AMERICAN PHILOSOPHICAL QUARTERLY
Volume 35, Number 4, October 1998

INTANGIBLE PROPERTY: PRIVACY, POWER, AND INFORMATION CONTROL

Adam D. Moore

Imagine a place where trespassers leave no footprints, where goods can be stolen an infinite number of times and yet remain in the possession of their original owners, where businesses you never heard of can own the history of your personal affairs, where only children feel fully at home, where the physics is psychology, and where everyone is as virtual as the shadows in Plato's cave. (John Perry Barlow, "Coming Into the Country"[1])

INTRODUCTION

It is an obvious truism that the proliferation of computer networks and the digitization of everything not obstinately physical[2] is radically changing the human experience. As more individuals obtain access to computer networks such as the Internet or the World Wide Web—the official word for this is to become "wired"—digital based environments and information have come to play a central role in our everyday lives. Our money is stored and transmitted digitally, we listen to CDs where the music is recorded and played digitally, there are now digital cellphones, cable television, and musical instruments. And all of this lies outside of the bit streams of 1's and 0's that make up computer networks, software programs, and operating systems. Many claim that the future holds information that cascades, not just through a PC, but across all forms of communication devices—headlines that flash across your watch, or a traffic map popping up on a cellular phone. It means content that will not hesitate to find you—whether you have clicked on something or not.[3] The integration, by digital technology, of what used to be disparate forms of communication is radically changing how we work and play.

At the center of this communication revolution is the control of information—who has it, how can it be gathered, can databases be owned, should information be "pulled" by users as a request or "pushed" to users who have shown interest? These concerns have obvious import into the areas of privacy and power. We each leave "digital footprints" that can be tracked by data mining companies and used to create purchasing profiles, medical summaries, political agendas, and the like. Moreover, this information is then sold to direct marketing companies—who will then call, write, or in the future, e-mail us—government agencies, private investigators, or to anyone for any reason. There used to be domains of a person's life that were totally inaccessible. A person's home and bedroom, notebook and hard drive, were all sanctuaries against the prying eyes and ears of others. It is alarming that digital technology is sweeping these domains away. Deborah Johnson accurately captures this sentiment.

> We have the technological capacity for the kind of massive, continuous surveillance of individuals that was envisioned in such frightening early twentieth-century science fiction works as George Orwell's *1984* and Zamyatin's *We*. The only difference between what is now possible and what was envisioned then are that much of the surveillance of individuals that is now done is by private institutions (marketing firms, insurance companies, credit agencies), and much of the surveillance now is via electronic records instead of by direct human observation or through cameras.[4]

The power of having such information should be obvious. Companies will be able to (and are able to) directly contact individuals who have shown interest in their products, or similar products, or their rival's products. And there are even more insidious uses for such information. Imagine a child custody case where one of the parents claims that the other is an unfit custodian for the children because the accused parent frequently views pornographic videos. Think of how governments could use such information to control populations or political opponents, or how insurance companies could use such information. In controlling information, especially sensitive personal information, the stakes could not be higher.

What follows is an explication and defense of a Lockean model of intangible property.[5] My goal is not to defend this model against all comers—rather, I will begin with weak and, hopefully, widely shared assumptions, sketch a theory based on these assumptions, and then proceed to the more meaningful task of analyzing a number of issues related to information control. Simply put, I will argue that individuals can own information about themselves and others. Moreover, I will make a case for limiting what can be done with intangible property based, in part, on privacy rights.

Before continuing, I would like to note a few important differences between intangible property and tangible or physical property. The domain of intangible property includes that of intellectual property—the subject matter of copyrights and patents (books, movies, computer programs, processes of manufacture, etc.)—as well as personal information, reputation, lists of facts, and the like. Intangible property is generally characterized as non-physical property where owner's rights surround control of physical manifestations or tokens of some abstract idea or type. Ideas or collections of ideas are readily understood in terms of non-physical types, while the physical manifestations of ideas can be modeled in terms of tokens. Intangible property rights surround control of physical tokens, and this control protects rights to types or abstract ideas.[6]

Intangible works, unlike tangible goods, are non-rivalrous. Computer programs, books, movies, and lists of customers can all be used and consumed by many individuals concurrently.[7] This is not the case for cars, computers, VCRs, and most other tangible goods. Intangible property, unlike physical property, is also non-zero-sum. In the clearest case, when I eat an apple there is one less apple for everyone else—my plus one and everyone else's minus one sum to zero. With intangible property it is not as if my acquisition leaves one less for everyone else.

Another difference between physical and intangible property concerns what is available for acquisition. While matter, owned or unowned, already exists the same is not true of all intangible works. What is available for acquisition in terms of intangible property can be split into three domains. There is the domain of ideas yet to be discovered (new scientific laws, mapping the human gnome, etc.), the domain of ideas

yet to be created (the next *Lord of the Rings*, *Star Wars*, etc.), and the domain of intangible works that are privately owned. Since it is possible for individuals to independently invent or create the same intangible work and obtain rights, we must include currently owned intangible works as available for acquisition.[8] Only the set of ideas that are in the public domain or those ideas that are a part of the common culture are not available for acquisition and exclusion. I take this latter set to be akin to a public park.

A Lockean Model of Intangible Property[9]

We may begin by asking how property rights to unowned objects are generated. This is known as the problem of original acquisition and a common response is given by John Locke. "For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is *enough and as good left for others*."[10] So long as the proviso that "enough and as good" is satisfied, an acquisition is of prejudice to no one. Locke argues that "Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same left him to quench his thirst."[11] While the proviso is generally interpreted as a necessary condition for legitimate acquisition, I would like to examine it as a sufficient condition.[12] If the appropriation of an unowned object leaves enough and as good for others, then the acquisition is justified.

Suppose that mixing one's labor with an unowned object creates a prima facie claim against others not to interfere that can only be overridden by a comparable claim. The role of the proviso is to provide one possible set of conditions where the prima facie claim remains undefeated.[13] Another way of stating this position is that the proviso in addition to X, where X is labor or first occupancy or some other weak claim generating activity, provides a sufficient condition for original appropriation.

Justification for the view that labor or possession may generate prima facie claims against others could proceed along several lines. First, labor, intellectual effort, and creation are generally voluntary activities that can be unpleasant, exhilarating, and everything in between. That we voluntarily do these things as sovereign moral agents may be enough to warrant non-interference claims against others.[14] A second, and possibly related justification, is based on desert. Sometimes individuals who voluntarily do or fail to do certain things deserve some outcome or other. Thus, students may deserve high honor grades and criminals may deserve punishment. When notions of desert are evoked claims and obligations are made against others—these non-absolute claims and obligations are generated by what individuals do or fail to do. Thus in fairly uncontroversial cases of desert, we are willing to acknowledge that weak claims are generated and if desert can properly attach to labor or creation, then claims may be generated in these cases as well.

Finally, a justification for the view that labor or possession may generate prima facie claims against others could be grounded in respect for individual autonomy and sovereignty. As sovereign and autonomous agents, especially within the liberal tradition, we are afforded the moral and legal space to order our lives as we see fit. As long as respect for others is maintained we are each free to set the course and direction of our own lives, to choose between various lifelong goals and projects, and to develop our capacities and

talents accordingly. Simple respect for individuals would prohibit wresting from their hands an unowned object that they acquired or produced. I hasten to add that at this point we are trying to justify weak non-interference claims, not full-blown property rights. Other things being equal, when an individual labors to create an intangible work, then weak presumptive claims of non-interference have been generated on grounds of labor, desert, or autonomy.

As noted before, the role of the proviso is to stipulate one possible set of conditions where the prima facie claim remains undefeated. Suppose Fred appropriates a grain of sand from an endless beach and paints a lovely, albeit small, picture on the surface. Ginger, who has excellent eyesight, likes Fred's grain of sand and snatches it away from him. On this interpretation of Locke's theory, Ginger has violated Fred's weak presumptive claim to the grain of sand. We may ask, what legitimate reason could Ginger have for taking Fred's grain of sand rather than picking up her own grain of sand? If Ginger has no comparable claim, then Fred's prima facie claim remains undefeated. An undefeated prima facie claim can be understood as a right.[15]

A Pareto-Based Proviso

The underlying rationale of Locke's proviso is that if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. Put another way, an objection to appropriation, which is a unilateral changing of the moral landscape, would focus on the impact of the appropriation on others. But if this unilateral changing of the moral landscape makes no one worse off, there is no room for rational criticism. The proviso permits individuals to better themselves so long as no one is worsened (weak Pareto-superiority). The base level intuition of a Pareto improvement is what lies behind the notion of the proviso.[16] If no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to a Pareto-superior move. Thus, the proviso can be understood as a version of a "no harm, no foul" principle.[17]

Before continuing, I will briefly consider the plausibility of a Pareto-based proviso as a moral principle. First, to adopt a less-than-weak Pareto principle would permit individuals, in bettering themselves, to worsen others. Such provisos on acquisition are troubling because at worst they may open the door to predatory activity and at best they give anti-property theorists the ammunition to combat the weak presumptive claims that labor and possession may generate. Part of the intuitive force of a Pareto-based proviso is that it provides little or no grounds for rational complaint. Moreover, if we can justify intangible property rights with a more stringent principle, a principle that is harder to satisfy, then we have done something more robust, and perhaps more difficult to attack, when we reach the desired result.

To require individuals, in bettering themselves, to better others is to require them to give others free rides. In the absence of social interaction, what reason can be given for forcing one person, if she is to benefit herself, to benefit others?[18] If, absent social interaction, no benefit is required then why is such benefit required within society? The crucial distinction that underlies this position is between worsening someone's situation and failing to better it[19] and I take this intuition to be central to a kind of deep moral individualism.[20] Moreover, the intuition that grounds a Pareto-based proviso fits well with the view that labor and possibly the mere possession of unowned objects

creates a prima facie claim to those objects. Individuals are worthy of a deep moral respect and this grounds a liberty to use and possess unowned objects.

Bettering, Worsening, and the Baseline Problem

Assuming a just initial position[21] and that Pareto-superior moves are legitimate, there are two questions to consider when examining a Pareto-based proviso. First, what are the terms of being worsened? This is a question of scale, measurement, or value. An individual could be worsened in terms of subjective preference satisfaction, wealth, happiness, freedoms, opportunities, et cetera. Which of these count in determining bettering and worsening? Second, once the terms of being worsened have been resolved, which two situations are we going to compare to determine if someone has been worsened? Is the question one of how others are now, after my appropriation, compared to how they would have been were I absent, or if I had not appropriated, or some other state? Here we are trying to answer the question "Worsened relevant to what?" This is known as the baseline problem.

In principle, the Lockean theory of intangible property being developed is consistent with a wide range of value theories.[22] So long as the preferred value theory has the resources to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds. For now, assume an Aristotelian eudaimonist account of value exhibited by the following theses is correct.

1. Human well-being or flourishing is the sole standard of intrinsic value.

2. Human persons are rational project pursuers, and well-being or flourishing is attained through the setting, pursuing, and completion of life goals and projects.[23]

3. The control of physical and intangible objects is valuable. At a specific time each individual has a certain set of things she can freely use and other things she owns, but she also has certain opportunities to use and appropriate things. This complex set of opportunities along with what she can now freely use or has rights over constitutes her position materially—this set constitutes her level of material well-being.

While it is certainly the case that there is more to bettering and worsening than an individual's level of material well-being including opportunity costs, I will not pursue this matter further at present. Needless to say, a full-blown account of value will explicate all the ways in which individuals can be bettered and worsened with reference to acquisition. Moreover, as noted before, it is not crucial to the Lockean model being presented to defend some preferred theory of value against all comers. Whatever value theory that is ultimately correct, if it has the ability to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds.

The Baseline of Comparison

Lockeans as well as others who seek to ground rights to property in the proviso generally set the baseline of comparison as the state of nature. The commons or the state of nature is characterized as that state where the moral landscape has yet to be changed by formal property relations. Indeed, it would be odd to assume that individuals come into the world with complex property relations already intact with the universe. Prima facie, the assumption that the world is initially devoid of such

property relations seems much more plausible.[24] The moral landscape is barren of such relations until some process occurs—and it is not assumed that the process for changing the moral landscape the Lockean would advocate is the only justified means to this end.[25]

For now, assume a state-of-nature situation where no injustice has occurred and where there are no property relations in terms of use, possession, or rights. All anyone has in this initial state are opportunities to increase her material standing. Suppose Fred creates an intangible work and does not worsen his fellows—alas, all they had were contingent opportunities and Fred's creation and exclusion adequately benefits them in other ways. After the acquisition, Fred's level of material well-being has changed. Now he has a possession that he holds legitimately, as well as all of his previous opportunities. Along comes Ginger who creates her own intangible work and considers whether her exclusion of it will worsen Fred. But what two situations should Ginger compare? Should the acquisitive case (Ginger's acquisition) be compared to Fred's initial state, where he had not yet legitimately acquired anything, or to his situation immediately before Ginger's taking? If bettering and worsening are to be cashed out in terms of an individual's level of well-being with opportunity costs and this measure changes over time, then the baseline of comparison must also change. In the current case we compare Fred's level of material well-being when Ginger possesses and excludes an intangible work to his level of well-being immediately before Ginger's acquisition.

The result of this discussion of bettering, worsening, and the baseline problem is the following proviso on original acquisition:[26]

> If the acquisition of an intangible work makes no one worse-off in terms of her level of well-being (including opportunity costs) compared to how she was immediately before the acquisition, then the taking is permitted.

If correct, this account justifies rights to control intangible property. When an individual creates or compiles an intangible work and fixes it in some fashion, then labor and possession create a prima facie claim to the work. Moreover, if the proviso is satisfied the prima facie claim remains undefeated and rights are generated.

Suppose Ginger, who is living off of the commons, creates a new gathering technique that allows her to live better with less work. The set of ideas that she has created can be understood as an intangible work. Given that Ginger has labored to create this new gathering technique, it has been argued that she has a weak presumptive claim to the work. Moreover, it looks as if the proviso has been satisfied given that her fellows are left, all things considered, unaffected by her acquisition. This is to say that they are free to create, through their own intellectual efforts, a more efficient gathering system, or even one that is exactly the same as Ginger's.

Overall, the structure of the argument that I have given is:

1. If the acquisition of an intangible work satisfies a Paretian-based proviso, then the acquisition and exclusion are justified.

2. Some acts of intangible property creation and possession satisfy a Paretian-based proviso.

3. So, some intangible property rights are justified.

Support for the first premise can be summarized in three related points: 1a) *The Paretian Intuition*—if no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted.

This "no harm no foul" principle leaves little room for rational complaint; 1b) A less-weak Pareto principle would allow predation and a stronger-than-weak Pareto principle would allow parasitism; and 1c) A Pareto-based proviso is consistent with the view that individuals are worthy of a deep moral respect, that their lives and lifelong goals and projects are not justifiably sacrificed for incremental gains in social utility.

Support for the second premise can be summarized as follows: 2a) Intangible property is non-rivalrous—it is capable of being used and possessed by many individuals concurrently; 2b) The "same" intangible work may be created and owned by many different individuals concurrently (zero-sum); 2c) The number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite (this makes the acquisition of intangible similar to Locke's water drinker example); 2d) Institutions or systems of intangible property may provide compensation for apparent worsenings that occur at the level of acts;[27] and 2e) Many creations and inventions are strongly Pareto-superior—meaning that everyone is bettered and no one is worsened.

Property, Privacy, and Information Control

Although I have made a case for granting intangible property rights to individuals who satisfy the Paretian test this does not mean that owners can do anything they want with their property. To take a simple example, my property right in a Louisville slugger does not allow me swing it at your knees, nor can I throw it at your car. Property rights are generally limited by the rights of others. More specifically, there is a prohibition of harm with respect to property rights.[28] This means that you can do what you want with your property short of unjustly harming others. Furthermore, this restriction—call it the harm restriction—fits well with the Lockean model under consideration. The proviso, a no harm no foul rule, allows individuals to acquire unowned goods. The harm restriction limits harmful uses of those goods.

A second constraint has to do with privacy and information control. Privacy may be understood as that state where others do not have access to you or to information about you. I hasten to note that there are degrees of privacy. There are our own private thoughts that are never disclosed to anyone, as well as information we share with loved ones. Furthermore, there is information that we share with mere acquaintances and the general public. These privacy relations with others can be pictured "in terms of a series of 'zones' or 'regions' . . . leading to a 'core self.'"[29] Thus, secrets shared with a loved one can still be considered private, even though they have been disclosed.

In an important article dealing with privacy, morality, and the law, William Parent offers the following definition for privacy.

> *Privacy is the condition of not having undocumented personal knowledge about one possessed by others.* A person's privacy is diminished exactly to the degree that others possess this kind of knowledge about him. Documented information is information that is found in the public record or is publicly available (e.g. information found in newspapers, court proceedings, and other official documents open to public inspection).[30]

The problem with this definition is that it leaves the notion of privacy dependent upon what a society or culture takes as documentation and what information is available via the public record. Parent acts as if undocumented information is private while documented information is not, and this is the end of the matter. But surely the secret shared between lovers is private in

one sense and not in another. To take another case, consider someone walking in a public park. There is almost no limit to the kinds of information that can be acquired from this public display. One's image, height, weight, eye color, approximate age, and general physical abilities are all readily available. Moreover, biological matter will also be left in the public domain—strands of hair and the like may be left behind. Since this matter, and the information contained within, is publicly available it would seem that all of one's genetic profile is not private information.

Furthermore, what is publicly available information is dependent upon technology. Telescopes, listening devices, heat imaging sensors, and the like, open up what most would consider private domains for public consumption. What we are worried about is what should be considered a "private affair"—something that is no one else's business. Parent's conception of privacy is not sensitive to these concerns.

A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information. It is a right to limit public access to the "core self"—personal information that one never discloses—and to information that one discloses only to family and friends. For example, suppose that I wear a glove because I am ashamed of a scar on my hand. If you were to snatch the glove away you would not only be violating my right to property—alas, the glove is mine to control—you would also violate my right to privacy; a right to restrict access to information about the scar on my hand. Similarly, if you were to focus your x-ray camera on my hand, take a picture of the scar through the glove, and then publish the photograph widely, you would violate a right to privacy.

Legal scholar William Prosser separated privacy cases into four distinct but related torts.[31]

> *Intrusion*: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. For example, a woman sick in the hospital with a rare disease refuses a reporter's request for a photograph and interview. The reporter photographs her anyway, over her objection.
>
> *Private facts*: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. For example, photographs of an undistinguished and wholly private hardware merchant carrying on an adulterous affair in a hotel room are published in a magazine.
>
> *False light*: Publicizing a highly offensive and false impression of another. For example, a taxi driver's photograph is used to illustrate a newspaper article on cabdrivers who cheat the public when the driver in the photo is not, in fact, a cheat.
>
> *Appropriation*: Using another's name or likeness for some advantage without the other's consent. For example, a photograph of a famous actress is used without her consent to advertise a product.

What binds these seemingly disparate cases under the heading "privacy invasions" is that they each concern personal information control. And while there may be other morally objectionable facets to these cases—for example, the taxi driver case may also be objectionable on grounds of defamation—there is arguably privacy interests at stake as well.

Having said something about what a right to privacy is we may ask how such rights are justified. A promising line of argument combines notions of autonomy and respect for persons. A central and guiding principle of western liberal democracies is that individuals, within certain limits, may set and

pursue their own life goals and projects. Rights to privacy erect a moral boundary that allows individuals the moral space to order their lives as they see fit. Clinton Rossiter puts the point succinctly.

> Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of the modern society. . . . It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.[32]

Privacy protects us from the prying eyes and ears of governments, corporations, and neighbors. Within the walls of privacy we may experiment with new ways of living that may not be accepted by the majority. Privacy, autonomy, and sovereignty, it would seem come bundled together.

A second but related line of argument rests on the claim that privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If individuals have rights to control personal information and to limit access to themselves, within certain constraints, then the kinds of oppression that we have witnessed in the twentieth century would be near impossible. Put another way, if oppressive regimes are to consolidate and maintain power, then privacy rights (broadly defined) must be eliminated or severely restricted. If correct, privacy rights would be a core value that limited the forces of oppression.[33]

Arguably any plausible account of human well-being or flourishing will have as a component a strong right to privacy. Controlling who has access to ourselves is an essential part of being a happy and free person. This may be why "peeping Toms" and rapists are held up as moral monsters—they cross a boundary that should never be crossed without consent.

Surely each of us has the right to control our own thoughts, hopes, feelings, and plans, as well as a right to restrict access to information about our lives, family, and friends. I would argue that what grounds these sentiments is a right to privacy—a right to maintain a certain level of control over personal information.[34] While complete control of all our personal information is a pipe dream for many of us, simply because the information is already out there and most likely cannot or will not be destroyed, this does not detract from the view of personal information ownership. Through our daily activities we each create and leave digital footprints that others may follow and exploit—and that we do these things does not obviously sanction the gathering and subsequent disclosure of such information by others.

Whatever kind of information we are considering there is a gathering point that individuals have control over. For example, in purchasing a new car and filling out the car loan application, no one would deny we each have the right to demand that such information not be sold to other companies. I would argue that this is true for any disclosed personal information whether it be patient questionnaire information, video rental records, voting information, or credit applications. In agreeing with this view, one first has to agree that individuals have the right to control their own personal information—i.e., binding agreements about controlling information presuppose that one of the parties has the right to control this information.

Having said all of this, I would like to test the Lockean model of intangible property

with a very tricky case dealing with personal information control.

> A women is kidnapped, taken to an apartment, stripped, and terrorized. The police—and the media—surround the apartment. The police eventually overcome the kidnapper and rush the woman, who clutches a dish towel in a futile attempt to conceal her nudity, to safety. A photograph of her escape is published in the next day's newspaper. She sued for invasion of privacy and eventually lost the case. (*Cape Publications, Inc. v. Bridges,* Florida 1982)[35]

According to the theory that I have sketched, the photographer may indeed have a property right to the photograph he took—if his mere acquisition does not worsen—but this does not mean that he can do anything with the photograph. His rights to control the picture are limited by the harm and privacy restrictions. So even if publishing the photograph did not harm the women involved, it would still be an illicit violation of privacy.

Now, it is clear that my view runs counter to prevailing attitudes about the First Amendment. I would place more restrictions on speech or expression than is currently found in the law. Not only can we not yell "fire" in a crowded theater—this would violate the harm restriction—we cannot publish sensitive personal information without permission. This is not to say that the harm restriction and the privacy restriction are exceptionless—those who live their lives in the public realm may have to endure a more limited sphere of privacy. Moreover, certain harms may be permitted in order to protect a community from criminals and the like—for example, consider laws that require public notification when a child predator is relocated to a new community. Politicians and entertainers, in a sense, sanction a more limited sphere of privacy by choosing a certain career path and a similar point can be made with respect to criminals. While the sphere of privacy protection may be more limited in these cases there are still boundaries that cannot be crossed. Becoming a "public figure" does not sanction continual harassment for autographs, pictures, and interviews. Access, in many ways, is still left to the individual—and this is how it should be.

On my view, an important part of a right to privacy is the right to control personal information; "control" in the sense of deciding who has access and to what uses the information can be put; "personal" in the sense of being about some individual as opposed to being about inanimate objects, corporations, institutions, and the like. These are not intended to be precise definitions—rather I am trying to capture the common everyday notion of a privacy interest. The appropriateness of who knows particular facts about an individual is, in an important sense, dependent on certain relationships. The kind of information access between doctor and patient, husband and wife, mother and child, and total strangers, are all appropriately different.[36]

Against this backdrop what sense can be made of the public's "right to know"? A newspaper may publish information about a kidnapping and rescue, but this does not sanction publishing sensitive personal information about the victim. Right-to-know arguments may carry some weight in cases where public funds are being spent or when a politician reverses his stand on a particular issue, but they seem to be suspect when used to justify intrusions. Sissela Bok echoes these concerns when she writes,

> Taken by itself, the notion that the public has a "right to know" is as quixotic from an epistemological as from a moral point of view, and the idea of the public's "right to know the truth" even more so. It would be hard to find a more fitting analogue to Jeremy

> Bentham's characterization of talk about natural and imprescriptible rights as "rhetorical nonsense—nonsense upon stilts." How can one lay claim to a right to know the truth when even partial knowledge is out of reach concerning most human affairs, and when bias and rationalization and denial skew and limit knowledge still further?
>
> So patently inadequate is the rationale of the public's right to know as a justification for reporters to probe and expose, that although some still intone it ritualistically at the slightest provocation, most now refer to it with a tired irony.[37]

The social and cultural benefits of free speech and free information is generally cited as justification for a free press and the public's right to know. This is why news services can publish photographs and stories that contain sensitive personal information about almost anyone. But computer technology has changed the playing field and such arguments seem to lose force when compared to the overwhelming loss of privacy that we now face. The kinds of continual and systematic invasions by news services, corporations, data mining companies, and other individuals that will be possible in a few short years is quite alarming.

Conclusion

While there is still much to be worked out, I think that important steps have been taken toward a Lockean theory of intangible property. If no one is worsened by an acquisition, then there seems to be little room for rational complaint. The individual who takes a good long drink from a river does as much as to take nothing at all and the same may said of those who acquire intangible property. Given allowances for independent creation and that the frontier of intangible property is practically infinite, the case for Locke's water-drinker and the author or inventor are quite alike.

Even so, such rights are not without limitations. I cannot justifiably slash your tires with my knife nor may I publish your medical records on my web site. The proliferation of the Internet and the World Wide Web into everyday life is forcing us to rethink our views about information access and control. The claim is not that controlling information used to be unimportant and now it is important—alas, censorship in various forms has always been with us. What I think true, however, is that computer networks coupled with digitally stored information is significantly changing the way we interact and communicate. We will have to be much more careful about what we do and say in the future both publicly and privately. Any information or ideas that we disclose, including inventions, recipes, or sensitive personal information, might soon be bouncing around cyberspace for anyone to access. Many net anarchists claim that "information want to be free" and advocate a model of unrestricted access to all kinds of information. In this article I have argued otherwise—information, especially sensitive personal information, can be owned and restricted on grounds of property or privacy. And if we are to err on the side of too much access or too much privacy, better—far better—the latter.

California State University, Fresno
Received June 16, 1998

NOTES

Portions of this paper were presented at the 1997 Central Division Meeting of the APA and at the 1998 Ohio Philosophical Association conference. I would like to thank David Wasserman, Jim Swindler, Earl Spurgin, Don Hubin, and Ken Itzkowitz for their suggestions and comments.

1. John Perry Barlow, "Coming Into the Country," *Communications of the ACM* 34 (March, 1991), 19.

2. This phrase comes from John Perry Barlow, "The Economy of Ideas: Everything You Know About Intellectual Property is Wrong," in *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by A. Moore (Lanham, Md.: Rowman & Littlefield, 1997), Chapter 15.

3. Kevin Kelly and Gary Wolf, "Push," *Wired Magazine* (March 1997), 14.

4. Deborah Johnson, *Computer Ethics* (Upper Saddle River, N.J.: Prentice-Hall, 1994), 84.

5. For a lengthy defense of the following Lockean model see A. Moore, "A Lockean Theory of Intellectual Property," *The Hamline Law Review* 21 (Fall 1997): 65–108, and A. Moore, "Toward A Lockean Theory of Intellectual Property," in *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by A. Moore (Lanham, Md.: Rowman & Littlefield, 1997), Chapter 5.

6. American copyright law prohibits the ownership of abstract ideas—copyright protects new and original expressions, not the ideas that stand behind the expressions. Nevertheless, there is still a type/token model here because copyrights protect expressions of a certain type.

7. It may be objected that some intangible works are rivalrous, for example the Mona Lisa or Michaelangelo's David. What is rivalrous about these works is not the ideas that are embodied in the canvas or stone; it is the physical works themselves. We can all hang a copy of the Mona Lisa in our living rooms—we just can't have the original embodiment.

8. Unlike copyrights and trade secrets, patents exclude other independent inventors from obtaining rights to a work already patented. The Lockean model of intangible property that I will sketch does include such a rule.

9. A more detailed discussion of the issues taken up in this section are addressed in earlier works. See Moore, "A Lockean Theory of Intellectual Property," 65–108, and "Toward A Lockean Theory of Intellectual Property," Chapter 5.

10. John Locke, *The Second Treatise of Government*, § 27 (italics mine).

11. Locke, *Second Treatise,* § 33.

12. Both Jeremy Waldron ("Enough and as Good Left for Others," *Philosophical Quarterly* [1979]: 319-328) and Clark Wolf ("Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generation," *Ethics* [July, 1995]: 791–818) maintain that Locke thought of the proviso as a sufficient condition and not a necessary condition for legitimate acquisition.

13. This view is summed up nicely by Wolf, "Contemporary Property Rights," 791–818.

14. Even Marx never explicitly denies that laborers are entitled to the fruits of their labor—"Indeed, it is natural to think that his condemnation of capitalist exploitation depends on a conviction that laborers are entitled to the whole fruits of their labor." Lawrence Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), n2, p. 121. See also, Karl Marx, *Capital* (New York: International Publishers, 1967), vol. 1, part VIII, chapter xxvi.

15. For a defense of this view of rights see G. Rainbolt, "Rights as Normative Constraints," *Philosophy and Phenomenological Research* (1993): 93–111, and Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press, 1986).

16. One state of the world, S_1, is Pareto-superior to another, S_2, if and only if no one is worse off in S_1 than in S_2, and at least one person is better off in S_1 than in S_2. S_1 is *strongly* Pareto-superior to S_2 if everyone is better off in S_1 than in S_2, and *weakly* Pareto-superior if at least one person is better off and no one is worse off. State S_1 is Pareto-optimal if no state is Pareto-superior to S_1: it is *strongly* Pareto-optimal if no state is *weakly* Pareto-superior to it, and *weakly* Pareto-optimal if no state is *strongly* Pareto-superior to it. Throughout this essay I will use Pareto-superiority to stand for *weak* Pareto-superiority. Adapted from G. A. Cohen's "The Pareto Argument For Inequality" in *Social Philosophy & Policy* 12 (Winter 1995): 160.

17. It is important to note that compensation is typically built into the proviso and the overall account of bettering and worsening. David Gauthier echoes this point in the following case. "In acquiring a plot of land, even the best land on the island, Eve may initiate the possibility of more diversified activities in the community as a whole, and more specialized activities for particular individuals with ever-increasing benefits to all." Gauthier, *Morals By Agreement* (Oxford: Clarendon Press, 1986), 204. Eve's appropriation may actually benefit her fellows and the benefit may serve to cancel the worsening that occurs from restricted use. Moreover, compensation can occur at both the level of the act and at the level of the institution. This is to say that Eve herself may compensate or that the system in which specific property relations are determined may compensate.

18. I have in mind Nozick's Robinson Crusoe case in *Anarchy, State, And Utopia* (New York: Basic Books, 1974), 185.

19. The distinction between worsening someone's position and failing to better it is a hotly contested moral issue. See Gauthier, *Morals By Agreement*, 204; Shelly Kagan, *The Limits of Morality* (Oxford University Press, 1989), chap. 3; John Harris, "The Marxist Conception of Violence," *Philosophy & Public Affairs* 3 (1973–74): 192–220; John Kleinig, "Good Samaritanism," *Philosophy & Public Affairs* 5 (1975–76): 382–407; and Eric Mack's two articles, "Bad Samaritanism and the Causation of Harm," *Philosophy & Public Affairs* 9 (1979–80): 230–259, and "Causing and Failing To Prevent Harm," *Southwestern Journal of Philosophy* 7 (1976): 83–90. This distinction is even further blurred by my account of opportunities. See Moore, "Toward A Lockean Theory," 88–89.

20. This view is summed up nicely by A. Fressola. "Yet, what is distinctive about persons is not merely that they are agents, but more that they are rational planners—that they are capable of engaging in complex projects of long duration, acting in the present to secure consequences in the future, or ordering their diverse actions into programs of activity, and ultimately, into plans of life." Anthony Fressola, "Liberty and Property," *American Philosophical Quarterly* (Oct. 1981): 320.

21. One problem with a Pareto condition is that it says nothing about the initial position from which deviations may occur. If the initial position is unfair then our Pareto condition allows those who are unjustly better off to remain better off. This is why the problem of original acquisition is traditionally set in the state of nature or the commons. The state of nature supposedly captures a fair initial starting point for Pareto improvements.

22. It has been argued that subjective preference satisfaction theories fail to give an adequate account of bettering and worsening. See D. Hubin and M. Lambeth's "Providing For Rights," *Dialogue* (1989).

23. For similar views see: Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), chap. VII; Aristotle, *Nicomachean Ethics*, books I and X; Kant, *The Fundamental Principles of The Metaphysics of Morals,* Academy Edition; Sidgwick, *Methods of Ethics*, 7th ed. (London: Macmillan, 1907); R. B. Perry, *General Theory of Value* (New York: Longmans, Green,

1926); and Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

24. One plausible exception is body rights which are similar to, if not the same as, many of the rights that surround property.

25. There may be many others, such as consent theories, consequentialist theories, social contract theories, theories of convention, and so on.

26. The proviso permits the use, exclusion and augmentation of an object. Although this does not give us a complete theory of property relations it begins the process. I would argue that the proviso, whatever other forms of property relations it might allow, permits private property relations.

27. Suppose that one way to achieve Pareto-superior results is by adopting an institution that promotes and maintains restricted access, or fencing, of intellectual works. This is to say that, given our best estimates, everyone is better off living within an institution where fencing is permitted and protected as opposed to alternative institutions where fencing is prohibited. If such a case can be made, then the Paretian may have a way to justify specific acts of appropriation by appealing to the level of institutions.

28. The "harm" that I have in mind here is in terms of an individual's level of well-being. Obviously alternative accounts of bettering and worsening will defend a different standard of harm.

29. Alan Westin, "Privacy in the Modern Democratic State," in D. Johnson and J. Snapper, *Ethical Issues in the Use of Computers* (Wadsworth, 1985): 187.

30. W. A. Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* (Fall 1983): 269–288, reprinted in D. Johnson and J. Snapper, *Ethical Issues in the Use of Computers* (Wadsworth, 1985), 203 (all page citations refer to the reprint).

31. Dean William Prosser, "Privacy," *California Law Review* 48 (1960): 383, 389, quoted in E. Alderman and C. Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995), 155–56.

32. C. Rossiter, *Aspects of Liberty* (Ithica, N.Y.: Cornell University Press, 1958) quoted in Westin, "Privacy in the Modern Democratic State," 188.

33. For more about privacy rights, see Charles Fried, "Privacy," *Yale Law Journal* 77 (1968): 477; A. Westin and M. Baker, *Databanks in a Free Society* (New York: Quadrangle Press, 1972); and J. Rachels, "Why Privacy is Important," *Philosophy and Public Affairs* 4 (Summer 1975): 323–33.

34. Would I be doing something morally illicit if I put on my new anti-monitoring suit that afforded me complete protection from every surveillance device except the human eye?

35. This case is cited in E. Alderman and C. Kennedy's *The Right to Privacy*, 171.

36. Rachels, in "Why Privacy is Important," argues that privacy is valuable because it is necessary for creating and maintaining different kinds of relationships with people.

37. Sissela Bok, *Secrets* (New York: Pantheon, 1982), 254.