

Privacy as Quasi-Property

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ABSTRACT: Courts and commentators struggle to apply privacy law in a way that conforms to the intuitions of the average person. It is often assumed that the reason for this discrepancy is the absence of an agreed upon conceptual definition of privacy. In fact, the lack of a description of the interest invaded in a privacy matter is the more substantial hurdle. This Article provides such a description of the privacy interest.

Privacy is quasi-property. Quasi-property is a relational entitlement to exclude. Unlike real property, there is no freestanding right to exclude from a quasi-property interest absent reference to a relationship between individuals. Rather, the right to exclude arises from the behaviors of the plaintiff and defendant. A defendant is identified based on a trigger arising from a relationship, action, or harm to a plaintiff. Prominent examples of doctrinal areas that employ the quasi-property model are information misappropriation and trade secret law.

The quasi-property model can account for the four privacy torts adopted as law in the vast majority of states and liberate privacy tort law from the ossification that has stunted its development and ability to adapt to modern conditions.

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I. INTRODUCTION

It has become cliché for scholars to observe that privacy “is a concept in disarray.”¹ But why is it so problematic from a practical legal enforcement perspective that scholars struggle to define the concept? After all, the precise contours of other interests protected at law are also contested among scholars and in society.

The reason why privacy’s indeterminate contours have earned it skepticism at law is that privacy is unusual because common law courts have not consistently defined the type of interest at stake in privacy cases. Classifying and describing the type of interest—be it a personal interest, a property interest, or some other type of interest—allows courts to decide cases through comparison to other cases implicating the same type of interest. Pamela Samuelson has framed the problem in the following way:

[A] serious impediment to a comprehensive approach [to privacy] in the U.S. is the lack of clarity in this country about the nature of the interest that individuals have in information about themselves: Is it a commodity interest, a consumer protection interest, a personal dignity interest, a civil right interest, all of the above, or no interest at all?²

Since privacy has not been consistently approached as either property or a personal interest, courts have hesitated to compare privacy cases to anything but other privacy cases. As technology and society evolve away from the circumstances of mid-20th century privacy cases, courts and commentators find themselves directly considering the theoretical basis of privacy far more

1. This statement finds its roots in a chapter of a recent book by Daniel Solove. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 1–11 (2008); see also Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1904 (2013) (discussing the perception of privacy as “old-fashioned” and ill-defined).

2. Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1170–71 (2000).

often than they would if there were a larger bank of case law relevant for analogical purposes. Classifying the genus that privacy is in would allow courts to work to define the species through comparison to other species in its genus. Analogical reasoning is an underused asset in creating a cogent privacy case law.³ Conceptualizing privacy as a quasi-property interest offers more analytical clarity than current approaches to information privacy in the digital age.

Quasi-property is a relational entitlement to exclude—the right to exclude specific actors from a resource given a specific event, a given type of behavior, and/or a given relationship between the actors.⁴ There is no freestanding right to exclude from a quasi-property interest; the right to exclude must be triggered.⁵ A defendant is identified based on a trigger arising from a relationship, action, or harm to plaintiff.⁶ The law communicates that an actor must not interfere with a quasi-property interest with an exclusionary signal that is independent of the resource.⁷ Prominent examples of doctrines that employ the quasi-property model are information misappropriation, sepulcher—the interest of a decedent’s family in her corpse—and trademark dilution.⁸

Conceptualizing privacy as quasi-property provides the essential model for assessing the interest held by a privacy claimant against a defendant, and whether it has been infringed. The quasi-property model can account for the four privacy torts first advanced by William Prosser and adopted as law in the vast majority of states,⁹ and liberate them from the ossification that has stunted their development and ability to adapt to modern conditions.¹⁰ In an era where the development of technology inevitably outpaces the

3. See generally Cass R. Sunstein, Comment, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (defining and clarifying the unique advantages of analogical reasoning in normative legal argument).

4. Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1891 (2012) (“This category consists of situations where the law attempts to simulate the functioning of property’s exclusionary apparatus through a relational liability regime.” (emphasis omitted)).

5. *Id.* at 1893.

6. *Id.* at 1900.

7. *Id.* at 1901.

8. *Id.* at 1891, 1895–98. While Balganesh identified privacy as an area where property rights have been considered due to the perceived desirability of the extraordinary remedies associated with property, he takes no position on whether privacy itself is a form of quasi-property. *Id.* at 1913.

9. The four Restatement privacy torts: unreasonable intrusion on seclusion of another, appropriation of the name or likeness of another, public disclosure of the private life of another, and publicity that places another in a false light before the public. RESTATEMENT (SECOND) OF TORTS: GENERAL PRINCIPLE § 652A (AM. LAW INST. 1977).

10. See Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1890–91 (2010) (discussing how the limited scope of the four privacy torts and lack of unifying concept caused them to fail to develop or adapt to new fact patterns following their widespread adoption by states in the 1970s).

development of preexisting law, common law plays a significant role.¹¹ Showing how privacy functions as quasi-property in tort law will show how the common law could more effectively take on privacy matters. This project is not about categorization. Whether the term “quasi-property” appeals or not, the purpose of the model advanced here is to illustrate how courts should handle questions about privacy functionally in tort. It is important to note that quasi-property is not property. It is an interest with a set of characteristics that, in some ways, simulate the exclusionary mechanism of property.

Privacy as property has intuitive appeal, and references to privacy’s resemblance to property have pervaded many analyses of privacy. It is a flaw of existing theories of privacy liability to ignore the similarities between the intuitions that individuals in a free society are from time to time entitled to exclude certain others from their private lives, and the right property owners ordinarily have to exclude others from their property. Construing privacy as property, however, is undesirable for both moral and pragmatic reasons. The quasi-property model harnesses the oft-ignored intuition that the creation and preservation of zones of private action and contemplation simulate the right to exclude to add precision and analytical depth to the privacy intrusion torts at law.

Part II will outline the basics of how privacy is currently conceptualized, show what motivated some scholars to frame privacy as property, and discuss why privacy as property is ultimately unpersuasive. Part III will outline the idea of quasi-property and apply it to privacy, and Part IV will discuss the advantages of approaching privacy as quasi-property and potential objections. Part V concludes.

II. EXISTING APPROACHES TO PRIVACY, AND THEIR LIMITATIONS

This Part will show that there are substantial difficulties both with conceptualizing privacy as property and with existing approaches characterizing privacy as a personal interest.

The two foundational texts describing the right to privacy do not specify whether privacy is a personal interest or a form of property.¹² Louis Brandeis

11. Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 428 (1998) (“It stands to reason that the faster a technology develops, the more rapidly it will surpass preexisting law, and the more prominent common law theories may become. It is not surprising, therefore, that as the Internet geometrically expands its speed, accessibility, and versatility—thereby vastly increasing the opportunities for economic free-riders to take, copy, and repackage information and information systems for profit—intellectual property owners again must consider the common law as a source of protection at the end of this century, much as it was at the beginning.”).

12. This Article uses both of these terms in their ordinary sense. Property is anything that a person owns, that is, has the right to exclude others from and any other powers that the law recognizes as accruing to owners of the type of property. Black’s Law Dictionary defines an

and Samuel Warren provided the first modern restatement of privacy at common law in their influential article *The Right to Privacy*.¹³ Brandeis and Warren described a broad, unitary right that they summarized as a “right to be let alone.”¹⁴ Brandeis and Warren referred approvingly to the German right of personality and grounded the right to privacy in persons’ interest in their “inviolate personality.”¹⁵ They stressed the importance of a flexible standard that would bend to meet the needs of changing technology.¹⁶ Brandeis and Warren were less interested in carefully defining the interest than justifying invasion of privacy as a claim at law in general.¹⁷ Brandeis and Warren did not take an express position on whether privacy is a personal interest, a form of property, or a hybrid.¹⁸ Another noticeably absent point of emphasis is how the privacy interest relates to the rights of others.

Writing half a century later, William Prosser sought to cabin the concept of privacy at tort law.¹⁹ Prosser rejected privacy as a single interest. Instead, he argued that the common law recognizes four relatively disjointed causes of action related to privacy: “1. Intrusion upon . . . seclusion or solitude, or into . . . private affairs. 2. Public disclosure of embarrassing private facts . . . 3. Publicity which places [a person] in a false light in the public eye. 4. Appropriation . . . of [a person’s] name or likeness.”²⁰ These four privacy torts have been included in the Second Restatement of Torts (“Restatement”) and are the law in most jurisdictions.²¹ Prosser’s privacy discussion was tailored to help preserve freedom of expression, which he believed conflicted with an

interest as follows: “Collectively, . . . any aggregation of rights, privileges, powers.” *Interest*, BLACK’S LAW DICTIONARY (10th ed. 2014).

13. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

14. *Id.* at 193.

15. *Id.* at 205.

16. *Id.* at 193 (“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”).

17. See *id.* at 211 (“The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.”); *id.* at 213 (“We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense.”).

18. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1832 (2010) (“Warren and Brandeis did not detail the precise contours of this interest [privacy].”).

19. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 423 (1960) (“[I]t is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt [in expanding the domain of privacy law].”).

20. *Id.* at 389. “The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . .” *Id.*

21. See, e.g., ROBERT M. O’NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 77 (2001) (noting that only North Dakota and Wyoming fail to recognize any of the privacy torts in some form or another).

overbroad privacy right.²² Prosser expressly declined to engage in a detailed discussion of whether privacy is property.²³ One of Prosser's primary objectives was to prevent privacy from swallowing established doctrines, so he purposefully crafted his four privacy torts in a cautious and limited way.²⁴

Despite the enduring influence of these two law review articles—Brandeis and Warren's broad account elaborating a broad and vague right to be let alone, and Prosser's limited, negative account, built in reference to where privacy law does not reach—they have provided courts with little guidance about what is the best form for privacy at common law.

Prosser's four torts at state common law are the only generalized avenue for information privacy disputes against non-governmental entities.²⁵ Nearly all of the federal and state statutory privacy causes of action in the United States are sectorial.²⁶ The Information Age has brought concerns that neither Brandeis and Warren nor Prosser could have anticipated. Prosser has been criticized for not delineating the privacy torts in such a way as to allow courts to adapt the torts to changing technology and societal norms.²⁷ Privacy law has failed to adapt to changed conditions since Prosser elaborated the four privacy torts.²⁸

Hannah Arendt, writing on privacy in *The Human Condition*, a text written contemporaneously with Prosser's *Privacy*, illustrates the underlying assumptions in Prosser's four torts.²⁹ Privacy theories that predate the Information Age presumed the backstop of the right to exclude that comes with owning or renting personal property. In *The Human Condition*, Hannah Arendt offered an influential account of why privacy matters and how assumptions about real property played into the mid-20th century theoretical formulations about privacy.³⁰ Arendt's account serves to illustrate the

22. Prosser, *supra* note 19, at 422–23.

23. *Id.* at 423. Prosser only broaches the issue of whether privacy is property in the context of appropriation of likeness, noting: "It seems quite pointless to dispute over whether such a right is to be classified as 'property.' If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses." *Id.* at 406.

24. Richards & Solove, *supra* note 10, at 1890.

25. See BJ Ard, *The Limits of Industry-Specific Privacy Law*, 51 IDAHO L. REV. 607, 607–08 (2015) (discussing all options for privacy regulation other than torts, concluding that all are sectorial, and that this imposed limitations on their effectiveness).

26. Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 910 (2009). The exception is the 1974 Privacy Act, which applies only to some government conduct. *Id.*

27. Richards & Solove, *supra* note 10, at 1890.

28. *Id.*

29. See generally HANNAH ARENDT, *THE HUMAN CONDITION* (2d ed. 1958).

30. Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 236 (2005) ("Arendt's metaphors of visibility and depth help us to understand the functions of spatial privacy in constructing a deeper, more self-actualized existence for individuals. Ownership of private property constructs, and underpins, notions of privacy and autonomy by ensuring a degree of solitude that is necessary for true human self-actualization. In this way, property and privacy are each grounded in territorial metaphors which construct boundaries that define realms of physical

limitations of approaching privacy as a personal interest due to the assumptions about property during the period when Prosser developed the four privacy torts, a sentiment echoed by scholars and the Supreme Court.³¹

Arendt describes the significance of privacy for society as:

A life spent entirely in public, in the presence of others, becomes, as we would say, shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense. The only efficient way to guarantee the darkness of what needs to be hidden against the light of publicity is private property, a privately owned place to hide in.³²

According to Seyla Benhabib, Arendt observed that literal ownership of the space that a person retreated to was neither necessary nor sufficient to describe that person's home.³³ Rather, Benhabib suggests, private reflection occurs wherever one considers oneself to be at home. She writes: "[T]he home . . . provides that space that protects, nurtures and makes the individual fit to appear in the public realm. The homeless self is the individual ready to be ravaged by the forces of the social against which it must daily fight to protect itself."³⁴ Benhabib's extension of Arendt says that the right to exclude others from one's real and personal property is just one way of asserting and maintaining a home.³⁵ Excluding others from one's property was the most natural and intuitive way of achieving a private space when Arendt and Prosser were writing.

If privacy is conceptualized as a personal interest that does not simulate some ability to exclude from the private sphere equivalent to the right to exclude from the home in the pre-Information Age, it will lose much of its substance and ability to fulfill its purpose. As more significant aspects of modern life take place in spaces that are not physical, society cannot rely upon trespass and trespass to chattels to provide indirect protection for private

or social immunity from state interference. Property rights confer a certain amount of spatial sovereignty in the property owned, a factor which directly complements the right to be left alone." (footnotes omitted)).

31. *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12 (1978) ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 771 (1964) ("Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. . . . Thus, property . . . creat[es] zones within which the majority has to yield to the owner.").

32. ARENDT, *supra* note 29, at 71.

33. Seyla Benhabib, *Feminist Theory and Hannah Arendt's Concept of Public Space*, 6 *HIST. HUM. SCI.* 97, 107 (1993).

34. *Id.*

35. *Id.*

spaces. A notion of privacy as a personal interest that does *not* simulate the right to exclude from the home, in the sense that Benhabib used the term, is inadequate to achieve the same level of privacy protection that existed prior to the Information Age.³⁶ The Fourth Amendment case law has recently acknowledged the special standing of the home, noting “[i]n the home . . . *all* details are intimate details.”³⁷

Some scholars have attempted to rebuild and conceptualize privacy in tort law. Such scholars have either taken Prosser as their model, itemizing in response to particular types of harms produced in a way ostensibly less likely to produce ossification under changed conditions,³⁸ or called for a return to the Brandeis–Warren approach, a unitary application of a broad concept of privacy by courts.³⁹ However, categorizing harms based on specific fact patterns is the same type of reasoning Prosser employed, and tends to result in the same issue that Prosser’s torts have faced over time: the underlying social and technological assumptions intrinsic to the status quo will change, making the categorization less effective and descriptive over time. Similarly, hearkening back to a return to a general concept of the “right to be let alone” merely recreates the problem that Prosser sought to combat in creating his four torts in the first place. Asking judges to determine whether a broad right to be let alone has been violated, without any sort of guiding framework or factors to guide their reasoning, unmoors judges from the analogical and precedential reasoning that is the hallmark of the legal profession. Jane Bambauer has observed that many prominent privacy scholars have forgone examining privacy in tort, “contending [privacy torts] are not relevant in the era of ubiquitous computing.”⁴⁰

In response to the inadequacy of approaches to privacy as a personal interest in the Information Age, some commentators have called for conceptualizing privacy as property.⁴¹ While this view is far from unanimously

36. *Id.*

37. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

38. SOLOVE, *supra* note 1, at 482–83 (outlining a four-part framework describing the types of invasions of privacy seen in all areas of law); Richards & Solove, *supra* note 10, at 1890 (arguing that Prosser’s torts are flawed but salvageable).

39. *E.g.*, Citron, *supra* note 18, at 1832; Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2032 (2010) (suggesting we should reject “everything [Prosser] sought to accomplish” and return to the Brandeis–Warren approach).

40. Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 208 (2012). See generally Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357 (2011) (arguing that the disclosure tort cannot adequately protect reputation and privacy in the digital age).

41. *E.g.*, *Developments in the Law: The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1634–48 (1999); Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 62–65 (1999); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 26–42 (1996); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383–84 (1996).

accepted among privacy scholars,⁴² it has been gaining in momentum since the late 1990s. Furthermore, privacy as property has taken hold in the courts. Two torts found in the Restatement, appropriation of likeness and public disclosure of private facts, are routinely handled as the property interest “right of publicity” in several jurisdictions. However, the right of publicity is not relevant to all forms of privacy.⁴³ We must look elsewhere for a generalized account of privacy as property.

Paul Schwartz offers the most persuasive and best-developed general account of privacy as property to date in *Property, Privacy, and Personal Data*.⁴⁴ Schwartz uses the working definition of property as an “interest . . . that is enforceable against the world.”⁴⁵ However, for Schwartz, this right against the world does not mean Blackstonian despotism over the *res*, but rather a bundle of related interests relating to the *res*.⁴⁶ He finds that the following conditions are required to have an attractive, sustainable market in personal data:

- (1) limitations on an individual’s right to alienate personal information;
- (2) default rules that force disclosure of the terms of trade;
- (3) a right of exit for participants in the market;
- (4) the establishment of damages to deter market abuses; and
- (5) institutions to police the personal information market and punish privacy violations.⁴⁷

He argues that these conditions will “respond[] to privacy market failure and to the need for a privacy commons.”⁴⁸

These conditions respond to the most significant challenge to privacy as property, the fear that people might fully alienate all their personal information, but still mistakenly feel that they have a right to it. This concern is paramount in Pamela Samuelson’s influential rejection of privacy as

42. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 750–57 (1999) (arguing that privacy should not be considered a form of property); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423–28 (2000).

43. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150–52 (3d Cir. 2013) (noting that New Jersey recognizes “the right of publicity”); *Somerson v. World Wrestling Entm’t, Inc.*, 956 F. Supp. 2d 1360, 1365–66 (N.D. Ga. 2013) (noting that in Georgia there is “no substantive difference” between the right of publicity and “the interests protected by the appropriation prong of the invasion of privacy tort.”). The American Law Institute also removed the discussion of the right of publicity from its sections on privacy and placed it in the Restatement (Third) of Unfair Competition. See *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 930 (6th Cir. 2003).

44. Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004).

45. *Id.* at 2058–64 (discussing and analyzing arguments about market failure in the market for access to personal information).

46. *Id.* at 2059–61.

47. *Id.* at 2095–116.

48. *Id.* at 2127.

intellectual property.⁴⁹ Samuelson's fear is that were privacy a form of property, most consumers would be left with even fewer rights than under current law because of careless alienation through form contracts.⁵⁰ As Jessica Litman bluntly observed: "The market in personal data is the *problem*. Market solutions based on a property rights model won't cure it; they'll only legitimize it."⁵¹

Schwartz seems to have solved these protests if his framework serves to permit people to have granular control over their personal information, and take back control over their personal information if they release it in error.⁵²

Schwartz's framework would require support from the administrative state and a rigorous definition of personal information, one that would be subject to update and be flexible as market actors seek to get around paying for personal information. The regime would be quite expensive, and it is unclear that this will do enough to correct the underlying problem of market failure in the market for personal information.⁵³ Furthermore, companies would raise consumer prices in response to the increased cost of accumulating personal information. This could have the effect of limiting access to desirable applications to less wealthy and young people.

There is a more fundamental concern with Schwartz's framework. It is an unusual property regime indeed that starts from such a strong presumption against alienability.⁵⁴ Declaring privacy to be property may change norms and architecture in society in a non-privacy-protecting way. As Samuelson puts it: "The rhetoric of property law may also be unsuited to further elucidation of normative understandings about acceptable and unacceptable uses of personal data that is sorely needed in this era of rapid technological,

49. See generally Samuelson, *supra* note 2 (arguing that property rights in personal information are unlikely to achieve greater privacy protections for individuals because the general policy of favoring alienability of property is more likely to defeat than achieve information privacy goals).

50. *Id.* at 1137–38.

51. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1301 (2000).

52. See *supra* notes 44–48 and accompanying text.

53. See PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 7–8 (1998) (arguing that because most consumers lack information about privacy, companies do not have the incentive to provide them with it because consumers will not know when to compensate companies more for privacy protections).

54. For many scholars, the right to exclude is a critical feature of what characterizes property. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (mentioning the importance of the right of exclude to nearly all, but ultimately arguing that right to exclude is the defining characteristic of property). But see Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 873 (2013) (reviving a "tree" metaphor for understanding property beyond the exclusionary approach and the bundle of sticks approach); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998) (challenging assumptions about the centrality of exclusion in even Blackstone's conception of property).

economic, and social change.”⁵⁵ If the law considers privacy to be alienable property, society may start to consider privacy to be less ethereal and valuable.⁵⁶

Because of the expense, uncertainty of success in changing the dynamics of the market for information, and more fundamental concerns about privacy truly as the type of thing that is appropriately classified as property, the case for privacy as property is weak. This Part has also argued that the restricted approach to privacy as a personal interest enshrined in the Restatement was designed presuming that privacy would be indirectly protected by property rights in physical space; in nonphysical spaces, some right to exclude is necessary to achieve the same level of protection in the Information Age.

As the next Part of this Article will show, conceptualizing privacy as quasi-property is a superior approach with many analytical advantages over both privacy as property and privacy as a personal interest.

III. PRIVACY AS QUASI-PROPERTY

Privacy should be understood as a quasi-property interest. Courts can handle privacy interests in similar ways as the other members of the quasi-property class.⁵⁷ For privacy, a quasi-property approach entails imposing a duty on others not to access or use data produced by a person, under certain circumstances driven by the relationship between the parties, the context, and any wrongful nature of the parties’ actions. As the foregoing analysis will demonstrate, quasi-property uses norms from property law but functions like tort law because of its emphasis on relationships between individuals.

Quasi-property imposes a duty of forbearance that resembles the right to exclude from the *res*, or item of information.⁵⁸ However, the right to exclude exists only under specified circumstances arising out of personal relationships.⁵⁹ Others have duties towards the owner of quasi-property that are mediated through the *res*. Before a cause of action arises, there is no fixed definition of the *res*. The *res* is malleable by design.⁶⁰ It allows for cases to adequately account for different factual circumstances and more effectively

55. Samuelson, *supra* note 2, at 1146.

56. See Balganes, *supra* note 4, at 1894 (noting that “the concept of property exerts a huge influence on people’s perceptions and incentives in different settings”); cf. YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN* 176–78 (2011) (arguing that in certain cases when tasks are done for money, it changes the normative framing and social signaling associated with the behavior, with more positive and altruistic attitudes associated with unpaid tasks).

57. These include hot news misappropriation, trade secret, and right of sepulcher. See Balganes, *supra* note 4, at 1894–95.

58. Following Balganes, this Article uses the term “res” interchangeably with “resource” to mean the thing at issue in the context of a quasi-property matter; that is, the trade secret, the corpse, or the personal information. See *id.* at 1893.

59. *Id.* at 1899–901.

60. *Id.* at 1915–18 (showing how quasi-property relies upon allowing the *res* to be not crisply defined prior to infringement).

guard against opportunism.⁶¹ The best way for actors to avoid infringing on the *res* is to understand what will trigger the relational exclusionary interest.⁶²

To determine whether there is a right to exclude from a quasi-property interest, one considers: (1) the relationship between the parties;⁶³ (2) the context of the parties' interactions, including the characteristics and social status of each party;⁶⁴ and (3) the wrongful nature of the defending party's actions.⁶⁵ This Article refers to this test for whether an exclusionary relationship is triggered as the "relationship-context-nature test."

The accommodation of when infringement occurs to particular circumstances is unsurprising given quasi-property's roots in equity.⁶⁶ A related characteristic of quasi-property is that the law sees fit to impose liability in a variety of ways.⁶⁷ This, too, is in line with quasi-property's roots in courts of equity, a jurisdiction associated with injunctive and other tailored relief.⁶⁸

There is clamor in the courts for the quasi-property approach. When handling privacy cases, courts, without using the quasi-property terminology, have long considered factors remarkably similar to the relationship-context-nature test. The offensiveness element of several of the Restatement torts raised concerns of vagueness in many observers.⁶⁹ In response, many courts broke the concept of "offensiveness" into multi-factor tests that turned on the facts of the case, not the conscience of the judge of a hypothetical average person. A highly influential example of such a formulation is the Supreme Court of California case *Hill v. National Collegiate Athletic Association*.⁷⁰ These factors include: (1) "the degree of the intrusion"; (2) "the context, conduct and circumstances surrounding the intrusion"; (3) "the intruder's motives

61. Cf. Henry E. Smith, *Equitable Intellectual Property: What's Wrong with Misappropriation?*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 42, 50 (Shyamkrishna Balganesh ed., 2013) (observing that "a major theme of equity in private law is anti-opportunism").

62. See Balganesh, *supra* note 4, at 1917–18.

63. Balganesh cites the "hot news" doctrine as an example of this, because courts stress the status of the claimant and defendant as competitors. *Id.* at 1902–03.

64. Balganesh discusses how the exclusionary right to a corpse of a family member is grounded in circumstances where there is likely to be emotional distress. *Id.* at 1900, 1904.

65. Balganesh again draws upon the right to a corpse, noting that the right only arises where there is a disrespectful act towards the corpse. *Id.* at 1904.

66. See *id.* at 1895.

67. See *id.* at 1890–91.

68. See *id.* at 1895 ("[E]quity's use of the term 'quasi-property' to describe certain kinds of interests predates the misappropriation doctrine [from *International News Service v. Associated Press*] by at least half a century. Equity courts began using the term 'quasi-property' to describe interests that resembled property rights in their functioning even when they weren't property rights, or, strictly speaking, ownership interests.").

69. Cf. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291, 362 (1983) ("Because 'unconscionability' is ultimately a subjective determination, open to many different interpretations, this theoretical narrowing of the tort is not, as a practical matter, likely to discourage many potential litigants from suing, or to prevent courts from continuing to arrive at conceptually irreconcilable results.").

70. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994).

and objectives”; (4) “the setting into which [the intruder] intrudes”; and (5) “the expectations of those whose privacy is invaded.”⁷¹ Citing California cases and following *Hills* lead, similar approaches that highlight the relationship between parties, context, and wrongful nature of the privacy invasion have been used in many jurisdictions.⁷² Other courts, not specifically referencing the California case law, have attempted to use a “reasonable person” standard for offensiveness, offering objective factors to indicate offensiveness.⁷³ However, in the absence of reform to the Restatement, it is difficult for this move towards reframing the offensiveness element to spread and perfect itself in any systemic way. The division of the privacy tort into four causes of action, some of which require offensiveness and others which do not, further complicates and slows the spread of this movement.

Despite the term “quasi-property,” I conceive of the causes of action arising from quasi-property interests as torts. It may be that in a broader account of property, quasi-property interests could be labeled a form of intellectual property.⁷⁴ In this Article’s account, what is most important is not what this set of interests is called, but how they function at law. This Article will make use of the term quasi-property, but readers need not accept any particular borderline between property and tort to accept what this Article calls “quasi-property” as a functional description of a type of interest.

Before applying quasi-property to privacy, this Article will illustrate the framework by reference to sepulcher, the common law entitlement of a person’s next of kin to control and dispose of the decedent’s corpse. Traditional right of sepulcher is state law with some variation between states,⁷⁵ but it is memorable, simple, and illustrative of the quasi-property model.⁷⁶

71. *Id.* at 648 (quoting *Miller v. Nat’l Broad. Co.*, 232 Cal. Rptr. 668, 679 (Ct. App. 1986)).

72. *See, e.g.*, *Bauer v. Ford Motor Credit Co.*, 149 F. Supp. 2d 1106, 1110 (D. Minn. 2001) (citing cases in Nevada and New Mexico influenced by the *Miller* approach and noting “[c]ontext is one of the several factors which a court considers when evaluating an invasion of privacy claim”).

73. *See, e.g.*, *Whye v. Concentra Health Servs., Inc.*, 583 F. App’x 159, 161 (4th Cir. 2014) (using reasonable expectations standard without reference to Fourth Amendment law as a means of gauging offensiveness); *Grimes v. CBS Broad. Int’l of Can., Ltd.*, 905 F. Supp. 964, 970–71 (N.D. Okla. 1995) (grounding analysis on offensiveness in objective factors relevant to a reasonable person’s judgment of invasion of privacy).

74. *See* Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1, 4 (2015) (outlining a broader definition of property “as a set of resource-dependent legal institutions characterized by overlapping sets of family resemblances”). The difference made if we were to consider quasi-property true property is that the tort associated with interference with the quasi-property would be trespass to chattels. However, the functional analysis in this section would still apply. Essentially, it would say that for invasions into this type of property, there is a liability regime that functions as I describe above.

75. *See generally* Ann M. Murphy, *Please Don’t Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381 (2007).

76. It is also a strong fit for comparison to the privacy torts, given that, at least arguably, the right of sepulcher comes from the intuition that families have the right to privately grieve with minimal interference from others.

The traditional common law interest is an uncontroversial member of the quasi-property family.⁷⁷ Under traditional sepulcher, a next of kin does not have a general right against the world to do whatever she pleases with the corpse. She does, however, have the right to block a person from attempting to control what happens to the corpse without her consent.⁷⁸ Here, the relationship between her and the decedent gives her that power. Furthermore, she has the right to stop someone from engaging in harmful conduct towards the corpse, or to stop another from engaging in behavior that is not inherently harmful, but is contextually inappropriate or offensive from the perspective of the next of kin (e.g., giving a decedent who was of one faith a burial ritual for a person of a different faith). Notably, this is a quasi-property interest held by the next of kin, rather than a descendible property interest in the body inherited by the next of kin.⁷⁹ It is about an infringement on the next of kin's notions of how the body should be treated, irrespective of the decedent's own feelings on the matter.⁸⁰

The concept of quasi-property maps on well to the way privacy torts are currently handled. Each of the privacy torts follows the same pattern. An individual does not have a right against the world to any factual information about themselves.⁸¹ However, when the information is about you and an actor relates in a specified way to you and/or uses the information in a specified way, a right to exclude is generated, along with a corresponding duty not to access or use the information. So, for a concrete privacy example, if a photographer took intimate photos of her neighbor through an open window, without the neighbor's knowledge or permission that would give rise to a quasi-property action. The neighbor has no freestanding right to any and

77. E.g., Patrick J. Mulqueen, "Only Dust Remains[?]: The 9/11 Memorial Litigation and the Reach of Quasi-Property Rights," 78 BROOK. L. REV. 231, 234 (2012); Denay L. Wilding Knope, Comment, *Over My Dead Body: How the Albrecht Decisions Complicate the Constitutional Dilemma of Due Process & the Dead*, 41 U. TOL. L. REV. 169, 170 (2009) (both characterizing sepulcher as quasi-property and citing case law to support the position).

78. See, e.g., *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (finding that relatives of the deceased have a quasi-property right to the body); *O'Donnell v. Slack*, 55 P. 906, 907 (Cal. 1899); *Louisville & N. R. Co. v. Wilson*, 51 S.E. 24, 26 (Ga. 1905); *Burney v. Children's Hosp.*, 47 N.E. 401, 402 (Mass. 1897).

79. David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 585–86 (2014).

80. Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 983 (1999) ("Probate courts in many instances have minimized the importance of the doctrine of testamentary freedom with respect to directions for the disposal of mortal remains to gratify the contrary burial wishes of next of kin."). Furthermore, in many jurisdictions, the next of kin is the individual given the quasi-property interest in the decedent's remains, despite the fact that the decedent may have wished another person to be responsible. Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1361 (2008) ("[T]he family paradigm—with all its flaws—applies to the disposition of a decedent's remains as well as her assets.").

81. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918). ("But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.").

all images of her naked body. But given the lack of relationship, the social norm that intimate photos are highly private, and the wrongful act of being a peeping tom, the neighbor now has a right to exclude. It is easy to update this classic example to the Internet age. Instead of an open window, imagine a hacked web camera, or a non-disclosed, non-agreed-to use of a web camera. The analysis is similar for revenge pornography, the distribution of intimate photographs by a former partner without the subject of the photo's permission.⁸²

In order to illustrate the applicability of this framework to a broad range of privacy matters, this Article will consider each of the Restatement privacy torts in turn, using illustrations from the Restatement as illuminating examples. In recent cases, many courts have directly referred to the comments of the Restatement (Second) in their analysis of privacy torts.⁸³ For each of the Restatement privacy torts, a combination of three factors determines whether a plaintiff has the right to exclude a defendant from access to, or use of, personal information.

I have two observations before I begin to apply the relationship-context-nature test to the four Restatement torts. First, the Restatement includes a condition of offensiveness to a reasonable person for intrusion upon seclusion, private disclosure of public facts, and publicity placing a person in a false light.⁸⁴ Prosser included it as a means of providing a limit to several of these torts so that they would not come to subsume ordinary behavior.⁸⁵ Whether a behavior offends the senses of a reasonable person is effectively subsumed in a more targeted manner by the aforementioned three factors. Grounding the analysis in these three factors has the advantage of rooting courts' analysis in the facts of the case. The offensiveness to a reasonable person prong, where not broken down to these objective factors, gives courts too much leeway to decide close cases based on policy considerations or rough welfare balancing. Conceptualizing the privacy interest as quasi-property suggests analytical machinery for approaching the reasonable expectations

82. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 357-59 (2014) (noting that public disclosure of private facts tort has been used by victims of revenge pornography, but the cost of civil suit, the disfavored status pseudonymous litigation, and the low amount of damages achieved on average act as deterrents to the use of civil suits in tort for this type of invasion of privacy).

83. E.g., *Cheney v. Daily News, L.P.*, No. CIV.A. 15-1194, 2015 WL 2084128, at *3 (E.D. Pa. May 6, 2015) (quoting RESTATEMENT (SECOND) OF TORTS: PUBLICITY PLACING PERSON IN FALSE LIGHT § 652E cmt. b (AM. LAW INST. 1977)); *Johnston v. One Am. Prods., Inc.*, No. CIV.A. 2:07CV042-P-B, 2007 WL 2903218, at *3 (N.D. Miss. Oct. 2, 2007) (quoting RESTATEMENT (SECOND) OF TORTS: APPROPRIATION OF NAME OR LIKENESS § 652C cmt. c (AM. LAW INST. 1977)).

84. RESTATEMENT (SECOND) OF TORTS: GENERAL PRINCIPLE § 652A (AM. LAW INST. 1977).

85. Prosser, *supra* note 19, at 423.

element.⁸⁶ Therefore, this element will not be given independent consideration because it is subsumed in the three factors.

Second, this discussion will not directly consider defenses such as consent, preferring to focus the discussion on shaping the contours of what proving the prima facie case looks like under this approach. Preliminarily, however, the construction of privacy as quasi-property could make defense claims against privacy torts more complicated. In a quasi-property matter, the *res* cannot be said to exist prior to the cause of action. Therefore, plaintiffs would be able to opportunistically develop the contours of the *res* to limit the scope of the consent. And, on the other hand, the defendants would make arguments to broaden or narrow the scope of the *res* based on what would eliminate or reduce liability.

A. INTRUSION UPON SECLUSION

The Restatement defines “Intrusion upon Seclusion” as follows: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”⁸⁷ Prosser expressly draws analogies between this tort and trespass upon chattels and real trespass, evoking the right of persons to exclude others from intimate facts and what goes on in intimate spaces.⁸⁸ However, he stops short of deeming the intimate space and intimate facts as a right against the world. He notes that several types of intrusion into seclusion are permissible.⁸⁹

The right to exclude necessary to generate a successful intrusion upon seclusion action is triggered by a combination of relationships, context, and wrongful manner of defendant. Implied is that a relationship between the parties is such that accessing the information would be an unreasonable

86. The Fourth Amendment reasonable expectations of privacy test, first promulgated in Justice John M. Harlan’s concurrence in *Katz v. United States*, 389 U.S. 347 (1967), has been widely critiqued on the ground that it is circular since government can expand the scope of surveillance and invasion simply by changing expectations. *E.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012) (Sotomayor, J., concurring); Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 560–64 (1998). David Alan Sklansky has noted that there “is persistent and growing confusion about the meaning and continuing validity of the ‘reasonable expectations of privacy’ test.” David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1071 (2014).

87. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977).

88. Prosser, *supra* note 19, at 389–90. For an example of this type of comparison, consider the following: “The privacy action which has been allowed in such cases will evidently overlap, to a considerable extent at least, the action for trespass to land or chattels.” *Id.*

89. *Id.* at 391–92 (specifying that “plaintiff has no right to complain when his pre-trial testimony is recorded,” and no right not to have a photo taken in public “since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see”).

intrusion. Another relevant factor would be the context, including the social standing and identities of the parties. The Restatement highlights in Illustration 8 that a landlord would not intrude upon the seclusion of a tenant were the landlord to knock upon the tenant's door to request past due rent.⁹⁰ This shows the role of social norms in determining what context would tend to trigger the right to exclude from the personal space. Finally, the manner of the intrusion can influence the outcome. If there is something that could be thought improper about the way the information was accessed, that tilts in the plaintiff's favor.⁹¹ In Illustration 7, the Restatement notes that the taking of an upskirt photo of a woman in a public place, even if the exposure was visible to all present at the time, would still be intrusion upon seclusion.⁹² Given an appropriate combination of these factors, a claimant may argue that a right to exclude a defendant from access to their information was triggered.

B. APPROPRIATION OF NAME OR LIKENESS

The Restatement defines "Appropriation of Name or Likeness" as follows: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."⁹³ Prosser expressly states that the following two triggers are required for a claimant to exclude a defendant from use of some personal information: (1) defendant must use the information to his or her personal advantage or profit;⁹⁴ and (2) claimant must have clearly imbued her personality in the elements that have been used by the defendant.⁹⁵

The relationship between the parties is thus ordinarily not of significance; one's name or likeness could be appropriated just as effectively by a family member as a stranger. The context is of significance because context is necessary to know whether a defendant could be said to be taking advantage of the plaintiff's identity. Illustration 4 in the Restatement offers the example of a mistress posing to society as her lover's common law wife.⁹⁶ The social context is necessary to understand the degree to which the impersonator is profiting at the plaintiff's expense, because there is no

90. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B cmt. d, illus. 8 (AM. LAW INST. 1977).

91. Note that improper behavior need not be per se illegal. *Cf.* E. I. duPont deNemours & Co., Inc. v. Christopher, 431 F.2d. 1012, 1017 (5th Cir. 1970) (holding that defendants improperly accessed trade secrets by taking photos from legally occupied airspace).

92. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B cmt. c, illus. 7 (AM. LAW INST. 1977).

93. RESTATEMENT (SECOND) OF TORTS: APPROPRIATION OF NAME OR LIKENESS § 652C (AM. LAW INST. 1977).

94. See Prosser, *supra* note 19, at 403-05.

95. *Id.*

96. RESTATEMENT (SECOND) OF TORTS: APPROPRIATION OF NAME OR LIKENESS § 652C cmt. b, illus. 4 (AM. LAW INST. 1977).

inherent tort in using a name that's not one's own.⁹⁷ Finally, the manner of use of the person's identity is relevant to whether there is a privacy tort, as the use must be to enrich the defendant, and the more improper and exploitative the use is, the better it is for the defendant. Illustration 3 provides the example of a private detective who impersonates a person in order to find out confidential information about him.⁹⁸

Thus, the relationship-context-nature test for triggering a right to exclude from using one's identity applies well to the tort of appropriation of name or likeness.

C. PUBLIC DISCLOSURE OF PRIVATE FACTS

The Second Restatement defines public disclosure of private facts as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.⁹⁹

Once again, all three of the factors come into play in describing when a plaintiff is able to properly bring a private disclosure of public facts claim. Relationships are relevant to defining the contours of the *res*. In the comments, the Restatement loosely defines private facts as information that the average person would not reveal to people outside her family and close friends.¹⁰⁰ If the relationship is one that society would expect to be confidential with respect to sensitive facts, this tort imposes a duty of confidentiality. Context also limits the scope of the tort's applicability. Public disclosure could be permitted if the private facts were matters of legitimate public concern, involved public figures, and/or were being used for educational and/or informative purposes.¹⁰¹

By and large, though, the tort is characterized by a disclosure of a private fact to the broader public, which is ultimately a question of how the defendant used the information, predicated on determinations of what information is private and what constitutes public disclosures.

An example from the Restatement will be illustrative. Illustration 11 of the tort reads:

97. *See id.* § 652C cmt. c, illus. 7 (saying there is no inherent privacy tort if XYZ adopts ABC's name out of admiration).

98. *Id.* § 652C cmt. b, illus. 3.

99. RESTATEMENT (SECOND) OF TORTS: PUBLICITY GIVEN TO PRIVATE LIFE § 652D (AM. LAW INST. 1977).

100. *Id.* § 652D cmt. b.

101. *Id.* § 652D cmt. d-f, j.

A is about to give birth to a child, and is told that a caesarian operation will be necessary. She agrees to allow B to make a motion picture of the operation for exhibition to medical students for educational purposes. B exhibits the picture to the public in a commercial theater. This is an invasion of A's privacy.¹⁰²

This example shows the relationship-context-nature manner model at work as follows: (1) the relationship of trust between A and B; (2) the reasonable context of donating an image for educational purposes; and (3) the wrongful act of breaching the confidence between A and B.

We see the same solicitude for consideration of how the information was obtained in trade secret law, another member of the quasi-property family. In trade secret law, another area of quasi-property law, the fact that a defendant had to resort to improper means to acquire the information can serve as evidence of whether the information was secret. Similarly, Prosser observes that the manner of obtaining the information can be considered "private facts"¹⁰³ despite occurring in what may technically be a public space where information is obtained "surreptitiously . . . over the plaintiff's objection," or through "bribery or other inducement of breach of trust."¹⁰⁴ The Restatement also notes that this may be proper for courts to consider, citing an illustration involving disclosure of questionably obtained private facts as a borderline case.¹⁰⁵

Thus, the private disclosure of public facts tort fits into the same framework as the previous two privacy torts discussed. Importantly, the quasi-property form allows us to sharply describe what is at stake with the private disclosure of public facts tort. Plaintiffs do not have a right against the world to private facts. Rather, they have a right to prevent people from using their information in certain ways. This has the effect of protecting the plaintiff's private emotional sphere, which is mediated through the quasi-property *res* of personal information.

D. PUBLICITY PLACING PERSON IN FALSE LIGHT

The Second Restatement defines "Publicity Placing [a] Person in False Light" as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

102. *Id.* § 652D cmt. c, illus. 11.

103. Prosser, *supra* note 19, at 389.

104. *Id.* at 395.

105. RESTATEMENT (SECOND) OF TORTS: PUBLICITY GIVEN TO PRIVATE LIFE § 652D cmt. k, illus. 26 (AM. LAW INST. 1977).

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.¹⁰⁶

While Prosser worried that the potential sweep of this tort could limit free speech,¹⁰⁷ subsequent First Amendment jurisprudence presents a clear backstop limiting its development in unduly speech-restricting ways.¹⁰⁸

Relationships are not important even as a factual predicate of the false light tort; there is no need that information that puts a person in a false light be private. Context is significant because it is necessary to know whether the facts used about a person are putting that person in a false light. In the case of the false light privacy tort, context is very intimately connected to manner. This is because, in order to put the plaintiff in a false light, the defendant must have been considering (or should have been considering) the context and how the use of the plaintiff's name or information would make the plaintiff appear. Like public disclosure of private facts, manner is the key factor in establishing the false light privacy tort. There must be something about how the defendant used the information about the plaintiff that tends to put the plaintiff in a false light. For example, Illustration 4 describes the case of person A who signs a petition circulated by B supporting candidate C, but wants to take his name off the list once he finds out the candidate's party.¹⁰⁹ If A's name remains on the list and the list continues to be circulated, this puts A in a false light and is actionable under the false light tort.

In summary, each of the privacy torts can be understood as describing a set of circumstances triggering a right to exclude certain other people from the *res*, which can be defined as a right to access certain information, or the right to use certain information in a certain way. One major implication of finding that each of the Restatement torts fits into the quasi-property approach is that it shows that the four privacy torts are not disjointed, as Prosser presented them to be.¹¹⁰ This common analytical framework suggests that the privacy torts are not a closed list.

Rather, if a plaintiff can develop a strong case that the relationship between parties, context, and manner of access or use of the personal information warranted the right to exclude, it should be considered an infringement of privacy even if it does not perfectly fit into one of the four

106. RESTATEMENT (SECOND) OF TORTS: PUBLICITY PLACING PERSON IN FALSE LIGHT § 652E (AM. LAW INST. 1977).

107. See Prosser, *supra* note 19, at 401.

108. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

109. RESTATEMENT (SECOND) OF TORTS: PUBLICITY PLACING PERSON IN FALSE LIGHT § 652E cmt. b, illus. 4 (AM. LAW INST. 1977).

110. Prosser, *supra* note 19, at 423.

Restatement privacy torts. Importantly, this could serve as a way to allow both the existing privacy torts to better accommodate changes in technology, and to provide room for others to arise in response to technological and social change.

An analogy will prove instructive. During the Middle Ages in Europe, it was thought that rats and bad sanitation caused the bubonic plague, so some enterprising people of the time attempted to avoid them to avoid illness.¹¹¹ We now know that germs carried by rats and that teemed in poor sanitary conditions are actually the cause of disease.¹¹² However, it is not wrong to say that avoiding rats and bad sanitation would reduce the odds of becoming ill; after all, they bear the germs that make us sick. Nevertheless, understanding that germs cause disease enables us to both better understand and avoid rats and poor sanitation, and identify other sources of infection.

In the same way, quasi-property provides an underlying reason why all the torts listed by Prosser are invasions in tort, and provides a higher level reasoning that can be applied to a broader range of facts. This is curative of the “ossification” problem that has plagued Prosser’s four privacy torts.¹¹³ Using the quasi-property framework in privacy cases provides a common analytical and normative approach underlying the four privacy torts.

One of the things the quasi-property model helps explain is the reason not all of the Restatement privacy torts are equally likely to be the ground for a successful cause of action under the quasi-property approach. Intrusion upon seclusion and appropriation of likeness map particularly strongly onto this framework. One of these causes of action, intrusion upon seclusion, has been flagged by at least one privacy commentator as having high potential salience in the Information Age.¹¹⁴ It may prove easier for defendants to bring these causes of action because the relationship between parties, context, and manner of use all provide indications as to whether a right to exclude has been triggered.

By contrast, where the right to exclude is triggered by issues based predominantly in the nature of the defendant’s manner of using or obtaining the *res*, plaintiffs will have to more carefully define that manner of use to demonstrate the right to exclude is warranted. The elements of public disclosure of private facts and false light generally focus on how a defendant used a piece of information. It is difficult to clearly define rules for determining what manner of use triggers the right to exclude from use of personal information that would both fairly notify potential wrongdoers *ex ante*, and avoid sweeping ordinary behavior too broadly into the ambit of

111. IRWIN W. SHERMAN, TWELVE DISEASES THAT CHANGED OUR WORLD 68–82 (2007).

112. *Id.*

113. See generally Richards & Solove, *supra* note 10 (arguing that the widespread adoption of the Restatement privacy torts has led to a pernicious ossification of tort privacy).

114. See generally Bambauer, *supra* note 40 (arguing that intrusion upon seclusion is the best privacy tort to vindicate information privacy).

privacy tort. This is why the illustrations and comments in the Restatement are more than three times longer for “Publicity Given to Private Life” and “Publicity Placing [a] Person in False Light” than the sections on “Intrusion upon Seclusion” and “Appropriation of Name or Likeness.”¹¹⁵ This makes the outcome of public disclosure of private fact cases and publicity placing a person in false light cases uncertain. The uncertainty of these causes of action is a large reason why the public disclosure of private facts and false light publicity torts have both fallen into relative disuse. Oftentimes, the “offensiveness” criterion is a safe way for judges to avoid allowing these two types of claims to make it past a defendant’s motion to dismiss.

The quasi-property model gives judges a roadmap to evaluate privacy invasions. While it covers the same ground as the Restatement privacy torts, it avoids the Restatement’s over-emphasis on construing a theoretical distinction between private and public, as well as defining “offensiveness.” The case of revenge pornography, the distribution of nude photos of a former partner by an aggrieved ex-partner, is instructive here. In most cases, revenge pornography would seem to fall neatly into the public disclosure of private facts tort. In fact, the facts of a revenge pornography matter could easily be analogized to the facts of the Restatement Illustration cited *supra*,¹¹⁶ describing the wrongfully commercially distributed caesarian section video. Social norms deem the act outrageous and offensive, as is evinced by the rapid spread of laws criminalizing the creation and distribution of revenge pornography in many states.¹¹⁷ But what is also evinced by the rapid spread of such revenge pornography laws is that the public disclosure of private facts was not working to give victims of revenge pornography recourse against their assailants. Due to early misunderstanding of the underlying technology, courts in several jurisdictions have imbued the privacy tort case law with very strict definitions of “public,” ones that include electronically sharing information with a few or even one confidant.¹¹⁸ Furthermore, the fact that many other internet-age wrongs fail to fit into the Restatement of Torts categories has led to the general perception that tort law cannot also fit into

115. Compare RESTATEMENT (SECOND) OF TORTS: PUBLICITY GIVEN TO PRIVATE LIFE § 652D (AM. LAW INST. 1977), and RESTATEMENT (SECOND) OF TORTS: PUBLICITY PLACING PERSON IN FALSE LIGHT § 652E (AM. LAW INST. 1977), with RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977), and RESTATEMENT (SECOND) OF TORTS: APPROPRIATION OF NAME OR LIKENESS § 652C (AM. LAW INST. 1977).

116. See *supra* note 102.

117. E.g., Kim Bellware, *Illinois Passes New ‘Revenge Porn’ Law That Includes Harsh Penalties*, HUFFINGTON POST (Dec. 31, 2014, 1:59 AM), http://www.huffingtonpost.com/2014/12/30/illinois-revenge-porn_n_6396436.html.

118. E.g., *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 444 (Cal. 1953) (“There can be no privacy in that which is already public.” (citation omitted)); see also DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 162–70 (2007) (discussing some courts’ reluctance to acknowledge privacy claims where there has been voluntary disclosure to even one person).

those categories. This perception will be discussed and debunked at least under the quasi-property approach, in Part IV *infra*.

The quasi-property model would help courts to more consistently approach the existing tort causes of action. But where the doctrine in jurisdictions has evolved to interpret words in such a way as to block the realization of cases that clearly fit into the ambit of the original four torts, the safe harbor of the general quasi-property model, which could perhaps be deemed a fifth omnibus privacy tort, could allow such wrongs to be recognized in tort.

IV. IMPLICATIONS OF PRIVACY AS QUASI-PROPERTY

It remains to be considered how the concept of quasi-property can help courts and commentators assess privacy claims. Several influential privacy experts, including Professors Neil Richards, Daniel Solove, and Julie Cohen, have spoken of tort privacy's limited relevance in protecting information privacy. Richards and Solove write that the newsworthiness standard, offensiveness standard, and the very broad definition of "public," which can include disclosure even to one person, all play a role in the longstanding ineffectiveness of Prosser's privacy torts.¹¹⁹ Cohen adds that "it is becoming increasingly clear that the common law invasion of privacy torts will not help to contain the destruction of informational privacy."¹²⁰ Richards has raised the concern that disclosure based privacy torts may run afoul of the First Amendment.¹²¹ However, when privacy is reframed as quasi-property, these

119. See Richards & Solove, *supra* note 10, at 1917–22.

120. Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2043 (2001). Cohen also observes:

Lawsuits by individuals outraged at the unauthorized sale and use of their personal information have been uniformly unsuccessful. Courts have responded to these novel informational privacy claims (based on the "unauthorized appropriation of name or likeness" branch of privacy doctrine) as if inspired by Lewis Carroll's Red Queen: Personal information is only valuable in aggregate, so individuals have no basis to claim injury against those who wish to sell their information for value; personal information has not been "appropriated" unless the entity that has collected it to use and exchange for value also releases it to the general public; personal information including correct, current address information is not the individual's if the name is slightly misspelled. While courts have recognized a privacy interest in sexual or intimate information (pursuant to the "embarrassing facts" branch of privacy doctrine), they are unlikely to hold that, for example, processing and sale of routine transactional data constitutes an embarrassing disclosure of private facts.

Id. (footnotes omitted).

121. *E.g.*, Richards, *supra* note 40 (arguing that the public disclosure of private facts torts and other torts that rely on finding disclosure of information to be tortious are in danger of running afoul of the First Amendment). His approach in the article shows the flaw in attempting to weigh privacy against other interests at law without making a determination about what type of an interest privacy constitutes. If privacy is indeed a quasi-property interest triggering a right to exclude, individuals cannot be disgorge of it by government fiat to allow others freedom to

concerns disappear, and the position of torts in the regulation of privacy must be reevaluated. Privacy as quasi-property accounts for the existing Restatement privacy torts while allowing for plausible causes of action for Information Age invasions of privacy.

The quasi-property approach provides a common conceptual framework that underlies all of the privacy torts, while avoiding the need for defining a broad, general concept that is fit to describe every case. It is difficult to provide a definition of privacy that is broad enough to describe every injury that the law recognizes as an invasion of privacy. This is why Daniel Solove has shrewdly argued that efforts to come up with a unitary motivation for privacy should be abandoned in favor of conceptualizing the series of infringements upon as having “family resemblances”—that is to say, like members of a family, each type of privacy infringement has common features with some others, but there is no one trait that all of them share.¹²²

Solove has elaborated on this family resemblances concept and created a taxonomy of all “harms and problems that have achieved a significant degree of social recognition,” taking current law as a starting point.¹²³ The four harms he identifies are: “(1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.”¹²⁴

Solove shaped this taxonomy around the ways in which others might interact with the person that produced the personal information:

I have arranged these groups around a model that begins with the data subject—the individual whose life is most directly affected by the activities classified in the taxonomy. From that individual, various entities (other people, businesses, and the government) collect information. The collection of this information itself can constitute a harmful activity. Not all information collection is harmful, but certain kinds of collection can be. Those that collect the data (the “data holders”) then process it—they store it, combine it, manipulate it, search it, and use it. I label these activities as “information processing.” The next step is “information dissemination,” in which the data holders transfer the information to others or release the information. The general progression from

speak, at least not without compensation. See Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v Robins*, 64 U. CHI. L. REV. 21, 22 (1997) (problematizing the *Pruneyard* decision, which held that private malls had to permit individuals to engage in free speech because they held them, and noting that “it is difficult to conceive of any property as private if the right to exclude is rejected”).

122. SOLOVE, *supra* note 1, at 12–38 (2008) (discussing examples of the categories of places where courts and scholars have found that privacy applies); *id.* at 42 (proposing an approach to privacy based upon Wittgenstein’s concept of “family resemblances” rather than forcing a unified overarching definition).

123. *Id.* at 484–86.

124. *Id.* at 489.

information collection to processing to dissemination is the data moving further away from the control of the individual. The last grouping of activities is “invasions,” which involve impingements directly on the individual. Instead of the progression away from the individual, invasions progress toward the individual and do not necessarily involve information.¹²⁵

Each element of Solove’s four-part taxonomy, like Prosser’s, can be explained in terms of quasi-property. Collection and invasion function similarly in the quasi-property model to appropriation and intrusion, each discussed in detail in Part III. Information processing and information dissemination do not fit readily in Prosser’s four torts; however they are readily cognizable in the quasi-property model. Any or all of the first factors in the relationship-context-nature test come into play when harm arises from data processing or data dissemination, and (1) there is a relationship of trust between the two parties that makes it reasonable for the plaintiff to expect her data would not be handled in that way; and/or (2) society deems it morally wrong or outrageous for data to be processed or disseminated in such a way;¹²⁶ and/or (3) the information is being processed or disseminated by

125. *Id.* (footnote omitted).

126. Jessica Litman highlighted the frequency and effectiveness of public backlash against invasive privacy practices as illustrative of social norms. After going through a list of privacy dust-ups companies have had, she summarizes:

None of the businesses caught misusing customer data responded by suggesting that nobody really expected her data to be private in today’s world. None claimed that the fact that consumers had chosen to supply the information in the course of voluntary transactions entitled the businesses to do with the data what they wanted. None insisted that it was their ability to reuse the data they collected that enabled them to offer the products that consumers wanted at an attractive price. They apologized, and sheepishly promised not to do it again. They appreciated that when consumers had volunteered their names, addresses, phone numbers, credit card numbers, prescriptions, book choices, and musical preferences, they had done so expecting that the information would be used only to consummate the transaction, and that by reusing that information or sharing it with third parties, they had breached their customers’ trust.

Litman, *supra* note 51, at 1307. While Litman wrote this 15 years ago, the principle that both companies and users behave as if companies have a duty to users to process and disseminate their data with basic solicitude for their privacy and data security still stands. A notable recent example of the same phenomenon is the controversy over a proposed change in Instagram’s terms of service that seems to allow Facebook, Instagram’s new parent company, to sell photos that users posted without compensation. See Ian Paul, *Instagram Reverses Service Terms: Is It Good for Users?*, PCWORLD (Dec. 21, 2012, 8:06 AM), <http://www.techhive.com/article/2022924/instagram-reverses-service-terms-is-it-good-for-users.html>. Ian Paul commented that even after Instagram backed down from the proposed terms of service, the next agreement they proposed still gave Instagram a broad, if not quite as extreme, entitlement to use user photos. Paul’s concerns about the revised terms of service illustrates that, without proper legal recompense, users’ ability to make good on social expectations of ethical business practices is limited. The status quo for privacy uses is much like the Wild West that would prevail in many industries if the fellow quasi-property interest in trade secrets did not exist at law. *Id.*

the defendant in a way that subjected plaintiff to harm or put plaintiff at substantial risk of harm (the most prominent example of this is data security).

Conceiving of privacy as quasi-property builds on the perception, implied in Solove's taxonomy, that what is at issue is the relationship between the defendant and the plaintiff as mediated by the personal information, not merely the information itself. This allows for a variety of conditions where there are infringements upon the same *res*: privacy.

The implication of the fact that the four types of privacy invasions Solove describes are cognizable as quasi-property means that conceiving privacy as quasi-property would reinvigorate the privacy torts. A whole range of conduct that simply did not readily fit into the cramped four Restatement privacy torts would be colorable causes of action; namely duties by companies to have reasonable, nonprivacy invasive policies of information collection, information processing, and information dissemination. In other words, quasi-property brings privacy tort to the Information Age.

Privacy as quasi-property allows tort law to reclaim its traditional status as the central source of inspiration for other actors in regulating privacy. There is a tradition of Fourth Amendment privacy taking its cues from tort privacy. Brandeis's famous dissent in *Olmstead v. United States* placed the right of privacy at the center of the Fourth and Fifth Amendment.¹²⁷ Brandeis's conception of privacy here was informed by his famous article *The Right to Privacy*.¹²⁸ In *Katz v. United States*, decided in 1967, prior to the widespread adoption of the Restatement (Second) privacy torts, the Supreme Court adopted Brandeis's vision of the Fourth Amendment and privacy.¹²⁹ The most common formulation of the test for whether the government has invaded an individual's privacy is the "reasonable expectation of privacy" test from Justice John M. Harlan's concurrence.¹³⁰ This test has faced heavy criticism in recent years as being circular and not capable of matching the ability of powerful actors to bamboozle the average person's actual expectations, thus placing a huge amount of emphasis on the "reasonable" aspect of the test.¹³¹ The quasi-property formulation I describe could similarly serve as a standard in Fourth Amendment jurisprudence. Though the consequences of invasion of privacy may differ for public versus private actors, there is little reason to believe the standard for finding an invasion should, especially in light of the extensive information sharing between public and private actors.

As Part II has illustrated, this common descriptive way of approaching the privacy torts is compatible with the four existing privacy torts. Moreover, quasi-property's recognition of their common method of operation creates

127. *Olmstead v. United States*, 277 U.S. 438, 471–88 (1928) (Brandeis, J., dissenting).

128. See generally Warren & Brandeis, *supra* note 13.

129. *Katz v. United States*, 389 U.S. 347 (1967).

130. *Id.* at 360–62 (Harlan, J., concurring).

131. See *supra* note 86 (providing sources of widespread critique of the reasonable expectation of privacy test).

an opportunity for courts to recognize and punish tortious behavior that follows the same pattern but does not fit into one of the four forms that Prosser specified. This is strong medicine to cure an oft-raised critique of the prevailing approach to privacy—its reliance on the existence of the four torts and their specific elements outlined by Prosser to adapt to changing business norms and technological architecture.¹³²

Quasi-property is also curative of another critique that has scourged privacy. Courts and commentators often worry about courts defining privacy in an ad-hoc way, resulting in unpredictable results.¹³³ In difficult privacy cases, judges often end up applying a broad welfarist test, balancing the claimant and similar individual's interest in privacy versus other claims and interests in society.¹³⁴ Courts are not well suited for this type of free-form, all-things-considered analysis where much of the developments in privacy are driven by fast-developing technology and business practices. Courts are better suited to identifying triggers based on analogical reasoning in reference to past cases. It is certainly possible to engage in reflective equilibrium reasoning from privacy-invading practices that society tends to deem inappropriate.¹³⁵ In this way, the quasi-property model is a fellow-traveler with the influential concept of contextual integrity elaborated by Helen Nissenbaum.¹³⁶ Contextual integrity defines privacy as a right to a flow of personal information in accordance with entrenched, context-relative informational norms.¹³⁷ The quasi-property approach is also better for parties because actors in society will be better able to predict what the court will do. Furthermore, the approach is rooted in state common law, and legislatures should adopt this approach on the state level. There is skepticism against omnibus privacy bills at this time because they might cut off state-level innovation, including tort claims, without sufficient privacy protections for consumers.

Another important implication of this categorization is the availability of injunctive and more tailored forms of relief. The potential threat of injunctive

132. See, e.g., Richards & Solove, *supra* note 10, at 1889–90.

133. See generally Cohen, *supra* note 1.

134. See Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 446 (1996) (“[P]laintiffs’ privacy rights rarely prevail over the public’s interests, rendering the limitation on the scope of the public interest essentially theoretical and leaving plaintiffs with rare success.” (footnote omitted)); Strahilevitz, *supra* note 39, at 2009–10 (arguing that Prosser’s four torts should be abandoned and noting that a broad welfarist analysis was more similar to what Brandeis and Warren were getting at and what courts actually do).

135. Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, 16 YALE J.L. & TECH. 59, 61 (2013) (categorizing privacy eroding behaviors by companies that the public finds “creepy”).

136. See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 129–30 (2010).

137. *Id.* at 129.

relief may encourage companies to develop consumer-facing solutions that allow interested consumers to gain more control over their information.

None of the possible concerns with this approach are sufficient to displace its clear superiority over alternatives. It seems intuitive, from both a Lockean and a Hegelian personality point of view, that a person should have some claim on the life she leads and the thought and effort she has put into leading it. However, awarding a limited property right, which emerges only against specified actors under specific circumstances, does not have these problems.

Under this Article's framework, miners of personal information can simply avoid triggering quasi-property relational exclusions, or pay to do so. This is a regime that is far less expensive to operate than the fully propertized regime proposed by Paul Schwartz in *Property, Privacy, and Personal Data*. Schwartz had to develop an institutional regime to take into account the non-alienable aspects of property. This Article's proposal avoids the issue of managing mistaken alienation of personal information by limiting its property-like characteristics to causes of action that infringe upon the privacy interest. The potential for private information to take on property-like characteristics and generate liability or even injunctive relief will incentivize firms to make changes that accord with privacy-advocates goals. Furthermore, industry would likely implement these changes in a more efficient way than direct regulation.

A final critique of this Article is that it is simply anti-modern to make any serious attempt to vindicate privacy interests at common law, and it is a good thing that the Restatement privacy torts as currently construed have not proven vigorous enough to have much influence in the Information Age. Technological change, and the social change it brings on this view, is inevitable. It is not the law's role to be at war with such developments. Viewing the changes in the privacy framework in the United States over the past 50 years, it is clear that society is incredibly pliable. As Lawrence Lessig has observed, regulation can take the form of law, norms, market, or architecture (limitations of physics or context-specific mechanical or software limits), and no one of these four forms is alone determinative.¹³⁸ As long as society sees value in the notion of a home and a private sphere in the sense that Arendt and others have described, there will be means to work toward preserving such an ideal if society maintains the will, and policymakers and stakeholders are creative.

V. CONCLUSION

Daniel Solove has suggested that, to be useful to courts, approaches to privacy should be "non-reductive and contextual, yet simultaneously useful in

138. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 664 (1998).

deciding cases and making sense of the multitude of privacy problems we face.”¹³⁹

The quasi-property framework provides just this type of guidance. The quasi-property framework adds analytical clarity to the Restatement privacy torts, and provides a natural avenue for recognizing privacy violations that do not neatly fall into any of the established torts. By reconceptualizing privacy in this way, we empower courts with the analytical tools to break through the ossification that has plagued the application of Prosser’s four torts while still predictably and meaningfully cabining privacy, respectful of Prosser’s First Amendment concerns. The fact that the quasi-property approach describes each of the elements of Solove’s taxonomy of privacy suggests that the approach could have applications outside of tort law, as well. While a universally agreed upon general definition of privacy may remain elusive, privacy as quasi-property provides hope for an avenue to predictably understand, frame, and ultimately systemize our moral intuitions about what should be protected at law.

139. See SOLOVE, *supra* note 1, at 482.