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Property as the Right to Be Left Alone

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ABSTRACT

Once upon a time, there existed a clear nexus between property and privacy. Protection of property rights was an important safeguard against intrusions of the privacy interests of owners both by the government and by private actors. Gradually, however, the symbiotic relationship between privacy and property has been forgotten by scholars and policymakers and fallen into oblivion.

In this Article, we seek to restore the centrality of privacy in property law by making two novel contributions – one descriptive and one normative. Descriptively, we demonstrate that concerns for privacy inform, at times implicitly, many important property doctrines. Indeed, we show that privacy provides an indispensable compass for understanding and uniting diverse and seemingly unrelated property rules.

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Second, we propose ways by which privacy concerns can be better and more explicitly incorporated into property law and policy. We show that attention to privacy can reinvigorate scholarly thinking about property and lead to new solutions to long-standing problems.

Property as the Right to Be Left Alone

INTRODUCTION

Few doubt the centrality of property to Western civilization, but, by the same token, few agree on the reason for its centrality.[1]

One prominent theory views property as vital for economic development. Property law allocates exclusive rights to resources, and thereby incentivizes their efficient management. This theory emphasizes property law's grant of rights of exclusion to owners.[2] Another prevalent set of theories portrays property as central to personal development or moral desert. These theories focus on the owner's ability to exclude others from an asset, to set an agenda for it and to control its transfer and alienation.[3] Yet another influential justification for the centrality of property emphasizes property as the arena of accommodating both complementary and conflicting social impulses. Theories of this kind eschew simple characterizations of property and stress the degree to which property doctrine should depend on changing social needs and the particulars of the case.[4]

It is remarkable that despite this plethora of theories justifying property, little attention has been paid to date to the importance of property to maintaining privacy. Privacy is highly valued in society and consequently by the law. The Supreme Court famously recognized a Constitutional right to privacy in the landmark case of

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[1] *See generally* Carol Rose, *Property as the Keystone Right?* 71 NOTRE DAME L. REV. 329, 333-361 (1996) (outlining seven reasons why property should be considered a keystone right).

[2] *See id.* at 358-362; *see also* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. PUB. POL'Y 593 (2008) (arguing that "[t]he idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property, whether private, public, or community"); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("the right to exclude others is more than just 'one of the most essential' constituents of property- it is the sine qua non"); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 103 (1997); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

[3] *See generally* G.W.F. HEGEL, PHILOSOPHY OF RIGHT (S.W. Dyde trans. 1996) (1986); Francisco J. Morales, *The Property Matrix: An Analytical Tool to Answer the Question, "Is This Property?"*, 161 U. PA. L. REV. 1125, 1133 (2013); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L.J. 275, 298-99 (2008) (emphasizing the importance of the owner's ability to set an agenda for an asset. *See also* Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 541-542 (2005) (reviewing scholarly works advocating a natural right conception of property).

[4] *See generally* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 627-628 (1988); HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011).

Griswold v. Connecticut[5] and the right to privacy has continued to play an important role in constitutional jurisprudence until today.[6] Privacy concerns have been highlighted in other areas of constitutional law, as well, such as Fourth Amendment protections against unwarranted searches and seizures.[7] A cluster of torts have been developed to develop privacy interests,[8] and numerous statutes have been enacted to protect privacy interests in a variety of contexts.[9] Particularly in recent years, thanks to the development of improved communications technology, issues related to privacy have come to the fore in new areas of the law, where a heated debate exists as to the appropriate relationship between privacy and property in information.[10] Yet, the role of property rights in protecting privacy in the physical world has played little role in

[5] 381 U.S. 479 (1965).

[6] For a discussion of Constitutional treatment of the right to privacy, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 10-15 (2009); Reva Siegal, *How Conflict Entrenched the Right to Privacy* 124 YALE L.J. FORUM 316,316 (arguing how Griswold helped entrench the right to privacy in Constitutional jurisprudence); Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885 (2012) (stating how concept of privacy plays a major role in constitutional jurisprudence).

[7] *See e.g.*, Katz v. U.S. 389 U.S. 347 (1967); Camara v. Municpal Court 387 U.S. 523 (1967); Jones v. U.S. 357 U.S. 493 (1958). *See also* Note, *Protecting Privacy under the Fourth Amendment*, 91 YALE L. J. 313, 313-343 (1981); William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, (2001-2002).

[8] William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 388-89 (1960) (dividing tort privacy into four distinct torts); W. PAGE KEETON, ET AL, PROSSER AND KEETON ON TORTS § 117 (5th ed. 1984).

[9] *See e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (2000); Children Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 15 U.S.C. §§ 6501-6506); Health Information Portability and Accountability Act of 1996, Pub L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 26, 29, and 42 U.S.C.).

[10] For arguments for applying property style rights in information space, *see* Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L 1, 26-41 (1996); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383 (1996); CARL SHAPIRO & HAL R. VARIAN, U.S. GOVERNMENT INFORMATION POLICY 45 (1997);) For arguments against applying property style rights in information space, *see* Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1547 (2000); Pamela Samuelson, *Privacy as Intellectual Property*? 52 STAN. L. REV. 1125, 1151–70 (2000). Cf. Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 COLUM. L. REV. 237 (2016) (discussing the role of registries in the relationship between property and information access); Sonia K. Katyal, Privacy vs. Piracy, 7 YALE J. L. & TECH. 222 (2005); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 165 (2015) (discussing the development of the theory of informational privacy).

property theory to date.

This is particularly ironic in light of the history of the development of privacy law. It is generally acknowledged that the roots of modern constitutional privacy law are to be found in concepts of property. Specifically, privacy interests were originally thought to be defined by, and in service of property rights.[11] It is only with time that privacy law separated from property law and became a distinct legal field. Yet, now that privacy law has emerged out of property law, theories of property law seem no longer to reflect the centrality of privacy. This development is regrettable. While there is little doubt that the new field of privacy law protects privacy interests that are outside the realm of property law, there is likewise little doubt that many privacy interests that concern us still do lie within the realm of property.

Since the rise of legal realism[12] and especially the work of Felix Cohen,[13] academic discussions of property have largely focused on the right of property owners to exclude others.[14] Proponents of exclusion rights support their position by reference to the values of autonomy and efficiency.[15] Opponents of the right to exclude, beginning with the legal realists and continuing with progressive property scholars, buttress their position by invoking the value of human "flourishing."[16] Privacy appears to have fallen by the wayside, receiving virtually no attention from either camp. This is not only surprising, but also unfortunate, since privacy is paramount both to autonomy and to human flourishing and thus offers a common ground or a bridge between two of the central competing

[11] *See* Note, *The Right to Privacy in Nineteenth Century America*, 94 HARVARD LAW REVIEW 1982 (1981); William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1,12-16 (2001-2002).

[12] Brian Leiter, American Legal Realism *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY, W. Edmundon & M. Golding eds. (2005); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005); Oliver Wendell Homes, The Path of the Law, 10 HARV. L. REV. 457 (1897).

[13] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[14] *E.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000); Joseph William Singer, *No Right to Exclude: Public Accomodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

[15] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004); Radhika Rao, *Property, Privacy, and the Human Body*, 80, B.U. L. REV. 359, 368 (2000) (discussing the right to exclude based on autonomy in the context of the human body).

[16] *See* Gregory S. Alexander et al, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) ("Values promoted by property include life and human flourishing").

ideologies in modern property theory. More importantly, it offers a unique view of property as an institution and of its defining characteristics that has been overlooked thus far.

In this article, we argue for giving privacy its deserved prominence among the values protected by property law. We show that property law is in many ways uniquely placed to protect privacy, and that privacy is rightly and naturally protected by property law. Indeed, we show that a number of extant doctrines in property law are best understood as attempts to defend rights holders' privacy rights, even if current theorizing has failed to take due notice.

The connection between privacy and property is evident in a variety of existing doctrines in property law.[17] Nowhere is this effect more pronounced than in the context of owners' exclusion rights. As we will show, owners' exclusion powers are often implicitly correlated with their expectations of privacy. Owners of commercial properties who invite the public to frequent their establishments virtually relinquish their right to exclude. By contrast, in the context of the home, where owners' privacy interests are paramount, the right to exclude is at its strongest. The varying scope of a property owner's right to exclude can be best explained through a privacy prism. Compare, first, the exclusion powers of owners of commercial properties with those of private dwellings. Commercial properties are often governed by civil rights acts[18] and the modern version of the public accommodations doctrine.[19] Together, these rules ban owners of commercial spaces that are open to the general public, such as hotels, shops and restaurants, from discriminating against individual patrons based on race, color, religion or natural origin.[20] Owners of commercial properties to which the rules apply have no expectation of privacy. In fact, they invite the public to visit their premises. And once they have waived their expectation of privacy, the law abrogates their power to bar entry to individual members of the public in an invidiously discriminatory fashion.[21]

Owners of private dwellings, by contrast, can generally deny private individuals entry to their home for any reason whatsoever,

[17] *Infra*, Part III.
[18] Fair Housing Act of 1968 §§ 804-806, 82 Stat. (codified as emended at 42 U.S.C. §§ 3604-3606); Housing and Community Development Act of 1974, Pub. L. No. 93-383 88 Stat. 633 (codified as amended at 42 U.S.C. §§ 3604-3606). *See Also* Civil Rights Act of 1964; Civil Rights Act of 1866.
[19] Civil Rights Act of 1964 (codified at various sections of 42 U.S.C.).
[20] *See supra* notes 18-19; *see e.g.* Heart of Atlanta Motel v. U.S. 379 U.S. 241 (1964) (holding that a motel, as a place of public accommodation, cannot exclude visitors based on discriminatory factors such as race).
[21] *Id.*

including invidious discrimination. The only limitation homeowners face in this context concerns their ability to engage in some kinds of commercial acts, such as leasing their premises, or advertising services related to the premises.[22] The Fair Housing Act, for instance, mandates that ads for the sale or lease of private spaces not express a preference based on race, color, religion, familial status or national origin.[23] Yet, even here, privacy concerns may prevail and allow property rightholders a broad scope of exclusionary rights. Consider the recent invocation of the ban on discriminatory advertising in *Fair Housing Council of San Fernando Valley v. Roommate.com*.[24] In that case, plaintiffs claimed, inter alia, that defendants violated civil rights rules by asking users to list gender and other preferences that would ordinarily be considered to run afoul of the Fair Housing Act. Rejecting the civil rights claim, the Ninth Circuit Court of Appeals, per Judge Kozinski, cautioned that government regulation of an individual's ability to pick a roommate intrudes upon decisions "inside the home," which "is entitled to special protection as the center of the private lives of our people."[25] The Court therefore ruled that indicating discriminatory preferences regarding roommates should not be considered within the scope of civil rights acts, and should, instead, lie within the traditional exclusionary powers of property rightholders.[26]

Taking account of privacy values in property law takes on increased importance and exigency in light of contemporary debates related to new technologies. Just as the development of commercial aviation prompted a reexamination of traditional property doctrines such as the rules of trespass and the *ad coelum* doctrine,[27] the increasing use of drones, the increased exposure of household items to the internet, and proliferation of home-based information networks will press (and to some degree have already

[22] *See* Fair Housing Act of 1968, *supra* note 18, at § 804 (stating that advertisements "with respect to the sale or rental of a dwelling that indicate[] any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin" are illegal under the act).
[23] *Id.*
[24] 666 F.3d 1216 (9th Cir. 2012).
[25] *Id.* at 1221, citing Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).
[26] *See supra* note 24 at 1223.
[27] *See* Chad J. Pomeroy, *All Your Air Right Are Belong to Us*, 13 NW. J. TECH. & INTELL. PROP 277, 287-292 (2015) (discussing the reasoning behind moving air travel outside of traditional trespass doctrine); *Airplane Noise: Problem in Tort Law and Federalism*, Note, 74 HARV. L. REV. 1581, 1582 (1961) (discussing airplane noise as a tort of trespass); *Airplane Noise, Property Rights, and the Constitution*, Note, 65 COLUM. L. REV 1428, 1432-1437 (discussing the landowner's right to compensatory and injunctive relief due to commercial flights over their property).

pressed)[28] traditional property law. It is evident that privacy concerns must play a key role in the development of the law.

In this Article, we aim to make two contributions – one descriptive and one normative. Descriptively, our goal is to advance a privacy-centered understanding of property. We show that notions of privacy have always been embedded in the institution of property, even if privacy has not received the scholarly attention it deserves. We show how privacy concerns continue to animate several vital doctrines in extant law, even if the term privacy is insufficiently highlighted. We demonstrate that, traditionally, property rules have been pivotal to the protection of privacy, and that privacy concerns have been pivotal to the development of property law.[29]

Normatively, we draw on our descriptive discussion to suggest ways in which property doctrine should be modified to offer better protection of privacy interests. Specifically, we argue that the degree of protection offered to property rights can be modified to reflect privacy interests. Likewise, we show that remedies for violations of the prerogatives of property rights holders, even in ordinary civil property law, can and often should be scaled to the degree of interference with the right-holder's legitimate expectation of privacy.

One important reference for our work is contemporary jurisprudence about the right to be free from unreasonable searches and seizures. The case law has rejected a simple approach under which any breach of traditional property rights is considered an unreasonable search, and has instead often focused on the

[28] *See generally* Henry H. Perritt, Jr. Eliot O. Sprague, *Law Abiding Drones*, 16 COLUM. SCI. & TECH. L. REV. 385, 407 (2015) (arguing that Drone operators are outside of the aviation community's culture of compliance); Pierce Giboney, *Don't Ground Me Bro! Private Ownership of Airspace and How it Invalidates the FAA's Blanket Prohibition on Low Altitude Commercial Drone Operations*, 67 FLA. L. REV. 2149 (2015) (discussing ownership of superadjacent airspace in the context of drones); *see also* Pomeroy, *supra* note 27 at 292 (arguing that drones do not typically fall into the exception to trespass that was designed for aircraft); Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164, 2211-2213 (2004) (proposing four legal approach to protecting information networks). *See generally* Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23 (2007) (discussing the creation and expansion of the cyberproperty legal theory).

[29] It is important to note that we do not intend to venture into the debate about the need to recognize rights to personal information as "property." This debate lies outside the ken of our article and we do not wish to contribute to the vast literature it has spawned. See e.g., Richard S. Murphy, Property Rights in Personal Information, An Economic Defense of Privacy, 84 GEO. L. J. 2381 (1995); Benjamin E. Hermalin & Michael L. Katz, Privacy, Property Rights and Efficiency: The Economics of Privacy as Secrecy, 4 QUANT. MARKETING & ECON. 209 (2006).

aggrieved's reasonable expectations of privacy. Modern Fourth Amendment jurisprudence has thus charted an uncertain course between asset-based conceptions of constitutional protections, and those based on privacy expectations. We demonstrate the lessons that property law can learn from the successes and failures of Fourth Amendment case law in developing a modern approach to property-based privacy protections. A privacy-based property regime would give extra protection to such assets in which the owner has a larger privacy expectation, such as the home, computers and cellular devices. After illuminating how our vision of can refocus and reshape property doctrine, we explain how it fits within the broader framework of property theory by juxtaposing it to leading property theories that predominate the scholarly discourse.

Before we proceed, several clarifications are in order. We do not argue that protection of privacy is the sole justification for the institution of property. We readily acknowledge that property law serves other purposes. Private property rights are important to induce optimal investment in and management of assets, as several prominent theories have argued.[30] We are also mindful of the work of other influential scholars who have advanced broad and multi-faceted theories of property; we have no argument with them either. We acknowledge too that the totality of extant privacy law cannot be incorporated en masse into property law. Our aim in this Article is not to discredit extant theories of property, nor is it to elevate privacy above all other interests advanced by property, nor to subordinate privacy law to property law. Our project is much more modest: we wish to reinstate privacy's pride of place in the law of property and restore property law's sensitivity to privacy interests both when it defines the scope of property rights and when it seeks to defend them.

Likewise, our account should not be read to negate property protection to possessions without a heightened privacy interest. No such negative inference should be made. An article of clothing on public display, or an unfenced front lawn, are still private property, even if the owner has no expectation of privacy. In our approach to property law, such assets would, of course, still be considered property and still be entitled to protection by law. However, the protection granted to them would be narrower in scope and weaker in magnitude than that granted to assets which owners associate with their privacy interest.

With these caveats in mind, we present our argument as follows. In Part I, we review the historical roots of the right to privacy. We show that the roots of the right to privacy can be traced

[30] STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev 347, 355-359 (1967).

back to the domain of private law, and that it was derived, inter alia, from property doctrines. In Part II, we turn our attention to the Fourth Amendment to gain a better understanding of the relationship between property and privacy. In Part III, we discuss extant property doctrines that embody and protect privacy expectations, with a focus on highlighting the ways in which privacy concerns already play a role in the law. In Part IV, we develop a normative account of property law that is centered around protection of privacy and explore its implications for property policy and scholarship alike. In Part V, we explore the interface between the privacy based conception of property and other influential property theories. A short conclusion ensues.

I. PROPERTY THEORIES AND PRIVACY

In this Part, we lay the theoretical groundwork for our analysis by looking at the development of privacy law, both within and without the law of property. We begin with a preliminary matter, by looking more broadly at the world of property theory.

A. Extant Property Theories

The institution of private property has preoccupied philosophers, legal thinkers and economists since antiquity. Unsurprisingly, multiple theories have been advanced to justify its existence. Existing justifications of the institution of property can be divided into two broad categories: non-utilitarian and utilitarian. As we will show, while the world of property theory is rich and fascinating, none of the major theories of property are centered, or even related to the notion of privacy.

We begin our exegesis of the world of property theories with Aristotle. Aristotle justified the notion of private property, and in particular, the right to exclude, by reference to individual virtue. He explained that individual owners can only signal their virtue by waiving their right to exclude and allowing others to come on their property if the law provides the backdrop of a general norm of exclusion.[31] For him, therefore, private property served an important general condition that helped separate virtuous owners from non-virtuous ones.

Another philosophical investigation aimed at justifying the existence of private property is found in the work of John Locke. Locke's theory, which remains immensely influential to this day, relied on dessert, or more specifically labor, as the key principle that supports recognition of private property rights in objects. In his

[31] ARISTOTLE, THE POLITICS P 5, at 25-29 (Stephen Everson., 1988).

theory, the laborer earns a superior entitlement to unowned external resources when she mixes effort with those resources by dint of the labor investment she has made.[32] Importantly, John Locke appeared to adopt two different senses of property in his writings—a narrow one that corresponded closely with traditional understandings of the term, and a broader one, in which Locke included such abstractions as "liberty."[33] This broader conception, however, is generally not used by modern theorists.

Georg Wilhelm Friedrich Hegel,[34] and contemporary theorists such as Margaret Radin,[35] connected private property rights to human personhood, suggesting that human beings need material assets through which to reflect their personalities and achieve self-actualization. Hegel's work highlighted the link between property and the self. To Hegel, property constituted the mechanism by which humans achieve self-actualization. He believed that the human will required material objects to manifest itself and that without them individual freedom could not exist.[36] Property, Hegel wrote, "is the means by which I give my will an embodiment."[37] More generally, he believed that "[a] person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation . . . over all 'things."[38] Yet, neither Hegel nor the scholars that have followed in his footsteps placed any emphasis of the importance on privacy.

Yet, neither Hegel nor the scholars that have followed in his footsteps placed any emphasis on the importance of privacy.

Moving to the utilitarian side of the ledger, the English legal philosopher Jeremy Bentham argued that private property is a

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[32] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT P 27, at 17 (Thomas P. Reardon ed., Liberal Arts Press 1952) (1690) ("every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands…are properly his. Whatsoever then he removes of the state that nature hath provided, and left it in, hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.").

[33] Id. *See also* Henry Moulds, *Private Property in John Locke's State of Nature*, AM. J. ECON & SOC. 179, 188 (1964) (discussing Locke's theory "[n]ote that property, broadly conceived, is anything that is one's own – life and liberty as well as the tangibles that too often engross the attention of the modern man).

[34] *See* Hegel, *supra* note 3.

[35] Radin, *supra* note 3 (laying out a personhood theory of property which requires control over resources in a person's environment in order for self-development to occur).

[36] GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT ¶¶ 39-45 (T. M. Knox trans. 1967) (1821).

[37] *Id*. ¶ 27.

[38] *Id*. ¶ 44.

necessary condition for maximizing human happiness.[39] Bentham's account of property was primarily, albeit not exclusively, positive. He rejected the notion that the right to property was a natural right. Nonetheless, he has taken the position that, as a general matter, the law ought to protect individual expectations. Hence, he resisted the idea of property redistribution as it upset the ability of owners to come up with "a general plan of conduct."[40] Bentham's theory neglected to pay heed to the expectation of non-owners. Nor did He make a real attempt to inquire how individual expectation are shaped.

Contemporary utilitarian theorists have developed a more complete account of the relationship between private property and social welfare by tying the concept of private property to efficient use and management of resources. Harold Demsetz, in a path-breaking article, powerfully argued that private property rights lead to efficient use of resources by internalizing all marginal costs and benefits in the hands of a single owner.[41] Comparing an open access regime to one of private property rights with a single owner, Demsetz showed that the former reduces the value of resources by encouraging their overuse and depletion, while the latter induces optimal utilization. Open access regimes enable users to enjoy the full benefit they can derive from a resource—be it a forest, park, an ocean fishery or a city street—without taking full account of the cost created by their depletion of the asset. Realizing this potential, users will exploit assets to their full ability, even if this means that the resource will ultimately be ruined. This dynamic results in what Garret Hardin famously described as "the tragedy of the commons."[42] Formalizing private property rights in a resource in the hands of a single owner avoids this gloomy outcome. When all rights to a resource are held by a single individual, she not only enjoys the full value that can be derived from a resource, but also bears the full cost that her decisions impose on the resource. Over-exploitation or mismanagement reduce the value of the resource to its owner and thus she will try to avoid them.

Refining the Demsetzian insight, Steven Shavell proposed that the private property rights lead to efficient investment of labor in

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[39] JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE (1830). *See also*, his analysis of property in C.B.MACPHERSON, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS at 41-59. The best edition is that contained in JEREMY BENTHAM, THE THEORY OF LEGISLATION, C.K.Ogden (ed.) (London, Routledge, 1931).

[40] Bentham, Jeremy (1931), *The Theory of Legislation* [1802], C.K. Ogden (ed.), London: Kegan Paul, Trench, Trubner & Co page 111.

[41] *See generally* Demsetz, *supra* note 30.

[42] Garret Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

resources.[43] Where Demsetz put the emphasis of the value of resources, Shavell focused on the investment decisions of asset owners. Ultimately, however, both accounts focus on value maximization and the efficiency created by concentrating ownership of an asset in the hands of a single owner. A radically different vision of property can be found in the work of the group of scholars, who view themselves as advancing a vision of "progressive property." The progressive property scholars, who include Greg Alexander, Joseph Singer, Eduardo Penalver, Laura Underkeffler,[44] Hanoch Dagan[45] and Jedidiah Purdy,[46] suggest that property, like all other legal institutions, should be designed to promote human flourishing, which they view as a broader concept than "utility" as the expression is used by utilitarians and economists. The progressive property scholars argue that property protection should be focused not solely on the interests or personality of owners, but rather on broad societal goals including those of non-owners that are sometimes at odds with the interests of the owners. Accordingly, there can be no single sacrosanct principle or guideline that can guide policymakers.[47]

To be sure, on occasion, scholars recognize the importance of property rights to the protection of privacy. Perhaps the most outstanding example of such recognition can be found in the writings of Jeremy Waldron. Waldron notes that property can serve many purposes, including "privacy and free trade,"[48] and he observed that the right to exclude, in particular, helps create "realm of private freedom . . . where [one] can make decisions about what to do and how to do it, justifying these decisions if at all only to [one]self." Waldron added that that individuals "need a refuge from the general society of mankind[,] . . . a place where they can be assured of being alone . . . or assured of the conditions of intimacy

[43] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 20-21 (2004).

[44] Gregory S. Alexander, Eduardo M. Penalver , Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). For criticism, see Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 108, 145 (2013).

[45] *See generally* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM AND RETHINKING PRIVATE LAW THEORY 164-65 (2013); Dagan, *supra* note 4.

[46] JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION (2010); Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047 (2007). It should be noted that Purdy does not see himself as a member of the "progressive property" movement despite his critique of exclusion essentialism. *See* Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1030-32 (2011) (understanding Purdy's views within the context of pluralistic values in property law).

[47] Alexander, *supra* note 46.

[48] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 412 (1990)

with others."[49]

Astoundingly, Waldron's observation on privacy has not seem to have struck deep roots in the theoretic property literature. Despite the linguistic family resemblance between "private property" and "privacy," a privacy based justification of private property is nearly absent from the modern literature and scholarly debates. It wasn't always like this. As we will show, historically, the right to privacy was intricately related to the concept of property. In fact, originally, privacy rights were seen as derivative of private law.[50] In recent years, however, the right to exclude has become the focal point of scholarly debates, and the right to privacy has fallen to the wayside. One can argue of course that the right to privacy is subsumed in the right to exclude. Strong protection of the owner's right to exclude invariably protects her privacy interests.[51] But this argument misses the point. The right to exclude is generally couched and defended in utilitarian terms.[52] Detractors of the right to exclude rest their case on distributive justice and social justice theories.[53] Privacy considerations are entirely missing from the exchange. This is truly unfortunate. As the debate currently stands, there exists no common ground between the two main camps to the debate. Each side rests its case on different and largely incommensurate philosophies. The introduction of privacy into the discussion has the potential to bridge the competing views of property.

B. The Emergence of Privacy Law from Property

Privacy law was unknown as such until the nineteenth century. This is not to say that privacy was not protected by law. The law protected many privacy interests, but the main bulwark for privacy

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[49] *Id.* at 295-296.

[50] Alexander, *supra* note **Error! Bookmark not defined.**.

[51] *See*) Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV 1239, 1255 (2012) ("The Court has recognized Fourth Amendement privacy interests that are best described as arising from the rights of individuals to exclude others").

[52] Demsetz *supra* note 30, at 356 ("The resulting private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.") *But see* ARISTOTLE, THE POLITICS 26-27 (Stephen Everson ed., Cambridge Univ. Press 1988) (justifying the right to exclude by reference to virtue); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 295 (1988) (justifying the right to exclude on the basis of both liberty and privacy); Shyamkrishna Balganesh, *Demystifying the Right to Exclude; Of Property, Inviolability and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 620(2008) (justifying the right to exclude on the principle of inviolability).

[53] *See* Alexander, *supra* note 16.

protection was found in legal protection of property rights. As far back as 1499 or 1506,[54] one can find legal expression of the English maxim that "a man's house … [is] his castle"[55] Even as the law provided for a handful of other legal tools for protecting privacy interests—such as a tort against "eavesdropping"[56]—the primary means for protecting privacy interests remained the protection of private property against intrusion, with force if necessary.[57] Blackstone wrote that the law has "so particular and tender a regard to the immunity of a man's House that it stiles it his castle, and will never suffer it to be violated with impunity."[58]

A number of developments, from the growth of government records and the invention of the telegraph to the development of the modern newspaper led to increasing legal attention to privacy interests.[59] However, the strands only coalesced into a new law of privacy with the appearance of Louis Warren's and Samuel Brandeis's famous 1890 article arguing that the common law protects a right to privacy.[60] Although, Warren and Brandeis cast their argument in descriptive terms, Roscoe Pound described the article as revolutionary.[61]

Warren and Brandeis advanced a conceptualization of privacy that has since then widely become known as "the right to be let alone."[62] Elaborating on this notion, Warren and Brandeis

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[54] Anonymous, Y.B. Mich. 21 Hen 7, F. 39, pl.50 (1499) *cited in* 2 The Reports of Sir John Spelman 316 n.2 (J.H. Baker ed., 1978). *See also*, Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1894 n.18 (1981); Daniel J. Solove, A Brief History of Information Privacy Law, *in* PROSKAUER ON PRIVACY (Practicing Law Institute, 2016); GWU Law School Public Law Research Paper No. 215. Available at SSRN: https://ssrn.com/abstract=914271.

[55] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223.

[56] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *169 (defining the offense as "listen[ing] under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales"); Note, The Right to Privacy in Nineteenth Century America, 94 HARV. L. REV. 1892, 1896 & n. 32 (1981).

[57] Note, The Right to Privacy in Nineteenth Century America, 94 HARV. L. REV. 1892, 1898 (1981).

[58] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223. *See* Daniel J. Solove, A Brief History of Information Privacy Law, *in* PROSKAUER ON PRIVACY (Practicing Law Institute, 2016); GWU Law School Public Law Research Paper No. 215. Available at SSRN: https://ssrn.com/abstract=914271.

[59] Daniel J. Solove, A Brief History of Information Privacy Law, *in* PROSKAUER ON PRIVACY (Practicing Law Institute, 2016); GWU Law School Public Law Research Paper No. 215. Available at SSRN: https://ssrn.com/abstract=914271.

[60] Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

[61] Letter from Roscoe Pound to William Chilton (1916) quoted in A. MASON, BRANDEIS: A MAN'S LIFE 70 (1956).

[62] Dorothy Glancy suggested that the term owes its origin to Thomas Cooley who

suggested that the right to privacy protected a person's choice to reveal or refuse to reveal information about one's "private life, habits, acts, and relations" to others.[63] Protection of such information, per Warren and Brandeis, was essential to upholding individual self-esteem.[64] Constructing their case along the private-public divide that was extremely influential at the time, Warren and Brandeis contended that legal recognition of the right to privacy confers upon individuals the "power to fix the limits of the publicity which shall be given [them]."[65] To Warren and Brandeis, the right to privacy was "essential to that aspect of individualism which involved the individual's affirmative capacity for self-determination, autonomy, and human dignity."[66] Warren and Brandeis argued that a person's self-esteem is affected when information about her is shared with others non-consensually.

The core project of Warren and Brandeis was to identify doctrines from various legal domains that effectively protect privacy interests, and, moreover, that formal legal recognition of the right to privacy as a protected interest is a natural next step. Importantly, Warren and Brandeis did not seek to conjure up the right to privacy out of thin air. Rather, they contended that the common law encompasses a right to privacy and scoured its different domains to substantiate their claim.

In addition to establishing a case for granting protection to privacy, they attempted to place the right to privacy in a broader jurisprudential vision. Hence, as Dorothy Glancy, explains

> They placed the right to privacy within the more general category of the individual's right to be let alone. The right to be let alone was itself part of an even more general right, the right to enjoy life, which was in turn part of the individual's fundamental right to life itself. The right to life was part of the familiar triad of fundamental, inherent, individual rights reflected in the fifth amendment to the United States Constitution: 'No person shall. . . be deprived of life, liberty, or property, without due process of law. . .'"[67]

Importantly, for our purposes, Warren and Brandeis were careful to distinguish between privacy and property.[68] By their

used it in his in his TREATISE ON THE LAW OF TORTS 29 (1st ed. 1879). *See* Dorothy J. Glancy, The Invention of the Right to Privacy, 21 ARIZ. L. REV. 1, 3 at n. 13 (1979).

[63] Warren & Brandeis, *supra* note 60, 4 HARV. L. REV. at 216.

[64] *Id*. at 197.

[65] *Id*. at 198.

[66] Glancy, *supra* note 62, 21 ARIZ. L. REV. at 25.

[67] *Id.* at 3.

[68] *See* Warren & Brandeis, *supra* note 60, 4 HARV. L. REV. at 213 ("the principle

lights, property centered on "every form of possession-intangible as well as tangible," and was therefore concerned with material wellbeing."[69] Privacy, by contrast, focused on a person's inner self and her psychological wellbeing. The conception of privacy that emerges from Warren's and Brandeis' article is deeply rooted in the concept of individualism. Privacy, to them, was at once, an important attribute of individualism, and a necessary legal construction for the protection thereof.[70] As commentators have pointed out, the conception espoused by Warren and Brandeis was heavily influenced by the writings of Ralph Waldo Emerson, who the centrality of solitude for cultivating individualism.[71] Emerson, however, did not focus his attention on privacy. Warren and Brandeis believed that although solitude was an important aspect of privacy, it did not exhaust all human conditions covered by the term. Privacy also covered voluntary social interactions with others. Solitude and privacy overlapped only if an individual chose to be alone.

Warren and Brandeis sought to add a practical dimension to the discussion of privacy by emphasizing the importance of legal protection. They maintained that privacy should receive legal protection against the government and private parties alike. This was a key innovation of their famous article; until that time, the predominant view among scholars was that privacy protection avails only against the government.[72] Warren and Brandies rejected this view, contending that the distinction between governmental and non-governmental bodies should be abandoned:

> The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?[73]

As importantly, in keeping with their ambition to establish legal protection for right to privacy, Warren and Brandeis also discussed the remedial aspects entailed by their quest. They argued that violations of the right to privacy should be penalized by a wide range of remedies, from monetary damages, through injunctions, to criminal sanctions.

While Warren's and Brandeis' article has been extremely

which has been applied to protect these rights is in reality not the principle of private property…[t]he principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy").

[69] Warren & Brandeis, *supra* note 60, 4 HARV. L. REV. at 193, 197.

[70] *Id.* at 196 ("solitude and privacy have become more essential to the individual").

[71] Glancy, *supra* note 62, 21 ARIZ. L. REV. at 26.

[72] *Id.* at 29.

[73] Warren & Brandeis, *supra* note 60, 4 HARV. L. REV. at 220.

influential, it has had two side effects that are of foremost significance to property law. First, Warren and Brandeis severed the tie between property and privacy. They advanced a conception of privacy that is wholly independent of traditional understandings of property. By unmooring privacy from property, they were able to make a case for privacy protections in areas devoid of property interests. This, in turn, expanded the scope of privacy protection, but left it unmoored—vague and ambiguous in its ultimate scope and ambitions.

Second, and relatedly, privacy law following Warren and Brandeis has become very broad and muddled. Privacy interests are protected today in several constitutional doctrines, in a number of torts, and dozens of statutes protecting specific privacy interests and types of information. The privacy interest is invoked in reference to such disparate topics as criminal procedure, contraception and medical information technology, with no perceived need for a unitary theory of privacy, the nature of people's interest in privacy or a particular body of law with which to protect privacy.

II. PRIVACY IN CONSTITUTIONAL SEARCH AND SEIZURE LAW

In the century since Warren and Brandeis wrote in favor of recognizing a right to privacy, privacy rights have appeared in many areas of the law. Indeed, the mushrooming of privacy rights has led some scholars to throw up their hands, labeling the right of privacy "chameleon-like," "vague and evanescent," "protean," and ultimately "about everything, and therefore ... [itself] nothing."[74] Several torts have been identified as sounding in privacy,[75] and dozens of statutes protect privacy interests through regulatory schemes and private rights of action.[76] The statutes cover such varied topics as medical information,[77] consumer information,[78] government surveillance,[79] bank records,[80] and searches of students at school.[81]

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[74] Daniel J. Solove, A Taxonomy of Privacy, 154 U. PENN. L. REV. 477, 479-480 (2006).
[75] *See* Prosser, *supra* note 8.
[76] *See* Solove, *supra* note 54.
[77] *See* Health Information Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936.
[78] *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).
[79] *E.g.* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (USA Freedom Act), Pub. L. No. 114-23, 129 Stat. 268; Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783.
[80] Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422.
[81] Family Education Rights and Privacy Act of 1974 (FERPA), Pub. L. No. 93-

Property as the Right to Be Left Alone

Only very few of the new privacy rights resemble property rights. Privacy rights in information, for instance, are not constructed like intellectual property rights, nor like traditional property rights. Nonetheless, there are some areas of privacy law that have developed in close proximity to property law. In this Part, we look at one particular area of privacy law—that developed in Fourth Amendment jurisprudence regarding the constitutionality of searches and seizures. Fourth Amendment jurisprudence is particularly important for us because it was traditionally oriented around property, and it has struggled for decades to develop a stable model for incorporating privacy concerns. The lessons of Fourth Amendment jurisprudence are thus vital for crafting a privacy-oriented view of property law.

A. Privacy, Property and the Fourth Amendment

While privacy-oriented interpretations of property law are the exception rather than the rule these days, in at least one area of the law—the Fourth Amendment's protection against unreasonable searches—privacy has become a dominant ingredient in judicial interpretations of the scope of legal protections.

The relevant part of the Fourth Amendment for our discussion is its guarantee of freedom from unreasonable searches and seizures by state actors. On its face, the protection of the Fourth Amendment appears to be limited to certain kinds of physical objects. The relevant part of the constitutional text states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[82] One might read this as stating that a search can only be unreasonable if it interferes with the possession of houses, papers and effects, or if it is conducted on the body of a person. And, indeed, until fifty years ago, the Fourth Amendment's guarantee against unreasonable searches and seizures was held to set out a rule protecting "constitutionally protected" areas or objects against certain kinds of physical invasions or interferences.[83] The Fourth Amendment, in other words, was thought to protect possession of the material and the tangible.

380, 88 Stat. 484 (codified at 20 U.S.C.A. § 1232g) (also known as the "Buckley Amendment").

[82] U.S. CONST. AMEND. IV.

[83] *See* Katz v. U.S. 389 U.S. 347, 350 (1967) (breaking away from the idea of constitutionally protected areas "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'".); *see also* Lewis v. U.S. 385 U.S. 206, 211 (1966) (stating that while the home is a protected space, it loses this status when converted into a commercial area).

For instance, in the 1928 Supreme Court decision *Olmstead v. United States*,[84] the Court had to consider whether Ralph Olmstead's constitutional rights had been violated when his home had been electronically wiretapped. Olmstead had been accused of engaging in commerce of alcoholic beverages in violation of the Volstead Act; Olmstead's defense was that the damning evidence had been collected in violation of the Fourth Amendment's protection against unreasonable searches and seizures.[85] Anticipating the Court's later endorsement of the Exclusionary Rule, Olmstead argued that using this evidence against him was unconstitutional.[86] The Court avoided the questions about excluding evidence by ruling that the search had comported with the requirements of the Fourth Amendment. According to the Court, "The Amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized."[87] Contrasting wiretapping with forbidden seizure of sealed letters in the mail, the Court emphasized the importance of focusing on things: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants. By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."[88]

It was not until the landmark 1967 decision of *Katz v. United States*,[89] that the Supreme Court changed the emphasis of constitutional search and seizure law from the physical invasion of spaces or seizure of things to interferences with individual expectations of privacy. In *Katz*, the Court had to determine whether eavesdropping on conversations taking place in a public telephone booth constituted an unreasonable "seizure."[90] Under the rule of *Olmstead*, the case would be easily resolved in favor of the prosecution, since the public telephone booth was a public place, and no *things* had been taken. However, the Court chose a different

[84] 277 U.S. 438 (1928).
[85] *Id.* at 455.
[86] Olmstead claimed that using the evidence would violate his Fifth Amendment rights against self-incrimination. *Id.*
[87] *Id.* at 465 (emphasis in original).
[88] *Id.* at 464-465.
[89] 389 U.S. 347 (1967).
[90] *Id.* at 354.

approach. Rejecting the theory that the case turned on an analysis of the amount of constitutional protection extended to the physical space within telephone booths, the Court stated that the real issue was the suspect's aim of protecting his privacy in the booth. Ruling that the suspect sought to exclude the "uninvited ear" when he occupied the telephone booth, closed the door, and inserted his coin to pay for the telephone call, the Court determined that one "who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" even if the booth itself is a public place.[91] Explicitly rejecting both *Olmstead* and what it called the "narrow view" that Fourth Amendment protections focus on "tangible items,"[92] the Court stated that it should be clear that "the Fourth Amendment protects people—and not simply 'areas' [or things]—against unreasonable searches and seizures... Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[93]

Today, it is well established that "[a] 'search', for purposes of the Fourth Amendment, occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."[94] The focus of the law of unreasonable searches has thus moved from a focus on the nature of the object to the nature of the possessor's expectations of privacy.

Recent cases illustrate the importance of this change. Consider, for instance, the Supreme Court's approach to aerial surveillance in *California v. Ciraolo*.[95] Police had rented a private airplane and without first obtaining a search warrant flew over the defendant's land in order to determine whether he was growing marijuana on the premises.[96] Having seen and photographed marijuana plants from the air, the police then sought and obtained a search warrant, and raided the grounds, seizing 73 marijuana plants.[97] The defendant argued that the overflight was an unreasonable "search."[98] Had the courts focused on physical spaces or tangible objects, the court would have had to determine whether the air space above private land was within the scope of the property interest in the land, and therefore protected from unreasonable searches just like the land. But in the post-*Katz* world, the scope of the property

[91] *Id.* at 516-517 (Harlan, J concurring).
[92] *Id.* at 354.
[93] *Id.* at 353, 359.
[94] United States v. Jacobsen, 466 U.S. 109, 113 (1984).
[95] 476 U.S. 207 (1986).
[96] *Id.* at 209.
[97] *Id.* at 210.
[98] *Id.* at 212.

right in land was irrelevant. The true question for the court was whether the defendant had an expectation of privacy regarding the particular kind of observation by which the search was conducted. Thus, the court analyzed not whether the defendant viewed the garden as a private space—in light of the ten-foot walls surrounding the area, it was clear that the defendant did view the area as private[99]—but, rather, the court asked whether the defendant had manifested an intent to shield the plants from observation from the air.[100] The court determined that the defendant had no reasonable expectation of privacy and the search was thus reasonable.[101] According to the Court, "[t]he observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace ... Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable, and is not an expectation that society is prepared to honor."[102]

Another interesting example is provided by the Court's decision in *Riley v. California*.[103] Riley had been stopped by a police officer for driving with expired registration tags, and was discovered to have a suspended driver's license. In a search of the vehicle incidental to the traffic stop, the officer found two guns concealed under the car's hood, leading to Riley's arrest. The arrest, in turn, led the police to search Riley's pockets, where an officer found a smart phone. The smart phone contained evidence that Riley was a member of the Bloods street gang.[104] Riley sought to exclude the evidence from the phone. While acknowledging the officer's right to search Riley's pockets incidental to the arrest, and therefore to seize *objects* in his pockets including the phone, Riley argued that the *data* in the phone was protected against a warrantless search.[105] The Court agreed. Noting that "[c]ell phones

[99] *See id.* at 211 ("clearly…respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits…It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views").
[100] *Id.* at 213 ("Accepting, as the State does, that this yard and its crop fall wihin the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.").
[101] *Id.* at 215 ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.").
[102] *Id.* at 213-214.
[103] 134 S.Ct. 2473 (2014).
[104] *Id*. at 2480.
[105] *Id*. at 2481. A companion case addressed by the same opinion, United States v. Wurie, involved the data on Brima Wurie's phones; Wurie had been arrested

[] place vast quantities of personal information literally in the hands of individuals," the court held that the digital content on cell phones was protected from warrantless search, even when the physical phone itself could be taken without a warrant.[106]

Yet, even as the jurisprudence of the Fourth Amendment has shifted its focus from tangible things to abstract expectations of privacy, it has ultimately remained bound to the physical. In several cases, the Supreme Court has rejected the idea that expectations of privacy relate purely to information, without connection to the physical location where the information is produced.

Consider, for instance, the case of *Kyllo v. United States*,[107] where the Court had to determine "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment."[108] Danny Kyllo had grown marijuana illegally in his home, using high intensity lamps in place of sunlight. The thermal imaging scanners were able to detect the high amount of heat produced in the home by the lamps, and police used the results of the scans to obtain a search warrant, enter the home, and seize more than 100 plants.[109] The scanning itself, however, had been conducted without a search warrant, and Kyllo claimed that it constituted a violation of his Fourth Amendment rights.[110] The lower courts denied Kyllo's claim, holding that Kyllo had made no attempt to conceal the heat escaping form the home, showing that he did not expect that the information would be secret, and, in any event. "there was no objectively reasonable expectation of privacy because the [scanner] 'did not expose any intimate details of Kyllo's life,' only 'amorphous 'hot spots' on the roof and exterior wall.'"[111] The Supreme Court, however, found in favor of Kyllo. The Court recalled that "well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass" and stated that even though Fourth Amendment rights had been "decoupled ... from trespassory violation of [] property,"[112] many basic property-

for a drug sale, and two cell phones had been seized from Wurie when his arrest was processed at the police station. The police used information from the cell phones to obtain a search warrant for Wurie's home, where they found 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash. *Id.* at 2481. Like Riley, Wurie claimed protection for the data in the phone. *Id.* at 2482.

[106] *Id.* at 2484.

[107] 533 U.S. 27 (2001).

[108] *Id.* at 29

[109] *Id.* at 29-30.

[110] *Id.* at 30.

[111] *Id.* at 31

[112] *Id.* at 31-32

related conceptions remained within the Fourth Amendment jurisprudence. For instance, while the Fourth Amendment gave no protection to items within the home that were in "plain view" of the public streets, constitutional protection was still heightened for the "area immediately adjacent to a private home" and for areas within the home that are "covered."[113] On that basis, the Court ruled that even though the thermal information could be obtained without physically entering the home, it was constitutional protected, as it emanated from the covered areas of the home. In some cases, the area creates the expectation of privacy, the Court noted; "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[114]

The 2012 case of *United States v. Jones*[115] has thrown into stark relief the tension between the Court's property-oriented and privacy-oriented jurisprudence. *Jones* involved the use of the data of a GPS device in a car. Police investigators received a warrant to attach a GPS tracking device to the underside of the defendant's car in Washington D.C. within ten days, but they attached the device on the eleventh day, in Maryland.[116] The defendant sought to exclude information obtained by the device on the grounds that GPS data was the product of a constitutional "search" and that the failure to comply with the terms of the warrant rendered the search illegal.[117] The government contended that the defendant had no reasonable expectation of privacy regarding the location of his vehicle, and that, consequently, there was no constitutional "search."[118] The District Court accepted the government's contention in part, holding that there was no reasonable expectation of privacy while the defendant drove the on the public streets; the ruling yield sufficient evidence to convict the defendant of drug trafficking.[119] A reversal by the D.C. Circuit Court of Appeals led the Supreme Court to reevaluate the scope of the *Katz* ruling.

In *Jones*, the Supreme Court not only ruled in favor of the defendant; it reasserted the importance of the asset-based approach to the Fourth Amendment. Noting that the government "physically occupied private property for the purpose of obtaining information,"[120] the Court ruled that the government necessarily conducted a "search" within the meaning of the Fourth Amendment because it intruded upon defendant's property in a manner that

[113] *Id.* at 33.
[114] *Id.* at 37.
[115] 565 U.S. 400 (2012).
[116] *Id.* at 403.
[117] *Id.*
[118] *Id.* at 406.
[119] *Id.* at 403.
[120] *Id.* at 404.

would be considered trespass.[121] Rejecting the idea that the Fourth Amendment protects "people not places," the Court stated that defendant's "Fourth Amendment rights do not rise or fall with the *Katz* formulation."[122] Painfully distinguishing a plethora of cases that seemed to indicate otherwise, the Court insisted that a trespassory search is always a search within the meaning of the Fourth Amendment, and *Katz* should not be read to "repudiate that understanding."[123] Rather, ruled the Court, "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test."[124]

After *Jones*, Fourth Amendment law remains in flux. It is evident that *Katz* and its progeny have brought into the constitutional law of search and seizure a concern with privacy expectations completely detached from the traditional thing-oriented understanding of the law. At the same time, *Jones* affirmed the vitality of the traditional thing-centered rules of constitutional search and seizure law. The balance between the competing approaches is yet to be decided.

B. Criticisms of Current Fourth Amendment Jurisprudence

The privacy-based jurisprudence of the Fourth Amendment has been strongly criticized.[125] The harshest critics argue that the "reasonable expectations of privacy" test does not and cannot dictate results, and is logically incoherent. As Matthew Kugler and Lior Strahilevitz recently wrote, there is widespread agreement that "there is a degree of circularity in the *Katz* 'reasonable expectations of privacy' test[; a]mong those expressing concern about this circularity are Justices Samuel Alito, Anthony Kennedy, Antonin Scalia and John Paul Stevens, Judges Alex Kozinski, Richard Posner, and George MacKinnon, and Professors Jed Rubenfeld, Dan Solove, Amitai Etzioni, Erwin Chemerinsky, David Sklansky, Orin Kerr, Michael Abramowicz, Mary Coombs, and Paul Schwartz." According to critics, the Court's post-*Katz* Fourth Amendment jurisprudence requires courts to extend the Fourth Amendment's protection to any objects within the scope of the public's reasonable expectation of privacy regarding the object, but the public's reasonable expectation of privacy regarding the object is largely determined by the court's decisions about whether legal protection extends to the object. As Judge Posner wrote, "it is

[121] *Id.*
[122] *Id.* at 406.
[123] *Id.* at 406-407.
[124] *Id.* at 409.
[125] In addition to the privacy-based pieces of Fourth Amendment jurisprudence, other aspects of Fourth Amendment analysis

circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is."[126] The result is an inquiry in which the premise depends on the outcome.

A softer version of this criticism views the reasonable expectation of privacy test as excessively malleable. Many have criticized current doctrine as insufficiently protective of suspects' rights,[127] and argued that the fault lies in a test capable of "taking on many alternative meanings" and therefore "open to ready manipulation."[128]

The mildest version of the criticism simply sees the test as "unstable."[129] As Daniel Solove wrote,

> Few commentators are particularly fond of Fourth Amendment law. U.S. Supreme Court decisions applying the reasonable expectation of privacy test have been attacked as "unstable" and "illogical," and even as engendering "pandemonium." As one commentator has aptly observed, "[M]ost commentators have recognized that regardless of the political palatability of recent decisions, [F]ourth [A]mendment doctrine is in a state of theoretical chaos . . . ."[130]

To be sure, the Court's jurisprudence has its defenders. A number of scholars praise the decision in *Katz*, even while opposing

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[126] Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (1979).

[127] *See* AMITAI ETZIONI, PRIVACY IN A CYBER AGE: POLICY AND PRACTICE 51 (2015)("The reasonable expectation of privacy standard is not only highly malleable by the courts but also subject to influence by various institutions."); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1870 (2016) ("But the twists involved render the privacy test very malleable and suggest that something else is going on."). Scott E. Sundby, *"Everman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 COLUM. L. REV. 1751, 1753 (1994) ("most arguments have coalesced along the lines that the Court has not properly measured the individual's expectations of privacy"); *see also* Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. K. 481, 490 (2013) (Comparing the trespass test from *Jones* with the *Katz* reasonable expectation of privacy test "[d]espite its pretentions, *Jones* does not redress *Katz*'s flaws so much as mimic them. *Jones* creates a new trespass test, just as malleable as *Katz*'s expectations-of-privacy approach.").

[128] John B. Mitchell, What Went Wrong with the Warren Court's Conception of the Fourth Amendment? 27 NEW ENGL. L. REV. 35, 40 (1992).

[129] Sherry F. Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 STAN. L. REV. 119, 122 (2002).

[130] Daniel J. Solove, Fourth Amendment Pragmatism, 51 B.C. L. REV. 1511, 1512 (2010)(citations omitted).

other aspects of the Court's Fourth Amendment jurisprudence.[131] And while criticism of the alleged circularity of the "reasonable expectations of privacy" test is widely shared, there are grounds for defending the court against the charge. In recent work, Matthew Kugler and Lior Strahilevitz examined the degree to which the Court's privacy expectations test is circular by surveying the public regarding its expectations of privacy in cell phone data both before and after the Supreme Court ruling in *Riley v. California*.[132] *Riley* involved the seizure of a telephone incidental to an arrest. The question raised by the case was whether the police, who lawfully seized the phone itself, had the right to extract the data from the phone by operating it. The Court ultimately decided that the data was protected, and could not be taken without a warrant.[133] As Kugler and Strahilevitz noted, the outcome of *Riley* was not predicted, and it represented "an unambiguous change in law."[134] This meant that if the public's expectations of privacy were developed on the basis of Supreme Court rulings, the ruling in *Riley* should have caused a measurable change in public opinion: the decision should have resulted in an increased expectation of privacy in cellphone data. However, the Kugler-Strahilevitz study showed that the public expectations were not greatly altered by the Court's decision. In the immediate aftermath of the decision, there was an immediate spike in the percentage of the population that believed that a warrant is necessary in order to access cellphone data. However, the public quickly returned to its previous beliefs; any effect the decision may have had dissipated within weeks and months, and by the time two years had elapsed from the decisions, no change in public attitudes was discernable.

Our aim in this article is not to resolve the problems of Fourth Amendment jurisprudence. Rather, we view the difficulty of developing a coherent model for protecting privacy interests in Fourth Amendment jurisprudence as an important cautionary tale for our effort to expand the profile of privacy interests in property law. While there is little doubt that privacy interests lie at the core of search and seizure law, courts and theorists have struggled to develop a definition of privacy expectations that can successfully anchor legal Fourth Amendment doctrine. Stated otherwise, even as the Court has argued that privacy interests should not be restricted

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[131] *See generally* Daniel T. Pesciotta, Note, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 CASE W. RES. L. REV. 187, 190 ("Despite heavy academic criticism of the reasonable expectation of privacy test, both Supreme Court and lower federal court cases provide little reason to worry that the test is ill suited for protecting citizens' Fourth Amendment rights.").

[132] Matthew B. Kugler and Lior Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. (forthcoming).

[133] *See supra* notes 103-106 and accompanying text.

[134] *See supra* note 132 at 26.

to traditional property rights of exclusion, the Court has failed to develop a model of protecting those interests that can stand completely independently of traditional understandings of property.

Some have argued that flaws of current Fourth Amendment law can be found by returning privacy to its property roots. They argue that so long as property rights are understood sufficiently broadly, privacy interests can be fully protected from intrusive searches and seizures by protecting suspects' traditional property interests. This Article's agenda, in many ways, is the opposite. We do not seek to shape the law of privacy by returning it to its property roots. Rather, we seek to return property law to its traditional solicitousness for privacy interests. We do not claim that property concepts can resolve all the dilemmas of privacy law. We do, however, claim that property law is well suited to protect many privacy interests.

III. PRIVACY INTERESTS IN PROPERTY LAW

To this point, we have examined the effect of privacy on property law only peripherally. In this Part, we show that even after the emergence of privacy law as a distinct body (or bodies) of law, privacy concerns have continued to play a central role in a number of areas of property law. To be sure, the doctrines we discuss here are not unified—for the most part, they represent the *ad hoc* use of privacy concerns to modify or interpret existing property law. There are, however, a few cases where privacy concerns have been referenced more explicitly, and even viewed as an independent source of legal property rights.

We begin with a series of instances in statutory and common law of property that have struggled with the place of privacy in property law. We conclude this part with a pair of Supreme Court cases that sought to define the limits that constitutional rights to privacy place on regulations of private residential property.

A. Property Rights, Civil Rights and Public Accommodations

One of the most important developments in property in the last century was the development of a body of civil rights laws. The relevant civil rights laws curb property rightholders' traditional rights, by denying or limiting the rightholders' ability to exercise those traditional rights when in service of specified kinds of invidious discrimination.

Civil rights laws regarding property did not come completely out of the blue. One of the most important antecedents that ultimately contributed to the development of modern civil rights

law was the common law of public accommodation.[135] While the common law ordinarily placed few limits on the owners' ability to exclude others for any reason whatsoever, the public accommodation doctrine stated that common carriers and inn keepers were not allowed to deny service arbitrarily. In addition, they could not charge unreasonable prices for their services.[136] The early roots of the public accommodation doctrine were, therefore, quite modest.[137] Nonetheless, even the modest doctrine made a clear distinction between the private realm and open market activity. It was only where rightholders had voluntarily made their property the arena for extremely public activity that their traditional exclusionary rights were curbed. While privacy interests were never explicitly identified as the source of the distinction between properties subject to the public accommodation and those that were not, one can easily identify the way the doctrine offered greater protection for owners where privacy interests are likely to be greater.

Modern civil rights law is more ambitious. Nonetheless, we would argue that it has followed a similar pattern of greater solicitousness to owners where privacy interests are likely to be stronger.[138]

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[135] See Thomas W. Merrill and Henry E. Smith, Property: Principles and Polices 374 (3d ed. 2017) (citing Blackstone, Commentaries, p. 164).

[136] *Id*.

[137] See James B. Speta, A Common Carrier Approach to Internet Connection, 54 FED. COMM.L.J. 225, 256-57 (2002). In recent decades, public accommodation law has dramatically expanded, both in case law, and more importantly by statute. Today, the most important source of public accommodation law is found in Title II of the Civil Rights Act of 1964, which prohibits operators of public accommodations from discriminating against customers on the basis of race, gender, religion, national origin, familial status, and disability. Title II defines public accommodation to include defined to include (1) "any inn, hotel, motel, or other establishment which provides lodging to transient guests;" (2) "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises;" and (3) "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment." 42 U.S.C. § 2000a(b) (2000). In the modern era, public accommodations have frequently been understood in the broader sense of the Civil Rights Act of 1964, rather than the narrow traditional common law definition, even where the Civil Rights Act does not formally apply. *See* Merrill & Smith, *supra* note 135 at 373-376. *See also* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L. J. 1271, 1277-1284 (2017); Daniel L. Schwartz, Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2124-2130 (1987) (discussing the state public accommodations doctrines).

[138] To be sure, there are other instances in which the antidiscrimination norm comes up against a competing liberty interest. As the recent controversy about Hobby Lobby highlighted, there may be cases when religious autonomy is

The first federal civil rights legislation was adopted in the wake of the Civil war, but the acts of the 1960s proved a watershed. The Civil Rights Act of 1866 remains in force,[139] but the most significant of the civil rights act through the prism of property was doubtless the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968).[140] The Fair Housing Act restricts the rights of property rightholders to withhold consent to a sale or rental refuse to sell or rent,[141] publish notices indicating a discriminatory preference regarding a sale or rental,[142] and discriminate in conditions of sale or rental.[143] However, the Fair Housing Act is not alone. Other federal civil rights acts also impact property rights.[144] Many state and municipal civil rights acts cover similar territory.[145]

The stormy debate that surrounded passage of the federal Civil Rights Act of 1968 has largely receded from memory. It concerned not only issues of race, but also professed concerns for property rights.[146] While it is evident that the civil rights acts did limit the

thought to clash with the antidiscrimination imperative. *See, e.g.*, Joseph William Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B.U. L. REV. 929 (2015); Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell* 92 IND. L. J. 1175 (2017); Christian Lecture & Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws* 60 ST. LOUIS U. L.J. 631 (2016).

[139] 14 Stat. 27-30, codified at 42 U.S.C.A. § 1982.

[140] Fair Housing Act of 1968 §§ 804-806, 82 Stat. (codified as amended at 42 U.S.C. §§ 3604-3606).

[141] 42 U.S.C. 3604(a).

[142] 42 U.S.C. 3604(c).

[143] 42 U.S.C. 3604(b). Several other acts are prohibited by the Fair Housing Act. *See* 42 U.S.C. 3604.

[144] E.g., Civil Rights Act of 1964 42 U.S.C. 2000(a); 42 U.S.C. 1982; Americans With Disabilities Act of 1990 Pub. L. No. 101-336, 104 Stat. 376 (codified in scattered sections of 42 U.S.C. 12101-12213). *See generally*, Alfred L. Brophy, *The Civil Rights Act of 1964 and the Fulcrum of Property Rights*, 6 ALA. C.R. & C.L. L. REV. 75 (2014).

[145] E.g., Florida Civil Rights Act of 1992, FLORIDA STAT. SEC. 760.01 et seq.; Kentucky Civil Rights Act (1966), KENTUCKY REV. STAT. 344.010, et seq.; Minnesota Human Rights Act , MINN. STAT. 363A.01, et seq.; Unruh Civil Rights Act (California), CAL. CIV. CODE § 51(b) (West 2007); New York City Human Rights Law, N.Y. EXEC. § 296 (McKinney 2010). For a list of state public accommodation laws and the list of protections they afford see State Public Accommodation Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES, 13TH JULY 2016 at http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx. *See also* Stephen A. Rosenbaum, *Disability Rights and Public Accommodations: State-by-State*, SOUTH EAST CENTER (2011) (describing the various state laws that complement the American Disabilities Act); Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91, 106-107 (2011) (discussing the Married Women's Property Acts passed by states in the late 19th century).

[146] *See* Stanley P. Stocker-Edwards, *Black Housing 1860-1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market*

traditional prerogatives of property rightholders, it is also clear that the drafters of the various civil rights acts did not intend to sweep away concern for property rights. The Fair Housing Act balanced prerogatives of property owners with the interests of combating discrimination by creating a series of exceptions to and limitations on the broad prohibitions on discrimination. And while the word privacy is not explicitly invoked by the Act, it is difficult to avoid the impression that it is a solicitousness for the privacy interests of property rightholders affected by the Fair Housing Act that animates the type and nature of the Act's exclusions.

To see this, it is important as a preliminary matter to understand the mechanics of the Fair Housing Act. On its face, the legislation is extremely broad. The Act works by laying out several forbidden classes of discrimination (discrimination on the basis of race, color, religion, sex, familial status, national origin and sometimes handicap), and by then forbidding discrimination based on those classifications, if the discrimination takes place within a specified list of acts (such as selling a dwelling, or advertising its availability for rental).

However, the Act adds a limited number of exceptions to its coverage. The most famous of these may be the so-called "Mrs. Murphy Exemption," which exempts from the Act's coverage dwellings with living quarters for four or fewer families, so long as the owner lives in at least one of those living quarters.[147] The Act includes a similar exception for owners of certain single-family homes; unlike the Mrs. Murphy exemption, the 296-word exception in section 3603(b)(1) lacks a colorful nickname, and is far more qualified. Nothing in these two exceptions explicitly references privacy concerns, but it is evident that their goal was to carve out a

in America, 5 HARV. BLACKLETTER J. 50, 71 (1988) (discussing the opposition to the Civil Rights Act of 1968 by the National Association of Real Estate Boards which stated that it would violate the rights of property owners to use their property as they pleased); *see generally*, Charles M. Lamb, *Congress, the Courts, and Civil Rights: the Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115 (1982); Jonathan Zasloff, *The Secret History of The Fair Housing Act* 54 HARV. J. LEG. 247 (2016).

[147] "Nothing in section 804 of this title (other than subsection (c)) shall apply to--... rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. 3603(b)(2). For a discussion of the description of the provision as the "Mrs. Murphy Exemption" or "Mrs. Murphy Exception," *see* James D. Wash, Note, *Reaching Mrs. Murphy: A Call For Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R. C.L. L. REV. 605 (1999); Robert G. Schwemm, *Discriminatory Housing Statements and 3604(C): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187 (2001).

small class of cases in which owners' property rights would prevail over the interest in preventing discrimination, due to the primacy of the rightholders' privacy interests. As Senator Walter Mondale (one of the sponsors of the Fair Housing Act) stated, the intent of the Mrs. Murphy exception was "to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants."[148]

The exceptions in the Act obviously do not exhaust every potential situation in which property rightholders might claim a privacy interest. This has led to repeated litigation about the application of the Act (and equivalent state anti-discrimination laws) to situations in which the complainant sought to become a roommate. Decisions have not been uniform. In some cases, courts have stuck to the language of the statute, and held property rightholders to the duty of nondiscrimination; in others, courts have upheld the primacy of the property rightholders' privacy interest.

Compare, for instance, the 2001 decision of the District Court of Massachusetts in Marya v. Slakey[149] with the 2008 decision of the Ninth Circuit Court of Appeals in Fair Housing Council of San Fernando Valley v. Roommate.com, LLC.[150] Marya v. Slakey involved a complainant (Kriti Arora) who sought to rent a room in a six-bedroom owned by Linda Slakey.[151] Slakey did not make decisions regarding the rentals; she rented each of the bedrooms separately to six tenants, but she permitted the tenants to choose replacements as a vacancy opened up in any of the bedrooms.[152] Prospective tenants were expected to be vegetarian non-smoking students at the University of Massachusetts; however, prospective tenants could only be accepted with the unanimous approval of existing tenants.[153] When Arora applied for one of the vacancies, she was rejected by two of the existing tenants. One (Suzanne Castello) explained his rejection as owing to a "personality conflict," while the other (Paul Norris) attributed his decision to Arora's Indian ethnicity. Norris stated that he did not want a third Indian roommate in addition to the two Indians already living on the premises because he did not want "a preponderance of one culture" in the house.[154] Among Slakey's defenses were two that implicitly sounded in privacy interests: first, Slakey claimed that Norris was not engaged "in the business" of renting dwelling space (meaning he was acting in a private rather than commercial

[148] 114 CONG. REC. 2495 (1968).
[149] 190 F. Supp. 2d 95 (D. Mass. 2001),
[150] 666 F.3d 1216 (9th Cir. 2012).
[151] 190 F. Supp. 2d at 98. The opinion also spells the name as "Aurora."
[152] *Id.* at 98.
[153] *Id*.
[154] *Id.* at 100.

capacity), and second, Slakey claimed she was entitled to the benefit of the Mrs. Murphy exemption.[155] The court made short work of both defenses. It observed that there was no language in the Fair Housing Act that restricted its anti-discrimination provisions to professional agents or landlords. The court also noted that Slakey did not occupy the premises and therefore did not fall within the literal language of the Mrs. Murphy exception.[156]

The Ninth Circuit Court of Appeals took a very different tack in Fair Housing Council of San Fernando Valley v. Roommate.com, LLC.[157] That case involved a challenge to the online service Roommate.com. Roommate.com is a website that matches up potential roommates with landlords and rooms. In order to match them up, Roommate.com requires users to answer a large number of questions in order to establish a "profile"; among the questions are requests that users disclose sex, family status and sexual orientation. The Fair Housing Council of San Fernando Valley sued under both the Fair Housing Act and the equivalent California legislation.[158] The Council claimed that Roommate.com was acting as a broker and asking questions that a broker would surely be barred from asking in order to steer prospective roommates in a manner that is discriminatory under the law.[159] Acknowledging that "it's quite clear that what Roommate does amounts to a violation" of the Fair Housing Act "[i]f the [Act] extends to shared living situation," the court nevertheless ruled for Roommate.com on the grounds that the Act does not apply to roommates.[160] It was evident that none of the privacy exceptions within the statute directly applied to case---not only because the complaint covered a general practice that applied to numerous individual homes, but also because the Fair Housing Act exceptions do not exempt advertising and the publication of notices. The court therefore essentially fashioned a new exception for rentals to roommates, by reinterpreting the term "dwelling." The court determined that in applying to "dwellings," the statute intended to apply only to "living unit[s] designed or intended for occupancy by a family," meaning that the Act applies only to "an independent living unit[,] stop[ping] the [Act] at the front door."[161]

In so ruling, the court placed great emphasis on the privacy interests of the property rightholders. The court wrote:

> Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that

[155] *Id.* at 104.
[156] *Id*.
[157] 666 F.3d 1216 (9th Cir. 2012).
[158] *Id.* at 1218.
[159] *Id.*
[160] *Id.* at 1219.
[161] *Id.* at 1220.

> between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms. Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. ... Holding that the [Fair Housing Act] applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.[162]

As the Roommate.com ruling highlights, it is evident that anti-discrimination rules regarding property are sensitive to the privacy interests of property rightholders. While courts (and legislatures) differ about the precise point where privacy interests should prevail over the societal interest in preventing discrimination, there is little doubt that privacy interests are important enough to protect property rightholders in at least some occasions, notwithstanding the very clear societal interest in preventing invidious discrimination.

B. Investigative Reporting and Trespass

Privacy interests are not generally thought to be part of the law of trespass. On paper, trespass is a strict liability tort. According to the Restatement, any intentional unlicensed entry on to land (in person or by means of an object) is a trespass, irrespective of whether it causes harm to the legal possessor of the land.[163] Stated otherwise, "[a]ny intentional intrusion that deprives another of possession of land, even if only temporarily, is considered a trespass."[164]

Despite the surface simplicity, there are cases where trespass cases involve a deeper analysis of the interests. For instance, in some instances, a person enters on the land of another with permission, but the permission was obtained by deception or fraud. Courts have divided on the question of whether and when such deceptions nullify the license to enter and turn the visitor into a trespasser.[165]

For our purposes, the most interesting of the trespass by decision cases is Desnick v. American Broadcasting Companies, Inc.[166] ABC reporters sought access to an eye clinic in order to report on deceptive and fraudulent practices by doctors in the clinic.

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[162] *Id.* at 1221.
[163] Restatement (Second) of Torts § 158 (1965).
[164] Merrill & Smith, *supra* note 135 at 7.
[165] LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P., No. 06-14312, 2008 WL 1923261 (E.D. Mich. Apr. 28, 2008) ("There is no clear majority rule on the subject of fraud vitiating consent to entry upon land.").
[166] 44 F.3d 1345 (7th Cir. 1995).

To get the full information, ABC itself engaged in some deception. A producer for the ABC program Prime Time Live told Dr. James Desnick (the owner of the clinic) that the program wanted to film the work of the Desnick Eye Center and interview doctors, technicians, and patients as part of a story on large cataract practices. The producer reassured Desnick that the segment would not "involve 'ambush' interviews or 'undercover' surveillance, and that it would be 'fair and balanced.'" However, the producer the concealed from Desnick that ABC also sent seven people with concealed cameras to the Desnick Eye Center to pose as patients and surreptitiously film the clinic's practices. The segment that was ultimately aired used the film gathered by the fake patients in a segment that ABC called an "undercover investigation" that revealed "evidence" that Desnick performed "unnecessary cataract surgery for the money." Desnick sued on a number of grounds including trespass.[167]

Seeking to cut through the confusing case law on fraudulently obtained licenses to enter, Judge Posner, writing for the court, stated that the different results cannot be explained on the basis of the nature of the fraud. Rather, he said, the case law must be explained with respect to the interests protected by the law. Where the plaintiff truly sought to prevent an "invasion" — for instance, where a "homeowner [is] victimized by the phony meter reader — the trespass claim should be upheld because the homeowner "does not want strangers in his house unless they have authorized service functions."[168] By contrast, wrote Posner, in this case, Desnick did not object to

> the presence of patients in the office. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted[;] ... [n]or was there any "inva[sion of] a person's private space," as in our hypothetical meter-reader case.... No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation ... Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy. ...[169]

Surprisingly, Posner did not explicitly acknowledge the relevant property interest protected by this class of trespass cases as

[167] *Id.*
[168] *Id.*
[169] *Id.* at 1352 (citations omitted).

privacy. Instead, he described the relevant interests as "ownership or possession of land,"[170] which is a description that could describe all trespass cases. Nonetheless, it is difficult to avoid the conclusion that Judge Posner sought to limit liability for trespass cases premised on a fraudulently obtained license to entry only to those cases where a privacy interest is compromised.

Judge Posner's approach is not universally accepted, but it has proved influential. Three years after Desnick, the Fourth Circuit Court of Appeals faced a similar set of claims against ABC and Prime Time Live for trespass based on deception in the context of an investigative report. Food Lion, Inc. v. Capital Cities/ABC, Inc.[171] involved two ABC television reporters who had used fake resumes to obtain employment at the supermarket Food Lion, in order to surreptitiously videotape "what appeared to be unwholesome food handling practices." Citing Desnick, the court this time found in favor of the plaintiff. The court acknowledged that the reporters here, like the "test patients" in Desnick had gained entry by a misrepresentation that did not appear to invade any significant protected property interest. However, the court reasoned, the ABC reporters in the Food Lion case did not simply enter the property. They entered "non-public areas of the store." According to the court, this was more analgous to using misprepresentation to place a video camera in the ceiling of an estranged spouse's bedroom. The court therefore found the jury finding of trespass legally justified.[172] As in the case of Desnick, the court did not explicitly invoke "privacy" as the name of the property interest being vindicated.

To be sure, the cases of trespass based on misrepresentation are not uniform in focusing in privacy. Nonetheless, there is an identifiable theme in some of the case law of assessing the strength of a trespass case on the basis of whether the property rightholders privacy interests were violated.

C. Beach Access, Public Easements and Privacy Interests

Another interesting area in which the privacy interests of property rightholders have muscled their way into the law is the field of beach access law. Beach access rules are not easy to summarize. The problem addressed by beach access law is this: often, beach areas are public, or at least open to the public, but the best routes to the public beaches cross through private land. In several states, courts have created doctrines for subjecting the

[170] *Id.* at 1353.
[171] 194 F.3d 505 (4th Cir. 1999).
[172] *Id.* at 519.

private lands to public easements in order to allow the public access to the public beaches.[173]

The most famous of these is the judgment of the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Ass'n*.[174] In Matthews, the Court considered claims for access to 76 beachfront properties in the coastal town of Bay Head. Of the 76 properties, six were owned by the Bay Head Improvement Association, and most of the other seventy were owned by Association members who had granted the Association the right to regulate access.[175] Under extant New Jersey law at the time, all beachfront property below the mean high tide line was owned by the state in accordance with the "public trust doctrine" which held that title to certain properties were held by the state for the benefit and use of the public.[176] The plaintiffs in Matthews claimed that since the beachfront was supposed to be available to the public, the public was entitled to cross through private lands in order to gain access to the public beaches. The Court agreed, arguing that public rights to the beachfront would be "meaningless" in the absence of the ability to access the beach, and that the "public trust doctrine" therefore necessarily implied the existence of a public easement over private lands in order to access the public beach.[177] The New Jersey version of the public trust doctrine therefore subjects coastal private lands to a public easement that allows members of the public to walk to the beach through the private property without permission.

New Jersey law has placed some limits on the judicially created public easements. The Matthews court identified four factors to be considered before creating and "fixing the contours" of the public easements: "[1] [l]ocation of the dry sand area in relation to the foreshore, [2] extent and availability of publicly-owned upland sand area, [3] nature and extent of the public demand, and [4] usage of the upland sand land by the owner."[178] There is little case law that explicates the nature of the usages that warrant upholding property rights against the potential claims of a public easement. However, it is evident that privacy plays a role in the issue; the fourth factor provides indirect protection to the privacy interests of beachfront

[173] *See generally*, 4-34 POWELL ON REAL PROPERTY § 34.11. In California, the judicial creation of a doctrine of public access in Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50 (1970) proved highly controversial, and prompted a legislative backlash. Cal. Civ. Code § 1009, enacted shortly after the Gion decision, limited the creation of implied public easements to cases of express written offers. Nonetheless, until recently, courts resisted the legislature's instruction to strengthen private property rights in this context. *See* Scher v. Burke, S230104 (Cal. 2017).
[174] 471 A. 2d 355 (1984).
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 365.

property owners. Obviously, a public easement that would potentially have members of the public wandering past homeowners' bedroom windows would have a weaker claim than one that would merely have them crossing through an empty field.

In Part IV, we will return to the issue of beach access and propose a better and more direct way to take account of the privacy interests of homeowners whose lots adjoin the shore.

D. Land Use Regulation and Private Residential Property

Another striking example of the importance of privacy interests in property law can be seen in the regulation of land use. A number of cases regarding the use of land have explicitly invoked privacy interests. While some of the cases involve privacy rights that the courts found outside the ambit of property law (and, instead, located in specific constitutional protection for privacy), nonetheless, it is also possible to see in the land use cases an understanding that property rights themselves entail a privacy interest.

The question of privacy rights of residential property rightholders arose at the national level in a pair of celebrated Supreme Court cases in the mid-1970s. In 1974,[179] and then again in 1977,[180] the Supreme Court dealt with constitutional challenges to local zoning ordinances that placed limitations on the rights of property rightholders to decide who would live in their private residences. In each case, the property rightholders challenged the ordinances on a number of constitutional grounds, including a claimed infringement upon the owners' rights to privacy. In one case, the Supreme Court sided with the state, and in one case it did not. Today, the constitutional privacy doctrine regarding residential property lies somewhere between the pair of rulings.

The 1974 case, *Village of Belle Terre v. Boraas*,[181] involved a zoning ordinance that permitted only one-family dwellings within the village of Belle Terre, and defined a "family" as meaning, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants."[182] The ordinance added that "[a] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."[183] The ordinance thus forbade unrelated roommates from living together in the village of Belle Terre, in any number of three or more persons. The

[179] Village of Belle Terre v. Boraas 416 U.S. 1 (1974).
[180] Moore v. City of East Cleveland, Ohio 431 U.S. 494 (1977).
[181] 416 U.S. 1 (1974).
[182] *Id.* at 2.
[183] *Id.*

challengers to the village's ordinance were six students at S.U.N.Y. Stony Brook who were living together in a single rented house, and the owner who had rented the house to them. The challengers claimed that the ordinance unconstitutionally discriminated against unmarried persons living together and that it suffered from a variety of other constitutional infirmities including that "the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy."[184] The Court dismissed all the challenges. While labelling the "rights of privacy" a fundamental constitutional right, the Court found no reason to believe that the land use restriction affected the right in any way. Instead, the Court viewed the ordinance as an example of economic and social legislation where courts should be reluctant to second-guess legislative line-drawing.[185]

Three years later, the Court examined a similar ordinance but reached a different conclusion. In *Moore v. City of East Cleveland, Ohio*,[186] the Court considered a zoning ordinance that permitted only one family to live within dwellings in the city.[187] In this case, however, the definition of family was longer and more restrictive than Belle Terre's. Essentially, the ordinance defined family as including only a person and his or her spouse, their unmarried children, and their parents. Additionally, grandchildren, and children in-law could be included in the family, so long as they all belonged to one, and only one dependent child.[188] Inez Moore, who challenged the ordinance, lived together with her son Dale, Sr. and two grandchildren, but fell afoul of the law since the two grandchildren were not offspring of the same child. One of the grandchildren, Dale, Jr., was the offspring of Dale, Sr., and therefore considered a member of the family according to the city of East Cleveland. However, the other grandchild, John, Jr., was a nephew of Dale, Sr., and cousin of Dale, Jr., and therefore not a member of the "family" according to the law.[189]

This time, the Court invalidated the zoning ordinance. A plurality found the ordinance to have "slic[ed] deeply into the family itself."[190] Stating that there is a "private realm of family life [into] which the state cannot enter,"[191] the Court's plurality held that while zoning ordinances could legitimately regulate the family, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of

[184] *Id.* at 7.
[185] *Id.* at 1.
[186] 431 U.S. 494 (1977).
[187] *Id.* at 495-496.
[188] *Id.* at 500.
[189] *Id.* at 496-497.
[190] *Id.* at 498.
[191] *Id*. at 499, quoting Prince v. Massachusetts, 321 U. S. 158, 166 (1944).

the governmental interests advanced and the extent to which they are served by the challenged regulation" and "[w]hen thus examined, this ordinance cannot survive." Acknowledging the validity of state interests in preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system, the plurality nonetheless found the ordinance to have "but a tenuous relation" to the resolution of such problems.[192]

Notably, in neither case did the Supreme Court purport to interpret the scope of the property rights at issue. Indeed, of the five justices that voted to strike down the offending ordinance in *Moore* attributed their ruling to the constitutional guarantee of "substantive" due process. Only one—Justice Stevens in a concurring opinion—explicitly labeled the protected interest as property. Nonetheless, the importance of privacy in property and land use regulation is evident.

IV. INCORPORATING PRIVACY IN PROPERTY LAW

In this Part, we present our normative thesis. First, we demonstrate how property doctrine should change to take greater account of privacy interests; in the next Section, we look at how privacy concerns should change our understanding of property theory.

A. Toward a New Understanding of Property Law

Doctrinally, we argue that property law should take account of privacy interests and, moreover, should be tailored to respect them. As we have shown,[193] some key aspects of extant property doctrine—in particular, owners' right to exclude—already embody privacy concerns. We propose adopting more broadly the rule that the protection of property rights should be calibrated to the strength of privacy expectations of the owner wherever possible. In saying this, we do not mean to say that where privacy expectations are low or nonexistent, property protection should disappear. Rather, we argue for adjusting property doctrine in two ways. First, the degree of relief offered to aggrieved property rights owners should vary with the degree of impact on privacy. Second, in some cases, the scope of rights that attend property ownership should vary based upon privacy expectations. We now turn to several specific contexts in which property doctrine can be adjusted.

Our doctrinal proposals are intended to be illustrative rather

[192] Moore, 431 U.S. at 499-500.
[193] *Supra*, Part III.

than exhaustive. Privacy concerns can be incorporated in almost every area of property law.

1. Trespass

The law of trespass is not as clear cut as it may appear at first blush. Not every unauthorized entry of another's property is actionable. As we demonstrated in the previous Part, courts have sanctioned physical entry into other persons' property when permission to enter was gained by fraud.[194] Furthermore, court have authorized certain unauthorized entries into others' airspace.[195] At the same time, courts have failed to develop a coherent theory that explains when physical invasions of another's space are actionable and when they are not. We posit that protection of privacy interests can serve as a unifying principle of trespass cases, and, thus, be serviceable to courts and private actors alike. Explicit recognition of the fact that privacy is one of the property interest protected by trespass can help clear up many of the doctrinal difficulties of trespass.

To illustrate this, consider again the case of trespass predicated on a theory of misrepresentation or fraudulently obtained license. As we noted, one line of case law can be interpreted as distinguishing actionable trespass on the basis of privacy interests.[196] Specifically, we observed that Judge Posner's ruling in the Desnick case seems implicitly to identify the privacy interest as one of the property rights sought to be upheld by the tort of trespass, and to rule that where someone enters property due to misrepresentation, that entry should only be considered trespassory if the entry results in harm to the privacy interest. We argue that Posner's implicit argument should be made explicit and expanded. One component of the value that land owners (and other property rightholders with rights of possession) realize from possession is the ability to protect their privacy. Openly recognizing this in the case of trespass makes it possible to identify actionable cases of the tort in a number of cases.

One case where the privacy interest can help has already been noted: it can distinguish between cases where a misrepresentation nullifies a license and turns an entry into trespass and those where the misrepresentation is insufficient to nullify the license. A second case where privacy interests can help involves aerial or subterranean entry to land. While trespass nominally occurs whenever there is purposeful unlicensed entry on to land, no matter how trivial, in practice, many courts have refused to uphold trespass

[194] *Supra*, Part III.B.
[195] E.g., Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).
[196] *Supra*, Part III.B.

claims premised on entry the court considered not to interfere with protected property interests. For instance, in the case of Hinman v. Pacific Air Transport, the court denied liability for trespass by two airline companies — United and Pacific — for repeatedly flying airplanes over the plaintiff's land at distances as low as 150 feet above ground.[197] The court acknowledged that the traditional doctrine of *cujus est solum ejus est usque ad coelum*[198] (generally referred to as the *ad coelum* doctrine) granted owners of land ownership not only of surface areas, but of the adjacent subterranean areas down to the center of the earth, and of adjacent airspace extending into the heavens.[199] If interpreted literally, this doctrine would have rendered all flights over private land, prior to the Federal Aviation Act of 1958,[200] trespass unless the airline obtained licenses from each and every overflown plot of land.[201] The Hinman court—like others faced with claims of trespass by overflight—brushed aside the trespass claim in uncompromising terms. The court ruled that the ad coelum doctrine "is not the law, and ... never was the law."[202] It then proceeded to acknowledged the validity of owners' claims to aerial rights, stating that the true law was that the "owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use."[203] Similarly extreme language appeared in U.S. v. Causby,[204] where the U.S. Supreme Court stated that the ad coelum doctrine "has no place in the modern world," before ruling that the owner of land owns only "the immediate reaches of the enveloping atmosphere."[205] Nonetheless, the Court found a taking of property when airplanes flew 83 feet off the ground; this distance apparently fell within the boundaries of the "immediate reaches."[206]

These cases may have important, yet unappreciated, implications in this day and age due to the growing use of drones. The case law reveals no clear answer to the question of when an aerial intrusion constitutes a trespass. Causby suggests the answer

[197] 84 F.2d 755, 758-759 (9th Cir. 1936).
[198] The literal translation is "whoever owns the soil owns also to the sky and to the depths." Merrill & Smith, *supra* note 135, at 10 n. *.
[199] Hinman, 84 F.2d at 757.
[200] *Id.*
[201] *See* William F. Baxter & Lillian R. Altree, Legal Aspects of Airport Noise, J. L. & ECON. 1 (1972); Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. Air L. & Com. 157, 191-192 (1990) (describing different ways to evaluate ownership of airspace above 500 feet); Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. Rev. 155, 165-170 (2015) (discussing the *ad coelom* doctrine in the context of U.S. v. Causby); *see also* note 27, *Airplane Noise, Property Rights, and the Constitution* at 1431.
[202] Hinman, 84 F.23 at 757.
[203] *Id*.
[204] 328 U.S. 256 (1946).
[205] *Id.* at 260-261, 263.
[206] *Id.* at 266.

is to be found in measure of distance of 83 feet or more from the ground; Hinman suggests a different answer—the ownership of land extends only to the aerial distance of the owner's actual uses. How should courts react when land owners raise claims of trespass by overflight of drones? One possible answer lies in examination of the privacy interests. Rather than focus solely on use or non-use of airspace, or an 83-foot measurement of the "immediate reaches," courts can look to the nature of the property interest threatened by the invasion. Some modern drones come equipped with cameras and transmission capabilities, and are readily used for surveillance, posing a significant threat to the privacy of overflown properties. A trespass claim ought to be viable even where the owner cannot demonstrate a use of the airspace, when the overflight threatens the privacy of the landowner.

2. Nuisance

Another legal area that stands to benefit from our call to play up the weight given to privacy considerations is nuisance law. Nuisance is defined as unreasonable interference with another's use and enjoyment of her land.[207] The critical determination courts ought to make in adjudicating nuisance claims is whether the alleged interference crosses the threshold of unreasonableness.[208] Nuisance doctrine is notoriously vague. A number of reasonableness standards compete for courts' affiliation.[209] Relatedly, nuisance doctrine is open-ended, inviting courts to consider a host of factors in deciding nuisance disputes.[210] Given

[207] Restatement (Second) of Torts §§ 821D, 822 (1979).

[208] *See* Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1, 2 (2012) ("[i]t asks whether the defendant has wrongfully harmed the plaintiff by unreasonably interfering with her use and enjoyment of land); *see also* Restatement (Second) of Torts (1979) §§ 822-828.

[209] *See* Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1122-1123 (7th Cir. 1975) (detailing the reasonableness standard in environmental pollution cases); Pub. Serv. Co. of Colorado v. Van Wyk, 27 P.3d 377, 391 ([i]n making any determination of unreasonableness, the trier of fact must weigh the gravity of the harm and the utility of the conduct causing that harm. Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient."); Bechhold v. Mariner Properties, Inc., 576 So. 2d 921, 923 (Fla. Dist. Ct. App. 1991) ("The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is reasonable under the circumstances"); *see generally* Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 202 (1990) (discussing the history of the development of the reasonableness test and describing two different versions, one that emphasized the rights of defendants and one that emphasized the rights of plaintiffs.).

[210] *See* Pestey v. Cushman, 788 A. 2d 496, 507-508 (Conn. 2002) (in order to recover damages in a common-law private nuisance cause of action, a plaintiff

the centrality of privacy to owners' enjoyment of their property, there is no reason to exclude privacy harms from the calculus. On the contrary, courts should examine whether the alleged interference also compromised the victim's privacy interest and if the answer is affirmative, this factor should heavily weigh in favor of classifying the activity as a private nuisance.

The nature of the cause of action we have in mind is illustrated in a legal dispute that arose between the Tate Modern gallery in London and nearby luxury flat dwellers.[211] The dwellers claim that the public platform that is part of the gallery compromises their privacy by giving visitors direct view of their homes. According to the owners "the "viewing platform is unreasonably interfering with the claimants' enjoyment of their flats, so as to be a nuisance."[212] A former dweller, Yumi Kumazawa said she supports the lawsuit filed by the current dwellers because "their privacy should be respected."[213] It should be further added that the units facing the viewing platform have become less marketable due to privacy concerns. The case constitutes a vivid example of the possible use

must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional…or the result of the defendant's negligence. Whether the interference is unreasonable depends upon a balancing of the interests involved under the circumstances of each individual case. In balancing the interests, the fact finder must take into consideration all relevant factors, including the nature of both the interfering use and the use and enjoyment invaded, the nature, extent and duration of the interference, the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded, whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property, and any other factors that the fact finder deems relevant to the question of whether the interference is unreasonable. No one factor should dominate this balancing of interests; all relevant factors must be considered in determining whether the interference is unreasonable.) (citations omitted); Pub. Serv. Co. of Colorado v. Van Wyk 27 P.3d 377, 391 (Colo. 2001) (en banc) ("the elements of a nuisance claim are an intentional, negligent, or unreasonably dangerous activity resulting in the unreasonable and substantial interference with a plaintiff's use and enjoyment of her property") ; Penland v. Redwood Sanitary Sewer Serv. Dist., 965 P. 2d 433, 436 (Or. Ct. App. 1998) ("In determining whether the composting operation constitutes a nuisance-*i.e.*, whether it substantially and unreasonably interferes with the use and enjoyment of plaintiffs' property-we must assess five factors: (1) the location of the claimed nuisance; (2) the character of the neighborhood; (3) the nature of the thing complained of; (4) the frequency of the intrusion; and (5) the effect upon the plaintiff's enjoyment of life, health and property.").

[211] Hannah Ellis-Petersen, Tate Modern Viewing Platform Challenged by Luxury Flat Dwellers, Guardian (April 19 2017), https://www.theguardian.com/artanddesign/2017/apr/19/tate-modern-viewing-platform-prompts-writ-from-luxury-flat-dwellers.

[212] *Id*.

[213] *Id*.

of nuisance law to protect privacy interests. While ordinarily nuisance law does not deal with visual interferences,[214] nothing in the doctrine prevents such suits and in appropriate cases it should be invoked to protect property owner's privacy.

3. Covenants and Other Servitudes

A third area where privacy concerns can be profitably integrated into property doctrine is the law of servitudes. The law of servitudes covers a multitude of non-possessory property interests, from promises that are enforceable on the basis of one's relationship with the burdened property (covenants and equitable servitudes) to such items as rights of way.[215] Real covenants and equitable servitudes are particularly flexible, and potentially cover every kind of activity that "touches and concerns" land.[216] The chronological reach of real covenants and equitable servitudes is indefinite; theoretically, covenants could persist in perpetuity, binding successors in interests separated by hundreds of years from the covenant's creation.[217] The vast scope of real covenants and equitable servitudes is restrained by a host of judicial doctrines that deny the enforceability or even terminate the servitudes in certain circumstances. For instance, courts will refuse to enforce servitudes that impose unreasonable restraints on alienation[218] or violate public policy,[219] and they may terminate servitudes when changed circumstance make further enforcement impracticable.[220]

The increased popularity of common interest communities in

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[214] Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 9 (2002) ("courts have denied aesthetic nuisance actions on the ground that visual interference does not constitute substantial interference").

[215] Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. CAL. L. REV. 1261, 1262 (1982) (explaining that servitudes are "private arrangements are used extensively to secure a wide variety of economic, aesthetic, and personal advantages to the owners and occupiers of land.").

[216] See *id*. at 1263-64.

[217] Stewart Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 IOWA L. REV. 615, 664 (1985) ("Freedom of contract can adversely affect third parties, and, because servitudes can be difficult to remove, freedom of contract may perpetuate restrictions that have lost their usefulness even to the parties who originally imposed them.").

[218] See cases collected in Luke Meier & Rory Ryan, Aggregate Alienability, 60 VILL. L. REV. 1013 (2015)

[219] See discussion in Andrew Russell, The Tenth Anniversary of the Restatement (Third) Of Property, Servitudes: A Progress Report, 42 U. TOL. L. REV. 753 (2011).

[220] See discussion in Comment, Termination of Servitudes: Expanding the Remedies for Changed Circumstances, 31 UCLA L. Rev. 226 (1983-1984).

recent decades[221] has expanded awareness of servitudes. Common interest communities use covenants as a governance device to ensure that all unit owners abide by certain rules. Substantively, the covenants span a wide range of issues from assessment and collection of fees, through maintenance of common areas, to usage of units. Courts have generally shown a great deal of deference to covenants, especially those recorded in a community's declaration.[222]

Interestingly, despite the wide array of tools available to courts to terminate or refuse to enforce covenants,[223] none specifically relates to privacy. We argue that this should change. Courts should incorporate privacy considerations in assessing the enforceability of covenants. Just as a covenant that unreasonably restrains alienation is set aside, so too should the courts refuse to enforce covenants that unreasonably infringe upon the privacy interests of burdened parties.

4. Remedies

Our final doctrinal suggestion concerns remedies for torts that sound in breaches of property rights, such as trespass. The remedies for such breaches are varied, and potentially drastic.[224] We argue that taking explicit account of privacy interests should help modulate the remedies. We illustrate our suggestions for modifying remedies in three distinct contexts.

a. Encroachments

We begin by considering the legal regime pertaining to encroachments or permanent trespass—cases in which one

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[221] Industry Data, Community Associations Institute, available at http://www.caionline.org/info/research/Pages/default.aspx (last accessed Feb. 23, 2011); Paula Franzese, Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice," 37 URBAN LAWYER 335, 335 (2005).

[222] *See e.g.*, Andrea Boyack, Common Interest Community Covenants and the Freedom of Contract Myth, 22 J. L. & POL'Y 783 (2014) (noting that "provisions of the recorded declaration as of the date of an owner's purchase are presumptively binding unless the provisions violate public policy".). For a passionate defense of this approach, see Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1360-1364 (1982).

[223] See discussion in Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1 (2000).

[224] *See* Alex Stein & Gideon Parchomovsky, *Reconceptualizing Trespass,* 103 NORTHWESTERN U. L. REV. 1823, 1829 (2009) (pointing out that "the law offers a property owner an impressive array of powers and remedies, all designed to help her fend off unwanted entry onto her property.").

trespasses by building a permanent structure on a neighbor's lot.[225] Under the common law, encroachments were met with an injunction. The encroached upon owner was entitled to injunctive relief even if the encroacher acted in good faith on the erroneous belief that she was improving her own lot.[226] Nowadays, most states have statutorily softened up the common law rule by granting courts broad discretion in establishing remedies. Courts may award damages instead of injunctive relief to good faith improvers, and they may even rearrange the property rights, such as by transferring title to the trespasser.[227] For instance, instead of ordering the destruction of the encroaching structure, courts can order that it be transferred to the plaintiff together with the land on which it was erected, and force the plaintiff to compensate the defendant-encroacher.[228] In the alternative, courts can leave the encroaching edifice in the hands of the possession of the defendant together with the land underlying, but have her pay an increased compensation amount to the plaintiff.[229] The doctrines governing the courts' discretion in cases of good faith encroachment are notably vague. California law, for instance, directs courts to adjust remedies for purposes of "substantial justice."[230] It would be a relatively straightforward matter to include privacy interests among the factors to be considered by a court in determining the remedy for encroachment. An encroachment that exposes areas of land where plaintiffs have privacy interests should naturally be treated more harshly than one where no such privacy interests are implicated. For instance, an encroachment that brings on to the plaintiff's land a window from which the trespasser can peer into the plaintiff's back yard should clearly be treated more seriously than an encroachment of a stone wall on to empty land that is being held for speculative purposes.

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[225] See e.g., JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 40 (2d Ed. 2005) (discussing encroachments).

[226] See e.g., Deepa Varadarajan, Improvement Doctrines, 21 GEO. MASON L. REV. 657, 669 (2014) ("Under the conventional common law view, the mistaken improver of land was not entitled to any compensation from the landowner for the improvement."); James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 CORNELL L. REV. 87, 134 (1993) (noting that under the traditional view of the common law, that of "the early nineteenth century," when an owner vindicated his title to the land by ejecting the improver from possession, his title was held to encompass title to the improvements[.]").

[227] E.g., Cal. Civ. Proc. Code § 871.1–.7 (West 2009).

[228] See Kelvin H. Dickinson, Mistaken Improvers of Real Estate, 64 N.C. L. REV. 37, 42 n.28 (1985) (reporting that at least forty-two states have adopted versions of such acts).

[229] *See* Ian Ayres, Protecting Property with Puts, 32 VAL. U. L. REV. 793, 796 (1998) (discussing this possibility).

[230] Cal. Civ. Proc. Code § 871.3(b).

b. Punitive Damages

Another instance in which trespass remedies could benefit from explicit consideration of privacy relates to punitive damages. As illustrated in the celebrated case of Jacques v. Steenberg Homes,[231] even minor acts of trespass can support awards of substantial punitive damages. Jacques involved the unlicensed transport of a mobile home across a snowy field owned by the Jacques. The court found no damage suffered by the Jacques, but it nevertheless awarded the Jacques $100,000 in punitive damages, and the punitive damages reward was upheld on appeal. The court justified the punitive damages award by looking at the egregiousness of the defendant's decision to trespass.[232] Punitive damages are a controversial subject in large part because they are difficult to pin down. By their nature, punitive damages awards cannot be straightforwardly calculated by standard damages formulae. In recent decades, the Supreme Court has placed proportionality limits on punitive damages,[233] but there is, as yet, no clear judicial enunciation of the way the proportionality limits should be applied in trespass cases. The Jacques court itself struggled to find an adequate means for measuring the appropriate amount of punitive damages, and the basis for determining proportionality.[234]

We submit that attention to the privacy interest in property can provide an important clarifying element in determining punitive damages awards. Specifically, the degree to which privacy interests are compromised by a trespass, even if not directly compensable, should play a role in the decision to award punitive damages and the scope of such damages.

c. Heads of Damage

A final way in which explicit attention to privacy could improve remedies calculations is by direct inclusion of privacy as a head of damages. While attention to privacy damage is rare, it can be found on occasion in past cases.

Consider, for instance, the case of City of Ocean City v. Maffucci.[235] The State of New Jersey and the Army Corps of Engineers sought beachfront property in order to build new sand dunes, and they used eminent domain to seize from the Maffuccis

[231] Jacque v. Steenberg Homes, 563 N.W.2d 154 (Wis. 1997).
[232] *Id*. at 160-161, 164.
[233] Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Exxon Shipping Co. v. Baker 554 U.S. 471 (2008) (requiring that punitive damages bear a reasonable relationship to damages and ruling that in maritime cases a one to one ratio is a fair upper bound).
[234] Jacque, 563 N.W.2d 154.
[235] 326 N.J.Super. 1, 740 A.2d 630 (Super. Ct. N.J., App. Div. 1999).

and several others an easement over a 50x80 foot strip of beach in front of their property. The court determined that the dune obstructed views and reduced beach access, producing small but measurable market losses to the property owners.[236] Importantly, in measuring damages, the court did not suffice with the value of the loss of view, reduced beach access, and the loss of use of the 50x80 foot strip. The court added an award of "loss of privacy," holding that it was proper to consider the reduced privacy resulting from increased pedestrian traffic should be considered part of the property "taken" by the state.[237] Other partial takings cases have likewise viewed privacy as a portion of the property taken, and therefore viewed a loss of privacy as a separate head of damage that deserves compensation.[238]

While it is in the context of eminent domain that courts have been most willing to recognize loss of privacy as a separate head of damage, there is no reason to restrict the head of damage to such cases. Trespass, nuisance, trespass to chattels, conversion, and, indeed any number of actions that result in compensable damage to property interests potentially involve damage to privacy interests, and all could benefit from the recognition of privacy as a separate head of damage.

It is important to recognize that the damages are not restricted to specific types of property or assets. Naturally, the degree of an owner's privacy expectations varies greatly among assets. An owner may have a strong privacy expectation at her home and a weaker privacy expectation at work. She may have a stronger degree of privacy expectation for her personal papers than for the newspaper she just bought. Indeed, property rights in certain objects—for example, a pen—characteristically gives rise to little or no expectation of privacy, while ownership of others—say a laptop computer—engenders privacy expectations. But this does not mean that privacy interests are only endangered by damage to certain kinds of assets but not others. A home is generally considered more sensitive from the viewpoint of privacy, but scope of the protection granted to an owner and the remedies to which she is entitled should depend on the privacy harm resulting from the violation. For example, a trespass on another's property consisting of an unauthorized U-turn on the edge of driveway would be treated very differently from an act of trespass involving unauthorized passing by the owner's bedroom window, as the latter would engender far more serious damage to privacy interests.

Likewise, consider a case in which one person breaks into another's car and uses it without her permission. Ordinarily one

[236] *Id.*
[237] *Id*.
[238] *See* cases cited in *id*.

would expect conversion of a car not to entail great damage to privacy interests. If, however, the car owner kept private correspondence inside the car, she should be entitled to remedies that reflect not only for the harm suffered from the seizure of the car and the unauthorized use, but also for the damage arising from the intrusion of her privacy.

There are certain assets whose unauthorized use would invariably involve an intrusion of the owner's privacy expectations. This would hold true in the case of smartphones, tablets and personal computers that house private information. A person who converts another's smartphone instantly gains access to the owner's private data, which in and of itself tramples the owner's expectation of privacy.

Tailoring damage awards is, therefore, an effective way of tailoring the law to protect privacy interests. .

V. INCORPORATING PRIVACY IN PROPERTY THEORY

In this part, we set out to place our privacy based account within the broader framework of property theory,[239] and explain how it interfaces with the three property visions that presently dominate the scholarly discourse. The first view can be termed as "exclusion centrism" as it puts the right to exclude at the epicenter of property law. The second view is widely known as the progressive property movement. It conceptualizes property as a constellation of institutions designed to bring about human flourishing. The third vision is known as the personhood theory of property.

A. Property as the Right to Exclude

The vision that puts the right to exclude at the center of the property world can be traced back to the English jurist William Blackstone, who famously described property law as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any

[239] It is important to note the lack of consensus among property theorists about the essential characteristics of the field. *See* Lee Ann Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1477 (2013) (observing that "Property theory today is alive with debate on core questions of entitlement design: whether property rules or liability rules should dominate, whether an exclusion—or thing—based vision of property should trump the bundle of rights metaphor, whether fixed menus of tenure forms aid or impede efficiency, and so on."). Our selection of three theories as points of comparison is not intended to suggest that other property theories are less compelling, important or insightful.

other individual in the universe."[240] The Blackstonian conceptualization, while antiquated, continues to exert significant influence on modern day property theorists.[241] Echoing the essence of the Blackstonian view, Thomas Merrill famously proclaimed that "property means the right to exclude others from valued resources, no more and no less."[242] A similar understanding was espoused by James Penner who wrote that the meaning of property can be fully accounted for via the rights to exclude and use.[243] Other contemporary theorists who have taken more nuanced positions on the centrality of the right to exclude still clearly view exclusion as an essential property incident.[244]

It is important to note that the right to exclude holds pride of place not only in the common law property system, but also in the civil law tradition. In their comparative study of civil and common law property, Yun-chien Chang and Henry Smith observe that even though the two legal systems grew out of very different traditions and use different property concepts, "ownership under the civil law and fee simple ownership of land in the common law system (and for the most part the respective notions of full ownership of personal property) coincide to a remarkable extent in their basic features: a possessory right to prevent invasions…".[245]

Economists, too. have placed the right to exclude at the very heart of the institution of property. For example, Harold Demsetz pointed that a property regime that puts resources in the hands of a single owner and grants her expansive exclusion powers would result in a more efficient utilization of resources.[246] Other

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[240] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (U. Chicago Press, 1979) (1766).

[241] Blackstone wrote more than this one sentence on property law, and some theorists have pointed out that the sentence may not accurately capture the essence of Blackstone's views, and that the view that has come to be known as "Blackstonian" may not be Blackstone's. Carol M. Rose, Canons of Property Talk, or Blackstone's Anxiety, 108 YALE L. J. 601, 602 (1998); David B. Schorr, How Blackstone Became a Blackstonian, 10 THEORETICAL INQ. L. 103 (2009)

[242] See, e.g., Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730, 754 (1998).

[243] *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68 (1997) (asserting that property rights can be entirely explained using the concepts of exclusion and use).

[244] *See e.g.,* Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability and Automatic Injunctions, 31 HARV. J.L. & PUB. POL'Y 593, 600 (2008) (emphasizing that, to be meaningful, the idea of property "must contain, at a minimum, some element of exclusion," but noting that the objective of the article "is not to argue that the right to exclude is all that there is in property").

[245] Yun-chien Chang & Henry E. Smith, An Economic Analysis of Civil Versus Common Law Property, 88 NOTRE DAME L. REV. 1, 3-4 (2012).

[246] See Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 356 (1967) (noting that an owner, by virtue of his power to exclude others,

economists have highlighted the fact that the right to exclude is the key to the successful functioning of property markets.[247]

Our privacy-based theory of property both endorses and rejects key parts of the owners' right to exclude. While privacy interests demand strong protection for the exclusionary rights of owners, they do not demand an absolutist view. Rather, the strength of an owner's right to exclude must reflect the strength of the privacy interest she seeks to protect. Where there is no plausible privacy interest to protect, there is no need to dogmatically protect the owner's exclusion right. And where exclusion is insufficient to protect privacy interests (such as where a neighbor's use interferes with privacy), the owner's privacy interest should not be downplayed. As we made clear throughout the Article, the law can and should privilege the owners' rights to exclude over other interests when doing so is necessary to defend their private interests. Accordingly, property owners should have strong exclusion powers with respect to assets, such as their homes, computers and all tangible and nontangible repositories of private information. Yet, our account also shows that unauthorized intrusions that do not implicate privacy violations should not be treated like intrusions that violate privacy.

As David Dana and Nadav Shoked powerfully demonstrate in a new paper the right to exclude has never been absolute and in many respects the exclusion powers of property owners are quite weak to begin with.[248] Thus, while our account differs from the most absolutist version of exclusion-centrism, it fits better with extant and historic doctrine.

B. The Progressive Property Movement

Pioneered by Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler, and joined by many other prominent scholars, the progressive property movement presents a pluralistic view of property designed to accommodate and promote a myriad of incommensurable values.[249] While the view advanced

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has "incentives to utilize resources more efficiently").

[247] *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 48 (4th ed. 1984) ("The market can function only in a situation where the 'exclusion principle' applies, i.e., where A's consumption is made contingent on A's paying the price, while B, who does not pay, is excluded. Exchange cannot occur without property rights, and property rights require exclusion. Given such exclusion, the market can function as an auction system.").

[248] David Dana & Nadav Shoked, *Private Property's Edges* (a work in progress) (on file with authors).

[249] See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, A Statement of Progressive Property, 94 CORNELL L. REV. 743, 744 (2009) (asserting that values implicated by property "cannot be

by progressive property scholars has much in common with the writings of the legal realists of the 1920s and 1930s, there are important differences between the two movements. The focus of legal realism was mainly conceptual, while the ambition of the progressive property movement is unabashedly normative: it calls for the furtherance of such values as civil responsibility, environmental stewardship, life, human flourishing, autonomy, freedom, and "individual and social well-being."[250] The progressive property movement puts societal interests on par with those of property owners, asserting that the rights of property owners should bow down to broader societal needs and wants.[251] The progressive property movement can therefore be characterized as decidedly non-individualistic. It approaches property owners as members of a larger group, whose rights are not trumps, but mere sticks a imprecisely defined bundle.[252]

At the same time, the progressive property movement joins legal realism in dismissing the possibility or desirability of a unified and consistent view of property. In endorsing a "pluralistic" vision of property,[253] progressive property scholars explain that property is supposed to advance a wide range of values, ranging from "individual interests, wants, needs, desires, and preferences" to "social interests, such as environmental stewardship, civic responsibility, and aggregate wealth," to general interests, such as "life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one's life on one's own terms."[254] The movement's statement explicitly states that these values are incommensurable and therefore cannot be "analyzed through a single metric" or "[r]educe[d] . . . to one common currency."[255] Property problems cannot, therefore, be resolved by deduction or balancing; rather, they must be resolved by "reasoned deliberation" that reconciles the

adequately understood or analyzed through a single metric").

[250] *Id*. at 743.

[251] *See* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 108, 145 (2013). (suggesting that the core ambition of the progressive property movement is "to recognize more exceptions to the default rights of an owner to exclude, or put differently, to expand recognition of the public's interest in privately held property.").

[252] See Jonathan Klick & Gideon Parchomovsky, The Value of the Right to Exclude: An Empirical Assessment, 165 U. PA. L. REV. 917 (2016) (suggesting that "[t]he emergence of the progressive property movement has resurrected the bundle of rights conception of property and has put renewed pressure to scale back the right to exclude.").

[253] See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, supra note 249, at 743 ("Property implicates plural and incommensurable values.").

[254] *Id*.

[255] *Id*. at 744.

"incommensurable" through the use of "critical judgment, tradition, experience and discernment" that together add up to a method of "rational choice" that "include[s] non-deductive, non-algorithmic reflection" as well as other undefined elements.[256]

Given the plurality of incommensurable values endorsed by the progressive property movement and the strong focus on human flourishing, nothing prevents champions of this view from adding privacy as a value that ought to be considered and respected. Indeed, few, if any, would deny that privacy is important to human flourishing and self-actualization. Hence, we can conjecture with a high degree of confidence that the progressive property movement would welcome the addition of privacy as a value that should shape property institutions.

Where we part ways with progressive property scholars is in the way we balance privacy against other societal interests. While progressive property scholars proclaim a commitment to the principle of incommensurability, we believe that legal reasoning should strive to resolve legal problems in a fashion that yields predictable and uniform results. One of our aims in focusing on the privacy needs property owners is to contribute to such predictability and uniformity; we seek rulings based on common and commensurable metrics. In granting strong property protection to property owners in protection of their privacy interests, we might therefore find ourselves outside the consensus of progressive property scholars who might privilege other societal interests on occasion.

We are fully mindful of this incongruence between our theory and the ideology underlying the progressive property movement. Yet, we feel that the property vision we portray throughout the Article is capable of accommodating some of the central themes of the progressive property movement. Concretely, our conception is open to the possibility of expanding the access and use privileges of the public as long as doing so does not interfere with the owners' privacy expectations. This position, while not fully consistent with the principles of the progressive property scholars, may mark an acceptable compromise for adherents of the movement.

C. The Personhood Theory

The personhood theory of property was developed by Margaret Radin,[257] on the basis of Freidrich Hegel's justification for private

[256] *Id*.
[257] *See* Radin, *supra* note 3.

property.[258] Importantly, Radin did not intend the personhood theory to be a comprehensive theory of property.[259]

Margaret Radin notes that some objects "embody" the owner's personality while others do not. Objects such as a family home or a wedding band are vital to a person's identity, and, therefore, she argues, entitled to the highest level of property protection.[260] By contrast, she argues that fungible assets are generally devoid of their owner's personality.[261] In some cases, Radin argues, owners develop personal attachments to assets, but the connection should not earn strong protection of the law as it is merely "fetishism."[262]

Radin does not deny that even fungible assets can and should enjoy the protections of property law.[263] Thus, Radin does not argue that "personhood" can completely illuminate the contours of property law. Nonetheless, Radin powerfully argues that the degree of legal protection granted property rights should reflect differences in personal attachment.[264] Highly personal assets should receive stronger protection than impersonal assets; for instance, injunctive relief should be reserved to cases involving violations of property rights in assets infused with a high degree of the owners' personality. Radin argues that monetary damages should be the principal means of redress with respect to transgressions involving rights in fungible and impersonal assets.[265]

We suggest an analogous strategy for calibrating degrees of protection. Like Radin, we do not view the value we seek to protect—privacy interests, in our case—to be the sole value protected by property law. Nonetheless, like Radin, we view the value is sufficiently important to serve as a good guideline for

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[258] *See* Hegel, *supra* note 3.

[259] *See Gregory A. Alexander, Property and Pluralism,* 8 FORDHAM L. REV. 1017, 1017 n. 1 (explaining that "unlike welfarism, the personhood theory is not and does not purport to be a comprehensive theory of property,.").

[260] Radin, *supra note* 3 at 959-60 (listing a wedding ring, a portrait, an heirloom, or a house" as examples as examples of "objects that are closely bound up with personhood" and then arguing that by virtue of this fact owners should be accorded broader liberties with respect to such objects).

[261] *Id.* at 986-88 (suggesting two levels of property protection, one for personal objects and one for fungible possessions.)

[262] *Id.* at 968-970 (discussing the problem of object fetishism).

[263] *Id.* at 986 (recognizing that fungible assets should receive protection, albeit less than personal items). -

[264] *Id.* at 986 (explaining that "the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.").

[265] *Id.* at 988 (suggesting that "that personal property should be protected by property rules and that fungible property should be protected by liability rules.").

determining the amount of legal protection to offer.

Obviously, the metric we use is very different from Radin's—our benchmark is expectation of privacy while hers is level of personhood. As a result, in some instances our framework gives rise to outcomes that are very different than Radin's. For instance, the personhood theory is predicated on the assumption that individuals need objects to express their inner-self through them, and, thus, achieve inner-growth and self-actualization.[266] Publicity through interaction between the inner-self and the outside world as mediated by assets, is therefore a key component of the personhood theory. Our theory, by contrast, is rooted in concerns for privacy and the desire to conceal information from the world. The wedding ring is a very personal object which conveys one's marital status to the world. However, it is not accompanied by a high degree of privacy expectation. A bank statement, by contrast, may be highly impersonal, yet be viewed as intensely private.

CONCLUSION

In this Article, we sought to highlight the important relationship between privacy and property and reinstate privacy as a decisive factor in determining the appropriate scope of property protection. Once upon a time, privacy considerations animated property law and policy. Gradually, however, that slipped away from the attention of scholars, who, instead, have increasing focused their academic investigations on information privacy. As we have shown in the Article, though, outside of the scholarly realm, in the world practice, the connection between privacy and property interests continues to be strong.

In addition to emphasizing the conceptual nexus between privacy and property, we have proposed several ways in which property doctrine can be reshaped to give stronger protection to privacy interests. We have contended that refocusing property law and policy around the value of privacy will pay dividends not only to lawmakers but also to property theorists. The privacy centered theory of property that we have developed in this Article has the potential to transform long-standing debates and disagreements about the appropriate scope of property owners' right to exclude and right to use, as well as to their remedial options.

Before concluding, we would like to emphasize once more that we do not argue that privacy is the sole consideration that should animate property law. Nor do we maintain that it ought to be the

[266] *Id.* at 957 (explaining that "[t]he premise underlying the personhood perspective is that to achieve proper self-development-to be aperson-an individual needs some control over resources in the external environment.").

most important one. As we have strained to make clear throughout the article our claim is more modest: that privacy aspects should be given greater weight in property law than they currently receive. In a society that constantly strives for more information, one should have a sphere where she can choose to be left alone.