COMMENT

THE PROPERTY MATRIX: AN ANALYTICAL TOOL TO ANSWER THE QUESTION, "IS THIS PROPERTY?"

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INTRODUCTION

When we see an object, a laptop sitting on a library desk, or a parcel of land, we have no difficulty recognizing that someone probably owns it. Most people in our society (save, perhaps, for legal scholars and thieves) instinctively perceive tangible objects as property and appreciate the concomitant responsibilities imposed on owners and the public. In other words, trespasser-George knows best not to take the computer from the desk, or to walk onto fenced-off land without permission—the *duties* (or *obligations*) that property imposes on him. Owner-Mary knows that she is entitled to do with her land as she pleases (within reasonable limitations set by the State)—her *privileges* as a property holder.[1] Mary also knows that she has unique recourses against George, were George to interfere with her property—her *rights* as an owner.

Thus, property serves as a signaling device that informs the holder and all others how to interact with the thing, and what they may or may not do with it. Property scholars consider this signaling function to be a crucial element of property.[2] Indeed, recognizing a thing as property could disturb

1 *See* Shyamkrishna Balganesh, *Demystifying the* Right *to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 602-05 (2008) [hereinafter Balganesh, *Demystifying*] (discussing the "right-privilege distinction").

2 *See, e.g.*, Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81-82 (1985) ("[C]lear titles facilitate trade and minimize resource-wasting conf[l]ict.").

the signaling function embedded in a given object, thereby forcing individuals to recalibrate their understanding of the rights and obligations that attach to it[3]: George and Mary would no longer know how to interact with the thing.[4] Similarly, when courts equivocate on their recognition of a given thing as property, they compromise the efficacy of property's signaling function. The operation of property as an effective means of signaling obligations and privileges depends on our ability to identify a thing as property and the consistency of the categorization system that we employ.

While it is easy for us to recognize a tangible object as property,[5] we are less comfortable recognizing an *intangible* thing, such as trade secrets, news, advanced degrees, or our time, as property. The same goes for objects that, though tangible, lie too close to the boundaries of ethics and bodily autonomy when identified as property. We find it unconscionable to think of organs, limbs, sperm,[6] DNA, or bone marrow as property, for instance.[7] We also experience discomfort when asked to determine whether what I call "semi-tangibles" enjoy property-law protection. These semitangibles might include an email server or information traveling between computers and Internet service providers.

Because of these ambiguities, I propose an analytical tool (which I call the "property matrix") to aid scholars, legislators, and lawyers in tackling the question, "Is this property?" I argue that we can create guidelines to answer this question even before we have academic consensus on a comprehensive definition of property, so that we may respond to pressing concerns about whether a given thing should be so labeled. Instead of defining what property is, my aim with the property matrix is more impressionistic; it is,

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3 I would like to thank my editor, Ethan Simonowitz, for this language. In his words: "Were we to take a given object—an object that currently enjoys a degree of consensus in the community regarding whether or not it constitutes property—and change its 'property-ness,' then individuals would be faced with the challenge of recalibrating the rights and obligations that attend to that thing."

4 *Cf.* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 47 (2000) ("The one out of one hundred who adopts a nonstandard form for property rights can increase the costs of processing the rights of ninety-nine others.").

5 Some scholars posit that property rights are so instinctive that nonhuman species, like wolves and chimpanzees, recognize them. *See generally* Melvin C. Fredlund, *Wolves, Chimps and Demsetz*, 14 ECON. INQUIRY 279 (1976).

6 *See infra* note 243.

7 *Cf.* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 804 (1996) ("What makes it impossible to conceive of certain rights as property rights, such as the right not to be murdered or the right to assemble or the right to marry or the right to make binding agreements, is that one cannot conceive of how such rights could be separated from a person . . . .").

to borrow a concept from Justice Stewart, an "I know it when I see it" understanding of property.[8]

In Part I, I provide an overview of our current understanding of property. I then describe a two-part test—the property matrix—to determine whether a given thing should be considered property. In Part II, I identify six contexts in which courts have struggled with defining and applying principles of property. I then compare these six "case studies" against the property matrix. In my conclusion, I posit that there may be varying degrees of property rights—weak, medium, and strong—and I suggest that each level gives rise to different groupings of obligations and privileges.

I. THE PROPERTY MATRIX

There are three circumstances under which the question, "Is this thing property?" might arise in court: under the takings doctrine,[9] when property is a required element in a statutory cause of action,[10] and when a court is reviewing the remedies that an alleged property holder has at his disposal against an intrusion or interference.[11] In these circumstances, courts ultimately seem to be asking the same question: Should we label this (be it bone marrow, an attorney's time, trade secrets, etc.) property? Though not uncontroversial, once we decide whether the analyzed thing is property, certain consequences follow naturally.[12] A court's answer to the seemingly simple question of whether a given thing constitutes property is crucial. In any of these three circumstances—when dealing with "new" or ambiguous forms of property—this question will be the most litigated issue.

Given the prominence of property in our legal system, it is surprising that there is no universally accepted definition of the concept.[13] Nevertheless, scholars do agree that property has certain characteristics. Most theorists concede that the institution of property describes the rights that a person

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8 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

9 *See, e.g.*, State v. Lynch, 796 P.2d 1150, 1153, 1160-62 (Okla. 1990) (holding that forcing an attorney into representing indigent defendants may result in a violation of the Takings Clause).

10 *See infra* Section II.A (mail and wire fraud).

11 *See, e.g.*, Intel Corp. v. Hamidi, 71 P.3d 296, 303-04 (Cal. 2003) (reviewing possible remedies for interference with a company's email server by a disgruntled former employee); Moore v. Regents of Univ. of Cal., 793 P.2d 479, 487-97 (Cal. 1990) (discussing whether to grant individuals property rights over their bodily cells).

12 Penner, *supra* note 7, at 799 ("[I]t is incontrovertible that calling something 'property' ramifies in all sorts of ways, legal, political, social, and cultural.").

13 Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533 (2005) ("[E]veryone knows what [property] is, but no one can define it.").

has over a given resource (or thing), and not the resource itself.[14] Theorists also agree that property rights are rights in rem,[15] or rights against the world—that is to say, rights held by the property owner that apply against any other person.[16] An in rem right attaches to the thing—unlike an in personam right that attaches to an individual (the right-holder).[17] Other points of agreement include the notion that property can be either tangible or intangible; that property is more than just possession; and that property can be private, common, or public.[18] All of these points of agreement lie on what I call a "descriptive plane": they describe the form and effect of a property right.[19] However, scholars disagree on "the nature and content"[20] of these rights, arguing on what I call the "normative plane" of property.[21] Given the lack of consensus on what these rights entail—and as I do not advocate any one of the current theories—four conceptualizations of "the nature and content" of property define the normative plane: the right to exclude, the bundle of rights, autonomous interests, and economic interests.

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14 *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 8-11 (2010) (describing the centrality of "thingness" to the concept of property); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731-32 (1998) ("[N]early everyone agrees that the institution of property is not concerned with scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources.").

15 The alternative to a right in rem is a right in personam—a right residing in a person against a definite group of persons (or a single person). *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718-20 (1917) (defining paucital (in personam) and multital (in rem) rights).

16 *See* Balganesh, *Demystifying*, *supra* note 1, at 603 ("Hohfeld characterized property relations as multital [in rem], because they involved the owner interacting with an indeterminate set of individuals (potential trespassers)."); Bell & Parchomovsky, *supra* note 13, at 545 (describing the "in rem" view of property as "a staple of property theory"); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 790 (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*] (describing property as an in rem right); *see also* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 58 (John Ladd trans., Hackett Publ'g Co. 2d ed. 1999) (1797) ("The usual definition of *a right in a thing* (*iues reale, ius in re*) is that 'it is a right *against every possessor of the thing*.'").

17 Merrill & Smith, *Property/Contract Interface*, *supra* note 16, at 787; *see also* KANT, *supra* note 16, at 59 ("[A]nd so my right would be like a guardian spirit accompanying the thing.").

18 *See* Merrill, *supra* note 14, at 731-33 (describing the consensus among property scholars regarding the form of property rights, but not their content).

19 *See infra* Section I.E.

20 Merrill, *supra* note 14, at 734.

21 By "normative," I mean the norms or standards that guide individuals' behavior toward conformity, *not* the value judgments that give rise to these norms.

A. *The Right to Exclude*

Some property theorists equate property with the right to exclude others from the thing owned.[22] Blackstone defined property as the "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 other individual in the universe."[23] While some argue that the right to exclude "is both a necessary and sufficient condition of property,"[24] others argue that it is only a necessary condition.[25]

Generally, scholars liken the right to exclude to the legal consequence of granting the property holder injunctive relief against a trespass.[26] Although the right does encompass such injunctive relief, it is not synonymous with the right to judicial relief.[27]

The guiding principle under the right to exclude is that others should not trespass onto one's property, and that, depending on the circumstances, one has the right to resort to self-help to exclude others from one's property, or to seek remedial relief.

B. *The Bundle of Rights*

Under this conceptualization, the owner holds an assortment (or bundle) of rights as to the thing. The Supreme Court described the bundle as "a collection of individual rights which, in certain combinations, constitute property."[28] The right to exclude is just one of several rights in this collection; furthermore, one cannot determine ex ante whether removing a given right would so alter the bundle that it would effectively undermine the

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22 *See, e.g.*, Balganesh, *Demystifying*, *supra* note 1, at 596 ("The idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property."); Merrill, *supra* note 14, at 730 ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 981 (2004) ("Exclusion is a low-cost, but low-precision, method that relies on rough informational variables like boundaries to define legal entitlements.").

23 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

24 Merrill, *supra* note 14, at 740.

25 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (describing the right to exclude as "a fundamental element of the property right"); Balganesh, *Demystifying*, *supra* note 1, at 596 ("The idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property, whether private, public, or community."); Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1899 (2012) [hereinafter Balganesh, *Quasi-Property*] ("Central to the idea of property is *exclusion*.").

26 Balganesh, *Demystifying*, *supra* note 1, at 638.

27 *See id.* at 610 ("Legal rules can be meaningful well before their breach is contemplated.").

28 United States v. Craft, 535 U.S. 274, 278 (2002).

"propertied" nature of the thing.[29] A.M. Honoré enumerated these rights or "incidents" attendant to property as

> the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity.[30]

Courts often describe exclusion as an "essential stick" in the bundle; however, under this conceptualization, property is not destroyed by the subtraction of the right to exclude.[31] Once "property is affected with a public interest,"[32] the right to exclude is seen as secondary to other rights and privileges. Ultimately, according to the legal realists—the main proponents of the bundle of rights conceptualization—"property has been destroyed as a useful concept," because property, "merely describes a collection of legally protected interests that can be disaggregated into their component parts. . . . Under this conception, property as a category has no utility except to obfuscate the underlying policy choices that must be made at the level of the detailed individual rules."[33]

J.E. Penner criticizes the bundle-of-rights theorists for denigrating the concept of property.[34] For him, the concept of property in and of itself has operative force.[35] Indeed, Penner describes property as

> the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.[36]

Ironically, this alternative definition of property continues to be an aggregation of rights. The legal realists believe that property is a compilation of

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29 Bell & Parchomovsky, *supra* note 13, at 545-46.

30 A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A.G. Guest ed., 1961).

31 *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82, 83 (1980) (describing the right to exclude as "one of the essential sticks in the bundle of property rights," but nevertheless requiring a mall owner to allow petitioners to "exercise [their] state-protected rights of free expression and petition").

32 Penner, *supra* note 7, at 717 (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

33 Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1458-59 (1996).

34 Penner believed that "the bundle of rights picture obscures more than it illuminates" our understanding of property. Penner, *supra* note 7, at 724.

35 *See id.* at 800-02.

36 *Id.* at 742.

rights, and that courts use these rights as an excuse to perform their objectives. Although Penner criticizes this conclusion—property itself has normative value (outside the rights that it protects) in his conceptualization—he, too, views property as a grouping of rights.

C. *The Autonomous Interests*

A third theory of property depends on the autonomous interest conceptualization. According to Kantian thought, property is an outgrowth of humans' "innate right" to freedom,[37] "the 'one sole and original right that belongs to every human being by virtue of his humanity.'"[38] For Kant, only three kinds of objects could become a person's property: "a corporeal thing external to me," "the will of another with respect to a particular act," and "the status of another in relation to me."[39] As to the first object, Kant elaborated that "an external thing is mine . . . if 'any interference with my using it as I please would constitute an injury to me.'"[40] Kant described the process of acquiring an outside object in the following manner:

> Whatever I can bring under my [control or] *authority* (in conformity with the law of external freedom) and with respect to which as an object of my will I have the ability to make use of (in conformity with the Postulate of practical reason), and finally (what in accordance with the Idea of a possible united *Will*) I *will* that it be mine, that will be mine.[41]

Put differently, "if I possess an object, then 'anyone who touches it without my consent . . . affects and diminishes that which is internally mine (my freedom).'"[42] Therefore, property bestows upon its holder the right to deal with the thing autonomously.[43]

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37 Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 414 (1999).

38 *Id.* at 414 (quoting IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 44 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797)).

39 Howard Williams, *Kant's Concept of Property*, 27 PHIL. Q. 32, 32-33 (1977). For purposes of this Comment, I assume that Kantian property includes intangibles. Perhaps this assumption is unfair. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1894 n.165 (1987) ("[T]here had seemed to be no place at all for intangible property in Kant's theory of *possessio noumenon*.").

40 Williams, *supra* note 39, at 33 (citation omitted).

41 KANT, *supra* note 16, at 56 (footnote omitted).

42 Haemmerli, *supra* note 37, at 418 (quoting KANT, *supra* note 38, at 57).

43 *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 93 (2009) ("Your right to property is your right to limit the conduct of others in relation to particular things."). *But see* Yochai Benkler, *Siren Songs and Amish Children: Autonomy,*

A related conceptualization of property is the personhood concept.[44] Hegel writes that "[a] person has . . . the right of putting his will into any and every thing and thereby making it his."[45] Margaret Radin draws from Hegel to conclude that property rights arise when an individual attaches her personhood to a thing.[46] Property becomes a sliding scale of entitlements positively correlated to an individual's personhood investment in the object. Radin concludes, "[t]he more closely connected with personhood, the stronger the entitlement."[47]

Common to Kant's, Hegel's, and Radin's conceptualizations of property is the notion that property protects one's freedom, will, or personhood by imposing the social norm of noninterference, as interference (even harmless interference) will injure the property holder.[48]

D. *The Economic Interests*

Yet another theory of property is the economic interest theory. Under this theory, property is that which is valuable to the holder and to society at large. In Harold Demsetz's words, "A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."[49] Although Demsetz's theory is descriptive,[50] scholars relying on his work

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Information, and Law, 76 N.Y.U. L. REV. 23, 61 (2001) ("[P]ervasive recognition of property rights in the information environment imposes an overall cost on autonomy.").

44 *See* Haemmerli, *supra* note 37, at 418 ("This means that, in a Kantian system, property is inseparably associated with one's 'personhood' because property grows out of freedom and freedom is essential to personhood.").

45 G.W.F. HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT para. 44 (Stephen Houlgate ed., T.M. Knox trans., Oxford Univ. Press 2008) (1821); *see also* Haemmerli, *supra* note 37, at 424 ("Property in this view is an extension of the personality and is essential to the actualization of the person.").

46 *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982) ("Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.'").

47 *Id.* at 986. Radin explains that, for instance, Joe's wedding ring has a stronger personhood investment than a wedding ring in the hands of a jewelry seller since "the price of a replacement will not restore the status quo." *Id.* at 959.

48 *See* RIPSTEIN, *supra* note 43, at 92 (explaining that, according to Kant, even harmless interference with an individual's property is impermissible).

49 Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

50 *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 264 n.21 (2007) (characterizing Demsetz's theory as descriptive); *see also* Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S333 (2002) ("[Demsetz's] article is about the evolution of 'property,' but at different times it offers different definitions of the institution of property that have different implications for the scope of the argument.").

describe property as a value-enhancing mechanism.[51] For instance, Carol M. Rose argues that property maximizes value by "facilitat[ing] trade and minimiz[ing] resource-wasting conflict."[52] And Abraham Bell and Gideon Parchomovsky posit that "property increases value by creating and defending stable ownership."[53] Bell and Parchomovsky conclude that "only assets for which protection of stable ownership will enhance social welfare should come under the aegis of property law."[54] As such, property should not include nonmarket goods, goods for which there is no in rem protection, over-fragmented assets,[55] and assets for which policing costs outweigh the benefits derived from property protection.[56] Under the economic interest conceptualization, property protects the value of an owned thing. We have a duty not to interfere with the value of another's thing, and the property holder has a right to protect this value.[57]

E. *The Property Matrix*

The property matrix takes into account the two dimensions (or planes) of property: the descriptive and the normative.[58] The descriptive plane refers to the form and effect of the property right. It details the rights and privileges of the property holder, the duties that the public owes to the property and the property holder, and how rights are transferred between holders. The descriptive characteristics of property can be summed up as follows: property describes the rights of a person over a given thing; property rights are rights in rem; property rights attach to the thing; property can be tangible or intangible; and property can be public, common, or private.[59] Because I cannot conceive of a thing that is neither tangible nor intangible,

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51 *See, e.g.*, CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 51-55 (1994) (analyzing the wealth-enhancing conception of property); Bell & Parchomovsky, *supra* note 13, at 552-53 (naming Harold Demsetz, Yoram Barzel, Steven Shavell, Robert Ellickson, and Carol Rose as scholars who view property as a utility-enhancing mechanism).

52 ROSE, *supra* note 51, at 16.

53 Bell & Parchomovsky, *supra* note 13, at 552.

54 *Id.* at 563.

55 An over-fragmented asset is an asset that has been too thinly divided, such that it has lost all of its value. *See id.* at 564 ("[A]s the asset becomes too small, it is unlikely to have any value . . . [and] moves beyond the range of the legal property system.").

56 *Id.* at 564-65.

57 It may be illustrative to compare the economic-interest with the autonomy-interest theory of property. Under the former, a harmless interference with another's property would be inconsequential; under the latter, even a "harmless" interference injures the other. *See supra* note 48.

58 Again, I use "normative" as a guiding standard. *See supra* note 21.

59 *See supra* sources accompanying notes 4-8.

nor can I conceive of a thing that is neither public, common, nor private, I omit these characteristics from the property matrix. Instead, I use the first three characteristics to inform the descriptive plane: for a thing to be considered property under the matrix, it must give rise to a right (or set of rights) of a person over a given thing.

Viewing the descriptive and the normative dimensions together will help us determine whether a given thing should be considered property. Furthermore, we may also be able to understand why a court may grant an injunction, damages, or neither.

It is important to make a quick aside to describe what I mean when I refer to a "right." Shyamkrishna Balganesh outlines three different types of rights associated with property: a claim-right, a privilege-right, and a remedial right.[60] A claim-right is the general right that a property holder has against interference from others. Put simply, a claim-right imposes a duty on others not to interfere with my property.[61] It is George's duty not to go into Mary's home without her permission. The privilege-right is the right to which a property holder is entitled in order to protect his or her property from intrusion.[62] Mary, for instance, may (generally speaking) resort to self-help to kick George out of her home. Finally, the remedial right is the right to an enforceable resolution of a challenge to property that the property holder can seek from the judiciary.[63] If George were to build a wall encroaching on Mary's land, Mary would have a right to seek injunctive relief. Each of these rights, moreover, must be in rem (they apply to every other person) and must attach to the thing (they can be severed from the right-holder).[64]

The normative plane explains what gives traction to these rights. Scholars have adopted different explanations of what these rights entail, including the right to exclude, a bundle of rights, rights of autonomy, and rights of value enhancement.[65] I hypothesize that what I call "strong property"

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60 *See* Balganesh, *Demystifying*, *supra* note 1, at 610 tbl.1 (displaying and describing the three different kinds of rights).

61 *See id.* (defining a claim-right as "the correlative duty (of non-interference) imposed on others").

62 *See id.* (characterizing the privilege-right as "the exercise of use-privileges to achieve exclusion").

63 *See id.* (calling the remedial right "the entitlement to commence action").

64 In a recent paper, Yun-chien Chang and Henry E. Smith describe the "three essential features" of property as being "*in rem* status, the right to exclude, and running with assets." Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. (forthcoming 2013) (Feb. 17, 2012 draft at 24), *available at* http://ssrn.com/abstract=2017816.

65 *See supra* Sections I.A–D.

should be explainable under a majority—at least three—of our normative points. When a thing is a strong property, all conceptualizations should agree that it is property, though they may differ as to the normative value(s) driving this conclusion.

To summarize, in order for a given thing comfortably to be characterized as property, it should lie on all of the points of the descriptive plane, because these are the components of property on which scholars agree.[66] Additionally, the more points of the normative plane on which a given thing lies, the stronger the property right that attaches to it. Table 1 is an illustration of this benchmark:

Table 1: The Property Matrix

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1 or 0	1 or 0	1 or 0

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
1 or 0	1 or 0	1 or 0	1 or 0

Under this binary approach, I grant a *one* if a thing conforms to a given quality, and a *zero* if the thing lacks the given quality. When I analyze different instances in which courts have defined certain rights as property rights, I will err in favor of finding compliance with the point (in other words, I will grant a *one*). Any instance with fewer than three total points is not property because the analyzed thing does not lie on the descriptive plane. As a given thing moves from four to seven points, I am increasingly comfortable with calling it property and with labeling it a stronger form of property. The stronger the property, the more privileges a property holder should have to protect his interest in the thing.[67] When holding a weak property right, an owner should only have a claim-right; but when holding a strong property right, his rights should include a remedial right.

This tool allows for a quick summary of how a given thing could be reviewed under our current understanding of property. When using the matrix, I first ask whether a given thing satisfies the elements of the

66 *See supra* notes 2-8.

67 *Cf. supra* text accompanying notes 60-63.

descriptive plane. If the thing conforms to the three descriptive characteristics, I then analyze whether bestowing property rights upon it is consistent with the normative plane.

As an example, I analyze Blackacre, the paradigmatic property, under the matrix. Blackacre satisfies all the elements of the descriptive plane. Mary, Blackacre's owner, has several rights over Blackacre, including the right to exclude, the right to alienate, and the right to use.[68] Generally speaking, Mary's rights over Blackacre are in rem (against the world). And the rights that Mary has over Blackacre are attached to Blackacre; if Mary were to sell Blackacre to George, Mary's rights over Blackacre would be transferred to George.

Mary's property rights over Blackacre can also be understood under the four conceptualizations of property. Many would argue that Mary's paramount right over Blackacre is the right to exclude others from her property.[69] Mary's property interest in Blackacre would most likely survive even if we withdrew Mary's right to exclude.[70] Under the Kantian interpretation of property, Mary has the right to exclude any trespasser, including a harmless trespasser, because the trespasser "violate[s] the owner's right to determine how his or her property will be used."[71] Mary derives value from owning Blackacre, from either using the land to generate income, from holding it to sell in the future, or perhaps from imputed income.[72]

Table 2: Blackacre Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1	1	1

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
1	1	1	1

68 Here I am not attempting to define the series of rights that define property, but rather am merely affirming that Mary's ownership of Blackacre conveys certain rights to Mary. *See, e.g.*, Honoré, *supra* note 30, at 113 (listing rights associated with property).

69 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997) ("[I]n certain situations of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property.").

70 *See supra* Section I.B.

71 RIPSTEIN, *supra* note 43, at 92.

72 *See supra* Section I.D.

Thus, under the property matrix, Blackacre scores a *seven* out of seven and is clearly a strong property.

II. Analyzing Intangible "Property" Rights Under the Matrix

A. *Property Under the Mail and Wire Fraud Statutes*

The federal mail and wire fraud statutes criminalize the use of the federal mail or interstate wire or electronic communications to execute any scheme to deprive a person of his or her property or money.[73] "The elements of mail or wire fraud are (i) a scheme to defraud (ii) to get money or property, (iii) furthered by the use of interstate mail or wires."[74] The broad scope of these statutes makes them particularly effective in prosecutions of white-collar crimes.[75] Before 1987, federal courts relied on the mail and wire fraud statutes to convict government officials who had defrauded constituents "of their right to an honest government" or other "intangible right[s]."[76] In 1987, however, the Supreme Court held in *McNally v. United States* that the mail and wire fraud statutes were limited to the protection of "property rights," and did not extend to intangible rights.[77] To avoid confusion, the Supreme Court clarified in *Carpenter v. United States* that the statutes *do* protect intangible *property* rights.[78] In response to *McNally*, Congress enacted

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73 *See, e.g.*, 18 U.S.C. §§ 1341, 1343 (2006).

74 United States v. Autuori, 212 F.3d 105, 115 (2d Cir. 2000) (citation omitted). Aside from the difference in the method of communication, courts construe the mail and wire fraud statutes identically. United States v. Siegel, 717 F.2d 9, 13-14 (2d Cir. 1983).

75 *See, e.g.*, 1 Joel Androphy, White Collar Crime § 8:1 (2d ed. 2011) (describing the mail fraud as "a powerful tool employed by prosecutors against a litany of crimes"); Michael S. Kim & Jonathan D. Cogan, White Collar Crime: Debtor-Creditor Fraud § 1:13 (2009–2010 ed. 2009) (describing the mail fraud statute as a "versatile tool"); 21 Marvin Pickholz, Securities Crimes § 5:28 (November 2011) ("A prominent feature on the terrain of federal law enforcement since its enactment in 1872, the mail fraud statute remains the prosecutors' tool of choice against business and regulatory offenses because of its breadth, flexibility and ease of application to almost every variant of fraudulent conduct.").

76 McNally v. United States, 483 U.S. 350, 366 (1987) (Stevens, J., dissenting), *superseded by statute*, 18 U.S.C. § 1346; *see also id.* at 362-67 nn.1-5 (recounting "scores of . . . examples of such schemes which, although not depriving anyone of money or property, are clearly schemes to defraud, and are clearly within the scope of Congress' purpose in enacting the mail fraud statute").

77 *Id.* at 356 (majority opinion) ("The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.").

78 *See* 484 U.S. 19, 25 (1987) ("*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.").

§ 1346, in which it declared that mail and wire fraud includes "a scheme or artifice to deprive another of the intangible right of honest services."[79]

Recently, however, the Supreme Court held that § 1346 is only actionable in cases involving a kickback or a bribery scheme.[80] In *Skilling v. United States*, the Court specifically rejected the government's proposal that § 1346 should encompass "undisclosed self-dealing by a public official or private employee."[81] This outcome has led to uncertainty among prosecutors.[82] With this new limitation on § 1346, prosecutors will most likely resort to classic §§ 1341 and 1342 analyses, rather than honest service fraud, but they will have to show that the defendants targeted property.[83] This change will necessarily raise the question of what can be labeled property. For instance, under Second Circuit jurisprudence, a defendant commits mail fraud by depriving a shareholder of information that could have been valuable in deciding how to manage her stock—what that court calls the shareholder's "right to control."[84]

1. The Right to Control—*United States v. Wallach*

In 1980, Eugene Wallach began lobbying on behalf of Wedtech, a small metal manufacturer, for new government contracts.[85] Wallach was not compensated for his original services, but in 1983, upon his insistence—and

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79 Pub. L. No. 100-690, § 7603 , 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346).

80 Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

81 *Id.* at 2932 (citation omitted).

82 *See* Randy M. Mastro & Lee G. Dunst, *White Collar Crime* ("In the aftermath of *Skilling* and *Black* [*v. United States*, 130 S. Ct. 2963 (2010)], federal prosecutors are scrambling to preserve many of their hard-fought white collar convictions under the honest-services theory."), *in* 10 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 112:36 (Robert L. Haig ed., 3d ed. 2012).

83 *See Siegelman & Scrushy—Post* Skilling—*Is 1346 Really Necessary?* WHITE COLLAR CRIME PROF BLOG (Jan. 20, 2011), http://lawprofessors.typepad.com/whitecollarcrime_blog/2011/01/siegelman-scrushy-post-skilling-is-1346-really-necessary.html ("The Supreme Court has clearly held that 'money or property' includes intangible property . . . . To include 'intangible rights' is therefore unnecessary for the prosecution of criminal misconduct." (internal citation omitted)).

84 *See* United States v. Speight, 75 F. App'x 802, 804-05 (2d Cir. 2003) (recognizing the right to control one's assets as property); United States v. Dinome, 86 F.3d 277, 284 (2d Cir. 1996) (relying on the "right to control" doctrine to affirm a conviction under the mail fraud statute); United States v. D'Amato, 39 F.3d 1249, 1258-61 (2d Cir. 1994) (affirming the "right to control" theory); United States v. Wallach, 935 F.2d 445, 463 (2d Cir. 1991) (holding that "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution"); *see also* United States v. Bayly, No. 03-363, 2008 WL 89624, at *4 (S.D. Tex. Jan. 7, 2008) (concluding "that accurate shareholder information is a legally cognizable intangible 'property' right within the meaning of the wire fraud statute"), *aff'd sub nom.* United States v. Brown, 571 F.3d 492 (5th Cir. 2009).

85 *Wallach*, 935 F.2d at 450.

shortly after Wedtech completed its initial public offering—Wedtech agreed to pay $125,000 for Wallach's lobbying efforts.[86] However, two Wedtech officers, Mario Moreno and Anthony Guariglia, requested that Wallach attribute the expenses solely to consultation services related to the company's initial public offering.[87] This misrepresentation allowed Wedtech to capitalize the consultation fee, instead of expensing it—a maneuver which, in turn, "had the effect of inflating Wedtech's profits per share."[88]

In 1985, Wallach introduced Guariglia and Moreno to defendant Rusty London, a real estate specialist, and defendant Wayne Chinn, a financial analyst.[89] Wedtech soon thereafter entered into a retention agreement with both London and Chinn, under which they were to provide financial advice and improve the company's image in the investment community.[90] Wedtech subsequently named Chinn a director in the company.[91] In December 1985, Guariglia and Moreno entered into an additional agreement with London and Chinn to assist in Wedtech's second public offering, scheduled for January 1986.[92] According to the agreement, London and Chinn would, in exchange for $1.14 million, create a demand for Wedtech's stock by "parking" on the newly issued stock.[93] Defendants, once again, mischaracterized this transaction to avoid SEC disclosure requirements.[94]

In 1986, Wedtech was subject to multiple federal investigations, and soon thereafter filed for bankruptcy.[95] Guariglia and Moreno pled guilty to several different criminal charges, cooperated with the government, and became the primary witnesses against Wallach, London, and Chinn,[96] who were charged with multiple counts of mail fraud relating to their scheme to receive $1.14 million from Wedtech.[97]

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86 *Id.* at 451.
87 *Id.*
88 *Id.*
89 *Id.* at 452.
90 *Id.*
91 *Id.*
92 *Id.* at 453.
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at 454, 460.

London and Chinn later appealed the mail fraud convictions and argued that the "charges [we]re legally insufficient because the government only allege[d] a fraudulent taking of intangible rights—interests that do not rise to the level of 'property' within the meaning of the mail fraud statute."[98] Defendants argued that "the shareholders' intangible 'right to control' how Wedtech's money was spent" was not susceptible to a mail fraud charge, as per *McNally*.[99] The court rejected the argument, reasoning that the defendants had defined "property . . . too narrowly."[100]

It is important to clarify that the court did not reason that the target of the scheme was the shareholders' property interest in the shares themselves.[101] This theory would not have satisfied the elements of mail fraud, because London and Chinn had not taken the shareholders' securities.[102] Rather, the government deemed the right to control to be a property interest. It argued that "the actions taken by the defendants denied the shareholders the 'right to control' how corporate assets were spent."[103] This particular right to control governed "an intangible property interest."[104]

According to the *Wallach* court, the right to control theory "is predicated on a showing that some person or entity has been deprived of potentially valuable economic information."[105] The Second Circuit concluded, based on this reasoning, that "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution."[106] At this point the court moved from describing the "right to control" as a property interest to describing it as an "incident of stock ownership."[107] The court then incorporated the bundle of rights terminology—further muddling its property analysis—by postulating that "the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest."[108]

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98 *Id.* at 460.

99 *Id.* at 461.

100 *Id.*

101 The Supreme Court has defined shares as property. *See* Hawley v. City of Malden, 232 U.S. 1, 10 (1914) (noting that previous state cases assumed that "shares are personal property"); 11 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5096 (rev. vol. 2011) ("Under the common law, and some state corporations codes, shares are deemed personal property having the same characteristics as any other property.").

102 *See generally* 18 U.S.C. §§ 1341, 1343 (2006).

103 *Wallach*, 935 F.2d at 462.

104 *Id.*

105 *Id.* at 462-63.

106 *Id.* at 463.

107 *Id.*

108 *Id.*

Ultimately, the Second Circuit concluded that "the government advanced a viable theory of fraud under the mail fraud statute."[109] Given the court's inconsistent terminology, it remains unclear what exactly was the property interest that made the mail and wire fraud actionable. Two possible explanations for the court's conclusion include: (1) by depriving the shareholders of the information, the defendants had effectively deprived them of their shares, or (2) the information was, in and of itself, the shareholders' property.

The first theory explains the court's use of the bundle of rights terminology. The court would be drawing parallels to takings case law holding that the taking of the property owner's right to exclude effectively deprives the property owner of her property.[110] The court, however, would be hard-pressed to find that this case was such an instance because, by their inaccurate reporting, London and Chinn did not eviscerate the shareholders' stocks, but rather, at most, diminished their value.[111] Given the prevalence of the right-to-control theory in the Second Circuit,[112] the right to exclude most likely did not animate the *Wallach* court's reasoning.

Under the second theory, the information of which London and Chinn deprived the shareholders by their inaccurate reporting is the property protected by the court.[113] The shareholders' property interest as to this information triggered their "right to control."[114] I assume that the court espoused this latter theory. But is it appropriate to label shareholders' "right to control" as property?

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109 *Id.* at 464.

110 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that the government must compensate property owners for taking away only their right to exclude, even if they retain a bundle of other use-rights).

111 Even a reduction in value is dubious, as defendants provided services that potentially increased shareholder value. *See Wallach*, 935 F.2d at 462 ("[A]ccording to London and Chinn, [shareholders] were in fact benefitted as a result of their efforts to enhance the value of the corporation's stock.").

112 *See supra* note 84.

113 The Second Circuit's distillation of *Wallach* supports this conclusion. *See, e.g.*, United States v. D'Amato, 39 F.3d 1249, 1258 (2d Cir. 1994) ("[Shareholders] have property rights of which they may not be fraudulently deprived by 'the withholding or inaccurate reporting of information that could impact on economic decisions.'" (quoting *Wallach*, 935 F.2d at 463)).

114 *Id.*

2. *Wallach*'s Right to Control Under the Property Matrix

Table 3: Wallach's "Right to Control" Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1	0	0

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
0	0	1	1

a. *The* Wallach *Interest on the Descriptive Plane*

The right-to-control theory fails the descriptive dimension of the property matrix.[115] The relationship between the shareholder and the information—the thing—triggers a right of accurate reporting, recognized by the Second Circuit as the right to control.[116] The shareholder, however, does not have a positive right to the information; rather, her right to control imposes a positive obligation (a claim-right) on the information holder (here, Wallach, London, and Chinn)[117] of accurate reporting. Therefore, because the thing—the information that the defendants should have reported—results in a claim-right, it conforms to the first characteristic of the descriptive plane, and thus receives a *one*.

The right to control, however, is not a right in rem. The only set of people who could infringe on this right are those with information that could affect a shareholder's decisionmaking, like London and Chinn. In other words, there first has to be an information holder before there is an accurate reporting duty, which would trigger the shareholder's right to control.[118] The logical conclusion here is that the right to control cannot possibly be a right against the world. Additionally, as noted by the *Wallach* court, corporate law further limits the group of people to whom this right applies.[119] As such,

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115 *Cf. supra* Section I.E.

116 *Wallach*, 935 F.2d at 463.

117 *Id.*

118 *Cf.* Zohar Goshen & Gideon Parchomovsky, *On Insider Trading, Markets, and "Negative" Property Rights in Information*, 87 VA. L. REV. 1229, 1267 (2001) (arguing for the assignment of property-derived obligations "to insiders with respect to inside information").

119 *See Wallach*, 935 F.2d at 463 ("The importance of this right to information is recognized by the statutes and rules that govern the operation of a publicly held corporation.").

the right to control is a right in personam and not a right in rem because the right applies only against a finite and (probably) identifiable set of individuals.[120] The right to control could be *quasi-property*, an "interest[] [that is] 'in the air' . . . until a defendant is identified."[121] Therefore, this interest receives a *zero* under the in rem characteristic on the descriptive plane.

The third characteristic on the descriptive plane is that the rights attach to the thing.[122] For instance, when an owner transfers the thing, the right attached to the thing ought to transfer with it. In the context of the right to control, how are we to identify the right-holder if the right is still "in the air" until it is triggered?[123] On the other hand, if we define the right to control as a "claim-right," and there is an obligation on the information holder, then how would this right ever transfer?[124] Under the right-to-control theory, we cannot identify the right-holder until the right has been triggered; this conundrum logically inhibits the discussion of a right transfer. In contrast, under the claim-right theory, we can identify the right-holder, but a transfer is impossible, as the right is attached to the information holder. In light of such ambiguity, I conclude that the *Wallach* interest does not satisfy the third and final characteristic on the descriptive plane, and thus merits a *zero*.

b. *The* Wallach *Interest on the Normative Plane*

The property interest identified by the *Wallach* court is the "shareholders['] . . . 'right to control' how corporate assets [a]re spent."[125] In *Wallach*, this interest results in the obligation (or norm) of accurate reporting.[126] The right-to-exclude theory, however, cannot explain this property interest and the right to control that attaches to it.[127] Put simply, this norm imposes an affirmative duty on the information holder but no right (claim, privilege,

120 *See supra* note 15.

121 Balganesh, *Quasi-Property*, *supra* note 25, at 1900 (quoting Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, C.J.)).

122 *See supra* Section I.E.

123 *See* Balganesh, *Quasi-Property*, *supra* note 25, at 1900.

124 *See supra* notes 60-63 and accompanying text.

125 United States v. Wallach, 935 F.2d 445, 462 (2d Cir. 1991).

126 *See id.* at 463 ("If corporate officers and directors, and those acting in concert with them, were free to conceal the true nature of corporate transactions, it is conceivable that the assets of the corporation could be so dissipated as to render a shareholder's investment valueless.").

127 *See supra* Section I.A.

or remedial) on the shareholder.[128] As such, this "right" receives a *zero* under the first conceptualization on the normative plane.

The right to control does not fare better under the bundle-of-rights conceptualization of property.[129] In the current case, the property interest defined by the *Wallach* court triggers only one right: the right to control.[130] Although the concept of the right to control the information associated with the stock may be similar to Honoré's "right to manage,"[131] the existence of only one right associated with the property interest indicates that the bundle of rights theory cannot explain the *Wallach* interest. This is so because there cannot be a bundle if there is only one right, and the *Wallach* interest thus receives another *zero*.

The right to control can be understood under an autonomous-interests conceptualization of property. Under this conceptualization, property is that which protects an individual's freedom, will, or personhood.[132] Because of the defendants' inaccurate reporting, Wedtech's shareholders were deprived of their freedom to exercise their shareholder rights; under the Second Circuit's terminology, shareholders were deprived of their right to control.[133] Particularly under Kant's vision, London and Chinn's interference is impermissible as it injured the property owner's autonomy.[134] The shareholders did not have all the information pertaining to their company that would have enabled them to protect their interests. Thus, the *Wallach* property interest satisfies the third point of the normative plane and receives a *one*.

The right to control is also understandable under the economic-interests theory of property. Under this conceptualization, the objective of property is to maximize value to the holder by either minimizing transaction costs or promoting the stability of property.[135] The right to control maximizes value for the shareholder, as it increases the amount of information available to a shareholder deciding whether to hold or sell her stock.[136] Consequently, the *Wallach* property interest also lies on the fourth point of the normative

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128 *See supra* text accompanying notes 60-63.

129 *See supra* Section I.B.

130 *Wallach*, 935 F.2d at 462.

131 *See supra* text accompanying note 30.

132 *See supra* Section I.C.

133 *See Wallach*, 935 F.2d at 462 (arguing that accurate information is necessary to permit shareholders to prevent harmful corporate activity).

134 *See supra* Section I.C.

135 *See supra* Section I.D.

136 *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521-26 (1945) (postulating that knowledge accumulation maximizes a system's efficiency); *cf.* Goshen & Parchomovsky, *supra* note 118, at 1263 (describing the importance of information accessibility).

plane, and scores a *one*. In conclusion, the *Wallach* interest scores only three points under the property matrix. Therefore, the right to control should not be considered property.

3. Confidential Business Information—*Carpenter v. United States*

Although the Second Circuit used the mail and wire fraud statutes in *Wallach* to protect accurate information reporting,[137] courts have also relied on the same statutes to protect confidential business information from misappropriation.[138] In *Carpenter v. United States*, R. Foster Winans, defendant-petitioner, was one of two writers of the *Wall Street Journal*'s column "Heard on the Street," which analyzed different stocks and made investment recommendations.[139] Despite the *Journal*'s "official policy and practice" that the contents of the "Heard" column were to remain confidential until publication, Winans entered into a scheme with two brokers to provide them with column information in advance of its publication.[140] The brokers then used the information "to buy or sell based on the probable impact of the column on the market."[141] The plan proved to be lucrative; over a four-month period, the coconspirators netted $690,000.[142] Winans was convicted in the Southern District of New York for violations of § 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and the federal mail and wire fraud statutes.[143] On appeal, he argued that because he had not received any "money or property"—elements necessary under §§ 1341 and 1343—from the newspaper, he could not have committed mail fraud.[144] The Supreme Court refuted this argument. It reasoned that "[t]he *Journal* had a *property right* in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column."[145]

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137 *See supra* subsection II.A.1.

138 *See* Carpenter v. United States, 484 U.S. 19, 26 (1987) (listing cases recognizing confidential business information as property).

139 *Id.* at 22. As part of his research, Winans met with executives but the interviews did not discuss "inside information." *Id.*

140 *Id.* at 23.

141 *See id.* at 22. While the defendants did not have access to insider information, the column itself affected market behavior. The Court noted that "[b]ecause of the 'Heard' column's perceived quality and integrity, it had the potential of affecting the price of the stocks which it examined." *Id.*

142 *Id.* at 23.

143 *See* United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985), *aff'd sub nom. Carpenter*, 484 U.S. 19.

144 *Carpenter*, 484 U.S. at 25 (citation omitted).

145 *Id.* at 26 (emphasis added).

4. Confidential Information Under the Property Matrix

Table 4: *Carpenter*'s Confidential Business Information Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1	1	1

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
1	1	1	1

a. *The Confidential Information in* Carpenter *on the Descriptive Plane*

The Court in *Carpenter* reasoned that because the *Journal* created and owned the confidential information from the "Heard" column, the *Journal* held a proprietary interest in this information. This interest conveyed to the *Journal* rights of confidentiality and exclusive use.[146] By signaling the *Journal*'s right to exclusive use, the Court indicated that this right applied against the world.[147] In a similar context, Professor Shyamkrishna Balganesh argues against the use of misappropriation theory to create a property interest in the news. Through the prism of *International News Service v. Associated Press*, he convincingly argues that a misappropriation theory cannot give rise to a property interest in news, because the Court sought to protect the Associated Press from "unjust enrichment" and "unfair competition" by International News Services.[148] However, the Court's reasoning in *Carpenter* is distinguishable from the Court's reasoning in *International News*.[149] The

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146 *Id.*

147 *Id.* at 26-27. Regarding the right to exclude, the Court noted that "it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *See id.*

148 *See* Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 429-39 (2011) (tracking the trajectory of the misappropriation theory as applied to "hot news" from its inception in 1918 in *International News* to the present and critiquing the expansion of the theory).

149 *Compare Carpenter*, 484 U.S. at 22 (protecting the "point of view" of stocks reviewed in the column), *with* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) (protecting news as "*quasi* property" involving two competing news services, "irrespective of the rights of either as against the public"), *and* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997) (recognizing a property right in "time sensitive information" developed by "profit seeking entrepreneurs").

Carpenter Court did not protect the news component of the "Heard" column, but rather the opinion component—including the information regarding which stocks were to be analyzed, the dates of this analysis, and the columnists' recommendations on whether to invest.[150] The *International News* Court, by contrast, sought to protect the actual news component. As Justice Pitney observed in *International News*, "In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it."[151]

Lastly, if the *Journal* sold the "Heard" column to another newspaper, a court would continue to protect the confidentiality of the column, as the identity of the column's owner would not affect the nature of the rights associated with it.[152] The confidential information protected in *Carpenter* thus scores a perfect *three* on the descriptive plane.

b. *The Confidential Information in* Carpenter *on the Normative Plane*

According to the Supreme Court, confidential business information carries, at minimum, the right to make use and the right to exclude.[153] Therefore, confidential business information can be understood under both the right-to-exclude and the bundle-of-rights conceptualizations.[154] Winans also injured the *Journal*'s autonomy interest by taking away the *Journal*'s confidentiality.[155] Under the autonomy theory, courts should recognize a property right in confidential business information to protect it from any interference by the public. Lastly, under the economic interest conceptualization, protecting the right of the *Journal* to the confidentiality of the

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150 *Carpenter*, 484 U.S. at 23 (reasoning that the opinion component allowed the conspirators "to buy or sell based on the probable impact of the column on the market").

151 *Int'l News*, 248 U.S. at 234.

152 The fact that the property right transfers with the thing illustrates that the right is attached to the thing, and not to the former owner of the thing—here the *Journal*. *Cf.* Radin, *supra* note 39, at 1851 ("[P]roperty rights themselves are presumed fully alienable . . . .").

153 *See Carpenter*, 484 U.S. at 26 (describing the *Journal*'s "right in keeping confidential and making exclusive use").

154 *See supra* Sections I.A–B.

155 A potential issue under this analysis is whether Kant, Hegel, or even Radin would find that corporations are entitled to the same rights as moral persons. Most likely, these scholars would conclude that corporations are not. *See* James E. Fleming, *The Lawyer As Citizen*, 70 FORDHAM L. REV. 1699, 1705 (2002) ("The translator of Kant's *The Metaphysical Elements of Justice*, John Ladd, has argued with characteristic vigor that '[s]ince . . . formal organizations are not moral persons, and have no moral responsibilities, they have no moral rights. In particular, they have no *moral* right to freedom or autonomy.'" (quoting John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 MONIST 488, 508 (1970))). Without moral freedom, there cannot be a right to property. *See supra* Section I.C.

material in the "Heard" column would promote stable ownership.[156] In sum, the confidential business information protected by the Supreme Court in *Carpenter* scores a perfect *seven* under the matrix analysis, and should be considered a strong property.

B. *Marital Property—The Professional Degree*

1. Are Professional Degrees Property?

The question of whether an advanced degree or a professional license is property—such that a spouse who supported the degree holder during the attainment of the degree ought to be entitled to its proceeds in a divorce—has baffled courts and scholars alike.[157]

Imagine the following hypothetical. Spouse *A* supports (or partially supports) spouse *B* while *B* pursues a law degree. Later, in a divorce settlement, *A* seeks equitable distribution of the value of *B*'s degree. State courts have reached three different conclusions regarding such a situation. Some courts award the value of the degree upon distribution of marital property. A second group of courts holds that even though an advanced degree is not

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156 *See supra* Section I.D.

157 *See, e.g.*, *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (interpreting Colorado's version of the Uniform Dissolution of Marriage Act and concluding that an educational degree "has none of the attributes of property in the usual sense of that term" but rather represents "an intellectual achievement that may potentially assist in the future acquisition of property"); *In re* Marriage of Olar, 747 P.2d 676, 680 (Colo. 1987) (affirming that an advanced degree does not constitute marital property but concluding that the "contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided"); Mahoney v. Mahoney, 453 A.2d 527, 532-33 (N.J. 1982) (holding that a business degree is not property under New Jersey's marital statute); O'Brien v. O'Brien, 489 N.E.2d 712, 717 (N.Y. 1985) (determining that "it would be unfair not to consider [a medical] license a marital asset"); Susan Etta Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property*, 21 VT. L. REV. 409, 423-35 (1996) (surveying the major cases regarding the imposition of spousal proprietary interests in professional degrees); Susan Klebanoff, Comment, *To Love and Obey 'Til Graduation Day—The Professional Degree in Light of the Uniform Marital Property Act*, 34 AM. U. L. REV. 839, 846 (1985) ("The determination of whether a professional degree or the enhanced earning capacity that it represents constitutes divisible marital property has caused considerable confusion in spousal degree cases."). *But see* Bell & Parchomovsky, *supra* note 13, at 612 (suggesting that "courts that have attempted to determine whether degrees are subject to distribution by examining whether they are 'property' have approached the question from the wrong perspective" and arguing that a degree may be "a source of wealth that is appropriate for equitable or equal distribution").

property, equity mandates compensation of the supporting spouse. Still other courts determine that the supporting spouse is not entitled to the value of the degree.[158] Only a minority of courts has held that an advanced degree is marital property.[159]

2. Professional Degrees Under the Property Matrix

Table 5: Professional Degree Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
0	0	0

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
0	0	1	1

a. *Professional Degrees on the Descriptive Plane*

A degree *as a degree* does not convey any of the rights that we typically associate with property. Recall Honoré's enumeration of property rights as

> the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity.[160]

Some could argue that a degree conveys, at least, the rights to use, manage, and gain income from the degree as a symbol of intellectual capital. It is not, however, the degree itself that conveys these rights but rather community consensus on the meaning of the degree. Additionally, the rights associated with a degree are not rights in rem. For example, an attorney who has passed the California Bar is not entitled to practice law in New York, regardless of the impressiveness of the degree-granting institution or her

158 *See* William M. Howard, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, 3 A.L.R. 6th 447 (2005) (summarizing the three approaches that courts adopt when determining spousal entitlement to an advanced degree).

159 *See id.* at 466-67 (enumerating the eight states that recognize an advanced degree as marital property).

160 *See* Honoré, *supra* note 30, at 113.

bar exam score.[161] The rights associated with the degree do not attach to the document but rather to the degree holder.[162] In other words, *C* does not acquire *B*'s right to practice law in New York by buying *B*'s degree. As Yun-chien Chang and Henry E. Smith would say, these rights do not "run" with the asset.[163] Thus, the advanced degree fails to satisfy the three "essential" points of the descriptive plane.[164]

b. *Professional Degrees on the Normative Plane*

Given that the professional degree scored a *zero* on the descriptive plane, and given that these three points of analysis are essential components of property,[165] there is no need to continue the analysis into the normative dimension.[166] For sake of argument, however, I will recount the normative analysis. There is no right to exclude, or any other right, associated with an advanced degree.[167] However, the misappropriation of *B*'s degree by *C* could arguably injure *B*'s autonomous and economic interests. Thus, an advanced degree would receive a *two* on the normative plane.[168]

C. *Client Lists—Amortization and Trade Secrets*

The final case study of intangible property rights begins with an examination of how the Internal Revenue Service and tax courts resolve whether an intangible asset should be amortized under the Internal Revenue Code. "Historically, when a taxpayer purchased a business, the portion of the purchase price allocated to goodwill was not depreciable."[169] To maximize

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161 *See* N.Y. STATE BAR ASS'N, THE PRACTICE OF LAW IN NEW YORK STATE 19 (2010), *available at* http://www.nysba.org/Content/NavigationMenu/Publications/ThePracticeofLawinNewYorkStatemembersonly/Practice_of_Law_2012-2013.pdf ("[Y]ou must gain admission to the *New York State* Bar in order to practice law." (emphasis added)).

162 For example, one who earns a law degree must "possess good moral character and fitness and successfully complete a written exam" in order to practice law in New York. *Id.* Such requirements focus on the *individual*.

163 *See* Chang & Smith, *supra* note 64, at 26.

164 *See supra* Section I.E.

165 *See* Chang & Smith, *supra* note 64, at 24 (noting "*in rem* status, the right to exclude, and running with assets" as characteristic features of property).

166 *See supra* Section I.E.

167 *See supra* text accompanying notes 161-63.

168 To clarify, I am not implying that courts should not distribute the earnings from an advanced degree among spouses. Rather, I claim that courts would err in reasoning that the entitlement of *A* to *B*'s future earnings flows from a proprietary interest in the advanced degree. In other words, courts could instead rely on equity and fairness principles to distribute these assets.

169 MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 341 (6th ed. 2009).

the amount of money that they could depreciate, taxpayers argued that "they had purchased other intangible assets with a determinable useful life that could be depreciated."[170] One of the seminal cases in this area of law[171] is *Newark Morning Ledger Co. v. United States*, in which the Supreme Court ruled that a newspaper's list of subscribers was not goodwill, but rather an amortizable intangible asset.[172] Although *Newark Morning Ledger* has been superseded by § 197 of the Internal Revenue Code[173]—which allows for the amortization of most intangible assets, including goodwill, over a fifteen-year period[174]—the Court's decision to count the list of subscribers as an intangible asset instead of goodwill illustrates, as in the mail and wire fraud cases, how loosely courts interpret statutory definitions of property.

1. *Newark Morning Ledger Co. v. United States*

In 1976, The Herald Company (Herald) bought a majority of shares in Booth Newspapers, Inc. (Booth).[175] Herald's adjusted basis in Booth was $328 million; Herald allocated $234 million of this to "financial assets (cash, securities, accounts and notes receivable, the shares of its wholly owned subsidiary that published *Parade Magazine*, etc.) and tangible assets (land, buildings, inventories, production equipment, computer hardware, etc.)."[176] Herald then allocated the remaining $94 million to "an intangible asset denominated 'paid subscribers'" ($67.8 million) and into going-concern value and goodwill ($26.2 million).[177] The asset "paid subscribers" was a list of the 460,000 subscribers to the eight newspapers that Booth used to manage, and "the $67.8 million figure was petitioner's estimate of future profits to be derived from these at-will subscribers."[178]

In 1987, the Newark Morning Ledger Co. (the Ledger), a newspaper publisher, merged with Herald, and became its successor.[179] "[The] Ledger

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170 *Id.*

171 *See* Catherine L. Hammond, *The Amortization of Intangible Assets: § 197 of the Internal Revenue Code Settles the Confusion*, 27 CONN. L. REV. 915, 925 (1995) (describing *Newark Morning Ledger* as a "landmark decision"). The question, "Is this property?" also arises in partnership taxation, specifically in I.R.C. § 712 cases. *See, e.g.*, United States v. Stafford, 727 F.2d 1043 (11th Cir. 1984) (discussing whether a partnership interest is taxable property).

172 507 U.S. 546, 570 (1993).

173 *See* GRAETZ & SCHENK, *supra* note 169, at 342 ("There is no longer any incentive to try to distinguish goodwill from other assets since both are now amortizable.").

174 I.R.C. § 197(a), (d) (2006).

175 *Newark Morning Ledger*, 507 U.S. at 549.

176 *Id.* at 549-50.

177 *Id.* at 550.

178 *Id.*

179 *Id.* at 549.

then filed for a refund with the IRS alleging that Herald should have been allowed a deduction for the amortization of the 460,000 paid subscribers," and subsequently sued for a tax refund in federal district court.[180] At trial, the Ledger argued that the list of subscribers was not goodwill (and was therefore amortizable) because its value was ascertainable, and the list had a limited useful life.[181] The government argued instead that the list of subscribers was indistinguishable from goodwill, and therefore nondeductible.[182] The district court ruled in favor of the Ledger, finding that the customer list had a "limited useful life" and an ascertainable value.[183] The Court of Appeals for the Third Circuit reversed, concluding that the customer list was "the essence of goodwill."[184]

The Supreme Court began its analysis by referring to the statutory basis for the decision, which at the time was § 167 of the Internal Revenue Code.[185] The Court wrote, "Section 167(a) of the Code allows as a deduction for depreciation a reasonable allowance for the exhaustion and wear and tear, including obsolescence, *of property* used in a trade or business or *of property* held for the production of income."[186] The Court then clarified that "[s]ince 1927, the IRS consistently has taken the position that 'goodwill' is nondepreciable."[187] As recounted by the Court, the Internal Revenue Service reasoned that goodwill was nondepreciable because it was not susceptible to wear and tear.[188] Thus, the Court held that any "taxpayer able to prove that a particular asset can be valued and that it has a limited useful life may depreciate its value."[189] As such, the Ledger was allowed to depreciate the value of the list of subscribers.[190]

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180 *See* Hammond, *supra* note 171, at 926.

181 *See Newark Morning Ledger*, 507 U.S. at 551 (stating that Ledger estimated the average subscriber would continue to subscribe to Booth newspapers for 14.7 to 23.4 years and that the value of the paid subscribers could reasonably be estimated at $67,773,000).

182 *Id.* at 552.

183 *Id.*

184 *Id.*

185 Congress enacted § 197 after the *Newark Morning Ledger* decision. *See* Hammond, *supra* note 171, at 936-38 (describing *Network Morning Ledger* as the "final step toward permitting the amortization of intangible assets before the enactment of § 197").

186 *Newark Morning Ledger*, 507 U.S. at 553 (emphasis added).

187 *Id.* at 554.

188 *See id.* at 554 n.8.

189 *Id.* at 566.

190 *Id.*

2. Client Lists Under the Property Matrix

Table 6: Client List Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1	Unclear	1

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
1	1	1	1

a. *The Client List on the Descriptive Plane*

Given the language of § 167, the Court implicitly categorized the client list as property by permitting the Ledger to depreciate the value of the list of subscribers.[191] Courts in trade secret cases, however, are often unclear as to whether a client list ought to receive trade secret protection. The willingness of a court to protect the client list often depends on the feasibility of its duplication.[192] This raises the question of whether courts' willingness to grant trade secret protection to a client list indicates the court's belief that client lists are property. In *Ruckelshaus v. Monsanto Co.*, the Supreme Court addressed whether a trade secret constitutes property.[193] The Court reasoned that despite their intangible nature, trade secrets have several of the

191 *See supra* text accompanying note 186.

192 *See* Heartland Home Fin. v. Allied Home Mortg. Capital Corp., 258 F. App'x 860, 862 (6th Cir. 2008) (refusing to protect "information that is openly available on the market at minimal cost"); Sys. Dev. Servs., Inc. v. Haarmann, 907 N.E.2d 63, 76 (Ill. App. Ct. 2009) (holding that the client list of a computer network service provider did not deserve trade secret protection because it was "general information and [wa]s common knowledge to people in the computer service trade or [wa]s otherwise readily available information"); Al Minor & Assoc. v. Martin, 881 N.E.2d 850, 855 (Ohio 2008) (protecting an employer's client list against a former employee's misappropriation by memory); Ed Nowogroski Ins. v. Rucker, 971 P.2d 936 (Wash. 1999) (ignoring the "manner of taking a trade secret"—whether by memory or by written copy—to protect a client list). *But see* DeGiorgio v. Megabyte Int'l, Inc., 468 S.E.2d 367, 369 (Ga. 1996) (ordering the trial court to revise an interlocutory injunction that prevented a party from "utilizing personal knowledge of customer and vender information" because the Georgia Trade Secrets Act only covered tangible client lists); *see also* Avnet, Inc. v. Wyle Lab, Inc., 437 S.E.2d 302, 305 (Ga. 1993) (interpreting the Georgia Trade Secrets Act to protect "tangible" client lists).

193 *See* 467 U.S. 986, 1003-04 (1984) ("We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause [sic] of the Fifth Amendment.").

characteristics of tangible property: a trade secret "is assignable," "can form the res of a trust," and "passes to a trustee in bankruptcy."[194] The Court further reasoned that the "general perception of trade secrets as property is consonant with" the labor theory of property.[195]

Under the first characteristic of the descriptive plane, ownership of a client list does convey upon the owner a set of rights, including the right to exclude, the right to transfer, and the right to make use. There is some ambiguity, however, as the rights derived from ownership of the client list often depend on, or at least correlate to, the confidentiality of the list.[196] In spite of this uncertainty, I give the customer list a *one* on the first point of the descriptive plane.

The current case law makes it unclear whether the rights attached to a customer list are in rem or in personam. Defendants in this type of case are often either former employees, who owed fiduciary or contractual duties to their former employers,[197] or competitors, to whom a principle of fair competition might apply,[198] or who have breached an agreement of confidentiality.[199] Since it is unlikely that a plaintiff will file a claim against a party that is neither a competitor nor a former employee (unlike a property owner seeking to enjoin a trespass, for instance), we are unable to determine fully whether the rights associated with a client list are rights in rem or in

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194 *Id.* at 1002.

195 *Id.* at 1002-03. John Locke first articulated the labor theory of property. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134 (Thomas I. Cook, ed., Hafner Press 1947) (1690) ("Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.").

196 *See, e.g.*, N. Atl. Instruments, Inc. v. Haber, 188 F.3d 38, 44 (2d Cir. 1999) ("A customer list developed by a business through substantial effort and kept in confidence may be treated as a trade secret and protected at the owner's instance against disclosure to a competitor, provided the information it contains is not otherwise readily ascertainable." (quoting Defiance Button Mach. Co. v. C&C Metal Prods. Corp., 759 F.2d 1053, 1063 (2d Cir. 1985))); Delta Med. Sys. v. Mid-Am. Med. Sys., 772 N.E.2d 768, 781 (Ill. App. Ct. 2002) ("[B]ecause a list of [plaintiffs'] customers can be duplicated with little effort, it was an abuse of discretion for the trial court to find that [plaintiff] presented a fair question that its customer 'list' . . . was a protectable trade secret."); *see also Haber*, 188 F.3d at 46 (listing a series of state and federal cases protecting hard-to-duplicate customer lists under New York law).

197 *See, e.g.*, *Martin*, 881 N.E.2d at 855 (recognizing a client list that was used by a former employee as an employer's trade secret despite the absence of a signed noncompete agreement).

198 *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("The question [as to what is unfair competition] is not so much the rights of either party as against the public but their rights as between themselves.").

199 *See, e.g.*, FMC Corp. v. Taiwan Tainan Giant Indus. Co., 730 F.2d 61, 63 (2d Cir. 1984) (per curiam) (affirming a grant of a preliminary injunction to a plaintiff seeking to prevent a former employee from disclosing information on the plaintiff's insecticide products in violation of a signed noncompete agreement).

personam. As such, I withhold judgment in the second category of the descriptive plane.

Lastly, the rights associated with a client list are attached to the list itself and are not vested in the corporation that originally created the list.[200] Therefore, the customer list scores a *one* in the third category of the descriptive plane.

b. *The Client List on the Normative Plane*

Even when courts refuse to grant trade secret protection to customer lists, they do not question the victims' right to self-protection.[201] In other words, a victim has, at least, a privilege-right to self-protection.[202] Interestingly, the Supreme Court in *Monsanto* emphasized that, with regard to trade secrets, "the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others."[203] Accordingly, the right-to-exclude norm explains why courts protect client lists. Similarly, this protection can be understood as within the bundle of rights, as ownership of the customer list conveys not only the right to exclude, but also the right to use and the right to alienate.[204]

The rights conveyed by the ownership of a client list are consistent with the autonomous-interest conceptualization of property. A third party who misappropriates a client list injures the list's owner. If that third party were to duplicate the list (without resorting to unfair competition), or if the owner were to relinquish the list, then (in Kantian terms) it would signal that the owner either did not have full control of the object (it was easily duplicated), or did not effectively exert her will on the object (and therefore voluntarily relinquished it).[205] Courts' examination of the reproducibility, and the measures taken to protect the confidentiality, of the customer list is consistent with the autonomy interest conceptualization. Because a client

200 For instance, in *Newark Morning Ledger*, the issue was whether the Ledger could depreciate the list of subscribers it obtained when it merged with Herald, which in turn had obtained it from Booth. *See* Newark Morning Ledger Co. v. United States, 507 U.S. 546, 570 (1993).

201 Courts emphasize the efforts taken by the client-list owner to protect the confidentiality of the list in determining whether the list owner is entitled to further protection. *See, e.g.*, Liebert Corp. v. Mazur, 827 N.E.2d 909, 921 (Ill. App. Ct. 2005) ("[Plaintiffs] must show they took affirmative measures to prevent others from acquiring or using the information.").

202 *See* Balganesh, *Demystifying*, *supra* note 1, at 613-14 (describing the privilege-right to exclude).

203 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984).

204 *See supra* subsection II.C.2.a.

205 *See supra* Part I.C.

list has "independent economic value,"[206] and protecting a trade secret promotes efficiency,[207] bestowing property rights upon the customer list is also consistent with the economic interest conceptualization. In conclusion, the client list scores a *six* under the property matrix. This case also reveals a potential problem with this kind of categorization: sometimes more information may be necessary to make a judgment. Thus a client list should be considered a medium-strength property.

D. *Organs for Transplant*

Courts have traditionally refused to recognize body parts as property,[208] mainly because courts view the sale of organs and limbs as unconscionable.[209] However, courts have recognized quasi-property interests "that members of a deceased's family ha[ve] over the deceased's mortal remains for purposes of disposal."[210] The scope of this interest is very limited: the only rightful holders are relatives, it gives rise only to a remedial right (the right of sepulcher), and it applies only against converters.[211] Advances in technology,

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206 Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767, 773-75 (2003) (identifying the way in which law firm "client lists may seem to possess the requisite 'independent economic value' to justify protection as trade secrets" but questioning the applicability of trade secrets doctrine to law firm client lists because of the unique ethical obligations of such firms).

207 *See* Jonathan R. Chally, Note, *The Law of Trade Secrets: Toward a More Efficient Approach*, 57 VAND. L. REV. 1269, 1296 (2004) ("[T]rade secrets promote[] efficiency because [they] insure[] that neither the original innovator nor the competitor seeking to obtain the trade secret undertake wasteful activities." (citation omitted)).

208 *See* Erin Colleran, Comment, *My Body, His Property?: Prescribing a Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1204 (2007) (attributing the reticence of courts to recognize organs as property as reflecting a wider societal fear regarding the sanctity of bodily autonomy).

209 Past scholarship has explored the reluctance of social institutions (including courts) to treat body parts as property. In this literature, the unconscionability of thinking of an arm or an eye as property figures as one of the primary reasons for this phenomenon. *See, e.g.*, Charles C. Dunham IV, Comment, *"Body Property": Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 41 (2008) ("The notion of the body as property (or the commodification of the body) raises ethical concerns and challenges the moral integrity and dignity of the body."). This ethical problem disappears when we ignore the act of severing an organ or limb from the holder, and instead think of a body part as a harvested item. While a thorough exploration of the bioethical concerns associated with the application of property principles to the human body is beyond the scope of this Comment, the scholarship on the historical trajectory of, and current debates in, this controversial field is well developed. For an overview of the issues associated with harvested organs, see generally Laura J. Hilmert, Note, *Cloning Human Organs: Potential Sources and Property Implications*, 77 IND. L.J. 363 (2002).

210 Balganesh, *Quasi-Property*, *supra* note 25, at 1897.

211 *See id.* Balganesh refers to the quasi-property interest as a "fiction" that nonetheless

particularly transplant technology, have now further problematized the question of whether body parts constitute property.

1. *Colavito v. New York Organ Donor Network, Inc.*

Shortly after Peter Lucia died, his family decided to donate his kidneys to his friend Robert Colavito, whose own kidneys were failing.[212] The family informed an officer from the New York Organ Donor Network (NYODN) that they were only willing to remove and donate Lucia's kidneys if the kidneys were given to Colavito.[213] Both of Lucia's kidneys were removed postmortem, and one was sent to a hospital in Miami, Florida, near where Colavito lived.[214] The day of the transplant, the physician realized that the kidney was damaged, so his office called NYODN to request the second Lucia kidney.[215] NYODN replied that the second kidney had already been donated to another patient.[216] The doctors subsequently discovered, after Colavito had been sent home, that neither of Lucia's kidneys were compatible with Colavito's antibodies.[217] Among other claims, Colavito brought a conversion claim against NYODN.[218] The district court dismissed the claim, relying on right of sepulcher case law; the court reasoned that it was "against public policy to recognize broad property rights in the body of a deceased."[219]

On appeal, the Second Circuit distinguished the right of sepulcher cases by signaling that in the former, the claim was not one of conversion but rather one of intentional infliction of emotional distress.[220] The court further reasoned that in organ donation cases, "[p]laintiffs such as Colavito

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> had real functional significance, since it enabled relatives to recover damages upon commercial and noncommercial interferences, and located the middle-level principle motivating this right in the idea of possessing the corpse. In keeping with the limited purpose that the interest served, the law came to forbid the conveyance of this quasi-property interest and recognized it to be of no independent pecuniary significance.

Id. (citation omitted).

212 Colavito v. N.Y. Organ Donor Network, Inc., 438 F.3d 214, 217 (2d Cir. 2006).

213 *Id.* at 218.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 219. Despite this discovery, Colavito remained unaware of the incompatibility of the kidneys for approximately one month. *Id.*

218 *Id.* at 220.

219 Colavito v. N.Y. Organ Donor Network, Inc., 356 F. Supp. 2d 237, 246 (E.D.N.Y. 2005), *aff'd in part and question certified to state supreme court* 438 F.3d 214.

220 *Colavito*, 438 F.3d at 223-24.

are not using the term 'property' as a legal fiction upon which to base a claim for emotional harm. They have—or assert that they have—a practical use for the organ, not a sentimental one."[221] The court concluded that "it is arguable that under the New York Public Health Law, a person or entity may have an enforceable property right in a functioning organ."[222] Ultimately, the Second Circuit certified the question to the New York Court of Appeals for resolution of the state law question.[223]

In answering the certified questions, the Court of Appeals of New York ruled that Colavito did not have a conversion cause of action, not because a kidney could not be property,[224] but because Colavito, "as a specified donee of an incompatible kidney," could not "possess the kidney in question."[225]

2. Organs for Transplant Under the Property Matrix

Table 7: Organ Transplant Matrix Analysis

Descriptive		
Rights of a person over a given thing	In rem	Attach to the thing
1	1	1

Normative			
Right to Exclude	Bundle of Rights	Autonomous Interests	Economic Interests
0	1	0	1

a. *Organs for Transplant on the Descriptive Plane*

As illustrated by the trajectory of the *Colavito* litigation, an organ transplant can give rise to rights over the organ. Most important for our analysis is the fact that the Court of Appeals of New York recognizes these rights only if the donee is able to assert dominion over the organ—in other words, if the organ is compatible with the donee.[226] This caveat leaves the organ in a legal-relationship limbo between the time when the donor passes away and

221 *Id.* at 225.

222 *Id.*

223 *Id.* at 232-33.

224 The court refrained from deciding whether and under what conditions a person "may conceivably have acquired rights in the body or organ of a deceased person." *See* Colavito v. N.Y. Organ Donor Network, Inc., 860 N.E.2d 713, 719 (N.Y. 2006).

225 *Id.*

226 *Id.* at 722.

the time before the donee is declared to be a match with the organ.[227] During this period, neither the relatives of the organ donor nor the donee can claim to have a use right over the organ. Nevertheless, because the organ does give rise to a right of possession (among other rights), this case satisfies the first point on the matrix. If the courts were to recognize a property right, this right would be against any other person in the world (not only the would-be converter in right-of-sepulcher cases).[228] An interesting question arises when the decedent's family decides *not* to donate the organ(s). Whose right takes precedence—that of the donee who was originally slated to receive the organ or of the family? Arguably, at least under New York law, the property right of the donee should trump the family's quasi-property right.[229] Finally, the right attaches to the organ itself. Therefore, organ transplants score a *three* on the descriptive plane.

b. *Organs for Transplant on the Normative Plane*

Were a court to recognize property rights in the organ, it would probably recognize the right to exclude others from the organ. But what would this recognition entail in practice? A conversion right is in essence a remedial right guarding one's right to exclude. The court would return to Mary an object stolen by George, thus affirming Mary's right to exclude others from her property. Even so, this instance cannot be understood exclusively under such a theory; as indicated by the reasoning of the Court of Appeals of New York in *Colavito*,[230] it is the right to possess, and not the right to exclude, from which property rights in an organ emanate. Thus, I grant a *zero* in the first category. For similar reasons, however, I grant a *one* under the bundle-of-rights framework.

The application of the autonomous-interest conceptualization is more challenging. One's body parts and organs are too "valuable" and the personhood "invested" in them too strong for the body part and the "original owner" to be severed figuratively even if physically separated.[231] It is unclear what would happen were the donor still alive or the organ cloned. The academic literature on this issue remains unresolved. Some scholars have

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227 The timing issue is further exacerbated by the fact that it is often difficult to define "death" in an ethically satisfying manner. For a depiction of current debates in defining death for the purpose of harvesting organs, see Rob Stein, *A Struggle to Define 'Death' for Organ Donors*, SHOTS: NPR HEALTH BLOG (Mar. 28, 2012, 10:30 AM), http://www.npr.org/blogs/health/2012/03/27/149463045/a-struggle-to-define-death-for-organ-donors.

228 *See supra* subsection II.D.1.

229 *See supra* text accompanying notes 220-22.

230 *Id.*

231 *See supra* Section I.C.

argued that even Kant would recognize property rights in organs in today's world.[232] But scholars who emphasize autonomy interests have refrained from recognizing a property interest in organs.[233] Therefore, I grant a *zero* under the autonomy interest. Conversely however, economic-interest scholars would more likely than not recognize a property interest in organs, even in a world in which the purchase and sale of the organs were forbidden.[234] Allowing donors (or their families) to identify particular donees and limit the transferability of a given organ would probably be welfare-enhancing even if it were not monetarily enhancing, as it would encourage more people to donate. Recall, for example, that the Lucia family was only willing to donate the kidney to their friend. Saying that property rights could be recognized in organs (or other genetic material), however, is not tantamount to approving of their commodification.[235]

In conclusion, organ transplants receive a *five* under the property matrix, and thus should be considered property, though of relatively weak strength. However, the matrix does not differentiate between the deceased donor (who really has no further interest in the organ[236]) and the living donor. In either context, the matrix would likely define the harvested organ as property, even though society has proven split on the use of harvested biological

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232 *See generally* Stephen R. Munzer, *Kant and Property Rights in Body Parts*, 6 CANADIAN J.L. & JURISPRUDENCE 319, 322-41 (1993) (contrasting Kant's explicit objection to the sale of body parts with broad Kantian theoretical approaches to property that suggest the existence of a property interest in a body part).

233 *See* Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 325 (2002) ("Radin is especially concerned about commodification of, and harm to, persons and personhood by the commodification of objects that are constitutive of personhood. She contends that there are strong arguments for considering such objects, which she labels 'contested commodities,' to be non-property, market-inalienable property, or property subject to carefully drawn regulations which limit commodification and protect personhood (i.e., partial market-inalienability)." (footnote omitted)). *But see* Kenyon Mason & Graeme Laurie, *Consent or Property? Dealing with the Body and Its Parts in the Shadow of Bristol and Alder Hey*, 64 MOD. L. REV. 710, 727 (2001) ("Recognising property rights in our person also facilitates further and better respect for individual autonomy . . . .").

234 *See, e.g.*, William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 719 (1995) ("A property right in the body should be recognized because it would serve as an important protection in a world where commercial interests in human body parts already exist."); *see also id*. at 724 ("Recognizing a property right does not mean that the law cannot regulate the subject of that right. For example, an object may be property, and yet there may be a regulation on the disposition and sale of that property.").

235 Still, some scholars have obfuscated the issue. *See, e.g.*, Donald Joralemon, *Organ Wars: The Battle for Body Parts*, 9 MED. ANTHROPOLOGY Q. 335, 344-47 (labeling as "sellers" those scholars who advocate a property rights recognition in body parts).

236 Excluding, of course, any spiritual beliefs that may dictate otherwise.

material from living donors and uncomfortable with the application of property principles to such material.[237]

As holders of weak-to-medium-strength property, the Lucia family should be entitled to (probably) both claim- and privilege-rights. Given the social importance of body parts, however, society would probably want to grant the highest level of protection to them: remedial rights. The matrix does not itself take into account social opprobrium. Courts, however, are free to consider the public interest and other such values when determining the applicability of property principles to organs from living donors. Even if courts conclude that organs are property, the property right may still be limited by other normative values—in this case, ethical and moral concerns.[238]

CONCLUSION

The Supreme Court declared in *Monsanto* that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[239] The continuing inability of scholars and courts to articulate a clear and consistent definition of property, combined with property's centrality to statutory and common law, makes it a powerful device that can be easily devalued by its incorrect usage. In Penner's words, "Deciding that one has property in one's body parts, or that a news service has property in reports of the events of the day, raises profound questions about the *role* the category of property plays in our moral and legal discourse."[240]

The property matrix I describe would help courts address whether a thing is property, as well as concomitant questions about which rights and obligations follow as a result of this determination.[241] Though theorists have long debated the content of property, rapid advances in technology ensure that courts will face these questions more frequently in the future. Current

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237 *See supra* note 209.

238 *Cf.* State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values. They are recognized to that end, and are limited by it.").

239 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

240 Penner, *supra* note 7, at 721.

241 *See* Balganesh, *Demystifying*, *supra* note 1, at 602 ("Characterizing something as a right—absolute or conditional—brings with it certain well-defined legal consequences. Therefore, understanding the basis of such a characterization helps to shed light on the kind of consequences that do and ought to follow.").

debates may center on whether bone marrow,[242] sperm,[243] or email servers[244] constitute property. One can imagine future questions of whether one's brain waves, DNA, and fertilized ova[245] are our property as well.[246] Precedent simply does not establish clear guidelines to approach these issues.

Our difficulty defining property does not lead to the conclusion that it is a hollow concept or that courts may freely employ property to justify their policy choices. The matrix I propose in this Comment would provide courts with a structure for appraising both the existence and degree of property in any given thing. For example, confidential business information receives a *seven* under the matrix; thus, it is a strong property. As a result, the *Carpenter* Court was correct in using the full machinery of the state to protect the *Journal*'s property. By comparison, customer lists, which receive a *six*, should receive a lower level of protection. Thus, it is consistent that the level of judicial protection owed a client list depends on how much its creator protected it—i.e., the list gives rise to a privilege-right. Objects that are not considered property (like advanced degrees) do not give rise to either of these rights (at least not from a propertarian framework).

Absent a framework for assessing property interests, inconsistencies in court decisions risk devaluing property as a concept. Clarifying our sense of property at this juncture is the appropriate way to prevent this devaluation. A first step toward tackling the devaluation of property would be the recognition by courts and scholars that property is difficult (and perhaps impossible) to define in simple, all-inclusive terms. One possible solution to this conundrum is to expand our terminology. The different scores for the case studies in this Comment suggest that there may be varying qualities of property rights: weak, medium, and strong. And courts should grant

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242 *See* Barry Lyons, *'The Good That Is Interred in Their Bones': Are There Property Rights in the Child?*, 19 MED. L. REV. 372, 393-96 (2011) (exploring the applicability of property principles to bone marrow).

243 *See* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 84-87 (1998) ("[C]ourts have generally faced the issue of whether sperm is property under more difficult circumstances—after the death of the donor—without reaching conclusive results.").

244 Intel Corp. v. Hamidi, 71 P.3d 296, 308 (Cal. 2003) (refusing "to create a fiction of injury to the communication system").

245 *See generally* Deborah Kay Walther, *"Ownership" of the Fertilized Ovum in Vitro*, 26 FAM. L.Q. 235 (1992).

246 *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (recognizing "[s]perm which is stored by its provider with the intent that it be used for artificial insemination" as property under California's Probate Code); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) ("[P]reembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category . . . ."). *See generally* Jonathan F. Will, Comment, *DNA as Property: Implications on the Constitutionality of DNA Dragnets*, 65 U. PITT. L. REV. 129, 139-41 (2003).

different rights in accordance with the quality of the property interest at stake. In other words, weak, medium, and strong quality property interests give rise to different sets of privilege-, claim-, or remedial rights. The strongest forms of property ought to be protected by all three such rights, while weak property should only be protected by claim-rights.[247] It is through this dual system of appraisal—an analysis embedded in the property matrix—that courts and scholars may at once decide *what is property* and *to what degree*. Thus, the matrix preserves the utility of "property" in the process.

247 *See supra* text accompanying notes 60-63.