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A Real-Property Model of Privacy

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A REAL-PROPERTY MODEL OF PRIVACY

G. Alex Sinha*

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Privacy has been a significant subject of scholarly attention for decades, but it has never been more confusing than it is today. As myriad social pressures inexorably corral an ever-growing share of the world's population down the digital rabbit hole, more and more people become both users and targets of new technologies. The complexity of these technologies and their unprecedented interactions with one another have completely outstripped the ability of the populace as a whole to understand the privacy implications of our new and shifting reality. Confronting privacy questions in this context is all but paralyzing.

This Article offers a new framework for the conception of privacy and privacy rights, which simplifies privacy questions in a hopelessly complex environment and provides a basis for strengthening privacy rights. That framework is built on a realist view of property rights, which serves the critical analogical functions of clarifying our relationship to our privacy interests and offering steadying guidance for addressing privacy questions that appear blurred by rapid technological advancement. It is both notable and counterintuitive that to modernize our theoretical understanding of privacy may require us to embrace a model built on the real-property regime, which is classically characterized by its adherence to long-standing, even arcane, common-law rules.

INTRODUCTION

In June of 2018, the Supreme Court decided *Carpenter v. United States*, a highly-anticipated case concerning the Fourth Amendment implications of cell phone users' cell-site location information (CSLI). Whether for placing calls, sending or receiving messages, downloading content, or in service of various other features, cell phones routinely connect to nearby radio antennas known as "cell sites," sometimes as often as several times per minute. Each connection generates a time-stamped record that is maintained by the phone's service provider; collectively, these records constitute CSLI. Pursuant to industry practice, service providers typically maintain CSLI for five years.¹ The generation and maintenance of CSLI can therefore create a detailed map of the location of a cell phone over a several-year period.²

In *Carpenter*, prosecutors obtained over four months' worth of CSLI for a criminal defendant's phone, and used the nearly 13,000

1. *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018).

2. The precision with which CSLI can reveal the location of a phone varies in part with the concentration of cell sites in a given area. Mr. Carpenter's data placed his phone "within a wedge-shaped sector ranging from one-eighth to four square miles." *Id.* at 2218.

location points contained in those records to argue that the defendant was near a series of RadioShack locations at the time they were robbed. Prosecutors did not first obtain a warrant for Mr. Carpenter's CSLI; instead, they acquired the records under a less demanding standard through the Stored Communications Act (SCA).³ Noting that CSLI can be collected "at practically no expense"⁴ and provides "near perfect surveillance"⁵ of a person's historical location, the Court held that individuals "maintain[] a legitimate expectation of privacy in the record of [their] physical movements as captured through CSLI."⁶ As a result, "accessing seven days of CSLI constitutes a Fourth Amendment search"⁷ and requires a warrant supported by probable cause.

Justice Gorsuch dissented. The majority observed that, "For much of our history, Fourth Amendment search doctrine was 'tied to common-law trespass' and focused on whether the Government 'obtains information by physically intruding on a constitutionally protected area,'"⁸ and Justice Gorsuch counseled a return to that approach. Rather than consider whether Mr. Carpenter had an expectation of privacy in his CSLI, per *Katz v. United States*, Justice Gorsuch argued for a "more traditional" Fourth Amendment analysis of CSLI, under which the Court would consider whether Carpenter has a property right in the records of his phone's location.⁹ Notwithstanding the fact that a third-party phone service provider is the creator of such records, Justice Gorsuch suggested that Carpenter might still have prevailed under a property analysis.¹⁰

It is no accident that the loci of constitutional privacy rights are, by and large, pieces of property (specifically houses, papers, and effects¹¹). Any compelling theory of privacy must protect certain property. But Justice Gorsuch's dissent gestures at a broader truth: Even to the extent that privacy reaches beyond the realm of property, it is best

3. 18 U.S.C. § 2703 (2012 & Supp. V 2018).

4. *Id.* at 2218.

5. *Id.*

6. *Id.* at 2217.

7. *Id.* at 2217 n.3.

8. *Carpenter*, 138 S. Ct. at 2213 (quoting *United States v. Jones*, 565 U.S. 400, 405, 406 n.3 (2012)).

9. *Id.* at 2272 (Gorsuch, J., dissenting).

10. *Id.* ("It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law.") (emphasis in original). *But see* Orin Kerr, *How Should an Originalist Rule in the Fourth Amendment Cell-site Case?*, WASH. POST (June 13, 2017), https://www.washingtonpost.com/amhtml/news/volokh-conspiracy/wp/2017/06/13/how-should-an-originalist-rule-in-the-fourth-amendment-cell-site-case/?__twitter_impression=true (expressing skepticism that Carpenter would possess property rights in the CSLI at issue).

11. U.S. CONST. amend. IV.

understood on a property model—whether under constitutional law, common law, statutory law, or human rights law. This Article makes the case for that novel proposition by articulating a theory of privacy and privacy rights modeled on the real-property regime.¹²

More specifically, this Article argues that “privacy” describes the state of a domain or private sphere—akin to real property we might own, but not entirelyly physical—that encompasses certain important personal interests extending above and beyond the mere economic. That domain includes both material objects (such as our bodies and certain real and personal property) and immaterial concepts (including certain liberties and our reputations).

This Article then appeals to property rights in a new way: It is not that we “own” our privacy or private matters in the way that we own property (even though we simultaneously own certain property that is considered private). It is that rights to policing our private spheres are more readily understood on the model of rights in real property—that is, as rights to exclude others (or not) from the private domain, rights to alienate items within that domain, and rights to enjoy that domain.¹³ Adopting this model has a variety of significant theoretical and practical benefits analyzed below.

Although a number of legal scholars have explored connections between privacy rights and property rights, those scholars generally argue that subcomponents of our privacy (especially private data) should be treated as if they are *actually* our personal property.¹⁴ Within the narrow confines of the question before the *Carpenter* Court, that is essentially what Justice Gorsuch advocates in his dissent.

12. By contrast, much of the literature focuses on the notion of *privacy* to the exclusion of *privacy rights*. See, e.g., Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002) [hereinafter Solove, *Conceptualizing Privacy*]; Ruth Gavison, *Privacy & the Limits of Law*, 89 YALE L.J. 421 (1980); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323 (1975); Andrei Marmor, *What Is the Right to Privacy?*, 43 PHIL. & PUB. AFF. 23 (2015).

13. I adopt the typical definition of the term “real property”: Land, and structures on land that cannot readily be moved, such as buildings. *Real Property*, L. DICTIONARY, <http://thelawdictionary.org/real-property/> (last visited Sept. 4, 2017). A major reason for relying on real-property rights rather than personal- or intellectual-property rights is the historical relationship between real property and privacy, as well as the analogical utility of real property for conceptualizing the private sphere. Yet another reason is the strictness of penalties for trespasses on real property, as discussed further below.

14. See, e.g., Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2056 (2004) (identifying a “model of propertized personal information” that could support a market in personal data); Mark A. Hall, *Property, Privacy and the Pursuit of Integrated Electronic Medical Records*, 95 IOWA L. REV. 631, 631 (2009) (focusing on the question of who owns a patient’s medical records); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1287–88 n.19 (2000) (collecting articles on the notion that people should own data about themselves).

Such analyses are not intended to capture the whole of privacy (let alone privacy *rights*), and they are often premised on economic considerations—driven by the idea of property as an asset with monetary value. Because private information can be economically valuable, it is not difficult to imagine a market for selling it, just like property. Additionally, because one can have privacy interests in one's property, some connection between the two is manifest. For example, my privacy interests in the content of a personal letter are arguably bound up with my property interests in the letter itself.

Yet a typical understanding of privacy also comprises non-property, including more abstract notions, such as one's reputation, or one's liberty to make particular personal or familial decisions. Those items are less obviously suitable to be treated as actual property, even if we focus on economic considerations alone. Moreover, as explained below, economic analyses do not exhaust the value of property, nor do they strike at the heart of privacy.¹⁵ Indeed, even the Fourth Amendment protects "[t]he right of the people to be secure in their *persons* . . . against unreasonable searches. . . ."¹⁶ We do not "own" our person in the same sense that we own our houses, papers or effects. The very text of the Fourth Amendment therefore suggests that privacy rights cannot be understood *literally* as property rights so much as structurally similar to property rights.

This Article therefore draws on property rights for their theoretical suitability, power to simplify privacy questions, and social justice implications when used to model our understanding of privacy and privacy rights. The analysis that follows explores the powerful explanatory force of the property-rights system for capturing a full range of perceived privacy violations. The model also simplifies complex privacy questions in several respects: It allows us to visualize all privacy violations on a physical model, even in intangible domains like cyberspace; it allows us to categorize and interpret privacy violations based on clear rules from the property context; and it channels common, normative intuitions about the proper strength of privacy rights by drawing explicitly on a famously potent rights regime.

This Article comprises three Sections. Section I defends the notion of the private sphere, a common but controversial idea in the privacy literature. This Section draws on the work of noted privacy scholar Daniel Solove¹⁷—a critic of the private sphere—to define the concept

15. Slippage in the other direction is possible as well: One can have interests in property that are not in any meaningful way tied to one's privacy.

16. U.S. CONST. amend. IV.

17. Solove, *Conceptualizing Privacy*, *supra* note 12.

via a two-step analytical process that first identifies a *prima facie* private sphere and then identifies a true private sphere. Section II develops the real-property model for understanding privacy rights as rights to exclude, alienate, and enjoy.¹⁸ Section III discusses the key implications of adopting a real-property model of privacy rights. Those implications include certain advantages of the model, such as its simplicity and suitability for rendering comprehensible privacy questions related to cyberspace, as well as its favorable implications for enforcement of privacy rights. Section III also explores the explanatory power of the real-property model for common, intuitive misgivings about the third-party doctrine, the famous evidentiary rule that has come under increasing scrutiny in the digital age. Lastly, Section III discusses several important respects in which privacy and real property differ. The Article then concludes by briefly considering the limits of a real-property model of privacy.

I. THE PRIVATE SPHERE

The existence of a private sphere is heavily disputed among privacy scholars.¹⁹ Although many theorists write in terms that suggest their recognition of such a domain,²⁰ others reject the idea.²¹ Some scholars also interpret privacy or privacy rights as a matter of control, whether over personal information or over private matters more broadly conceived.²² For those who accept a control view, the private sphere offers a natural shorthand for denoting the matters over which one should have control.

18. Crucially, this account of privacy rights is compatible with more or less any view of the private sphere, and thus it stands immune to many of the objections one might raise to the argumentation in Section I.

19. For a helpful catalog of theories of privacy, see Solove's impressive collection and categorization of theories in Solove, *Conceptualizing Privacy*, *supra* note 12.

20. See, e.g., Arnold Simmel, *Privacy Is Not an Isolated Freedom*, in NOMOS XIII: PRIVACY 71, 72 (J. Ronald Pennock & J.W. Chapman eds., 1971) ("The territory that we claim as our private sphere varies with the adversary we face."); Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315, 316 (1975) ("I shall refer to these laws and conventions as defining a 'zone' or 'territory.'"); see also HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND INTEGRITY OF SOCIAL LIFE* 94–96 (2010) (noting other scholars who take a similar view).

21. See Solove, *Conceptualizing Privacy*, *supra* note 12, at 1131–32 (observing that "the metaphor of space has significant limitations," and that "[w]e can avoid allowing the metaphor of space to limit our understanding of privacy").

22. See *id.* at 1109–15 (discussing views of privacy defined in terms of control over information); see also Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 279 (1974) ("Fried, Miller, Gross and others were correct to define privacy as a form of power or control over something."); Marmor, *supra* note 12, at 3–4 (arguing that privacy is "grounded in people's interest in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others").

Yet debates about privacy are often muddled. There is a manifest distinction between privacy and privacy rights.²³ That distinction is not often made clearly, and its absence can lead to confusion. Certain theories treat *privacy itself* as concerning control over certain sensitive matters, such that loss of control is itself a loss of privacy.²⁴ Others treat *privacy rights* as rights of control, independently of the question of what qualifies as private.²⁵ Criticisms of control views can reinforce the confusion by similarly omitting the distinction. Although some critiques seem to reject the notion that *privacy itself* is a matter of control, they do not always make their stance clear.²⁶ Other criticisms of control accounts are ambiguous as to which idea they reject.²⁷

This Article defends the view that *privacy rights* are rights of control over access to and interference in the various domains that collectively constitute the private sphere, whether those domains are physical, mental, digital, or informational. As argued in Section II, the rights of control over the private domain closely resemble major categories of real-property rights and should be understood on a similar model. *Privacy* is the state of one's private sphere (or, depending on the context, the state of some portion of one's private sphere)—namely, whether and to what extent the private sphere has been compromised by others.²⁸ The value of privacy becomes apparent through an examination of the ways in which we choose to exercise our privacy rights to control the borders of the private sphere.

But why accept the idea of a private sphere paired with a control view of privacy rights? One approach to examining privacy might be to canvass the interests that society seems to denote as private in an attempt to locate a common thread. This appears to be what noted privacy scholar Daniel Solove refers to as the “traditional method.”²⁹ Of the various challenges posed by that approach, one is especially salient: Identifying the subjects of privacy interests at the broadest

23. That distinction applies to the subject of more or less any rights. Privacy rights protect our interests in privacy, just like property rights protect our interests in property.

24. E.g., Parker, *supra* note 22.

25. E.g., Marmor, *supra* note 12; Rachels, *supra* note 12.

26. See, e.g., Gavison, *supra* note 12, at 427 (discussing problems with understanding privacy both as a matter of weak control and as a matter of strong control); Thomson, *supra* note 12, at 304–05 n.1 (taking aim at Parker's view of privacy—not privacy rights—being defined in terms of control).

27. See Solove, *Conceptualizing Privacy*, *supra* note 12, at 1109–15 (describing various challenges to control-over-information accounts that do not hinge on the distinction between accounts of privacy and accounts of privacy rights).

28. It is not entirely clear how this view would be classified under Solove's taxonomy. See generally *id.*

29. *Id.* at 1095–96.

level does not necessarily reveal much about how to understand *privacy rights*; even an uncontroversial list of interests could warrant protection in a variety of ways. I propose instead to work in the other direction, in what might be characterized by Solove as a variation on the traditional method. By considering whether there is a common thread in cognizable privacy *violations*, we may reveal structural features of privacy rights that could inform the sorts of interests that should be protected as private as a matter of theoretical consistency.

Solove has developed a thorough taxonomy of privacy violations that serve this purpose nicely.³⁰ A review of those violations reveals a common thread explicable in terms of rights to police a self-regarding domain, most notably by regulating the access of others. Solove identifies four broad categories of legally-recognized privacy intrusions: information collection, information processing, information dissemination, and invasion.³¹ According to Solove, information collection covers violations pegged to surveillance and interrogation.³² Information processing comprises violations related to the aggregation of data, identification of the people that various data concern, data insecurity, secondary use of data (or the use of data for a purpose other than for which it was provided), and “exclusion” (or “the failure to provide individuals with notice and input about their records”).³³ Information dissemination encompasses breaches of confidentiality, improper disclosure of information, exposure (a variation of improper disclosure), increased accessibility of information (which increases the chances of an improper disclosure), blackmail, appropriation (of another’s identity), and distortion (of one’s reputation).³⁴ Finally, invasion includes intrusions into “a private realm” and interference with personal decisions.³⁵

All of these sorts of violations can be understood in terms of the notion that there is a zone around each individual over which she is entitled to control access or use—whether the zone is defined to encompass certain types of data or freedom to make certain decisions without interference. Notably, most of the violations concern access or the threat of access to information. This suggests that we should think about privacy rights as rights of control over a private domain; and

30. See generally Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

31. *Id.* at 478.

32. *Id.* at 491, 499.

33. See generally *id.*

34. See generally *id.*

35. *Id.* at 548–49, 553.

that domain, in significant part, should encompass sensitive information.³⁶

There are numerous ways of defining the contours of the private domain. It is possible to pair any number of accounts of the private sphere with the real-property analysis offered in Section II. But the very nature of a control account of privacy rights points to some helpful parameters for identifying the private domain. A primary reason that control is valuable, if it is, is that it is empowering to us as agents. Moreover, the interests typically protected or advanced by privacy are closely linked to human agency. For example, Ruth Gavison suggests that we claim privacy across varied situations for similar reasons, including "promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society."³⁷ Andrei Marmor defends a view of privacy "grounded in people's interest in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others."³⁸ James Rachels locates the value of privacy in large part in "our ability to create and maintain different sorts of relationships with different people."³⁹ All of these theorists appear to see privacy as serving our ability to set the terms on which we engage with each other and the world at large. On a control account, it is plausible that privacy serves to empower us as agents, and the private sphere should encompass zones where regulating access is of special normative significance in doing so.⁴⁰ The view defended here is therefore an agency-oriented view of privacy paired with a control view of privacy rights.

36. It is worth noting that Solove's review of various theories of privacy seems to substantiate this result. See generally Solove, *Conceptualizing Privacy*, *supra* note 12. That review breaks down into six different categories: the right to be let alone, limited access to the self, secrecy, control over personal information, personhood, and intimacy. *Id.* at 1092. The distinctions among some of these categories are arguably rather thin for all are at least superficially and obviously explicable in terms of control over access to oneself, one's relationships or one's information. The label for the "personhood" category may not be self-explanatory, but upon closer examination, it fits the same pattern. Solove identifies two strands of "personhood" theories: one based around individuality, dignity, and autonomy, and another oriented around anti-totalitarianism. *Id.* at 1116. According to Solove, personhood theories concern the "protection of the integrity of the personality," which touches upon, *inter alia*, "what aspects of the self should be limited, or what information we should have control over." *Id.* Once more, the notion of control figures prominently.

37. Gavison, *supra* note 12, at 423.

38. Marmor, *supra* note 12, at 3-4.

39. Rachels, *supra* note 12, at 326.

40. As discussed further below, Marmor is wary of defining the value of autonomy in terms of privacy, arguing that, "[i]f you equate the right to privacy with the right to personal autonomy, you just admit that no particular interest in privacy exists that is worthy of protection, distinct from the much broader and, admittedly more important right to personal autonomy." Marmor, *supra* note 12, at 25. If privacy serves a distinctive feature of autonomy, however, this objection

A. *The Prima Facie Private Sphere*

As an initial step, let us designate as “*prima facie* private” any zone the intrusion upon which has especially important implications for our agency—that is, how we set the terms on which we engage with the world. This formulation is necessarily rough and leaves space for disagreement about what it encompasses, but it will serve as a starting point.

At a minimum, the *prima facie* private sphere captures our mental processes (like thoughts, memories, and intentions); our bodies; our homes and certain sensitive personal effects (like computers and phones); and certain information about us (especially, but not exclusively, information that bears on our mental processes, bodies, and sensitive personal effects).⁴¹ Mental processes constitute the heart of our agency and thus warrant special protection on an agency-driven account of privacy. Our bodies provide our fundamental means of confronting and maneuvering about the world. Sensitive property (like homes, phones and computers) gives us zones or tools to form intimate bonds with others, to explore ideas, and to develop our personalities. Finally, certain information (such as health information), when held by others, can have especially far-reaching implications for our freedom to pursue various goals and projects in the world.⁴² It may well be the case that additional items are *prima facie* private, but we may set those aside for present purposes.⁴³

is not necessarily troubling. That is precisely the view taken here—namely, that the various strands of privacy are bound together by distinctive and common features.

41. On this view, certain famous—or perhaps notorious—court cases concerning rights to regulate our bodies are properly decided as a matter of privacy, as discussed *infra* notes 63–64.

42. There is some overlap among these categories, especially to the extent that accessing certain domains (such as examining another’s body or personal effects) reveals information that can be private. As articulated here, this list would likely trigger an objection from scholars like Solove that specificity is lacking. See *infra* Section I.D. It is perfectly true that a further level of detail would be important for applying a theory of privacy, but rendering that level of detail is not the purpose of this Article. I contend that it is possible to flesh out the list significantly (albeit, perhaps, not without controversy) in a manner that substantially blunts Solove’s vagueness concerns. At the very least, there is no reason to doubt the possibility of elaborating on this list further. However, at this point, the purpose of presenting the list is simply to outline the domains that present privacy considerations so that it is possible to make sense of the real-property model presented *infra*. The areas listed here conventionally fall at least in part within the private domain, and, as argued here, there is a good reason for that. Accepting that these categories contain private items—whether *arguendo* or because the agency-oriented account is compelling—is adequate to move the instant analysis forward.

43. Although the protected subdomains are defined by their influence over human agency, it does not follow that any single invasion of a domain that is *prima facie* private in fact has devastating effects on our agency. Like many rights we have, the depth of harms caused by violations can vary from the trivial to the catastrophic. Part of the virtue of understanding a control account in this way is that it allows us to conceptualize the private sphere as composed of categori-

Some items that are *prima facie* private are intrinsically connected to human agency, such as one's mental processes. For example, manipulating another's thoughts would interfere in a fundamental way with that person's agency and therefore would constitute a *prima facie* violation of one's privacy.⁴⁴ Other matters are *prima facie* private because of contingent facts, such as social practices. Consider the example of Social Security numbers, which are a purely social construction that serve to identify individuals and thereby provide access to important rights and benefits. Loss of control over one's Social Security number can compromise the ability to access not just those rights and benefits, but even one's identity in other various interactions.

Some items that are *prima facie* private may be difficult to classify as intrinsically or contingently significant. Certain facts about one's body or health status might seem to qualify. For example, the dissemination of particular health information can lead to social stigma, and those facts might be *prima facie* private only because of how they are perceived in a given time and place.⁴⁵ As a result, such facts might seem to warrant *prima facie* privacy protection only for contingent reasons. Yet some information about one's body or health can inherently reveal important information about one's agentic capacities and processes (independently of any additional stigma)—such as whether a person suffers from certain cognitive impairments—objectively undermining one's ability to engage socially with others.

Prima facie private designations for physical spaces and personal property might also seem difficult to classify, though such domains are likely to be intrinsically linked to human agency.⁴⁶ It is hard to imag-

cal subdomains (rather than as comprising individual matters), which provides some measure of clarity in discerning the boundaries of another's private sphere.

44. As discussed below, however, overt or explicit manipulation of another's thoughts probably cannot fall within the true private sphere for reasons of practicality. See *infra* Section I.B.

45. Stigmatizing information is among the most sensitive information about us precisely because it so seriously affects our ability to engage with the world. The notion that protection of reputation is a matter of privacy is widely recognized in the law, as well. For example, there are privacy torts aimed at protecting reputation, such as false light. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (listing false light as one of four privacy torts). Reputation is also protected under the heading of privacy as a matter of human rights law. See International Covenant on Civil and Political Rights art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 171 (barring "unlawful attacks" on one's "honor and reputation").

46. That real property can constitute part of one's private sphere presents an analytical opportunity when combined with the fact that the account presented here models privacy rights on real-property rights. Those propositions jointly imply that certain forms of real property can serve as a partial or miniature representation of the private sphere. The most salient form of real property that falls within the private sphere is one's home, although that is not necessarily the only example. The property rights regime protects a number of interests beyond privacy. See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005) (offering an account of the value of property without once mentioning the word "privacy"). But

ine a life devoid of private physical domains, such as a living space out of the public eye or a vessel (whether material or digital) for the expression of our most closely-held doubts, insecurities, and aspirations. It seems obviously true that such domains are truly integral to the exercise of human agency, for they offer us the opportunity to flourish largely unburdened by the social demands of the community. That includes the freedom to express sentiments or explore ideas without the risk of social judgment; the power to forge intimate relationships with others that are defined, in part, by their exclusive nature;⁴⁷ the opportunity to craft a public face for engaging with the world (whether through experimentation with modes of dress or speech, or otherwise); a venue for rest and the management of one's personal physical and emotional needs; and the chance to develop a free-standing identity. Perhaps, however, we have been conditioned by reasonably widespread access to such domains to think they are essential. Perhaps, that is, it would be possible to thrive under different social conventions that result in substantially less physical privacy.⁴⁸

For our purposes, it is not especially important whether anything designated as *prima facie* private belongs there inherently or contingently. It is worth noting, however, that permitting contingent items in the *prima facie* private sphere will result in a conception of that sphere that varies to some extent across time and place. Similarly, the significance of certain privacy intrusions may also differ as a result of social conventions. The flexibility to accommodate such changes is a virtue in a theory of privacy.

B. The True Private Sphere

As a second analytical step, we may now designate the *actual* private sphere. Not everything that is *prima facie* private falls into the

real-property rights also protect our privacy to a substantial degree because the home is such an important part of the private sphere. See *infra* Section III.B.

47. As discussed below, selectively sharing private information can be deeply empowering, for entrusting others with such information can be essential to forging especially deep and lasting bonds. See generally Rachels, *supra* note 12 (focusing on the role of privacy in forging and managing significant social relationships).

48. For example, social conventions concerning access to and use of physical space have changed significantly over time. See, e.g., Katrin Schatz Byford, *Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment*, 24 RUTGERS COMPUTER & TECH. L.J. 1, 32 (1998) (noting some significant developments during the Renaissance); Solove, *Conceptualizing Privacy*, *supra* note 12, at 1137-40 (discussing the history of the home). History may reveal that we are in fact adaptable with respect to our ostensible need for physical privacy, although the mere fact that social conventions may have significantly limited our physical privacy in the past will not be sufficient to support such a conclusion. It may be the case that, in societies characterized by more limited physical privacy, individuals simply persisted in a suboptimal state, subject to artificial and unfortunate limitations on the exercise of their agency.

true private sphere, but everything within the true private sphere will also be *prima facie* private. The private sphere therefore comprises a subset of that which is *prima facie* private. Specifically, the true private sphere includes *prima facie* private items: (1) over which we have not given up control or (2) over which there are no other decisive reasons to restrict our ability to assert privacy protections.

Regarding the first limitation, if I sufficiently publicize information about myself that is *prima facie* private, that information will no longer qualify for inclusion in the true private sphere; under the proper circumstances, I will have waived my rights to control access to that information (or alienated that information, to use the property analogy drawn out below), and therefore I will have pushed the information out of my true private sphere.⁴⁹

The second limitation is more complicated but no less important. One compelling reason to exclude a matter that is *prima facie* private from the true private sphere is that it is essentially impossible to give agents rights of control over such a matter. Consider the notion that one's thoughts and memories are *prima facie* private. I take this to be reasonably uncontroversial; absent special circumstances, like being placed under oath or bearing a special relationship to someone posing a question to us, the outside world is not generally entitled to have free access to our recollections, opinions, or intentions. Those elements of our mental process are not only *prima facie* private; they also fall within the private sphere. Compelling someone to reveal those types of items—such as through a coerced polygraph exam—would typically amount to an invasion of privacy.⁵⁰

But consider the private enjoyment of one's own mental domain. On the view laid out above, forcing one's way into another's thoughts or causing them to relive unwanted memories may be an invasion of a *prima facie* private domain. After all, it can involve imposing on one of the identified zones without permission or invitation. It can even have deep implications for the exercise of human agency. Imagine a young woman working through the painful trauma of experiencing a miscarriage. Suppose she suffered an early-term loss, and she has revealed neither the pregnancy nor the loss to anyone else. By chance, as part of a promotion run by a local store, she receives coupons in the

49. An exploration of the conditions for relinquishing control over matters that are *prima facie* private is extremely important for answering privacy questions in the digital age, but it is also an extended and lengthy exercise best reserved for a subsequent article.

50. A well-known fictional example might be "legilimency" from the *Harry Potter* stories, a magical method for accessing another's thoughts or memories. See generally J. K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* (2003).

mail for baby formula.⁵¹ It is not difficult to imagine that the receipt of those coupons might trigger debilitating memories for the young woman. Many may nevertheless resist treating a case like this one as a violation of privacy—that is, as an invasion of the private sphere.

One compelling explanation is that, although there has been an uninvited intrusion into the woman's *prima facie* private domain, social realities render it effectively impossible in most instances for us as agents to assert the violation of our rights over unwanted impositions on our thoughts.⁵² Mental solitude might require physical and social solitude, which are rare and possibly undesirable for other reasons. Under radically different circumstances—perhaps if individuals were routinely segregated from each other and could actually screen out unsolicited contact with others—the private sphere might encompass the young woman's situation. As the world is presently configured, to regard such intrusions as violations of the true private sphere would fundamentally complicate our view of rights by suggesting the existence of rights that cannot be vindicated in any meaningful way.⁵³

Other compelling reasons (including overriding moral reasons) might exist for excluding matters that are *prima facie* private from the actual private sphere. Reproductive rights serve as a controversial but illustrative example. On the account proposed here, a pregnant woman's choice to terminate a pregnancy would be *prima facie* private because it concerns her treatment of her own body—in a medical context no less. Those who believe that the termination of a pregnancy is murder might claim that the moral significance of a termination renders the choice to terminate a non-private matter.⁵⁴ Under this view, the choice would arguably be excluded from the private sphere because of overriding moral concerns. Similarly, a society that places significant value on freedom of speech might limit the ability of individuals to constrain the dissemination of shared *prima facie* private information, such as details about a private relationship between two people that one of the two wishes to publish.⁵⁵

51. To screen out confounding factors that might trigger misleading intuitions about the privacy interests at stake, it is important for the purposes of this example that the young woman receives the coupons by chance, rather than being targeted. We can stipulate that the company never obtained information about the young woman's pregnancy.

52. Others might argue that this is not relevant to privacy at all because the company mailing out the coupons does not know the young woman was pregnant. Part of the point of this analysis is to suggest that such a conclusion is mistaken.

53. At the same time, classifying the case as one involving an intrusion upon the young woman's *prima facie* private sphere empowers us to explain why it is unfortunate.

54. This is not my view; I offer it only as an example.

55. Helen Nissenbaum has argued that "what bothers people" about current information-gathering practices "is not that they diminish our control and pierce our secrecy, but that they

There can be good faith disagreement over whether matters are merely *prima facie* private or fall also within the private sphere. Those disagreements may turn on different assessments of whether someone has waived control over a matter or whether a stated purpose for treating a *prima facie* private matter as non-private is sufficiently weighty. Additionally, to the extent there is a “correct” answer in such disputes, that answer could change over time. In fact, this formulation generally allows for some variation across time and place on that which is deemed worthy of protection as a matter of privacy. As new modes of engaging with the world as agents become available—for example, through the rapid evolution of digital technologies—the contours of the *prima facie* private and the private sphere will necessarily shift. I nevertheless take it as true that *some* private domain is essential for agents in any given time or place. It is of course possible to imagine a dystopian society where there is no such thing as a private sphere, but that society would be composed of fundamentally crippled agents.⁵⁶

In any event, I propose a working definition of the private sphere for the following analysis that captures (to the extent possible, within the guidance above) the mind, the body, certain sensitive or personal information, and pivotal property that plays a significant role in setting the terms on which we engage with the world (e.g., homes, cell phones, computers, books, and so forth). As noted above, the real-property model of privacy described in Section II can make sense of a range of control accounts of privacy; it is not essential to accept the view of the private sphere defended in this Section. There are a variety of reasons for which one could favor different conceptions of the private sphere. For example, on the view of the private sphere outlined here, privacy is intrinsically valuable because it empowers us as agents at a basic level. Even the choice to give up one’s privacy can be empowering. That may not be true for just any account of the private

transgress context-relative informational norms.” NISSENBAUM, *supra* note 20, at 186. That view is fundamentally at odds with the view defended here, but the space between the *prima facie* private sphere and the true private sphere allows those compelled by Nissenbaum’s view to graft their intuitions about norms onto a control view of privacy rights. One could accept the view that sufficiently meritorious context-relative informational norms limit those *prima facie* private items that also appear in the true private sphere.

56. This two-step analysis—separately delineating the *prima facie* and true private spheres—may render my approach more compatible with Solove’s. In *Conceptualizing Privacy*, Solove argues for a “pragmatic approach” to privacy to minimize disruptions to key social practices. See Solove, *Conceptualizing Privacy*, *supra* note 12, at Part II. Although Solove might prefer to reject the notion (defended here) that there is a single overarching purpose to privacy, it is conceivable that the practices he is concerned about could be used to identify the subset of *prima facie* private matters that make the cut into the true private sphere.

sphere. The key point is that the private sphere should encompass sub-domains over which dominion is central to the vindication of the values served by privacy. A different understanding of the function of privacy would lead to a different understanding of the private sphere.

C. *Competing Views of the Private Sphere*

Competing accounts of the private sphere help provide context for the foregoing and can also be understood via a two-step analysis. Consider the account developed by James Rachels. Rachels examines the idea that “there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people.”⁵⁷ By his own terms, Rachels appears to endorse some version of a “control” account of privacy rights, although he provides somewhat less detail on what control entails. Rachels’s view implies a private sphere consisting of information the control over which is crucial for managing our social interactions.

In fairness, Rachels acknowledges other values of privacy, and presumably would therefore recognize other matters as falling within the private sphere, but his focus is on the social dimension of privacy.⁵⁸ Imagine, for the sake of argument, if Rachels believed that autonomy with respect to social interaction is the only meaningful value vindicated by privacy. That view could be fitted with the theoretical framework laid out above. It would take the form of a narrower conception of the private sphere than I have defended, over which some form of control is crucial in service of a particular value.

Andrei Marmor has recently put forward such an account. As noted briefly above, on Marmor’s view, privacy is “grounded in people’s interest in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others.”⁵⁹ This is also a narrower understanding of the virtue of privacy than I have defended, and it is built around the dimension of privacy explored by Rachels.

Marmor and I disagree rather substantially. Whereas I have linked privacy to autonomy in a direct way, Marmor explicitly warns against conflating privacy and autonomy.⁶⁰ Marmor argues that, if “you equate the right to privacy with the right to personal autonomy, you

57. Rachels, *supra* note 12, at 326.

58. *See id.* at 323–25 (noting various consequences from others gaining access to private information, including loss of competitive advantage, embarrassment, and financial repercussions).

59. Marmor, *supra* note 12, at 3–4.

60. *Id.* at 25.

just admit that no particular interest in privacy exists that is worthy of protection, distinct from the much broader and, admittedly, more important right to personal autonomy.”⁶¹ Of course, I have not equated privacy with autonomy. I have defended the view that privacy serves a distinctive role in preserving and augmenting autonomy—namely that privacy designates domains over which a reasonable level of control against others is essential for setting the terms on which we engage with the world. Thus, on my view, privacy and autonomy are inextricably linked because the former plays a special role in securing the latter, and that special role gives privacy a distinctive character.

As a result of this difference, Marmor also openly acknowledges that his account is exclusively outward-facing and that his view of privacy does not protect actions.⁶² That means his account cannot make sense of impositions on the uses of our bodies, at least not as violations of privacy. He is therefore compelled to conclude that legal decisions like *Griswold v. Connecticut* and *Roe v. Wade*—which respectively protect the rights to use contraception and to obtain an abortion on constitutional privacy grounds—are confused.⁶³ I take it as a virtue of the approach I have defended that it can accommodate fundamental privacy jurisprudence like these cases.⁶⁴

Marmor is mistaken in part because of his analytical starting point. He imagines a “global Panopticon” where “walls are made of glass with no blinds or shades of any kind, every conversation can be heard by others, and nothing you say or do can be hidden from anyone. Everything is there for anyone to see, hear, or smell.”⁶⁵ Marmor then proceeds to ask what is lost in a world like that, concluding that “it is, first and foremost, our social lives that would be severely compromised, not necessarily or primarily our inner or private world.”⁶⁶

Imagining the global Panopticon can be analytically helpful, no doubt. Perhaps Marmor is right about the social implications of a world without walls. But it begs the question to assume that a world

61. *Id.*

62. *Id.* at 23.

63. *Id.* at 24–25 (“No doubt there are some concerns about privacy in the *Griswold* case, but the Court’s rationale that the right to use contraceptives derives from the right to privacy seems patently wrong.”).

64. The account of the private sphere defended here would unequivocally encompass reproductive rights, which is of particular significance given the recent shift in the political balance of the Supreme Court that could curtail those rights. Absent additional normative assumptions, my view of the private sphere cannot dictate *when* the termination of a pregnancy should be permitted, but the model explains why some of the weighty interests at stake are precisely the privacy interests of the pregnant woman.

65. Marmor, *supra* note 12, at 6.

66. *Id.* at 7.

without walls exemplifies a world without privacy. Marmor essentially assumes that perpetual physical observation exhausts the range of possible privacy intrusions. A view derived from that assumption would have no reason to consider the integrity of mental processes or freedom from restrictions on the use of our bodies, and therefore no reason to consider whether notions such as these share central or defining features with freedom from physical observation.⁶⁷ In short, it is no wonder he arrives at a narrower conception of the value of privacy. By contrast, I have attempted to avoid an *ad hoc* limitation on how to understand the sorts of matters protected by the private sphere by attempting to locate a common thread to the sorts of violations that are widely considered privacy violations.

In any event, notwithstanding these differences, Marmor's view can also be understood on the model proposed above, including via the real-property analysis outlined in Section II. Marmor's *prima facie* private sphere would comprise matters that bear sufficiently on the ways in which people can present themselves (and what is theirs) to others. Whether those matters would also fall within the private sphere would depend on whether it is generally reasonable for individuals to assert rights of control over them. At the very least, based on his Panopticon example, we might think Marmor's sphere would contain certain real property (like the home) and certain information about us.

For good measure, consider how one further, prominent view of privacy might fit with the account defined here. Ruth Gavison's view, noted briefly above, begins from a hypothetical starting point of a state of "perfect privacy."⁶⁸ Gavison argues that an individual enjoys perfect privacy when nobody has any information about him, pays any attention to him, or has physical access to him.⁶⁹ In Gavison's terminology, these three dimensions along which one can enjoy privacy correlate with "secrecy," "anonymity," and "solitude," which are "distinct and independent, but interrelated" elements of privacy.⁷⁰

The thrust of Gavison's view of privacy is compatible with an agent-oriented control account of privacy rights. Secrecy and solitude both align with parts of the private sphere defined above—specifically, dominion over sensitive information about oneself and access to one's

67. Marmor could just as well have started with the world described by Margaret Atwood in *The Handmaid's Tale*, where, in addition to pervasive (albeit not omnipresent) physical observation, members of a significant subset of the population also lack the power to control access to their own bodies. See generally MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986).

68. Gavison, *supra* note 12, at 428.

69. *Id.*

70. *Id.*

body.⁷¹ If nobody has any information about me or any access to me physically, by definition I have yet to lose control over any sensitive matters that may undermine my agency.⁷² Gavison may not attach much significance to control, but the link between her view of privacy and the effect on human agency is clear enough.

Although described by Gavison as simply another dimension of privacy, anonymity is a different sort of concept. Gavison explains anonymity through the example of the president attempting to walk down the street “incognito.”⁷³ Gavison notes that, were someone to call out, “Here is the President,” the president would lose his temporary anonymity simply because others on the street would begin to pay attention to him.⁷⁴ Thus, she concludes that merely being the subject of others’ attention results in a diminution of privacy.

This is a peculiar example for a variety of reasons. First, walking down the street is an inherently public act. Watching or listening to a man walk down the street may not violate his privacy at all, though it might intrude upon his *prima facie* private domain. Second, and setting aside the question of whether someone has a right to walk down the street without being the subject of attention, the notion that merely being the subject of attention is a distinct way of losing privacy seems misleading. To be the subject of attention is just to be the subject of attempts to penetrate one’s private sphere (or, as here, perhaps one’s *prima facie* private sphere). In this case, serving as the subject of attention is tantamount to being a target of prying eyes and ears as one takes a stroll, intended to get physical or informational access to a particular person. The attention only results in a loss of some anonymity if the people paying attention actually have some measure of access to the subject of the attention.

To the extent there is a meaningful intuition behind this example, however, it is worth noting that, by paying attention to him, others on the street are interfering with the president’s ability to set the terms on which he’s engaging with the world (in perhaps a trivial or permissible way) by depriving him of the chance to walk anonymously and

71. Presumably they would fall within the private sphere that would accompany Marmor’s view as well.

72. A person enjoying perfect privacy as understood by Gavison is a person whose very existence the world appears not to acknowledge. That scenario, hypothetical though it is, raises a variety of challenging questions about the nature of one’s power to engage with the world. See *infra* notes 73–75 and accompanying text.

73. Gavison, *supra* note 12, at 432.

74. *Id.*

therefore undisturbed.⁷⁵ That element of the situation can be captured by the concepts of the *prima facie* private sphere and an understanding of privacy rights as rights of control.

Regardless of the wrinkle posed by the notion of anonymity, the crucial point here is that a person in a state of perfect privacy as defined by Gavison exists in an undisturbed private sphere. As discussed further below, privacy operates largely (though not entirely) as a one-way ratchet. Allowing access to the private sphere generally dilutes one's power over the sphere, albeit often with various other positive effects that explain why we routinely choose to invite others into the sphere or push items out of it.⁷⁶ Someone in a state of perfect privacy has yet to make any irrevocable decisions about, for example, granting others access to private information. The intuitions driving Gavison's view can largely be accounted for by the view of privacy rights developed here.

In sum, although the contents of the *prima facie* private sphere and the actual private sphere proposed here are not the subject of unanimous agreement, they and their link to human agency reflect central elements of many other theories of privacy. To the extent one prefers to adopt a smaller private sphere, the same model remains apt. For the analysis in Section II, it is most important to assume that at *least some* information, choices or activities are entitled to protection because they are "private."

75. There are other confounding features of Gavison's example. Most notably, it trades on the fact that the title "president" identifies a person of note about whom the public typically possesses substantial information. An announcement that the president is walking down the street would invite the attention of passersby because the president is an important person; and because he is important, many will already know or believe many things about him. Gavison claims that "attention alone will cause a loss of privacy even if no new information becomes known." *Id.* But that statement seems misleading. Even if Gavison is correct, her example still involves a substantial loss of secrecy, at least vis-à-vis a particular man on the street. Before they recognize the president, the other pedestrians fail to realize that they have information about the gentleman walking among them. That changes once they link *that specific person* with the information they each respectively possess about the president, such as his political party or his positions on various public policy issues. Moreover, once they lay eyes on him, and identify him as the important person they associate with the title, they would likely begin to acquire new information out of interest (for example, observing his posture, gait, height, facial expression, mode of dress, and so forth). By contrast, if someone called out, "Here is Mike," as a random person named "Mike" walks down the street, the loss of anonymity would probably be much less meaningful because nobody knows or cares much about Mike. (Of course, a loss of anonymity could well involve a loss of privacy on my own view, but not simply because it corresponds with one becoming the subject of attention.) Finally, Gavison's example may be problematic because, as a public figure, the president may have an atypically small private sphere.

76. Of course, sharing certain private information with another can also conduce intimacy, which in turn can generate new private information or subdomains as well.

D. Objections to the Private Sphere

The foregoing two-step analysis is original and therefore has not yet been subjected to criticism in the literature. But certain objections have been raised previously that could apply to the approach advocated for in this Article. Solove, for one, has raised a number of concerns about various theories of privacy, some of which might reach the proposal advanced here.

Some of Solove's concerns are glancing. One of his persistent worries is the purported vagueness of certain classes of theories. Whether discussing right-to-be-let-alone theories, limited-access-to-self theories, or control-over-information theories, Solove has complained that examples in the literature are simply not detailed enough to be helpful.⁷⁷ That is less an objection to any particular class of theory than a request for more detailed accounts. Unless he believes there is reason for which no theory in any such family *could ever* provide the requisite level of detail, at best his concerns about vagueness justify suspension of an ultimate judgment. At some points, he seems to defend that stronger view, suggesting that entire families of theories fundamentally suffer from vagueness.⁷⁸ At others, he implies the problem could be remedied by providing "an understanding of what matters are private and the value of privacy."⁷⁹ The preceding portions of this Article offer an explanation of the value of privacy and a schematic description of what matters are private. To the extent that Solove might regard my own suggestions as excessively vague, I do not share his apparent pessimism about the possibility of rendering sufficient further details.⁸⁰

Some of Solove's concerns are more directly relevant. As his analysis implies, a control account of privacy rights presumes from the outset that there is such a thing as the private sphere—that is, a domain over which a person ought to have some measure of control. Solove has in fact questioned the merits of delineating a private sphere.⁸¹ For one, he regards the metaphor of physical space as significantly limited in illuminating non-spatial elements of privacy, such as privacy in cyberspace.⁸² This Article directly confronts that complaint in Section

77. See, e.g., Solove, *Conceptualizing Privacy*, *supra* note 12, at 1101–02, 1104, 1111 (raising an objection about vagueness against different families of theories).

78. *Id.* at 1104 (claiming that, "[l]ike the right-to-be-let-alone conception, the limited-access conception suffers from being too broad and too vague").

79. *Id.*

80. See discussion *supra* note 42.

81. Solove, *Conceptualizing Privacy*, *supra* note 12, at 1131–32.

82. *Id.* at 1131.

III.A, arguing that, *qua* metaphor, the concept of physical space is *especially* valuable for understanding privacy in non-spatial dimensions.

But Solove's main objection appears to be that classifying matters into either a private or a public sphere is overly reductive and possibly misleading.⁸³ Solove appears to assume that acceptance of the private sphere entails acceptance of a public sphere, as well as the notion that items must be crammed into one or the other. Although the term "public sphere" is also well known,⁸⁴ the latter assumption is unfounded. As outlined below, the extent to which anything is private is a matter of degree, but that complication by no means renders meaningless the classification of something as contained within the private sphere. In fact, the account developed in this Article specifically provides for the possibility of matters remaining private to the world at large even as select individuals have permission to access them.

II. CONTROL OVER THE PRIVATE SPHERE AS A BUNDLE OF RIGHTS

Section I distinguishes between privacy and privacy rights, and provides an outline of a view of the private sphere. This Section argues that privacy rights should be understood as rights of control over the private sphere that resemble rights of control over real property. In developing this analysis, this Section highlights the underappreciated extent to which specific and concrete elements of real-property law can illuminate the intuitively appropriate contours of privacy protections.

For the purposes of developing the analogy between privacy and property, the following analysis treats property rights as a "bundle of sticks" comprising several distinct sorts of rights. This is by no means to suggest that the bundle-of-sticks view of property is free from controversy.⁸⁵ It is, however, one dominant view that recommends itself in the present context because it can accommodate the various entitlements necessary to confer the forms of control one reasonably needs to be able to exercise over the private sphere to maintain a meaning-

83. *Id.*

84. Even the *Carpenter* decision refers to the "public sphere." See *Carpenter v. U.S.*, 138 S. Ct. 2206, 2217 (2018).

85. See, e.g., Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 872-76 (2013) (describing an "impasse" between the "bundle-of-sticks" model and the "ownership" model, and then endorsing yet another model (the "tree model") of property); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 276-80 (2008) (criticizing the "bundle-of-sticks" approach to understanding ownership and developing a competing "exclusivity" model).

ful level of privacy. Let us therefore assume, specifically, that real-property ownership confers a bundle of rights, including the right to exclude others from one's property, the right to alienate parts or all of the property, and the right to use or enjoy the property.⁸⁶ This cluster reflects rights identified in prominent articulations of the bundle-of-sticks view.⁸⁷ It also fits neatly with the intuitive range of privacy rights we often accept, even if we do so at times under different descriptions.

Some might think this entire exercise of rendering privacy rights on a real-property model rests on a confusion or on a temptation to oversimplify privacy by imposing a spatial analysis on a (partially) non-spatial domain. Gavison has raised a version of that objection,⁸⁸ as have Solove⁸⁹ and Lloyd Weinreb.⁹⁰ Beyond the substantial theoretical fit explained above, however, there are compelling reasons for expecting some structural similarities between privacy and property, especially given a view of privacy rights based on control over the private domain. For one, privacy and real-property rights appear to share theoretical roots. For example, some scholars have argued that the notion of privacy is derived in some sense from the need to safeguard property:

[T]he need for a private sphere was both necessitated and facilitated by the ownership of private property and the attendant necessity to

86. There are accounts of property ownership that include a bundle with even more sticks. As noted below, some might consider A. M. Honoré's list of eleven "standard incidents of ownership" to be such an account. A. M. Honoré, *Ownership*, in *THE NATURE AND PROCESS OF LAW* 370, 370 (Patricia Smith ed., 1993). It might be possible to map these incidents onto privacy, but it may be less useful to do so. The value of the model is to graft the structure of the property regime onto privacy for analytical purposes while preserving the flexibility necessary to account for legitimate distinctions between property and privacy. A bundle like Honoré's, designed to go beyond capturing the general structure of property ownership to describe "the incidents which apply, in the ordinary case, to the person who has the greatest interest in the thing admitted by a mature legal system," may take us (perhaps substantially) past the point of structural similarity. *Id.*

87. See di Robilant, *supra* note 85, at 879–80 (describing Henry Terry's account of elementary property rights as encompassing, among other rights, "the right to possess, use, and transfer" and Wesley Newcomb Hohfeld's account as encompassing in part "the right that others may not enter . . . or cause physical harm to the land[;] an indefinite number of legal privileges of entering the land, using the land, and harming the land[; and] the legal power to alienate [one's] legal interest to another"). Hohfeld's account contains a fourth feature that refers to the property owner's various "legal immunities, among which are the immunity that no ordinary person can alienate" the owner's privileges. *Id.* Analogs of such immunities are likely compatible with the account proposed here.

88. Gavison, *supra* note 12, at 425–28.

89. Solove, *Conceptualizing Privacy*, *supra* note 12, at 1131.

90. Weinreb claims that a spatial model for privacy "does not specify at all the shape or dimensions of the space or what it contains[;]" and therefore "adds nothing, except by way of metaphor . . ." Lloyd L. Weinreb, *The Right to Privacy*, 17 *SOC. PHIL. & POL'Y* 25, 34 (2000).

safeguard and administer one's possessions. As the separation between what was "mine" and what was "yours" took on increasing importance in the Renaissance era, the contours of personal identity began to derive their shape from the nature of the individual's personal possessions, and it was in these possessions that a perceived right of privacy came to reside. Additionally, the need to manage property led to the emergence of the study as a place where the householder could carry out his tasks in undisturbed contemplation of his possessions and, in so doing, experience his own uniqueness. Thus, the study "not only inaugurated the experience of a private behavior but also nourished the apprehension of individual selfhood." Who one was, therefore, came to be a matter of what one owned. Likewise, the quiet enjoyment of one's possessions came to be viewed as a possessory right with which others could not interfere absent some overriding justification. Representing perhaps the ultimate possession, as well as a shelter not only for the person but also for all personal belongings, the home—and in a more narrow sense the study—became a sacred, inviolate space where the householder could experience his selfhood to an extent not possible in other settings.⁹¹

A historical link tracing the genesis of the notion of privacy to the development of real-property conventions certainly could help explain why the latter provides an intuitively appealing model for the former.⁹² Even without such a link, however, control over real property—and especially over one's home—directly overlaps with an element of control over the private sphere. Homes occupy a central place in the private sphere, and accordingly they could be understood *qua* property as being governed by the real-property regime and *qua* private subdomain as being governed by a control account like the one outlined in this Article. That fact also suggests a natural connection between real-property rights and privacy rights worth exploring.

To the extent that control over physical elements of the private domain resembles control over real property, theoretical simplicity counts in favor of considering whether a similar model applies to non-physical, private subdomains. Indeed, the structural affinity between the real-property regime and the privacy regime is difficult to overlook on a control account of privacy rights. Like property rights, rights in the private sphere appear to take the general form of rights *in rem*, even if they are rights in a more abstract *res*.

Moreover, as noted above, our interests in both real property and in privacy are varied and context-specific, but in comparable ways. Depending on the circumstances, it can be advantageous in either do-

91. Byford, *supra* note 48, at 32.

92. Perhaps a control account of privacy rights could even help to shed light on the relationship between the bundles of sticks in certain accounts of real-property rights.

main to exclude people or to invite them in. A central interest in both contexts also concerns deriving enjoyment of each respective domain without undue interference. The multifaceted notion of control codified in real-property law therefore offers promise for privacy. And as Section III makes clear, there are additional, manifest advantages to the real-property model.

A. *The Right to Exclude*

The right to exclude others from one's property is considered by some to be the quintessential property right. For essentialists who are skeptical of the bundle-of-sticks model of property rights, the right to exclude stands as the salient candidate to bear the entire theoretical heft of the property rights regime. One prominent formulation treats the right to exclude as *the* right that owners have in real property.⁹³ On the view defended in this Article, the power to exclude others from the private sphere also represents a key subset of privacy rights. In fact, an essentialist account that accepts a sufficiently nuanced position on the right to exclude could still shed substantial light on privacy and might even be fully capable of providing a model for privacy as articulated here.⁹⁴

In any case, in the context of the private sphere, the right to exclude prevents unwanted intrusions in or trespasses upon our private matters. "Trespass" can take on a literal or metaphorical meaning, depending on whether the subdomain of the private sphere we are discussing is physical or nonphysical. Nevertheless, the notion of a metaphorical trespass is perfectly comprehensible. Although breaking into someone's bedroom may be a trespass in the most literal sense (on one's property rights as well as one's privacy), it is no less intuitive to regard gaining inappropriate access to private information (in whatever form—digital or physical, verbal or pictorial) as a trespass. That is because the view defended here maps quite cleanly to the colloquial view of privacy rights as, *inter alia*, limiting nonconsensual access to matters that are our own business and not anyone else's.

The right to exclude others from the private sphere amounts to the right to exercise a reasonable degree of control over who can "enter"

93. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1998) [hereinafter Merrill, *Property and the Right to Exclude*] (describing a version of essentialism attributed to Blackstone on which "the right to exclude . . . is both a necessary and sufficient condition of property").

94. For example, Merrill identifies a "multi-variable version of essentialism" that might accomplish this purpose. *Id.* at 736–37. But see di Robilant, *supra* note 85, at 879 (treating one of Merrill's examples of a multi-variable essentialist—that of Honoré—as, in fact, a realist example of the bundle-of-sticks view).

the private sphere. There is room to quibble about the precise scope of such control, but that is a matter we may set aside for present purposes. There are limitations on the right to exclude in the real-property context—for example, bans on discrimination in certain venues as a matter of public policy⁹⁵—and some limitations are appropriate for privacy as well. There are important ongoing debates about what methods of exclusion are “reasonable” or otherwise acceptable, such as the use of encryption to protect digital communications.⁹⁶ The key point is that measures taken to secure one’s private sphere, if reasonable, fall within the right to exclude.

The use of the term “reasonable” is also meant to capture the notion that one can “waive” protections for certain portions of the private sphere by rendering those portions public. That can be done deliberately, alienating items in the private sphere (as discussed below), or it can be done inadvertently (if done sufficiently culpably, at the very least). Again, disagreements exist about when someone might have waived privacy protections for information,⁹⁷ but the essential point is that it can cease to be “reasonable” to exclude people from items that one has pushed outside of the private sphere. More specifically, publicizing information to a sufficient degree reduces or eliminates one’s ability to exclude others from accessing it, whether practically (because the information has become freely available) or morally (because we have revealed an intention to permit others to access it).

The analogy to property rights is perhaps most obvious in connection with the right to exclude. Excluding others from one’s private sphere is functionally similar to excluding others in the context of real property. Absent special circumstances, to enter another’s real property without permission is to commit the tort of trespass. It is for the

95. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 372 (1982) (“[T]he common law right to exclude is substantially limited by a competing common law right of reasonable access to public places.”). Note that this particular holding offers a neat property analog to the notion that one’s right to exclude people from a matter that is *prima facie* private could be compromised if the matter becomes sufficiently public.

96. See Dan Froomkin & Jenna McLaughlin, *Comey Calls on Tech Companies Offering End-to-End Encryption to Reconsider “Their Business Model”*, INTERCEPT (Dec. 9, 2015, 10:48 AM), <https://theintercept.com/2015/12/09/comey-calls-on-tech-companies-offering-end-to-end-encryption-to-reconsider-their-business-model/> (describing one such debate about end-to-end encryption between privacy advocates and then-FBI director James Comey).

97. For example, I have written elsewhere about this issue in connection with the human right to privacy under the ICCPR. See G. Alex Sinha, *Technology, Self-Inflicted Vulnerability and Human Rights*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 270 (Molly K. Land & Jay D. Aronson eds., 2018). A prominent subject of debate in this connection is the third-party doctrine, discussed below. See *infra* Section III.C.

most part uncontroversial that if property rights provide for anything, it is the right to exclude others. The same must be true of privacy. Excluding others is the first assertion of control over a domain; lack of the right to exclude vitiates meaningful control.

B. The Right to Alienate

The right to alienate or transfer property is another stick in the classic bundle.⁹⁸ Thomas Merrill describes this as derivative of the right to exclude: The right to alienate is “an irrevocable agreement to give permanent access to the resource to another combined with an irrevocable agreement to exclude *oneself* from access to the resource.”⁹⁹ One could also alienate or transfer a subset rather than a complete set of one’s “aggregate of entitlements” in property.¹⁰⁰ Fundamentally, however, someone cannot typically alienate or transfer another’s entitlements.¹⁰¹

Likewise, regulating access to one’s private sphere also requires the reasonable power to alienate matters within that sphere. To alienate something from the private sphere is simply to reveal it or relinquish control over it to another, whether “it” is information, a dimension of our bodies or minds, or any other element of the sphere. Note, of course, that to alienate in this sense is not necessarily to extinguish our own interest. One cannot transfer away one’s private sphere to another with an irrevocable agreement to exclude oneself going forward. We are inherently chained to our own private spheres in a manner that is not true of any particular piece of property.

Although the effect can at times be the same, exercising the right to alienate is significantly different from simply declining to exercise the right to exclude someone from the private sphere. The latter depends in the first instance on someone seeking entrance to one’s sphere or wandering in incidentally. By contrast, the right to alienate positively empowers us to share private information or other items, and the power to do that is extremely valuable. Bringing others into the sphere is an essential tool for seeking advice or other assistance, building trust, developing intimacy, and so forth. Interference with our right to alienate private matters would impede our ability to manage our relationships effectively. In transferring power over private mat-

98. See discussion *supra* note 87 (describing accounts of property rights bundles from Terry and Hohfeld).

99. Merrill, *Property and the Right to Exclude*, *supra* note 93, at 743 (emphasis added).

100. di Robilant, *supra* note 85, at 881.

101. *Id.* (citing Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917)).

ters to another, we can also create further private matters, such as facts about a relationship with someone who has been granted the right to enter our sphere.

Again, the analogy to real-property rights is both strong and analytically helpful. Suppose I want to share some sensitive information with a friend—say, information about a medical diagnosis I have recently received. I can provide that information to my friend and ask for her advice on weighing treatment options, how to share the diagnosis with my employer, and so on. In doing so, I give her access to some part of my private sphere, much as I might lease her access to a guestroom. Sharing this information does not amount to inviting her into every corner of my private domain, no more than leasing the guestroom permits her to dig through the dresser in my own room.¹⁰² Similarly, by permitting my friend to learn of my diagnosis, I can stipulate that I am not inviting *all* of my friends to learn of it. Again, the same is true in real property; a landlord can reserve the power in a lease to regulate whom the lessee can invite onto the property.¹⁰³

C. *The Right to Use or Enjoy*

In the property context, the right to use property may simply be another way of expressing that one has the right to enjoy it.¹⁰⁴ Under one formulation or the other, that right is once more part of the classic bundle.¹⁰⁵ In essence, ownership over property includes the right to make use of the property more or less as one sees fit (within reasonable limits).¹⁰⁶ Interferences with the right to use or enjoy one's property are typically treated as "nuisances."

Similarly, we have the right to use or enjoy our respective private spheres without undue interference. Restrictions on how we may conduct ourselves in private or utilize our privacy are equivalent to nuisances in the property context.¹⁰⁷ Examples include laws governing

102. One area where privacy and real property diverge to some extent relates to revocation of access that has been granted to others, addressed below. See *infra* Section III.D.

103. See Merrill, *Property and the Right to Exclude*, *supra* note 93, at 747–48.

104. See *id.* at 736 (arguing that the two formulations are "arguably redundant").

105. See discussion *supra* note 87.

106. See, e.g., Louis W. Hensler III, *What's Sic Utere for the Goose: The Public Nature of the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY L. REV. 31, 31 (2010) ("Owners may use land in many ways. For example, the owner may improve the land and use it as a residence. Or the land may be used for recreation. Land can also serve commercial purposes. All of these potential uses are encompassed within the owner's interest in using and enjoying the property.").

107. Gavison rejects the notion that property nuisances like smells can constitute invasions of privacy, arguing that "[t]here are no good reasons . . . to expect any similarity between intrusive smells or noises and modes of acquiring information about or access to an individual." Gavison,

sexual behavior (such as laws banning sodomy), restrictions on the use of contraceptives, and the like. Such restrictions do not necessarily require the government to know anything about our private behavior, and thus do not necessarily entail a privacy trespass. Instead, they limit our liberty to engage in private conduct (that is, to “enjoy” our private sphere). We can label impositions on the use or enjoyment of subdomains properly identified per the analysis in Section I as privacy nuisances. It is a separate question in any given instance whether such a nuisance is defensible or justifiable as a policy matter.

The ability to *rely* on the privacy of certain matters is central to the use and enjoyment of the private sphere, especially given the near-impossibility of reclaiming full control over private information that has been revealed. Activities that involve exploring unpopular ideas or stigmatizing social interaction are only possible with some assurance that those matters will remain private from others to the reasonable extent that we wish it. Threats that chill such activities, especially when the chilled response is justified, are nuisances as well. Surveillance provides a prime example. Knowledge that my correspondence will or may be swept up by surveillance may (or even should) dissuade me from expressing myself without reservation, impinging on my ability to undertake what (we can stipulate) is a legitimate, private exchange. That is different from sending correspondence with the belief that it will remain private and then learning later that it was intercepted, which is a violation of the right to exclude and more akin to a trespass.

Again, interferences with the private sphere that chill one’s ability to use or enjoy the sphere are not necessarily impermissible as a result. To return to the example above, the mere fact that a surveillance program has a chilling effect may not render the program illegitimate or unlawful (although that fact may be relevant). Just as in the case of property rights, some limitations on the use and enjoyment of the private sphere may justify restrictions that would otherwise be impermissible as nuisances, especially where more than one person shares access to private information.

D. Competing Views of Control

The view outlined in this Section represents only one option for how to define the role of control in an account of privacy and privacy

supra note 12, at 439. To the extent such nuisances can interfere with one’s use or enjoyment of the private sphere, the real-property model might yield a different conclusion. But more importantly, the prime candidates for privacy nuisances are forms of intrusive legislation that are nuisances in a more metaphorical sense.

rights, though I believe it to be the strongest view. As alluded to above, one might consider the possibility that *privacy itself* (rather than privacy rights) is a matter of control. In *A Definition of Privacy*, Richard B. Parker advances that view. Specifically, for Parker, privacy "is control over when and by whom the various parts of us can be sensed by others."¹⁰⁸ According to Parker, we lose control (and therefore privacy itself) when others obtain the power to sense us.

Perhaps the most illuminating example Parker provides concerns someone who has a private conversation recorded at a party.¹⁰⁹ He argues that "[w]hether the recording is ever replayed has no effect on the degree of loss of privacy, for the loss consists not in being listened to, but in losing control over when and by whom one is listened to."¹¹⁰ In other words, once we lose the power to regulate the dissemination of private information (or other access to a private domain), our privacy has been violated as to that information *regardless of whether it is actually disseminated*.

This view is counterintuitive. Surely it matters a great deal for my privacy interests whether a recording of my conversation is actually played for people who are not supposed to hear it. Indeed, all else equal, the more widely it is played, the greater the harm to me, and the greater the intrusion on my privacy. That is not to say that the recording does not violate my privacy, but Parker's account seems to be missing something. Philosopher Judith Jarvis Thomson makes a similar observation in response to Parker. She writes:

[W]hy *control*? If my neighbor invents an X-ray device which enables him to look through walls, then I should imagine I thereby lose control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated until my neighbor actually does train the device on the wall of my house.¹¹¹

Thomson's objection is exactly right, and it is certainly consistent with the view laid out in Section I. Our privacy interests are constantly vulnerable to some extent, but that does not necessarily mean that we regard them as harmed, or that we regard our privacy as infringed. Although vulnerability figures into any adequate theory of privacy, it simply cannot be the whole story. Parker may be picking up on the idea that utter lack of control over the private sphere leaves us unable to rely on our privacy.

108. Parker, *supra* note 22, at 281.

109. *Id.* at 281–82.

110. *Id.* at 283.

111. Thomson, *supra* note 12, at 305 n.1.

Consider the example of homelessness, which sadly helps to reveal the significance of the issue.¹¹² It might seem accurate to say that a homeless person lacks privacy because she lacks reasonable control over whether she is observed, but that is not right. A homeless person on a deserted street may well have privacy, even if she does not know it (because she does not know the street to be deserted) or cannot protect it (because she has no walls or curtains to interpose between her and passersby).¹¹³ It is better to say that her lack of a private dwelling compromises her privacy rights and renders her vulnerable to privacy violations because she lacks the reasonable resources to regulate entry into her private sphere when her street is not deserted.¹¹⁴ There could therefore be a meaningful correlation between our level of control over a private matter and our confidence that it is and will remain private. But that is not a reason to think that control is the touchstone for evaluating how much privacy we have, even as it shows that control is undeniably relevant to a comprehensive discussion of privacy.

The real-property model helps illuminate the trouble with Parker's view. If we applied his view of privacy to the realm of real property, Parker would be tracking something akin to the distinction between owning a field and owning a fortress; our rights are similar in each even as their respective vulnerability to certain forms of violation is radically different. Perhaps our failure to take steps to protect our private information weakens our basis for complaining when that information is obtained, but that is not the same as claiming that

112. The example of homelessness suggests a strong actual—as opposed to merely theoretical—link between certain real-property rights and privacy rights. See *infra* Section III.B.

113. I take the view that someone living alone in an isolated area has an extremely high level of privacy, even if she lacks shelter or other resources to keep out observers. Solove disagrees. He claims that “a person stranded on a deserted island” is in “a state of isolation” rather than a state of privacy. Solove, *Conceptualizing Privacy*, *supra* note 12, at 1104. By way of explanation, he adds that “[p]rivacy involves one’s relationship to society; in a world without others, claiming that one has privacy does not make much sense.” *Id.* That may well be true of a *world* without other people; if only one person *exists*, the notion of privacy may not be particularly useful. A deserted island in a crowded world is a perfectly valid thought experiment for assessing the reach of a theory of privacy, however, and, even granting Solove’s assumption, it is not the same as a world without people.

114. There may be conventions for speaking about privacy that do not align with this analysis but that can be explained as a matter of casual imprecision. Suppose you and I are walking down the street, and you ask me to reveal to you some secret I have been keeping. I might reply, “This is not a private spot.” That statement could be accurate in a literal sense, if there are others around. Or, if others are not present or at least not visible, my response could be elliptical for, “This spot may appear private for the moment, but we cannot be sure that it is; and even if we knew it to be private right now, we could not trust that it would remain so.”

information unknown to others is not private simply because others could obtain it.

On the view defended here, my rights to exclude others from my private domain are not violated simply because others have the actual (non-legal) power to intrude; they are violated when others actually do intrude. In this context, my right to control my private domain means I am wronged if my neighbor peers through my walls without my consent, and I should be entitled to seek a remedy if she does so. Merely owning an X-ray machine is no more a violation of a neighbor's privacy than owning a wrecking ball is a violation of a neighbor's real-property rights.

We should reject Parker's view that privacy itself is a matter of control. That view is still helpful for illuminating some advantages of the real-property model, however. Suppose we treat Parker's view as a view of *privacy rights* instead. The view would be that privacy rights are rights of "control over when and by whom the various parts of us can be sensed by others."¹¹⁵ This is closer to the mark in some respects, as it identifies the proper level at which control is relevant, but it still cannot be right.

On this modified version of Parker's view, privacy rights would protect a private sphere comprising "various parts of us." Based on Parker's party example, that phrase would cover eavesdropping on private conversations—not just access to our bodies, as the language might imply. Leaving aside questions about the contents of this version of the private sphere, it is apparent that the view is overly broad. Suppose that, without my permission, someone records a conversation with me. Depending on our view of control over the private sphere, that could be a violation of my privacy. But suppose I consent to that person's recording of the conversation subject to the qualification that the recording is not to be played for anyone who was not party to the conversation. I have still lost power over the recording because it is not in my custody, but, presumably because I consented to it, that loss of power is not a violation of my privacy. Crucially, my qualification preserves my rights in the information on the recording even though I have traded away the physical power to protect the information. At that point, there would be a violation of my privacy vis-à-vis the tape only if my interlocutor plays the recording for a third party. But that violation would not occur at the moment that I lost physical power over the contents of the conversation; it would occur only when the tape is played.

115. Parker, *supra* note 22, at 281.

More generally, it is difficult to conceive of a right to control *anything* that is violated merely because others have the physical power to harm the interest it protects. Indeed, any right that hinges on the literal inability of anyone else to infringe it is superfluous by definition. Parker's broad view of control, whether used to define privacy or privacy rights, misidentifies the location of the link between privacy violations and harms. The form of control captured by the real-property model overcomes this problem.

III. KEY IMPLICATIONS OF THE REAL-PROPERTY MODEL OF PRIVACY

Collectively, the rights to exclude, alienate, and use or enjoy capture the variety of rights we need to exert reasonable control over our respective private spheres—specifically by policing the boundaries and inner workings of our spheres.¹¹⁶ Any privacy violation should be cognizable as fitting into one of these categories. On the view defended in this Article, privacy can be viewed as a form of capital for the exercise of human agency.¹¹⁷ Depending on the circumstances, it can be advantageous to retain and make use of it directly or to trade it away in exchange for some other advantage. The power to make decisions about which path to pursue in any given instance is an incredibly significant component of the exercise of human agency. Moreover, losing the power to regulate or protect the boundaries of the private sphere does not necessarily entail that items in the private sphere cease to be private, but their status as private becomes immediately more tenuous. Depending on how much of that form of control is lost, the privacy of parts of the sphere may become so vulnerable that one can no longer rely on those parts to remain private. The inability to rely on matters remaining private can, under many conditions, eliminate much of the benefit of privacy.

The real-property regime provides an extremely useful heuristic device for understanding and assessing these rights. As noted above, the theoretical similarities between privacy and real property do not appear simply by coincidence; the notion of understanding privacy rights on a real-property model suggests itself in part because the two concepts appear to share a historical link and because real property can

116. This suggests that the core sticks in the bundle typically associated with property rights are of significance at a deeper theoretical level than might typically be acknowledged.

117. This formulation closely mirrors a common understanding of property rights on a “bundle of sticks account.” See, e.g., di Robilant, *supra* note 85, at 871 (describing this view of property rights as “a bundle of entitlements regulating relations among persons concerning a valued resource”).

itself be so important for protecting a subset of our privacy interests. Beyond theoretical fit, there are further key advantages to (and certain notable neutral implications of) embracing the analogy and adopting a real-property model for privacy.

A. The Real-Property Model of Privacy Simplifies the Privacy Analysis in Complex Domains, such as Cyberspace

Perhaps because we have privacy interests in so many disparate types of items—whether our minds, our bodies, our data, or our real or personal property—conceptualizing and protecting privacy can seem impossibly complex. That complexity presents us with several choices as we attempt to make sense of privacy and its protections. First, we can accept the complexity at face value and cobble together a legal regime designed to protect the various separate strands. That approach may be appropriate if we conclude that there is no common idea linking the different interests we regard as “private.” Of course, if no common theme to privacy interests is apparent, binding them together will seem ad hoc. To the extent protecting such ostensibly different interests may require different mechanisms, the right to privacy threatens to splinter and dissolve into a clump of loosely-related or entirely unrelated interests.¹¹⁸

A second possibility is to adopt a narrower model of which matters are private (and therefore a more manageable view of what privacy protects). If privacy itself is less complicated as a concept—say, because it only protects information and not activities¹¹⁹—it could well become less complicated to understand and to protect.

The view defended here represents a third possibility. First, we let the private sphere be as widely encompassing as it needs to be to capture our jurisprudence about ostensible privacy violations or our intuitions about what matters are private. Then, we unify the diverse sub-domains within the private sphere by reference to a single, overarching interest. Finally, we conceptualize violations of privacy rights on a model that renders intrusions on widely disparate types of protected matters in broadly similar terms. Real-property rights provide the power to conceptualize privacy in just such a manner.

118. Thomson adopts some form of this view, concluding that privacy does not cohere as a unitary concept. *See generally* Thomson, *supra* note 12.

119. For example, one could take Marmor’s view discussed above, on which privacy only concerns how we present ourselves to others. *See generally* Marmor, *supra* note 12. That view still manifests numerous complexities, but the less capacious underlying view of privacy simplifies the task of understanding and protecting privacy rights.

One particularly important feature of the approach defended here is that it simplifies privacy at a time when privacy badly needs simplification. The current landscape poses particular challenges above and beyond the inherent complexities of privacy. The combination of rapid technological development and the growing and often uninformed adoption of digital technologies by the public makes it extremely difficult for most technology users to understand their own privacy vulnerabilities, let alone adopt protective measures. Few are equipped to handle these challenges, even among those who have substantial resources and every incentive to overcome impediments to protecting their privacy.¹²⁰ It is easy to let these practical realities muddle our theoretical commitments.

There are two key ways in which the real-property model simplifies privacy. First, it is intuitively accessible, especially in relation to leading alternatives. The ubiquity of the notion of the private sphere is a major indicator of its accessibility. Moreover, the property heuristic allows us to visualize the private domain and privacy violations on a model that applies to tangible reality. Obviously, violations of real-property rights such as trespasses and nuisances are especially easy to visualize because they pertain to a physical domain.¹²¹ We can literally see real property and its boundaries, and we can picture intrusions. Being able to visualize privacy in the same way, even if metaphorically, serves an essential function that becomes apparent when one contemplates other available models.

For example, Solove has defended an approach that “conceptualizes privacy within particular contexts rather than in the abstract.”¹²² The purpose of this approach is to “aid in solving problems, assessing costs and benefits, and structuring social relationships.”¹²³ But Solove deliberately avoids attempting to “describe the sum and substance of privacy,” as I have done above. As a result, his approach yields more amorphous results. He essentially concludes that privacy serves different functions in different contexts, and that perceived violations disrupt particular practices. Because Solove provides little more

120. See generally G. Alex Sinha, *With Liberty to Monitor All: How Large-Scale US Surveillance Is Harming Journalism, Law, and American Democracy*, HUMAN RIGHTS WATCH & AM. C.L. UNION (July 28, 2014), https://www.hrw.org/sites/default/files/reports/usnsa0714_ForUPload_0.pdf [hereinafter Sinha, *With Liberty to Monitor All*] (illustrating that journalists and lawyers with professional obligations to protect the privacy of their sources and clients, respectively, struggle substantially nevertheless).

121. That is not to say that property law is itself straightforward. Plainly, many elements are not. Many law students will recall with dread the experience of attempting to master the Rule Against Perpetuities, for example.

122. Solove, *Conceptualizing Privacy*, *supra* note 12, at 1129.

123. *Id.*

guidance on what privacy is at a fundamental level, his approach has much less normative force than a fulsome account of privacy tied to an account of its fundamental value. More to the point, unlike the real-property model, his does not provide an intuitive basis (or really any basis) for clearly conceiving of one's privacy or imagining what falls within it.

Or consider a model developed by Helen Nissenbaum, according to which "privacy is a right to appropriate flow of information."¹²⁴ On her view, the basis for our concerns about "contemporary systems and practices of information gathering, aggregation, analysis, and dissemination is not that they diminish our control and pierce our secrecy, but that they transgress context-relative informational norms."¹²⁵ Her view is therefore pegged to our perceptions of the propriety of information flows in light of the norms that govern the particular context in which a given privacy question arises. Whatever the merits of this approach, it is most assuredly not as intuitively accessible as the real-property model. The norms at the heart of this "contextual integrity" approach "are characterized by four key parameters: contexts, actors, attributes, and transmission principles."¹²⁶ The application of the model to evaluate a given system or practice involves nine distinct steps.¹²⁷ The number of moving parts in this approach renders it unable to provide the *ex ante* visual or intuitive clarity of the real-property model.

The second respect in which the real-property model simplifies privacy is that it is able to accommodate technological developments while also remaining conceptually stable.¹²⁸ The model renders the protected interests on the same plane and brings into focus the questions we need to ask about ostensible violations. The various ways in which one can violate another's privacy, such as by eavesdropping on them, barring them from sharing their private matters with their loved ones, or restricting the uses of their bodies, all have one thing in common: They are interferences with a domain that everyone possesses and is entitled to govern.

It does not matter that some of these intrusions do not involve crossing a physical boundary. In fact, nowhere is this analogy more helpful than in complicated, non-spatial domains like cyberspace. As

124. NISSENBAUM, *supra* note 20, at 127 (emphasis omitted).

125. *Id.* at 186.

126. *Id.* at 140.

127. *See id.* at 181–83 (elaborating on each step).

128. Nissenbaum claims that her view is designed for a similar, albeit narrower, purpose—namely, "for evaluating in moral and political terms the myriad new technology-based systems and practices radically affecting the flow of personal information." *Id.* at 158.

noted above, some theorists are especially skeptical that a spatial metaphor can make sense of a non-spatial domain.¹²⁹ As one has written:

In view of the very nature of cyberspace—its lack of physical characteristics, its unboundedness, and its independence of material contingencies—traditional Western conceptualizations of privacy clearly do not translate easily into this new environment. A territorial view of privacy, which associates the concept of privacy with the sanctity of certain physical spaces, has no application in a realm in which there is no space.¹³⁰

The analysis in Sections I and II suggests this passage is mistaken. Perhaps the point would be compelling if our aim were to visualize the whole of cyberspace as a physical domain. But all we need to do is visualize each person as the center of a private domain—a domain that cuts across certain elements of both the material and immaterial world. Each person's mind and body, as well as some of their property and information, will fall within that domain. Whether some of that information is stored in digital form does not seriously complicate the analysis. What places the information within a person's private domain is not a matter of whether it is in transit in packet form over fiber optic cables, stored in a server across an ocean, or saved to a flash drive in a person's home (although the flash drive might also be protected as private personal property).¹³¹ The boundaries of the private sphere depend simply on the nature of the information and whether the person has waived protections for it.

This is a particular virtue of adopting and embracing the spatial metaphor for privacy. Cyberspace has bedeviled privacy advocates because it is difficult for many people to understand. Even highly-educated Internet users often render sensitive data vulnerable online in ways that simply seem stupid in retrospect.¹³² And Internet users continue to find their private data exposed in ways they did not realize was possible¹³³ or did not anticipate.¹³⁴ By and large, it is much more

129. See Solove, *Conceptualizing Privacy*, *supra* note 12, at 1131–32 (expressing this concern and citing Byford in support).

130. Byford, *supra* note 48, at 40.

131. For a detailed discussion of the challenges posed by attempting to identify the physical location of data, see Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326 (2015). For a contrary view, see Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729 (2016).

132. See, e.g., Erica Fink & Laurie Segall, *Government Workers Cope with Fallout from Ashley Madison Hack*, CNN (Aug. 22, 2015, 11:28 AM), <http://money.cnn.com/2015/08/22/technology/ashley-madison-hack-government-workers/> (describing the consequences suffered by government workers who were discovered to have used their official email addresses to register with a website that facilitated extramarital affairs).

133. See *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fall->

difficult to grasp the security of one's data online than it is to understand its security in physical form, even as the use of digital technologies and the proportion of our data stored in digital form has exploded. By focusing on the relationship between a person and her data, it is possible to render questions about digital privacy structurally identical to questions about physical privacy. We can also sidestep fruitless efforts to map out cyberspace itself, as well as approaches that fundamentally and unrealistically require a populace with a better grasp of digital technologies.

B. Both Theoretical Fit and Enforceability Count in Favor of the Real-Property Model of Privacy

On the account defended here, privacy rights are extremely important because they play a central role in advancing one of our strongest interests as agents. The rationale behind them extends to more or less everyone as well, for privacy rights are universal rights.¹³⁵ As a theoretical matter, that position lines up with societal practice. Whether understood as human rights or constitutional rights, privacy rights are not limited in any significant way to a subset of the population based on age, sex, class, or any other demographic division.¹³⁶

One important consideration in selecting a model for privacy rights must be that it helps to cognize violations of those rights in a manner that reflects the seriousness of their violation. The real-property regime is extremely effective in this respect, as it offers owners powerful tools to enforce their rights to possession of their land—especially when they suffer trespasses. “Generally speaking, when the intrusion is governed by trespass, then there is no exception for de minimis harms, a rule of strict liability applies, and the landholder can obtain an injunction to prevent future invasions.”¹³⁷ Courts will typically

out.html (providing a summary of the Times' coverage of the scandal, in which Cambridge Analytica gained improper access to the private data of tens of millions of Facebook users and used it in an attempt to influence the U.S. elections, including the 2016 presidential election).

134. See Donna Borak & Kathryn Vasek, *The Equifax Hack Could Be Worse than We Thought*, CNN (Feb. 10, 2018, 10:43 AM), <https://money.cnn.com/2018/02/09/pf/equifax-hack-senate-disclosure/index.html> (discussing the massive scope of the 2017 hack of national credit bureau Equifax, which affected nearly 150 million people).

135. By tying privacy interests to agency, the account defended here invites questions about the privacy interests held by those with diminished capacities, such as people who are particularly young, old, or disabled in certain respects. I tend to think privacy simply does play a somewhat less pronounced role for people with limited agency, although it will remain very important in all but the most extreme cases.

136. There are limited exceptions, such as age-based differences that allow adults to control certain private matters for minor children or others of limited capacity.

137. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUDIES 13, 13 (1985) [hereinafter Merrill, *Trespass, Nuisance, and the Costs of Deter-*

award nominal damages for a trespass even if no actual damages are demonstrated.¹³⁸ And intentional or knowing trespass often results in multiple statutory damages.¹³⁹ Moreover, trespass covers intrusions by tangible objects generally (like animals, vehicles, rocks, and so forth), rather than just people.¹⁴⁰

The availability of remedies is therefore yet another reason to favor a real-property model for privacy. Importing property-style remedies to the realm of privacy is appropriate given the importance of privacy protections. Beyond the normative argument provided in this Article to support the notion that privacy ought to be more strictly protected, recent developments also suggest a public mood that is open to such a shift. For example, in July of 2018, Facebook set a record when it suffered the largest single-day drop in its stock value of any publicly-traded company in history.¹⁴¹ Facebook's "privacy missteps"—including its failure to provide adequate protection for users' data—contributed significantly to its catastrophic day on Wall Street.¹⁴² Thus, although certain rules may require limited modification—such as a strict liability standard for trespasses¹⁴³—the influence of the property regime in this respect is promising.

Moreover, because of the structural similarity between privacy (on the view defended here) and property, the forceful rules of the property regime carry over well by analogy. For example, that any tangible object can yield a trespass in the property context offers a compelling analogy for the notion that a privacy trespass can be effected by the nonconsensual collection of private data by a computer—even if the data are never shared with another human, as in various forms of national security surveillance conducted by the government.¹⁴⁴ The collection of such data by a non-sentient intruder still interferes with our

mining Property Rights]. Of course, in the property context, the law is somewhat less helpful for victims of nuisances. See generally *id.* (comparing remedies for trespass and nuisance).

138. *Id.* at 18.

139. *Id.* at 18 n.26.

140. *Id.* at 14.

141. Craig Timberg & Elizabeth Dwoskin, *How Year of Privacy Controversies Finally Caught up with Facebook*, WASH. POST (July 26, 2018), https://www.washingtonpost.com/technology/2018/07/26/how-years-privacy-controversies-finally-caught-up-with-facebook/?utm_term=.4dbdae755c26. Facebook's value dropped by over \$100 billion dollars. *Id.*

142. *Id.* (describing "a world in which public pressure is mounting for stricter privacy protections").

143. See *infra* Section III.D.

144. See, e.g., Ashley Gorski & Patrick Toomey, *Unprecedented and Unlawful: The NSA's 'Upstream' Surveillance*, AM. C.L. UNION (Sept. 23, 2016), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/unprecedented-and-unlawful-nsas-upstream>. For additional background on NSA surveillance, see generally G. Alex Sinha, *NSA Surveillance Since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861 (2014).

sole possession of the private sphere, and constitutes a privacy trespass. Similarly, the computerized scanning of personal messages—such as Google’s practice of scanning the text of Gmail users’ emails for the purpose of displaying targeted ads—most assuredly implicates the users’ privacy.¹⁴⁵

Similarly, the aggregation of data poses a growing privacy problem in the digital age. It has become faster and cheaper to assemble semi-public pieces of information about a person to paint a revealing picture that would be largely invisible otherwise.¹⁴⁶ The practice is analogically similar to a “‘constructive’ interference with exclusive possession” of a piece of real property, where a nonactionable, minor interference can become so severe that it is treated as a trespass.¹⁴⁷ Once data aggregation reaches a critical mass—because it begins to reveal protected details, for example—it effectively interferes with the subject’s power to exclude others from the private sphere.

Borrowing from a potent rights regime is all the more important because privacy rights are not distributed equally across the population. Privacy has become expensive.¹⁴⁸ It can be time-consuming or nearly impossible to secure in the digital era.¹⁴⁹ And, in some respects, it is also distributed inequitably across race and class as a matter of government policy, as evidenced by enormous racial disparities in police searches of citizens.¹⁵⁰ In fact, modeling privacy rights on real-

145. The *acceptability* of the practice may ultimately turn on the validity of users’ consent, but the model implies that the practice at minimum *implicates* users’ privacy.

146. See K. A. Taipale, *Technology, Security and Privacy: The Fear of Frankenstein, the Mythology of Privacy and the Lessons of King Ludd*, 7 YALE J.L. & TECH. 123, 176 (2005) (discussing the problem).

147. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, *supra* note 137, at 30.

148. See Julia Angwin, *Has Privacy Become a Luxury Good?*, N.Y. TIMES (Mar. 3, 2014), <https://www.nytimes.com/2014/03/04/opinion/has-privacy-become-a-luxury-good.html> (arguing that protecting one’s privacy has become expensive and difficult); Amanda Hess, *How Privacy Became a Commodity for the Rich and Powerful*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/magazine/how-privacy-became-a-commodity-for-the-rich-and-powerful.html> (same).

149. See generally Sinha, *With Liberty to Monitor All*, *supra* note 120.

150. See Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016, 3:09 PM), <https://www.vanityfair.com/news/2016/07/data-police-racial-bias> (summarizing findings from various studies suggesting that police disproportionately stop and search racial minorities, especially African Americans or Hispanics, in San Francisco, California; Ferguson, Missouri; Chicago, Illinois; Greensboro, North Carolina; New York, New York; and Maricopa County, Arizona); see also Al Baker, *New York Minorities More Likely to be Frisked*, N.Y. TIMES (May 12, 2010), <http://www.nytimes.com/2010/05/13/nyregion/13frisk.html> (“Blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009, but, once stopped, were no more likely to be arrested.”); N.Y. Times Editorial Bd., *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html> (noting that New York City conducted an

property rights brings the inequality of privacy rights into relief in one of the sharpest ways possible, both because real-property rights also belong disproportionately to the privileged¹⁵¹ and because property rights serve as a proxy for an especially important subset of privacy rights.

Control over a physical space, such as a house or an apartment, provides the basis for part—though only part—of a reasonable private sphere. It offers a physical domain (protected in part by privacy law, such as the Fourth Amendment, but also by standard property rights) in which agents can store personal property and information, develop and pursue intimate relationships, explore controversial ideas, engage in unpopular activities, express emotions and thoughts without inviting the judgment of others, and generally exert some measure of control over the terms on which they engage with the world. Owning real property thus empowers agents both directly to the extent it confers certain privacy rights (say, if one has a reasonable expectation of privacy in the property in question), and indirectly through property rights. Those wealthy enough to own more property, or to own more secure property, can thus experience significant privacy-related advan-

“astounding 4.4 million stops between January 2004 and June 2012. Of these, only 6 percent resulted in arrests and 6 percent resulted in summonses. In other words, 88 percent of the 4.4 million stops resulted in no further action—meaning a vast majority of those stopped were doing nothing wrong. More than half of all people stopped were frisked, yet only 1.5 percent of frisks found weapons. In about 83 percent of cases, the person stopped was black or Hispanic, even though the two groups accounted for just over half the population.”); Anthony M. DeStefano, *Stop-and-Frisk Encounters Down 50% but Minorities Still Stopped More, Stats Show*, *NEWSDAY* (July 28, 2015, 8:57 PM), <http://www.newsday.com/news/new-york/nypd-stop-and-frisk-encounters-down-50-but-minorities-still-stopped-more-stats-show-1.10685785> (“NYPD officers conducted nearly 50 percent fewer stop-and-frisk encounters in the first quarter of this year than they did in 2014, but the percentage of minorities stopped was still greater than 80 percent, close to the level reported in previous quarters, the latest statistics show.”); *Justice Department Announces Findings of Investigation into Baltimore Police Department*, U.S. DEP’T OF JUST. (Aug. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> (alleging, *inter alia*, that “BPD makes stops, searches and arrests without the required justification [and] uses enforcement strategies that unlawfully subject African Americans to disproportionate rates of stops, searches and arrests”).

151. For example, census data show that rates of home ownership vary massively by race. See *Housing Vacancies and Homeownership*, U.S. CENSUS BUREAU tbl.16, <https://www.census.gov/housing/hvs/data/histtabs.html> (last visited Nov. 15, 2018) (showing that, dating back to 1994, homeownership rates among Whites have stood at about 70–75%, whereas homeownership by African Americans fluctuated between 40–50%). Similar statistics hold across different social classes. *Id.* at tbl.17 (showing that, dating back to 1994, homeownership rates among Americans with above-median family incomes have hovered around 80% and those with below-median incomes have remained around 50%). Non-homeowners may still hold real-property rights in some form, but those rights will likely be weaker (for example, if they rent their homes instead of owning). In any event, to the extent that real property is a valuable asset, it is plainly more accessible to the wealthy.

tages. Such disparities warrant attention especially because it cannot be taken for granted that they are normatively justifiable.

In short, the real-property model supports the adoption of powerful remedies for privacy violations and offers resources for explaining why certain practices that seem intuitively problematic ought, in fact, to be treated like privacy violations. Moreover, the fundamental significance of privacy (combined with the unequal distribution of privacy rights) points to yet another reason for adopting the model: The protections afforded for privacy should, to the extent practical, be at least as strong as the protections for property.

*C. The Real-Property Model of Privacy Explains Intuitive
Misgivings About the Third-Party Doctrine*

The third-party doctrine essentially states that “a person cannot have a reasonable expectation of privacy [for Fourth Amendment purposes] in information disclosed to a third party.”¹⁵² The rule, which has been established and refined through a number of significant court decisions, applies to the “collection of evidence from third parties in criminal investigations.”¹⁵³ The cases that establish the rule generally involve the use of information provided by government informants or agents, or the use of third-party business records.¹⁵⁴ The Supreme Court arguably narrowed the third-party doctrine in its recent *Carpenter* decision, discussed above.¹⁵⁵ There, the Court explicitly stated that the proper application of the third-party doctrine must account for the nature of the data being conveyed to a third party, and it declined to “extend[the rule’s logic] to the qualitatively different category of cell-site records.”¹⁵⁶

Even before *Carpenter*, the doctrine had its defenders,¹⁵⁷ though it has also come under growing scrutiny in light of technological advancements that render it increasingly difficult for individuals to manage their affairs without providing sensitive information to third-party

152. Orin Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) [hereinafter Kerr, *The Case for the Third-Party Doctrine*].

153. *Id.*

154. *See id.* at 567–70 (discussing the cases).

155. *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *see also supra* text accompanying notes 1–10.

156. *Carpenter*, 138 S. Ct. at 2216–17. The Court argued that knowingly conveying information to a third party might diminish one’s expectation of privacy in that information, but does not necessarily eliminate it—especially when the information concerns a matter “[t]he Court has . . . already shown special solicitude,” such as detailed information about one’s location over an extended period. *Id.* at 2219. The Court also noted that CSLI “is not truly ‘shared’ as one normally understands the term.” *Id.* at 2220.

157. *See generally* Kerr, *The Case for the Third-Party Doctrine*, *supra* note 152.

service providers.¹⁵⁸ And the doctrine stands. The *Carpenter* Court explicitly avoided “disturbing the application” of the third-party doctrine to the facts of its foundational cases on the subject.¹⁵⁹ Although *Carpenter* provides some reassurance, the fundamental premise of the doctrine is arguably minatory for privacy rights not only because it controversially limits Fourth Amendment protection for certain data, but also because it conditions the public to hesitate to share those data. The typical articulation of the rule invites the common objection that the provision of information to a third party does not necessarily render an expectation of privacy in that information unreasonable. For whatever the objection is worth, that is perfectly true. We often convey private information to others on the expectation that the information will not be disseminated further.¹⁶⁰

That objection carries more force if we adopt the view of privacy as a matter of control over a domain: Analogous control over a domain in the real-property context does not admit of the same sort of dilution of one’s power to exclude the State. Permitting the entry of visitors into one’s home is not tantamount to consenting to a State search of one’s home even if one is under criminal investigation, for there is no real-property analogy to the third-party doctrine.¹⁶¹ The same is true with personal property. As Justice Gorsuch points out in his *Carpenter* dissent, the law recognizes that we may maintain our interest in personal property that we have entrusted to another for a specific purpose (an arrangement known as a bailment).¹⁶² The asymmetry between property and privacy rights may result because the Fourth Amendment test is cashed out in terms of expectations of privacy,

158. See, e.g., *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (“More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”) (internal citations omitted).

159. *Carpenter*, 138 S. Ct. at 2220.

160. The leaking of information from a party with permission to possess it to a party that lacks such permission is a particularly tricky issue, however. See *infra* Section III.D.

161. Kerr draws an analogy between providing information to a third party and sharing a home with a third party as co-occupants. Kerr, *The Case for the Third-Party Doctrine*, *supra* note 152, at 589. In each case, he argues, we give control over information or property (respectively) to a third party, who can then consent to its search by police. *Id.* By treating any third party to whom we have given information as equivalent to a cohabitant in a home, Kerr’s comparison elides the possibility that someone to whom we have given information should be analogized to a mere visitor in one’s home—someone who *cannot* pass on consent to a search on our behalf. The latter analogy is more appropriate in a number of contexts.

162. *Carpenter*, 138 S. Ct. at 2268–69 (Gorsuch, J., dissenting).

whereas real-property rights are not.¹⁶³ But, per the account defended here, control over the private domain should be understood in the same way as control over property. That model would drastically constrict the third-party doctrine, at the very least limiting it to cases where a third party has independent authority to provide the State with access to contested information.

D. On the Real-Property Model of Privacy, the Most Difficult Questions Arise Where Property and Privacy Are Dissimilar

It should go without saying that difficult questions will remain on a real-property model of privacy. It should also go without saying that real-property rights and privacy rights are different in respects that must be accommodated by the model. Rights in a purely physical domain differ significantly from rights in a partially non-physical domain, not least in terms of discerning violations and actually enforcing the proper boundaries. And, of course, real-property rights are not exclusively about privacy; it is possible to acquire real property with no interest at all in the attendant privacy protections. Real-property law is designed to serve those sorts of interests as well, if not first and foremost.¹⁶⁴

This latter observation points to a key difference between real-property rights and privacy rights: Subject to the limitations of a person's material resources, someone can acquire (and relinquish) as many pieces of real property as she likes, but she only has one private sphere. Our respective private spheres will generally accrete items over our lives, growing as our persistence across time continuously creates new facts about our present selves and accumulates more facts about our past selves. But each of us only has one private sphere, intrinsically anchored by proximity to our agency, and our relationship to the sphere will remain of massive normative significance.

As discussed above, real property can serve as an essential element of the private sphere, particularly when the property in question is incorporated into our lives in a central way. *Some* real property is likely to matter a great deal for nearly everyone's privacy. But the link

163. Of course, the consent of a co-occupant to the search of a shared space is also to be understood in terms of a reasonable expectation of privacy; *that* is a privacy rule applied to real property. By contrast, the third-party doctrine is a privacy rule applied to information. If anything, the fact that these different standards both derive from the Fourth Amendment helps underscore the difference between the treatment of information and property under the Fourth Amendment, which is suggestive of a flaw in Kerr's analogy.

164. See Bell & Parchomovsky, *supra* note 46 (identifying some such interests).

between privacy and real property is contingent on our use of the real property in question. A real estate speculator may possess a dozen loci of real-property rights, but few of them will likely serve the sorts of interests identified in Section I. This fundamental difference reminds us that privacy rights and real-property rights are not on the same plane of moral importance, even if they can overlap in certain circumstances.

There is a second, particularly salient difficulty on a real-property model of privacy: Interpreting the potential privacy violations that accompany the disclosure of private information from one party with permission to access it to other parties who lack such permission. In many respects, privacy is a one-way ratchet. Relinquishing control over private matters by revealing those matters to others, or having that control wrested from us against our will (say, by spying or theft), dilutes our power over the domain. Private information becomes less private once shared, and our power to keep it private diminishes accordingly. Once private information becomes partially or fully public, it is difficult or impossible to claw it back. Private facts are like cats; they can be impossible to recapture once let out of the bag. Losing the ability to stop private information from becoming public can therefore be deeply disconcerting and disempowering.¹⁶⁵

Real-property rights are arguably more discrete, especially when compared to the control of private information. One can be granted temporary permission to cross a physical boundary (say, a license to come over to dinner). Because we cannot compel others to forget, however, it is not generally possible to grant another temporary permission to know a piece of information. Additionally, certain information is easy to disseminate casually or carelessly, whether through routine conversation or correspondence—and, crucially, without any action on the part of the recipient. If I tell you a secret that I had no business repeating, I have dragged you into a small part of someone else's private sphere.¹⁶⁶ By contrast, barring the use of physical force,

165. Note that, in Europe, courts have recognized “the right to be forgotten,” which allows certain complainants to claw back information from the public domain that they wish to treat as private. See Jeffrey Toobin, *The Solace of Oblivion*, *NEW YORKER* (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/09/29/solace-oblivion> (offering some history on the development of the right to be forgotten).

166. As discussed above, Parker denies that this sort of leak gives rise to an additional privacy violation. See Parker, *supra* note 22, at 283 (articulating the view that further dissemination of stolen private information does not yield additional privacy violations). By contrast, Rachels shares the view defended here. See Rachels, *supra* note 12, at 333 (“Suppose you are recently divorced, and the reason your marriage failed is that you became impotent shortly after the wedding. You have shared your troubles with your closest friend, but this is not the sort of thing you want everyone to know. Not only would it be humiliating for everyone to know, it is none of

I can invite you to trespass on another's property but no trespass is actually effected absent an affirmative act by you to step over the boundary. The difficulty is exacerbated by the fact that it can be challenging to identify what information is private and therefore protected. Again, that is less an issue with real property, except to the extent that someone's private property is poorly marked. Each of these dissimilarities poses certain distinctive challenges, but collectively we might call this the problem of iterating trespasses: Informational privacy trespasses beget further trespasses.

CONCLUSION

To accept a real-property model for privacy is to acknowledge the questions raised in the previous section, which are theoretically difficult. At the same time, the implications of these questions for the value of the model defended here are limited. Many private matters are not difficult to identify (or, at least, will not be on a fuller account of the private domain), and many forms of interference with privacy remain straightforward. The real-property model can clearly accommodate major categories of interferences that an account should be able to capture, such as hacking, identity theft, surveillance, improper forms of physical contact, and so forth. The difficulties apply primarily to marginal cases that would pose a challenge to more or less any model.

Even for those harder cases, like those that raise questions about iterating trespasses, it is possible to sidestep some of the challenges when it comes to the practical matter of actually enforcing privacy rights. One promising solution is to set default rules for demarcating the private sphere. For example, we can (and in some contexts already do) designate certain categories of information, like health information, as *prima facie* private, eliminating guesswork about whether certain information can be shared down the line without the consent of the subject. We should also adopt modified liability rules: Trespass on the private domain might not be assessed on a strict-liability basis given the various ways in which one can be dragged faultlessly into another's private sphere. Liability for such a privacy violation should require an affirmative act by the trespasser or a culpable mental state.

their business. It is the sort of intimate fact about you that is not appropriate for strangers or casual acquaintances to know. But now the gossips have obtained the information (perhaps one of them innocently overheard your discussion with your friend; it was not his fault, so he did not violate your privacy in the hearing, but then you did not know he was within earshot) and now they are spreading it around to everyone who knows you and to some who do not. Are they violating your right to privacy? I think they are.”).

In any event, whatever solutions we adopt, they may well be easier to conceptualize on a model of privacy rights that embraces an explicit analogy to physical space.¹⁶⁷

Ultimately, the differences between privacy and property do not undermine the utility of the real-property model of privacy. The model does more than accommodate key intuitions about how to understand privacy rights. It also offers theoretical clarity across various private subdomains, underscores the significant moral weight of privacy rights, and allows us to approach remaining theoretical challenges through an analogy to a similar and well-developed rights regime. The real-property model of privacy provides a promising mechanism for interpreting a complex and important area of the law.

167. It is also important to keep in mind that, on any theoretical model, enforcing privacy rights is notoriously tricky because legal enforcement mechanisms often draw even more attention to sensitive matters. See Gavison, *supra* note 12, at 457–67 (discussing these challenges in some detail). Enforcing our privacy rights can be at least partially self-defeating because the remedy may compound the harm if it requires us further to publicize private information, especially when the harm to be remedied derives from wrongful exposure of that information in the first place. As a result, absent altogether different methods for vindicating privacy rights, only a subset of privacy violations will be “worth” vindicating at all.

