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Privacy Remedies

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PRIVACY REMEDIES

LAUREN HENRY SCHOLZ*

When consumers sue companies for privacy-intrusive practices, they are often unsuccessful. Many cases fail in federal court at the motion to dismiss phase because the plaintiff has not shown the privacy infringement has caused her concrete harm. This is a symptom of a broader issue: the failure of courts and commentators to describe the relationship between privacy rights and privacy remedies.

This Article contends that restitution is the normal measure of privacy remedies. Restitution measures relief by economic gain to the defendant. If a plaintiff can show the likely ability to recover in restitution, that should be sufficient to pass muster at the motion to dismiss phase even if the court is unconvinced that the plaintiff could show a case for compensatory damages flowing from harm.

This argument intervenes in the scholarly literature in two ways. First, it supports the realist perspective that remedies are constitutive of rights. The election of restitution as a remedy suggests that privacy should be conceptualized in tort as quasi-property, and that contract and/or restitution claims should be a standard part of privacy infringement pleadings. Second, it challenges the view that defining specific and stronger privacy rights at law would be sufficient to increase privacy protection. If any privacy rights are to exist at all, they must be linked to proportional, accessible remedies.

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INTRODUCTION

Courts struggle to determine when privacy infringements that occur in cyberspace are sufficiently “concrete” to allow standing in federal courts.¹ This Article argues that underenforcement of the privacy right has resulted from failure of courts and commentators to consider restitution as the quintessential remedy choice for privacy matters. Remedies are best understood as components of the rights they enforce. Remedies allow the scope of the right to be tailored to the facts of each case.

In an amicus brief in *Spokeo v. Robins*, a group of leading remedies scholars argued that the argument that a privacy plaintiff needed some sort of concrete harm to get into federal court was fundamentally incorrect as a matter of law.² Remedies law is the field of law dealing with what a court can do for the winning plaintiff (and to the losing defendant).³ The First Congress anticipated the ability for plaintiffs to collect remedies measured by defendant’s gain.⁴ Restitution is the form of relief measured by the defendant’s gain.⁵ There are many examples of longstanding restitution claims throughout American law that do not require a showing of harm to stand.⁶ The remedies scholars named ten familiar causes of action that do not require plaintiffs to show harm beyond the violation of their legal rights: commercial bribes and kickbacks, business opportunities, other conflicts of interest, misuse of confidential information, forfeiture of fees, infringement of intellectual property, trespass, conversion, rescission, and the slayer rule.⁷ They called upon the Court to “stand up for restitution.”⁸ In a showing of judicial restraint, the majority remained silent on the question of restitution’s relationship to the law of standing in the opinion.⁹ The parties, after all, had not even addressed restitution as a remedy in their briefs. Yet, the evidence the writers of the amicus brief showed was incontrovertible.

1. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (promulgating the current standard for standing to state a claim in federal court that plaintiffs must suffer a concrete, discernible injury—not a “conjectural or hypothetical” one (internal quotation marks omitted)). The Court’s metaphor of concreteness to describe a matter sufficiently weighty to afford the attention of federal courts is hardly helpful for digital harms.

2. Brief of Restitution & Remedies Scholars as Amici Curiae in Support of Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

3. DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES* 1 (9th ed. 2018).

4. Doug Rendleman, Douglas Laycock & Mark P. Gergen, *Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent: Spokeo v. Robins*, WASH. & LEE SCH. L. SCHOLARLY COMMONS (Sept. 8, 2015), <https://scholarlycommons.law.wlu.edu/wlufac/486> [<https://perma.cc/H4AR-JNDC>] (“Statutory minimum recoveries for defendants’ violations of plaintiffs’ individual rights without proof of pecuniary damages or actual harm were well known before the American founding. Indeed the First Congress enacted at least one statutory minimum recovery.”).

5. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

6. Rendleman, Laycock & Gergen, *supra* note 4.

7. Brief of Restitution & Remedies Scholars as Amici Curiae in Support of Respondent, *supra* note 2, at 6–18.

8. Rendleman et al., *supra* note 4.

9. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Unjust enrichment has been both a cause of action and a measurement of relief since the founding generation of the United States.

If, indeed, restitution is the quintessential privacy remedy,¹⁰ the “harm problem” that has so antagonized privacy advocates and scholars¹¹—that is, the difficulty in defining a measurable economic harm issuing from privacy infringements—does not need to be solved in order for privacy claimants to be heard and to receive relief. Courts consider the likelihood that the plaintiff shows eligibility for relief at the pleading phase.¹² Both in and out of federal courts, the notion of standing is a concern

10. I do not mean to say that restitution is the exclusive remedy for privacy infringements. See discussion *infra* Part II.

11. *E.g.*, Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV 737 (2018).

12. Several recent cases have dismissed privacy claims for lack of constitutional standing. *E.g.*, *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1322 (11th Cir. 2012) (involving theft of several laptops from defendant’s corporate headquarters, with medical and personal information for over one million AvMed customers contained within those computers); *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 717 (N.D. Cal. 2014) (claiming that “after defendants processed consumer’s payment for an application downloaded to her mobile device, they included sensitive identifiable data about the consumer when remitting funds to third-party vendor”); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 646 (S.D. Ohio 2014) (bringing “putative class actions against insurer, alleging violations of Fair Credit Reporting Act (FCRA), negligence . . . and bailment, stemming from theft of consumers’ personally identifiable information (PII) from insurer’s computer network” by hackers), *rev’d and remanded*, 663 Fed. App’x 384 (6th Cir. 2016); *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1091 (N.D. Cal. 2013) (involving hackers that infiltrated LinkedIn’s computer systems and services and “posted approximately 6.5 million stolen LinkedIn users’ passwords” and user email addresses); *Low v. LinkedIn*, 900 F. Supp. 2d 1010, 1016 (N.D. Cal. 2012) (alleging that personal information of consumers, including browsing histories, were disclosed by defendant to third-party companies); *Pachowitz v. LeDoux*, 666 N.W.2d 88, 88 (Wis. Ct. App. 2003) (claiming EMT invaded plaintiff’s privacy by “disclosing private medical information to plaintiff’s co-worker”). But some very prominent cases have found standing for privacy plaintiffs, most notably three recent circuit court opinions. *Galaria*, 663 Fed. App’x at 388, 389 n.1 (finding “substantial risk of harm, coupled with reasonably incurred mitigation costs,” supported standing in data breach case because theft of personal data by ill-intentioned criminals placed them at “continuing, increased risk of fraud and identity theft” and plaintiff “suffered three unauthorized attempts to open credit cards in his name”); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693–94 (7th Cir. 2015) (finding that plaintiffs had standing to sue in the wake of a breach even though they had not experienced fraudulent charges on their credit cards because those plaintiffs knew from the fact that other plaintiffs’ cards had been used fraudulently, that their personal information had been stolen by individuals who intended to misuse it); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (finding increased risk of identity theft constituted injury in fact where someone had attempted to use stolen personal data to open bank accounts because plaintiffs had alleged a “credible threat of real and immediate harm stemming from the theft of a laptop” with the unencrypted names, addresses, and Social Security Numbers of 97,000 employees); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1157–59 (D. Minn. 2014) (finding that “unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills, and late payment charges or new card fees” incurred by plaintiffs constituted injuries in fact in the wake of the theft of credit card and personal data of 110 million customers).

important to judges.¹³ The most influential theorization of privacy was done in two law review articles, written in 1890 and 1960—well before the idea of standing became a mainstay of legal culture.¹⁴

Courts' concerns with privacy cases, though, run deeper than the standing question. Courts worry that recognizing the privacy right in the absence of a clearly defined concrete harm may lead to unpredictable, excessive damages based on plaintiffs' subjective perceptions.¹⁵ But much of the scholarly literature on privacy focuses on defining privacy rather than explaining how the state should act when privacy rights are violated. As Anita Bernstein has put it, "[f]rom the vantage point of [a potential plaintiff] the causes of action available for virtual injuries probably do a better job of describing than remedying."¹⁶ An approach that takes assessing and measuring privacy remedies seriously, and integrates that into understanding the practical scope of the right, would squarely address courts' concerns about runaway relief for privacy infringement. This is precisely the ambition of this Article.

The legal realism movement has influenced modern legal discourse so deeply that observing the prevalence of the phrase "we are all legal realists now" has itself become a cliché.¹⁷ However, one central—and mostly forgotten, at least in terms of current influence—element of the legal realism movement was the principle that remedies should be "constitutive components of rights."¹⁸ Karl Llewellyn, a leading

13. See, e.g., *Maglio v. Advocate Health & Hosps. Corp.*, 40 N.E.3d 746, 752–53 (Ill. App. Ct. 2015) (explaining that federal standing principles are similar to those in Illinois and in turn dismissing data breach claims under Illinois law because risk of identity theft and emotional distress did not amount to injury in fact sufficient to support standing). A common move in privacy cases is to remove to federal court under any available pretense to access the federal standing rules. E.g., *Wickens v. Blue Cross of Cal., Inc.*, No. 15cv834-GPC (JMA), 2015 WL 4255129 (S.D. Cal. July 14, 2015) (district court remanding to state court); *Barricks v. Barnes-Jewish Hosp.*, No. 4:11-CV-1386(CEJ), 2012 WL 1230750 (E.D. Mo. Apr. 12, 2012).

14. It is uncontroversial that standing gained new import starting in the mid-twentieth century. Some commenters claim that the idea of standing was a novel invention, others contend it is a natural evolution of existing principles. Compare Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 689–91 (2004) (providing a historical analysis that argues that standing doctrine has deep roots in the common law), with John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (finding "[t]here was no doctrine of standing prior to the middle of the twentieth century").

15. See, e.g., *Galaria*, 998 F. Supp. 2d at 653–57 (finding injuries stemming from theft of consumers' personally identifiable information from insurer's computer network insufficient to find standing), *rev'd and remanded*, 663 F. App'x 384 (6th Cir. 2016); *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d at 1092–94 (holding allegations of economic harm from company failure to protect user privacy were insufficient for standing).

16. Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1462 (2012).

17. Professor Michael Green is typically cited for this observation, who has more recently noted that "people have said 'we are all legal realists now' so often that it has become a cliché to call it a 'cliché.'" Michael Steven Green, *Legal Realism*, WM. & MARY, <http://msgre2.people.wm.edu/Legal%20Realism.html> [https://perma.cc/P3LU-JXQ5]; see also Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

18. Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L. 1, 5, 7 (2011).

mid-twentieth century realist legal scholar, said, in addressing the problem with a rights discourse that assumes remedies are wholly separate from rights, the approach tends to “double the tendency to disregard the limitations actually put on rules or rights by practice and by remedies.”¹⁹ This echoes concerns raised in modern policy discussions about privacy rights. The main fear of privacy skeptics is a slippery slope: recognizing privacy rights will inevitably lead to limitless and arbitrary damages for opportunistic plaintiffs.²⁰

Considering privacy rights alongside their remedies addresses the fear of overenforcement of privacy rights due to their vagueness. Taking privacy remedies seriously contributes to (1) clear boundaries for the rights and (2) adequate protection of the rights when infringed upon. Privacy advocates cannot assume that merely conceptualizing a right to privacy can protect privacy interests, even if that right is enshrined in statutory law.²¹ Without remedies to deter infringement of privacy, and disgorge violators of rents, recognizing privacy rights at law is meaningless. And without predictable rules for the measurement of privacy remedies, courts will be loathe to rule in favor of recognizing privacy rights.

19. KARL N. LLEWELLYN, *A Realistic Jurisprudence—The Next Step*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 3, 13 (1962).

20. See Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978); see also Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1122–23 (2000) (“[E]xpanding the doctrine to create a new exception may give supporters of information privacy speech restrictions much more than they bargained for. All the proposals for such expansion—whether based on an intellectual property theory, a commercial speech theory, a private concern speech theory, or a compelling government interest theory—would, if accepted, become strong precedent for other speech restrictions, including ones that have already been proposed. The analogies between the arguments used to support information privacy speech restrictions and the arguments used to support the other restrictions are direct and powerful. And accepting the principles that the government should enforce a right to stop others from speaking about us and that it’s the government’s job to create ‘codes of fair information practices’ controlling private parties’ speech may shift courts and the public to an attitude that is more accepting of government policing of speech generally. The risk of unintended consequences thus seems to me quite high.”).

21. One of the more common type of privacy article is the categorization article, that is, an article that seeks to impose order on privacy by defining and describing subcategories of the phenomenon, usually drawing on nonlegal social science methods and perspectives in the process. See, e.g., Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 484 (2006) (“The purpose of this taxonomy is to aid in the development of the law that addresses privacy.”); see also Jacqueline D. Lipton, *Mapping Online Privacy*, 104 NW. U. L. REV. 477, 514 (2010) (“Although the framework presented here does not provide concrete solutions to privacy problems, it does illustrate how much the privacy matrix has broadened, and continues to broaden, since the advent of the Web 2.0 era.”). The problem with many categorization articles is that they do not make clear how precisely these categorizations will help lead to better-protected privacy rights, beyond the general observation that it will provide policymakers with more information and “clarity.” But see M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1153–56 (2011) (justifying the distinction between objective and subjective privacy harm, but also noting that seeing the right this way guards against dilution of the right, creates a rule of recognition for new privacy problems, and decouples privacy harm from privacy violations).

The illustrative case this Article will use to show the value of evaluating fit between right and remedy in constructing privacy rights is the case of trafficking in personal data by third-party companies.²² Through evaluating the relevant types of privacy claims and the suite of available remedies, I conclude that restitution is the most appropriate measurement for the plaintiff's relief for this type of infringement. Despite an increasing number of plaintiffs succeeding in unjust enrichment claims or restitutionary remedies for privacy infringement in the courts,²³ privacy scholars and advocates have largely ignored this phenomenon.

By focusing on one example, I do not mean to suggest that privacy rights are uniform. The characteristic that unites all privacy infringements is the mechanism of infringement. Privacy is a quasi-property right, like its cousins trade secret and information misappropriation.²⁴ That means it is a relational right to exclude.²⁵ The right to limit access or use of personal information is not freestanding against the world but rather is triggered by contextual factors to do with the relationship (or lack thereof) between the plaintiff and defendant. Considering remedies shows that not every infringement of privacy must amount to the same sort of remedy, and that there are fair and predictable measurements of privacy remedies. Remedies allow the law to create proportionality in the enforcement of interest. In this way, this Article seeks to mainstream the privacy right,²⁶ that is, to have the interest evaluated and enforced like other similar rights rather than as an exceptional right. Ryan Calo has observed

22. For a detailed description of the data-trafficking industry, see *infra* Part II.

23. *E.g.*, *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1323 (11th Cir. 2012) (holding that current or former members of health care plans who brought action against plan operator in Florida state court, relating to identity theft incidents, stated a claim for unjust enrichment); *Fero v. Excellus Health Plain, Inc.*, 236 F. Supp. 3d 735, 735 (W.D.N.Y. 2017) (holding insurance subscribers who “brought action against healthcare providers and insurers, asserting various federal and state law claims arising from data breach that occurred when hackers secured access to confidential health care information through a cyber attack,” alleged restitution claim); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 654 (E.D. Pa. 2015) (finding plaintiff who claimed that “employer failed to maintain security of his personal identification information in connection with theft of company laptops by other employee,” alleged restitution claim); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 785 (N.D. Cal. 2011) (denying motion to dismiss on unjust enrichment claims for Facebook’s “advertising practice of placing members’ names, pictures, and assertion that they ‘liked’ certain advertisers on other members’ pages”); *State v. Moua*, 874 N.W.2d 812, 818 (Minn. Ct. App. 2016) (finding that where defendant had engaged in identity theft, victims whose private identifying information was stolen were entitled to restitution).

24. Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113, 1116 (2016) (describing privacy as a quasi-property interest).

25. Shyamkrishna Balganes, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889, 1894–1906 (2012) (defining quasi-property as a relation right to exclude based on status, context, and conduct).

26. Here, I am using the term “mainstream” in the way Danielle Keats Citron does in *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010). In that article, Citron argues that rather than inventing new privacy torts, privacy tort law could invoke already mainstream tort doctrines.

that courts tend to use a more exacting harm standard for privacy cases than for other torts, even other dignitary torts, in lawsuits.²⁷

This Article will proceed as follows. In Part I, I will describe the role remedies play in the enforcement of rights and show that courts and commentators have not discussed the key role privacy remedies play in determining the scope of privacy rights. This has resulted in the underenforcement of privacy rights in the courtroom and contributed to the undervaluation of consumer privacy in the market economy. In Part II, I will discuss the case of trafficking in sensitive consumer data by companies unknown to consumers. I will discuss the available causes of action and the possible suite of remedies, and conclude that restitution provides the best fit between right and remedy. This conclusion can be applied to many—though not all—instances of privacy infringement. In Part III, I will discuss the implications of this analysis. Getting around the “harm problem” will allow privacy cases to proceed further in court or for privacy matters to be settled on terms more favorable to privacy plaintiffs than in the status quo. This would both increase knowledge of privacy norms and promote protection of privacy in society. Further, attention to remedies bounds the scope of the privacy right and strengthens our understanding of what the privacy right constitutes. This is because remedies specifically tailor the law’s impact to the behavior and incentives of individuals. Looking at the right-remedy nexus forces the law to confront most immediately what its purpose is in intervening in private interactions.

I. THE ROLE OF REMEDIES IN PRIVACY LAW

In this Part, I will explain the relationship between rights and remedies and argue that remedies can potentially play a significant role in defining rights, drawing in particular on Hanoch Dagan’s work on pluralism in remedies.

Judges, lawmakers, and other stakeholder must confront both the threat of overenforcement of privacy interests and the reality of underenforcement of privacy interests. Scholars have historically had an outsized influence in shaping the path of the law of privacy, as these groups often look to scholars to suggest how to balance these two concerns.²⁸ This Article contends that a reflective return to practical consideration of remedies can help define and bound the privacy interest. Remedies are institutionally situated and can bring the conversation back to the issues that most concern policymakers, judges, and stakeholders.

In *Remedies, Rights, and Properties*, Hanoch Dagan argues that remedies define the rights they enforce.²⁹ Furthermore, a “multiplicity of potential remedies” is an

27. Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361, 361 (2014) (“[C]ourts and some scholars require a showing of harm in privacy out of proportion with other areas of law. Many also assume, counterintuitively, that the information industry somehow differs from virtually every other industry in generating no real externalities.”).

28. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 117 (5th ed. 1984) (arguing that privacy torts show the influence of legal periodicals on the courts); *see, e.g.*, *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845, 846 (N.D. Cal. 1939) (attributing several states’ adoption of privacy torts to Warren and Brandeis’s *The Right to Privacy*).

29. Dagan, *supra* note 18, at 1.

important means for the law to refine doctrines and “accommodate qualitative (and normatively attractive) distinctions between different types of rights.”³⁰ He argues that rights and remedies are interdependent, and neither should be marginalized.

Most of the privacy literature has assumed an approach to privacy that considers rights to be independent of remedies. That is, it assumes courts determine what rights a plaintiff has without reference to the remedies that right may yield, and determining remedies is a wholly separate, subsequent procedure that occurs after a court decides what rights the plaintiff has. Court decisions and scholarly articles written on privacy operate in the shadow of William Prosser’s *Privacy* and Samuel Warren and Louis Brandeis’s *The Right to Privacy*.³¹ Remedies are an afterthought in both papers, sketched only very briefly in Warren and Brandeis’s article, and not discussed at all in the Prosser article.

At the turn of the twenty-first century, a rash of articles pointed hopefully at the possibility of considering privacy as a type of property interest.³² This was intended to give privacy violations the status of property infringements, which would include powerful equitable remedies such as injunctive relief. This would appear to be the long-awaited movement the field needed to take privacy remedies seriously. Several scholars argued that liability rules simply were not strong enough to protect the privacy interest.³³ However, property interests can be sold via contract. The worry is that people will contract away their property. Many scholars have argued that there would be excessive administrative complexity if the law created a presumptively unalienable property right in privacy.³⁴ Furthermore, a presumptively unalienable property right in privacy would run counter to mainstream popular notions of property.³⁵

This debate was steeped in the classic framework for understanding the distinction between liability and property interests as described by Guido Calabresi and A. Douglas Melamed.³⁶ In the article, Calabresi and Melamed distinguish between liability rules and property rules.³⁷ This Article can be critiqued for unduly

30. *Id.*

31. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

32. For a comprehensive summary of this debate, see my discussion in Scholz, *supra* note 24, at 1120–24.

33. See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 142–63 (1999) (advocating the use of property rights to protect privacy on the internet); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 26–41 (1996); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2385 (1996).

34. E.g., Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1284–85 (2000) (outlining skeptical perspectives on privacy as property); Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1129 (2000).

35. See Litman, *supra* note 34; Samuelson, *supra* note 34.

36. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter *Cathedral*].

37. *Legal Theory Lexicon 052: Property Rules and Liability Rules*, LEGAL THEORY LEXICON (Aug. 13, 2006), https://lsolum.typepad.com/legal_theory_lexicon/2006/08/property_rules.html [<https://perma.cc/2PTT-RVBP>] (last updated July 1, 2018) (providing a broad

simplifying remedies analysis.³⁸ There is more to a discussion of remedies than whether privacy—or any other interest—falls into the broad category of property or liability. The scholars who advocated a property approach did so because they presumed different and superior remedies would be available for the infringement of a privacy interest. However, they also constructed highly conditional and difficult to alienate property rights for privacy as property.³⁹ For property rights that stray from the ideal of real property, the law's approach is still difficult and developing,⁴⁰ so it is not clear that courts would award remedies similar to the remedies for real property rights even if the privacy interest was not disclaimed via contract. It is important to note that it is not inevitable to consider property rules as distinctly different in kind from other rules. In other Western jurisdictions with similar legal and moral foundations as the United States, damage to personal dignity is seen as unique for similar reasons as property and therefore not presumptively subject to relief with money damages.⁴¹ Ronen Perry has persuasively argued that there is an economic bias against imposing liability for relational losses that cannot be supported by consequentialist rationales for imposing liability in matters.⁴²

Those that opposed the privacy as property framework largely objected on the basis that the alienability of property would lead to worse privacy outcomes than a liability model.⁴³ The question of remedies is not significant to this critique.

So for different reasons, both the pro-property and anti-property sides of the debate did not parse the relationship between specific remedy options and the privacy right. The questions of what remedies would best vindicate privacy rights and what remedies might set asunder a good balance between privacy and other interests has rarely been addressed in the legal literature, with some notable exceptions.⁴⁴ But the

summary of the Calabresi and Melamed article and a discussion of how American lawyers and law professors tend to use it).

38. Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. (forthcoming 2018) (critiquing the *Cathedral* article's analysis and vocabulary). The remedies choice is between compensatory damages, plaintiff's loss, restitution, defendant's gain, and an injunction. The choice between liability rules and property rules is too limited; one of the *Cathedral* article's drawbacks is that it doesn't discuss the remedy this article focuses on, restitution, at all.

39. E.g., Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 HASTINGS L.J. 899, 922–929 (2003); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2096–116 (2004).

40. Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1, 4 (2015).

41. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 219 (2006).

42. Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573 (2008).

43. E.g., Samuelson, *supra* note 34.

44. Katy Barnett, *Gain-Based Relief for Breach of Privacy*, in REMEDIES FOR BREACH OF PRIVACY 183 (Jason Varuhas & Nicole Moreham eds., 2018) (discussing the use of restitution in privacy cases in Australian law); Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, 82 TEMP. L. REV. 891, 898 (2009) (discussing remedies in the context of confidential disclosures on platforms); Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877 (2003); Joel R. Reidenberg, N. Cameron Russell, Alexander J. Callen, Sophia Qasir & Thomas B. Norton,

conflation between torts and property in light of the protection of privacy interest is understandable. As the works of Joshua Fairfield have described and analyzed, the transition from an industrial economy to an information economy has created changes in social organization of property rights that has, incidentally, resulted in less protection of privacy interests without a corresponding conscious choice about how society would like privacy interests to be allocated.⁴⁵ As a result, Fairfield has argued for an interpretation of property rights that would allow property interests to defend privacy in the way they have historically been able.⁴⁶

The turn of the century is-privacy-property debate often categorically assumed the inability of liability interest to provide sufficient enforcement to practically defend privacy. A more nuanced analysis of liability interests shows that they are very capable of protecting valuable and important interests in society. After all, commercial law is powered by contracts and licenses, and few would argue that nonproperty commercial interests are unprotected or contractual obligations go unenforced. What determines whether a liability interest is pro forma or of great consequence is what remedy is associated with its violation.

The case law also suffers from consideration of remedies when considering the privacy interest. Courts, for their part, have largely stuck to conclusionary analysis regarding the presence or absence of a harm.⁴⁷ The analysis as to why a harm is not

Privacy Harms and the Effectiveness of the Notice and Choice Framework, 11 I/S: J.L. & POL'Y FOR INFO. SOC'Y 485 (2015); Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. CHI. L. SCH. ROUNDTABLE 75 (2002); see also Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457 (2012) (discussing remedies for injuries in cyberspace, including but not limited to privacy injuries).

45. JOSHUA A.T. FAIRFIELD, *OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM* (2017). Fairfield explicitly and eloquently rejects the idea of accepting just any property rights in property as a panacea. *Id.* at 11. ("By no means are property rules a magic cure. Property is not good or desirable in and of itself. Good property rules let humans work together; they make cooperation easier. Bad property rules reduce people to the level of commodities and prepare resources for easy theft by the powerful and unscrupulous. So here is the guiding principle for this exploration of property rules in a digital age: property rules should be measured by a human yardstick. Where they do not make human lives better, where they do not expand the range of possibilities for what humans can perform, they should be reformed.").

46. *Id.*

47. *E.g.*, *Pearce v. Whitenack*, 440 S.W.3d 392, 401 (Ky. Ct. App. 2014) ("Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. . . . By analogy, Pearce's Facebook posting was a walk on the Internet, the information super-highway." (citation and emphasis omitted)); *People v. Stipo*, 124 Cal. Rptr. 3d 688, 691 (Cal. Ct. App. 2011) ("A subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. Therefore, his challenge to a warrant requiring his Internet provider to identify him through his Internet Protocol (IP) address has no merit."). *But see* *Taus v. Loftus*, 151 P.3d 1185, 1218 (Cal. 2007) ("Unlike a person's appearance or activities that occur in a public place, and unlike personal information about a person that is contained in a public record open to inspection by the general public as a matter of law, personal information about a person that happens to be known by the person's relatives or close friends is not information that has entered the public domain. A person's interest in preserving the privacy of such information—the very interest the intrusion tort was designed to protect

present is often superficial or absent. Analysis of the harm is absent where courts seek to avoid analysis of compensatory harms based on the theory that any disclosure of information anywhere constitutes consent, obviating the potential for relief from the privacy tort.

This Article examines how remedies can help define and enforce the privacy interest even if one understands it as a nonproperty right. This Article begins the important work of showing how we should think about choosing remedies for the myriad of privacy interests recognized at law. The following two Parts will illustrate the virtues of considering rights and remedies as interdependent in the case of the privacy interest.

II. ILLUSTRATION: THE CASE OF CONSUMER DATA TRAFFICKING

This Part discusses the relationship between the problems privacy regulation seeks to solve and possible remedies for privacy invasions. This Part will use third-party personal data trafficking as an illustrative example of what it means to consider privacy rights alongside remedies.

First, it defines this Part's illustrative example: third-party consumer data trafficking. Second, it describes the available causes of action available against the data traffickers, with reference to the underlying principles of privacy law. Then, it considers the remedies available against the data trafficker. Finally, it argues that the best-fit remedy against the data trafficker is typically restitution. This finding shows the limitations of superficial court analysis of remedies at the motion to dismiss phase. If, in at least one important area of privacy and possibly others, the correct remedy is not compensation, but restitution, privacy cases should not be dismissed simply because a harm cannot be shown. The analysis is incomplete.

Third-party data trafficking is a widespread phenomenon that impacts virtually every person in the United States.⁴⁸ These companies do not have a relationship with either individual users whose information they possess or with major platforms⁴⁹ (i.e., Facebook, Google, etc.) on which consumers might be posting information.⁵⁰ It is important to note that because of the wide range of information sources these data traffickers take advantage of, one does not need to be a prolific Facebook user or even the owner of a Gmail account to have extensive personal information in the account. Data traffickers combine online and offline data to build their databases on

—would be substantially undermined if a would-be investigator could employ any means whatsoever to extract or obtain such private information from a relative or close friend.” (citations omitted)).

48. FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, at iv (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> [<https://perma.cc/DL6D-23CP>].

49. Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 135, 142 (2017). *But see* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 89–91 (2016) (using a different, more narrow definition of platform, specifically platforms for peer-to-peer services, such as Uber).

50. FED. TRADE COMM’N, *supra* note 48.

American consumers.⁵¹ One must simply use a debit card and have conducted basic transactions, such as being an employee, buying a home, or simply having public records of any kind. This is impossible for almost anyone in American society to avoid. At least one prominent data trafficker has 3000 data segments for nearly every American consumer.⁵²

This Article uses the term “data traffickers” rather than “data brokers,” a term that has been used by the Federal Trade Commission (FTC) and some other commentators. This is because the term “traffickers” encompasses both actors who engage in wrongful conduct and actors who engage in nonwrongful conduct.⁵³ By contrast, the term “brokers” implies a level of legal and social legitimacy that participants in the industry have not yet obtained. The issue of which data trafficking practices are legal and what reforms should be made to further regulate the industry is a live one. That makes the term “data broker” inappropriately conclusory as applied indiscriminately to all actors who buy and sell data.

The federal government has long been concerned with the potential for exploitation of individuals by actors with access to their personal information. In 1970, the Fair Credit Reporting Act (FCRA) was passed.⁵⁴ This statute covers the provision of consumer data by consumer reporting agencies where it is used or is expected to be used for decisions about credit, employment, insurance, housing, and similar eligibility determinations.⁵⁵ However, it generally does not cover the sale of consumer data for marketing and other purposes. The internet enables access to increasing amounts of consumer data, both through currently legal methods, such as “scraping” information from online platforms or purchasing information from legitimate custodians of databases, and through expressly illegal methods, such as hacking into private databases or purchasing data from others who have obtained data by theft or misrepresentation.⁵⁶ As a result, though the FCRA legislature clearly intended to prevent individuals from being negatively exploited by use of their personal data without their notice or consent, the data trafficking industry largely operates outside its scope of protection.⁵⁷ The FTC has identified three categories of

51. *Id.* at 2.

52. *Id.* at iv.

53. *Compare Traffic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trafficker> [<https://perma.cc/MY9N-QHWZ>] (defined as the “import and export trade,” “the business of bartering or buying and selling,” or “illegal or disreputable usually commercial activity”), *with Broker*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/broker> [<https://perma.cc/JM4T-MCRK>] (defined as “one who acts as an intermediary” or “one who sells or distributes something”). The verb “traffic” includes both legal and illegal commerce, though it is frequently associated with the latter, whereas “broker” is a nonpejorative term to describe an actor with a mediator function in commerce.

54. 15 U.S.C. § 1681 (2012).

55. *Id.* § 1681b.

56. *See* Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012) (liability for intentionally accessing a computer without authorization or exceeding authorized access).

57. FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 2 (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> [<https://perma.cc/LZ9B-RFV9>].

data traffickers: (1) FCRA-covered entities; (2) entities that maintain data for marketing purposes; and (3) non-FCRA-covered entities that maintain data for nonmarketing purposes, such as to detect fraud or locate people.⁵⁸ Two out of these three categories are currently not subject to regulation.

Data traffickers acquire their data from a variety of sources, including state and federal government sources, scraping or crawling⁵⁹ information from publicly accessible websites, including social media, and purchasing access to other data trafficker resources.⁶⁰ All three of these methods present actual or potential legal concerns. Using state records on driver's licenses or voter registration is against federal law and the law of many states, respectively.⁶¹ Scraping information from many websites, particularly many popular social media websites, such as Facebook, is against their terms of service.⁶² Breaking a website's terms of service is not only a breach of contract, but it may also be a violation of the Computer Fraud and Abuse Act (CFAA).⁶³ The current prevailing interpretation of the CFAA interprets breach of terms of service of an application as intentionally accessing a computer without authorization or exceeding authorized access.⁶⁴

Finally, and most significantly, many major data traffickers acquire most of their resources from purchasing data from other data traffickers.⁶⁵ Data traffickers have no legal, social, or financial incentive to avoid purchasing information from other data traffickers that obtain information from illegal sources. There is no legal barrier preventing data traffickers with high legitimacy levels from purchasing data from entities that acquire their information from clearly illegal sources under the CFAA.

58. *Id.* at 65.

59. *Web Scraping*, WIKIPEDIA, https://en.wikipedia.org/wiki/Web_scraping [<https://perma.cc/NP6M-JDZV>] (“[D]ata scraping used for extracting data from websites.”); *Web Crawler*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/web%20crawler> [<https://perma.cc/HMF6-ZP2U>] (“[A] computer program that automatically and systematically searches web pages for certain keywords.”).

60. FED. TRADE COMM’N, *supra* note 48, at 13–15.

61. Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721–2725 (2012) (federal law limiting use of driver’s license registers). States restricting the use of voter registration information for commercial and nonelection related purposes include California, Georgia, Illinois, Kansas, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Oregon, South Dakota, West Virginia, and Wyoming. *Voter List Information*, U.S. ELECTIONS PROJECT, <http://voterlist.electproject.org> [<https://perma.cc/NS9K-SXBK>].

62. FED. TRADE COMM’N, *supra* note 48, at 13 n.40.

63. For a full summary of how the CFAA is being used to make breach of a terms of service criminal, see David Thaw, *Criminalizing Hacking, not Dating: Reconstructing the CFAA Intent Requirement*, 103 J. CRIM. L. & CRIMINOLOGY 907, 926–42 (2013).

64. *E.g.*, Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058 (9th Cir. 2016); *see also* Jamie Williams, *Take Two: Ninth Circuit Revises Two Password Sharing Decisions, but Fails to Fix CFAA Mess*, ELECTRONIC FRONTIER FOUND. (Dec. 15, 2016), <https://www EFF.org/deeplinks/2016/12/take-two-ninth-circuit-revises-two-password-sharing-decisions-fails-fix-ctfaa-mess> [<https://perma.cc/6736-HKGH>].

65. All but one of the companies that the FTC identified as leaders representative of the field bought data from other companies. FED. TRADE COMM’N, *supra* note 48, at 13. The nine companies ordered to contribute information to the FTC study were Acxiom, Corelogic, Datalogix, eBureau, ID Analytics, Intelius, PeekYou, Rapleaf, and Recorded Future. *Id.* at 8–9.

Only a minority of leading data traffickers has chosen to “affirmatively evaluate the legitimacy, stability, and quality of their sources before accepting data from them.”⁶⁶ Cybersecurity threats increase daily throughout the economy, and over seventy-five percent of cybersecurity attacks have financial motives.⁶⁷ The status quo actively encourages cybersecurity attacks, such as the high-profile breach of Equifax.⁶⁸ Hackers can launder their data through the vast web of data traffickers.

By the time the most legitimate data traffickers, such as the ones interviewed by the FTC, choose to purchase access to the data, the sources of the data have become unclear. This is far from inevitable. Property law has a long history of using public registers so prudent, good-faith buyers can purchase property with knowledge that the title is clean and free of encumbrances. But the current law has no provisions for the traffic of data that was hacked and resold. The legal need for plausible deniability leads the majority of data traffickers to choose not to investigate where their data came from. As for social pressure not to use stolen resources, the lack of public knowledge regarding the trade in personal data shields all actors in the data trafficking industry from accountability. This creates a disturbing reality in the status quo: data traffickers who do not engage in illegal or even immoral activities themselves have every incentive not to investigate where the data they purchase comes from.

The most important thing to note about data trafficking practices for the forgoing analysis is that there is no contractual relationship between the data traffickers and the individuals with profiles in their databases. This factors the question of consent out of the equation with respect to establishing the question of harm to consumers because there is no agreement between the data traffickers and the subjects of the information in the databases in the first place.⁶⁹ This sets the stage for the application of restitution.

A person who is unjustly enriched at the expense of another is subject to liability in restitution.⁷⁰ The rationale for the law’s implication for an obligation of the enriched party to pay the other for the value of the resource received can be rooted

66. *Id.* at 16.

67. VERIZON, 2016 DATA BREACH INVESTIGATIONS REPORT 7 (2016), http://www.verizonenterprise.com/resources/reports/rp_DBIR_2016_Report_en_xg.pdf [<https://perma.cc/KPA6-B5NQ>].

68. Andrew Liptak, *Hackers Accessed More Personal Data from Equifax than Previously Disclosed*, VERGE (Feb. 11, 2018, 10:55 AM), <https://www.theverge.com/2018/2/11/17001046/equifax-hack-personal-data-tax-identification-numbers-email-addresses-drivers-licenses-cybersecurity> [<https://perma.cc/55H3-S27X>].

69. However, some have argued that consent has been given a burden it cannot sustain even when there is apparent agreement to terms in online form contracts. *See, e.g.*, Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 800 (2007); Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 730 (2015).

70. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

in precedential⁷¹ or economic⁷² principles. While the precedential argument for restitution will be discussed further below, the basic economic argument is worthy of outline here. As Judge Richard Posner has observed in his treatise on the economic analysis of law: “If a court is reasonably confident both that there would have been a [contract] and what its essential terms would have been [where there are prohibitively high transaction costs] . . . it does not hesitate to write a contract between the parties after the fact. Note the analogy to maritime salvage.”⁷³

Data traffickers acquire data about individuals without contract with, or providing services to, consumers. Furthermore, they profit from the data they acquire by selling it to companies that provide services. It is impossible to decisively quantify the full scope of the data trafficking entity given that a portion of it is based on the trade of data that has been acquired through hacking. However, the FTC has surveyed a set of nine well-known and presumably white hat,⁷⁴ or mostly ethical, companies that buy and sell data. Data traffickers sell products in three broad categories: (1) marketing, (2) risk mitigation, and (3) people search.⁷⁵ “These products generated a combined total of approximately \$426 million in annual revenue in 2012 for the nine data brokers” that the FTC surveyed in 2014.⁷⁶

Having summarized the characteristics of the data trafficking industry, the Article will now look to analyze the potential causes of action entities⁷⁷ and individuals whose data is acquired and sold without their notification or consent might have against data traffickers.

Three principal categories of causes of action might be brought in the area of consumer data trafficking: (1) tort law,⁷⁸ (2) consumer contract law,⁷⁹ and (3) restitution.⁸⁰

71. See, e.g., Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85, 124–25 (1986) (making an equitable argument for allowing recovery for out-of-pocket expenses incurred by a nonprofessional rescuer when the rescuee has been unjustly enriched).

72. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 168–69 (8th ed. 2011).

73. *Id.*

74. *White Hat*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20hat> [<https://perma.cc/W6Z8-QXX2>] (“[A] hacker who tests computer systems for possible vulnerabilities so that they can be fixed.”).

75. FED. TRADE COMM’N, *supra* note 48, at 23 .

76. *Id.*

77. It is possible that artificial persons (i.e., companies and organizations) might have their data trafficked. The same principles apply to such actors in the economy.

78. See Robert L. Rabin, *Intangible Damages in American Tort Law: A Roadmap* 19–22 (Stanford Pub. Law & Legal Theory Working Paper Series, Research Paper No. 2727885, 2016), <https://ssrn.com/abstract=2727885> [<https://perma.cc/C3FN-WNYE>].

79. See Christoph Busch, *The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data*, in RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW 221 (Christian Twigg-Flesner ed., 2016); Omri Ben-Shahar & Lior Jacob Strahilevitz, *Contracting over Privacy: Introduction*, 45 J. LEGAL STUD. S1 (2016) (discussing the centrality of consumer contract law in privacy regulation); Kim & Telman, *supra* note 69.

80. See Thomas Camp, *Restitution on a Partial Failure of Basis*, 28 BOND L. REV. 21 (2016).

Tort law is likely the most intuitive legal approach to address the behavior of data traffickers. It provides the closest connection between general statements of law and finding of liability. In brief, it would find, under some tort theory, that the data traffickers acted wrongly and therefore have to make injured parties whole.

There are the four privacy torts listed in the *Second Restatement of Torts*: intrusion upon seclusion, appropriation of likeness, public disclosure of private facts, and false light.⁸¹ The Prosserian approach to the worry that privacy plaintiffs would bring too many general claims into court was to consciously cabin the right into highly specific fact patterns.⁸²

In addition, there are many other torts specifically designated to protect privacy that the state or federal government has sought to protect, such as revenge pornography.⁸³ So, if a court finds the torts match the behavior of the data traffickers, there is liability. An issue with this approach for newly possible privacy infringements, though, is that both the *Restatement* privacy torts and most statutory provisions are designed to deal with specific delineated problems. When problems are framed highly specifically, they struggle to apply effectively to newly possible infringements created by technosocial developments.⁸⁴

Given the cramped nature of the privacy torts, a better avenue for tort law for data trafficking lies in torts related to wrongful business practices.⁸⁵ This family of torts has the aim of promoting basic fair play in commerce. This family of torts includes, but is not limited to, fraud, theft, infringement of intellectual property, and breach of fiduciary duty.⁸⁶ They protect the moral standing of the law by not permitting con artists to hide behind the law to achieve their ends. These torts also promote economic efficiency by reducing the amount of money and time actors have to spend on self-help mechanisms to prevent these wrongful acts.

The tort of tortious interference with a contract is instructive of how these torts can be applied in the context of data trafficking.⁸⁷ Given that most consumers interact

81. RESTATEMENT (SECOND) OF TORTS § 652 (AM. LAW INST. 1979).

82. Prosser, *supra* note 31, at 389, 422–23 (discussing the dangers of a vague and overbroad cause of action for the general right “to be let alone”).

83. Christian Nistáhuz, Comment, *Fifty States of Gray: A Comparative Analysis of “Revenge-Porn” Legislation Throughout the United States and Texas’s Relationship Privacy Act*, 50 TEX. TECH L. REV. 333, 356–63 (2018) (survey of state legislation on revenge pornography).

84. See Celina Raffl, Wolfgang Hofkirchner, Christian Fuchs & Matthias Schafranek, *The Web as Techno-Social System: The Emergence of Web 3.0*, <http://fuchs.uti.at/wp-content/uploads/web3.pdf> [<https://perma.cc/PVB6-L2YR>].

85. Not incidentally, this is the private law analogue of the unfair and deceptive business practices enforcement power of the Federal Trade Commission, which has taken a leading role in the regulation of information privacy and data security in the decades since the rise of the public internet. See generally Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

86. See generally GABRIEL ABEND, *THE MORAL BACKGROUND: AN INQUIRY INTO THE HISTORY OF BUSINESS ETHICS* (2014); NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKET AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016).

87. RESTATEMENT (SECOND) OF TORTS § 766 (AM. LAW INST. 1979) (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person

via a platform of one sort or another that makes affirmative privacy representations, if a data trafficker acts in a manner inconsistent with the platform's terms of service, in some circumstances, they might be said to be tortiously interfering with the contract.

Many of the rights consumers possess in their personal information come from contract law. Companies routinely expressly promise more with respect to privacy and data protection than they deliver.⁸⁸ In consumer contract law, the important keystone to begin with is browsewrap and clickwrap agreements. Clickwrap agreements are agreements in which consumers must click an "I agree" icon in order to proceed with a transaction.⁸⁹ Many courts have found clickwrap agreements to be enforceable contracts, at least when the clickwrap terms are not overreaching or abusive.⁹⁰ Browsewrap agreements are agreements in which terms available on a webpage purport to hold consumers who browse the website to have agreed to terms.⁹¹ In these policies, most companies make representations about information privacy and data use.⁹² "Most courts which have considered the issue . . . have held that in order to state a plausible claim for relief based upon a browsewrap agreement, the website user must have actual or constructive knowledge of the site's terms and conditions, and have manifested assent to them."⁹³

If a company engaging in data trafficking made representations to consumers inconsistent with their practices, this exposes them to liability for breach of contract.⁹⁴ This is in addition to implied warranties or fiduciary duties to which a custodian of personal information might be bound in the absence of proper disclaimers, given the infeasibility of negotiated agreements.⁹⁵ Even if the data traffickers are not in direct contract with the consumers whose data they acquire, there may be circumstances under which privity with respect to contractual obligations about what to do with personal information exist. Further, when a data

not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.").

88. See generally Solove & Hartzog, *supra* note 85.

89. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76 (9th Cir. 2014).

90. *E.g.*, *Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010) (refusing to find enforceable a clickwrap agreement that required consumers to bring all claims in Texas and also required consumers to relinquish their right to bring a class action suit against Dell for any reason whatsoever).

91. *Nguyen*, 763 F.3d at 1175–76.

92. Aleecia M. McDonald, Robert W. Reeder, Patrick Kelley & Lorrie Faith Cranor, *A Comparative Study of Online Privacy Policies and Formats*, in *PRIVACY ENHANCING TECHNOLOGIES: 9TH INTERNATIONAL SYMPOSIUM* 37–55 (Ian Goldberg & Mikhail J. Atallah eds., 2009).

93. *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010).

94. Kelly D. Martin, Abhishek Borah & Robert W. Palmatier, *Research: A Strong Privacy Policy Can Save Your Company Millions*, *HARV. BUS. REV.* (Feb. 15, 2018), <https://hbr.org/2018/02/research-a-strong-privacy-policy-can-save-your-company-millions> [<https://perma.cc/QPL9-36Z8>].

95. See Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, *ATLANTIC* (Mar. 1, 2012), <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851> [<https://perma.cc/EQW9-YR9E>].

trafficker acquires personal information about customers from a platform in conflict with the platform's terms of services, the data trafficker could be liable to the platform under the CFAA.⁹⁶

There is a widespread misconception among privacy advocates and commentators that consumers cannot rely on contract law to bring privacy claims.⁹⁷ Two cases addressing information privacy in the infancy of the consumer interest, the earlier of which occurred in the mid-1990s, denied the coverage of particular privacy policies as binding contracts. Some scholars have pointed to these same two cases as evidence, more than two decades later, that courts and company practices deny the applicability of contract law to privacy policies. This is empirically inaccurate. A recent article by Professors Omri Ben-Shahar & Lior Jacob Strahilevitz shows, through an empirical study of cases over the past decade, that most courts actually find privacy policies to contain bilateral binding promises between consumers and companies.⁹⁸ Ben-Shahar and Strahilevitz expressly bemoan the myopia of many privacy scholars in effectively extrapolating the law's approach to privacy from two rather idiosyncratic, lower-court cases, *In re Jet Blue Airways Corp. Privacy Litigation* and *Dwyer v. American Express Co.*⁹⁹ A failure to look beyond these two cases leads to a broader myopia: missing that contract law and related interests may be the primary source of consumer privacy rights is the status quo. Even where representation by a company is not binding in contract, a showing of reliance on a promise provides grounds for an individual to seek relief in promissory estoppel.¹⁰⁰ Promissory estoppel lies where a party relies upon another's promise, the defendant knew the party would rely on the promise, and injury results.¹⁰¹ While the doctrine of promissory estoppel is not true contract law, relying as it does on reliance as opposed to bargained-for exchange, it is a frequent fellow traveler of contract law, as evinced by its presence in the *Restatement of Contracts*. That is to say, promissory

96. *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016); *see also Williams, supra* note 64.

97. Ben-Shahar & Strahilevitz, *supra* note 79. *But see* Solove & Hartzog, *supra* note 85, at 595–96 (arguing that privacy policies are not contract law, relying on the cases discussed in the text, and concluding: “Today, contract law—formal contract and promissory estoppel—plays hardly any role in the protection of information privacy, at least vis-à-vis websites with privacy policies. Contract law litigation theories have barely been attempted, as the number of cases involving these theories has been exceedingly low over the past fifteen to twenty years after the rise of privacy policies.”).

98. Ben-Shahar & Strahilevitz, *supra* note 79.

99. *In re Jet Blue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) (rejecting a hypothetical claim for damages based on “the loss of the economic value of their information” because “[plaintiffs] had no reason to expect that they would be compensated for the ‘value’ of their personal information . . . [and there is] no support for the proposition that an individual passenger’s personal information has or had any compensable value in the economy at large”); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (holding that the use of consumer data to target third parties did not violate the intrusion upon seclusion or appropriation privacy torts because defendants were not disclosing particular cardholders’ financial information and finding that “a single, random cardholder’s name has little or no intrinsic value to defendants”).

100. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

101. *Id.*

estoppel tends to arise in a context where a contract could have or should have been formed but, for some reason, was not properly formed.

Finally, I will consider restitution as a basis of liability. Restitution, in brief, is liability for benefits received. Courts and commentators sometimes call this the “freestanding” action in restitution, to emphasize that it is a basis of liability parallel to torts and contract.¹⁰² This is to disambiguate this cause of action from restitution as a remedy or measurement of relief.¹⁰³ Restitution lies when one person receives a benefit from another when the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.¹⁰⁴ Restitution, it is important to underscore, is not an action in tort or contract but, rather, a wholly distinct basis of liability based purely on the unjust transfer of a thing of value.

The “unjust” in unjust enrichment is a term of art. Unjust enrichment is subject to the following bright-line limitations:

- (1) The fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched.
- (2) A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.
- (3) There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of contract.
- (4) Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse.¹⁰⁵

Subject to the above exceptions, the formula for finding an unjust transfer is straightforward. First, the transfer by the plaintiff must be nondonative; that is to say, the plaintiff did not intend to give the defendant something for nothing.¹⁰⁶ Second, the plaintiff’s transfer must be received by the defendant knowing, or should have known, that the plaintiff’s transfer was nondonative.¹⁰⁷ There are several circumstances where restitution tends to be a cause of action.¹⁰⁸ Dean Ward

102. *E.g.*, Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 886 (1999).

103. The terminology in this area is notoriously confusing. *See* *Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co.*, 695 So. 2d 383, 387 (Fla. Dist. Ct. App. 1997) (clarifying terms applied in restitution actions where plaintiff and defendant literally went to trial before realizing they had briefed based on different definitions of “quantum meruit,” an action in restitution). In my analysis, I use the *Third Restatement’s* formulation, which was designed to minimize confusion by avoiding the use of ambiguous terms.

104. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”); RESTATEMENT OF RESTITUTION § 1 cmt. c (AM. LAW INST. 1937).

105. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 (AM. LAW INST. 2011).

106. Ernest J. Weinrib, *The Structure of Unjustness*, 92 B.U. L. REV. 1067, 1070 (2012).

107. *Id.* at 1072.

108. *See infra* Part III.

Farnsworth has illustrated the scope of the field by dividing situations where restitution actions work into four basic categories: (1) mistakes, where neither party intended the transfer; (2) conferrings, where the giver intended the transfer but the recipient did not; (3) takings, where the recipient intended the transfer but the giver did not; and (4) finally, failed contracts, where a transfer might have been intended by both, but due to the failure of a contract to be created, unjust enrichment occurs anyhow.¹⁰⁹

As for the second element of the test for restitution, the element of enrichment, it merely means there must be some basis for believing that there was a gain to the defendant. Cases in which a legal wrong results in injury to the claimant but no benefit to others are not part of the law of restitution.¹¹⁰

To return to our case study, the general argument for a restitution action applying to data trafficking goes that if a data trafficker acquired personal information by interception, scraping, hacking, purchase, or other acquisition of data that was acquired by tortious or criminal means (for example, data from a data breach subject to mandatory reporting), they are liable for unjust enrichment.

Before the Article begins the remedies analysis, though, it is worth noting that only the tort avenue of liability requires a judge to evaluate harm to plaintiff. When a contract has been breached, judicially determined harm to plaintiff is not a relevant factor in determining either liability or availability of remedy. Under the bargained-for theory of consideration endorsed by most modern courts, courts expressly defer from judging the objective value for which each party bargained.¹¹¹ For a court to find a contract enforceable, to quote Justice Oliver Wendell Holmes's influential formulation, "the promise induces the detriment or that detriment induces the promise."¹¹²

Once liability in tort, contract, or restitution is established—and naturally the application of any or all will be fact-sensitive even within the general category of data traffickers—there remains the remedies question, that is, the question of what a court does in response to a finding of liability.¹¹³

There are two principal types of monetary remedies available: (1) damages, where relief is measured by loss to plaintiff; and (2) restitution, where relief is measured by gain of defendant. Damages and restitution are both normally relief at law, rather than equity.¹¹⁴ Restitution is considered a remedy at law or equity depending on which remedy accounting the court chooses.¹¹⁵ A claimant entitled to a remedy for

109. WARD FARNSWORTH, *RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT* 2–3 (2014).

110. *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 3 cmt. b (AM. LAW INST. 2011).

111. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 110 (8th ed. 2016).

112. *Wis. & Mich. Ry. v. Powers*, 191 U.S. 379, 386 (1903).

113. See Douglas Laycock, *How Remedies Became a Field: A History*, 27 *REV. LITIG.* 161, 168 (2008).

114. Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 *SMUL. REV.* 1577, 1599 (2002).

115. *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 4 (AM. LAW INST. 2011) ("Liabilities and remedies within the law of restitution and unjust enrichment may have

unjust enrichment “need not demonstrate the inadequacy of available remedies at law.”¹¹⁶

There are several specific measures of restitution that courts use.¹¹⁷ For the purposes of this Part, I will focus on how courts measure monetary restitution. This type of remedy is available in most cases and is most likely to come into play in most nonmedical data trafficking cases, as will become apparent in my analysis below.

There are two questions that courts must consider when measuring restitution as a remedy. First, can the defendant return what she took to the plaintiff?¹¹⁸ If so, the remedy is simply the return of what was taken. If not, the court must consider how to value the degree of enrichment. This is difficult because many measurements of the enrichment are possible. The possible monetary measures of enrichment are:

1. the amount defendant saved as a result of the plaintiff’s efforts,
2. the cost the plaintiff spent to provide the benefit,
3. the amount the defendant said he would pay for the benefit,
4. the market value of the benefit, or
5. all the benefits the transfer produced for the defendant, including not just the asset itself but any use value it had and any investment income it produced.¹¹⁹

Some possible measurements of restitution are more financially generous to plaintiffs than others.¹²⁰ So, the second question courts must consider when evaluating how to measure restitution when the resource cannot be returned is what responsibility, if any, did the defendant have for her enrichment at the expense of the plaintiff?¹²¹ The more responsibility the defendant has for her enrichment, the more generous the measurement of damages. The responsibility of a defendant is evaluated on a spectrum. An innocent recipient is one that received nonreturnable benefits that she never asked for and had no opportunity to refuse.¹²² In this case, restitution is measured by the amount the recipient saved as a result of the transfer. This typically is the lowest value way to assess the enrichment. For defendants who at least requested the benefits received, though, the measurement of damages is no less than the market value of the benefits.¹²³ The courts’ logic here is that if the recipient

originated in law, in equity, or in a combination of the two.”)

116. *Id.*

117. Professor Samuel Bray discusses the economic implications and incentives created by each measure of restitutionary remedy. Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71 (2018). The measures he discusses include accounting for profits, constructive trust, equitable lien, rescission in equity, rescission at law, and recovery in quasi-contract. *Id.* at 88.

118. FARNSWORTH, *supra* note 109, at 105.

119. *Id.*; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49 (AM. LAW INST. 2011).

120. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 49–53 (AM. LAW INST. 2011) (providing different possible measurements of restitutionary damages and their bases).

121. FARNSWORTH, *supra* note 109, at 105.

122. *Id.* at 105–06.

123. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50 cmt. d (AM.

requested the benefits but failed to settle the price, she was at least ready to pay the market price for the benefits.¹²⁴ This implies no judgment about the intentions of the defendant.

Finally, there are the cases where the defendant is judged to have engaged in bad behavior, either from failing to source a resource wrongfully acquired earlier in the supply chain, acquiring the enrichment via blameworthy means short of an actionable wrong in tort or criminal law, or literally acquiring the enrichment via means wrongful in tort or criminal law. In the latter two of these cases, which involve “conscious wrongdoers,” courts often measure restitution not just by the value of the thing literally taken from the plaintiff but also all the gains that flowed from the wrongdoing.¹²⁵ This measurement of restitution is called disgorgement.

With few exceptions,¹²⁶ a claimant entitled to a disgorgement remedy in restitution might instead recover compensation for the injury caused by the defendant’s tort or other breach of duty. Restitution becomes significant when it affords remedial or procedural advantages by comparison with an action for compensatory damages.¹²⁷

The application of the case law to the case of data trafficking should be clear. When one measures the remedy by market value, the amount of money at stake in litigation against a data trafficker becomes clearly substantial. While it may be difficult to put a dollar value on the value to a consumer of control over her personal data, it is clear that databases of information about discrete consumers have immense value in today’s economy. Companies have long resisted publicly acknowledging the dollar value of data as data, prior to analysis via algorithm. Understanding restitution as a potential form of liability could have the salutary effect of forcing this valuation.

Furthermore, where the actions by the data trafficker are found to be blameworthy or wrongful, the remedy could be measured in terms of disgorgement. This would enable plaintiffs to collect not just the market value of their data but the value of all the profits a data trafficker made through use of their data.

Despite the immense potential of this remedy, courts do not invariably consider unjust enrichment as it is not always pleaded or requested by plaintiffs.¹²⁸ Some states have included unjust enrichment expressly in their privacy statutes as a form of relief.¹²⁹ Courts have discussed when unjust enrichment applies to privacy claims,

LAW INST. 2011).

124. *E.g.*, *Anderson v. Schwegel*, 796 P.2d 1035, 1038–39 (Idaho Ct. App. 1990).

125. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 53 (AM. LAW INST. 2011).

126. FARNSWORTH, *supra* note 109, at 2–3 (arguing that mistaken transfers and conferrings are cases in which restitution provides the only basis for liability and recovery).

127. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b (AM. LAW INST. 2011).

128. *E.g.*, First Amended Complaint for Invasion of Privacy, Unjust Enrichment, Violation of California Civil Code Sections 2223 and 2224, and Violation of California Business & Professions Code Section 17200 *Et Seq.*, *Shakib v. Discover Bank*, No. CGC-02-416194 (Cal. Super. Ct. Apr. 24, 2003) (providing an example of restitution pleaded properly as a cause of action and source of relief). *See generally* 123 AM. JUR. TRIALS 433 (2018).

129. *E.g.*, WIS. STAT. ANN. § 995.50 (West 2007) (“The right of privacy is recognized in

and several claims have been successful in recent years.¹³⁰ Courts have discussed when injunctive relief applies to privacy claims.¹³¹ Thus, even in an environment where there are a depressed number of privacy court cases based on the idea of concrete harm being a barrier to the courtroom for privacy and data security matters, these alternative sources of relief other than compensation are important sources of law for courts to consider. As a matter of common law, there is no reason for a court not to consider all these rights and remedies when considering privacy cases. However, restitution as both a freestanding cause of action and a remedy is far from the psyche of judges, lawyers, and the public, largely for historical reasons.¹³² Restitution has not been taught as a class in most law schools since the 1960s, so there is a lack of facility with the field among practicing lawyers, judges, and law professors.¹³³

The available causes of action and remedies should be considered in light of the principles that govern privacy in the United States. The Fair Information Practice Principles (FIPPs) are widely cited principles for the aims of privacy law. These principles include the following:

- (1) Transparency: ensuring no secret data collection; provides information about the collection of personal data to allow users to make an informed choice;
- (2) Choice: giving individuals a choice as to how their information will be used;
- (3) Information Review and Correction: allowing individuals the right to review and correct personal information;
- (4) Information Protection: requiring organizations to protect the quality and integrity of personal information; and

this state. One whose privacy is unreasonably invaded is entitled to the following relief: . . . [c]ompensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and . . . [a] reasonable amount for attorney fees.”)

130. *E.g.*, *Fero v. Excellus Health Plain, Inc.*, 236 F. Supp. 3d 735 (W.D.N.Y. 2017) (holding insurance subscribers who brought action against healthcare providers and insurers, asserting various federal and state law claims arising from data breach that occurred when hackers secured access to confidential health care information through a cyber attack; court found plaintiff alleged restitution claim); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654 (E.D. Pa. 2015) (alleging that employer failed to maintain security of his personal identification information in connection with theft of company laptops by other employee; court found plaintiff alleged restitution claim); *State v. Moua*, 874 N.W.2d 812 (Minn. Ct. App. 2016) (finding that where defendant had engaged in identity theft, victims whose private identifying information was stolen were entitled to restitution).

131. *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102 (N.D. Cal. 2010) (holding plaintiffs who brought class action against AOL for state privacy law violations had Article III standing and that, under the theories alleged, plaintiffs were eligible for compensatory damages, restitution, injunctive relief, or punitive damages); *see also* *Bovay v. Sears, Roebuck & Co.*, No. 1–14–2672, 2017 WL 660595, at *1 (Ill. App. Ct. Jan. 6, 2017), *appeal denied*, 84 N.E.3d 363 (Ill. 2017) (granting summary judgment in favor of defendants on invasion of privacy, Illinois Consumer Fraud Act, and unjust enrichment claims where plaintiffs alleged that defendant “violated the terms of its privacy policy and Illinois law by wrongfully disclosing its credit card customers’ ‘personal, private and confidential information’ to third-party marketers”).

132. *See generally* Laycock, *supra* note 113, at 268.

133. *Murphy*, *supra* note 114, at 1635.

- (5) Accountability: holding organizations accountable for complying with FIPPs.¹³⁴

The FIPPs are influential in private practice where there are lacunas in the scope of privacy law, where in-house counsel and consultants provide advice to companies as to how to avoid the ire of government and consumers.¹³⁵

The FIPPs owe their influence largely to the fact that they remain the most comprehensive, general policy statement on privacy made by the American federal government.¹³⁶ The problem with the FIPPs from the perspective of private law is that they are framed in terms of overall aims for societal outcomes. They are not explicit about what rights individuals should have and what recourse they have if those rights are violated.

It is somewhat uncommon when one is considering bilateral rights and remedies to expressly make arguments about fit between rights and remedies from a public interest perspective.¹³⁷ After all, the rejection of the doctrine of election of remedies in the modern era says that provided that the cause of action is proven, the plaintiff can have her choice of available remedies.¹³⁸ Furthermore, private law speaks in terms of making the aggrieved party whole, which is down to the facts of each particular case. Many argue that the private law should confine its considerations to resolving these episodic conflicts justly. By contrast, in the constitutional law and public international law literature, there is a rich literature on fit between right and remedy.¹³⁹

However, it is a mistake to allow the consideration of public interest arguments to go unrealized in the application of general private law principles to the newly possible. Whether expressly or not, many judges take into account the public interest when considering cases. Fear of stepping on industry and industry-friendly legislature toes in a growing new area of commerce may be a major factor in the

134. ROBERT GELLMAN, FAIR INFORMATION PRACTICES, A BASIC HISTORY (2017), <https://bobgellman.com/rg-docs/rg-FIPshistory.pdf> [<https://perma.cc/Z3LQ-3JZ6>] (providing a history of the development of the FIPPs).

135. See generally KENNETH A. BAMBERGER AND DEIRDRE K. MULLIGAN, PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE (2015).

136. Omer Tene, *Privacy Law's Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws*, 74 OHIO ST. L.J. 1217, 1220–23 (2013) (discussing the origin, scope, and influence of the FIPPs in the development of privacy law).

137. There are an increasing number of exceptions to this rule. See, e.g., Sarah R. Wasserman Rajec, *Tailoring Remedies to Spur Innovation*, 61 AM. U. L. REV. 733, 773 (2012) (arguing for a larger role for public interest in determining patent breach remedies); Nick Gamse, Comment, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 348 (2011) (discussing the potential for property remedies to assist the goal of promoting public interest journalism).

138. See, e.g., U.C.C. § 2-703 cmt. 1 (AM. LAW. INST. & UNIF. LAW COMM'N 1978) (“reject[ing] any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach”).

139. E.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (rejecting rights essentialism and arguing that “[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence”); Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 695 (2008).

overemphasis of harm in privacy cases. The problem with this is, naturally, courts are not well suited for making this type of analysis in the context of a court case. They are limited to the arguments made by each party and the discovery evidence produced (if the case even gets to the discovery phase of litigation). This leaves courts trying to act as public actors attempting to directly apply cost-benefit analysis or deferring to the market as a superior arbiter of justness or business ethics.

When influential, general statements of federal agency policy like the FIPPs exist, they should influence how courts interpret the common law, especially when they are dealing with newly possible technology. Courts are well suited as a matter of institutional competence to apply the FIPPs principles to the substantive law on the books.¹⁴⁰ The FIPPs make no reference to concrete harm at all. What the FIPPs found most problematic about privacy invasions was the removal of control and agency and the potential for exploitation by individuals. So, it does not make sense that harm and its corollary remedy remain at the center of conversations about privacy.¹⁴¹ Privacy was about dignity integrity for Brandeis and Warren. A focus on harm beyond violation of right in privacy regulation has little basis as a matter of history, law, or policy. What's more, under section 13(b) of the Federal Trade Commission Act, the FTC is specifically authorized to apply restitutionary remedies in its resolution of privacy and data protection matters, under the broad category of "unfair or deceptive practices."¹⁴² The potential for restitutionary remedies is a factor for the FTC in choosing which action to pursue against corporate actors. Restitution also assists the FTC in determining the measurement of settlements with actors that it pursues actions against on the basis of the FIPPs.

Given all of the above, restitution is likely the best choice among compensation, restitution, and injunctive relief in many data trafficking matters. Substantively, taking material of value from others (in this case, personal information) without their knowledge or consent and profiting from it appears to be a colorable case of benefit from another when the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. Restitution as a freestanding cause of action fits well with restitution as a form of relief. The first four FIPPs support the idea that some forms of acquisition and retention of data by data traffickers are unjust, and the last prong, which encourages accountability, invites action by courts.

But even if the source of liability is not restitution, restitution is a proper source of relief simply because it goes to the actual problem that data trafficking presents society. Data has been taken from individuals—data that has more value in the possession of the taker than the original possessor. To properly address the wrongdoing performed by the trafficker, it makes sense to measure his benefit rather than the cost to the aggrieved person. This is because the principal motivation for the law's action here is the wrongful profit and the incentives that it creates for

140. Lauren Henry, Note, *Institutionally Appropriate Approaches to Privacy: Striking a Balance Between Judicial and Administrative Enforcement of Privacy Law*, 51 HARV. J. ON LEGIS. 193, 211 (2014).

141. Consider *Spokeo* and other instances of this foregrounding of harm/compensation as a presumptive privacy remedy in court opinions, popular media, and scholarship. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *supra* notes 5–7 and accompanying text.

142. 15 U.S.C. § 53 (2012).

businesses, not what it means for the aggrieved party to possess what has been taken. This is similar to the other areas of law where restitution is a common form of relief, including commercial bribes and kickbacks, business opportunities, misuse of confidential information, infringement of intellectual property, and conversion.¹⁴³ Again, the FIPPs support the actions of a judge here in their emphasis on the unfairness of secretly collecting and benefitting from data without giving consumers the opportunity to choose. The focal point of the FIPPs is the action of organizations managing personal information, not harm to individual consumers, and in this way it points to considering these broad social concerns in the framing of the remedy of breach of the right.

There are a variety of common actions for which the form of relief is generally restitution.¹⁴⁴ These actions include bribery,¹⁴⁵ commercial bribery,¹⁴⁶ tortious interference with a potential business opportunity,¹⁴⁷ professional conflicts of interest,¹⁴⁸ misuse of confidential information¹⁴⁹ (perhaps the most intuitively similar to privacy and data protection matters), infringement of intellectual property,¹⁵⁰

143. Brief of Restitution & Remedies Scholars as Amici Curiae in Support of Respondent, *supra* note 2, at 6–16; *see also* Hazel Carty, *The Economic Torts and English Law: An Uncertain Future*, 95 KY. L.J. 845 (2007) (discussing economic torts in the context of unfair trading).

144. Brief of Restitution & Remedies Scholars as Amici Curiae in Support of Respondent, *supra* note 2, at 6–18.

145. Bribery elements include: (1) an intent for a quid pro quo transaction and (2) a promise or transfer of a thing of value. 12 AM. JUR. 2D *Bribery* §§ 6–7 (2009); *see also* 18 U.S.C. §§ 201, 666, 1952 (2012).

146. Commercial bribery elements include: (1) “offering or accepting a bribe to an employee or other agent” and (2) “with the intent of influencing that person’s relationship with his or her employer.” 12 AM. JUR. 2D *Bribery* § 16 (2009).

147. A claim for tortious interference with a prospective business opportunity requires: “(1) a reasonable probability of a business opportunity; (2) the intentional, non-privileged interference by the [defendant] with that opportunity; (3) proximate causation; and (4) damages.” *Tortious Interference*, 25 BUS. TORTS REP. 79, 81 (2013). In *Soterion Corp. v. Soteria Mezzanine Corp.*, for example, “Soteria clearly met the first prong of this test, the court concluded. While neither Tenet nor Lake Cumberland had signed an enforceable contract with Soteria, this was not necessary to find tortious interference. *Id.*; *see Soterion Corp. v. Soteria Mezzanine Corp.*, No. CIV.A. 6158-VCN, 2012 WL 5378251, at *13 (Del. Ch. Oct. 31, 2012).

148. George Chamberlin, *Cause of Action for Breach of Fiduciary Duty or Undue Influence By Attorney in Self-Dealing with Client*, in 25 CAUSES OF ACTION 1 (1991) (providing a practical outline of the claim of breach of fiduciary duty against an attorney); *see also* Caroline Forell & Anna Sortun, *The Tort of Betrayal of Trust*, 42 U. MICH. J.L. REFORM 557 (2009) (arguing that the family of conflict of interest torts do not protect against betrayal without economic loss and proposing new statutory law that would do so).

149. “An agent has a duty (1) not to use property of the principal for the agent’s own purposes or those of a third party; and (2) not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.” RESTATEMENT (THIRD) OF AGENCY § 8.05 (AM. LAW INST. 2006); *see also* 138 AM. JUR. PROOF OF FACTS 3d § 113 (2014).

150. In a suit for copyright infringement under the U.S. Copyright Act, 17 U.S.C. §§ 101 et seq., the plaintiff must generally prove that: “(1) the work is original, sufficiently creative and within the subject matter of copyright; (2) the plaintiff is the registered owner of a valid

trespass,¹⁵¹ conversion,¹⁵² rescission,¹⁵³ and the slayer rule.¹⁵⁴ Many of these causes of actions have both criminal and noncriminal avenues of enforcement.

The methodological principle underlying this analysis is that privacy should be treated like the interests it is most similar to—unless there are compelling policy reasons not to do so. The FIPPs analysis above suggests that there are not compelling policy reasons to not employ restitution as the ordinary measure of privacy remedies. So, the Article now turns to discussing the ways in which the family of privacy interests are similar to the areas where American law has seen fit to grant restitution as an ordinary remedy.

Actions for which restitution is a frequent remedy can be divided into two rough groups: (1) those actions that are primarily motivated by preserving the ethics of fair play (bribery, commercial bribery, misuse of confidential information, and infringement of intellectual property); and (2) those actions that are primarily motivated by protecting the autonomy of individual decision-making power from subversion (trespass, conversion, recession, and the slayer rule).¹⁵⁵ I say a “rough” distinction because these two objectives are closely related.

First, I will discuss the business ethics aspect of actions for which restitution is an ordinary remedy. The reason why there are laws against bribery or interference with a business opportunity is because of a historical American norm in favor of protecting fair play in market behavior.¹⁵⁶ This is grounded either in morality and socioeconomics, or both. The people who created the common law tradition that our

copyright; and (3) the defendant has wrongfully exercised one or more of the six exclusive rights granted to the copyright owner.” 9 CAUSES OF ACTION 2D 65 (1997).

151. To establish a prima facie case for trespass, the plaintiff must plead and prove the following: “(1) A possessory or ownership interest at the time of the alleged trespass; and (2) Intentional entry by defendant; and (3) Lack of permission, consent or authorization; or (4) Refusal to leave after permission has been granted but thereafter withdrawn.” 61 CAUSES OF ACTION 2d 467 (2014).

152. There are many different types of conversion, from embezzlement to just taking and using someone’s computer without asking.

153. Florida’s rescission elements include the following: (1) “character or relationship of the parties”; (2) “making of [a] contract”; (3) “existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation”; (4) “[t]hat the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission”; (5) “[i]f the moving party has received benefits from the contract, [it] should further allege an offer to restore these benefits to the party furnishing them”; and (6) “that the moving party has no adequate remedy at law.” *Billian v. Mobil Corp.*, 710 So. 2d 984, 991 (Fla. Dist. Ct. App. 1998), *rev. denied*, 725 So. 2d 1109 (Fla. 1998).

154. The Uniform Probate Code includes a nonoptional provision barring a person who feloniously and intentionally kills a decedent from taking an intestate share from that decedent and providing that any property that would have gone to the decedent passes as if the killer had disclaimed his or her share. UNIF. PROBATE CODE § 2-803 (UNIF. LAW COMM’N 1993); *e.g.*, FLA. STAT. ANN. § 732.802 (West 2017) (providing that a “[k]iller [is] not entitled to receive property or other benefits by reason of [a] victim’s death” under a will or under the Florida Probate Code).

155. *Cf.* Carty, *supra* note 143, at 846 (making a similar distinction between economic torts that require misrepresentation and “general” economic torts).

156. *See generally* ABEND, *supra* note 86.

modern law is built on were predominantly religious men. So, laws mandating business ethics allowed honest, God-fearing men to not be prejudiced against in their ability to succeed by a law that will serve the interests of “evil” or irreligious men by omission.¹⁵⁷ Perhaps a more enduring argument in the current climate is the socioeconomic argument: enable trust in interactions with others—it is efficient not to have self-help antifraud mechanisms divert market resources. Furthermore, it is socially beneficial that success not be down to being con artists, who effectively accrue rents to themselves at the expense of others, but instead enable success in business based on objectively valuable market contributions that benefit all actors. Restitution is the normal measurement of relief in this family of cases because it captures and removes the distortionary effect the bad behavior had on the market. Merely returning the value lost to plaintiffs would not necessarily achieve this goal. Similarly, allowing some actors to use exploitative personal data practices without legal repercussions disadvantages actors who refuse to play ball.

Second, I will consider the series of actions that are grounded on preventing undue influence over culturally and historically salient interests. Restitution is the normal measurement of relief in this family of cases because the actor who behaved wrongfully may not necessarily be disgorged of her gain if the measurement is measured by compensation. The principle that the wrongdoer must not benefit from her own wrong is paramount here. The idea that a core reason why the law protects privacy is to do with giving individuals freedom from subversion, which has a long history in privacy law and policy. This principle extends from Brandeis’ and Warren’s declaration that privacy is “the right to be let alone” to modern formulations of privacy as relational autonomy and freedom from exploitation.¹⁵⁸

In *Privacy as Quasi-Property*, I argued that the *Restatement* torts were not disjointed but rather reflected a common consideration of a two-step quasi-property analysis. To determine whether there is a right to exclude from a quasi-property interest, one considers: (1) the relationship between the parties; (2) the context of the parties’ interactions, including the characteristics and social status of each party; and (3) the wrongful nature of the defending party’s actions.¹⁵⁹ First, a plaintiff argues that a defendant has disturbed a privacy or data protective interest of a plaintiff, arising from a relationship, social context, or harm to a plaintiff. Harm or unjust enrichment arises from data processing or data dissemination when:

- (1) there is a relationship of trust between the two parties that makes it reasonable for the plaintiff to expect her data would not be handled in that way; and/or
- (2) society deems it morally wrong or outrageous for data to be processed or disseminated in such a way; and/or
- (3) the information is being processed or disseminated by the defendant in a way

157. See M.H. Hoeflich, *On the Christian Origins of American Legal Ethics*, J. KAN. B. ASS’N, May 2017, at 49, 53.

158. Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World* (Dec. 23, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3306006> [<https://perma.cc/78UV-9WM4>].

159. Scholz, *supra* note 24, at 1123.

that [either] subjected [the] plaintiff to harm [or risk of harm or unjustly enriched the defendant].¹⁶⁰

Both the common law and the FIPPs and FTC practice support considering restitution as the normal remedy for privacy infringements. Bringing the FIPPs into the analysis of cases is not necessary for the finding that restitution should be a prominent source of relief in data trafficking and potentially other species of privacy matters. However, the FIPPs provide judges who already consider their actions a quasi-public law balance between the interests of private actors to process data and the interest an individual has in her data not being an involuntary subject of commerce with additional support for the finding that restitutionary relief is proper.

III. IMPLICATIONS OF INCORPORATING REMEDIES INTO PRIVACY LAW ANALYSIS

Rights and remedies are interdependent and, especially in difficult cases, they should be considered with awareness of one another, not sequentially. This is not to say they are coterminous, as some legal realists argue.¹⁶¹ Rather, I take the intermediate position that possible privacy remedies show the boundaries of the privacy right in any particular case. Showing that the privacy interest has limits is important in convincing courts to enforce the right.¹⁶²

I have argued that the general mechanism that unites the broad range of privacy interests is the fact that privacy interests are quasi-property interests.¹⁶³ Quasi-property is a relational entitlement to exclude. Unlike real property, there is no freestanding right to exclude from a quasi-property interest absent reference to a relationship between individuals. Rather, the right to exclude arises from the behaviors of the plaintiff and defendant. A defendant is identified based on a trigger arising from a relationship, action, or harm to a plaintiff. When considered in light of damages, we can see more clearly when the relational thing has been infringed upon.

The use of remedies to help bound the right is a primary reason for the enforcement difference between enforcement in privacy and its related quasi-property interests, trade secret law and right of publicity.¹⁶⁴ As trade secret expert

160. *Id.* at 1137–38 (footnote omitted). *Privacy as Quasi-Property* used “harm” as a shorthand for “cognizable ground for legal remedy.”

161. Legal realists refused to fully appreciate the necessary “gaps” between rights and remedies due to a variety of institutional and practical factors. See Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, in *TAKING REMEDIES SERIOUSLY* 31 (Robert J. Sharpe & Kent Roach eds., 2009). But see HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* (2013) (offering a nuanced and charitable modern reading of American legal realism).

162. See Calo, *supra* note 27.

163. See Scholz, *supra* note 24, at 1123.

164. Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 *BUFF. L. REV.* 1119 (2013); Sharon K. Sandeen, *Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law*, 2006 *MICH. ST. L. REV.* 667; Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Analogies*, 67 *HASTINGS L.J.* 143 (2015); see also Elizabeth A. Rowe, *Unpacking Trade Secret Damages* (Univ. of Fla. Levin Coll. of Law, Legal Studies Research Paper Series, Paper No. 17-25, 2016),

Sharon Sandeen has observed, “[p]rivacy law in the United States is frozen in amber . . . [w]hat distinguishes modern trade secret law from the current state of information privacy law are the procedural and substantive ways in which these issues were addressed.”¹⁶⁵ In a carefully researched article, Sandeen compared the history of privacy law to the history of trade secret law.¹⁶⁶ The primary difference she found is that while modern privacy law is almost exclusively based on the writings of three privacy scholars prior to 1960, the law of trade secret was developed by a group of professors, lawmakers, and practicing lawyers in the 1970s and 1980s.¹⁶⁷ Given that the description and enforcement of remedies is a significant part of practice, but a less developed area of theoretical interest, it makes sense that a practice-oriented group would have an account of remedies for trade secret that had substance.¹⁶⁸ Since trade secret matters actually are litigated and contracted about expressly, the academic literature has been able to effectively track the business models created by the existing trade secret environment and propose reform informed by a deep bank of case law and practice.¹⁶⁹

Privacy’s original sin, then, inherited from the landmark articles that first theorized privacy infringement as a cause of action, is to assume all regulatory issues can be worked out without reference to remedies. This is unrealistic in an era where at least a thin legal realism is nearly universally accepted. This Article proposes that scholars, advocates, and businesses seriously consider that the main way that the privacy interest should be regulated—and hopefully protected—is through describing remedies, not limiting and defining the right. We need not go as far as Llewellyn in declaring that there is no difference between right and remedy, but the case of the privacy interest as discussed in this Article suggests that modern judges and legal scholars might benefit by taking their interdependence more seriously.

If courts find a reasonable likelihood of showing restitutionary recovery sufficient for passing muster at the motion to dismiss phase of a lawsuit—as this Article suggests they should—it will be easier for privacy claims to be judged on their merits. More cases in which privacy cases are judged on the merits would be a good thing for helping to clarify privacy norms in the modern era. Furthermore, they would allow a broader range of the public to feel as though they have a stake and a claim on the developing information economy. This would help solidify the legitimacy of large information economy actors, who are increasingly regarded with suspicion by the general public due to their power and lack of institutional accountability.¹⁷⁰

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842325 [https://perma.cc/6TWJ-82B6] (empirical analysis of trade secret recovery of relief).

165. Sandeen, *supra* note 164, at 667, 671.

166. *Id.* at 673–92.

167. *Id.*

168. *Id.* at 692–704.

169. See Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018) (describing a trend toward the increasing use of trade secrets claims to prevent outside scrutiny of algorithmic systems).

170. Noam Cohen, *Silicon Valley Is Not Your Friend*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/interactive/2017/10/13/opinion/sunday/Silicon-Valley-Is-Not-Your-Friend.html> [https://perma.cc/M63Z-H45X]; David Streitfeld, *Tech Giants, Once Seen as Saviors Are Now Viewed as Threats*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/technology/tech-giants-once-seen-as-saviors-are-now-viewed-as-threats.html>.

The barriers to voicing and enforcing a privacy infringement are best illustrated by an example. Peter Thiel, a wealthy entrepreneur, hated Gawker because the website outed him as a gay man to the public without his consent.¹⁷¹ So, he bankrolled litigation in order to undermine Gawker financially. He chose to fund Hulk Hogan's invasion of privacy case against Gawker, and thus, one of the most visible and financially successful privacy court cases was initiated. A court ruled for Hulk Hogan on a theory of invasion of privacy.¹⁷² As for remedies, he was awarded compensatory damages and unjust enrichment.

The average American does not have Thiel's resources. Many privacy cases are dismissed at the motion to dismiss phase for a failure to show concrete harm. The standard for whether privacy harms pass muster in federal court is murky and was not clarified by the Supreme Court when it squarely addressed the issue in *Spokeo v. Robins*.¹⁷³ This means that few lawyers will take privacy matters on a contingency basis, even for a class action suit. When cases are not likely to be brought on a contingency basis, the universe of plaintiffs contracts sharply. We must ask: Are there few privacy plaintiffs because of financial constraints or because most people simply do not see why privacy advocates deem privacy concerns as problematic at all?

The jarring difference between American privacy-protective beliefs and actions¹⁷⁴ and their widespread use of services that expose their personal information to data brokers is well known. There are two stories to explain the public's behavior, even presuming each member of the American public is *homo economicus*. The happy story is that they are lying to themselves and their behavior tells us they really do prefer the status quo and do not care about the broad exposure of private information. The sadder story is that they do not prefer the broad exposure of their private information, but on an individual basis it simply is not worth the time, expense, and social cost to choose not to engage in the modern economy by choosing not to use credit cards and email. Most Americans believe—probably rightly—that there is no way the average person can avoid extensive privacy invasions in the modern world. Since an individual protesting privacy-invasive applications would have limited effect anyway, it is rational for a person who would prefer greater privacy protections to use privacy-invasive applications. Perhaps most probably, the population has a mix of people with both attitudes. Since there is no realistic avenue for privacy-sensitive consumers to make claims or alternative places for them to bring their business, we simply do not have the information to conclude whether the happy story or the sad story is the real one.

.com/2017/10/12/technology/tech-giants-threats.html [https://perma.cc/5GNJ-HRYM].

171. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html> [https://perma.cc/PN88-SQXW].

172. *Id.*

173. 136 S. Ct. 1540 (2016); e.g., Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 265 U. PA. L. REV. ONLINE 47 (2016); Solove & Citron, *supra* note 11, at 743.

174. Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Privacy and Human Behavior in the Age of Information*, 347 SCI. 509 (2015) (highly privacy protective and concerned about their own privacy, as demonstrated by surveys and choice to use privacy-protective patches and apps).

The use of the characteristic generalist reasoning of judges judging privacy opinions on the merits will allow a richer body of substantive privacy law to arise. Litigation serves a variety of functional goods relevant here.¹⁷⁵ One of them is an information-cultivating function. Another is a claim recognition and allowing for a reasonable opportunity to be heard. According plaintiffs a real ability to have privacy claims heard in court also takes the burden off of the FTC to be the primary vehicle for enforcing privacy rights. Scholars have acknowledged the leading role the FTC plays in consumer privacy, usually approvingly.¹⁷⁶ But there are some limitations to the FTC's approach. First, the FTC does not directly serve consumer complaints, so the claim-vindicating function the courts have cannot be vindicated. Second, the FTC is limited in the number of cases it can take, so the information-serving function is lower relative to the courts. Finally, the FTC typically ends cases with consent orders, which have no precedential value and allow the company to disclaim admission of wrongdoing.

The common law as it is practiced in state courts matters because it itself is a backstop and way of directly regulating the newly possible before the administrative state gets involved. And if courts act, it will spur legislatures to reinforce or correct the decisions—no New Deal-era reforms without the morass of cases in the early twentieth century with courts trying to deal with the industrial age. Of course, there may be immense value to subsequent legislative and administrative state action, but the “first responders” are and should be in common law courts.¹⁷⁷ Business practices do not speak in the kind of way that is particularly useful for policy crafting. Court matters translate business disputes into fact-intensive guides for behavior. Human reasoning and conscious choice about values to be implemented are unavoidable in regulating the newly possible. The courts, in implementing general common law principles—closely related as they are to the morals of the recent past—must not shirk their role as the front line in figuring out the legal rules of tomorrow.

Taking remedies seriously in the evaluation of privacy rights allows the law to enforce substantial cases of privacy infringement while limiting the impact of cases that are only marginal.¹⁷⁸ The interest need not be limited at the interest phase in order for enforcement to be limited to the cases that matter. For an analogy, consider an example from elsewhere in tort law. Gary and Ash are rivals. If Gary pushes Ash, causing Ash to stumble but not fall, Gary has committed battery. The elements of civil battery are: intent (not criminal intent to cause injury, necessarily, but intent to commit the act), contact (nonconsensual contact with the individual or his/her effects, such as clothing), and harm (actual harm, meaning physical, mental, or emotional).¹⁷⁹ However, it is unlikely that Ash will even consider the harm sufficient

175. See generally ALEXANDRA D. LAHAV, *IN PRAISE OF LITIGATION* (2017) (arguing that litigation helps democracy function through enforcement, transparency, participation, and equality).

176. E.g., Solove & Hartzog, *supra* note 85. But see Justin (Gus) Hurwitz, *Data Security and the FTC's UnCommon Law*, 101 IOWA L. REV. 955, 959 (2016).

177. See Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 694–95 (2007).

178. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

179. RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965) (“An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact

to be a legal controversy,¹⁸⁰ and even if he did, he is unlikely to get a full hearing in even a court of general jurisdiction, much less damages. If, by contrast, Gary drove a car over Ash's leg, Ash probably would be able to go into court and get compensatory remedies from Gary. The reason why the courts would accept the second case between the rivals, but not the first, is not because the elements of battery were not met in the first case. Rather, it is because in the second case Ash could make an argument that he was entitled to substantial compensatory damages for his injuries. In the first case, any damages from a push that causes another person to stumble, but not fall, would be nominal. Even the dignitary damages in the matter would not be at a level that would normally fall within the scope of law.

Instead, courts (and, where relevant, administrative agencies) can explicitly choose not to allow privacy matters to proceed forward where there is not a significant compensatory, restitutionary, or dignitary interest at stake. To do this, they must expressly evaluate possible sources of relief.

Several factors influence how remedies are measured. These factors break down into two categories: (1) the remedy's ability to adequately deter invasive conduct, and (2) the proportionality of the remedy. These factors both have support in case law and reflect how the FTC has determined settlement quantities in privacy matters. Let us walk through the two factors for measurement of restitutionary remedies in turn.

A. Deterrence

Restitution creates different incentives for actors in society than compensation.¹⁸¹ Professors Ariel Porat and Robert Cooter have summarized the difference as follows: "Tort law usually makes the injurer internalize wrongful harms through damages. In contrast, restitution law does not enable the benefactor to internalize the benefits she confers on others without their request, through damages, and only seldom allows her to recover for the costs she incurs in creating those benefits."¹⁸²

When the law enables choosing restitution, it does so to deter the pernicious effects of particular types of free riding.¹⁸³ For example, free riding could lead to the

with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.").

180. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980).

181. ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 10–11 (2014); see also Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 486–90 (discussing compensation versus disgorgement in tort law from a law and economics perspective); Robert Cooter & Ariel Porat, Internalization and Deterrence in the Law of Torts and Restitution (unpublished manuscript) (on file with the *Indiana Law Journal*).

182. Robert Cooter & Ariel Porat, *Torts and Restitution: Legal Divergence and Economic Convergence*, 92 S. CAL. L. REV. (forthcoming 2019) (manuscript at 2), <https://ssrn.com/abstract=3302807> [<https://perma.cc/J992-G2JC>].

183. "By definition, disgorgement damages make the injurer give up his gain from imposing risk on the victim. If the injurer does not expect to gain by imposing risk on the victim, he might as well not impose any. Consequently, disgorgement damages are the

encouragement of negative behaviors (such as theft and misappropriation of data in our central example in Part II) and the discouragement of positive behaviors (such as cleaning up pollution in a river many actors share).¹⁸⁴ The incentive to engage in both types of free riding could be diminished by the availability of recovery in restitution.

Consideration of this factor shows that there are times when compensation will be a superior and necessary remedy in privacy matters with different facts from this Article's core example.¹⁸⁵ Compensation, properly considered, might not be an inappropriate or inadequate solution in all privacy matters.

B. Proportionality

Courts should have based their holdings on the explicit weighing of the likelihood of recovery remedies in compensation, restitution, and equity. Prosser, when framing the four privacy torts that appear in the *Restatement*, specifically mentioned that his goal in dividing the privacy interest into four specific cases was to prevent the aimless spread of the right to privacy and limit the privacy right's impingement on speech, innovation, and other valuable interests.¹⁸⁶ However, at least in the modern era, limiting the scope of a right is not how we limit enforcement. A right is no right without a remedy. Rather, we evaluate whether the law can be called upon to defend a right based on whether remedies could reasonably be argued to be available to the plaintiff. In restitution as a remedy, the measurement is of the enrichment.¹⁸⁷ This builds proportionality into the enforcement of the right.

These two principles help rationalize the use of remedies to enforce privacy rights and provide a way of looking forward to how remedies will enforce rights. The practical scope of a right is delimited by the choices courts make in measuring relief for infringement of that right. Privacy is a private right for which this relationship is particularly critical for creating the practical scope of the right. This framework is likely transferable to other private rights.

Deterrence and proportionality are guiding principles to be used in measurement of restitutionary remedies. But determining what calculations, exactly, courts (or administrative agencies, where applicable) must do to measure restitutionary damages are a ripe area for research. Expert witnesses will need to produce numbers about how much a given database is worth to the company. While the company may have processed the data in ways that increase its value, as discussed above, some measurements of restitution, based on the culpability, involve disgorgement of the benefit accrued.

minimum damages that deter the injurer from imposing the risk of an accident on the victim.”
Id. at 6.

184. *Id.* at 10.

185. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1713 (2010).

186. See Prosser, *supra* note 31, at 422–23.

187. A full discussion of the role of defendant responsibility in money remedies appears in *supra* Part II.

Some existing work has been done that may touch on how stakeholders and governments measure restitutionary remedies in privacy and data protection actions. European scholars and policy centers did work on restitutionary methods of measuring remedies in conjunction with developing the General Data Protection Regulation (GDPR)'s approach to setting its fines for violation of the GDPR.¹⁸⁸ Some scholars have begun to examine the data insurance industry and interrogated how insurance company actuaries develop insurance premiums.¹⁸⁹ Some work in industry and white paper publications has been done on describing the phenomenon of cy pres settlements in privacy cases.¹⁹⁰ Existing work in this area, although illuminating, does not address the question of the systematic underuse (at least in explicit court judgments) of restitutionary remedies. So, the insurance numbers are smaller than they should be, and the cy pres settlements are inadequate as a result. Both these sorts of studies take for granted a legal landscape based on an incorrect assumption that the normal measure of privacy remedies is compensation. The normal measure of privacy remedies should be restitution.

Future projects for understanding restitutionary remedies for privacy infringements could take many forms. For example, a particular formula or series of formulae could be proposed and evaluated for determining restitutionary remedies. Or, a qualitative study of experts employed to help negotiate cy pres privacy settlements could be done to determine how they propose, modify, and settle upon numbers in these settlements and, based on this, propose what changes would need to be made to their analysis. Finally, the research agenda should prioritize research that attempts to value databases, which would be useful for determining the benefit to companies of having databases of personal information. Perhaps the most accurate way to measure this is to evaluate, either through economic models or qualitative interviews, how investment professionals evaluate the value of companies that rely on the value of personal information. This type of work would help guide courts and administrative agencies in determining remedies based on benefit to data user, rather than cost to data subject.

Privacy interests serve as the canary in the coal mine in the information age. It is untenable that companies can at once take advantage of the huge commercial value of databases on the one hand and also purport that the material it is made from is valueless on the other. Databases of personal information should have measurable value just like any other major corporate resource, like an executive or a factory. The availability of restitutionary remedies for privacy is one avenue for putting pressure

188. *GDPR Key Changes*, EU GDPR.ORG, <https://www.eugdpr.org/key-changes.html> [<https://perma.cc/P9DQ-NWM3>].

189. *E.g.*, Sasha Romanosky, Lillian Ablon, Andreas Kuehn & Therese Jones, *Content Analysis of Cyber Insurance Policies* (RAND Justice, Infrastructure & Env't, Working Paper No. WR-1208, 2017), https://www.rand.org/content/dam/rand/pubs/working_papers/WR1200/WR1208/RAND_WR1208.pdf [<https://perma.cc/73YQ-L89R>].

190. John Black & James R. Steel, *Privacy Developments: Private Litigation, Enforcement Actions, and Settlements*, 73 *BUS. LAW.* 177 (2018); Marc Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action Litigation and the Challenge of Cy Pres*, in *ENFORCING PRIVACY: REGULATORY, LEGAL AND TECHNOLOGICAL APPROACHES* 307 (David Wright & Paul De Hert eds., 2016).

on companies to be accountable for use, a critical feature of the twenty-first century business model.

CONCLUSION

The extent to which a right is enforceable is fundamental to whether an individual has any meaningful right at all. Therefore, it is critical to take remedies out of the shadows and into the center of the discussion of privacy rights. Doing so reveals that, in many important cases, restitution is the appropriate remedy for privacy invasion.

Taking restitutionary remedies seriously solves privacy's "harm problem." Article III standing can be met by showing a plausible case for relief in the form of restitution. In many instances, profitability of a defendant's business model built on the use of personal data would illustrate the plausibility of relief on the basis of disgorgement of a benefit. Sidestepping the question of how harm can be shown in a privacy matter would lead to more privacy cases being evaluated on the merits. Privacy cases reaching the merits would create a rich body of case law examining and defining the privacy interest in particular cases. Common law has an important role to play in enabling the law to determine how to contend with newly possible social phenomenon based on existing social values and basic liberal principles of governance. While generalist courts may not be the best permanent regulator for all aspects of information privacy, case law in an area of social and technological change can guide legislatures and industry stakeholders to develop principled approaches for incorporating traditional business ethics into the information economy.