

Columbia Law School

Scholarship Archive

Faculty Scholarship

Faculty Publications

2012

Quasi-Property: Like, but Not Quite Property

Shyamkrishna Balganesh

Columbia Law School, sbalganesh@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Common Law Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Shyamkrishna Balganesh, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889 (2012).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3151

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

ARTICLE

QUASI-PROPERTY: LIKE, BUT NOT QUITE PROPERTY

SHYAMKRISHNA BALGANESH[†]

Quasi-property interests refer to situations in which the law seeks to simulate the idea of exclusion, normally associated with property rights, through a relational liability regime, by focusing on the nature and circumstances of the interaction in question, which is thought to merit a highly circumscribed form of exclusion. In this Article, I unpack the analytical and normative bases of quasi-property interests, examine the primary triggering events that cause courts to invoke the category, and respond to potential objections to the recognition of quasi-property as an independent category of interests in the law.

INTRODUCTION	1890
I. THE IDEA OF QUASI-PROPERTY INTERESTS	1894
A. <i>Triggering Exclusion</i>	1901
1. Status	1902
2. Context	1904
3. Conduct	1904
B. <i>Signaling Relational Exclusion</i>	1906
II. REASONS FOR QUASI-PROPERTY INTERESTS	1909
A. <i>Affirmative Influences</i>	1910
1. Preserving Economic Value	1910
2. Creating an Identifiable Focal Point for Coordination	1911
3. Expanding Remedial Options	1912

[†] Assistant Professor of Law, University of Pennsylvania Law School. Many thanks to the participants at the Symposium on New Dimensions in Property Theory, jointly sponsored by the *University of Pennsylvania Law Review* and the University of Pennsylvania Law School, and to the students in my Fall 2011 Property Theory Seminar, for helpful questions, comments, and suggestions. All errors remain mine.

B. *Negative Influences*..... 1913

1. Avoiding Expressive Commodification 1914

2. Preserving the Ethereality of Subject Matter..... 1915

3. Tailoring the Res to the Actio..... 1917

III. POSSIBLE OBJECTIONS 1918

A. *Sporadicity of Usage*..... 1919

B. *Incoherence from Metaphorical Use*..... 1921

C. *Beyond Formalism* 1922

CONCLUSION 1924

INTRODUCTION

Tort, contract, and property have long been taken to be the foundational categories of the common law.¹ Very roughly speaking, tort law deals with the breach of obligations imposed by law, contract law with the creation and breach of voluntary obligations, and property law with the rights and duties that relate to “things.” To this threefold classification, courts and scholars have added two more hybrid categories: quasi-contract and quasi-tort.² The law of quasi-contract deals with situations where the law implies the existence of contract-like obligations based on a party’s actions, and the law of quasi-tort (or quasi-delict) refers to the law’s recognition of an obligation on the part of one party to compensate another for reasons resembling actionable wrongdoing.³

So if the law of quasi-contracts deals with contract-like situations that aren’t strictly contractual, and the law of quasi-torts with tort-like scenarios that aren’t purely delictual, does a more prominent category of situations exist where the law creates property-like entitlements, but recognizes them to be something other than truly proprietary in

¹ See generally PETER BIRKS, UNJUST ENRICHMENT 20-32 (2d ed. 2005).

² The origins of these categories are often traced back to the Roman jurist Justinian. See Peter Birks, *Definition and Division: A Meditation on Institutes 3.13*, in THE CLASSIFICATION OF OBLIGATIONS 6 (Peter Birks ed., 1997).

³ For work on the category of quasi-contract, see generally WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (New York, Baker, Voorhis & Co. 1893) (five volumes); Arthur Linton Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533 (1912); William A. Keener, *Quasi-Contract, Its Nature and Scope*, 7 HARV. L. REV. 57 (1893); Joseph L. Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 CALIF. L. REV. 171 (1914); and Max Radin, *The Roman Law of Quasi-Contract*, 23 VA. L. REV. 241 (1937). Scholarship on the idea of quasi-delict, which is much rarer, includes Nathan Isaacs, *Quasi-Delict in Anglo-American Law*, 31 YALE L.J. 571 (1922), and Olivia Robinson, *Justinian’s Institutional Classification and the Class of Quasi-Delict*, 19 J. LEGAL HIST. 245 (1998).

character? Could it be that the idea of property is sufficiently loose and open-ended so as to accommodate all property-like situations? In this Article, I argue that there is indeed a coherent category of property-like interests best defined by the term “quasi-property.” This category consists of *situations where the law attempts to simulate the functioning of property’s exclusionary apparatus through a relational liability regime.*

The idea of “quasi-property” is today commonly associated with the Supreme Court’s decision in *International News Service v. Associated Press*,⁴ a decision credited with developing the common law doctrine of information misappropriation.⁵ Speaking for the majority, Justice Pitney recognized the right of an information gatherer to prevent a competitor from free riding on the original gatherer’s labor for a limited period of time.⁶ What distinguished the interest recognized by the Court from property, however, was that it would only ever exist between the two parties in question and never in the abstract against the world at large.⁷ Justice Pitney therefore used the term “*quasi* property” to describe the entitlement.⁸ In the years since the opinion, hardly anyone has attached any significance to Justice Pitney’s use of the term to describe this peculiar bilateral interest in exclusivity.⁹

Justice Pitney’s use of the term “*quasi* property” was, however, very deliberate. Beginning in the nineteenth century, common law courts came to characterize some interests that sought to mimic the functioning of property solely as a mechanism of liability, as quasi-property in nature. Rather prominent among these was a person’s right to control the corpse of a dead relative—known as the right of “sepulcher”—interferences with which were rendered actionable.¹⁰ In both the sepulchral rights and *International News Service* contexts, the law’s choice of quasi-property *instead* of property was both conscious and analytically significant.

⁴ 248 U.S. 215 (1918).

⁵ See, e.g., *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 n.13 (9th Cir. 2002) (attributing the term “quasi-property” to *International News Service*); 2 RUDOLF CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 15.02 (4th ed. 1986) (“The landmark case in this field, the INS case . . . is one of the most important cases, if not the most important, in the law of unfair competition.”).

⁶ See *Int’l News Serv.*, 248 U.S. at 238.

⁷ *Id.* at 236.

⁸ *Id.*

⁹ See, e.g., *Newman*, 287 F.3d at 797 & n.13 (describing quasi-property as “a term with little meaningful legal significance”).

¹⁰ See *infra* text accompanying notes 24-36.

A property right has long been thought to center around the idea of exclusion, and is often described as entailing the “right to exclude.”¹¹ The right to exclude is in turn believed to operate in rem (i.e., against the world at large).¹² The interest that the Court created in *International News Service*, however, was consciously tailored to avoid being in rem.¹³ Neither was it in personam (i.e., against a specified party, a characteristic commonly associated with contractual rights). Rather, the right was to operate against a *specified class of actors*, and only ever upon the occurrence of a *specific triggering event*.¹⁴ Through the use of a tailored liability framework, the law sought to replicate the functioning of property rights as exclusionary entitlements. A resource would thus become owned only within this highly contextual setting, while independent of it, the resource remained unowned, thereby endowing it with a distinctively chameleonic character. The entitlement that the Court created was therefore entirely relational and marked a major departure from the in rem idea commonly associated with traditional property.

Quasi-property interests thus involve the use of a relational entitlement mechanism to simulate property’s exclusionary framework within limited settings. As a category, its significance is more functional than just taxonomical. A relational entitlement to exclude has a fundamentally different signaling effect from an equivalent entitlement created by the traditional right to exclude commonly associated with property. The distinction maps onto (but remains distinct from) the difference between simple and relational legal directives used to distinguish between the functioning of the tort and criminal law systems. Whereas criminal law communicates direct (and therefore simple) legal commands in the nature of “X act is prohibited” or “every X act will result in

¹¹ See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997) (contending that “use serves a justificatory role for the [property] right, while exclusion is . . . the formal essence of the right”); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 596-600 (2008) (noting the centrality of the right to exclude but explaining that the “right and remedy” have been unlinked, with consequences for “intellectual property and property more generally”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing that the right to exclude is not simply an essential aspect of property; rather, “it is the *sine qua non*”).

¹² Balganesh, *supra* note 11, at 602-03, 611-12.

¹³ See *Int’l News Serv.*, 248 U.S. at 236 (“[W]e may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication . . .”).

¹⁴ See *id.* at 236, 241 (explaining that the “quasi property” right in the news “does not result in . . . the right to monopolize either the gathering or the distribution of the news”).

Y punishment,” a liability framework (such as tort or unjust enrichment) merely specifies what individuals in a particular relationship to each other are meant to do or not do.¹⁵ These communications are thus of the form “A should/should not perform X act on B,” where A and B are specified by class or context. Translated into the property context, traditional property rights communicate a simple directive to the world at large that relates to an identified resource (i.e., the res). Property scholars have described this signaling as the directives of “abstention,” “forbearance,” or “inviolability.” They signal to the world: *stay away—this resource is owned*.¹⁶

A quasi-property right, by contrast, doesn’t communicate the same message. Instead, its directive operates in much the same way as those of tort law—i.e., it merely signals to one party to stay away from an actual or fictional resource only when the two parties stand in a particular relationship to each other, which is in turn activated by certain triggering facts. These triggering facts may be the parties’ statuses vis-à-vis each other, the specific actions that one or both of them undertake, the peculiarities of the context within which the parties interact over the resource, or some combination of the three. Until one party comes to be identified as standing in a particular relationship towards the other (as recognized by the directive), no signal of exclusion is communicated. This triggering is crucial and is indeed one of the most unique features of a quasi-property interest. As a direct result of the emphasis on the parties’ relationship, an exclusionary signal never attaches to the resource itself in the abstract; instead, this signal is mediated through the relationship.

This Article does three things. First, it unbundles the analytical framework underlying the concept of quasi-property by focusing on *how* quasi-property interests differ from traditional property rights. Second, it shows *why*, in some situations, the law might choose to characterize some interests as quasi-property rather than as property, and in the process attempts to identify the law’s principal motivations for choosing one over the other. Third, it shows that the set of quasi-property

¹⁵ For a fuller treatment of this idea, see Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 88-93 (1998).

¹⁶ See, e.g., PENNER, *supra* note 11, at 71-72 (describing the exclusionary thesis); Balganesch, *supra* note 11, at 619; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789-90 (2001). Indeed, the exclusionary principle can be traced as far back as Kant’s concept of property. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 90 (2009).

interests in the law might in reality be much more expansive than is currently believed.

The normative theme underlying much of this Article is that, while the idea of property in law has at once expanded as a category and at the same time come to be endowed with ideological significance, its core architectural framework as a legal institution has fallen into neglect in most contexts.¹⁷ The costs of this neglect are more than just academic, since the concept of property exerts a huge influence on people's perceptions and incentives in different settings. Identifying a set of entitlements that are "like, but not quite" property—quasi-property—will go some distance in maintaining the conceptual and analytical integrity of property as a normatively important institution under the law.

The Article unfolds in three main parts. Part I sets out the idea of quasi-property by focusing on the signaling effects of exclusionary interests created through relational liability regimes. In the process, it endeavors to show that there is indeed a common underlying framework that connects these seemingly disparate interests characterized as quasi-property, and that this framework derives from the fundamentally different way in which these interests operationalize the idea of exclusion. Part II builds on the structural framework of the previous Part by exploring possible reasons why the law might choose to regulate a particular resource or interaction through a quasi-property framework rather than a traditional property- or tort-based one. Finally, Part III considers and responds to a few possible objections to the recognition of quasi-property as an analytically coherent category of interests in the law.

I. THE IDEA OF QUASI-PROPERTY INTERESTS

The term "quasi-property" is today commonly associated with the Supreme Court's now-infamous opinion in *International News Service v. Associated Press*.¹⁸ There, the Court refused to recognize a full-blown property right in news and instead chose to create an unfair

¹⁷ For an early identification of this phenomenon, see Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69, 69-73 (J. Roland Pennock & John W. Chapman eds., Nomos XXII, 1980); for the argument that ever since Coase, property has come to be conceptualized less like a "distinctive in rem right" and more like a "list of use rights in particular resources," see also Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359-60, 366-75 (2001).

¹⁸ 248 U.S. 215.

competition-based action of “misappropriation,” which would function as a quasi-property interest in the news.¹⁹ *International News Service* was, however, a case in equity.²⁰ And, as I shall discuss below, equity’s use of the term “quasi-property” to describe certain kinds of interests predates the misappropriation doctrine by at least half a century.

Equity courts began using the term “quasi-property” to describe interests that *resembled* property rights in their functioning even when they weren’t property rights, or, strictly speaking, ownership interests. A “lien” on another’s property,²¹ an owner’s right to any improvements made to his realty,²² or a mere beneficial interest in a property were frequently termed by courts as interests that were *quasi-property*.²³

The earliest systematic usage of the term arose a few years later in relation to corpses. The rights and obligations of sepulcher refer to the entitlements and liabilities associated with the burial of a corpse.²⁴ Very early in its development, English common law came to adopt the position that there was no property right or ownership interest whatsoever in a corpse.²⁵ This rule emanated from the rather strict division between the courts of common law and the ecclesiastic courts: pursuant to this division, the former were allowed to develop any rules necessary to ensure the proper burial of corpses in accordance with any required

¹⁹ *Id.* at 236.

²⁰ *Id.* at 240.

²¹ *See, e.g.,* *Hunter v. Blanchard*, 18 Ill. 318, 324 (1857) (construing a statutory lien as giving the furnishers of building materials “a *quasi* property in those materials, and others with which it has been commingled in the building”); *Gove v. Cather*, 23 Ill. 634 (1860).

²² *See, e.g.,* *Horner v. Pleasants*, 7 A. 691, 692 (Md. 1887); *Balt. & Ohio R.R. v. Chase*, 43 Md. 23, 35-36 (1875); *Casey’s Lessee v. Inloes*, 1 Gill 430, 501 (Md. 1844).

²³ *See, e.g.,* *Woodruff v. United States*, 7 Ct. Cl. 605, 626 (1871) (“They had . . . an interest in the cotton itself, the *jus in re*, which is *quasi* property; and the United States held the cotton charged with that obligation of specific performance to which it was subject when seized.”), *rev’d on other grounds sub nom.* *The Elgee Cotton Cases*, 89 U.S. 180 (1874).

²⁴ For earlier works on the property law related to burial remains, see generally Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 971-72 (1999), and P.D.G. Skegg, *Human Corpses, Medical Specimens, and the Law of Property*, 4 ANGLO-AM. L. REV. 412, 412 (1975). *See also* *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 235-44 (1872).

²⁵ *See* Hernández, *supra* note 24, at 982 (“[E]arly English common law did not recognize property interest in a dead body”); Skegg, *supra* note 24, at 412 (“It is generally accepted that in English law the corpse of a human being is not the subject of property, even though the person who is under the duty to dispose of it has a right to possession for that purpose.”).

religious practices.²⁶ Edward Coke thus famously declared that under the common law, corpses were “*nullius in bonis*” (i.e., no one’s property).²⁷

As the common law crossed the Atlantic, however, this jurisdictional division presented a problem: the absence in America of a strict separation between the common law and ecclesiastical law—ecclesiastical courts did not exist in America—meant that the common law could no longer simply avoid the subject along the lines suggested by Coke.²⁸ American courts were understandably reluctant to follow the English rule.²⁹ To such courts, corpses seemed deserving of *some* protection against mutilation in order to protect the emotional interests of the family and the next of kin; ironically, though, that very reason also militated in favor of not treating corpses as ordinary ownable resources.³⁰ Courts in a number of states thus adopted a middle position by applying the category of quasi-property to the interest.³¹ As one early court, in identifying this conflict, observed,

²⁶ See Hernández, *supra* note 24, at 993; BLACK’S LAW DICTIONARY 407-08 (9th ed. 2009).

²⁷ EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 203 (London, W. Clarke & Sons 1817).

²⁸ See Hernández, *supra* note 24, at 993.

²⁹ See, e.g., *Renihan v. Wright*, 25 N.E. 822, 823-25 (Ind. 1890) (arguing that because of the “ecclesiastical element” inherent in England’s jurisprudence but “not found in our[s],” England’s law should not “exert any controlling influence”); *Pierce*, 10 R.I. at 237 (noting that while “[t]he question is new in this state . . . there is no right of property in a dead body”).

³⁰ See PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (W. Page Keeton et al. eds., 5th ed. 1984) (“[T]he courts have talked of a somewhat dubious ‘property right’ to the body, usually in the next of kin, which . . . cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses.” (footnotes omitted)); Hernández, *supra* note 24, at 1026 (discussing the law’s need to balance the interests of the decedent and his family).

³¹ For example, under Arkansas law, “the next of kin [has] a quasi-property right in a dead body.” *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984). For examples of state court cases identifying a quasi-property interest, see *Cohen v. Groman Mortuary, Inc.*, 41 Cal. Rptr. 481, 483 (Dist. Ct. App. 1964); *O’Donnell v. Slack*, 55 P. 906, 907 (Cal. 1899); *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 27 (Ga. 1905); *Burney v. Children’s Hosp. in Bos.*, 47 N.E. 401, 402 (Mass. 1897); *Brown v. Maplewood Cemetery Ass’n*, 89 N.W. 872, 879 (Minn. 1902); *In re Donn*, 14 N.Y.S. 189, 191 (Sup. Ct. 1891); *Long v. Chi. Rock Island & Pac. Ry. Co.*, 86 P. 289, 290-91 (Okla. 1905); *Hackett v. Hackett*, 26 A. 42, 43-44 (R.I. 1893); *Pierce*, 10. R.I. at 238; and *Griffith v. Charlotte, Columbia & August R.R.*, 23 S.C. 25, 41 (1885).

[T]he burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of quasi property . . . ³²

Quasi-property thus emerged as the American common law term for the possessory or custodial interest that members of a deceased's family had over the deceased's mortal remains for purposes of disposal. The use of the term, and the development of a liability regime, were motivated by the impetus to protect the "personal feelings" or "sentiment and propriety" of the next of kin in having the corpse buried.³³ Prosser thus described this idea of a property-like right in the body to be a mere "fiction likely to deceive no one but a lawyer."³⁴ Nonetheless, the fiction had real functional significance, since it enabled relatives to recover damages upon commercial and noncommercial interferences, and located the middle-level principle motivating this right in the idea of possessing the corpse. In keeping with the limited purpose that the interest served, the law came to forbid the conveyance of this quasi-property interest and recognized it to be of no independent pecuniary significance.³⁵ Additionally, some jurisdictions also came to require that the plaintiff establish some kind of "mental anguish" or a proxy therefor before finding liability for the interference.³⁶ Justice Pitney's use of quasi-property in *International News Service* was thus more than just a play on words.

A second area in which courts have come to use the idea of quasi-property in recent times is trademark law and the doctrine of trademark dilution.³⁷ Unlike traditional trademark infringement, which is

³² *Pierce*, 10 R.I. at 237-38; accord *Donn*, 14 N.Y.S. at 191 ("It is the almost universal practice among civilized people to scrupulously conform to the wishes and requests of friends and relatives as to the disposition to be made of their bodies.").

³³ *Hackett*, 26 A. at 43.

³⁴ PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 30, § 12, at 63.

³⁵ See, e.g., *Donn*, 14 N.Y.S. at 191; *Long*, 86 P. at 292 ("[E]quity will always aid one in the enjoyment of a legal right, even though no property interests are involved.").

³⁶ See, e.g., *Galvin v. McGilley Mem'l Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987) ("The gist of the cause of action, as presently evolved, is the emotional distress and anguish to the nearest kin from mistreatment of the body.").

³⁷ See, e.g., *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 801 (6th Cir. 2004) ("Dilution law, unlike traditional trademark infringement law . . . is not based on a likelihood of confusion standard, but only exists to protect the quasi-property rights a [trademark] holder has in maintaining the integrity and distinctiveness of his mark." (quoting *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 628 (6th Cir. 2003))); *Ringling*

predicated on a showing of consumer confusion, trademark dilution is an action that seeks to protect the “capacity of a famous [trade]mark to identify and distinguish goods or services”³⁸ as a quasi-property interest that is actionable independent of consumer confusion.³⁹ Treated as a quasi-property interest, reputation is protected through a heavily circumscribed exclusionary framework that is tailored to the centrality of perception, which forms the source of its protection-worthy attribute. The quasi-property framework allows trademark to retain its roots in the ideas of deceit and unfair competition without abandoning the idea of exclusionary protection altogether.⁴⁰

While the rights regimes that the common law came to create in the news, corpses, and the reputation of a trademark may at first seem completely unrelated, they in fact exhibit important structural similarities. First, in all three contexts the law consciously *avoids* the recognition or creation of an ordinary property right in the subject matter involved. While the law’s reasons for this avoidance are different, avoidance of a property interest was nonetheless crucial to the development of all three regimes. Second, despite its avoidance of creating a traditional property right in rem, the law nonetheless evinces the belief that there is some value in the idea of imposing a limited duty of forbearance. Third, this duty is heavily circumscribed by considerations that emanate directly from the parties’ actions, interactions, and statuses, and only indirectly relate to the subject-matter in question. Finally, the law deems it appropriate (or necessary) to impose liability on actors that

Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 955 F. Supp. 605, 613 n.7 (E.D. Va. 1997) (“A federal dilution claim . . . shifts the focus away from consumer protection and towards the protection of an owner’s quasi-property right in a famous mark, itself.”).

³⁸ 15 U.S.C. § 1127 (2000) (defining “dilution”), *amended by* Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1730-33 (striking definition of “dilution” from 15 U.S.C. § 1127 and fleshing out dilution law in § 1125).

³⁹ See *Kellogg*, 337 F.3d at 628 (laying out the five-part test for trademark dilution under the Federal Trademark Dilution Act); see also 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:70 (4th ed. 2009) (“Dilution . . . might occur where the effect of the defendant’s unauthorized use is to dilute by tarnishing or degrading positive associations of the mark and thus, to harm the reputation of the mark.”).

⁴⁰ See Kathleen B. McCabe, Note, *Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement*, 68 FORDHAM L. REV. 1827, 1835 (2000) (“[T]rademark law is instead viewed as . . . developing from the notion of unfair competition . . . [which] in turn evolved from the commercial tort of fraud and deceit. Hence, . . . courts . . . use elements of both the tort of deceit and trespass, . . . which results in quasi-property protections.” (footnotes omitted)).

breach this duty in different ways. While this fourth point is unexceptional, the second and third points are crucial to the idea of quasi-property. The first, regarding avoidance, is the subject of the next Part.

Central to the idea of property is *exclusion*.⁴¹ Classifying an interest in an object as a “property right” thus entails endowing it with (i) an exclusionary significance (ii) that is largely objective, in the sense of being insensitive to time, place, and context. An interest is endowed with exclusionary significance when a norm of inviolability (i.e., the duty of forbearance) is associated with the object that the interest relates to.⁴² This inviolability may originate either in a social norm (more likely for traditional tangible resources such as land and chattel)⁴³ or entirely in a legal directive (more likely for intangibles like patents).⁴⁴ Yet regardless of its source, the norm operates by identifying the boundaries of the object and imposing a duty of forbearance (or exclusion) on everyone—the indeterminate set of individuals—other than the owner.⁴⁵ The insensitivity to context is an attribute of property’s status as an *in rem* right, which operates against the world at large (i.e., against strangers to the right-holder, and independent of any causal relationship between the parties).⁴⁶

A quasi-property interest works by relaxing both of these features of traditional property rights. It deemphasizes the connection between the interest and the resource; as a result, the resource comes to be devoid of objective exclusionary significance. Yet because exclusion remains a crucial feature, quasi-property must still *allude* to property as an idea. Instead, the law generates the exclusionary framework through the creation of a liability regime that focuses on a different set of interests that are implicated in the parties’ interactions. These interests

⁴¹ See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing “the right to exclude others” as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”); Merrill, *supra* note 11, at 752 (“[T]he right to exclude is the *sine qua non* of property.”).

⁴² For a more in-depth analysis of the norm of inviolability and the right to exclude, see Balganes, *supra* note 11, at 625-29.

⁴³ See *id.* at 624 (“The precise strength of the norm tends to vary across resource and context. . . . Much of the variation depends on social custom.”).

⁴⁴ See *id.* at 628-29.

⁴⁵ *Id.* at 625-29.

⁴⁶ For the leading account unbundling the idea of the right *in rem*, see Albert Kocourek, *Rights in Rem*, 68 U. PA. L. REV. 322 (1920).

in turn relate to, but do not emanate exclusively from, the resource. They derive instead from the nature, context, and consequences of the parties' interactions—much like the laws of tort and unjust enrichment—and less from the connection between the resource and the right-holder. As a result, the exclusionary significance of the right is targeted only at a determinate set of actors.

This heightened determinacy certainly does not imply that the quasi-property interest is purely ad hoc; in the abstract, the interest preexists the identification of a defendant. But until the defendant enters the picture and is identified (by relationship, action, or harm), the plaintiff's interest is practically inconsequential; unlike traditional property rights that are meaningful even prior to their infraction, it is latent at best. Quasi-property interests thus hang "in the air," to borrow then—Chief Judge Cardozo's analogous description of negligence law, unless or until a defendant is identified.⁴⁷

Returning to our examples of quasi-property reveals how this common framework functions. In *International News Service*, the Court created a liability framework that would allow one newsgatherer to exclude another from the time-sensitive news that the former collected, but *only when they were both direct competitors in the same market*.⁴⁸ The parties' relative statuses—here, as direct competitors—triggered the quasi-property exclusionary framework. Exclusion thus relates to the time-sensitive news (its subject matter), but hardly emanates from it, since without the parties' statuses vis-à-vis each other, news has little objective exclusionary significance. The exclusion is thus highly sensitive to the peculiarities of the context. So too it is with the rights of sepulcher discussed earlier. A person is allowed to exclude another from the corpse of a relative, but only when that person is likely to suffer mental anguish as a result of the latter's actions. Here, the exclusionary framework is triggered by both the plaintiff's status in relation to the deceased and the nature of the defendant's actions.

What we thus see happening in these quasi-property settings is that the exclusionary signal, commonly associated with a property interest, isn't *fully* mediated through the res. Property scholars have long identified the creation of a jural relationship mediated through the

⁴⁷ *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (quoting FREDERICK POLLOCK, *THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW* 455 (11th ed. 1920)).

⁴⁸ See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235-36 (1918).

resource as a characteristic feature of the law of property rights.⁴⁹ This mediation is thus thought to enable the true *in rem* nature of the right, since it allows for both owner and interferer to remain indifferent to each other's identity and characteristics.⁵⁰ In the quasi-property context, however, the law communicates its exclusionary signal independent of the resource—even though it relates the signal to the resource. Indeed, the exclusionary signal emanates from the relationship between the parties in question: their statuses *vis-à-vis* each other, their interaction, or the particular context within which they interact. Only when this relational dimension is implicated does the resource come to be endowed with the limited exclusionary significance that resembles the functioning of property. The description above thus implicates two interrelated analytical elements for quasi-property interests: a *trigger* for the exclusionary signal, and its *communication* as a signal to actors.

A. Triggering Exclusion

One characteristic feature of quasi-property interests is that they endow a resource with exclusionary significance only within certain narrow domains that are in turn triggered by certain circumstances. Until and unless these circumstances arise, the resource in question remains *nullius in bonis* (i.e., unowned). The additional significance of these triggers is that they can in some sense be turned “off.” Thus, when the factual circumstances that affirmatively endow the resource with exclusionary significance disappear, the exclusionary significance itself also ceases to exist. This off switch is particularly important because, as we will see below, it influences the nature and functioning of the legal directive involved.

Nearly eight decades ago, noted theorist and legal realist Leon Green published a series of articles under the title “Relational Interests,”⁵¹ wherein he voiced exasperation that courts tended to

⁴⁹ See, e.g., PENNER, *supra* note 11, at 29 (“The criterion is whether the duty is in any way specific to particular individuals in terms of its content.”); Merrill & Smith, *supra* note 17, at 364 (“[I]n *rem* property rights . . . attach to persons insofar as they have a certain relationship to some thing.”).

⁵⁰ See PENNER, *supra* note 11, at 30 (“Norms *in rem* establish the general, impersonal practices upon which modern societies largely depend. They allow strangers to interact with each other in a rule-governed way, though their dealings are not personal in any significant respect.”).

⁵¹ For the series of articles, see Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934) [hereinafter Green, *Relational Interests* (pt. 1)]; Leon Green, *Relational Interests*,

characterize certain interests as forms of property with the sole objective of invoking and applying equitable considerations.⁵² He instead proposed treating these interests as a distinct category of interests that were not in any sense connected to a “tangible thing,” but instead focused on protecting a relationship that the plaintiff had to another individual or society.⁵³ Green’s basic intuition was in some sense correct: courts were directly reacting to the relationship between the parties rather than just to their interaction through a tangible object. However, Green’s analysis breaks down when he insists (i) that the relationship always involved a third party (beyond the litigants) and (ii) that the relationship needed to preexist the dispute in question.⁵⁴ By relaxing these two assumptions, we can make sense of why courts were treating some interests as property-like: the courts were looking to the consequences and effects of the exclusionary framework on *the parties’ relationship* (or interaction).

Generally speaking, then, quasi-property interests originate in the circumstances of parties’ relationships broadly understood. What triggers courts’ identification of these relationships (for their invocation of quasi-property) is (i) the status of the parties vis-à-vis each other, (ii) the unique environment or context within which they interact, (iii) the nature—wrongful or otherwise—of one party’s actions, or (iv) a combination of these factors. Each of these factors requires brief elucidation.

1. Status

In situations where the law seeks to regulate parties’ interactions over a resource as a result of their unique status vis-à-vis each other, quasi-property proves an ideal vehicle. The paradigmatic instance is of course the “hot news” misappropriation doctrine, which endows time-sensitive news with exclusionary significance only when the parties are direct competitors in the same market, a requirement that involves an analysis of their relationship.⁵⁵ Their status as competitors in the same

30 ILL. L. REV. 1 (1935) [hereinafter Green, *Relational Interests* (pt. 2)]; Leon Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

⁵² See, e.g., Green, *Relational Interests* (pt. 1), *supra* note 51, at 461 (“This inadequacy of classification has proved extremely costly to legal science . . .”).

⁵³ *Id.* at 460, 462.

⁵⁴ See *id.* at 462 (“While in hurts to personality, or property only two parties, plaintiff and defendant, are involved, in hurts to relationship interests, three parties must always be involved.”).

⁵⁵ See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918) (explaining that the test for misappropriation examines “the rights of complainant and defendant,

market is thought to necessitate ensuring that one doesn't free ride on the information gathered by the other through the creation of an exclusionary framework limited to the duration for which the parties retain this status as competitors.⁵⁶

Another domain where the status of a party imbues a resource with limited exclusionary significance is that of insider trading.⁵⁷ There, courts endow market-sensitive factual information with limited exclusionary significance when obtained and used by someone who has the status of a fiduciary to the source.⁵⁸ What seems to matter in these settings where the law emphasizes the parties' status is the fact that the parties' objective/relative positions mandate that they pay greater attention to the manner in which they obtain and use certain resources.⁵⁹ The normative focus of the regime is thus on the harm that is likely to occur directly from their status (e.g., unfair competition or market fraud) rather than any harm to the resource or through its use in the abstract.⁶⁰

competitors in business, as between themselves," rather than "the rights of the complainant as against the public," since the purchaser of a newspaper has different rights in relation to the seller and the news than does the competitor who would "transmit that news for commercial use . . . in order to divert a material portion of the profit from those who have earned it"); *see also* Shyamkrishna Balganesh, "Hot News": *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 438-40 (2011) (elaborating on the relational requirement in the misappropriation doctrine).

⁵⁶ *See* Balganesh, *supra* note 55, at 448-49 ("In the Court's understanding, free riding was problematic because it allowed a competitor to lower its costs and compete on unfair terms with a collector of the news.").

⁵⁷ *See* *United States v. O'Hagan*, 521 U.S. 642, 653-54 (1997) (adopting the misappropriation theory for insider trading). Misappropriation theory and insider trading are closely related. *See* Zohar Goshen & Gideon Parchomovsky, *On Insider Trading, Markets, and "Negative" Property Rights in Information*, 87 VA. L. REV. 1229, 1266-68 (2001); Kimberly D. Krawiec, *Privatizing "Outsider Trading"*, 41 VA. J. INT'L L. 693, 696 (2001).

⁵⁸ *See O'Hagan*, 521 U.S. at 656 ("[T]he fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to the principal, he uses the information to purchase or sell securities."); *see also* Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1504-06 (1999) ("[T]he misappropriating trader deceives those who entrusted her with confidential information." (footnote omitted)).

⁵⁹ *Cf.* Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 866-72 (1983) (discussing possible reasons for allocating property rights in corporate information to "insiders" rather than shareholders).

⁶⁰ *See O'Hagan*, 521 U.S. at 656.

2. Context

In some instances, the environment within which the parties interact over the resource is one that is especially sensitive and deserving of protection. By treating the resource as a form of quasi-property and imbuing it with limited exclusionary significance, the law seeks to protect the parties' interests in circumstances under which they are most likely to be affected. The quasi-property nature of sepulchral rights belongs to this category. As courts have long noted, the common law came to endow a corpse with limited exclusionary rights vested *only* in parties who were likely to suffer emotional anguish upon an interference, and deemed these rights to be infringed *only* by activities that were in turn most likely to cause such anguish directly.⁶¹ Thus, courts have limited such quasi-property claims to "close family members,"⁶² and have cabined the nature of a required infraction to an "intrusion, manhandling, or manipulation" of the corpse.⁶³ They have also disallowed monetary claims for conversion⁶⁴ or for mere invasions of privacy.⁶⁵ Much as with status, the primary harm that the law of sepulchral rights seeks to protect originates in the effects of the defendant's actions on the plaintiff's circumstantially vulnerable emotional wellbeing, rather than any harm to the res as such.

3. Conduct

A third set of situations in which the law invokes the quasi-property idea involves a defendant's morally ambiguous behavior, which, though directed at the plaintiff, affects some res. Here, courts often hesitate to create a full-blown property interest in the res for either

⁶¹ See *supra* notes 28-36 and accompanying text.

⁶² *Boorman v. Nev. Mem'l Cremation Soc'y, Inc.*, 236 P.3d 4, 8 (Nev. 2010).

⁶³ *Riley v. St. Louis County*, 153 F.3d 627, 630 (8th Cir. 1998); *accord* *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880 (Colo. 1994) ("Clearly, there can be no property right in a dead body in a commercial sense, since a dead body cannot be bartered or sold. Some courts have recognized a quasi-property right in dead bodies for the limited purpose of seeing that the body is decently interred or disposed of.").

⁶⁴ See, e.g., *Culpepper*, 877 P.2d at 882 & n.6; *Boorman*, 236 P.3d at 9; see also *Bauer v. N. Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 244 (Ga. Ct. App. 1999) (explaining that because Mrs. Bauer "has no pecuniary interest in her husband's corpse, . . . accordingly, Mr. Bauer's corneal tissue is not subject to valuation" with respect to her conversion claim).

⁶⁵ See, e.g., *Riley*, 153 F.3d at 631 (denying a Fourth and Fourteenth Amendment invasion of privacy claim because the protection is for highly personal matters only).

formal or substantive reasons.⁶⁶ They choose instead to impose liability on the defendant by tailoring the law's exclusionary framework to the conduct that they seek to censure. The law of trade secrets—as well as the multiple causes of action under the heading of unfair competition—fits this description in large measure.⁶⁷

We might also include within this category situations in which the party whose actions are morally ambiguous isn't the potential plaintiff. Various kinds of equitable claims (such as liens) that are recognized by courts but are nonetheless treated as inferior to another party's stronger claim are good examples here.⁶⁸ For instance, some courts treat the doctrine of accession as creating a quasi-property right in the mistaken improver's contribution to the resource.⁶⁹ Such a claim is treated as inferior to the true owner's superior claim—it doesn't come into existence unless the improver's conduct, which, while technically a trespass, is nonetheless found to have been in good faith.⁷⁰

⁶⁶ The distinction between formal and substantive reasons here often implicates courts' equitable, as opposed to ordinary common law, jurisdiction.

⁶⁷ See, e.g., *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (noting how the focus was on behavior and not the asset itself); Shyamkrishna Balganesha & Gideon Parchomovsky, *The Role of Unfair Competition in the Common Law* (describing the nature of the focus in greater detail), in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyamkrishna Balganesha ed., forthcoming 2012); Ramon A. Klitzke, *Trade Secrets: Important Quasi-Property Rights*, 41 *BUS. LAW.* 555, 557 (1986) ("It is clear that [trade secret protection's] home port is fairness and honesty between business competitors.").

⁶⁸ See, e.g., *Hunter v. Blanchard*, 18 Ill. 318, 323-24 (1857) (finding a supplier of building materials to have a lien over his contribution to the building); *V.S. Cook Lumber Co. v. Harris*, 71 P.2d 446, 450-51 (Okla. 1937) (treating the interest of a shareholder who has borrowed on his stock as quasi-property, subject to the superior claim of the corporation); *Att'y Gen. v. Chi. & Nw. Ry. Co.*, 35 Wis. 425, 578-80 (1874) (upholding, against a Contracts Clause challenge, the right of the state to set the maximum tolls that the defendant railroad companies could charge passengers or freight shippers, since "[a]s far as the franchise [to toll] is considered property, it was subject to this limitation," reserved by the state, that the franchise could be altered); MARIE C. MALARO, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 188-89 (1985) (describing a museum's interest as a gratuitous bailee or trustee in terms akin to quasi-property).

⁶⁹ See Harmon D. Maxson, Comment, *Property—Damages for Timber Trespass*, 1 *WM. & MARY L. REV.* 434, 436 n.7 (1958) (noting that, with regard to the property principles presented in *Wooden-Ware Co. v. United States*, 106 U.S. 432 (1882), "it is recognized even in courts of law that an equitable and quasi-property right is acquired by one who in good faith adds value to the property by his labor, although the property . . . may be that of another").

⁷⁰ *Id.* at 436 n.6.

* * *

It should be fairly apparent from the discussion above that the categories of facts that trigger the law's choice of a quasi-property framework are hardly watertight. A party's status might thus in some instances inform the court's analysis of its conduct (as in *International News Service*) or motivate the adoption of a quasi-property framework. What is crucial in all these settings is that the law's choice *not to endow the resource with objective exclusionary significance* is both conscious and analytically meaningful.

B. Signaling Relational Exclusion

Having seen the conditions under which the law might choose to endow an actual or notional res with limited exclusionary significance, it is worth exploring how exactly the law chooses to *communicate* this decision. Liability regimes impose duties and obligations on actors that are best described as "relational" in nature, since they identify both an action that triggers liability and an actor to whom the obligation is owed.⁷¹ Property law, too, operates as a system of liability, notwithstanding its in rem nature characterized paradigmatically by the law of trespass.⁷² And while it may be true that, under property law, actors owe a duty of forbearance to the individuals who own the res in question, this obligation is communicated *via* the res, which mediates it. This structure occasionally produces the mistaken idea that the obligation is owed to the resource and not to the individual. In quasi-property, on the other hand, the law endows the res with only limited exclusionary significance, yet the directive is almost never communicated through the res itself.

⁷¹ See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945-46 (2010) (describing torts as "relational, injury-inclusive wrongs"); Zipursky, *supra* note 15, at 88-93 (1998) (describing tort law as "rights, wrongs, and recourse").

⁷² I am conscious here not to equate the regime of liability surrounding property rights as simple "liability rules" under the Calabresi-Melamed framework. As scholars have long shown, that framework focuses largely on the "protection" of an entitlement, which has in recent times come to be equated with remedies rather than rights. The framework also says little about the analytical bases of the underlying right that the regime protects or the "first-order question" about who should obtain the entitlement and why. For more information on the property-rights framework, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972); Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1347-52 (1986); and Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 973 (2004).

Quasi-property revolves around a directive best described as “relational forbearance.” Such a regime imposes (and communicates) a limited duty of forbearance on individuals when they acquire a particular status in relation to the interest-holder, or when the context of their interaction or conduct necessitates limited exclusion. This duty of forbearance is only ever imposed relationally, by reference to the interest-holder rather than the object of the interest. Individuals are directed by the law to avoid interfering with the object of the interest *under a particular set of circumstances*, defined with a good measure of specificity. By emphasizing the circumstances of interference rather than the interference itself, the law moves away from the object and towards the relationship between the interest-holder and the interferer. In the process, the normative basis of exclusion moves away from the boundaries of the object and towards the circumstances necessitating exclusion. It is this feature that differentiates the law of trespass from the category of quasi-property. While trespass law emphasizes the boundaries of the object as the source of the duty of forbearance, quasi-property, on the other hand, communicates forbearance relationally and with reference to the unique circumstances calling for exclusion.

The rationale for employing relational forbearance instead of a general duty of forbearance in turn derives from the law’s need to make clear the precise *reasons* for the exclusionary framework. Quasi-property serves to break what is often referred to as the “irreducibility of ownership”—the belief that property and ownership as conceptual devices preclude any further investigation into the reasons for which they exist.⁷³ By refraining from endowing the res in question with the objective status of an “owned” resource, quasi-property draws attention to the reasons why the law might nonetheless choose to endow the interest in question with limited exclusionary significance. Often, it turns out that these reasons have little to do with the abstract connection between the interest-holder and the object—believed to be central to property—but rather derive from a specific context or setting within which that connection becomes necessary to further *other* values or goals. The commodification of the object is clearly secondary to other interests, and the quasi-property framework allows for these other interests to be considered more directly.

⁷³ This idea owes its origins to Jim Harris. See J.W. HARRIS, PROPERTY AND JUSTICE 64-66 (1996) (“Ownership acts as an irreducible organizing idea in the daily, non-contested functioning of a property institution. No inferential move from the content of all these rules can give us a list of the privileges and powers which ownership entails.”).

In important work, Henry Smith has shown how property law attempts to delineate rights through either an “exclusion” strategy, which focuses on a “thing” and simple on/off signals for the directive (e.g., boundary-crossing as trespass), and a “governance” strategy, which is more fine-grained and involves a more circumstantial determination of when a right is infringed.⁷⁴ The choice of strategy is thought to emanate from the law’s attempt to optimize information costs.⁷⁵ More recently, Smith has extended this analysis to the property/tort interface to argue that “[w]here property starts with a thing as the beginning for delineating rights, tort law takes action as its starting point.”⁷⁶ Although Smith doesn’t directly address the source of the directive in either formulation, his theory suggests that property law’s in rem directives emanate from the thing itself, while in tort law they originate in the duties of care around which tort law’s focus on an individual’s actions revolve.⁷⁷ Smith thus implies that there is a continuum wherein the law’s focus moves from thing to action—depending on its normative focus—embodied in the move from property to tort. From a communicative standpoint, this move manifests itself in shifting the focus from communicating the directive as a general exclusionary message via the res to a more nuanced action-based command via relational duties.

Quasi-property interests originate precisely at this transition point. What Smith characterizes as actions can be disaggregated into conduct, context, and status, all of which generate obligations against which the defendant’s “actions” are judged in the assessment of liability. As the law moves away from communicating its obligations through the thing and towards doing so through relational duties, it comes to a point where the costs of imprecision favor greater granularity in the regime. Even so, the res continues to remain a viable mechanism *around* which, rather than *through* which, to communicate that signal. The thing, in

⁷⁴ See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S467-78 (2002) [hereinafter Smith, *Exclusion Versus Governance*] (casting exclusion and governance as rules of access and of use, applied according to their respective costs and benefits); see also Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1749 (2007) [hereinafter Smith, *Intellectual Property as Property*] (applying this distinction to explain the difference between patent and copyright law).

⁷⁵ Smith, *Exclusion Versus Governance*, *supra* note 74, at S467-71.

⁷⁶ Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011, at 1, 14.

⁷⁷ *Id.* at 14.

other words, forms the focal point for the relational duties from which the law generates its obligations, even though it doesn't form the conduit for the obligations as such.

It is indeed this narrow set of interests that seem to fit the description of quasi-property. Smith is therefore correct to fault theories of tort law that he describes as "commodification"-based, which attempt to treat any interest protected by liability as a proprietary one (e.g., reputation or a business opportunity), and to suggest that in reality something else is going on in these contexts.⁷⁸ In the next Part, I propose some possible answers to explain what these regimes are trying to achieve normatively. At the very least, however, a major structural difference that Smith's observation captures is the fact that these quasi-property regimes communicate a fundamentally different *kind* of exclusionary signal: one that *relates* to the thing, but which is nonetheless rooted in the background conditions relating to the parties' interactions surrounding the thing.

II. REASONS FOR QUASI-PROPERTY INTERESTS

Having examined in the previous Part how quasi-property interests work and the way in which they communicate their exclusionary signal to actors, this Part examines why the law might select the framework of quasi-property for certain kinds of interests. Why, in other words, might the law want an interest to function like property, without calling it a full-blown property interest? In answering this question, I distinguish between two kinds of conflicting influences. The first are best described as *affirmative* influences, or reasons that might push the law toward treating certain interests as regular property rights to begin with. To some extent, these influences track ordinary reasons for the emergence of property rights in the ordinary setting. The second set of influences push in the exact opposite direction and inject a meaningful degree of caution into the framing of the interest; we might call these factors *negative* influences. Some combination of affirmative and negative determinants therefore results in the law's choosing to cabin the exclusionary regime relationally, and to this end adopting the idea of quasi-property. The affirmative influences explain the *property* element of quasi-property, while the negative ones account for the *quasi* element.

⁷⁸ See *id.* at 6-9, 14-16 (describing situations in which both property and tort law may apply, and others in which one or the other is more appropriate).

At the outset, two important cautionary notes about these influences are in order. First, the determinants identified here are largely (if not exclusively) instrumental in their orientation.⁷⁹ It necessarily follows that the law's reasons for choosing quasi-property as a category in some instances must be instrumental, as well. While not precluded, an immanent explanation for the evolution of these interests remains less plausible given the relatively recent nature of these interests as a formal category (in comparison to property).⁸⁰ Second, in seeking to explain why quasi-property interests emerge in different contexts and in offering reasons for their emergence, I do not suggest that common law courts have engaged in some kind of concerted attempt to move the law in a particular direction. As with much of the common law, these developments have occurred across time and context, oftentimes without any reference to each other.⁸¹ Despite this caveat, this Part seeks to establish that these interests nevertheless did *not* develop in an entirely ad hoc manner.

A. *Affirmative Influences*

The first group of influences is in some sense propertarian, since they motivate the law towards creating a property interest around the res in question. Such influences track the law's instrumental justifications for the creation of property rights in resources.

1. Preserving Economic Value

Starting with the work of Harold Demsetz, economists have long posited that property rights emerge in scenarios where the benefits of internalization outweigh the costs of exclusion.⁸² A milder version of

⁷⁹ I use the word "instrumental" here in the broadest sense of the term, and not necessarily to implicate utilitarian or social welfare-related objectives.

⁸⁰ For an intrinsic account of the common law's core conceptual categories, see BIRKS, *supra* note 1, at 20-32. In contrast to Birks's account, my account here consciously recognizes that courts do develop common law concepts and categories in the pursuit of policy goals.

⁸¹ For a similar account of the common law in relation to intellectual property, see generally Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

⁸² See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."); see also Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 165 (1975) ("Establishing and protecting property rights is very much a productive

this thesis is seen in some quasi-property interests, where the belief is that the nature of the parties' interaction *around a thing* is likely to diminish its objective market value, thereby necessitating limited exclusion. Quasi-property interests emanating from the idea of unfair competition are paradigmatic of this concern, which in some sense tracks the idea of free riding.⁸³ Unlike traditional intellectual property, however, the economic value that the law seeks to preserve does not emanate from exclusivity as such, since that would render the motivation circular. Instead, the economic value is thought to derive from a party's actions, for which the thing forms an easy and indirect referent.

2. Creating an Identifiable Focal Point for Coordination

Legal rules operate by providing individual actors with a common focal point around which to coordinate their behavior. They perform an important guidance function by helping to set expectations as to what other actors will do in a particular setting.⁸⁴ Property law has long been known to perform this function in different social settings by mediating its directives of exclusion through the res.⁸⁵

activity toward which resources can be devoted. But, like any other activity, the amount of this investment will depend upon the marginal benefits and costs to investors of allocating resources to these endeavors.”); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S332 (2002) (“Desmetz hypothesized that property rights emerge when some change in the relative value of resources occurs that makes it cost-effective to internalize costs that previously were experienced as externalities . . .”).

⁸³ See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) (arguing that, in the intellectual property context, courts and commentators treat such property as real property—which “leads them to an almost obsessive preoccupation with identifying and rooting out that great evil of the modern economic world—free riding”).

⁸⁴ Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000); see also Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 LAW & SOC'Y REV. 865, 866 (2008) (“[W]hen the parties involved have some common incentive to ‘coordinate’ their behavior, the law’s articulation of a behavior will tend to create self-fulfilling expectations that it will occur.”). Indeed, recent experimental evidence seems to suggest that the focal point theory, at least in a modified form, holds true for property law. See Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 452 (2010) (“How a property entitlement is framed . . . will affect the attitudes and behaviors of societal actors subject to legal rules and influence policymakers as they choose among possible legal rules.”).

⁸⁵ See Merrill & Smith, *supra* note 16, at 788 (describing how the two-way nature of property’s in rem structure performs this coordination function through the res); PENNER, *supra* note 11, at 49.

Quasi-property interests incorporate this element of property into their functioning. While they signal liability for certain actions, they frame the liability regime around an actual or notional *res* in understanding the action in question, thereby enabling individuals to coordinate their behavior not solely by reference to the action, but also by reference to the *res*. The right of sepulcher is a good example. While the liability regime certainly focuses on the defendant's actions and the likely emotional harm they will cause to the plaintiff, the actions are judged by reference to their effects on the corpse (the *res*), not their effects on the plaintiff directly.⁸⁶ In turn, this channeling through the *res* allows actors (medical examiners, mortuaries, etc.) to coordinate their behavior around the *res*.

3. Expanding Remedial Options

Perhaps the most obvious reason why courts might choose to characterize some interests as being endowed with attributes of property derives from the special treatment that proprietary rights historically received in equity.⁸⁷ Historically, equitable (or extraordinary) remedies were restricted to rights that were proprietary rather than personal in nature, and over time, courts strove to structure the regimes they were creating as proprietary in nature in order to avail themselves of such remedies.⁸⁸

Scholars have long noted the absurdities that this distinction created before it eventually broke down.⁸⁹ Nonetheless, the impulse motivating

⁸⁶ In other words, on the assumption that it will have caused mental anguish, the interference with the corpse is considered sufficient to trigger liability. This cause of action does not require an independent showing of such anguish or harm, as is required for the tort of intentional infliction of emotional distress. *Boorman v. Nev. Mem'l Cremation Soc'y, Inc.*, 236 P.3d 4, 8 (Nev. 2010).

⁸⁷ See, e.g., *Gee v. Pritchard*, (1818) 36 Eng. Rep. 670 (Ct. Ch.) 674 (noting that relief in equity for libel could only be sustained on protection of rights of property). For early accounts documenting and criticizing this rule, see Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 642-46, 668-77 (1916), and Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115, 122-26 (1923).

⁸⁸ See generally Green, *Relational Interests* (pt. 2), *supra* note 51, at 39-40 (describing how English courts invoked the idea of property in order to sustain equitable jurisdiction).

⁸⁹ *Id.*; see also Green, *Relational Interests* (pt. 1), *supra* note 51, at 461 ("Courts, having assumed that equity would only protect a property interest, have constantly expanded the property concept to include every sort of valuable interest which they deemed worthy of protection."); William Bliss Giles, Note, *A Re-Interpretation of Gee v. Pritchard*, 25 MICH. L. REV. 889, 889 (1927) (explaining that the *Gee* rule "has been so severely criticized

this distinction remains, and in no small measure. The movement towards treating some forms of privacy claims as centered around “property”⁹⁰—and indeed the recent debates about the availability of injunctive relief for intellectual property⁹¹—are evidence of this impulse. Treating an entitlement as covered by a quasi-property framework might thus allow for equitable relief to become readily available for infraction of the entitlement. In fact, some courts view the Court’s use of the concept of “quasi-property” in *International News Service* as motivated by precisely this objective.⁹²

B. Negative Influences

In contrast to affirmative influences, which explain why courts remain influenced by the idea and metaphor of property in their construction of the quasi-property interest, another set of influences—which I label negative influences—push courts in the exact opposite direction. These influences explain why the law doesn’t go all the way toward classifying the interests in question as property rights. In equilibrium with one another, the affirmative and negative influences produce the midway position of *quasi*-property interests.

and so strained in its application that one is inclined to doubt that it has appreciable vigor at the present time”).

⁹⁰ See Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1289 (2000) (noting a “recent upsurge” in “[t]reating privacy as a property right”); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1127 (2000) (explaining that “some American commentators have proposed that the law should grant individuals a property right in their personal data”); Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 744-45 (2004) (discussing the issue of “whether genetic information should be treated as property”).

⁹¹ See Balganes, *supra* note 11, at 649-50 (explaining that “the Federal Circuit had developed a general rule in the context of patent injunctions, under which the courts granted plaintiffs a permanent injunction once validity and infringement were factually proven”).

⁹² For example, in *Victoria Park Racing & Recreation Grounds Co. v Taylor*, the High Court of Australia agreed with Justice Brandeis’s dissent in *International News Service* and observed that

courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour.

(1937) 58 CLR 479, 509 (Austl.).

1. Avoiding Expressive Commodification

Commodification refers to the process by which some *thing* comes to be understood in the popular mind as a “commodity” to which a price can be attached, and for which a market exists.⁹³ Integral to this process is the identification of the thing that then operates as the commodity. Commodification as a process is thought to entail both an extrinsic and an intrinsic dimension—with the former referring to the way in which outsiders perceive participants’ interaction around an object, and the latter to the way in which insiders themselves model their interaction around the object.⁹⁴ In numerous contexts, however, the law and/or actors within a specific social setting find the process of “commodifying” certain objects or values to be deeply problematic.⁹⁵ Such objections may emanate from both deontological precepts (e.g., not wanting to treat babies as things in adoption law), or from purely instrumental ones (e.g., not wanting to encourage the trade of babies because of the regulatory problems that it is likely to engender).

What is important here is that commodification as a process can come about both through the law’s actual regulation of behavior and in its expressive dimension.⁹⁶ In the former, the law’s active treatment of certain items as tradable commodities becomes relevant, whereas in the latter the law’s signaling that some items are to be treated analogously to commodities is what matters. Although the two often go together, they do not have to. It is the latter set of scenarios that courts see as problematic in some quasi-property contexts. A court’s identification of an object as a *res* certainly doesn’t result in it being commodified as an operational matter, in the sense of creating a market for the object as such. It nonetheless signals that the law conceives of the object as a commodity, albeit for a limited, regulatory purpose: what one might call “expressive commodification.” And much like in other types of commodification, this limited, expressive commodification is also seen as problematic—for the same kinds of reasons as in the original context of commodification.⁹⁷ In turn, this impulse is what pushes the

⁹³ See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 1-2 (1996).

⁹⁴ *Id.* at 2-3.

⁹⁵ *Id.* at 131.

⁹⁶ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2036-38 (1996) (discussing how and why social norms ban “commodification”); *id.* at 2045-48 (using emissions trading in environmental law as an example of how commodification can come about through the law’s expressive function).

⁹⁷ *Id.* at 2036-38.

common law to adopt the category of quasi-property, a position midway between declaring an object to have full exclusionary significance and giving it no such significance at all.

We see this influence at play in relation to both sepulchral rights and the misappropriation doctrine. With regard to sepulchral rights, common law courts have explicitly observed that calling a corpse someone's property or an owned object is problematic for moral (and sentimental) reasons.⁹⁸ Indeed, courts have thought such commodification problematic, even for the limited purpose of providing redress for interference with the corpse. This impulse to avoid commodifying corpses as an expressive matter thus moved the law in the direction of quasi-property.

The same logic was at work in *International News Service*, where the Court held that the news, the "history of the day," the object that the plaintiff sought to be infused with exclusionary significance as a form of property, was instead "*publici juris*"—"common property" that could not be owned privately.⁹⁹ Again, the Court might have called the news "property" for the limited purpose at hand, yet the impulse against expressive commodification once again seems to have pushed in the other direction.

2. Preserving the Ethereality of Subject Matter

Creating a property right around a res necessarily requires identifying the boundaries of the res that is being endowed with exclusionary significance. And when the exclusionary signal or directive is mediated entirely through the res, determining its boundaries thus assumes additional functional significance. Despite property law's move away from the "lay" or unscientific conception of property as a thing, identifying the res—either as a factual or notional matter—still continues to influence the way in which property works.¹⁰⁰ In relation to tangible resources, defining the res poses few problems (if any). With

⁹⁸ See, e.g., *Bauer v. N. Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 244 (Ga. Ct. App. 1999) ("The quasi-property right in a corpse is not pecuniary in nature, nor should it be . . . [O]ur laws . . . will not impose a pecuniary value on the flesh itself. To do so would make the strangest thing on earth that much stranger."); see also PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 30, § 12, at 63 ("It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected . . .").

⁹⁹ *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234-35 (1918).

¹⁰⁰ For a description of the unscientific or lay conception of property, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26-27 (1977).

intangibles, however, defining the boundaries of the res is hardly a costless exercise.¹⁰¹ Delineating the metes and bounds of an intangible in order to give it exclusionary salience involves significant administrative and judicial costs. A good example here is intellectual property, where the legal system has historically attempted to optimize the costs of delineating the res in multiple ways—ranging from a voluntary self-identification (i.e., claiming) system, requiring various kinds of formalities, or by mandating a deposit of the item being endowed with exclusionary significance.¹⁰²

Costs aside, one can also see independent affirmative reasons for the legal system to avoid defining the precise boundaries of the res. Most, if not all, quasi-property regimes originated in the common law and thus emerged in the context of liability regimes that developed inductively by generalizing from the context of a particular dispute.¹⁰³ All the same, in order to survive and develop incrementally, the principle of liability that developed needed to do *more* than deal with the specifics of the dispute before the court. Because the common law speaks in generalities, courts developing quasi-property regimes began to abstract from the particular in order to preserve their legitimacy and future applicability.¹⁰⁴ Thus, even when they came to identify a res, courts instinctively gravitated towards generalizing its essence rather than specifying or delineating it with precision. That task was relegated to the stage of rule application.

Trade secrets are a good example of this phenomenon; so, too, are notions of the “distinctiveness” of a trademark and attributes of an individual’s “persona”—all of which are technically the res of quasi-property interests. What we see in such scenarios is that the law consciously avoids delineating the intangible subject matter of protection with any measure of precision, and instead describes the subject matter by class,

¹⁰¹ See Smith, *Intellectual Property as Property*, *supra* note 74, at 1787, 1793 (envisioning a model to explain the cost of clarifying boundaries of the protected “res” in intellectual property law).

¹⁰² See generally Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 730-52 (2009) (describing the claiming systems in both patent and copyright law).

¹⁰³ See OLIVER WENDELL HOLMES, *Codes, and the Arrangement of the Law* (1870), reprinted in THE COLLECTED WORKS OF JUSTICE HOLMES 212, 212 (Sheldon M. Novick ed., 1995) (“It is the merit of the common law that it decides the case first and determines the principle afterwards.”).

¹⁰⁴ See *id.* at 213 (“New cases will arise which will elude the most carefully constructed formula. The common law, proceeding . . . by a series of successive approximations—by a continual reconciliation of cases—is prepared for this, and simply modifies the form of its rule.”).

characteristic, or category in the belief that the delineation is best achieved from within the context of adjudicating an infraction and not prior to it. The law, in other words, chooses to preserve the fluidity of the res, and to adjudicate the possibility of any boundary crossing ex post.

3. Tailoring the Res to the Actio

A third influence derives from the law's need to tailor the interest involved with a high degree of precision because of the costs associated with overinclusiveness. In some ways, this point flows from, and is intricately connected with, the previous one. On the one hand, the law seeks to preserve the unbounded nature of the res to allow for flexibility and applicability to future contexts. Generalizing or abstracting to the res from the particular context of the dispute is thus central to preserving this flexibility. On the other hand, it must not be forgotten that the law's ultimate focus is on the defendant's behavior, which the law seeks to regulate through a mechanism of liability. Thus, while flexibility cuts in favor of generalization, which in turn motivates a general reluctance to define the precise boundaries of the res, the focus on the defendant's behavior seeks to align the boundaries of the res with the actions that trigger liability.¹⁰⁵ While these two influences aren't diametrically opposed, they nonetheless complicate the process of defining the res around an identifiable object.

The law of trade secrets is a good example of this phenomenon. The need to develop a generalizable regime pushed the common law in the direction of treating any valuable information that was subject to some measure of secrecy as a possible trade secret.¹⁰⁶ However, such an abstract definition results in a weak exclusionary signal. Moreover, trade secret law has long been thought to exist in order to ensure "[t]he maintenance of standards of commercial ethics" among market actors.¹⁰⁷ Thus emerged the idea that the taking (or misappropriation) of a trade secret could come about only when the secret was acquired

¹⁰⁵ This theory of trade secret law corresponds roughly to what Smith has described as the "governance strategy" for organizing property rights. Smith, *Exclusion Versus Governance*, *supra* note 74, at S455-56.

¹⁰⁶ See, e.g., Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 248 (1998) ("[A]lmost anything can qualify as a trade secret, provided it has the potential to generate commercial value . . . [including] customer lists, pricing information, business methods and plans, and marketing research data." (footnotes omitted)).

¹⁰⁷ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

through “improper means.”¹⁰⁸ Notice that the nature of the res of such a trade secret is transformed. The res is now any valuable information subject to secrecy, *if and when* it is acquired through improper means.

On its face, this construction may seem absurd.¹⁰⁹ Why should the nature of the interference have any bearing on the structure of the res? The answer is that in the absence of any other indicator, the understanding of the interference forms the only exclusionary signal that relates to the res. The improper means idea—the notion that the regime seeks to regulate a certain type of action—is functionally as much a part of what constitutes a trade secret as is the underlying information itself. The action, simply put, influences the functional conception of the res.

What accounts for this influence, then, is the law’s functional focus on the defendant’s activity. In order to focus in on the precise activities, the directive of liability needs to be highly granular, so a lumpy exclusionary signal becomes inadequate. A more tailored governance-style signal becomes necessary. All the same, it is important to note that the law doesn’t formally abandon the idea of boundary-crossing that is central to property. If it did, there would simply be no need to identify the “trade secret”; the law could simply focus on the means of appropriation and use. Instead, the law adopts a midway position: quasi-property.

III. POSSIBLE OBJECTIONS

Now that we have seen what the idea of quasi-property entails, the way in which it functions, and the influences that move the common law in the direction of creating and recognizing such interests, this Part considers and responds to three possible objections to the recognition of quasi-property as an independent category of interests in the common law. These objections derive from (A) *sporadicity*—that the law’s sporadic usage of the term ought to caution against inferring a coherent analytical framework for these interests; (B) *analytical incoherence*—that there might be interests in the common law that are property-like but analytically very different from quasi-property as

¹⁰⁸ Bone, *supra* note 106, at 250-51; *see also* UNIF. TRADE SECRETS ACT § 1(1) (amended 1985), 14 U.L.A. 537 (2005) (“Improper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage . . .”).

¹⁰⁹ Indeed, even Bone treats the “misappropriation” requirement as going to liability rather than the definition of trade secrets themselves. Bone, *supra* note 106, at 250.

described here; and (C) *realism*—that quasi-property ought to be seen as a mere placeholder for courts to invoke certain remedies, consequences, and results in individual cases. I consider and respond to each of these objections in turn.

A. *Sporadicity of Usage*

The claim advanced in this Article is that quasi-property refers to a wide set of interests in the law that involve a common analytical framework—one where the law seeks to simulate the functioning of property's exclusionary framework relationally. As I have shown, the set of interests following this pattern is, in reality, much more expansive than merely the specific instances where the law has expressly described the interest as quasi-property. The laws of trade secrets, publicity rights, idea protection regimes, and insider trading can all be seen as following the same analytical pattern as those instances where courts have explicitly described the entitlement being enforced as quasi-property. All the same, one might argue that courts' unwillingness to extend the nomenclature to such settings is deliberate. The sporadic nature of quasi-property recognition, this argument goes, represents a reticence rooted in the absence of a common analytical basis for these cases, which is precisely what my argument hinges on. By failing to call trade secrets (and other similar interests) "quasi-property," the argument goes, courts are in fact signaling that there is no such category with which to work.

While descriptively accurate, this objection misses the functional significance of the argument being offered here. In effect, it operates along the lines of what legal theorists call a "transparency" objection, or one rooted in the self-understanding of the law.¹¹⁰ According to the transparency criterion, the express reasoning offered by courts (and the law more generally) must necessarily correspond to its actual and

¹¹⁰ See STEPHEN A. SMITH, CONTRACT THEORY 24-32 (2004) (explaining "transparency" as a criterion for assessing interpretive theories of contract); see also JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 27 (2001) (noting that objections based on self-understanding of tort law "cannot serve as a functional explanation of the core of tort law"). But see Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 349-56 (2007) (embracing the efficient evolution model of the common law as "postulating a causal mechanism" undermining Smith and Coleman's views of transparency).

unstated reasoning.¹¹¹ The law's self-understanding must track any understanding of it that outsiders seek to develop.

Yet the transparency criterion is largely irrelevant in establishing the validity of quasi-property as an analytically independent category in the law. It is irrelevant because the traditional context within which transparency becomes necessary is the domain of "reasoning."¹¹² The practice of legal reasoning is fundamentally different from the process of identifying a legal category, unless such identification is invariably accompanied by a strong reliance on analogy. In the development of common law categories, analogies have always been drawn in factual rather than analytical terms.¹¹³ In other words, for example, trespass law almost never looks to the law of negligence for analogies, even though both are understood as "torts" with a common analytical framework revolving around the law's imposition of an obligation on actors and its allowance for a claim of unliquidated damages upon breach. If any reasoning by mere analogy to category is abjured, the need for transparency largely dissipates. Thus, when reasoning is not at issue, the law's self-understanding need not map onto our external understanding of how it performs its analysis. It is precisely this nuance that the sporadicity objection misses.

It thus matters very little that courts and judges themselves don't expressly describe *all* scenarios in which they are seeking to simulate property's exclusionary framework relationally as quasi-property. Even if courts did describe these interests as such, little would automatically result. Indeed, it is precisely in this manner that the common law's set of categories has continued to evolve over the years.¹¹⁴ The numerous causes of action that are today described as relating to the law of restitution for unjust enrichment represent an example of such a devel-

¹¹¹ See SMITH, *supra* note 110, at 25 ("[T]o account for law's claim to be transparent a legal theory of the common law must, *inter alia*, take account . . . of the reasons that judges give for their decisions.").

¹¹² See, e.g., *id.* at 28 ("[A] good legal theory should explain the law in a way that shows how judges could sincerely, even if perhaps erroneously, believe that the reasons they give for deciding as they do are the real reasons.").

¹¹³ See FREDERICK SCHAUER, THINKING LIKE A LAWYER 85-102 (2009) (distinguishing analogy made on the basis of factual similarity from precedent); Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) ("[A]nalogical reasoning focuses on particulars, and it develops from concrete controversies.").

¹¹⁴ For an introduction to the mapping of legal concepts, see STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 1-22 (2003).

opment.¹¹⁵ Few today would claim that the mere fact that judges do not make reference to the common analytical thread unifying restitution ought to negate its legitimacy as an independent category.

B. *Incoherence from Metaphorical Use*

The incoherence objection is the exact opposite of the sporadicity objection. Here the argument is that there exist numerous areas where the law seeks to simulate property's functioning without describing the right as a property right. The use of property as a "metaphor" in such disparate ways, therefore, is not an analytically coherent way of thinking of these interests.¹¹⁶ Prominent examples include the "prepossessory interest,"¹¹⁷ equitable ownership,¹¹⁸ restitutionary rights in equity,¹¹⁹ and entitlement claims during bankruptcy and divorce proceedings.¹²⁰ In each of these situations, the law seeks to treat the interest or asset as a form of property for a very limited purpose. Why, then, shouldn't these interests also merit characterization as quasi-property?

The response to this objection is fairly straightforward. The idea of quasi-property advanced here entails more than the law's mere simulation or metaphorical reliance on the idea of property without also classifying an interest directly as a form of property. Of fundamental significance to the analysis are the questions of *what* is being simulated and *how* this simulation is being achieved. First, the interests identified as quasi-property seek to simulate property's core commitment to

¹¹⁵ See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 25-36 (2004) (identifying these concerns as valid but recognizing the area to present a "loose framework" category).

¹¹⁶ See, e.g., Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. & TECH. L. REV. 265, 327-31 (2006) (adopting an incoherence objection to the application of property metaphors to the Internet).

¹¹⁷ See, e.g., *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *5-8 (Cal. Super. Ct. Dec. 18, 2002) (holding that a baseball spectator who had caught a Barry Bonds baseball had a legally cognizable prepossessory interest).

¹¹⁸ See, e.g., *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 567, 570 (1946) (describing the federal government's security interest in a piece of private property as a form of "equitable ownership").

¹¹⁹ See, e.g., *Producers Lumber & Supply Co. v. Olney Bldg. Co.*, 333 S.W.2d 619, 628 (Tex. Civ. App. 1960) ("[W]hen a person, acting in good faith without negligence, in the mistaken belief that he is the owner of the land, erects improvements on the land of another, he then has an equitable interest . . . in the land . . . to the extent his improvements enhance[] the value of the land . . .").

¹²⁰ See, e.g., *O'Brien v. O'Brien*, 489 N.E.2d 712, 715-17 (N.Y. 1985) (declaring that a professional license earned during a marriage should be considered marital property).

exclusion.¹²¹ One may certainly advance the familiar argument that property is not only about exclusion, but that it also ought to focus on other dimensions, such as inclusions, affirmative obligations, and the like.¹²² Regardless of whether such a contention is true, the fact remains that quasi-property as an idea takes as given a connection between property and exclusion, and in turn tries to replicate this connection in a situational manner. Second, the simulation isn't a mere nominal or expressive one; rather, it is deeply functional.¹²³ It uses the law's liability framework and its generation of guidance rules to achieve the same effect as property's exclusionary signal (which is mediated through the object of the property right). Quasi-property is thus much more than just the attempt to replicate *some* effects of property without using the term property to describe the interest.

In short, for an interest to be classified as quasi-property, the simulation has to be of a very specific kind. This requirement excludes a variety of other instances in which courts are attempting to replicate *just some* aspect of property.¹²⁴ Far from enabling the unregulated attachment of the quasi-property label—a haphazard approach that would undoubtedly dilute quasi-property's coherence—in the conception I advance, the category of quasi-property interests embodies an equilibrium maintained by its unique modality of property simulation.

C. *Beyond Formalism*

The last objection to quasi-property as a category of interests originates in the legal realist critique of common law formalism.¹²⁵ In this objection, quasi-property is seen as a mere placeholder used by courts to invoke a set of remedies and consequences ordinarily associated

¹²¹ For more on this connection, see *supra* note 11 and sources cited therein.

¹²² See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 37-55 (2011); Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1853-60 (2012) (distinguishing exclusion property from governance property where there exists a multiplicity of owners and interests within the "black box"); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 285-89 (2008) (arguing that the exclusion approach to ownership does not tell us enough about the owner's position).

¹²³ Quasi-property is vastly different from the idea of "incomplete commodification" made famous by Margaret Radin. See RADIN, *supra* note 93, at 102-03 (defining "incomplete commodification" as "the social state of affairs envisioned by" social policy and other such norms).

¹²⁴ See *supra* notes 117-20 and accompanying text.

¹²⁵ For an interesting recent account on the realist-formalist divide, see BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

with property, without having to classify an entitlement as a property right for all purposes. Quasi-property in this conception is seen to have such little analytical meaning of its own that it fails to merit identification as an independent category. Instead, the view is that quasi-property is a strategic device invoked for a variety of consequentialist reasons, not all of which are the same. Quasi-property is thus simply a product of what it lets courts *do* with an entitlement, rather than a category of entitlements with independent analytical meaning.

While this objection has some merit, it misapprehends the role that I claim for quasi-property as an independent category in the law. To begin with, it frames the distinction in excessively binary terms, and as such ignores the possibility that a category of entitlements may derive its meaning entirely from its functioning—i.e., the consequences that it produces when applied. The problem that lies at the root of the objection arises only when this meaning is thought to embody an immanent rationality within the category, independent of its functioning—a “mechanical jurisprudence.”¹²⁶

Indeed, an objection along these lines has been made against the category of property itself within the law. Alluding to its meaninglessness, the noted Scandinavian Legal Realist Alf Ross argued that property could well be replaced by the term “tû-tû” and produce the same results, if society came to understand the term to produce the same consequences as property.¹²⁷ In a similar vein, Tom Grey advanced the argument that the idea of property disintegrated in the law and consequently could no longer remain a “central category” of thought.¹²⁸ Despite these claims, property continues to remain a normatively significant category in the law, one whose meaning today is thought to originate in largely functional terms. Thus, it doesn’t dilute the coherence of a legal category if the category derives its meaning from the consequences that it produces, so long as the set of such consequences is finite and can be identified in advance.

The understanding of quasi-property advanced in this Article doesn’t rely simply on formalism. Rather, it pays clear attention to the

¹²⁶ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-07 (1908) (describing the formalist approach as entailing a form of mechanical jurisprudence); cf. TAMANAHA, *supra* note 125, at 28 (arguing that mechanical jurisprudence was a trope, not a reality ever believed by any legal scholars or judges).

¹²⁷ Alf Ross, Comment, *Tû-Tû*, 70 HARV. L. REV. 812, 815, 818-19 (1957).

¹²⁸ See Grey, *supra* note 17, at 82 (“The development of a largely capitalist market economy toward industrialism . . . must lead to the decline of property as a central category of legal and political thought.”).

reasons why courts invoke the category and the consequences that flow from this choice. At the same time, my theory posits that there is a common analytical—even if not normative—framework underlying quasi-property. I certainly do not advance a mechanistic idea of the category, and do not presume that courts must rely on it in some deductive sense. Rather, the argument for quasi-property actively embraces realism, without allowing quasi-property to abjure all reliance on categories and concepts in the law altogether.¹²⁹ Indeed, many of the reasons suggested for the evolution and use of the category derive quite legitimately from “policy” considerations that are exogenous to the category itself, an idea that is fundamentally at odds with a formalist approach to constructing categories and concepts in the law.

CONCLUSION

Quasi-property forms a plausible category of interests in the common law where the law chooses to simulate property’s exclusionary framework through a mechanism of relational liability. While there isn’t a consistent pattern of usage for the concept in any one area, one can still trace a common structural framework in the areas where courts do frequently employ the idea. What we begin to see in these areas is that the idea of quasi-property is employed in situations where the law wants to signal limited exclusion, yet at the same time is reluctant to connect the directive to the res itself. Instead, the law chooses the framework of a liability regime to communicate this directive in a relational, bilateral manner.

Ever since the Realist turn in legal thinking, legal concepts and categories have come to matter increasingly little to courts, scholars, and even students of law. The idea of “property” is no exception. Indeed, the concept today is understood less as a category and more as a set of consequences flowing from certain situations. “Property is what property does” has become the dominant way of thinking about the idea. In the process, the concept has come to be stretched and applied to a host of situations, either directly, by analogy, or as metaphor, with the result that Grey’s famous declaration of property’s conceptual “collapse” is arguably truer today than it was when originally made.¹³⁰

¹²⁹ In fact, the term “realism” itself means several different things. For a useful attempt to reconcile realism and common law conceptualism, see Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1558 (2003), and Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 647 (2007).

¹³⁰ Grey, *supra* note 17, at 74.

Taking quasi-property seriously as a category and concept in the common law is on its own unlikely to go far in stemming this trend. All the same, it highlights an important and unappreciated dimension to the idea of property in the common law: an element of *introspection*, so to speak, in the law's own framing of an interest as a metaphor or simulation of the idea of property. In characterizing certain interests as property-like, but not property, the law can be understood as signaling that property as a concept does indeed have *some* core static content that it is seeking to mimic through a liability regime. One hopes that the recognition of this core content might provide courts and scholars with reason to pause before altogether writing off property as a normatively and functionally insignificant category in the law.