

INSEPARABLE USES*

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There is widespread debate over whether and to what extent a person should control personal information. This Article provides clarity to the terms and stakes of this debate. First, it lays out a new, normative foundation for the importance of control in data protection regimes, as well as for determining the limits of control after personal data is transferred. The central claim is that personal data—as well as other unique cases that this Article identifies—retains a connection to the person even after they no longer control it. This Article analyzes the philosophical concept of separability, which provides conceptual clarity for parsing when and to what degree legal mechanisms should give people control over information that describes them. While separable uses do not raise normatively relevant issues of control, when personal data is used inseparably, the use risks violating basic deontological maxims—such as refraining from using a person as a means to an end. Such violations undermine human dignity. As a result, policymakers should craft legal rules that allow individuals to control inseparable uses of their personal data.

This Article transcends previous accounts of separability that fail to recognize that separability often turns principally on how the potential thing is used, not on some fundamental feature of the thing. This Article offers a new model of separability that fully accounts for the normative significance of use. This innovative account of separability yields practical benefits by casting new light on an array of puzzles from information law and property law. In information law, separability provides normative grounding for use restrictions of personal data that do not fall prey to the traps of purpose limitations. Separability also provides important insights into property theory and debates over alienability. For instance, it casts new light on the debate over the alienability of rights of publicity. It also determines the boundaries of “moral rights” in copyright, which provide artists with legal mechanisms of control over their creative works that

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persist after these works are sold. And finally, separability resolves several challenges in the debate over deepfakes by more clearly delineating the interests that people have in uses of their image.

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INTRODUCTION

The appropriate limits of control that people retain over their personal information are deeply contested among scholars and policymakers. While the scope of many privacy rules is under debate and subject to revision, current privacy legislation reflects a sweeping array of rules granting consumers rights of control over their information. Some “control regimes” provide data subjects with deletion rights that allow a person to force platform firms to delete their personal information.¹ Others grant use restrictions that prevent firms from using personal information for new purposes without the consumer’s consent.² Even so, in some of the most common control regimes, there is little consensus over whether these rules are desirable and which foundational principles justify their existence.

This Article argues that the crux of this confusion stems from the central (and correct) intuition that a person retains a normatively significant connection to their personal information even after they relinquish control over it. This often overlooked intuition continues to drive proposals for information policy.³ Most commonly, the fact that an individual’s personal information retains a connection to that person leads scholars to gravitate toward property

1. California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.105(a) (2020) (“A consumer shall have the right to request that a business delete any personal information about the consumer which the business has collected from the consumer.”); Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) art. 17(1) [hereinafter GDPR] (“The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay . . .”).

2. GDPR, *supra* note 1, art. 5(1)(b) (Personal data shall be “collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes . . .”). In addition, the Fair Information Practice Principles (“FIPPs”)—which often guide information policy—include purpose limitations as a core provision. Purpose limitations require that data holders do not use information for purposes that did not motivate the initial collection. The seminal source for the FIPPs is widely considered the HEW Report. *See generally* SEC’Y’S ADVISORY COMM. ON AUTOMATED PERS. DATA SYS., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973) [hereinafter HEW REPORT] (recommending the enactment of a federal code of fair information practices that rests on five basic principles to safeguard personal data).

3. Often commentators and legislators default to property-talk when recognizing the significant relationship that connects people to their personal information. Different proposals that grant “property rights” to data subjects have gained traction in recent years. *See, e.g.*, Salomé Viljoen, Data as a Democratic Medium: From Individual to Relational Data Governance 44–49 (Aug. 31, 2020) (unpublished manuscript) (on file with the North Carolina Law Review) (describing the political economy of property rights proposals for personal data). One salient example of this phenomenon is Andrew Yang’s “data dividend,” which would create property rights in personal data. Makena Kelly, *Andrew Yang Is Pushing Big Tech To Pay Users for Data*, VERGE (June 22, 2020, 10:00 AM), <https://www.theverge.com/2020/6/22/21298919/andrew-yang-big-tech-data-dividend-project-facebook-google-ubi> [<https://perma.cc/F92Y-Q6BD> (staff-uploaded archive)].

regimes in personal information.⁴ Yet property regimes in personal data are largely unworkable both pragmatically and theoretically and thus provide a poor pathway to securing ongoing control over information.⁵ Property rights conceptually rely on alienability, which would undermine the ability of people to control their information after transfer and give companies that process data greater mechanisms of control than they currently enjoy.⁶ Further, the connection that exists between people and their data is not necessarily a *property* relation.⁷ Ultimately, scholars and policymakers are forced into an apparent bind: either we grant property rights in data which leads to undesirable normative and conceptual outcomes or we abandon the intuitive and foundational notion of a connection that links a person to their data.

By undertaking a rigorous analysis of the relationship that a person has with their personal data, this Article offers a way out of this bind—a new normative foundation for control over information that does not rest on property rights. Rather than defaulting to a property model, this analysis focuses on *separability* as the cornerstone for developing a governing regime for information privacy. Inseparable uses potentially violate basic deontological principles.⁸ More specifically, these uses risk dignity violations because they contravene fundamental principles in Immanuel Kant’s deontological moral philosophy: a person should neither be treated as a thing nor used merely as a means to an end.⁹ This Article uses separability to distinguish between uses that

4. Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2056 (2004) (offering a property-style approach to the regulation of personal data); Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113, 1126–27 (2016) (conceptualizing privacy through the lens of property entitlements). Beyond academia, regulators often reach for property models to govern personal data. For instance, Senator John Kennedy recently introduced a bill that would provide property rights in personal data. Own Your Own Data Act of 2019, S. 806, 116th Cong. (2019). Similarly, California Governor Gavin Newsom floated the idea of a “data dividend” that is premised on user property rights over their data. See Jill Cowan, *How Much Is Your Data Worth?*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/us/newsom-hertzberg-data-dividend.html> [<https://perma.cc/HR3G-2NNY> (dark archive)] (discussing Governor Newsom’s proposal).

5. Pamela Samuelson offers one of the canonical criticisms of promoting privacy with a property regime. Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1137–39 (2000); see also Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1301 (2000) (offering a critique of property approaches to privacy); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1391 (2000) (same).

6. Litman, *supra* note 5, at 1295–96 (arguing that property facilitates transfers rather than restricts them); Cohen, *supra* note 5, at 1375–76.

7. Cohen, *supra* note 5, at 1378 (“[T]he understanding of ownership that applies to, say, cars or shoes just seems a crabbed and barren way of measuring the importance of information that describes or reveals personality.”).

8. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/ethics-deontological/> [<https://perma.cc/8LPT-W9A2>] (Oct. 17, 2016).

9. IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785), reprinted in GROUNDWORK FOR THE METAPHYSICS OF MORALS 46–47 (Allen W. Wood ed. & trans., 2002) [hereinafter KANT, GROUNDWORK].

merely appropriate the thing and uses that appropriate the personal connection (and person) inherent in the thing. Uses that appropriate the person often use the person as merely a means to an end and, by extension, are normatively suspect.

Separability departs from a traditional property theory of information control because it recognizes the descriptive and normative significance of inalienability.¹⁰ Descriptively, separability identifies a person's interest in potential uses of their data that are *not* extinguished after transfer. Unlike typical commodities, personal data (and the other cases examined in this Article) have an inalienable connection to the person even after they are physically alienated or transferred. Here, separability performs invaluable conceptual work in locating the boundary between persons and things and identifying specific uses that remain connected to the person.

Normatively, this Article argues that we should legislate rules that give legal weight to these inalienable interests. To that end, separability identifies a principle—an inseparable use potentially uses the person, rather than a particular thing, and thus violates deontological maxims that prohibit both treating a person as a thing and using a person as merely a means to an end. This interest is similar in kind to the interest that a person has in controlling the use of their body parts. A person may reasonably consent to some uses, but (in most cases) they cannot and should not be able to irrevocably alienate uses of their body. Inseparable uses of personal information commit a similar type of wrong to the person as unconsented uses of their body. This conceptual analogue leads separability toward granting informational rights that provide similar rights of control as those to which a person retains over their body.

This Article also provides a key contribution to the debate over separability and the distinction between persons and things. This distinction is particularly salient for moral philosophy and property theory. Again, the conceptual distinction between persons and things determines the content of our moral obligations under Kantian (deontological) moral philosophy.¹¹ Similarly, recent neo-essentialist work in property theory has attempted to move beyond the legal realist understanding of property as legal relations

10. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987) (discussing one type of inalienability that restricts markets transfers) [hereinafter Radin, *Market-Inalienability*]; Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405–06 (2009) (discussing the relationship between inalienability rules and efficiency); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931–33 (1985) (providing a taxonomy of different types of inalienability).

11. KANT, GROUNDWORK, *supra* note 9, at 46; David P. Ellerman, *The Kantian Person/Thing Principle in Political Economy*, 22 J. ECON. ISSUES 1109, 1110 (1988); Adam Bjorndahl, Alex John London & Kevin J. S. Zollman, *Kantian Decision Making Under Uncertainty*, PHILOSOPHERS' IMPRINT, Apr. 2017, at 1.

between people and instead argues that property is a legal right to a thing.¹² In order to adequately facilitate their theoretical goals, neo-essentialist visions of property require some demarcation between persons and things.¹³

However, previous accounts of separability in both moral philosophy and property theory falter because they collectively fail to recognize that separability often turns on *use* of a thing, rather than some characteristic fundamental to the thing.¹⁴ A renewed focus on use better distinguishes between persons and things. This focus remedies previous conceptual errors and allows separability to faithfully track its normative commitments.

Under this Article's renewed theory of separability, a use must meet two conditions to be inseparable. First, the thing that is used must retain a connection to a specific person. Some connections dissipate upon alienation or transfer and do not satisfy this condition. This dissipation is common for paradigmatic commodities, such as cars: once a car is transferred, the link between the previous owner is almost always exhausted. Other things retain connections that survive transfer, such as personal data. However, a continuing connection is not sufficient for inseparability. Rather, the use must rely on the personal connection and affect that person. For instance, an inseparable use of personal data necessarily relies on the personal connection inherent in the information in order to affect the person about whom the data refers.

This Article applies separability to a unique set of things—such as body parts, publicity rights, creative works, and personal data—that retain a connection to a specific person even after they are transferred. Inseparable uses depend on the connection linking the person to the thing. This Article argues that people retain an inalienable deontological interest in controlling inseparable uses of a thing even after it is transferred.

Most prominently, this Article uses separability to solve several puzzles within information law. Privacy statutes commonly draw distinctions between personal information and nonpersonal information.¹⁵ However, there is little consensus about the demarcation between personal information and

12. Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 186 (2017).

13. Wyman carefully maps conceptual attempts in property theory to distinguish between persons and things. *Id.* at 197. This distinction is fundamental to Essentialist visions of property theory because property is control over “things” that are distinct and separable from persons. *See id.* at 194.

14. *See infra* Section I.B.

15. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1816 (2011). As Schwartz and Solove recognize, federal statutes define the scope of privacy harms through the lens of personal information. *Id.* Examples include the Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 15 U.S.C. §§ 6501–6506), the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.), the Video Privacy Protection Act, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified at 18 U.S.C. § 2710), and the HITECH Act, Pub. L. No. 111-5, 123 Stat. 226 (2009) (codified as amended in scattered sections of 42 U.S.C.).

nonpersonal information.¹⁶ Separability provides conceptual clarity about this distinction. The line distinguishing these two concepts should turn on (1) whether the information is connected to the person and (2) how it is used. Not only does separability provide conceptual clarity, but it also more faithfully tracks the normative considerations motivating legislators to distinguish between these types of information in the first place.

In addition, separability provides a normative foundation for crafting use restrictions over personal data. Although use restrictions are a staple of information privacy laws, they often reflexively incorporate purpose limitations—cabining uses of information to the purpose for which it was originally collected.¹⁷ This Article argues that use restrictions based on separability, rather than purpose limitations, are a better response to the potential normative issues inherent in using personal data. In particular, separability identifies uses of information that are connected to specific people where, by virtue of their connection, people should have some control over how that information is used.

Alongside information law, separability provides crucial insights into debates over the scope and content of alienability restrictions in property law. Consider the debate over the assignability of publicity rights. In a foundational article, Jennifer Rothman argues that publicity rights should be inalienable because of their inherent connection to the person whose image is exploited commercially.¹⁸ However, different uses have different degrees of connectedness to the person. Further, separability identifies the uses that are more robustly entwined with the person and thus justify granting some limits on alienability.¹⁹ As a result, limitations on alienability should focus on inseparable uses rather than less nuanced and more general restrictions on alienability.²⁰ This approach allows society to retain the benefits of assignability while sidestepping potential normative pitfalls that accompany these transfers.

Finally, this Article mobilizes separability to solve challenges posed by transfers of genetic material and creative works. Like information and publicity rights, the scope of control rights for both genetic material and creative works are contested. For instance, can a sperm donor revoke consent and block

16. Schwartz & Solove, *supra* note 15, at 1828–36 (discussing the lack of uniformity in definitions of personal information).

17. See HEW REPORT, *supra* note 2, at xx–xxi (discussing purpose limitations); Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 10–11 (2001).

18. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 226 (2012) (“[O]ne’s identity—including its representation in one’s name, likeness, voice, and other indicia—is not detachable from the underlying person. Without any possibility of separation, the alienation of publicity rights should not only be disfavored, it is not possible.”).

19. See *infra* Section III.A.3.

20. See *infra* Section III.A.3.

unwanted future uses of their reproductive material to procreate? Alternatively, what if the sperm donor merely donated the sample for medical research? Separability is crucial in parsing these different cases along firm deontological commitments. Separability identifies the uses of these things that are linked to the person and where, by extension, the person has strong normative claims to exercise legal control over uses.

The rest of this Article unfolds as follows. Part I explains the normative work that separability performs and sketches where previous accounts of separability have gone awry. Part II introduces a novel account of separability that recognizes the importance of *use* for determinations of separability. In doing so, it offers a conceptual account that more faithfully tracks the normative stakes that separability serves. Part III applies this novel account of separability to resolve several puzzles in property and information law. In particular, separability provides crucial insight into the appropriate limits of control that a person may exercise over genetic material, creative works, rights of publicity, and personal data.

I. MARKING THE EDGES OF SEPARABILITY

This part maps the rough terrain around normative and conceptual features of separability. Section I.A explores the normative stakes of separability. Moral philosophers invoke separability to demarcate the boundary of the person.²¹ Broadly, things are distinguished from people because a thing can be separable from a person. The ontological distinction between persons and things is essential to Kantian ethical theory because it determines our different obligations in the world.²² The duties we owe people are different than the ones that we owe mere things.²³ This insight grounds the Kantian ethical requirement to never use a person as merely a means to an end.²⁴ Stated another way, when we use a person as a thing, we fail to appreciate the person's inherent dignity.²⁵

21. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 41, at 73 (Allen W. Wood ed., H.B. Nisbet trans., 1991); IMMANUEL KANT, LECTURES ON ETHICS 124 (Louis Infield trans., 1930) [hereinafter KANT, LECTURES]; J.E. PENNER, THE IDEA OF PROPERTY IN LAW 111 (1997); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 972 (1982) [hereinafter Radin, *Property*].

22. Bjoern Dahl et al., *supra* note 11, at 1 (“There is something compelling in the idea that there is a fundamental moral difference between persons and things, and that a significant portion of ethics is concerned with ensuring that our treatment of ourselves and others reflects this distinction. Kantian ethics places this intuitively appealing idea at the center of its moral system.”).

23. *Id.* at 4–5.

24. *Id.* There is extensive literature on the precise contours of Kant's restriction on using people as merely a means. See Alexander A. Guerrero, *Appropriately Using People Merely as a Means*, 10 CRIM. L. & PHIL. 774, 779–80 (2016) (discussing this literature).

25. 1 DEREK PARFIT, ON WHAT MATTERS 212 (2011).

Section I.B considers how different conceptual accounts of separability map to the background normative commitments that separability often supports. Both moral philosophers and property theorists have attempted to refine the conceptual boundaries of separability.²⁶ This section focuses most closely on two plausible theories of separability: separability as physical separation and separability as contingency. Ultimately, I argue that both accounts suffer from fatal errors that force these theories to deviate from the normative commitments that separability serves.

It is worth noting, however, that property theorists have relied on separability for slightly different ends than what this Article offers. Property theorists often depend on separability to determine which things can be the subject of property claims rather than focusing on the normative stakes inherent in an analysis of separability.²⁷ That said, there is some natural overlap. Property tends to disfavor downstream restrictions, so identifying the boundaries of property implicitly recognizes a situation where people have limited rights over controlling uses of a thing after it is transferred.²⁸ This Article is primarily concerned with identifying specific instances of uses that violate deontological values such that the person has a recognizable interest in controlling these uses even after they transfer the thing.

A. *The Normative Structure of Separability*

Philosophical approaches to separability largely serve to distinguish between persons and things. This distinction is necessary because philosophers recognize that control over the external world, through property claims over things, is generally necessary and beneficial.²⁹ Property promotes autonomy through stable expectations of control and use.³⁰ Complex projects inevitably use many things that cannot be physically controlled simultaneously. For instance, property rights allow a construction company to retain control over all

26. See HEGEL, *supra* note 21, § 41, at 73; KANT, LECTURES, *supra* note 21, at 124; PENNER, *supra* note 21, at 111; Radin, *Property*, *supra* note 21, at 972.

27. PENNER, *supra* note 21, at 111 (discussing his vision of separability and the work it performs in restricting the scope of permissible property claims); see also Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 48 (2009) (discussing Penner's account of separability in property theory).

28. For the canonical work on downstream restrictions on property, see generally Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928). However, recent commentators have also taken up the problems introduced by Chafee. See Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1449 (2004) (examining the distinction between real property servitudes and personal property servitudes); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 915 (2008).

29. HEGEL, *supra* note 21, § 41, at 73 (claiming that property allows people to actualize their will in the external world); see also Radin, *Property*, *supra* note 21, at 972 (discussing this passage from Hegel).

30. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (discussing the purposes of the property system).

the constituent parts of a bridge that it is building without exercising physical possession of them. These rights over the external world—that apply even in the absence of control—promote freedom and human flourishing.³¹

At the same time, however, the scope of permissible property claims is not unlimited. Philosophers—most notably G.W.F. Hegel and Immanuel Kant—argue that property rights are only permissible in things that are external to the self.³² This limitation performs important normative work because it prevents the mechanisms of control inherent in the property system from applying to persons.³³ This Article highlights how this overapplication of property is normatively problematic.

The Hegelian theory of property grapples with the tension between the need for property and the need for a limiting principle for property claims.³⁴ Hegel recognizes that some system of property is necessary because it allows individuals to actualize their desires in the world.³⁵ Yet Hegel also claims that normatively defensible property claims are not appropriate in any universal element of one's self.³⁶ These property claims turn something that is essential to the person into the property of another.³⁷ Hegel goes on to argue against slavery on these grounds, claiming that slavery alienates the personality and turns it into the property of another.³⁸ While Hegel could be slightly more explicit about the wrongs that follow from granting property rights in the self, the uneasiness appears to rest on the fact that these property claims transfer

31. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 333–34 (1988) [hereinafter Hughes, *Philosophy*].

32. See HEGEL, *supra* note 21, § 67, at 97; see also Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 359 (1993) (“In Continental liberalism, the subject-object dichotomy emanates from the writings of Kant and Hegel, who posited that a conceptual separation between person and external thing is requisite to freedom, self-actualization and moral responsibility.”).

33. Kant rejects the application of property to people because it is inconsistent with the fundamental ethical norm that requires a person to treat another person as an end in themselves rather than as a means. Property for Kant is partially about identifying the set of things that can be used by people to further their goals. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 90 (2009). Ripstein also acknowledges that the “relation of property to setting and pursuing purposes underlies both its rationale and its structure.” *Id.* at 91. Of course, then, the ability to use property merely as a means limits valid property claims to things rather than people.

34. Hegel claims that self-actualization requires a sphere where people can exercise control over objects in the world. HEGEL, *supra* note 21, § 41, at 73. At the same time, however, property claims cannot permissibly extend to the person (or personality) because this would limit absolute freedom by turning one's self into the property of another. *Id.* §§ 66–67, at 95–97.

35. Dudley Knowles, *Hegel on Property and Personality*, 33 PHIL. Q. 45, 57 (1983); see also Hughes, *Philosophy*, *supra* note 31, at 333 (“Acting upon things is an initial step in the ongoing struggle for self-actualization. Socially mandated property rights do not trigger this self-actualization; they are only a means to protect the individual's initial attempt to take command of the world.”).

36. HEGEL, *supra* note 21, §§ 65–66, at 95.

37. *Id.* § 67, at 97.

38. *Id.* § 66, at 96.

control over the person to another individual, thus potentially undermining, rather than promoting, autonomy.³⁹

Kant is more explicit about the normative foundations underlying separability. For example, Kant depends on separability to navigate conceptual difficulties that attend capturing the benefits of property (or use of things) while also remaining faithful to our positive obligations in how we treat ourselves and each other.⁴⁰ However, Kant's ability to distinguish between persons and things transcends property and is a foundational principle in his moral philosophy because it shapes the content of our moral obligations.⁴¹ More specifically, the characterization of some entity as a person or thing determines its source of value and our collective duties toward that entity.⁴²

Some background on Kant's moral philosophy is necessary to understand the normative valence inherent in his view of separability. Kant divides the world into two entities (persons and things) that are distinguished according to their worth and source of value.⁴³ Persons have dignity and derive their value from their rationality.⁴⁴ In describing persons Kant says, "[R]ational beings . . . are called *persons*, because their nature already marks them out as ends in themselves, i.e., as something that may not be used merely as a means . . ."⁴⁵ For Kant, the rationality of persons generates their moral worth and requires that people are treated as ends rather than means.⁴⁶ Rationality allows a person to deliberate and make moral choices for themselves, providing a source of inherent worth and value, thus making persons ends in themselves.⁴⁷

Standing in conceptual opposition to rational persons are things, which do not have the capacity for reason.⁴⁸ Without reasoning capacities, things are

39. Radin claims that both Kant and Hegel justify property on the grounds that it promotes "freedom and actualization of the person." Radin, *Market-Inalienability*, *supra* note 10, at 1891.

40. KANT, LECTURES, *supra* note 21, at 124.

41. Bjorndahl et al., *supra* note 11, at 1.

42. *Id.* at 3.

43. In distinguishing persons and things, Kant references the divergent sources of value for persons and things. Persons derive their worth from their rationality, while things only have value insofar as they contribute to the projects of people. Dieter Schonecker & Elke Elisabeth Schmidt, *Kant's Ground-Thesis: On Dignity and Value in the Groundwork*, 52 J. VALUE INQUIRY 81, 85–86 (2017), <https://link.springer.com/article/10.1007/s10790-017-9603-z> [<https://perma.cc/X5R7-TE63>]. Further, a person is degraded when they are reduced to a thing which is merely used to further the interests of someone else. KANT, GROUNDWORK, *supra* note 9, at 52–53. Bjorndahl, London, and Zollman also single out this foundation of Kant's writing. Bjorndahl et al., *supra* note 11, at 3. They claim that Kant "distinguish[es] the status of beings with dignity from the worth of things with price." *Id.* Further, they note that "[t]he value of things with a price derives from, and is therefore conditional upon and relative to, the ends of agents." *Id.*

44. KANT, GROUNDWORK, *supra* note 9, at 52–53.

45. *Id.* at 46.

46. CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 110–11 (1996).

47. See JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 192 (Barbara Herman ed., 2000).

48. KANT, GROUNDWORK, *supra* note 9, at 46.

limited to instrumental, rather than inherent, value.⁴⁹ While persons have inherent moral worth—what Kant calls “dignity”—in virtue of their rational capabilities, things do not have inherent value.⁵⁰ Instead, the value of things is purely instrumental; that is, they have value insofar as they are used in service of the goals of persons.⁵¹

Things and property have an analytical symmetry that limits property claims to things, rather than legitimately extending to include property rights over persons. Under Kant’s theory of property, it is perfectly permissible and desirable that a person use their property as a means to an end.⁵² As Arthur Ripstein explains, “[T]he right to have something as your own is the right to be able to have it as your means, that is, to decide the purposes for which it will be used.”⁵³ Again, the value of the property system and specific incidents of property is that it is used to facilitate the goals and projects of persons.⁵⁴ It is not unreasonable to consider property and things as nearly interchangeable. Not all things are necessarily property, yet property is necessarily control over things.

Returning to Kant’s moral prescriptions, the Humanity Formula requires that a person “[a]ct so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means.”⁵⁵ Violations of this maxim fail to recognize the inherent dignity of persons and reduce them to a mere thing. Creating property entitlements in the person violates the Humanity Formula because property is subject to the control of another person who often uses property as merely a means to an end.⁵⁶ The normative impermissibility of property claims in persons is grounded in the idea that when something is property it can be used in service of the property owners’ goals without considering the interests of others.⁵⁷

49. *Id.* at 52–53.

50. *Id.*

51. *Id.*

52. RIPSTEIN, *supra* note 33, at 99 (explaining that under Kant’s theory of property, a person is entitled to use a thing as merely a means to an end, and that property defines the scope of permissible means for a person to use to achieve their desired ends).

53. *Id.*

54. *Id.*

55. KANT, *GROUNDWORK*, *supra* note 9, at 46–47.

56. For instance, Kant’s rejection of property claims in the body can only be fully understood in light of the distinction between persons and things. A person has dignity, and because a person’s body (and its parts) constitute the person, it also has dignity. Exercising property claims over body parts treats them as mere things, which degrades the person. Property claims degrade the person because they necessarily subject the person to the needs and desires of the person who controls the property claims. See Nicole Gerrand, *The Misuse of Kant in the Debate About a Market for Human Body Parts*, 16 J. APPLIED PHIL. 59, 64 (1999).

57. RIPSTEIN, *supra* note 33, at 90; see also Stephen R. Munzer, *Kant and Property Rights in Body Parts*, 6 CANADIAN J.L. & JURIS. 319, 322 (1993) (“[T]o recognize or exercise property rights in body parts is to degrade persons and their bodies, which is to thrust, or to attempt to thrust, them into a

Therefore, the problems of property in the person are principally about the potential to use the person, rather than undesirable outcomes that follow from crafting property entitlements in the first instance.

As the next section discusses, earlier accounts of separability fail to faithfully identify when the person is being used from more innocuous situations where merely a thing is being used.

B. *Conceptual Strategies for Determining Separability*

This section details previous strategies for determining separability and, by extension, identifying the boundary between persons and things. In doing so, this section details three approaches to separability. First, this section demonstrates the inherent problems with failing to offer a rigorous conceptual analysis of separability, or separability as tautology. Separability as tautology simply claims that something is separable when it is separate from the person. This approach falters for several reasons and potentially leads to legislative fiat supplanting robust normative considerations.

Next, this section examines separability as physical separation, which claims separability is determined by whether a thing is physically connected to the person. Separability as physical separation counts Kant and Margaret Jane Radin among its adherents. Ultimately, separability-as-physical-separation fails to track the normative values that underlie separability because physical separation does not fully determine situations where the person is mistreated, which risks overinclusion and underinclusion in several significant cases.

Finally, this section examines the most compelling account of separability to date. Property theorist J.E. Penner claims that a thing is separable from the person when it “might just as well be someone else’s.”⁵⁸ Penner’s criteria delimit separability according to whether the thing is necessarily or contingently connected to the person.⁵⁹ However, separability as contingency fails to recognize that contingency is often determined by how the thing is used, rather than some inherent feature of the thing.

1. Separability as Tautology

Hegel depends on separability to demarcate the boundary of normative permissible property claims because separability distinguishes subject from object.⁶⁰ Hegel insists that only things with an external nature are adequate for

lower level, grade, rank, position, status, or degree than they should occupy. Such recognition or exercise, it may be said, involves treating persons, their bodies, or parts of their bodies as, say, ‘things’ or ‘objects.’” (emphasis omitted)).

58. PENNER, *supra* note 21, at 112.

59. *Id.* at 111.

60. HEGEL, *supra* note 21, § 65, at 95, § 67, at 97.

property claims.⁶¹ Yet Hegel merely provides loose guidelines to determine which things are external to the person, claiming only that external things have an existence independent of our will.⁶²

Worse still, Hegel seems to simply reiterate that something separable exists separately from the person, risking tautology.⁶³ The lack of a robust conceptual structure leads to many borderline cases that cannot be resolved by logic alone.⁶⁴ For example, Hegel argues that wage labor is an alienable property right, yet it is not obvious that our labor exists independently of our will.⁶⁵

The inherent flexibility in Hegel's distinction between persons and things has drawn an array of criticism.⁶⁶ Most importantly, the lack of thick criteria to parse difficult cases leads to underdetermination; that is, other values or considerations are driving the distinction between persons and things, rather than the conceptual force of separability.⁶⁷ As Neil Netanel sharply explains:

Because the categorization of an attribute as a subject or object is somewhat arbitrary, commentators, legislators and courts can make classifications based on the result they believe is desirable. When they believe that an interest should be alienable, they say that it is an external thing, susceptible to ownership, acquisition and transfer. When they think that it should be subject to significant alienability restrictions, they often characterize it as a personal right, an intrinsic part of the self.⁶⁸

The haziness of the distinction between persons and things gives legal institutions considerable latitude over how to classify ambiguous cases.⁶⁹ As a result, Hegel's criteria for separability are largely underdetermined.⁷⁰ For example, Hegel's criteria fail to provide much guidance for borderline cases,

61. *Id.*

62. See Netanel, *supra* note 32, at 361 (“To be certain, the liberal delimitation of the border between the self and the external world are hardly etched in stone. One reason is that the consequences of a particular subject-object distinction are not always intuitively obvious.”); see also Radin, *Market-Inalienability*, *supra* note 10, at 1894.

63. Netanel, *supra* note 32, at 360.

64. Radin, *Market-Inalienability*, *supra* note 10, at 1894 (discussing how the market imperative—rather than the subject/object distinction—led Hegel to consider wage labor external to the person and alienable).

65. *Id.*

66. Netanel, *supra* note 32, at 361.

67. Radin, *Market-Inalienability*, *supra* note 10, at 1895. The Legal Realists criticized underdetermination of legal outcomes more broadly. See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 472 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

68. Netanel, *supra* note 32, at 362.

69. *Id.*

70. *Id.*

including the cases that this Article considers such as body parts,⁷¹ creative works,⁷² publicity rights,⁷³ and personal data.⁷⁴

Often, actors that are politically dominant will determine whether a thing falls on the subject or object side of the dichotomy.⁷⁵ The normative upshot is that political power will inevitably determine the limits of control that a person can exercise over these boundary cases. For example, because firms that derive their profit from harvesting and processing consumer data wield more political power than data subjects, it is not difficult to imagine that personal data will be regulated as a thing separable from the person.⁷⁶ Data subjects will likely have very limited mechanisms of control even if there are colorable arguments for personal data falling on the subject side of the dichotomy.⁷⁷ Ultimately, Hegel's criteria for separability fail to track firm normative commitments and likely defers to the whims of powerful actors.⁷⁸

2. Separability as Physical Separation

Separability as physical separation appeals to both philosophers and property theorists. Kant and Radin endorse resolving concerns over separability through an analysis of the physical connection between the person and thing.⁷⁹ However, mere physical separation fails to correctly identify the normative stakes inherent in separability. Often things that are physically intact do not appear to use the person. By contrast, things that are physically separate may retain nonphysical connections to the person and potentially use the person.⁸⁰ Thus, physical separation fails to track the dignity interests of the person, so separability must rest on a different conceptual foundation.

71. See *infra* Section III.A.1.

72. See *infra* Section III.A.2.

73. See *infra* Section III.A.3.

74. See *infra* Section III.B.

75. Radin, *Market-Inalienability*, *supra* note 10, at 1895; Singer, *supra* note 67, at 472.

76. Cohen, *supra* note 5, at 1389–90 (discussing how the debate over “transaction costs” is inconsistent across intellectual property and privacy and, instead, reflects larger political motivations).

77. Just as Hegel sought to commodify labor to satisfy the dictates of the market, platform firms will invariably move to consider personal information something commodifiable in order to meet the needs of the platform economy. See *id.* (discussing the inherently political choices that make up the debates over information policy).

78. Again, the Legal Realists noted that underdetermination of legal rules leads to powerful actors (usually judges) making decisions that appear to inexorably follow from rules but instead reflect latent policy preferences. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700 (1976); see also Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 496–502 (1987) (offering a detailed analysis of the indeterminacy critique provided by the Legal Realists).

79. KANT, LECTURES, *supra* note 21, at 124; see also Munzer, *supra* note 57, at 319; Radin, *Property*, *supra* note 21, at 966.

80. For example, a kidney can be physically separated and donated, but it retains a genetic link to the donor that persists after the physical connection is severed.

a. The Roots of Separability as Physical Separation

Immanuel Kant offers an early account of separability as physical separation. More specifically, Kant reduces separability to the body concept. Things that are (or once were) connected to the body are inseparable and unfit for property claims. Moreover, anything not connected to the body is appropriate for property claims. It bears repeating that Kant's view of separability is inherently normative: Kant argues that it undermines the dignity of the person to treat them merely as a thing that is used in service of another person's ends.

Though Kant is not always explicit about the reduction of separability to the body concept, it follows naturally from some of his conclusions about creating property rights in any part of the body. For example, Kant writes that a person is not permitted to sell any part of their body, "even if [they] were offered ten thousand thalers for a single finger."⁸¹ Kant similarly suggests that a person cannot sell a single tooth.⁸² Based on these statements, Kant seems to consider all body parts inseparable, even if they are painlessly removed and bear little attachment to the self.

While Radin is skeptical of bright-line distinctions between persons and things, she offers some claims about how to resolve this boundary.⁸³ Like Kant, Radin reaches for physical connectedness to determine separability. To that end, Radin claims

[w]e have an intuition that property necessarily refers to something in the outside world, separate from oneself. . . . [T]he idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed⁸⁴

Conversely, Radin suggests that if a person has prosthetic limbs implanted into their body, these implants become part of the person.⁸⁵ Radin relies on physical separation to determine separability. Things that are currently in the body are inseparable (and not propertizable), while things that are outside of the body are separable (and propertizable).

81. KANT, LECTURES, *supra* note 21, at 124; *see also* Munzer, *supra* note 57, at 319.

82. KANT, LECTURES, *supra* note 21, at 165; *see also* Ruth F. Chadwick, *The Market for Bodily Parts: Kant and Duties to Oneself*, 6 J. APPLIED PHIL. 129, 133 (1989) (citing this passage from Kant at greater length).

83. Radin, *Property*, *supra* note 21, at 966 ("Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line").

84. *Id.*

85. *Id.* at 966–67.

However, Radin's account is less restrictive than Kant's because it allows property claims in body parts that have been separated from the person.⁸⁶ Kant, by contrast, considers all parts that begin connected to the person as unsuited for property claims, even after they are separated from the person.⁸⁷ Yet both views fail to track the background normative commitments of separability across an array of cases.

b. The Limits of Separability as Physical Separation

While reducing separability to physical separation has intuitive appeal and is easily administrable, it fails to correctly identify when a dignity violation occurs through use of something that is potentially inseparable. Physical separation is both overinclusive and underinclusive. That is, some things that are physically connected to the person may have little attachment to the self and do not necessarily implicate a person's dignity interests, leading to overinclusion. Conversely, some things that are physically separate may retain a nonphysical connection that can plausibly be leveraged to use the person, leading to underinclusion. At bottom, physical separation fails to adequately resolve ambiguities around when a person's interest—by virtue of their connection to the thing—is exhausted.

i. Overinclusion

Both Kant's and Radin's approaches to separability as physical separation risk overinclusion. That is, transferring control over some parts of the body does not necessarily undermine the dignity of the person. Stephen Munzer argues that restrictions on selling or transferring inessential body parts (such as hair) founder because they mistakenly assume that how a person treats parts of the body is indicative of how the person is treated.⁸⁸ According to Munzer, even if we grant the assumption that a person cannot have property rights in the whole person, this does not necessarily mean that they lack property interests in parts of their bodies.⁸⁹ Moreover, Munzer claims that this logical move is unjustified because it depends on the fallacy of division, which wrongly claims that what is true of individual parts is true of the whole.⁹⁰

Returning to the normative values that separability serves, just because part of the body is physically connected, this connection does not necessarily mean that transferring control over that part transfers control over the person. Put another way, using a person's hair as a means to an end does not use the

86. *Id.* at 966 (discussing the possibility for blood or organs that have been removed from the body to be considered incidents of property).

87. KANT, LECTURES, *supra* note 21, at 166.

88. Munzer, *supra* note 57, at 325.

89. *Id.*

90. *Id.*

person (who grew the hair) as a means to an end. Thus, physical separation does not fully determine the dignity interests inherent in separability.

ii. Underinclusion

Separability as physical separation may also be underinclusive because it reduces the person to their physical boundaries. Put differently, things that may be physically separate from the person may still retain a nonphysical connection to the person that implicates important dignity values. Moreover, the boundaries of the person may plausibly extend beyond things that are physically connected to them. While demarcating the person in terms of physical boundaries is easily administrable, it falters because things that are not *physically* connected may still be *robustly* connected to the person.

Philosophical writing on personal identity casts doubt on strict demarcations of the person according to their physical boundaries.⁹¹ More specifically, the conceptual criteria that are required for the *same* person to exist through space and time are often not merely physical continuity.⁹² Some philosophers, including John Locke, consider psychological continuity—rather than physical continuity—the cornerstone for defining the person.⁹³ Put more simply, if person A’s memories are transferred into person B’s body, then the person who inhabits B’s body is A, not B.⁹⁴ The focus on nonphysical criteria for the persistence of personal identity reinforces the idea that the person is not exclusively reducible to their physical boundaries.

Moreover, some things that are foundational to our person and sense of identity are not things that are physically connected to us.⁹⁵ It is plausible that a wedding band that is passed down across generations is more constitutive of our person than a lock of hair. Similarly, control over these nonphysically connected things is potentially more significant to our identities than things that happen to retain a physical connection to our person.⁹⁶

91. Eric T. Olson, *Personal Identity*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/identity-personal/#UndPerQue> [<https://perma.cc/52M7-SCBC>] (Sept. 10, 2019) (discussing psychological continuity views of personal identity).

92. *Id.*

93. *Id.*

94. *Id.* (claiming that psychological views of identity persistence hold that “[i]f your brain were transplanted, and that organ carried with it your memories and other mental features, the resulting person would be convinced that he or she was you”). We can imagine that memories are transplanted even without transferring any biological material, thus strengthening the focus on psychological, rather than physical, continuity.

95. Interestingly, this intuition appears to underlie Radin’s work on property and personhood. See generally Radin, *Property*, *supra* note 21, at 959 (claiming that certain things “are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities”).

96. *Id.* (discussing how some things, like wedding bands, can become bound up with our personal identities).

Consider three of the cases that this Article discusses—creative works, personal image, and personal data. Creative works are commonly referred to as extensions of the person, though, of course, created works are not physically connected to the person.⁹⁷ Take our personal image. Often people control their image through manipulating their physical appearance, yet a person’s image is also constituted by photographs of them or even physical items (clothes and accessories) that functionally comprise identity. Thus, identity is constituted by both things that are physically connected to the person as well as things that are physically distinct. Finally, personal data is not physically connected to the person but retains a semantic connection because it is about them. Thus, nonphysical connection can implicate the same fundamental dignity values as many things that are physically connected to the person.

3. Separability as Contingency

J.E. Penner reaches beyond mere physical separation to craft a more capacious account of separability.⁹⁸ According to Penner, separability implies contingency; that is, something that is separable can only be contingently connected to any particular person.⁹⁹ The converse of this statement provides more clarity; that is, property does not have any necessary connection to a particular person.¹⁰⁰ For example, our personality and our talents are not separable because they are necessarily connected to us—these things make us who we are.¹⁰¹ Likewise, friendships are not separable because the substance of friendship is based on the people involved.¹⁰² In these cases, there are necessary links to specific people, making these things inseparable and unfit for property claims.¹⁰³

Penner’s conceptual framework for demarcating separability is that new owners must stand in basically the same relationship to the thing as past and

97. Hughes, *Philosophy*, *supra* note 31, at 337 (noting that “intellectual property need not be justified by analogy to physical property”).

98. Penner’s separation thesis states:

Only those ‘things’ in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.

PENNER, *supra* note 21, at 111. Further, Wyman claims that Penner’s account of separability composes one of the most complete accounts of distinguishing persons from things within property theory. Wyman, *supra* note 12, at 197.

99. PENNER, *supra* note 21, at 111.

100. *Id.* at 112.

101. *Id.* at 111–12.

102. *Id.*

103. *Id.*

future owners.¹⁰⁴ In other words, there is nothing normatively significant about the relationship between any particular owner and the thing.¹⁰⁵ In order to more adequately capture this point, Penner claims that contingency requires that the thing “might just as well be someone else’s.”¹⁰⁶

Separability as contingency recognizes the role of social and technological considerations.¹⁰⁷ Consider, again, the separability of body parts. Penner suggests that body parts are a highly useful case for probing the contextual considerations of separability because “the extent to which we regard our body parts as separable from us is a matter of intention, social convention, and technology”¹⁰⁸

Separability is partly a product of cultural or social convention. In some cultures, specific parts of the body may be more intimately connected to the person, while other cultures may view these parts as nonessential and seemingly disconnected. For example, some societies have viewed hair as deeply intertwined with the person and cutting or altering a particular hairstyle leads to dignity loss and personal harm.¹⁰⁹ For instance, a Japanese Samurai warrior’s “top knot” hairstyle reflected social standing and, further, removing a warrior’s top knot often resulted in harm to dignity as well as a decline in social status.¹¹⁰ Most cultures do not view hairstyle as necessarily entwined with the dignity interests and social standing of an individual, thus making hair potentially separable from the person and transferrable without restrictions.

Additionally, the ability to separate body parts depends on technology, such as the current state of surgical methods. Some organs might be removable using today’s advanced medical practices but not necessarily so in earlier historical moments. A kidney, then, may be inessential to the person and separable using contemporary medical practices, yet kidneys at earlier historical moments were essential parts of the person because there was no extant method of physically removing them. As a result, whether a thing might as well be someone else’s depends on a host of factors, including both social and technological ones.

104. *Id.* at 112.

105. *Id.* at 111.

106. *Id.* at 112. Without this addition Penner fears that property would sweep too broadly and include both tort damages and contract obligations as potential property, as there is nothing necessary about our relationship to them. For many essentialist property scholars like Penner, part of the project of property theory is distinguishing it from other privacy law concepts, such as contract and tort. At bottom, contractual obligations and tort damages bind only specific people (in personam), while property obligates the world generally (in rem).

107. *Id.* at 121; *see also* Wyman, *supra* note 12, at 208 (claiming that determinations of separability in new essentialism are not static).

108. PENNER, *supra* note 21, at 121.

109. *See* Suzanne G. O’Brien, *Splitting Hairs: History and the Politics of Daily Life in Nineteenth-Century Japan*, 67 J. ASIAN STUD. 1309, 1328–29 (2008).

110. *See id.* at 1318–19.

Penner's theory of separability marks an improvement over earlier accounts because it recognizes the contextual conditions that underlie separability. Moreover, Penner's account of how a thing is connected to a person implicitly understands that connections are not exclusively physical. The condition that the thing might as well be someone else's captures the various ways in which a person can be connected to a thing.

While Penner's account of separability captures important aspects of the connection between a person and a thing, it overlooks another vital feature of separability. Penner fails to recognize cases where the object "might just as well be someone else's" even as there are specific uses that are tied to a different person.¹¹¹ Separability as contingency overlooks the fact that the relationship that exists between a person and a thing is often a product of how the thing is used, rather than some ontological feature of the thing.

For example, many different people could potentially stand in the same relationship to a kidney. Kidneys are often donated and become someone else's, yet the kidney still contains a genetic link to the donor.¹¹² While the kidney itself is disconnected from the donor, some uses are still connected to that person by virtue of it having been *their* kidney in the past. For instance, different uses of the genetic material found in the kidney can affect the donor, and they have some interest in controlling these uses. As a result, the deontological interests that undergird separability turn on the specifics of how the kidney is used.

Personal data faces a similar stumbling block. Personal data is physically separable from the person and, in most cases, there is nothing normatively significant about who controls personal data. Still, some uses are connected to a particular person while others are not.¹¹³ At bottom, Penner fails to recognize that the normative values that separability tracks often turn principally on use, rather than connection alone.

In order to account for some of these complications, the next part provides a novel vision of separability that recognizes the importance of use.

111. PENNER, *supra* note 21, at 112.

112. Malgorzata Zagozda, Agnieszka Sarnecka & Marek Durlik, *Microchimerism After Pancreas and Kidney Transplantation – A Review*, 16 ANNALS OF TRANSPLANTATION 134, 134 (2011) ("The donor's genetic material (DNA) is detected in the recipient's blood and lymphoid tissues even a few months after transplant rejection.").

113. Personal data can be used in several distinct ways and only some of them are connected to the data subject. For example, personal data may be used for a research study, but the use is more distinct as long as the personal data is not used to make decisions about the data subject or to otherwise affect them. Of course, an analysis of when a use affects an individual is highly contingent and subject to a host of social considerations.

II. A USE THEORY OF SEPARABILITY

This part offers a new vision of separability that more fully recognizes the importance of use for this analysis—separability as a function of how a thing is used rather than some inherent feature of the thing. By contrast, previous theories of separability focus almost exclusively on the connection that a person has to a thing.¹¹⁴ The exclusive focus on connection is undesirable conceptually and normatively. Conceptually, an analysis of separability that focuses principally on connection falters because—as demonstrated in the cases included in this part—a person’s ongoing link to a thing is determined primarily by how it is used, rather than the connection alone.

Normatively, these conceptual errors frustrate the stakes of separability because an account of separability that commits these errors fails to track a person’s interests in uses of a thing that is connected to them. A more complete account of separability tracks the dignity interests of the person across a two-step process. First, some things retain a connection to the person even after they are physically transferred. For instance, creative works—as well as the other boundary cases discussed—are still associated with the artist even after they are sold. When downstream uses appropriate that connection, these uses effectively use that person. Second, when a person is used through uses of a thing that is connected to them, it risks treating that person as merely a means to an end, undermining their inherent dignity.

Additionally, a person may contest certain uses of things that appropriate the connection to the person by appealing to the same underlying logic that allows a person to control access to their body. Both of these concerns—the right not to be used as merely a means and the right to control our person—are commonplace deontological values worthy of protection through law. A renewed vision of separability that accommodates the significance of different uses resolves previous conceptual missteps and more closely aligns to these core normative values.

This part unfolds as follows. First, this part offers a simple thought experiment to help frame the importance of connection and use for separability. Next, this part provides an overview of the use theory of separability. Section II.B.1 focuses on the connection aspect of separability. This analysis highlights *particularized connections* that continue to connect a person to a thing, even after physical transfer. Section II.B.2 examines uses and how they interact with separability. Here, the paradigmatic case of inseparability becomes clear: a use is inseparable when it appropriates a particularized connection in a way that affects the person, creating a *particularized effect*. Section II.B.3 solves the puzzle introduced at the beginning of this part. Finally, Section II.B.4 examines

114. See *supra* Section I.B.

potential ambiguities inherent in this model and offers suggestions to minimize their consequences.

A. *The Puzzle of Separability*

In order to understand the importance of use for an analysis of separability, consider the following examples. Imagine that Amy donates a kidney to Brad. The kidney has a connection to Amy even after it is transferred to Brad because Amy's genetic information is stored in the kidney after it is implanted into Brad's body. The connection that Amy retains to the kidney is constant, but consider how four different uses potentially implicate Amy's interests.

First, imagine that after the kidney donation procedure Brad develops a few unhealthy habits. He regularly stays out late in bars where he smokes cigarettes and drinks himself into a stupor. A mutual friend tells Amy about Brad's lifestyle choices. Amy is frustrated by this news. In particular, she claims that Brad is misusing his new kidney because of his drinking and smoking. She claims that she should be able to control what Brad consumes because the kidney was hers.

Second, imagine that after the kidney donation procedure Brad develops a budding interest in biomedical research. Moreover, he is particularly interested in how kidney cells respond to different external conditions, such as temperature and light. To fulfill this interest, Brad takes cells from his original kidney and his newly implanted one. He examines how his kidney cells and Amy's cells respond to changed conditions. A mutual friend informs Amy that Brad is conducting experiments on cells that contain her genetic information. Amy is upset by this news and wants to stop Brad from conducting research on "her" cells.

Third, imagine that after the kidney donation procedure Brad invites Amy over to thank her for saving his life. Amy and Brad share in common their mutual interest in practical jokes. Thinking it will be funny, Brad splices some of Amy's cells into a petri dish and spills the cells on the tile floor outside of his apartment. He figures that Amy will come over and slip on the cells and they both will get a good laugh out of it. What type of interest does Amy have in preventing Brad from using her cells to create a hazard intended for her?

Fourth, imagine that after the kidney donation procedure Brad enters the employment of a health insurance company that provides coverage for Amy. In his new job, Brad is responsible for determining insurance premiums. One day Amy's file comes across his desk. Brad figures that he can make a more accurate assessment of Amy's rates if he tests her residual kidney cells for genetic anomalies. Amy learns that Brad is analyzing the cells to adjust her insurance rates and wants to stop Brad from conducting this analysis.

While the connection that Amy retains to her kidney is constant through the examples, different uses of the kidney have different normative stakes. Moreover, Amy's interests are differently implicated across the examples, which also informs how to craft legal responses to the different uses. The next section resolves the puzzle posed by these cases by developing a concept of inseparable uses that implicate Amy's interest in controlling uses of things that are connected to her.

B. *(In)Separable Uses*

This section offers a new understanding of separability that focuses on both connection and use and, by extension, more faithfully tracks the normative values underlying separability. This marks an improvement over previous theories of separability. Earlier accounts of separability—such as those offered by Kant and Radin—overlook the significance of nonphysical connections.¹¹⁵ This oversight inappropriately limits the interests in controlling things that are imbricated with our person to only the set of things that are physically connected.

J.E. Penner offers a much-improved account of separability. Penner's notion that separability is principally about whether a person is only contingently connected to the thing and, in particular, whether the thing "might just as well be someone else's" implicitly recognizes the variety of physical and nonphysical connections that link people to things.¹¹⁶ However, Penner fails to understand that the normative bite of separability applies to how things are used, rather than the pure existence of a connection. For example, things that have necessary connections to a person may be used in ways that are normatively benign. On the other hand, some uses of things with necessary connections risk running afoul of deontological values such as the ability to control our person and be treated as an end rather than a means.

Building on these insights, this section details a new account of separability that more faithfully tracks the normative stakes underlying separability. Inseparable uses depend on two factors. First, that the thing maintains a particularized connection to the person. And second, that the use leverages that connection and affects that person. People retain deontological interests over inseparable uses even after the thing is transferred, and legal regulation would benefit from considering these interests in crafting use restrictions.

115. See *supra* Section I.B.2.

116. PENNER, *supra* note 21, at 112.

1. Connection

While the theory of separability offered here criticizes past efforts for their narrow focus on the connection between a person and a thing, connection is still an indispensable part of this separability analysis. In particular, the existence of a *particularized connection* between a person and a thing is a necessary condition for inseparable uses. The defining feature of a particularized connection is that the link between the person and the thing survives alienation or transfer—even when the thing is transferred it is still connected to the person. As a result, a thing with a particularized connection may be transferred, but the interests that a person has in the uses of the thing cannot be alienated.

Other bodies of law recognize the normative significance of particularized connections. For example, Hegelian theories of intellectual property—often referred to as personality theory—provide a strong normative foundation for examining connections that exist between a person and a thing even after transfer.¹¹⁷ Personality theory generally asserts that an author is so intimately connected with their work that they should be given specific rights to control their work.¹¹⁸ Further, personality theories of copyright consider works to be extensions of an author’s person, such that intrusions on the work are akin to invasions of the author’s body.¹¹⁹

Alongside a Hegelian personality connection, people may have a particularized connection to a thing by virtue of an attributional relationship that continues after transfer. An attributional relationship exists when people make judgments about a person based on their having created something.¹²⁰ An attributional relationship is common with works of art. For instance, Pablo Picasso has an attributional connection to his painting *Guernica*.¹²¹ When people view the painting, they attribute the work to Picasso and make judgments about his artistic skill.

117. See Hughes, *Philosophy*, *supra* note 31, at 337–39 (discussing Hegelian justifications for intellectual property).

118. Christopher S. Yoo, *Rethinking Copyright and Personhood*, 2019 U. ILL. L. REV. 1039, 1041 (explaining that under personhood theory, “authors have such deep connections with their creations that respect for their sense of self requires giving them a degree of ongoing control over those works”).

119. *Id.*; see also Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (“When an artist creates, . . . he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.”).

120. See David Ekserdjian & Doug Fishbone, *Debate: Should We Care About Attribution?*, ROYAL ACAD. MAG. (Feb. 29, 2016), <https://www.royalacademy.org.uk/article/giorgione-debate-does-attribution-matter> [<https://perma.cc/6W4N-KDZL>]; see also Martin Bailey, *Not a Fake: Van Gogh Self-Portrait Is His Only Work Painted While Suffering Psychosis, Experts Say*, ART NEWSPAPER (Jan. 20, 2020 1:04 PM), <https://www.theartnewspaper.com/news/a-van-gogh-self-portrait-authenticated> [<https://perma.cc/5625-SEP3>] (explaining that authenticating attribution of a work to Van Gogh enables the work to “provide[] a unique insight into his mental condition”).

121. Alicja Zelazko, *Guernica: Work by Picasso*, BRITANNICA (May 29, 2020), <https://www.britannica.com/topic/Guernica-by-Picasso> [<https://perma.cc/ZV2W-PEU7>].

The semantic connection between a person and information about them is particularized because it is not exhausted when a new person controls the information. The crux of the semantic connection inherent in personal data is that the information is *about* a specific person.¹²² Further, the link between the data and the specific person survives the transfer of the data itself.¹²³

People often have biological connections to things, as is the case with any person who transfers anything containing their genetic information.¹²⁴ Donations of biological material include the genetic information of the donor.¹²⁵ Like the other kinds of particularized connections, the genetic link between a person and their biological material remains intact once the material is physically separated from the person.¹²⁶ Kidneys, blood, and reproductive tissue all contain the genetic information of the donor even after they are removed and after they have been implanted into a new person.¹²⁷

However, as the next section details, only some uses depend on a particularized connection linking a person to a thing. Normatively, a person has an interest in controlling those uses because they implicate the dignitary interests of that person. Thus, a thick, normative conception of separability necessarily turns on an analysis of both connection and use.

2. Connection and Use

An analysis of separability that focuses on both connection and use more faithfully tracks foundational normative considerations and allows us to parse cases based on these commitments. Broadly, when a person is connected to a thing that is transferred, their interests are implicated by particular uses rather than the mere fact of transfer. In particular, only some uses are inseparable from the person. Inseparable uses attach to important normative values, such as the capacity to control things that are necessarily connected to the person and have corresponding implications for deontological moral philosophy.

For separability to track these normative considerations, both connection and use are important points of analysis. The initial threshold condition of separability is whether the thing has a particularized connection to a person. Uses of separable things may affect a particular person, but the effect is not a product of their connection to the thing. For instance, a hair sample that

122. GDPR, *supra* note 1, art. 4(1) (defining personal data as information relating to an identified or identifiable natural person). As we can see, even the GDPR's definitional foundation of "personal data" is that it is connected to a person.

123. *Id.* art. 4(20) (referring to "transfers or a set of transfers of personal data").

124. For the kidney transplant discussion, see *supra* Section I.B.3.

125. Zagozda et al., *supra* note 112, at 134 ("The donor's genetic material (DNA) is detected in the recipient's blood and lymphoid tissues even a few months after transplant rejection.").

126. *Id.*

127. In addition, the donor's genetic material may even be detectable in cases where the transplant is rejected. *Id.*

contains a person's genetic information may be destroyed or used in a piece of conceptual art without necessarily affecting that person. This is because even when a thing has a particularized connection, some uses are separable because they do not depend on the connection linking the person to the thing.

Starting with the conceptual structure of inseparability, the defining characteristic of an inseparable use is that it leads to *particularized effects*, which are effects that are particular to you because the thing is (or was) your thing or connected to you in some way. In other words, the use of the thing affects you because you have some relationship to it. Thus, it is not simply about an object having a particularized connection or about the use of the object affecting a particular person; rather, some uses depend on the connection to create these effects—these uses are inseparable.¹²⁸

Inseparable uses leverage a particularized connection to bring about an effect on a person (again, a *particularized effect*). This special class of uses is exclusively the result of the connection a person has to a specific thing and, further, how some uses exploit that connection, leading to effects on that person. Again, recognizing a person's interest in controlling uses that lead to particularized effects is an inherently normative project. The central point is that these uses are intimately tied to the person and, as a result, the person should have some claim to control or prohibit these uses even if the thing is transferred. This marks an improvement over previous theories because it recognizes that a person's dignity interests are implicated by use, rather than simply the existence of a connection.

Based on this view of separability, we can examine the initial puzzle that this part introduced. In doing so, use-based separability analyzes the different uses of Amy's donated kidney in light of foundational normative commitments.

3. Solving the Puzzle of Separability

This part began with a puzzle. Amy donated a kidney to Brad. Subsequently, Brad used the kidney in a variety of ways. Examining Brad's different uses through separability reveals how Amy's interests are implicated differently across the cases and how different uses of the kidney conflict with deontological commitments that use-based separability successfully tracks.

128. Philosophers working on the conceptual boundaries of Kant's prohibition against using a person merely as a means recognize that violating the principle requires that the person (or parts of the person) used must be necessary to accomplish the use's ends. See Guerrero, *supra* note 24, at 789. The existence of a particularized effect tracks the same central idea that the effects on the person must be a product of the fact that use appropriates a thing that is connected to them. The notion of particularized effect and Guerrero's condition for using merely as a means both track the idea that the person (or thing connected to the person) must be essential for the use.

Consider, again, the first case of the puzzle. After receiving the kidney from Amy, Brad begins smoking and drinking regularly. This lifestyle choice creates additional strain on his recently implanted kidney. Should Amy have a legal interest in controlling Brad's lifestyle based on the effects that it has on the kidney's functioning? Probably not.

Amy should not have a legally recognizable interest in controlling Brad's consumption choices for several reasons. To start, Brad's use of the kidney does not rely on the connection that it has to Amy. Similarly, this logic would be the same if Amy had sold Brad her car, and Brad decided to drive the car recklessly. While Amy may dislike Brad's driving habits, she should not be able to exercise control over them. Similarly, Amy should not be able to exercise control over Brad's consumption choices. All of the effects of Brad's actions are borne specifically by Brad (or the public generally) rather than Amy. More importantly though, Brad is using the kidney to filter blood, which does not depend on the fact that the kidney retains a connection to Amy. He is using the kidney as a thing disconnected from Amy, rather than using the connection it has to Amy.

In the second case, Brad uses Amy's kidney cells to conduct several experiments. Brad splices the cells with Amy's genetic information and exposes them to different levels of temperature and light to study how the cells respond. Should Amy have the legal ability to prevent Brad from using these cells for research? Again, probably not. While Brad happens to use cells that have a genetic connection to Amy, the use does not depend on the fact that they retain a connection to Amy. If Brad had received a donated kidney from Claire, he would still be able to conduct roughly the same experiments (using Claire's kidney cells rather than Amy's) in service of his recent fascination with biology.

The situation is trickier in the practical joke case. Here, Brad uses a thing with a particularized connection to Amy in order to affect her. Brad places Amy's cells outside of his apartment door, thinking that she will slip on them when she comes over to his apartment. While Amy has an obvious interest in not being the target of practical jokes that lead to physical harm, this interest is not a product of the connection she has to her kidney cells. This is because Brad's use of the cells does not rely on the connection that they have to Amy.

In other words, Brad's use of the cells depends on their slippery quality, rather than the fact that they have a connection to Amy. Brad could have used his own cells to achieve similar results, or any other slippery liquid. As a result, Amy's interest in contesting this use is not a product of the connection that she has to her cells, but rather the general interests she has in not being the subject of physical harm. Stated again, the fact that Brad used *Amy's* cells does not provide a reasonable normative foundation to contest this use.

Finally, Brad's use of Amy's genetic information to adjust her insurance premiums is an inseparable use. Amy has an interest in controlling this use

because of her particularized connection to her kidney cells. Inseparable uses form a circuit between the connection that a person has to the thing and the effects of the use. In these cases, the effect depends on the connection that a person has to the thing.

Put differently, when Brad uses the kidney cells to adjust Amy's insurance rates, the effect of this action is dependent on the connection that Amy has to the cells. Unlike in the hazard example, the use depends on the fact that the cells are connected to Amy. If Brad had used someone else's cells (or his own), the effect would not be the same on Amy. As a result, Amy has a strong normative foundation to contest these uses. Again, this foundation is based on the deontological interests that Amy has in controlling things that are connected to her and, further, how some uses of these things treat Amy as a means to an end.

4. Potential Conceptual Ambiguity for Separability

There are a few principal sources of ambiguity in a model of inseparability that is premised on connection and use. The connection element of inseparability is subject to two distinct challenges of ambiguity. First, potential limitations on use are less clear when the person who maintains a particularized connection to the thing is deceased. Second, conceptual ambiguity also potentially arises when multiple people maintain particularized connections to the same thing. However, both of these challenges are ultimately resolvable. Alongside the ambiguities around connection, effects are sometimes unable to be resolved by logic alone. That is, sometimes the interests that a person has in controlling an inseparable use is outweighed by countervailing concerns.

a. Separability After Death

Death poses an interesting puzzle for separability. At first glance, death appears to sever the connection between a person and a thing, thus undermining justifications for use restrictions based on inseparability. However, some inseparable interests survive the death of the person who was originally connected to the thing. Often, other people are connected to the deceased person and, in virtue of this connection, have an interest in how the thing is used. While death may sever the connection with the original person, some people may still have inseparable interests based on their connection to the deceased.

*National Archives and Records Administration v. Favish*¹²⁹ demonstrates these conceptual issues quite well. The issue in *Favish* centered on whether the National Park Service was justified in denying, on privacy grounds, a Freedom of Information Act ("FOIA") request for death scene photographs of recently

129. 541 U.S. 157 (2004).

deceased Deputy White House Counsel Vincent Foster.¹³⁰ While none of Foster's family members were depicted in the photographs, the Supreme Court recognized that the uses of information about Foster also implicated the interests of his family.¹³¹

In doing so, the Supreme Court derived use restrictions based on the privacy interests of Foster's family rather than dignity interests that Foster retains after death.¹³² Use-based separability loosely follows this tradition. That is, upon the death of a person with a connection to a thing, uses may become separable. However, this is culturally dependent. If a different socio-legal system recognizes some continuing connection that persists after death, then the legal system could reasonably build use restrictions around these connections.

The central upshot of *Favish* is that, even though the photographs were not about Foster's family, his family still had some recognizable interest in their use based on their connection to Foster.¹³³ However, determinations about when interpersonal relationships are sufficient to generate interests may involve difficult line-drawing problems. For instance, should Foster's extended family be able to control the uses of photos depicting him? Even more remotely, should former friends be able to exercise these same levers of control? Importantly, a renewed focus on use allows us to sidestep some of the inherent fuzziness of these determinations. Previous models of separability focused entirely on connection, so ambiguity about connection caused these theories to falter.¹³⁴ Instead, use-based separability also examines how potential uses change this calculus, thus clearing up some of the inherent fuzziness.

Inevitably, however, some line drawing will remain. That said, legislation organized around a vision of separability based on use allows courts (or legislatures) to assess and balance the interests at stake in different uses. Often, though, these tradeoffs will sound in conflicts over individual versus social interests, yet both legislatures and courts routinely resolve these tensions and will be able to do so similarly in these instances.¹³⁵

130. *Id.* at 160 (“This case requires us to interpret the Freedom of Information Act (FOIA). FOIA does not apply if the requested data fall within one or more exemptions. Exemption 7(C) excuses from disclosure ‘records or information compiled for law enforcement purposes’ if their production ‘could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” (citation omitted) (quoting the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552(b)(7)))).

131. *Id.* at 165–66.

132. *Id.* at 166.

133. *Id.* at 166–67.

134. *See supra* Section I.B.

135. *See* Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMANS. 171, 199–200 (2010) (describing how the public disclosure tort protects private interests but is subject to a “newsworthy” defense that allows publication of private facts that are issues of legitimate public concern).

b. Multiple Connections

Situations where multiple people are connected to a single thing also create potential complications for an analysis of separability. When people cooperate to create a work of art, that single artistic creation is connected to all of the coauthors. Similarly, information may contain a link to a group of people. In particular, data can describe individuals, but often it describes groups of people such as families or neighborhoods.

The problem of multiple connections has proven a difficult issue for both intellectual property and information law.¹³⁶ More specifically, courts and commentators have struggled to delineate what control rights individuals have based solely on their connection to the thing.¹³⁷ In the next part, this issue will be discussed more fully in the context of information law; however, expanding the analysis to include an examination of use provides a principle to resolve some of these difficulties. More specifically, even when a thing is connected to multiple people, the use may affect particular people. In these cases, then, the people affected by the use have a stronger moral foundation to contest the use.

c. Inseparable Uses Without Legal Recognition

One final complication contemplates how the interests that inseparability tracks will be incorporated into the broader legal system. Here, moral philosophy runs into problems of legal implementation. Just because a person has an interest in controlling an inseparable use does not necessarily mean that the legal system should provide legally significant mechanisms of control. This problem is ultimately an issue of commensurability. Inevitably, there will be other interests (often public interests) that stand in opposition to the purely

136. See Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 58–59 (2019) (describing concerns about the fragmented copyright control that would result from vesting actors with protectible interests in a finished motion picture). As Hughes notes, the originality requirement in copyright prevents fracturing control over a finished motion picture. *Id.* The concern is that mutual overlapping claims may prevent the dissemination of the work or distort the financial incentives that copyright purports to produce. However, this potential problem is largely mitigated by contractual agreements. *Id.* at 68. In addition, commentators often reject the possibility of ownership claims over personal data because it is unclear who would have the best claim to control. Cameron F. Kerry & John B. Morris, Jr., *Why Data Ownership Is the Wrong Approach to Protecting Privacy*, BROOKINGS (June 26, 2019), <https://www.brookings.edu/blog/techtank/2019/06/26/why-data-ownership-is-the-wrong-approach-to-protecting-privacy/> [https://perma.cc/LC57-GZX6] (recognizing the potential for “intersecting interests” in ownership rights over personal data).

137. This is particularly problematic for information law where different actors purport to have the strongest claim over information. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), Justice Gorsuch squarely addressed the question of who had a better claim to the cell site location information (“CSLI”) that the government used to convict Carpenter. *Id.* at 2261–62 (Gorsuch, J., dissenting). Turning toward a property model in his dissent, Justice Gorsuch claimed that Carpenter had a strong case for a protectible property interest in this information. *Id.* at 2272. The theoretical crux of this problem is that assigning rights over information is contested with many different actors having colorable claims to “ownership.”

private interests that separability identifies. In many cases, these purely private interests should give way to public concerns.

However, this problem of commensurability is not unique to inseparability. First, the legal system commonly grapples with questions of private versus public interest.¹³⁸ Judicial decisions balance interests, and regulation is often premised on balancing different concerns.¹³⁹ Second, this type of balancing is particularly common with information privacy law.¹⁴⁰ Here, private individuals wish to keep information about themselves out of public scrutiny.¹⁴¹ The public, by contrast, often wishes to access the information, especially when it implicates issues of public concern.¹⁴² Information privacy as a body of law has recognized these inherent tensions and developed mechanisms to calibrate these different interests.¹⁴³ Inseparability merely offers policymakers a lens to better identify the interests at stake.

* * * * *

Ultimately, separability—through the prism of connection and use—advances a normative principle. That is, inseparable uses risk treating the person as a means to an end, rather than as an end in itself. These uses risk undermining the inherent dignity of the person. The next part builds on this normative framework and argues that we should craft legal mechanisms of control that track the values inherent in separability. In doing so, this part

138. Property law is faced with dilemmas over whether a person can control their land in ways that conflict with larger social goals as well as issues over takings where private property is transferred to the public. See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1600–01 (1988) (discussing takings in private property); Richard F. Babcock & Duane A. Feurer, *Land as a Commodity* “*Affected with a Public Interest*”, 52 WASH. L. REV. 289, 290–91 (1977); Raymond J. Penn, *Public Interest in Private Property (Land)*, 37 LAND ECON. 99, 102 (1961) (discussing the interplay between public and private interest in land use controls); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964) (distinguishing takings from police power regulations).

139. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344–45 (1993) (discussing the use of balancing different interests in constitutional matters); see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77 (1980) (discussing the private interest of the mall owner versus public commitments to freedom of speech).

140. Newsworthiness—a defense to public disclosure tort suits—essentially claims that the information serves important public interest values and thus outweighs private interests in maintaining secrecy. See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1829 (2010) (“Courts dismiss public disclosure claims where information addresses a newsworthy matter, in other words, one of public concern.”). However, newsworthiness is not a sufficient defense to intrusion upon seclusion claims. See Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 231 (2012).

141. Bambauer, *supra* note 140, at 265–66 (“The [public disclosure] tort is constructed with a number of safety valves to ease the inherent tension between the right to speech and the right to not have one’s story told.”).

142. *Id.* at 232–33.

143. *Id.* at 233–34.

applies the separability framework to contested debates over property and information law.

III. SEPARABILITY AS A NORMATIVE FOUNDATION

This part appropriates separability as a normative foundation for legal regulation. In particular, this part argues that separability should serve as a normative guidepost for crafting use restrictions for contested cases within property and information law. Section III.A concentrates on contested cases within property law and details how a focus on separability provides valuable insight about into whether and how to craft legal regulations over specific uses. Section III.B turns its insights to controversial issues within information law and suggests that separability offers a promising avenue to understand the normative stakes underlying use restrictions for personal data.

A. *Property Law*

This section applies the theory of separability to three contested cases in property law. To begin, this section returns to the debate over body parts, including genetic material and reproductive material. In doing so, this discussion applies use-based separability to determine the boundaries of control that exist after body parts are transferred.

Next, this section applies separability to the debate over moral rights and the limits of control over creative works. The normative upshot of this discussion is that it identifies how potential uses of creative works implicate the values that separability protects. Moral rights regimes would do well to focus on inseparability, largely because it strikes a compromise that protects the dignity interests of the author while providing the purchaser flexibility to use the work as they see fit.

Finally, this section applies separability to people's image and likeness. In particular, this discussion focuses on rights of publicity and deepfakes.¹⁴⁴ Within rights of publicity, use-based separability provides insight into the debate over the alienability of publicity rights. Additionally, use-based separability provides normative support for limiting the use of people's images for deepfakes.

1. Body Parts and Reproductive Material

Separability provides guidelines about whether and how a person should be able to control uses of their biological material. This puzzle underscores one

144. A deepfake is "an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said." *Deepfake*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deepfake> [https://perma.cc/63L2-5K9P].

of the most studied cases in property theory: *Moore v. Regents of the University of California*.¹⁴⁵ In *Moore*, the California Supreme Court grappled with questions over Moore's economic and personal interests in his spleen after it was removed during surgery and, unbeknownst to him, used for a profitable medical innovation.¹⁴⁶ In particular, Moore's claim for conversion of his bodily material was premised on the idea that he "continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research."¹⁴⁷ And further, because he did not consent to these uses, he was entitled to a proprietary interest in the products created from his cells.¹⁴⁸

Ultimately, the California Supreme Court found that Moore's conversion claim failed.¹⁴⁹ The majority offered an array of theories to bolster their conclusion. First, the imposition of conversion liability for medical research on human cells would likely chill socially beneficial innovation.¹⁵⁰ Second, and more relevant to our analysis, the majority held that Moore's conversion action required that he had to have possessed an ownership interest in his excised cells and, further, that he did not have such an interest.¹⁵¹

However, the discussion about whether and what type of interest Moore has in his excised cells is precisely the question use-based separability addresses. In particular, we can consider whether Moore should have an interest in limiting scientific research and the eventual commercial exploitation of his cells. That said, the purely commercial exploitation of Moore's cells is separable under this theory. As a result, Moore should have limited legal ability to control these uses.

The scientific use of Moore's cells is separable because the use does not rely on the inherent connection between Moore and his cells. Of course, the separability of this practice does not override the lack of informed consent in Moore's case. But if Moore had consented to the surgery with full knowledge that surgeons could potentially use his cells for commercial purposes, then his downstream rights should be limited. Additionally, this use does not create any effects that are particular to Moore based on his connection to his cells. If anything, the effects are merely economic rather than personal.

This does not mean that Moore does not have any interest in the use of his cells. In a dissenting opinion, Justice Mosk makes a similar claim.¹⁵² Mosk

145. 793 P.2d 479 (Cal. 1990).

146. *Id.* at 480.

147. *Id.* at 487.

148. *Id.*

149. *Id.* at 493.

150. *Id.* at 493–94.

151. *Id.* at 488–89.

152. *Id.* at 510–11 (Mosk, J., dissenting).

stresses that even though Moore's rights over his excised sample were limited by statute, that does not mean that he did not have any property interest in them.¹⁵³ This point is largely correct under the use-based separability theory. However, unlike Justice Mosk's claim, use-based separability is agnostic about whether this interest is a *property* interest. According to use-based separability, Moore does have an interest in the inseparable uses of his cells because they remain connected to him even after transfer. Some uses, such as analyzing his genetic structure to make insurance determinations about him, are inseparable. More specifically, this use relies on the connection that Moore has to his cells and creates particular effects (increased price or lost opportunities) based on that connection. For this reason, Moore should be able to control this particular use.

The boundaries of the theory can be sharpened by examining another set of cases regarding the rights of individuals to control biological material after it is transferred. In *Doe v. Ministry of Health*,¹⁵⁴ the Israeli Supreme Court considered whether a sperm donor could restrict unwanted future uses of his sperm.¹⁵⁵ Here, an anonymous sperm donor transferred sperm to a woman who used it to conceive a child.¹⁵⁶ Later, the woman wanted to conceive a second genetically related child, but the sperm donor had undergone a religious conversion that conflicted with the use of his sperm.¹⁵⁷ The Supreme Court of Israel was forced to decide whether the donor could change his mind and block this use.¹⁵⁸ In the end, the Israeli Supreme Court sided with the sperm donor and allowed him to change his mind and block additional uses of his sperm sample.¹⁵⁹

Ministry of Health provides an interesting lens for assessing use-based separability. In particular, this case anticipates some of the concerns that a focus on inseparable uses captures. More specifically, the opinion focuses on the strength of the connection between the donor and the use.¹⁶⁰ To that end, the donor only retains a genetic connection to the child conceived; there are not any attendant legal obligations that attach.¹⁶¹ However, the use inherently relies on the donor's genetic information to create a child.¹⁶² Moreover, the effect that this has on the donor is a product of the fact that it was *his* sperm that was used

153. *Id.* at 508.

154. HCJ 4077/12 (2013) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Doe%20v.%20Ministry%20of%20Health.pdf> [<https://perma.cc/PL9E-XQV4>].

155. *Id.* at 3–4.

156. *Id.* at 4.

157. *Id.*

158. *Id.* at 1.

159. *Id.* at 26.

160. *Id.* at 23–26.

161. *Id.* at 24–26.

162. *Id.* at 22.

to conceive the child.¹⁶³ This effect, then, is particular to him.¹⁶⁴ It is an open question whether the particularized effect is one that should be legally recognized. However, the Supreme Court of Israel gave legal weight to these effects on the donor and allowed him to restrict uses of his sperm.¹⁶⁵

However, *Ministry of Health* stands in interesting comparison to another Israeli Supreme Court case, *Nahmani v. Nahmani*.¹⁶⁶ In *Nahmani*, Daniel and Ruth Nahmani each contributed reproductive tissue that was used to create a fertilized ova that was stored for future use.¹⁶⁷ However, the couple separated before the fertilized ova could be implanted into a surrogate.¹⁶⁸ After the separation, Ruth petitioned—against Daniel’s objections—to gain control of the fertilized ova to produce a child.¹⁶⁹ Here, the fertilized ova contained a genetic link to both Daniel and Ruth. Moreover, unlike in *Ministry of Health*, Daniel would not merely be a genetic father to the child. Instead, Daniel would be both a legal and genetic parent. Despite the stronger link in this case, the Israeli Supreme Court granted Ruth the legal right to use the fertilized ova.¹⁷⁰ Part of the reasoning was that Ruth had no opportunities to have a genetically related child other than the fertilized ova at issue.¹⁷¹ This case, though, does highlight something important for separability. That is, just because someone has an inseparable interest does not mean it is absolute. Other interests may outweigh the particularized effects of an inseparable use, such as in *Nahmani*, where the mother lacked any other opportunity to have a genetically related child.¹⁷²

2. Creative Works

In many jurisdictions, authors of creative works are provided a collection of legal rights called “moral rights.”¹⁷³ Moral rights generally rest on the idea that an artist retains a connection to their work after that work is transferred and, by extension, an artist should be able to exercise continuing control over

163. *Id.* at 24–26.

164. *Id.* at 26.

165. *Id.*

166. CivA 5587/93 (1995) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Nahmani%20v.%20Nahmani.pdf> [<https://perma.cc/L3K7-BBL3>]; see Helene S. Shapo, *Frozen Pre-Embryos and the Right To Change One’s Mind*, 12 DUKE J. COMPAR. INT’L. L. 75, 77–80 (2002).

167. Shapo, *supra* note 166, at 78.

168. *Id.*

169. *Id.*

170. *Id.* at 79; see also Joel Greenberg, *Israeli Court Gives Wife the Right to Her Embryos*, N.Y. TIMES (Sept. 13, 1996), <https://www.nytimes.com/1996/09/13/world/israeli-court-gives-wife-the-right-to-her-embryos.html> [<https://perma.cc/ZRS9-LLJ5> (dark archive)].

171. CivA 5587/93 Nahmani, at 41.

172. *Id.*

173. ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* xiii (2010); Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 264 (2009); Brian Angelo Lee, *Making Sense of “Moral Rights” in Intellectual Property*, 84 TEMP. L. REV. 71, 73 (2011).

the work.¹⁷⁴ Though largely considered a European import, moral rights are codified in the United States at both the federal and state level.¹⁷⁵ Federally, moral rights are codified in the Visual Artists Rights Act of 1990 (“VARA”).¹⁷⁶ Further, many state law provisions provide legal mechanisms of control similar to those provided by VARA.¹⁷⁷

VARA and its state law analogues provide artists a suite of rights. Often viewed as the most distinctive legal right within most moral rights regimes, the right of integrity allows artists to prevent modifications or alterations of their work.¹⁷⁸ As conceived by VARA, the right of integrity provides visual artists with the legal ability to prevent alterations of a work that would be prejudicial to an artist’s reputation.¹⁷⁹ Alongside legal control over modifications, VARA also vests in creators of works of “recognized stature” the right to prevent the work’s destruction.¹⁸⁰ Interestingly for our purposes, the right of integrity conferred under VARA expires upon the death of the artist.¹⁸¹

Separability provides an interesting vantage point from which to assess moral rights, in part because these statutes implicitly recognize the continuing connection that exists between an artist and their work. Moreover, some moral rights anticipate the concerns of use-based separability, while other moral rights are harder to justify on these grounds and lead to inconsistencies across the American moral rights regime more generally.

Consider the right of integrity, particularly as it is implemented in VARA. Here, artists are expressly entitled to prevent modifications that would impugn

174. Lee, *supra* note 173, at 79.

175. *Id.* at 73–74.

176. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A).

177. Lee, *supra* note 173, at 79–80 (discussing the American statutory landscape of moral rights).

178. *Id.* at 73.

179. § 603(a), 104 Stat. at 5129.

180. *Id.*

181. However, some states depart from VARA by terminating the right of integrity fifty years after the artist’s death. These states include California, Connecticut, Massachusetts, New Mexico, and Pennsylvania. CAL. CIV. CODE § 987(g)(1) (2020); CONN. GEN. STAT. ANN. § 42-116t(d)(1) (2019); MASS. GEN. LAWS. ANN. ch. 231, § 85S(g) (Westlaw through Chapter 226 of the 2020 2d Ann. Sess.); N.M. STAT. ANN. § 13-4B-3(E) (Westlaw through the end of the 2d. Reg. Sess. and 1st Special Sess. of the 54th Legis. (2020)); 73 PA. STAT. AND CONS. STAT. ANN. § 2107(1) (Westlaw through 2020 Reg. Sess. Act 95). Other states do not terminate the right of integrity. According to Brian Lee, these states have an “implicitly perpetual” grant of the right of integrity. *See* Lee, *supra* note 173, at 81–82. These states include Louisiana, Maine, Nevada, New Jersey, and Rhode Island. LA. STAT. ANN. § 51:2153 (Westlaw through the 2020 1st Extraordinary Sess.); ME. STAT. tit. 27, § 303(2) (Westlaw through the 2019 2d Reg. Sess. of the 129th Leg.); NEV. REV. STAT. § 597.740(1) (Westlaw through the end of both the 31st and 32d Spec. Sess. (2020)); N.J. STAT. ANN. § 2A:24A-4 (Westlaw through L.2020, c. 127 and J.R. No. 2); 5 R.I. GEN. LAWS § 5-62-3 (LEXIS through Chapter 79 of the 2020 Sess.); *see* Lee, *supra* note 173, at 79–80 nn.22–32, 82 nn.47–48.

the artist's reputation.¹⁸² Oddly enough, this limited use-based restriction tracks the concerns of the theory of separability developed in this Article. More specifically, VARA grants an artist the ability to control uses of the work that lead to reputational effects by appropriating the attributional connection between a creator and the work.¹⁸³ The reputational effects envisioned by VARA are exactly the type of effects that use-based separability considers. Put differently, the effects created through modifications are specific to the author because the author retains a connection to the work in virtue of having created it. However, there may be some cases where modifications do not trace back to affect the author. For example, in situations where the work of art is not displayed publicly the attributional connection is attenuated, leading to limited reputational effects.

However, other aspects of VARA represent a more haphazard approach to incorporating separability. Consider VARA's prohibition against destroying works that have achieved a significant stature.¹⁸⁴ Viewed through the prism of use-based separability, we should not be particularly worried about destruction. This is because destruction—unlike modification—severs the connection between an artist and their work rather than exploiting the associational connection in a way that leads to particular effects on the artist's reputation.

While the right against destruction may stem from a different normative foundation, two other possible justifications for moral rights create internal inconsistencies when applied to VARA's prohibition on destruction. First, limiting destruction may be justified by the social value of preserving significant works of art. Yet this value is difficult to square with VARA's expiration upon the death of the artist.¹⁸⁵ If the right against destruction was truly about preservation, then this right should be more fiercely safeguarded—likely by the public rather than the author.

Second, the prohibition on destruction may follow from stronger Hegelian conceptions of separability. On these accounts, an author injects their personality into the work and, by extension, destroying the work leads to personal harms against its creator.¹⁸⁶ However, accepting this rationale would suggest that VARA should incorporate additional rights (as is the case in many European jurisdictions) and the rights that VARA provides would be inalienable.¹⁸⁷ For example, rather than protecting against modifications that

182. § 603(a), 104 Stat. at 5129 (permitting an author of a visual work to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”).

183. *Id.* § 603(a), 104 Stat. at 5128.

184. *Id.* § 603(a), 104 Stat. at 5129.

185. *Id.* (stating the moral rights conferred under VARA endure for the life of the author).

186. See Roeder, *supra* note 119, at 556; Yoo, *supra* note 118, at 1048, 1076.

187. See Netanel, *supra* note 32, at 393–98 (comparing the robust moral rights regimes of France and Germany with the more limited moral rights regime of the United States).

harm the reputation of the author, the right of integrity would likely protect against any and all alterations.

As a more general matter, the American moral rights regime would do well to consider use-based separability as its guiding normative light. This is because separability strikes a compromise allowing moral rights regimes to protect authors against unwanted uses that affect them by virtue of their associational connection to their work, while providing some flexibility for purchasers of a work to use it as they see fit. In particular, use-based separability comes down most harshly on uses that the American right of integrity currently protects; that is, modifications that lead to reputational harms.¹⁸⁸ Further, these uses are particularly troubling because the connection between the author and the work is exploited, which is the underlying cause of the reputational effects.

Similarly, a renewed focus on use-based separability also cabins the rights of artists in ways that are socially beneficial. Under this view, artists cannot control every minute detail of how their work is used, such as whether it must be displayed or how it is presented. This flexibility allows purchasers (either individuals or museums) to use the work in ways that they value most, provided that the use does not leverage the attributional connection that links the artists to the work.

3. Image and Likeness

This section addresses the debate over controlling one's image and likeness—particularly as it relates to publicity rights and deepfake technology. To begin, this discussion examines the debate over the alienability of rights of publicity. Rothman proposes that the right of publicity should be inalienable, partly because it is inseparable.¹⁸⁹ However, Rothman's analysis relies on outmoded definitions of separability that were critiqued in Part I. Instead, questions about alienability are more nuanced, particularly because separability itself is more complicated than previously recognized. More specifically, not all uses of personality rights are inseparable. As a result, restrictions on alienability should focus on inseparable uses of publicity rights.

After discussing publicity rights, this section considers the debate over deepfakes. By applying use-based separability to this debate, this section casts light on a normative justification for continuing control over one's likeness for deepfakes. To that end, certain uses of one's likeness (usually one's face) for deepfakes has a particularized effect on that person and, therefore, people should have the ability to control these uses.

188. See Lee, *supra* note 173, at 109.

189. Rothman, *supra* note 18, at 226.

a. *Rights of Publicity*

The right of publicity—the legal right to control commercial uses of one’s name and likeness—is a hybrid creation of both privacy law and property law.¹⁹⁰ Unlike privacy claims that are not assignable, most commentators and courts suggest that the right of publicity follows property and, likewise, is fully transferrable.¹⁹¹ To that end, a person may transfer their legal rights of control over their identity. For example, NBA star LeBron James could assign legal rights of control over his identity to another person. In practice, this is not wholly uncommon, as the National Collegiate Athletic Association (“NCAA”) required (until 2021)¹⁹² that student athletes assign their rights of publicity as a requirement for participating in collegiate athletics.¹⁹³

In an influential article, Rothman resists the tide of unrestrained alienability for the right of publicity.¹⁹⁴ In particular, Rothman contends that restraints on the alienability of publicity rights are justified for a panoply of reasons, such as economic efficiency, fundamental rights, and anticommodification concerns.¹⁹⁵ More central to this Article, however, Rothman also argues that separability warrants restrictions on transfers of these rights.¹⁹⁶ In particular, Rothman claims that publicity rights cannot be separated from the person whose identity it actually is (the “identity-holder” in Rothman’s terms).¹⁹⁷ As a result, inseparability either “negates the possibility of alienability entirely or suggests that publicity rights must be extremely limited in nature if they are to be treated as alienable.”¹⁹⁸

Rothman’s use of separability as a normative principle to determine the bounds of transferability breaks important new ground. Rothman claims that publicity rights are inseparable from the identity holder because the identity holder retains the ability to influence the economic value of the right after it is transferred; and conversely, the publicity holder maintains the ability to cause

190. *Id.* at 205.

191. *Id.* at 186 (“Courts and scholars have routinely described the right of publicity as such a freely transferable property right. The leading treatise author in the field, J. Thomas McCarthy, has observed that the ‘rule of free assignability in gross of the right of publicity has never been seriously questioned.’” (citation omitted) (quoting 2 J. Thomas McCarthy & Roger E. Schechter, RIGHTS OF PUBLICITY AND PRIVACY § 10:13 (2011))).

192. Evan Gourvitz, *INSIGHT: Student-Athletes on Cusp of Compensation with ‘Right of Publicity’ Changes*, BLOOMBERG L. (Dec. 20, 2019, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-student-athletes-on-cusp-of-compensation-with-right-of-publicity-changes?context=search&index=3> [<https://perma.cc/Z9QS-U6DA>].

193. Rothman, *supra* note 18, at 188.

194. *Id.* at 189–90.

195. *Id.* at 208–20.

196. *Id.* at 234 n.228.

197. *Id.* at 234.

198. *Id.* at 190.

both economic harms and dignitary harms to the identity holder.¹⁹⁹ As a result, Rothman concludes that publicity rights cannot be fully divested from the identity holder and should be inalienable.²⁰⁰

Interestingly, Rothman seems to implicitly adopt a view of separability that gives pride of place to uses. Further, an account of separability that focuses on uses maps to the spirit of Rothman's concerns more fully. The heart of Rothman's view of separability is that different uses can implicate the interests of the identity holder.²⁰¹ However, this leads to different results than Rothman imagines. As a result, we should not focus on alienability generally but should instead fashion use restrictions that limit the ability of the publicity holder to create particularized effects on the identity holder. Many, if not all, of Rothman's concerns about the alienability of publicity rights evaporate if the identity holder maintains some control over this special class of uses.

Rothman's fears are evidenced by her choice of examples. To illustrate the problems with the alienability of publicity rights, Rothman points to a lawsuit by the estate of Ronald Goldman arguing that Orenthal James ("O.J.") Simpson should be required to assign his publicity rights in order to facilitate payment of a \$33 million civil judgment against him for the deaths of Goldman and Nicole Brown Simpson.²⁰² According to Rothman, normatively suspect consequences follow from this.²⁰³ For example, the Goldman family would be entitled to produce clothing and posters with O.J. Simpson's name and face alongside the slogan "I Did It."²⁰⁴

However, Rothman's—as well as others'—understanding of separability fails to provide determinative criteria for determining when transfers of publicity rights are normatively undesirable, and such analysis appears necessary. To remedy this shortcoming, we can appeal to separable uses to decide these cases. More specifically, Simpson should be able to retain control over uses that have a particularized effect on him—again, an effect that is specific to him because of his connection to the thing. This way of thinking categorizes uses of publicity rights into those that are assignable and those that are not.

199. *Id.* at 227–28.

200. *Id.*

201. *Id.* at 210 ("If alienated, the right of publicity can be used to severely restrict the liberty, free speech, and associational rights of identity-holders.")

202. *Id.* at 200. Ultimately, the district court denied the Goldman's request to transfer Simpson's publicity rights. *Goldman v. Simpson*, No. SC036340, 2006 WL 6845603 (Cal. Super. Ct. Oct. 31, 2006). The judge compared assigning publicity rights to an "involuntary servitude." *Id.* at 12. By contrast, however, Goldman received the copyright to Simpson's book—*If I Did It: Confessions of the Killer* (2007)—after filing a motion to assign these rights. Order Granting ex Parte Motion for Assignment of Rights and Turnover Order, *Goldman*, 2007 WL 2455120 (No. SC036340).

203. Rothman, *supra* note 18, at 200.

204. *Id.* at 210–11.

Rather than outright restrictions on alienability, the concerns that Rothman rightly points out would be better resolved through use restrictions based on the theory of separability that this Article offers. Again, separability more faithfully tracks its normative commitments when it is viewed through the prism of connection and use. Let's return to Rothman's examples. The Goldman family's ability to produce T-shirts with Simpson's face and "I Did It" is clearly an inseparable use. More specifically, the Goldmans use a thing (Simpson's face) with a particular connection to Simpson and, further, this use affects him uniquely because it is *his* face attached to the slogan.

Other uses of Simpson's personality rights are separable from him. While rights of publicity are explicitly about the commercial exploitation of one's likeness, there are still situations where commercially exploiting one's likeness does not lead to particularized effects. For instance, rather than printing T-shirts with Simpson's face and a commentary about his actions, the Goldmans could have acquired the publicity rights for garden-variety commercial purposes. In particular, the Goldmans could have merely collected payments for using Simpson's name to endorse rental car companies or breakfast cereals. If there is any effect of this use on Simpson, it is not because of the Goldmans' use of a thing that has a particular connection to him.

This principle is clarified further by considering the factual scenario behind the famous California Supreme Court ruling about rights of publicity in *Comedy III Productions, Inc. v. Saderup*.²⁰⁵ Comedy III Productions brought a suit against artist Gary Saderup because Saderup produced unlicensed charcoal drawings of the Three Stooges that he sold as prints and T-shirts.²⁰⁶ However, merely producing prints and T-shirts with the Three Stooges image on them is separable from them—the effect that producing these items has on the Three Stooges does not affect them in virtue of it being *their* faces depicted. Instead, the effect is economic rather than something that is inherent to the connection that the Three Stooges have to their image. In light of the separability of this particular use, we should have fewer qualms about assigning publicity rights for this specific and limited purpose.

To sum up, restricting uses of publicity rights more adequately accounts for potential problems with alienability than fully restricting assignments. Moreover, an analysis of connection and use provides a framework for determining the content and scope of these use restrictions. In the end, we may have worries about the assignability of publicity rights, but separability only justifies concerns about some uses, not assignability generally.

205. 21 P.3d 797 (Cal. 2001).

206. *Id.* at 800–01.

b. Deepfakes

Deepfakes are digitally falsified media that use cutting-edge techniques to produce images, video, or audio that falsely depict a person.²⁰⁷ Deepfakes first gained national attention for their use in pornographic videos.²⁰⁸ More specifically, deepfake pornography splices a person's face—almost always a woman's—into sexually explicit content.²⁰⁹ However, as Bobby Chesney and Danielle Citron warn, deepfake technology will likely migrate beyond pornography and lead to larger individual and social harm.²¹⁰ For instance, Citron and Chesney describe a case where a deepfake video depicted gun control activist Emma Gonzalez tearing apart a copy of the United States Constitution.²¹¹ In reality, Gonzalez was merely ripping up a gun target adorned with a bullseye. Deepfake technology stands to exacerbate the proliferation and spread of fake media, particularly in a time where the public trust of media institutions hangs in the balance.²¹²

In response to the looming challenges posed by deepfakes, use-based separability provides normative grounding to contest the use of a person's image or likeness in deepfake videos. Again, inseparable uses appropriate the particularized connection in a way that effectively uses the person. Additionally, thinking through the difficulties ushered in by deepfakes demonstrates the effectiveness of separability for making these distinctions.

Consider again the use of an image of a person's face for deepfake pornography. A person has some connection to an image of their face. There is an obvious association between a person and their face, and deepfake pornography leverages that connection. As many examples of deepfake pornography make clear, a person's image is often chosen because the creator wants it to appear like that specific person appeared in the video. To that end, deepfake pornography creators may use an image of an ex-girlfriend (in the case of revenge pornography)²¹³ or a celebrity to create an association between that

207. Cade Metz, *Internet Companies Prepare To Fight the "Deepfake" Future*, N.Y. TIMES (Nov. 24, 2019), <https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html> [<https://perma.cc/LT7C-9PUL> (dark archive)].

208. Aja Romano, *Deepfakes Are a Real Political Threat. For Now, Though, They're Mainly Used To Degrade Women*, VOX (Oct. 7, 2019, 7:00 PM), <https://www.vox.com/2019/10/7/20902215/deepfakes-usage-youtube-2019-deeptrace-research-report> [<https://perma.cc/8NFC-8ESZ> (staff-uploaded archive)].

209. *Id.*

210. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019).

211. *Id.* at 1755–56.

212. *Id.*; see also Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129, 129–30 (2018) (describing how news dissemination through internet platforms contributes to institutional distrust of traditional news outlets).

213. "Revenge porn" is the "distribution of sexually graphic images of individuals without their consent." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST

person and the sexually explicit video.²¹⁴ Importantly, this analysis also extends beyond deepfake pornography and would be essentially the same for the case involving Emma Gonzalez and other nonpornographic deepfake cases.

Use-based separability provides a normative justification for giving a person control over the use of their image in deepfake videos. Interestingly enough, the ability to control images of our faces is incredibly fraught, particularly from a privacy perspective.²¹⁵ The reason for this is that our faces are generally displayed to the public; they are not private information.²¹⁶ As discussed earlier, different uses of these images implicate central deontological values and, by extension, should be the target of intervention.²¹⁷

However, through the lens of use-based separability, not all uses of one's image are equally troubling. Some uses are disconnected from the person and do not appear to use *the person*; thus, they do not violate the prohibition on using a person as merely a means to an end. Separability provides a normative foundation for only some subset of uses for things that maintain a particularized connection to the person. While other uses may be potentially problematic, they are not problematic for the deontological reasons that separability identifies.

Consider some uses that are seemingly separable from the person whose image is used. We can imagine a study using deepfakes to see how children respond to falsified facial images. Alternatively, using a collection of different facial images to test the limits of deepfake technology is seemingly separable as well. With these possible uses, the use does not rely on the connection that a specific person has to their image. A different person's image could be substituted and the use itself would be unchanged. Put differently, the use does not depend on the connection that a *specific* person has to their image—it merely depends on using images of people's faces. It is worth mentioning that we may have significant social reasons to reject any of these uses, but these rationales are different than grounding our criticisms on the potential inseparability of these uses.

L. REV. 346, 346 (2014). The use of deepfake technology to create revenge pornography is particularly morally repugnant. While the moral underpinnings of separability partially explain the unique moral wrong of using this technology, it appears somewhat incomplete. For instance, it is open to debate whether we have the same moral intuitions about deepfake pornography that depicts public figures who benefit from a variety of privileges and status. To some extent, then, part of the moral wrong of deepfake revenge pornography is that it is used against marginalized groups—often women or people of color—and this partially contributes to its unique moral repugnance.

214. See Matt Burgess, *Porn Sites Still Won't Take Down Nonconsensual Deepfakes*, WIRED (Aug. 30, 2020, 9:00 AM), <https://www.wired.com/story/porn-sites-still-wont-take-down-non-consensual-deepfakes/> [<https://perma.cc/9NNF-YG2B>].

215. See *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 444 (Cal. 1953) (“There can be no privacy in that which is already public.” (quoting *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931))).

216. *Id.*

217. See *supra* Section III.A.3.a.

* * * * *

Separability provides a normative foundation that helps resolve several puzzles in property law. Moreover, focusing on separability creates a regime that allows purchasers of contested property to use the thing in ways that maximize its value. At the same time, however, separability locates the specific interests that people have in virtue of their connection to the thing. Thus, separability allows purchasers to use things in ways they deem fit but creates an important limitation that protects people's deontological interests in the thing.

B. *Information Law (Data)*

This section applies separability to longstanding debates within information law, particularly the regulation of data. In doing so, this section outlines how separability offers a framework for assessing the scope and content of use restrictions over personal information. Use restrictions based on separability track important deontological commitments. In particular, inseparable uses of personal data potentially overlook the dignity of the individual and further risk treating the individual as merely a means to an end.

Additionally, this section uses separability to generate insights about the distinction between personal data and de-identified data.²¹⁸ In particular, this discussion applies separability to help demarcate the scope of personal data in situations where data contains a semantic link to a small number of people—but not to a single person. Moreover, use-based separability offers potential insights for concerns over the re-identification of anonymized data. Specifically, separability provides a system for attaching use restrictions to re-identified data, while providing potentially fewer restrictions to uses of de-identified data.

Separability provides a normative foundation for delineating the scope and content of use restrictions over personal data. To start, separability tracks values that often shape our collective policy commitments. More specifically, uses of personal data that are inseparable risk offending an individual's dignity interests.²¹⁹ Stated in Kantian terms, inseparable uses fail to fully recognize the inherent worth of the individual by using the person as merely a means to an end.²²⁰

Use restrictions are necessary for governing personal data because, unlike paradigmatic commodities, personal data retains a connection to specific people that survives transfer. As such, personal data fails to fit neatly into the standard

218. See generally SIMSON L. GARFINKEL, NAT'L INST. OF STANDARDS & TECH., DE-IDENTIFICATION OF PERSONAL INFORMATION (2015), <https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf> [<https://perma.cc/F4GY-XWC5>] (giving "an overview of de-identification issues and terminology" as well as discussing "significant publications to date involving de-identification and re-identification").

219. See *supra* notes 34–39 and accompanying text.

220. See *supra* notes 43–47 and accompanying text.

property paradigm that is reluctant to assess downstream uses. This fact is not lost on several privacy scholars. For instance, Lauren Scholz notes that an important feature of data is that, unlike typical commodities, it is not fungible because it is about particular people or describes their behavior.²²¹ Similarly, Julie Cohen balks at the idea that property concepts apply equally well to cars and shoes as they do to personal data because personal data describes personality.²²² However, privacy scholars have failed to fully craft privacy regulations that account for the uniqueness of personal data and the continuing connection that links people with their personal data.

We can resolve this theoretical oversight by building a theory of use restrictions around separability. In crafting these use restrictions, the central points of analysis are considerations about the connection between the information and data subject as well as how the information is used.

1. No Connection (De-Identified Data)

The first point of analysis for crafting use restrictions for information based on separability is whether the information retains a connection to a person. Many privacy statutes already explicitly recognize the connection between a person and information, and privacy statutes often distinguish between personal data (which contains a semantic connection to a person) and de-identified data (which does not).²²³ Moreover, the collection or misuse of personal data, rather than de-identified data, is a necessary condition for a privacy violation under current American privacy law.²²⁴

Although some scholars have recommended abandoning the distinction between personal data and de-identified data, use-based separability confirms the significance of this distinction.²²⁵ De-identified data fails to meet the first threshold condition for inseparability; that is, de-identified data does not have a continuing connection to a person and, by extension, cannot lead to particularized effects. Put differently, uses of de-identified data are necessarily

221. Lauren Henry Scholz, *Big Data Is Not Big Oil: The Role of Analogy in the Law of New Technologies*, 86 TENN. L. REV. 863, 885 (2019).

222. Cohen, *supra* note 5, at 1378 (“Within certain sectors of the privacy community, there is a deep-seated resistance to property talk. This reaction is at once visceral and deeply principled. On the one hand, the understanding of ownership that applies to, say, cars or shoes just seems a crabbed and barren way of measuring the importance of information that describes or reveals personality.”).

223. Schwartz & Solove, *supra* note 15, at 1831–32 (detailing statutes that distinguish between personal data and nonpersonal data).

224. *Id.* at 1827.

225. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1742–43 (2010) (recommending that privacy law jettison the concept of personal data as protective of privacy because of the increasing possibility for re-identification).

separable.²²⁶ As with cars or other paradigmatic commodities that do not retain a connection to a person, some uses of de-identified data might affect a specific individual.²²⁷ However, these effects are not a consequence of any particular connection that a person has to de-identified data. Even in cases where de-identified data leads to effects on individuals, these effects are not a byproduct of the connection between the person and thing.

Moreover, use restrictions are a poor fit for uses of de-identified data because individuals do not have an interest in the use of this information in virtue of their connection to it. Additionally, potential misuses of de-identified data are harder to diagnose *ex ante*, so use restrictions are likely to be less effective than general obligations, such as the duties imposed by tort law. Again, that de-identified data is necessarily separable does not mean that all regulation is normatively undesirable or that people do not have any legitimate claim to contest uses of de-identified data. This claim is merely that de-identified data—as well as other things that do not have a continuing connection to a person—are ill-suited for use restrictions founded on inseparability.

2. Connection Without Particularized Effect (Personal Data)

Unlike de-identified data, personal data retains a semantic connection linking information with a person. However, there is some inherent fuzziness regarding the boundaries of personal data discussed in the next section. In particular, some information retains a connection to a small number of people, rather than a single individual. This ambiguity has proven to be a stumbling block for establishing consensus over the conceptual boundaries of personal data.²²⁸ Putting these concerns aside for a moment, even when information contains a link to several people, a semantic link between a person and the information still exists.

Personal data overcomes the initial threshold condition for inseparability because it retains a connection to particular individuals, and this connection can

226. See generally Yianni Lagos & Jules Polonetsky, *Public vs. Nonpublic Data: The Benefits of Administrative Controls*, 66 STAN. L. REV. ONLINE 103, 104–05 (2013) (describing de-identification and techniques to create de-identified data).

227. For example, policing algorithms could be built on entirely de-identified data. Perhaps these tools might identify the wrong person or area as high-risk, leading to a harmful interaction with the police. In such a case, the use of de-identified data may cause physical or personal harm.

228. This lack of clarity over the boundaries of personal data has created ambiguities about whether some types of information, such as IP addresses, meet the threshold conditions for personal data. In the United States, for example, a number of cable companies have successfully argued that IP addresses are not personal data. See *Klimas v. Comcast Cable Commc'ns, Inc.*, 465 F.3d 271, 276 n.2 (6th Cir. 2006); *Johnson v. Microsoft Corp.*, No. C06-0900RAJ, 2009 WL 1794400, at *4 (W.D. Wash. June 23, 2009); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *13 n.10 (C.D. Cal. May 29, 2007). In Europe, IP addresses are almost universally considered personal data. See Frederik Zuiderveen Borgesius, *The Breyer Case of the Court of Justice of the European Union: IP Addresses and the Personal Data Definition*, 3 EUR. DATA PROT. L. REV. 130, 130 (2017).

be leveraged to create particularized effects. As a result, some uses of personal data are potentially inseparable.

However, not all uses of personal data necessarily leverage this connection to affect the person and, therefore, are separable. Uses of personal data for research purposes are commonly separable from specific people. For example, smart city initiatives often use personal data in order to improve public transit.²²⁹ This often requires examining personal data to create new public transportation routes or increase the level of service for specific areas.²³⁰ In doing so, these initiatives frequently use personal data that is collected through Smart Card technology that tracks when and where people use public transportation.²³¹

Nonetheless, these uses are separable from particular people. The use does not create effects on particular people in virtue of their connection to the data. If anything, the effects of transportation changes may affect people individually—through changed commute times or other service changes—but this is hardly a result of any particular person’s data.²³² Uses of personal data that do not lead to particularized effects do not raise the specter of dignity violations that undergird the need for use restrictions. As a result, people have a weaker interest in controlling these uses of personal data.

The General Data Protection Regulation (“GDPR”) allows researchers to use and process personal data for scientific purposes without the consent of the data subject.²³³ Importantly, the GDPR singles out research as an exception to the general requirement that using personal data requires the consent of the data subject.²³⁴ While the GDPR does not mention separability as the normative justification for this exception, an examination of separable uses would reach this result.

Moreover, the GDPR is careful to prevent personal data obtained for research purposes from being used in ways that are inseparable.²³⁵ Again, the

229. Shane Hickey, *How GPS and Smart Card Data Is Used To Reduce City Transport Congestion*, *GUARDIAN* (Dec. 7, 2014, 8:47 AM), <https://www.theguardian.com/business/2014/dec/07/gps-smart-card-open-data-used-reduce-transport-congestion> [<https://perma.cc/A2ZZ-ZBUX>]; see also Christina Iliopoulou & Konstantinos Kepaptsoglou, *Combining ITS and Optimization in Public Transportation Planning: State of the Art and Future Research Paths*, 11 *EUR. TRANSP. RSCH. REV.* 27, 27 (2019), <https://link.springer.com/article/10.1186/s12544-019-0365-5> [<https://perma.cc/UDT2-HRN3>].

230. See Hickey, *supra* note 229; Iliopoulou & Kepaptsoglou, *supra* note 229, at 27.

231. See Hickey, *supra* note 229.

232. Alternatively, the effects of certain uses could be limited by an analysis of foreseeability akin to scope of liability (proximate cause) in tort law. See *RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM* § 29 (AM. L. INST. 2010). Of course, any changes in the transportation system are likely to have effects on particular people, but these effects are insufficiently related to the processing of a specific person’s information.

233. GDPR, *supra* note 1, art. 89(1).

234. *Id.*

235. See *id.* at Recital 162.

GDPR does not mention separability, but the exemption for processing data for research is limited in that the data cannot be used “in support of measures or decisions regarding any particular [individual].”²³⁶ While the next section further clarifies the role of inseparability in developing use restrictions over data, the GDPR carves out inseparable uses from its research exemption for personal data.²³⁷ However, rather than appealing to inseparability, the GDPR instead frames this use as “measures or decisions” regarding specific people.²³⁸

While the GDPR limits individual control over personal data for research purposes, it follows control theories of privacy that largely view personal data as the property right of the data subject and allow individuals to control almost all secondary uses of their personal data.²³⁹ In addition, within the United States, this model of privacy has found many ardent supporters. For instance, the Fair Information Practice Principles (“FIPPs”) require the consent of the data subject before personal data can be transferred or used for a purpose for which it was not originally collected.²⁴⁰

In this same vein, Paul Schwartz suggests a model for data governance where the data subject would retain the right to block secondary transfers or uses of personal data.²⁴¹ Schwartz’s proposal does not assess the potential effects of the use on the data subject but instead proposes that all secondary uses require the consent of the person to whom the data refers.²⁴² Likewise, Jerry Kang and Benedikt Buchner argue that a control model coupled with inalienability provisions offers a possible path forward for information privacy legislation.²⁴³

By contrast to these previous ideas, a model of data governance founded on separability would focus use restriction on uses that are inseparable rather than creating a blanket consent regime for nearly all secondary uses. At bottom, use restrictions based on separability track closely to the interests that a data subject has in their personal data while also allowing data controllers to use data in socially useful (and separable) ways. To that end, separability provides a mechanism for determining when a data subject should be able to control uses of their information and when they should have weaker claims for control.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* art. 5(1) (describing purpose limitations on processing personal data—that it may only be processed in accordance with the purpose for which it was initially collected).

240. See Rotenberg, *supra* note 17, at 14; HEW REPORT, *supra* note 2, at 41.

241. Schwartz, *supra* note 4, at 2098 (describing a model of data inalienability that prevents unwanted secondary uses of personal data).

242. *Id.*

243. Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229, 251 (2004).

3. Connection with Particularized Effect (Personal Data)

Use restrictions over personal data should focus on constraining uses that are inseparable. Again, inseparable uses leverage the connection that a person has to their data and bring about effects on the person based on that connection. Put differently, an inseparable use creates effects on a person by virtue of the fact that the thing used is connected to them or about them in some way.

Consider again the example from the previous discussion about Smart Card technology and traffic optimization.²⁴⁴ While personal data collected by this technology can be used in ways that are separable, it can also be used in ways that are inseparable. Rather than using personal data to analyze systemic patterns in traffic flow, personal data could be used to identify individuals who may have committed a crime based on their location data or to identify individuals that potentially evaded paying the fare. Use of personal data for these purposes targets specific individuals based on their information and creates effects on them because of the content of their personal data.

However, the use of Smart Card technology for inseparable uses also captures another important point—just because use of personal data is potentially inseparable does not mean that it should never be used to create particularized effects. Rather, inseparability merely locates the specific interests that an individual retains over uses of a thing that is connected to them. There may be cases where public safety or other concerns outweigh the interest that a particular person has in the use of their personal information; striking these bargains is inherently a process of political and social negotiation. Nevertheless, it is important to recognize that a person still has interests in uses of their personal data after it is transferred or shared with a third party.

Several other uses of personal data within the information economy bring about particularized effects on the data subject and are inseparable. Targeting, for example, risks inseparability in most cases. Targeting is the practice of delivering messages to a specific population of people.²⁴⁵ Moreover, this practice uses personal data—often behavioral data, such as browser history—to create individualized profiles that advertisers use to direct messages at specific groups of people.²⁴⁶ Here, the messages that a person receives, and the corresponding effects on them, are a product of using their personal data to predict their interests.

244. Hickey, *supra* note 229.

245. Leslie K. John, Tami Kim & Kate, *Ads That Don't Overstep*, HARV. BUS. REV., Jan.–Feb. 2018, at 62, 64, 66, <https://hbr.org/2018/01/ads-that-dont-overstep> [<https://perma.cc/J4UV-LJUM>] (describing ad targeting practices and ways to mitigate consumer backlash to such practices).

246. *Id.* at 62.

Importantly, targeting is not limited to advertising.²⁴⁷ Content personalization is another form of targeting worth mentioning. For instance, Netflix's recommendation algorithm crunches users' data about their activity on the platform to predict their preferences.²⁴⁸ Armed with these predictions, Netflix recommends specific shows or movies to users in an attempt to match their preferences.²⁴⁹

At bottom, several common uses of personal data are inseparable. In particular, when personal data is used to single out specific individuals for some action—such as marketing or other decisions including police scrutiny and creditworthiness—these uses potentially violate basic deontological values. More specifically, these practices potentially use the person as merely a means to an end and undermine the person's inherent dignity. As a result, information policy should provide people with legal mechanisms of control over these uses.

* * * * *

Separability identifies the specific interests that individuals have in uses of information. First, uses of de-identified data do not implicate the values that separability protects. This is because the connection between the person and the information is severed during the de-identification process.²⁵⁰ Second, some uses of personal data are separable from the data subject. Here, a person retains a connection to the data, but the use does not affect them by virtue of that connection. Again, individuals have weaker claims to contest these uses. Finally, some uses of personal information appropriate the personal connection inherent in the data and affect the individual. These uses are inseparable and potentially violate deontological principles, and therefore, individuals should have legal mechanisms of control over these uses.

CONCLUSION

This Article grounds the debate over downstream restrictions of personal data and other contested commodities in philosophical first principles. However, there is still difficult—though ultimately necessary—work required to translate inseparability as a conceptual and normative framework into actual legislation. Put another way, although a focus on inseparable uses identifies a person's interest in uses of things that they no longer control, this does not lead inexorably to specific regulatory choices.

247. See, e.g., *Personalization & Search*, NETFLIX RSCH., <https://research.netflix.com/business-area/personalization-and-search> [<https://perma.cc/F5KW-2N9Z>] (referring to targeting as personalization for an online streaming service).

248. *Id.*

249. *Id.*

250. Granted, individuals may not have a strong foundation to contest uses of de-identified data because it is connected to them, but some uses may still be contested because of broader social concerns.

There are a few guideposts that could assist with this translational work. First, although inseparability does not turn on whether the secondary users intended to affect the person who is connected to the thing, intent could still provide a legislative focal point to craft legal rules protecting inseparability and, by extension, the deontological interests that inseparability serves. Potential legislation could prioritize extending control to people where an individual uses a thing downstream in a way that they intend to affect the person. Of course, proving intent is sometimes challenging, but other bodies of law routinely employ intent to determine the existence of a legal wrong.²⁵¹

Second, potential legislation could attempt to distinguish between the different types of connection that persist between an individual and a thing. Here, regulators might prioritize specific connections that are more significant and deserving of legal protection. For instance, is the connection that a person retains to their genetic information more significant than the connection that links a painter to her finished artwork? The use-based account of separability sketched in this Article largely sidesteps considerations over the strength of connections because separability merely requires that a connection persist after transfer. A similar strategy is implicitly employed in current privacy regulation where legislation singles out particularly “sensitive” information for protection.²⁵² Ultimately, decisions over which connections justify greater control over uses that appropriate that connection will be contested, yet it still remains a promising avenue to implement considerations of separability.

This Article provides a philosophical grounding to the debate regarding limits of control over personal information and other unique things that retain a connection to specific people after transfer. A renewed focus on separability affords clear opportunities for conceptual and normative clarity across several distinct areas of law, yet the difficult process of translating theory to practice remains. However, the benefits of implementing separability as a normative guidepost greatly exceed the costs of this work. In other words, the painting is “well worth the oils.”²⁵³

251. See, e.g., 20 U.S.C. § 1097(d) (requiring that a defendant “inten[d] to defraud the United States” in order to commit obstruction of justice); see also *Bates v. United States*, 522 U.S. 23, 31–33 (1997) (explaining how the prosecution must prove that a defendant has a specific intent to defraud the United States in order to convict them under 1097(d)); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04(A)(1) (8th ed. 2018) (“[T]he prosecution must prove that the defendant intentionally committed the social harm that constitutes the *actus reus* of the offense.”).

252. Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1130 (2015).

253. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1128 (1972).