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MEASURE OF DAMAGES FOR VIOLATION OF PROPERTY RULES: BREACH OF CONFIDENTIALITY

JAY WEISER†

“Three may keep a secret if two are dead.”

Benjamin Franklin.¹

“Don’t go telling my business in the street.”

African-American saying.

“You have zero privacy now. Get over it!”

Sun Microsystems CEO Scott McNealy.²

A. INTRODUCTION‡

In the Information Age, we swim in a sea of data. The American economy is a service economy that rests on the transfer of information, even in one-on-

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1. Benjamin Franklin, *Poor Richard's Almanac* (July 1735), in John Bartlett, *Bartlett's Familiar Quotations* 309:15 (Justin Kaplan ed, Little Brown, 16th ed 1992).

2. Richard Morochove, *Sun Microsystems Lets Jini Out Of Bottle*, Toronto Star, Feb 4, 1999.

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one transactions, as between a lawyer and client or a doctor and patient. Massive databases contain information on people's health, finances and purchases. The information has a duality: it is generated by (or from) one person or entity and used by another. This article uses property and liability rule theory to consider what should happen when information is misused, concluding that property rule damages should be adjusted to reflect the investment incentives of the parties. It examines the elements of liability and property rules, looking at the effects of judicial error, and concludes that property rules must be tailored to the gains of individual defendants. The article may help provide a more general model for determining damages for takings of property interests.

The article applies the theory to case and federal statutory law in Part F, with several findings. (1) Doctrinal analysis for breach of confidentiality damages is wildly inconsistent and needs a unified theory specifying the elements of damages. (2) Punitive damages are an empty doctrinal category that should be replaced by an analysis of the specific interests protected by property rules. (3) There is probably underdeterrence on average because (a) liability rules are often applied where property rules should be; (b) proximate cause damages for items such as emotional distress are often excluded; and (c) not all valid cases are successfully prosecuted. (4) Damages for large-scale takings of low-value data, as when databases are misused, pose difficulties of assessment and potentially large expenditures of judicial resources. To avoid overdeterrence, modest per name damages (which will be large in aggregate) may be appropriate.

A detailed review of this article's argument may be helpful. I will refer to protected confidential information as "Data" and a taking of Data as a "Taking." (Different tenses of the verb "to take" will also be capitalized as appropriate.) The person or entity that is the original source of the Data is the "Source." A person or entity that has a legitimate right to the Source's Data and then wrongfully uses or further discloses it is the "Gatherer." And a third party who wrongfully Takes Data from the Source, or receives it from the Gatherer without a direct relationship with the Source and without any right to do so, is the "Third Party."³

Part B summarizes the literature discussing when confidentiality should be protected. Part C begins considering the rarely addressed question of *how*, using the property and liability rule analysis of Louis Kaplow and Steven Shavell⁴ to explore which damages rules will best protect confidentiality. If damages are too low, individuals will inefficiently suffer harmful externalities from having their personal information disclosed. If they are too high, information will not flow to the most efficient user. A Taking of Data does not fit neatly into Kaplow and

3. In the interest of consistency, this terminology will also be used in discussing the academic literature, even though the authors themselves did not employ it.

4. Louis Kaplow and Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 Harv L Rev 713, 733 (1996).

Shavell's categories. Following Carol Rose, close cases are analyzed by considering the effect of the Taking on investment incentives,⁵ which are often split between two parties, but on balance, point to property rule protection for the Source.

Part D examines the content of liability and property rules: the elements of damages when confidentiality is breached. A liability rule for a Taking will compensate the Source for losses, including restitution of the Source's dollar value for the Data. It also should include proximate cause damages such as loss of existing transactions (e.g. job loss), emotional distress, loss of future transactions (i.e. damage to reputation), and added costs in screening unwanted transactions (the hassle factor). The Gatherer should bear these losses as the party that can more cheaply take precaution.

A property rule protected by damages provides damages at some kicker amount above a liability rule. If Gatherers value the Data highly enough, they will treat a low property rule kicker as an option and not be deterred from a Taking. Given judicial error, however, an excessive kicker will overdeter low-valuing Gatherers. In order to provide appropriate deterrence for high- and low-valuing Gatherers, a property rule should be tailored by including several elements: (a) disgorgement of the Gatherer's profits, less any overlap between disgorgement and liability rule restitution damages; (b) disgorgement of the Gatherer's illicit gain (such as malice), if any; and (c) fencing cost damages to compensate for the externalities imposed on the Source and society if property interests are destabilized by Takings. While fencing costs have received attention in the property/liability rule and privacy literatures, there has been little attention paid to appropriate damages for them either there or in the punitive damages literature, so this is a potentially significant finding.

Damages should be adjusted based on the level of intent, reserving higher damages for a Taking without a strong, reasonable belief in the Gatherer's right to the Data, and where the Taking does not create a positive externality. This type of analysis—specifying the interests protected by property rules—could clear up some of the doctrinal confusion surrounding punitive damages.

Finally, when applying liability and property rules, there must be a correcting factor to compensate for assessment-error (error in correctly determining damages), enforcement-error (error in correctly determining liability) and enforcement costs (which act as a tax on litigation, increasing damages for Gatherers and screening out smaller claims for Sources). If an adjustment is not made, the result will be overdeterrence or underdeterrence—more likely the latter.

Part E explores how damage rules should vary with the investment incentives in different relationships. Let us start with intentional Takings. In a classic

5. Carol M. Rose, *The Shadow of The Cathedral*, 106 Yale L J 2175 (1997) (demonstrating how tort, contract and property law address different transaction cost and investment problems, including the tension between encouraging investment and preventing strategic bargaining).

fiduciary relationship, such as lawyer-client, the Source relies on the Gatherer to act solely in the Source's behalf, reflecting the societal goal of maximizing the Source's investment in its Data. Thus strong property rule protection is needed, with a high kicker. In an arm's length relationship between Source and Gatherer, as between a bank and borrower, the Gatherer has a right to maximize its use of the Data for some purposes (for example, to evaluate creditworthiness). The strongest property rule protection might overdeter the Gatherer, so a medium property rule is indicated. Where the Gatherer has a full property right in the Data but nonetheless offers the Source some confidentiality protection, as when a website adopts a privacy policy, damages should be lowered in order to encourage the market to provide additional privacy protection. Finally, a Source should receive strong protection from an intentional conversion by a Third Party.

In all relationships, a negligent Taking of Data should receive less protection than an intentional Taking: it is inefficient for the Gatherer to overinvest in precautions. Weak property rule protections should nonetheless generally be available because of the destabilizing effects of a Taking of a property interest. The default rules for Takings should usually be inalienable, given the existence in most cases of a Gatherer information oligopoly with respect to unsophisticated parties. The proposed intent and negligence rules are summarized at Table 3.

To make the discussion more concrete, I will use a hypothetical throughout the article. Tony Toe rents foot fetishist porn videos from Cornbuster, a national video store chain. Tony also patronizes Spikeheels.com, a foot fetishist website, where he visits chat rooms, reads articles and participates in online auctions for used women's shoes. Five years ago, Tony's fetish led him into antisocial behavior: he stole supermodels' shoes and sliced them up with razors, although he was never discovered or prosecuted.⁶ Because of this, he regularly visits a psychologist, Dr. Imelda Pump, to discuss his foot fetishism and keep his antisocial instincts under control, which he has done successfully ever since. Tony is a cashier in the Last Judgment Bookstore, which specializes in fundamentalist religious literature. The owners of Last Judgment regard foot fetishism as an abomination and would fire Tony if they knew of his proclivities. Finally, Redolent Vintage Footwear is a dealer in used celebrity shoes interested in learning about potential customers. Thus, in our hypothetical, Tony would be the Source; Cornbuster, Spikeheels.com and Dr. Pump would be Gatherers; and, if one of the Gatherers were to disclose Tony's proclivities, Last Judgment and

6. This is based on an actual case in which Marla Maples' publicist, Chuck Jones, was accused of stealing and slashing more than 70 of her designer shoes and boots, although after two trials he was ultimately convicted only of breaking into her apartment. Jones admitted to a "sexual relationship" with Maples' footwear. Maples, a model, was at various times the girlfriend, wife and ex-wife of Donald Trump. Barbara Ross and Leo Standora, *Ex-Marla Aide Loses in Retrial*, Daily News (New York), May 6, 1999, at 6; Associated Press, *Jury Convicts Publicist of Footwear Theft*, NY Times, Feb 17, 1994, at B2.

Redolent would be Third Parties.

B. WHY PROTECT CONFIDENTIALITY?

B.1. TRADITIONAL PRO-PRIVACY VIEW

Historically, the exchange of personal information has been viewed through the lens of privacy, treated as a personal interest protected by tort liability. Beginning with Warren and Brandeis,⁷ commentators have contended that privacy is an essential human right, often in flowery and vague language.⁸ This sin-based view of privacy was of doubtful relevance a century ago. It is inadequate for our current world, which is not made up of autonomous individuals lurking behind the veil of privacy, but of inevitable participants in the information marketplace. The participants, however, have misgivings: polls show that most people fear disclosure of personal information.⁹

By the mid-20th century, a series of cases had protected privacy and confidentiality. William Prosser distilled them into a grab bag of four non-congruent sub torts: intrusion, public disclosure of embarrassing private facts, depiction of the subject in a false light, and commercial misappropriation of the plaintiff's identity.¹⁰ By century's end, disorder multiplied as still more theories were added to the mix.¹¹ Despite this incoherence, courts have long recognized duties of confidentiality in certain relationships, as with the lawyer's duty to her client, or the banker's more limited duty to his depositor or borrower.¹² These relation-

7. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv L Rev 193, 196 (1890). ("The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. . .")

8. See, for example, Charles Fried, *Privacy*, 77 Yale L J 475, 477 (1968) (privacy concerns "ends and relations of the most fundamental sort" such as "love, friendship and trust"); Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 Ga L Rev 429, 442 (1978) (privacy is "integrally and inextricably related to the social value of preserving our individuality and the integrity of our inner space or spiritual nature.")

9. "In 1970, 34% of people were 'concerned with threats to their privacy.' In 1978, 47% were 'concerned,' with 31% 'very concerned.' By 1992, the percentage 'concerned' had risen to 79%, with 48% 'very concerned.' And in 1994, 84% were 'concerned' and 51% were 'very concerned.'" Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Georgetown L J 2381, 2405 (1996). In a study of 10,000 Web users by the Graphic, Visualization and Usability Center at the Georgia Institute of Technology, 71% of respondents believed there should be laws to protect privacy on the Internet, while 84% objected to content providers reselling information. Jennifer Lach, *The New Gatekeepers*, American Demographics, June 1999, at 41-42.

10. William L. Prosser, *Privacy*, 48 Cal L Rev 383, 389 (1960).

11. See below at Part F.

12. See L. Richard Fischer, *The Law of Financial Privacy: A Compliance Guide* ¶¶ 1.07[2], 5.04, 7.03, 7.04 (Warren Gorham & Lamont, 2d ed 1991 & Supp 1996); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 Buffalo L Rev 1 (1995); M. P. Thompson, *Breach of Confi-*

ships may be personal or commercial.¹³

B.2. THE PRAGMATIST ASSAULT: COSTS TO GATHERERS AND THIRD PARTIES

Warren and Brandeis's demand for privacy law was not fully embraced by courts, which interpreted narrowly the types of disclosures that would lead to liability. For example, courts have upheld the sale of names on mailing lists,¹⁴ and First Amendment concerns limit liability for disseminating matters of public interest.¹⁵ One commentator has pronounced the privacy tort dead.¹⁶

But the first coherent assault on privacy came from Law and Economics scholars beginning in the 1970s. Richard Posner, Richard Epstein and George Stigler noted that privacy is not an unmixed blessing: the disclosure of Data reduces search costs and provides more accurate views of people,¹⁷ reducing

dence and the Protection of Privacy in English Law, 6 J Media L & Prac 5 (1985); Rolf A. Hanning and Kirk P. Brady, *Extrajudicial Truthful Disclosure of Medical Confidences: A Physician's Civil Liability*, 44 Denv L J 463 (1967); Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U Pa L Rev 2385 (1992); Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U Cin L Rev 103, 109 (1967); , Note, *Breach of Confidence: An Emerging Tort*, 82 Colum L Rev 1426 (1982) (all arguing for a breach of confidentiality tort).

13. Intellectual property law has several subfields that address Takings of commercially valuable Data—trade secret, copyright, patent and trademark. For a discussion of intellectual property damages, see Roger D. Blair and Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 Wm & Mary L Rev 1585 (1998). In contrast, this article focuses on Takings of Data that are generally not protected by these intellectual property subfields and that often result in noneconomic losses, such as emotional distress and loss of reputation.

14. *Dwyer v American Express Co.*, 273 Ill App 3d 742, 652 NE2d 1351 (1995); *Shibley v Time, Inc.*, 45 Ohio App 2d 69, 341 NE2d 337 (1975); *US News & World Report, Inc. v Avrami*, 1996 WL 1065557 (Va Cir Ct June 13, 1996).

15. *Florida Star v BJF*, 491 US 524 (1989) (publication of truthful information about rape victim in news story); *Smith v Daily Mail Pub. Co.*, 443 US 97, (1979) (publication of truthful information about juvenile offender in news story). See also *US West v FCC*, 182 F3d 1224 (10th Cir 1999) (First Amendment violated by regulations that required consumer permission before telecommunications carrier could use consumer information for marketing). But see *Dun & Bradstreet, Inc. v Greenmoss Builders*, 472 US 749 (1985) (credit report not a matter of public interest requiring a showing of "actual malice" under the First Amendment to be actionable for defamation); *Trans Union Corp. v FTC*, 245 F3d 809 (DC Cir 2001) (no First Amendment violation when FTC seeks to regulate credit reporting agency's sale of credit information). But see *Shulman v Group W Productions, Inc.*, 18 Cal 4th 200, 955 P2d 469 (1998) (TV crew records rescue of car-crash victim; invasion of privacy claim is trumped by First Amendment, but intrusion claim can proceed); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U L Rev 1 (1986) (attacks absolutist view of free speech; must measure value against danger of erroneous suppression). See generally Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L Rev 261 (1998); Gilles, 43 Buff L Rev (cited in note 12); Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 San Diego L Rev 1153 (1997); Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and The Bill of Rights*, 33 Wm & Mary L Rev 665 (1992).

16. Diane L. Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L Rev 291 (1983).

17. Richard A. Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J Legal Stud 665, 668 (1980); Richard A. Posner, *Privacy*, in 3 *The New Palgrave Dictionary of Economics and the Law* 103 (1998) ("Posner, Privacy Palgrave"); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 Buff L Rev 1 (1979); Richard A. Posner, *The Right of Privacy*, 12 Ga L Rev 393, 394–95 (1978); George J. Stigler, *An*

fraud and allowing merchants to find customers. In the health care area, massive databases allow insurers to assemble statistics on best practices.¹⁸ Credit card companies, armed with payment histories, can more efficiently price their products. As Stigler pointed out, if Data is not used to make separations, there is a mixing of high risk and low risk customers (a pooling equilibrium in game theory terms), meaning that the low risk customers will pay higher prices to offset the losses from the high risk customers.¹⁹ This may result in adverse selection, as high risk buyers flock to products and services that they don't have to pay the full cost of consuming and low risk buyers, unwilling to bear the increased cost, exit the market. Critics of this view have noted that if a separation takes place, high risk customers will pay more, but if the prices are prohibitive, inefficiency may result as they are effectively excluded from the market. The resulting social loss from this exclusion may be greater than the gains from efficient pricing.²⁰ This is exactly the fear of privacy advocates, who worry about employment discrimination due to fear of higher health insurance costs, which may even not be reasonable.²¹

Even when a cash cost is not involved, argues Posner, the demand for privacy generally reflects the Source's desire to keep others from finding out the truth. In his analysis, privacy is not a final good, something desirable in itself, but instead an intermediate good which people desire for insidious ends.²² A market in reputation enables people to determine whom they would like to deal with, whether in business transactions, friendship, or marriage. Posner argues that privacy, by allowing the concealment of disreputable facts, permits Sources to hide the true cost of dealing with them. In our hypothetical, if Last Judgment found out that Tony had stolen and slashed supermodels' shoes, it would justi-

Introduction to Privacy in Economics and Politics, 9 J Legal Stud 623, 633–40 (1980); Gertrud M. Fremling and Richard A. Posner, Market Signaling of Personal Characteristics (Chi John M Olin L & Econ Working Paper, 2d No 87, Nov 1999) available at <<http://www.law.uchicago.edu/Lawecon/index.html>> (visited May 13, 2002).

18. Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L Rev 451, 463–67 (1995); Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 Tex L Rev 1, 12, 16–17 (1997); Paul M. Schwartz, *The Protection of Privacy in Health Care Reform*, 48 Vand L Rev 295 (1995).

19. Stigler, 9 J Legal Stud at 633–40 (cited in note 17).

20. Douglas G. Baird et al, *Game Theory and the Law* 122–58 (Harvard 1994). See also Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 Berkeley J Emp & Lab L 314 (2000) (discrimination against the disabled reflects market failure; Americans with Disabilities Act is needed to correct this).

21. Schwartz, 76 Tex L Rev at 18–22 (cited in note 18). Epstein replies that if there are extra costs that individuals with undesirable characteristics should not bear, the solution is a government subsidy to the losers (as for increased health insurance costs due to genetic conditions) rather than restricting the flow of Data. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 480–94 (Harvard 1992); Richard A. Epstein, *Deconstructing Privacy And Putting It Back Together Again* (Chi John M Olin L & Econ Working Paper, 2d No 75, May 1999), available at <<http://www.law.uchicago.edu/Lawecon/index.html>> (visited May 14, 2002).

22. Posner, 12 Ga L Rev (cited in note 17). But see Bloustein, 12 Ga L Rev at 445 (cited in note 8); Fried, 77 Yale L J (cited in note 8) (both contending that privacy is a final good).

fably conclude that there was an above-average probability that he would be dishonest and dangerous in the future.

If we change our hypothetical so that Tony did not have criminal behavior in his past, and a Third Party learned of his foot fetishism, there would be no reason to associate Tony with a higher risk of dishonesty or danger. However, people might be less willing to deal with Tony if they learned of his foot fetishism because they would think he is weird. While they would not know anything about the risks that foot fetishism might pose, they also would not want to invest the time to find out that it is irrelevant to any dealings they might have with Tony.²³ To this Posner replies that people should generally discount unflattering information to the appropriate extent,²⁴ although this argument is less than satisfying if they have a taste for discrimination.²⁵ In Tony's case, the information would get him fired from Last Judgment even if he were an otherwise competent employee.

B.3. COSTS TO SOURCE: EXPERIMENTATION AND FENCING COSTS

Posner's argument has been attacked on economic grounds. Protecting against disclosure, Richard Murphy says, allows for the freedom to experiment with different behaviors, without which innovation would be suppressed.²⁶ In our hypothetical, if Tony's privacy is protected he will be able to master his anti-social tendencies without consequences from Last Judgment. That sort of privacy has also allowed experimentation with new social arrangements, such as the availability of abortion; new living arrangements by unmarried heterosexuals, lesbians and gays; pursuit of religious alternatives; and political movements. It also aids the development of new business ideas.

23. Murphy, 84 Georgetown L J at 2400-01 (cited in note 9).

24. Posner, 12 Ga L Rev at 394-95 (cited in note 17).

25. If people have a taste for discrimination, see Gary S. Becker, *The Economics of Discrimination* 39-45 (Chicago, 2d ed 1971), they will under-discount the information. This might produce a deadweight loss, as people refuse to associate with Tony, even though his foot fetishism would not affect their activities. Worse, if their taste for discrimination is high enough (if their discount rate is negative?), they might go beyond a refusal to enter into transactions with the Source and instead enter into a different kind of transaction, harassing the Source. This happened in *Multimedia WMAZ, Inc. v Kubach*, 212 Ga App 707, 443 SE2d 491 (1994), where an AIDS patient was harassed after his identity was disclosed. Becker argues that those who engage in a taste for discrimination are ultimately punished by the market, as others without the taste will flock to enter into transactions with the victims of discrimination on advantageous terms, but there is little comfort to be drawn from the Jim Crow South and Nazi Germany, where the taste for discrimination was indulged (and cartelized by social norms and legal sanctions) notwithstanding its devastating human and economic impact. See also Stein, 21 Berkeley J Emp & Lab L (cited in note 20) (Americans with Disabilities Act).

26. Murphy, 84 Georgetown L J (cited in note 9). See also Fried, 77 Yale L J at 483 (cited in note 8). Posner has acknowledged that protecting some commercial information, as through trade secret law, may be necessary to spur innovation. He does not see a similar benefit from the protection of noncommercial information. Posner, *Privacy Palgrave* at 105 (cited in note 17); Posner, 28 Buff L Rev at 10 (cited in note 17).

In addition, the disclosure of Data can create externalities. Not every Third Party is Posner's paragon of market efficiency, solely interested in driving down costs. Some have less noble motives, such as the deranged fan who stalked and murdered TV actress Rebecca Schaeffer after getting her address from California driver's license records.²⁷

Where disclosure of Data is permitted, a Source wishing to conceal it will be forced to incur socially wasteful fencing costs²⁸ in order to protect it. That may mean using disguises to maintain anonymity (Tony uses a phony screen name in Spikeheels.com's m4clogs chatroom) or negotiating confidentiality pledges with people before dealing with them.²⁹ Or the Source may simply refuse to enter into otherwise efficient market transactions because the cost of the transaction may exceed the benefit if confidentiality is breached, a concern magnified if the Source is risk averse³⁰ or places a high subjective value on the confidentiality of the Data.³¹

In addition, one-sided disclosure of Data has distributional consequences. As the African-American epigraph to this article tells us, information has strategic value, and people don't ordinarily want to give it up without getting something in return. The Source whose Data has been Taken is in a poor position to extract any of the gains from trade from the Gatherer because the Gatherer has information on the Source's bottom line. If Spikeheels.com sells Tony's name and preferences to Redolent, Redolent can raise the price it charges Tony for used Britney Spears slippers, since it will know that Tony has a high subjective value for sweaty celebrity shoes.³²

A Taking of Data has a related distributional consequence, in that it leaves

27. Jeffrey Rothfeder, *Privacy for Sale* 17 (Simon & Schuster 1992). This was not a breach of confidentiality, since at that point, the State of California had no legal obligation to keep the records secret. Schaeffer's death led to the passage of the federal Driver's Privacy Protection Act of 1994, 18 USCA § 2721 (West Supp 2000).

28. Murphy, 84 Georgetown L J at 2400-02 (cited in note 9). The Source's fencing expenditures, Murphy argues, will result in increased offensive expenditures incurred by Gatherers and Third Parties who seek the Data. In addition, he suggests, Sources will overinvest in their reputations, which can be viewed as another form of fencing cost—not one directly geared toward concealing the Data, but one that minimizes the impact if the Data is Taken.

29. I routinely put down "Do not use for telemarketing" when I give my phone number to a website.

30. On risk aversion, see generally Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 Am L & Econ Rev 116, 131-35 (1999) (referred to as loss aversion). In addition to risk aversion, the Source may realistically fear that a court determination of damages would not fully compensate for all losses. See the text accompanying notes 107-109, and Part F.

31. This could be an example of an endowment effect. Tony, knowing that the Data is confidential, is reluctant to part with the confidentiality protection even when it would be efficient to do so. Christine Jolls et al, *A Behavioral Approach to Law and Economics*, 50 Stan L Rev 1471, 1483-84 (1998), citing Daniel Kahneman et al, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J Pol Econ 1325 (1990). See also Murphy, 84 Georgetown L J at 2397-99 (cited in note 9) (satisfaction of private preferences).

32. Redolent, however, can find Tony more cheaply than if it had not obtained the Data, which may permit it to offer a lower price.

the Source unable to use the disclosure of the Data as a screen to determine whether a potential transaction is worthwhile. In a typical negotiation, Data is not revealed except in exchange for the other party's information. If the other party's information isn't given or is unsatisfactory, this signals that the transaction is unlikely to be of value and should not proceed.³³ If Last Judgment is unable to buy the Data on Tony's chatroom visits from Spikeheels.com, it must instead negotiate with him for the information ("I'll bet you use that box cutter to slash lots more than book crates.") and Tony can determine whether to proceed with Last Judgment or instead seek other, more valuable transactions (perhaps by finding another job) without revealing his private information. In contrast, if Last Judgment can Take the Data, it can simply fire Tony.³⁴

Takings of Data may also result in foregone transactions as a result of fairness norms.³⁵ Behavioral studies have shown that transactions that violate fairness norms in apportioning gains from trade will be rejected, even if they add surplus.³⁶ While these studies have focused on money offers, norms also include the way to trade information.³⁷ If the Source is aware of the asymmetrical availability of private information (i.e. if Tony knows that Cornbuster is using his Data against him) and feels that negotiation norms have been breached, he may exit the transaction.³⁸

C. SHOULD A CONFIDENTIALITY INTEREST BE PROTECTED BY A PROPERTY RULE OR A LIABILITY RULE?

Assuming that a Gatherer is liable for a Taking of Data, the Gatherer will be responsible for damages. This section analyzes the literature on property and liability rules to determine the appropriate level of damages for each class of Takings.

33. Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 Va L Rev 385 (1999).

34. As the Navy did when America Online informed it that Master Chief Petty Officer Timothy R. McVeigh (no relation to the Oklahoma City bomber) was the possessor of a gay-oriented screen name. Philip Shenon, *Sailor Victorious in Gay Case of On-Line Privacy*, NY Times, Jun 12, 1998, at A1. McVeigh ultimately obtained a settlement.

35. Kaplow and Shavell suggest that fairness norms may introduce asymmetric information into negotiations, resulting in one party's inability to accurately perceive another's bottom line and causing some transactions to blow up. Kaplow and Shavell, 109 Harv L Rev at 733 (cited in note 4).

36. In mug games, parties will reject a trade that leaves them with an unfairly small portion of the surplus, even if the proposed deal would leave them slightly ahead. Jolls et al, 50 Stan L Rev at 1490-97 (cited in note 31).

37. Johnston, 85 Va L Rev 385 (cited in note 33). See generally James C. Freund, *Smart Negotiating: How to Make Good Deals in the Real World* 130-50 (Fireside 1992) (concession patterns).

38. One colleague of mine will not interact with websites that require the user to accept cookies. However, this type of strategic bargaining is mitigated because most Sources do not know enough about the use of the Data to get upset, Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan L Rev 1193, 1253 nn255-56 (1998), or underassess their risk from sharing it, Jolls et al, 50 Stan L Rev at 1524 (cited in note 31) (people assume that they are less likely than average to suffer bad results).

C.1. IN THE BEGINNING: CALABRESI AND MELAMED ON TRANSACTION COSTS

Guido Calabresi and Douglas Melamed contended in their classic article that the appropriate rule to apply when a right is violated depends on transaction costs: the cost of negotiating a transfer of the right beforehand.³⁹ For low transaction cost cases where the parties can bargain beforehand, such as the sale of real property, they proposed a property rule (which they called Rule 1): if a party Takes another person's rights (for example by trespassing on land), a court, rather than permitting the Taking on payment of compensatory damages, will issue an injunction⁴⁰ or (of more interest for purposes of this article) impose supercompensatory damages, such as punitive damages, so that the violator will never have an incentive to Take. Because of this, Calabresi and Melamed's theory states, the violator is forced to bargain with the property interest holder rather than Take.⁴¹

In contrast, in a high transaction cost setting, there is no possibility of bargaining before the violator Takes, and Calabresi and Melamed would apply a liability rule providing for compensatory damages (Rule 2).⁴² For example, a car

39. Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1972). Property/liability rule theory has generated a large literature in recent years. See Ian Ayres, *Protecting Property with Puts*, 32 Val U L Rev 793 (1998) Ian Ayres and J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 Yale L J 703 (1996); Ian Ayres and Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 Yale L J 235 (1995); Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 Yale L J 1027 (1995); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 Yale L J 2091 (1997); Richard A. Epstein, *Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres*, 32 Val U L Rev 833 (1998); Louis Kaplow and Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 Yale L J 221 (1995); Kaplow and Shavell, *Property Rules*, 109 Harv L Rev 713; James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L Rev 440 (1995); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal L Rev 1293 (1996); Robert P Merges, *Toward a Third Intellectual Property Paradigm: Comments: Of Property Rules, Coase, and Intellectual Property*, 94 Colum L Rev 2655 (1994); Rose, 106 Yale L J (cited in note 6)(also providing the Cliffs Notes version of the sometimes-oblique positions of Calabresi and Melamed, Ayres and Talley, and Kaplow and Shavell).

40. Injunctions are beyond the scope of this article because of their limited use in breach of confidentiality settings: once the Data is taken, an injunction often will not bring it back, since the Gatherer will often retain knowledge or a stray copy of it. An injunction could prevent future breaches, but enforcement will be imperfect due to monitoring problems, and damages will still be needed to compensate the Source for the pre-injunction period. See Blair and Cotter, 39 Wm & Mary L Rev at 1589, text at n18 (cited in note 13); Julian E Barnes, *Unilever Wants P. & G. Placed under Monitor in Spy Case*, NY Times, Sept 1, 2001, at C1 (Procter & Gamble obtains confidential Unilever information from trash bins; even though documents have been returned, Unilever demands monitoring by corporate auditors for three years because Procter & Gamble managers have read and will remember documents; also demands \$20 million payment).

41. Calabresi and Melamed, 85 Harv L Rev at 1115-16 (cited in note 39). They also discuss one other rule that deals with the Source's remedies when the Gatherer or a Third Party uses Data: Rule 4 is an entitlement protected by a liability rule that gives the Gatherer the right to use the Data, but lets the Source stop the Gatherer on payment of damages. Id. Recent literature, see below at note 54, has come up with at least two more variations involving put options, but these are not relevant to this article.

42. Calabresi and Melamed, 85 Harv L Rev at 1106 (cited in note 39); Kaplow and Shavell, 109

driver cannot possibly negotiate in advance with every possible driver with whom she might collide while driving from home to work. Because compensatory damages are available, a Taking will occur only when the value to the violator exceeds that of the victim. In order to avoid paying damages when the violator's value is less than the victim's value, the violator will take precautions up to the amount of expected liability.⁴³ Calabresi and Melamed's Rule 3 is a reverse property rule, giving the Gatherer a property right in the Data. If the Source does not want the Gatherer to use the Data, the Source must negotiate this with the Gatherer. This is, in fact, the rule for most Data today.⁴⁴

C.2. KAPLOW AND SHAVELL'S REFINEMENT: EXTERNALITIES AND POSSESSORY INTERESTS

Louis Kaplow and Steven Shavell, while acknowledging the importance of transaction costs in determining whether bargaining is possible, also distinguish between cases where the Taking creates an externality and cases where the Taking is of a possessory interest. By an externality, Kaplow and Shavell mean cases such as *Boomer v Atlantic Cement Co.*, where a cement plant's pollution damaged homeowners.⁴⁵ By a possessory interest, they refer to the taking of a thing, using the example of a laptop computer. Kaplow and Shavell offer a four-box categorization for liability and property rules:⁴⁶

TABLE 1: SUMMARY OF KAPLOW/SHAVELL ANALYSIS

Type of Entitlement/ State of Bargaining	Externality	Possessory
Impossible	Liability rule superior	Property rule superior
Possible	Neither superior	Property rule superior

Where there is an externality and bargaining is impossible, we are in Calabresi and Melamed's Rule 2 auto accident case: the accident is the externality caused by the driver's travel. Where there is a possessory interest and bar-

Harv L Rev at 724 (cited in note 4).

43. Id. For a discussion of marginal precaution, see Richard A. Posner, *Economic Analysis of Law* 179–83 (Aspen, 5th ed 1998), discussing the Learned Hand rule articulated in *United States v Carroll Towing*, 159 F2d 169, 173 (2d Cir 1947).

44. Calabresi and Melamed, 85 Harv L Rev at 1115–16 (cited in note 39).

45. 26 NY2d 219, 257 NE2d 870, 874–75 (1970).

46. For a summary, see Rose, 106 Yale L J at 2189–91 (cited in note 5) (calling the analysis a “four-square box”). The original discussion is at Kaplow and Shavell, 109 Harv L Rev at 719–23 (cited in note 4) (providing summary).

gaining is impossible, for example if a laptop is negligently taken because the taker mistakes it for his own laptop, a property rule is superior, since the owner of the laptop has lost her possessory interest. It is not efficient to protect against a negligent Taking of a possession by a liability rule, since the owner has investment expectations in the thing, and if the thing does not receive additional protection, the owner will be forced to incur fencing costs to prevent a Taking.⁴⁷ When there is a possessory interest and bargaining is possible, a property rule is again superior. Here we are back at Calabresi and Melamed's Rule 1: it is inefficient to permit someone to steal the laptop from the owner, since that will defeat investment expectations and increase wasteful fencing costs as the owner tries to prevent theft.⁴⁸ Finally, when there is an externality and bargaining is possible, the result is ambiguous.⁴⁹

C.3. TAKINGS WITH MIXED CHARACTERISTICS

When the Taking has aspects of both the taking of a possessory interest and the creation of an externality, Kaplow and Shavell offer several tools to deter-

47. As will be seen, however, high property rule damages for a negligent Taking can create overdeterrance problems for the Gatherer or Third Party. See below at p116. Cf Epstein, 32 Val U L Rev at 845-50 (cited in note 39) (victim of negligent conversion may demand return of the converted item, receive payment for lost value, or [if the item is damaged] receive payment for the item's entire value—the first option generally doesn't work with Data).

48. Calabresi and Melamed, 85 Harv L Rev at 1116 (cited in note 39). An intentional Taking is generally viewed as one where bargaining is possible—the Gatherer could have tracked down the Source and tried to negotiate before Taking. Implicitly, the Kaplow/Shavell analysis does not require intent for a property rule. Kaplow and Shavell, 109 Harv L Rev at 759-63 (cited in note 4).

49. This conclusion differs from Ayres and Talley, who argue that liability rules, by in effect granting an option to the Taker, overcome strategic bargaining obstacles to transactions. Kaplow and Shavell, however, contend that liability rules, by approximating true value, have an advantage regardless of whether there is strategic bargaining. See Rose, 106 Yale L J at 2184-85, 2189 (cited in note 5); for detail, see Ayres and Talley, 105 Yale L J (cited in note 39); Ayres and Talley, 104 Yale L J (cited in note 39); Kaplow and Shavell, 109 Harv L Rev at 736 n71, 785-87 (cited in note 4); Kaplow and Shavell, 105 Yale L J (cited in note 39).

Kaplow and Shavell argue that when there is an externality and enforcement costs are low relative to value, a liability rule may be superior when there is strategic bargaining. On the other hand, when there is an externality, bargaining is possible and enforcement costs are high relative to value, a property rule may discourage lawsuits by giving the Source the ability to easily stop the Gatherer from Taking. (Enforcement costs are part of what they call administrative costs, and include the costs of bargaining around a rule.) Kaplow and Shavell, 109 Harv L Rev at 741-43 (cited in note 4).

The latter argument is questionable where enforcement costs are high relative to value, given that a Gatherer will profit by Taking despite a property rule unless (1) the property rule includes the Source's full enforcement costs (including the opportunity cost and nonmonetary aggravation of pursuing a small claim) or (2) the parties have a continuing relationship and norms to the contrary. (A legal rule can help create the norm.) In Robert Ellickson's study of California ranchers, enforcement costs were too high to justify lawsuits for cattle trespass, but this did not end up creating a property right in the trespassers because the local norm was for owners of trespassing cattle to pay for damage. The norm was enforced by gossip and physical retaliation against the cattle of offending ranchers, and effectively restored a liability rule. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan L Rev 623, 628, 685 (1986). The empirical effect of high transaction costs is also discussed below at p101 and Part F.4.a(4).

mine the appropriate rule. A Taking of Data will often have both aspects.⁵⁰ If Cornbuster sells Data about Tony's video preferences to Last Judgment, it has Taken a thing (the information) from Tony, but it will also create a harmful externality for Tony, who will lose his job.

C.3.a. Property Rule Favored: Correlated Externalities

A property rule is favored if the taker's gain is not independent of the externality harming the victim.⁵¹ For Data, the Source's and Gatherer's values are generally not independent: the information on the Source is what is valuable to the Gatherer, even (or, if we believe Posner, especially) if its disclosure would harm the Source.

Carol Rose suggests that the regime for addressing externalities also tilts toward property rules when the externalities impose increasing marginal costs rather than a simple one-time loss. Liability rule damages may be insufficient to compensate for the cumulative nature of the harm.⁵² This may occur in database settings: linked databases held by various entities create an "electronic persona,"⁵³ consisting of bits and pieces of information that together form a fine-grained portrait of an individual. If Tony's name is linked with one visit to the Spikeheels.com auction for Elle Macpherson's mud-encrusted Doc Martens, little harm may result. But if his name is linked to credit card records of all his transactions with all vendors, such as his rental records from Cornbuster, a detailed portrait of his foot fetish may emerge. And if a review of Tony's entire electronic persona allows Last Judgment to ascertain that the Tony Toe who has visited Spikeheels.com and rented from Cornbuster has the same social security number as the Tony Toe who is its employee, the results will be disastrous for him. However, where there is one piece of Data containing one big secret (e.g., a seller's bottom-line price for the sale of a corporate division), marginal damages will be lower.

C.3.b. Investment Incentives and Split Data

Rose also suggests that a property rule is indicated when it provides efficient incentives to invest.⁵⁴ Incentives may be needed for investment in Data, since, as

50. Kaplow and Shavell do not discuss whether this determination should be made on a case-by-case basis or overall, by class of cases. The latter approach would offer more predictability.

51. As Kaplow and Shavell, 109 Harv L Rev at 771–73, note, the lines can be hard to draw. They observe that even in *Boomer v Atlantic Cement Co.*, 26 NY2d 219, 257 NE2d 870, 874–75 (1970), the factory is arguably appropriating clean air for combustion that would otherwise be the neighbors'.

52. Rose, 106 Yale L J at 2193 (cited in note 5).

53. Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 Berkeley Tech L J 1, 4 (1996).

54. Rose, 106 Yale L J at 2197 (cited in note 5). Kaplow and Shavell make the narrower argument that property rules help efficiency where there are problems of reciprocal takings (for example, the taker

discussed above, in the absence of protection against unwanted Takings, a Source may refuse to enter into certain transactions⁵⁵ and may be forced to incur socially wasteful fencing costs.

When the ownership of a property right is split, however, Ayres and Talley suggest that a property rule may lead to strategic behavior by both owners and, as a result, efficient trades may not be made. They argue for a liability rule dividing a property interest into an option and a property right subject to an option. The higher-valuing party could exercise its option, take the entire property and pay damages, resulting in a unified property right. This could reduce strategic bargaining, since a Source could not hold out for an excessive share of the surplus.⁵⁶ In addition, liability rules avoid an overdeterrence problem: if property rules protect split interests, they may cause each owner to inefficiently underinvest because of the risk of draconian damages for a violation.⁵⁷

Rights in Data are inherently split between the Source and Gatherer.⁵⁸ When Tony rents EEEEE-XXXXX, a porn video, from Cornbuster, Cornbuster has the right to use Data on his preferences for its own purposes (to ensure that the tape is returned and identify the most popular videos), while Tony continues to know his own preferences. But Ayres and Talley's liability rule, by

takes a victim's car, believing that it is more valuable to the taker than the victim, but the victim then takes it back). Reciprocal takings are not an issue in the disclosure of confidential information: once Cornbuster wrongfully takes Data from Tony by selling it to Redolent, it is difficult for Tony to take it back. A complex literature has developed on reciprocal takings and on the related issue of takings as options. See Ayres, 32 Val U L Rev (cited in note 39); Ayres and Balkin, 106 Yale L J (cited in note 39); Ayres and Talley, 105 Yale L J (cited in note 39); Ayres and Talley, 104 Yale L J (cited in note 39); Epstein, 106 Yale L J (cited in note 39); Epstein, 32 Val U L Rev (cited in note 39); Kaplow and Shavell, 109 Harv L Rev at 767–68 (cited in note 4); Krier and Schwab, 70 NYU L Rev (cited in note 39).

55. This would include refusal to invest in social experimentation, see above at note 26 and accompanying text. A liability rule can arguably increase efficiency by discouraging behavior that would violate norms. Cf Posner, *Privacy* Palgrave at 105–06 (cited in note 17) (privacy protection undermines norms; in absence of privacy protection, cost of protecting against disclosure may deter norm violation). This is parallel to Kaplow and Shavell's argument that less than full liability rule compensation encourages victim precaution. Kaplow and Shavell, 109 Harv L Rev, at 738–39, 756 text accompanying n138 (cited in note 4).

Liability rules will efficiently discourage norm violation only if society's current norms are efficient. See Robert C. Ellickson, *The Market for Social Norms*, 3 Am L & Econ Rev 1 (2001) (offering model for efficient creation of norms, but emphasizing that reality does not necessarily match the ideal). Norms, however, will change in response to social and economic changes. *Id.* at 22–25. If people at the leading edge of norm change—the first adopters whom Ellickson calls “self-motivated leaders” and “norm entrepreneurs,” *id.* at 11—do not receive sufficient protection against Takings of Data while developing new norms, there may be an inefficiently low level of change. That is why a First Amendment privacy rule granted property rule protection to the identities of the self-motivated leaders in the civil rights-era case of *NAACP v Alabama ex rel. Patterson*, 357 US 449 (1958).

56. Ayres and Talley, 104 Yale L J at 1029 (cited in note 39) (summary); Rose, 106 Yale L J at 2178–79, 2184–85 (cited in note 5). Kaplow and Shavell, 105 Yale L J (cited in note 39), do not think liability rules reduce this risk for the reasons discussed above at note 49.

57. See the discussion of overdeterrence below at Part D.7.b.

58. Given the large number of paired relationships that a Source has with database Gatherers, a Source's electronic persona can be compared to a real estate fee interest encumbered by innumerable easements, leases and covenants. See Mell, 11 Berkeley Tech L J at 76 (cited in note 53).

undermining investment incentives, may create more inefficiency than the strategic bargaining and potential overdeterrence created by a property rule.⁵⁹

C.4. PROPERTY/LIABILITY RULE THEORY: SUMMARY

Whether a property or liability rule is desirable will depend on whether (1) a possessory interest or externality is involved (there is no answer for Data, so this drops out), (2) prior negotiations are possible, (3) externalities are correlated, (4) ownership is split, (5) there are increasing marginal damages, or (6) investment incentives are affected. This must be balanced against the risk of strategic bargaining and overdeterrence under a property rule. When the Source and Gatherer both have substantial investment incentives in the Data, a mixed rule along the continuum from liability to property rules,⁶⁰ weighted toward the latter, may be appropriate.

D. THE TROUBLE WITH THEORY: APPLYING PROPERTY RULES AND LIABILITY RULES

D.1. INTRODUCTION

When asked to give a number for the natural rate of unemployment, a concept he had created, Milton Friedman warned of the difficulty of applying theory to reality: "I don't know what the natural rate is, neither do you, and neither does anyone else."⁶¹ The same problem exists in applying property/liability theory to breach of confidentiality damages.

Liability rule damages for breach of confidentiality—the amount sufficient to compensate the Source for its losses—are often not easily reduced to money.⁶² Even if they can be, there is no clear method for determining the appropriate property rule, which sets damages higher than the liability rule at an amount sufficient to always prevent a Taking. Because of assessment-error, en-

59. If rights are unclear, Ayres and Talley's argument may have more force. If Cornbuster wants to sell the Data to Redolent, Tony's right to confidentiality is protected by a property rule, and Cornbuster is unsure if its action is a Taking (it may be 60% certain that its property interest includes its proposed use of the Data), the existence of property rule damages may deter it from an efficient transaction, such as the transfer of the Data to Redolent for targeted marketing. See *Big Seven Music Corp v Lennon*, 554 F2d 504, 512–14 (2d Cir 1977), where the court refused punitive damages because rights to the Data (a John Lennon album) were unclear beforehand and the court did not want to overdeter a record producer who had acted aggressively, without malice, in a "concededly 'hustlin' business." For a discussion of how intent and the clarity of rights to Data should affect damages, see below at Part D.7.e.

60. Kaplow and Shavell, 109 Harv L Rev at 756–57 (cited in note 4).

61. Amanda Bennett, *Inflation Calculus: Business and Academia Clash Over a Concept: 'Natural' Jobless Rate*, Wall St J, Jan 24, 1995, at A1.

62. See below at Parts D.2.b, D.7.c.

forcement-error and enforcement costs, liability and property rules cannot always be calculated precisely, with the result that they will have different deterrent effects on different wrongdoers.

D.2. LIABILITY RULE DAMAGES

D.2.a. Restitution as a Base

The mixed characteristics of a Taking of Data become apparent when trying to determine an appropriate liability rule—the amount that would compensate the Source's losses. Any liability rule, to begin with, must compensate for the Source's direct losses. For example, in a negligence case, if a driver negligently collides with another car, a liability rule will, at the least, compensate for the damage to the second car. Applied to Data, that test is ambiguous, since the Data itself is not destroyed when Taken, though it may sometimes lose its value, as in the public disclosure of a trade secret such as the formula for Coca-Cola.⁶³

If the Gatherer's obligation to the Source is viewed as contractual (the breach of a promise to maintain confidentiality), expectation damages (the difference between the price that the Source bargained for and the value that the Gatherer delivered) are not closely matched to the Source's lost value. There is generally no explicit exchange of Gatherer dollars for Source Data—the transfer of Data is usually ancillary to another transaction between the Gatherer and the Source⁶⁴—and no ability for the Source to cover by selling the Data to another Gatherer.⁶⁵ Nor will reliance damages generally apply, since it is rare for the Source to invest dollars in its transaction with the Gatherer in reliance on the Gatherer's future performance.⁶⁶

A restitution rule, compelling the Gatherer to compensate the Source for

63. Blair and Cotter, 39 Wm & Mary L Rev at 1601 (cited in note 13).

64. Though not always. When Seattle city planner Terry Whittman stopped at a Pizza Hut to pick up dinner, the cashier refused to fill her order unless she provided her name, address, phone number and pizza-topping preferences. Whittman offered to pay cash for the pizza without giving the information, but was rejected. Marcia Stepanek, *Weblining*, Bus Wk, Apr 3, 2000, at EB22.

65. See generally E. Allan Farnsworth, 3 *Farnsworth on Contracts* §§ 12.1, at 147–51, 12.9, at 201–04 (Aspen, 2d ed 1998). A variant on expectation damages may be appropriate where the Data has a one-time value for commercial use. Assume that Tony is negotiating to buy the house of The Old Woman Who Lived In A Shoe and that his lawyer discloses Tony's bottom line price. There will probably be a difference between the price that Tony actually paid and the price if the Data had not been disclosed. This article will treat this type of damages as proximate cause damages, see below at Part D.2.b.

66. See generally Farnsworth, 3 *Farnsworth on Contracts* at § 12.1, at 151–52, 12.16, 12.16a (cited in note 65). Although a Taking will affect the Source's investment incentives, as discussed below at Part C.3.b, this will occur by reducing or distorting the Source's future investments. In a typical reliance setting, in contrast, the victim of the breach will have made expenditures in anticipation of the breacher's performance.

the Source's value of the Data, will generally be a better fit, since it requires the Gatherer to return the amount that the Gatherer saved by using the Source's Data.⁶⁷ Restitution generally applies to inputs by the Source that bestow a benefit on the Gatherer (if a contractor builds a good-quality house and the owner refuses to pay, then the contractor would be entitled to restitution for the value of the services). A Taking of Data could be viewed as bestowing a benefit on the Gatherer, entitling the Source to the imputed sale price of the Data to the Gatherer. Restitution is a liability rule remedy—where the Gatherer values the Data more highly than the Source, it will Take, pay the Source the market value of the Source's contribution and keep any profit. While the value of a claim under a restitution standard will often be low—a name on a mailing list rents for pennies⁶⁸—the more that is disclosed, the higher the commercial value of the Data. For example, a full-scale portrait of someone's electronic persona, including information that is illegal to obtain, costs several hundred dollars.⁶⁹ Even that measure of damages is modest compared to the cost of a lawsuit.

To summarize, restitution is the best baseline liability rule. None of the baseline liability rule tests, however, give any weight to the Source's subjective value for the Data—the Source's desire not to have her business told in the street, even if the disclosure of the Data would not create externalities. This is probably appropriate for a liability rule—if subjective value is taken into account, the Source will swear that she valued her privacy as much as Greta Garbo, who wanted to be alone.⁷⁰

67. See generally Farnsworth, 3 *Farnsworth on Contracts* at §§ 12.1, at 152–53, 12.19, at 318–25 (cited in note 65).

68. Prices per name for one-time rental included 4 cents for college students, 7 cents for Hispanic new movers, 11.5 cents for Forbes subscribers and 30 cents for medical patients. Jeff Sovern, *Opting In, Opting Out, or No Options At All: The Fight for Control of Personal Information*, 74 Wash L Rev 1033, 1034 n5, 1035 text at n7, 1108 text at nn354–56 (1999). The capitalized value of a name is also tiny. A dot-com database “far larger” than 250,000 names was liquidated for \$210,000, or less than 84 cents a name. Matt Richtel, *Toysmart.com in Settlement with FTC*, NY Times, July 22, 2000, at C1. Failed dot-com eToys offered a \$5 discount coupon to customers who agreed to the transfer of their personal information. Michelle Slattalla, *Giving Up Privacy for a Bargain Price*, NY Times, July 26, 2001, at G4.

69. One price list for illegally obtained database information offered unpublished telephone numbers and addresses for \$85, a monthly phone bill for \$75, bank statements for \$100 and stock transactions for \$200. Douglas Frantz, *Law Confronts a Peddler of Private Data*, NY Times, July 1, 1991, at A1. Liam Youens, who stalked and killed Amy Boyers, paid “hundreds of dollars” to online research services to determine Boyer's birth date, Social Security number and home and work addresses. Assoc Press, *Killer Kept Web Pages on Victim*, Nov 30, 1999. A Social Security number, criminal record or credit report can each be obtained for under \$25. Sovern, 74 Wash L Rev at 1037 n22 (cited in note 68).

70. Undercompensation of the Source for its subjective liability rule damages can be largely avoided because, as will be discussed below at Part D.2.b, the Source can still prove emotional distress, reputation and other proximate cause damages, which will measure most of the subjective loss from a Taking. The tests for these damage classes have some objectivity.

D.2.b. Proximate Cause Damages

A Taking may create externalities for the Source that go beyond the value of the Data, such as emotional distress. Whether a liability rule should include those damages is a difficult question, for law and economics as well as doctrinally, because breach of confidentiality falls into that confused area known as contorts, which is short for contractual torts.⁷¹ A Taking can have elements of breach of contract (an agreement to keep the Data confidential) as well as tort (invasion of privacy). Doctrinally, the Taking's characterization is significant, since contract damages are generally limited by the *Hadley v Baxendale* principle that excludes consequential damages,⁷² while tort damages include the equivalent of consequential damages through the doctrine of proximate cause. The doctrinal complexities will be discussed below,⁷³ but this article will next consider which rule should apply to breaches of confidentiality from an economic perspective.

Landes and Posner have suggested that proximate cause damages should be awarded for torts only if the tortfeasor can limit damage more cheaply than the victim. This rationale is parallel to the economic analysis of *Hadley*, under which a breaching party is liable for contract consequential damages only if it could have more cheaply avoided the harm.⁷⁴ This notion of precaution, although not articulated in quite that language, is also found in the classic tort case of *Palsgraf v Long Island R.R. Co.*⁷⁵ For ease of reference, the discussion that follows will refer to (a) both contract consequential damages and tort proximate cause damages as "proximate cause damages," (b) damages excluding proximate cause damages as "*Hadley* damages," and (c) the combination of *Hadley* and proximate cause dam-

71. Grant Gilmore coined the word in *The Death of Contract* (Ohio St 1974). For recent contorts articles, see William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L J 629 (1999); Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 Seton Hall L Rev 390 (1997); Erik K. Moller et al, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J Legal Stud 283 (1999); Douglas J. Whaley, *Paying for The Agony: The Recovery of Emotional Distress Damages In Contract Actions*, 26 Suffolk U L Rev 935 (1992).

72. 9 Ex 341, 156 Eng Rep 145 (1854). *Hadley* itself addresses expectation damages, which, as discussed above at the text accompanying note 65, are not generally applicable to Takings of Data. But the *Hadley* principle of when to limit consequential damages is our focus here.

73. See below at Part F.

74. William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 249-51 (Harvard 1987) (noting parallels between proximate cause doctrine in tort and *Hadley* consequential damages doctrine in contract). See also Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal L Rev 1 (1985) (goal in tort, property and contract law is to encourage both sides to take efficient precautions); Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 Case W Reserve L Rev 286 (1985/1986). Cf Farnsworth, 3 *Farnsworth on Contracts* at § 12.14, at 254 (cited in note 65) (comparing tort proximate cause and contract unforeseeability rules); Fowler V. Harper et al, 4 *The Law of Torts* §§ 20.4-20.5 (Little, Brown, 2d ed 1986) (proximate cause); W. Page Keeton et al, *Prosser & Keeton on the Law of Torts* §§ 42, at 273-79, 43 at 281-300 (West, 5th ed 1984) (noting triumph of the somewhat parallel "scope of the foreseeable risk" within proximate cause doctrine).

75. 248 NY 339, 162 NE 99 (1928).

ages as “Palsgraf damages.”⁷⁶

Applied to intentional Takings of Data, the Source should obtain proximate cause damages because the Gatherer could have more cheaply avoided the harm by choosing not to Take and instead negotiating a market transfer with the Source.⁷⁷ Any precautions by the Source would amount to socially wasteful fencing expenditures.

For a negligent Taking, the question is more difficult.⁷⁸ The Source can take some precautions before entrusting the Data to the Gatherer, primarily by checking the Gatherer’s reputation, privacy policy and security arrangements, but the Source is likely to be less than expert in the Gatherer’s business and therefore unlikely to ask the right questions. Often, the Source will have no choice but to entrust its Data to the Gatherer, as when stalker victim Rebecca Schaeffer gave personal information in order to obtain a driver’s license.⁷⁹

Even if negotiation is possible, the entrustment of Data will usually take

76. Although Mrs. Palsgraf, in fact, was held not entitled to proximate cause damages. *Id.*

77. Landes and Posner, *Tort Law* at 160–61 (cited in note 74). When negotiations are not always possible before intentional Takings, Landes and Posner recommend that any punitive damages be limited to enforcement costs plus no more than modest punitive damages, *id.* at 161.

Proximate cause damages are always available for intentional torts, and are interpreted more expansively for intentional torts than for negligent ones. Dan B. Dobbs, 1 *The Law of Torts* §§ 40–41 (West 2001). Because proximate cause damages are not ordinarily available for a contract breach, the non-breaching party is encouraged to take precautions by not over-relying on the breacher’s performance. Were contract proximate cause damages available, the prospective breacher would have to raise its prices to insure against the breach liability. Cooter, 73 Cal L Rev at 38–40 (cited in note 74); Posner, *Economic Analysis* at § 4.8, at 130–40 (cited in note 43). Because contract liability is usually strict, some of it is unavoidable even with breacher precaution, and it is more efficient for the individual breach victim to determine how much protection it needs rather than for the breacher to insure this. In addition, it is more efficient socially to let the breacher move to a more efficient contract where the non-breacher can readily cover. See generally Farnsworth, 3 *Farnsworth on Contracts* (cited in note 65). But see Richard Craswell, *Contract Remedies, Renegotiation and the Theory of Efficient Breach*, 61 S Cal L Rev 629 (1988) (expectation remedy may sometimes be inefficient due to risk aversion, decisions on level of precaution by promisor and promisee, and imperfect enforcement.).

The exception, in the contract context, is an opportunistic breach with the intent of squeezing the non-breacher. This is a contort, and proximate cause damages are generally available. For example, when fraud is committed, the victim can generally collect its out-of-pocket expenses and sometimes its anticipated profits. See, for example, *Delabanty v First Pennsylvania Bank, N.A.*, 464 A2d 1243 (Pa Super Ct 1982) (loss of income compared to prior years after bank fraudulently induces borrower to go into car leasing business, then steals his idea and competes with him). There is no general agreement on the class of contract cases that should constitute contorts, however. See generally Dorff, 28 Seton Hall L Rev (cited in note 71).

78. It is not so easy to distinguish between intentional and negligent Takings of Data. See below at Part D.7.e.

79. Rothfeder, *Privacy for Sale* at 17 (cited in note 27). There are forced dealings with other classes of Gatherers as well, such as a health insurer selected by the Source’s employer. See generally the articles cited above at note 18. Some types of electronic transactions have become virtually required, such as the use of e-mail at work. See, for example, Karin Schatz Byford, *Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment*, 24 Rutgers Computer & Tech L J 1 (1998); Myrna L. Wigod, *Privacy in Public and Private E-Mail and On-Line Systems*, 19 Pace L Rev 95 (1998). Even people who prefer to transact in person generate electronic trails that find their way into databases, as with banking transactions.

place as part of a larger transaction where it will be difficult for the Source to separate the immediate gain from the longer-term loss from a Taking of the Data.⁸⁰ Gatherers, whose desire is to maximize their ability to use and re-sell the Data, have an incentive to encourage Sources to underestimate their potential losses, to hide details of use from Sources and to actively discourage Sources from fully investigating confidentiality precautions. Sources will have a limited ability to pierce this smokescreen for three reasons. First, an oligopoly equilibrium in the Data privacy market may exist where Gatherers do not fully compete to offer consumers better privacy terms, but instead take advantage of consumer ignorance to maintain maximum flexibility in Gatherer business practices (this oligopoly equilibrium is referred to afterwards as an “information oligopoly”).⁸¹ Second, transaction costs for the negotiation may be too high relative to the Source’s value for the Data.⁸² Third, there may be an agency problem: for

80. It is unclear whether Sources will accurately assess the risks of inadequate precautions or of a Taking. Behavioral economics has shown that people systematically overestimate the likelihood of low probability events and underestimate the likelihood of high probability events, although some low probability risks are ignored. W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J Legal Stud 107, 131 (2001). See also Jolls et al, 50 Stan L Rev at 1523–27 (cited in note 31) (discussing hindsight bias). Takings with significant proximate cause damages are probably low probability events, but public fears about loss of privacy, see above at note 9, suggest that they are not perceived this way. On the other hand, people assume that they are less likely than average to suffer bad outcomes. See Jolls et al, 50 Stan L Rev at 1524 (cited in note 31).

81. The concept of a *monopoly* equilibrium in the market for health care information privacy protection is discussed in Schwartz, 76 Tex L Rev at 48–49 (cited in note 18). The monopoly equilibrium concept comes from Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U Pa L Rev 630, 661 (1979). In the wake of online retailers’ recent efforts to voluntarily offer privacy policies, it is hard to argue that there is a monopoly equilibrium premised on the existence of an overwhelming majority of ignorant consumers and industry efforts to keep them ignorant. But an *oligopoly* equilibrium remains plausible, with trade associations creating standards that fob off the bare minimum of privacy protection on the public.

There is impressionistic evidence of this. Financial institutions, though obligated to offer their customers privacy opt-outs under the Gramm-Leach-Bliley Financial Services Modernization Act, 15 USCA § 6802 (West Supp 2000), try to make the disclosures as hard to find and confusing as possible. One comprehensibility expert hired by a privacy rights group (and thus possibly biased) found that notices had print too small for middle-aged eyes to read and were generally written between a third and fourth year college reading level. A layperson commented that bank privacy disclosures sought a right to share Data with “everyone on the planet” while making it sound like a highly selective, closed group.” In addition, the sheer number of Gramm-Leach-Bliley privacy disclosures—estimated at 15 to 25 per middle class American adult—discourages reading and understanding. John Schwartz, *Privacy Policy Notices Are Called Too Common and Too Confusing*, NY Times, May 7, 2001, at A1. Often, online organizations’ privacy policies are hard to find and bristle with legalese. See, for example, the websites discussed below at note 172.

82. Kang and Paul Schwartz make a related point, arguing for a collective action problem: many individual consumer Sources will lack the leverage or time to negotiate a separate individual deal for privacy precautions with large institutional Gatherers, but the risks of inadequate precaution are individually not great enough to justify organizing a mass movement to demand more precaution. Kang, 50 Stan L Rev at 1254 (cited in note 38); Schwartz, 76 Tex L Rev at 50–51 (cited in note 18). The existence of a collective action problem seems empirically questionable, since consumer groups have demanded more privacy protection over the past quarter century and politicians have responded, however imperfectly, with a large number of privacy statutes. See, for example, the statutes cited below at Table 4: Analysis of Federal Statutory Damages for Breach of Confidentiality; Gramm-Leach-Bliley Financial Services Modernization Act,

health insurance privacy issues, Sources rely on their employers to communicate desires for privacy precautions to the insurer Gatherers, but the employers have every incentive to keep costs down and may not communicate the desires.⁸³

If the Source is in a poor position to take precautions against a negligent Taking before entering into a transaction, it is in a worse position afterwards. Once Data has been disclosed to the Gatherer, if the Gatherer has some right in it (for example, if Tony registers with Spikeheels.com) the Source cannot pull it back and tell the Gatherer to forget it. At best, the Source can monitor the Gatherer's use of the Data, but this is likely to be high-cost and ineffective.⁸⁴ Tony could theoretically inspect Dr. Pump's security arrangements at the end of each psychotherapy session, but this would not stop her from leaving her notes on the bar at Loafers, the cocktail lounge where she unwinds each evening. Still less would Tony be in a position to monitor the security procedures of a health insurer with massive computerized databases. In contrast, the Gatherer is in a good position to take precautions. While it usually cannot anticipate the Source's specific proximate cause damages, it can anticipate the possibility if the Data is disclosed, and can change the level of Data security.

While the Source is limited in its possible precautions against a Taking, if a Source would have *Palsgraf* damages on a Taking and the liability rule makes Gatherers liable only for *Hadley* damages, then a Gatherer whose value (from transactions being encouraged, avoided or differently priced) exceeds the Source's *Hadley* damages will Take, effectively exercising an option. Assume that Tony's *Hadley* damages—the restitution value of the Data—are \$1, and his proximate cause damages—the loss of his job after Cornbuster discloses the Data to Last Judgment—are \$50,000. Tony's *Palsgraf* damages are therefore \$50,001. Assume further that Cornbuster sells the Data to Last Judgment for \$2, and that Cornbuster incurs zero transaction costs in doing so. Cornbuster's gain from the Taking of Data is therefore \$1. The Gatherer will spend on precaution to reduce the number of Takings to the point where the marginal cost of precaution is equal to the marginal reduction in *Hadley* rule liability: in other words to the point where a dollar of precaution will reduce *Hadley* damages by a dollar.⁸⁵ If the Gatherer does not have to pay *Palsgraf* damages, the Source will bear

Pub L No 106-02, 113 Stat. 1437 (1999); Health Insurance Portability and Accountability Act of 1996, Pub L No 104-191, 110 Stat 1936 (1996); Robert E. Smith, *Compilation of State and Federal Privacy Laws* (Privacy Journal 1992).

83. Schwartz, 76 Tex L Rev at 50–51 (cited in note 18).

84. Even if the Source demands that the Data be returned—for example, Tony requests that his lawyer, Chancellors Foot LLP, return his files—the Gatherer is likely to keep copies in case of a malpractice claim or for other professional purposes such as form files. Confidentiality agreements for large commercial deals often require that if a transaction does not close, the buyer candidate will return documents and destroy all copies, but given the number of copies floating around and the reluctance of people to clean their files, this is probably ineffective. See Barnes, *Spy Case* (cited in note 40).

85. See generally Cooter, 73 Cal L Rev (cited in note 74); Kaplow and Shavell, 109 Harv L Rev at 725–27 (cited in note 4).

an externality equal to the difference between *Palsgraf* and *Hadley* damages (i.e., proximate cause damages).

This level of precaution is inadequate, however, given that the Source has *Palsgraf* damages. In an efficient regime, the Gatherer should be willing to spend on precaution to reduce the number of Takings up to the point where the marginal cost of precaution is equal to the marginal reduction in *Palsgraf* damages (i.e. *Hadley* damages plus proximate cause damages): in other words to the point where a dollar of precaution will reduce *Palsgraf* damages by a dollar.

To summarize, the Gatherer should be liable for *Palsgraf* damages if a liability rule applies. Given that the Gatherer and the Source can theoretically bargain beforehand on their liability regime, the question is whether the *Palsgraf* damages regime should be inalienable (non-waivable),⁸⁶ or whether it should be a default rule that the Gatherer and the Source can bargain around.⁸⁷

An inalienable rule is probably best. If *Palsgraf* damages are merely the default rule, a Gatherer will have an incentive to screen for Sources who will have *Palsgraf* damages if there is a Taking (*Palsgraf* Sources) and either (1) refuse to do business with them or (2) charge them a higher fee to reflect the Gatherer's increased liability, cover the cost of the Gatherers' increased precaution against disclosure of the Data and capture all of the gains from trade with the *Palsgraf* Source.⁸⁸

The Gatherer will accomplish this by initially disclaiming proximate cause liability, in the same way that United Parcel Service screens for shippers with high consequential damages by limiting its liability to a modest sum in the absence of disclosure. In game theory terminology, if the Gatherer disclaims liability, a Source that knows that it is a *Palsgraf* Source will be faced with unraveling: those Sources who would not have proximate cause damages if there is a Taking (*Hadley* Sources) will accept the disclaimer, while *Palsgraf* Sources will reject it.⁸⁹ If *Palsgraf* Sources reject the disclaimer, they thereby reveal themselves to the Gatherer. If a *Palsgraf* Source is risk averse or if there is error in the Gatherer's favor in the litigation process,⁹⁰ the risk of disclosure may outweigh the prospect of compensation through litigation. The price differential, plus people's overop-

86. Calabresi and Melamed originated the concept of inalienability, 85 Harv L Rev at 1111-15 (cited in note 39).

87. See generally Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87 (1989). Cf Kang, 50 Stan L Rev at 1249-60 (cited in note 38) (arguing that default rule should provide that Source, rather than Gatherer, should have initial right to Data, with ability to "opt in" if Source wishes to give Gatherer the right to use Data for marketing).

88. Ian Ayres and Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L J 729 (1992). In extreme cases, the Gatherer may even blackmail the Source. See generally Symposium, *Blackmail*, 141 U Pa L Rev 1565 (1993).

89. On unraveling, see Baird et al, *Game Theory* at 89-90 (cited in note 20). Posner has adopted this position in recent years. Posner, *Privacy* Palgrave at 103 (cited in note 17) ("As for privacy in general, it is difficult to see how a pooling equilibrium is avoided in which privacy is 'voluntarily' surrendered, making the legal protection of privacy futile.")

90. See below at p100.

timistic tendency to believe that they are less likely than average to suffer bad results,⁹¹ will encourage many Sources to mistakenly believe that they are *Hadley* Sources beforehand, even though they will turn out to be *Palsgraf* Sources afterwards. This mistaken belief will be abetted by the Gatherers' information oligopoly, although it may be offset by the human tendency to overestimate the likelihood of low-probability events.⁹²

If disclaimers are allowed, a *Palsgraf* Source's response will often be to mimic the *Hadley* Source and accept the disclaimer in a pooling equilibrium in which all Sources claim they are *Hadley* Sources.⁹³ For example, if Cornbuster and Spikeheels.com disclaim liability for proximate cause damages unless they are disclosed in advance, Tony is not likely to say, "If you reveal my foot fetishism to Last Judgment, they will fire me." He would not want to take the risk that the Gatherer would raise its prices to him or tip off Last Judgment. Nor would Tony want to undergo the embarrassment of admitting that his predilections could cost him his job. The result will effectively enshrine the *Hadley* liability rule as the governing rule in all transactions between Gatherers and Sources.

If disclaimers are not allowed, a Gatherer will charge the same price to all Sources (*Hadley* and *Palsgraf* alike) and pay all proximate cause damages that occur from Takings. This will create a different pooling equilibrium: in pricing its products, a Gatherer must spread the cost of the proximate cause damages among all the *Hadley* Sources and *Palsgraf* Sources (effectively providing insurance), since it cannot differentiate between them. For example, assume that there are 1,000,000 Sources, 999,999 of whom are *Hadley* Sources with \$1 damages and one of whom is a *Palsgraf* Source with \$100,000 of damages. If the Gatherer Takes from all 1,000,000 Sources (say that Spikeheels.com negligently rents to Last Judgment an e-mail address list of Sources, including Tony, who have requested that their names not be released, and only Tony has proximate cause damages), total damages will be:

$$(999,999 \times \$1) + (1 \times \$100,000) = \$1,099,999.$$

If the Gatherer defrays its expected liability by increasing its prices to all Sources, it will charge:

$$\$1,099,999 / 1,000,000 \approx \$1.10$$

to each Source, even though the *Hadley* Sources would only suffer \$1 damages

91. Jolls et al, 50 Stan L Rev at 1524 (cited in note 31).

92. See above at note 80.

93. This will depend on how highly the Source values the Gatherer's product and how high the Source's proximate cause damages would be. For the pooling equilibrium in the privacy context, see Stigler, 9 J Legal Stud at 633-40 (cited in note 17). For the mathematics of mimicking, see Ayres and Talley, 104 Yale L J at 1055-57 (cited in note 39); Baird et al, *Game Theory* at 83, 130 and *passim* (cited in note 20).

each. *Hadley* Sources thus pay a 10% insurance charge over their rate in a separating equilibrium.

Although the pooling equilibrium created by a mandatory proximate cause rule disadvantages *Hadley* Sources, it is probably the lesser of the two evils, since it insures all Sources against the danger that they will be *Palsgraf* Sources.⁹⁴ Given the difficulty of identifying the *Palsgraf* Sources in advance and given that substantially all the precautions are in the Gatherer's control, the pooling equilibrium caused by making the *Palsgraf* liability rule mandatory will encourage the Gatherer to take efficient precautions to protect all Sources rather than spending money on additional screening to differentiate the types of Sources. Thus, to use our example above, if the Gatherer can identify the *Hadley* and *Palsgraf* Sources in advance, then, in a separating equilibrium, the Gatherer would spend up to \$1 per *Hadley* Source, and up to \$100,000 per *Palsgraf* Source, to prevent Takings or to screen the *Palsgraf* Sources. In contrast, if the Gatherer cannot identify which is which, it will spend up to \$1.10 per Source on precautions against Takings. If the number of Sources is large enough, the ratio of *Hadley* Sources to *Palsgraf* Sources is high enough and *Palsgraf* liability rule damages modest enough, the additional insurance charge per Source will be modest.

To summarize, Sources should generally not be expected to take precaution against Takings, and should be entitled to proximate cause damages under a liability rule. This will force the Gatherer to take efficient precautions.

D.3. ELEMENTS OF LIABILITY RULE DAMAGES

Since we have determined that proximate cause damages should be included in liability rule damages for Takings of Data, we can now analyze the elements of liability rule damages. We will assume that there is no assessment-error (determination of the amount of damages), enforcement-error (incorrect finding of liability) or enforcement cost (cost of litigation) to skew the effective damages under a liability rule. We will also assume that the Source is entitled to proximate cause damages.

Sources suffer a number of possible damages from a Taking:

lost gains from trade resulting from existing transactions terminated as a result of breach of confidentiality. (Last Judgment fires Tony.)

emotional distress. (Tony, distraught, hallucinates that he is Thom McAn.)

reputation loss caused by incorrect assessment of the Data after a Taking that results in lost future commercial and noncommercial transactions, either be-

94. This analysis might change, however, if there is a high proportion of *Palsgraf* Sources and the Gatherer can reliably identify *Palsgraf* and *Hadley* Sources before entering into a transaction. In that case, the pooling equilibrium could create an adverse selection problem as *Palsgraf* Sources rush to do business with the Gatherer at an artificially low price, raising the Gatherer's costs so high that *Hadley* Sources exit. Ayres and Talley, 104 Yale L J at 1041-42 (cited in note 39); Baird et al, *Game Theory* at 153-54 (cited in note 20); Rose, 106 Yale L J at 2199 (cited in note 5) (summarizing Ayres and Talley on adverse selection).

cause the Source foregoes them for fear of an adverse reception or because others refuse to deal with the Source.⁹⁵

the hassle factor, which is the value of time spent by the Source in evaluating unwanted potential transactions (such as telemarketing calls) because of the disclosure of the Data, less any amount saved because the targeted marketing enables the Source to enter into desired transactions.⁹⁶

D.3.a. Assessment Error and Enforcement Error

It is often difficult to accurately assess liability rule damages, particularly if they are nonmonetary. We have previously discussed the difficulty of determining the subjective value of Data.⁹⁷ The difficulties are comparable for determining proximate cause damages: if Dr. Pump discloses Tony's foot fetishism to Redolent, the resulting emotional distress and reputation damages will be hard to quantify.⁹⁸ Emotional distress can be inferred, to some degree, from the Source's subsequent visits to mental health professionals and changes to patterns of activity, but these can be manipulated. If these damages are consistently underassessed, the Source's damages will be below a liability rule level even if a liability rule is nominally applied. But the damages may also be overassessed: where a Source's personal life has been disrupted, the finder of fact may be swayed by emotion. I will refer to Takings of Data that result in low damages as "pinpricks" and those that result in high damages (including all verifiable economic loss of whatever amount) as "train wrecks."

The common law of defamation and some federal privacy statutes attempt to deal with this assessment problem through presumed damages, where a set award is made without an inquiry into the actual damages.⁹⁹ This saves enforcement costs (which include the cost of making the damages determination), but,

95. Cf Posner, Right of Privacy, 12 Ga L Rev at 399–400 (cited in note 17). Justified reputation loss would be a positive externality whose effect on damages is discussed in more detail below at Part D.7.e. While lost gains from trade in current transactions will be relatively easy to prove, reputation loss resulting in lost future transactions will be more speculative.

96. The average professional in the United States will spend eight months sorting junk mail over the course of a lifetime. The average American received 553 pieces of junk mail in 1997. Sovern, 74 Wash L Rev at 1054–55 (cited in note 68). Additional time is spent on junk e-mail, America Online instant messages from porn merchants, and telemarketers. The economic impact of this is unclear. I hate my junk mail, but love my Staples discount coupons.

Another possible source of damages are the Source's additional fencing costs after a Taking. Generally, under a liability rule, the victim is expected to take an appropriate level of precaution at its own expense, so fencing costs are discussed as an element of damages only when such precaution is not expected—when a property rule applies, see below at Part D.7.c(3).

97. See above at the text accompanying note 70.

98. This creates mapping problems similar to those for punitive damages. See discussion of mapping problems below at Part D.7.f.

99. See Dobbs, 2 *The Law of Torts* at § 422 (cited in note 77) (defamation presumed damages, noting that rule is under attack); below at Parts F.3., F.4. (privacy statutes). Copyright law uses statutory damages to similar effect, Blair and Cotter, 39 Wm & Mary L Rev at 1651–57 (cited in note 13).

depending on the level of the presumed damages and the transaction costs of reaching a deal for the Data, it may underdeter high-valuing Gatherers or overdeter low-valuing Gatherers.¹⁰⁰

In addition to being affected by assessment error, the Gatherer's valuation of damages will be affected by enforcement error—the uncertainty over whether liability will be accurately found.¹⁰¹ If the Gatherer knows that it will be found liable less than all of the time that it should have been found liable in the absence of enforcement error, then it will multiply the total liability rule damages that it inflicts by the probability of being found liable, and take precautions only to the extent of its effective liability. For example, if liability rule damages are \$100 but the Gatherer will be found liable only 50% of the time that it is actually liable, then effective liability rule damages will be

$$= \$100 \cdot .5$$

$$= \$50.$$

Thus the Gatherer will take only \$50 of precautions to prevent liability, although \$100 would have been the efficient amount.

A similar calculation takes place if too many determinations of liability are made. If liability rule damages are \$100 but the Gatherer will be found liable 150% of the time that it should have been found liable in the absence of enforcement error, then effective liability rule damages will be

$$= \$100 \cdot 1.5$$

$$= \$150.$$

Thus the Gatherer will take \$150 of precautions to prevent liability, although \$100 would have been the efficient amount.

D.3.b. Enforcement Costs

Enforcement costs will raise effective liability rule damages from the point

100. Ayres and Talley, 104 Yale L J at 1046–73 (cited in note 39), call damages that are not tied directly to the harm “untailored damages,” and argue that they are information forcing: the difference between actual damages and untailored damages will make trade easier by encouraging an offer from the higher-valuing or lower-valuing party, depending on the context. Kaplow and Shavell, 109 Harv L Rev at 736 n71 (cited in note 4), agree. In the context discussed in this article, this is questionable. Sources will be hard-pressed to assign a dollar value to many types of Data and will often be unaware of the full consequences of a Taking. Even if a Source can accurately determine its dollar value, there will be perverse effects if a property rule is appropriate (Ayres and Talley consider a contract setting where a liability rule is appropriate): presumed damages that are too low will result in excessive fencing expenditures. See Kaplow and Shavell, 109 Harv L Rev at 761 (cited in note 4); above at text accompanying note 47, and at note 55 with accompanying text. If presumed damages are always fixed above actual damages, they effectively become a property rule. Kaplow and Shavell, 109 Harv L Rev at 761 n152 (cited in note 4).

101. See generally John E. Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va L Rev 965 (1984); Richard Craswell and John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J L Econ & Org 279 (1986).

of view of the Gatherer, but reduce effective liability rule damages received by the Source. As Robert Cooter has observed, the expense of litigation is effectively a tax on both parties.¹⁰² Assume that the Gatherer violates the Source's rights in Data, liability rule damages are \$100,000, litigation expenses for each of the Gatherer and the Source are \$100,000, and there is no assessment or enforcement error. The Gatherer knows that if the Source brings suit, the Gatherer will be facing \$200,000 of total expenses (\$100,000 property rule damages + \$100,000 litigation expenses). From the Source's point of view, however, a successful suit will be worth nothing (\$100,000 property rule damages - \$100,000 litigation expenses). Thus enforcement costs screen out pinprick claims, becoming a source of enforcement error because not all Takings will be compensated.¹⁰³ In addition, in a pinprick scenario, it may not be cost-effective to investigate who breached confidentiality.¹⁰⁴

Even a regime that compensates for monetary enforcement costs will screen out some pinprick claims. Litigation inflicts a considerable opportunity cost on parties in time and aggravation, which means that even if a damages regime awards monetary enforcement costs, claims will not be brought when liability rule damages are insufficient to compensate for nonmonetary opportunity costs.

Enforcement costs are conceptually not part of a property or liability rule, but instead an addition to or subtraction from damages. Nonetheless, they have the effect of raising or lowering the effective property or liability rule standard. For example, assuming that a liability rule applies, the American rule (each side bears its own legal costs) effectively burdens the Gatherer with greater than liability rule damages (since it must pay the cost of defense of all actions), and effectively compensates the Source with less than liability rule damages (since it must pay its own legal expenses).¹⁰⁵ In our hypothetical, enforcement costs are

102. Robert Cooter et al, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J Legal Stud 225, 238, 244 (1982). If liability rule damages are difficult to determine, as is the case with emotional distress and reputation damages, this will raise enforcement costs, as more time and money must be spent litigating them. See also Landes and Posner, *Tort Law* at 161 (cited in note 74) (property rule damages for intentional takings should always include enforcement costs at a minimum).

103. Baird et al, *Game Theory* at 244-67 (cited in note 20) (in part discussing impact of litigation costs on whether party will proceed); A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv L Rev 869, 901, 921-23 (1998).

104. If there is no enforcement error, then there will be underdeterrence when enforcement costs are positive. With zero enforcement error, all Gatherers will comply at first, and no Source will bring a costly suit because, given perfect compliance, it will lose. This will encourage some Gatherers to fly under the radar and Take in the hope that Sources will assume that the Taking was within the Gatherer's rights. Janusz A. Ordover, *Costly Litigation in the Model of Single Activity Accidents*, 7 J Legal Stud 243 (1978) (negligence setting). Once enforcement error is introduced to this world of positive enforcement costs, however, perfect compliance or overdeterrence become possible. Keith N. Hylton, *Costly Litigation and Legal Error under Negligence*, 6 J L Econ & Org 433 (1990).

105. Under the English rule, where the winner collects litigation costs, the problem remains in diminished form due to the nonmonetary costs of supervising a lawsuit. And a new problem is introduced, in that the loser is faced with possible enforcement error saddling it with liability for both sides' attorneys' fees.

so high relative to liability rule damages that they effectively create a property rule giving the Gatherer ownership of the Data: the Gatherer will Take regardless of the liability rule giving rights in the Data to the Source.¹⁰⁶

D.4. THE ELUSIVE MULTIPLIER

The actual direction of enforcement-error, assessment-error and enforcement cost for Takings of Data is an empirical question beyond the scope of this paper, although underdeterrence appears likely. Not all Takings will be detected; if detected, not all suits will be brought, and even for those brought, proof will not always be sufficient. Breaches of confidentiality that produce train wrecks will often be highly embarrassing, and Sources may be reluctant to endure the intrusive questioning and possible publicity of a trial.¹⁰⁷ Empirical evidence in other areas indicates a substantial skew toward underdeterrence.¹⁰⁸ On the other hand, hindsight bias may cause finders of fact to retroactively overestimate low-probability events of the kinds likely to result in train wrecks, resulting in excessive findings of negligence liability.¹⁰⁹

A. Mitchell Polinsky and Steven Shavell have proposed to compensate for underassessment and pro-defendant enforcement error by multiplying actual damages by the reciprocal of the enforcement error (i.e. if there is only a 10% chance of detection, a multiplier of 10 would be applied). Their proposal would bring the value of damages up to that provided under a perfect liability rule.¹¹⁰

As it turns out, multipliers are like relationships (at least like the author's relationships): you can't live with them and can't live without them. The multiplier cannot be accurately set without information on error rates in the universe of all cases, both litigated and unlitigated. Uncertainty about whether the standard will be correctly applied will skew the deterrent effect,¹¹¹ as will cases where the

106. Unless the parties have a continuing relationship and norms to the contrary, as Robert Ellickson's study of Shasta County ranchers suggests. Ellickson, 38 Stan L Rev (cited in note 49) (discussed in detail there).

107. J. Thomas McCarthy, 2 The Rights of Publicity and Privacy § 11.7[A], text accompanying nn10–11 (Release #22, 6/99).

108. Polinsky and Shavell, 111 Harv L Rev at 887–88, 888 n45 (cited in note 103) (assuming downward skew for purposes of analysis, explaining possible reasons, and citing empirical studies finding downward skews in medical malpractice, oil spill and fraud areas). See also Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala L Rev 1143 (1989).

109. Finders of fact will overestimate the amount of care reasonably needed and find liability for negligence more often than warranted. Jolls et al, 50 Stan L Rev at 1523–27 (cited in note 31) (discussing hindsight bias); Viscusi, 30 J Legal Stud, (cited in note 80).

110. Polinsky and Shavell, 111 Harv L Rev at 954–57 (cited in note 103) (summary of proposal). The use of the multiplier to make up for enforcement error is, by now, a commonplace in the law and economics literature. See, for example, Blair and Cotter, 39 Wm & Mary L Rev at 1619–20 (cited in note 13); Cooter, 40 Ala L Rev (cited in note 108)); Robert Cooter and Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 NYU L Rev 1045 (1991); Landes and Posner, *Tort Law* at 160–63 (cited in note 74).

111. Calfee and Craswell, 70 Va L Rev (cited in note 101); Craswell and Calfee, 70 Va L Rev (cited

probability of punishment responds to improvements in the defendant's behavior.¹¹² Even if correct multipliers can be determined in each case, the limited empirical evidence to date suggests that jurors will refuse to apply them despite instructions to do so.¹¹³ Furthermore, due to hindsight bias, judges and jurors retroactively overestimate the probability of events that subsequently come to pass, such as the likelihood of detection, which would reduce multipliers below the efficient level.¹¹⁴ In addition, the proposal would require different multipliers for acts causing the same amount of damages; the huge differences in damages for identical acts would violate many people's sense of fairness. Not surprisingly, this approach has not been popular with courts.¹¹⁵

If a perfect case-by-case multiplier cannot be attained, a reasonable alternative is to apply a correcting factor as a kind of presumed damages, with a grid setting out enhancements based on the type of Taking.¹¹⁶ This will overdeter in some instances and underdeter in others, but has some hope of being approximately right.

D.5. THE NEED FOR A PROPERTY RULE KICKER

While the property rule/liability rule distinction works with reasonable clarity when contrasting injunctive relief with compensatory damages, it becomes fuzzier when the property rule is protected by damages. The classic injunctive property rule simply returns to the victim the thing taken and prevents the taker from making further use of it.¹¹⁷ If a property rule is to be protected by damages, however, the damages must be set high enough to discourage the Gatherer from a nonconsensual Taking. In order to do this, damages must be greater than the amount that would be set by a liability rule.¹¹⁸ In Figure 1, if actual damages under a liability rule are equal to D_L , then damages under a property rule (D_P)

in note 101).

112. Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 Mich L Rev 2185 (1999).

113. Test jurors have not agreed with policies that adjust punitive damages for probability of detection, and, for the most part, do not adjust in model cases. Cass R. Sunstein et al, *Do People Want Optimal Deterrence?*, 29 J Legal Stud 237 (2000) (model based on intentional tort question); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J Legal Stud 313 (2001) (model based on intentional tort question).

114. The resulting excess findings of liability in negligence cases may partly counterbalance a refusal to apply the multiplier. Cf Jolls et al, 50 Stan L Rev at 1523–27 (cited in note 31) (hindsight bias); Viscusi, 30 J Legal Stud (cited in note 80).

115. Craswell, 97 Mich L Rev at 2238 (cited in note 112).

116. See Cass R. Sunstein et al, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L J 2071; below at Part D.7.f.

117. If a property rule rather than a liability rule should apply, injunctive relief will limit assessment error because of its simplicity. It is subject to the same problems with enforcement error and enforcement cost as a damages rule.

118. The issue becomes more complicated when the Gatherer's gain is less than the Source's liability rule damages. See the text accompanying note 138.

would require a kicker¹¹⁹ of some additional amount, K .

FIGURE 1: DIFFERENCE IN DAMAGES BETWEEN PROPERTY RULE AND LIABILITY RULE

In the chart, the x-axis reflects the level of harm inflicted on the Source and the y-axis the dollar amount of damages for that level of harm. Line D_L is money damages under a liability rule for a given level of harm. Line D_P is money damages under a property rule for a given level of harm. For harm at a level of x^* , a liability rule will produce damages of y_1 , while a property rule will produce damages of y_2 . The difference in damages between the property and liability rules equals $y_2 - y_1$, which is the kicker, K , at any point.

The kicker is a high multiple of the liability rule damages at low levels of harm to the Source, compensating for the fact that enforcement costs are very high relative to harm at low levels of harm and that damages will otherwise be too low to deter. If a Taking of Data would result in liability rule damages of \$1, a 100% (\$1) kicker will provide little deterrence. A kicker multiplier of 20,000 may be required in order to deter a Taking. As harm to the Source increases, the multiplier decreases, reflecting the diminishing relative importance of enforcement costs and the risk that a very high multiplier will cause overdeterrence. If

119. Calabresi and Melamed, 85 Harv L Rev at 1126 (cited in note 39), originated the term "kicker."

Data with liability rule damages value of \$1,000,000 has a kicker multiplier of 20,000, property rule damages will be \$20,001,000,000, which will probably overdeter.

D.6. EFFECT OF LIABILITY RULE ASSESSMENT-ERROR, ENFORCEMENT-ERROR AND ENFORCEMENT COSTS ON PROPERTY RULE DAMAGES.

If damages under the liability rule are inefficient because of assessment-error, enforcement-error or enforcement costs, then damages under the property rule (which is a function of the liability rule) will be affected as well. If a downward bias occurs, what are nominally property rule damages will, in fact, provide less than property rule protection for the Source.¹²⁰ For example, assume that actual damages for a Taking under a liability rule would be \$5,000 and under a property rule \$10,000, but the likelihood of detection of the Taking is only 10%. From the Gatherer's point of view, damages under the property rule would have an expected value of only:

$$\$10,000 \cdot 10\% = \$1,000.$$

In this case, the Gatherer's expected property rule damages would be *less than* liability rule damages under perfect enforcement. So what purports to be a property rule actually functions as less than a liability rule—a rule that in effect gives a partial property interest in the Data to the Gatherer.

This is shown graphically in Fig. 2. The x-axis reflects the level of damages inflicted on the Source and the y-axis the dollar amount of damages for that level of damages. Line D_L reflects liability rule damages, and Line D_P reflects property rule damages. For ease of reading, the property rule is not a multiple of the liability rule, but instead reflects a constant amount of damages added to the liability rule, so the difference between D_P and D_L is constant throughout.

If liability rule money damages are systematically underassessed, they will drop, as shown on line D_{LU} . Since property rule damages are a function of liability rule damages, property rule damages will drop as well, as shown on line D_{PU} . Thus, at point x^* , the Source's property rule damages, as calculated by the court, will be less than the actual liability rule damages shown on line D_L .

120. Cf Kaplow and Shavell, 109 Harv L Rev at 761 (cited in note 4) (if liability damages too low, excess Takings will result). This inefficiency does not have to be the result of a systematic underassessment of damage by courts. Craswell and Calfee conclude that very broad uncertainty about liability may lead to underdeterrence (i.e. there will be more Takings than are economically justified under a property rule). Craswell and Calfee, 70 Va L Rev at 280 (cited in note 101). While Craswell and Calfee did not address error in determining the amount of damages, by the same logic, broad uncertainty as to the amount of damages would also cause underdeterrence. If a multiplier is applied to prevent underdeterrence, overdeterrence is likely. *Id.*

FIGURE 2: EFFECT OF UNDERENFORCEMENT AND UNDERASSESSMENT ON LIABILITY AND PROPERTY RULES:

D.7. HOW HIGH A PROPERTY RULE KICKER?

D.7.a. Property Rule as Option; Assumptions of Zero Enforcement-Error and Enforcement Costs

Assuming that liability rule damages are determined with zero assessment-error, enforcement-error and enforcement cost, this does not tell us how much of a kicker is necessary to create a property rule. As previously discussed, a liability rule effectively grants a Gatherer an option in the Data: whenever the Gatherer values the Data more than the Source, the Gatherer will Take, pay damages and earn as its profit the difference between its value and the Source's value.¹²¹ But if damages for each Taking are not sufficient to eliminate the gains of all Gatherers, then high-valuing Gatherers will also receive an option to Take the Data—a higher-priced option.

121. See above at p96.

In order to have a perfect property rule, damages must be set high enough to deter *all* Gatherers from Taking. A low addition to liability rule damages will not deter high-valuing Gatherers. For example, let us say that both Gatherer₁ and Gatherer₂ Take the Source's Data, and that at a given point, liability rule damages are \$100. Let us further assume that Gatherer₁ values the Data at \$10,000, while Gatherer₂ values it at \$150. If the kicker is \$200 (total damages of liability rule damages plus the kicker, or \$100 plus 200 = \$300), Gatherer₂ will be deterred, but not Gatherer₁. If the kicker is \$9,900 (total damages of liability rule damages plus the kicker, or \$100 plus \$9,900 = \$10,000), both will be deterred.¹²²

If there is zero enforcement error and zero enforcement cost—if (1) all Gatherers who commit a Taking of Data protected by a property rule are held liable under the property rule, (2) no Gatherers are liable under the property rule unless they commit a Taking of Data protected by a property rule, and (3) all Gatherers who are not liable under a property rule have zero enforcement costs in defending themselves against property rule claims for Takings of Data—then the \$10,000 property rule kicker in our hypothetical is appropriate.

It looks like the sky is the limit: with no enforcement error and no enforcement cost, only Gatherers who have intentionally Taken will face property rule damages, and no one else need be concerned with the risk of incurring enforcement costs. Because property rule damages are set at or above the amount at which the Gatherers value the Data, they will never Take. If the highest-valuing Gatherer values the Data at no more than \$10,000, it doesn't matter whether the property rule kicker is set at \$10,000 or \$1,000,000 or \$1,000,000,000. Enforcement is perfect, costs of defending an erroneous claim are zero, and the Gatherer, knowing that it can never keep any gain from the Data, will never Take.¹²³

122. Gatherer₁ will be deterred because it has \$0 profit after Taking and paying damages.

123. This oversimplifies. As discussed below at Part D.7.c(3), property rule damages must go above the Gatherer's gain in order to force the Gatherer to internalize fencing costs—the destabilization of property interests caused by the Taking. In addition, at some point, fairness would prevent infinite damages for Takings of low-valued Data. Behavioral law and economics work suggests the importance of fairness norms. Jolls et al, 50 *Stan L Rev* at 1489–98, 1511–12 (cited in note 31). Polinsky and Shavell, however, suggest that if fairness norms are incorporated into sanctions, resulting in lowered penalties for violations, then deterrence can be maintained only through more (and more expensive) enforcement. A. Mitchell Polinsky and Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy*, 2 *Am L & Econ Rev* 116 (2000). For the debate over whether fairness is always consistent with Pareto optimality, see (listed in order of appearance) Louis Kaplow and Steven Shavell, *The Conflict between Notions of Fairness and the Pareto Principle*, 1 *Am L & Econ Rev* 63 (1999), Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 *Yale L J* 173 (2000), Louis Kaplow and Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 *Yale L J* 237 (2000), Howard F. Chang, *The Possibility of a Fair Paretian*, 110 *Yale L J* 251 (2000).

Apart from unfairness, excessive damages for a Taking of low-valued Data can create negative externalities. Assume that Cornbuster is an upstanding corporate citizen whose \$1 billion video business brings happiness to millions of foot fetishists, but in a moment's madness, it intentionally Takes Tony's Data, valued at 11 cents. Assume further that Tony suffers no proximate cause damages. If, assuming zero en-

D.7.b. Potential Overdeterrence When Relaxing Assumptions of Zero Enforcement-Error and Enforcement Costs in Applying Property Rule

If we relax the assumption of zero enforcement error, the calculations change. When the Gatherer knows that there is a chance that it will be held liable for property rule damages even if its conduct only merited liability rule damages, it will be overdeterred.¹²⁴ Let us first look at a typical liability rule. Assume that if the Source is injured through Gatherer₂'s negligence, Gatherer₂ will be responsible for \$100 in liability rule damages. Assume further that, in determining the liability rule, there is zero assessment error, zero enforcement error and zero assessment costs. In that case, Gatherer₂ will Take only if its value exceeds \$100, and will be willing to spend up to \$100 to prevent a Taking.

If there is enforcement error, however, Gatherer₂ risks having a property rule applied even though the Taking should have been subject to a liability rule. Assume that if Gatherer₂ is negligent, there is a 90% chance that it will correctly be held liable for liability rule damages and a 10% chance that it will erroneously be held liable for \$10,000 property rule damages (consisting of \$100 liability rule damages plus a property rule kicker of \$9,900). Assume further that Gatherer₂ values the Data at \$150. In this case, Gatherer₂ will be overdeterred. Its expected damages will be:

$$(.9 \cdot \$100) + (.1 \cdot \$10,000) = \$1,090.$$

Gatherer₂ should spend up to \$1,090 to prevent a Taking, far more than is efficient. If Gatherer₂ values the Data at only \$150, it will inefficiently cease using the Data (i.e. exit the business) because the \$1090 of expected damages exceeds the value of the Data to it:

forcement error, Cornbuster is assessed \$1 billion damages, it will go out of business, disappointing its loyal customers. While, in an efficient market, another video business will fill Cornbuster's niche, there will be social waste for the disappointed Sources, who must expend resources to locate another purveyor of foot fetishist videos, and also in resources expended in the creation or expansion of the video businesses that replace Cornbuster. This, of course, is one of the concerns in the punitive damages literature, below at note 136.

Another negative externality is that grossly excessive property rule damages, like draconian criminal sanctions, will have perverse effects on marginal deterrence: if you get the same death penalty for stealing a loaf of bread and for murder, then you may as well kill the owner of the loaf of bread when you steal it. See A. Mitchell Polinsky and Steven Shavell, *The Optimal Tradeoff between the Probability and the Magnitude of Fines*, 69 Am Econ Rev 880 (1979); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J Pol Econ 526 (1970).

124. Liability rules generally should not apply to Takings of Data. See below at Part E.5. The analysis remains the same, however, if a Gatherer is held liable for strong property rule damages when it should have been held liable for weak property rule damages.

\$1,090 expected damages - \$150 value = \$940 loss.¹²⁵

Relaxing the assumption of zero enforcement costs has a similar effect on Gatherer₂'s decisions. If Gatherer₂ Takes Data and should be subject to a liability rule, but instead is sued for property rule damages,¹²⁶ Gatherer₂ must defend against the allegation that property rule damages apply. Even if enforcement error is zero (i.e. even if Gatherer₂ will never be found liable for property rule damages if it should not be), Gatherer₂ will still have to bear enforcement costs, and this will affect its incentives. Assume that if Gatherer₂ Takes, there is a 100% chance that it will be held liable for liability rule damages and a 100% chance that it will be sued for property rule damages. Assume further that (1) the Source has zero enforcement costs (and therefore will not be deterred from bringing suit), (2) Gatherer₂'s cost of defending a liability rule suit is zero, (3) the extra cost of defending against the property rule claim is \$100, (4) there is a 100% chance of \$10,000 property rule damages if Gatherer₂ does not contest the property rule claim, and (5) there is a 100% chance of zero damages if Gatherer₂ does defend. Assume further that Gatherer₂ values the Data at \$150. Once again, Gatherer₂ will be overdeterred. Its expected cost will be:

\$100 liability rule damages + \$100 enforcement cost = \$200 total cost

Gatherer₂ should spend up to \$200 to prevent a Taking, more than its \$150 value. It will inefficiently cease using the Data:¹²⁷

\$100 liability rule damages + \$100 enforcement costs - \$150 value
= \$50 loss

Once enforcement-error and enforcement costs are factored in, for a given level of liability rule damages to the Source, there can be no single property rule kicker (or, in doctrinal terms, no single level of property rule presumed damages) that will efficiently deter all Gatherers from intentional Takings. Going back to our earlier hypothetical, if Gatherer₁ values the Data at \$10,000, any

125. This is another argument in the punitive damages debate—whether property rule damages are applied when liability rules should be. Polinsky and Shavell, 111 *Harv L Rev* passim (cited in note 103), discussed below at pp113–115. (The debate, however, does not use the property/liability terminology.) In contrast, if enforcement error sometimes causes liability rules to be applied when property rules should be, high-valuing Gatherers will be underdeterred. Although Sources will continue to receive liability rule damages, the additional Takings by high-valuing Gatherers will destabilize property rights. See below at Part D.7.c(3).

126. Perhaps the claim is that the Taking was malicious.

127. If the Source's enforcement costs are positive, then, depending on the level of the Source's enforcement costs and the Source's estimate of the probability that the Gatherer will defend the property rule claim, this will reduce the chances that the Source will bring suit. If the Source's probability of suit is reduced, Gatherer₂'s effective cost will be reduced below \$200.

combination of property rule damages and enforcement costs below \$10,000 will underdeter it. If Gatherer₂ values the Data at \$150, any property rule damages and enforcement costs above \$150 will overdeter it. This is illustrated graphically in Figure 3. Damages under a liability rule are shown by line D_L . The Gatherer's total exposure under a weak property rule (liability rule damages plus weak property rule kicker plus enforcement costs) is shown by line D_{PW} , while damages under a strong property rule (liability rule damages plus strong property rule kicker plus enforcement costs) are shown by line D_{PS} . The Gatherer's gain from Taking is shown on line G_G . Under a liability rule, the Gatherer will take whenever its gain exceeds the liability rule damages of y^1 (i.e. at a level of harm to the Source less than or equal to x^1). Under a weak property rule (D_{PW}), the Gatherer will Take whenever its gain exceeds damages of y^2 (i.e. at a level of harm to the Source less than or equal to x^2). And under a strong property rule (D_{PS}), the Gatherer will Take whenever its profits exceed damages of y^3 (i.e. at a level of harm to the Source less than or equal to x^3).¹²⁸ Obviously, fewer Takings will occur under the strong property rule than under the weak one or the liability rule.

In this hypothetical, the choice is between a draconian property rule that will overdeter lower-valuing Gatherers and a less draconian rule that operates as a liability rule for higher-valuing Gatherers.¹²⁹ Unpleasant choices like this may explain why there is so little clarity about what constitutes property rule damages or their doctrinal cousin, punitive damages.¹³⁰ To the extent that a property rule can be tailored to each Gatherer, the choice is avoided.

128. D_{PS} could theoretically be shown as a vertical line with infinite damages, but in reality considerations of fairness and fears of negative externalities, see above at note 123, will cause a shallower slope. Furthermore, no matter how high the level of property rule damages, some Gatherers may not be deterred. Cf. Ordovery, 7 J Legal Stud (cited in note 104) (negligence will occur if zero enforcement error and positive enforcement costs). But cf. Hylton, 6 J L Econ & Org (cited in note 104) (perfect deterrence possible if enforcement error).

129. Under some circumstances, the social gain from a Taking by a high-valuing Gatherer could exceed the loss caused by the destabilization of the Source's property interest. Kaplow and Shavell, 109 Harv L Rev at 762 n157 (cited in note 4), believe that this will rarely be true for takings of things. (What I call a weak property rule they call a liability rule with damages exceeding average value.) The weak property rule is one of Kaplow and Shavell's rules along the continuum of property and liability rules. Id at 756-57. The overdeterrence/underdeterrence problem is similar to that with presumed damages, see above at notes 99-100.

130. On the doctrinal mess, see below at Part F.6.

FIGURE 3: WHEN HIGH-VALUING GATHERERS WILL TAKE:
LIABILITY RULE, WEAK PROPERTY RULE & STRONG
PROPERTY RULE

D.7.c. Elements of Property Rule Kicker

D.7.c(1) Disgorgement of Monetary Gain

As we have seen, without a property rule, the Gatherer will Take if its gain exceeds the Source's liability rule damages. If the Gatherer's gain consists solely of monetary profit, then, assuming zero enforcement-error, assessment-error and enforcement costs, it will not Take if the property rule kicker is equal to its profits. This is a disgorgement rule: if Spikeheels.com is renting Tony's name to Redolent for 5 cents, then 5 cents in damages will deter.¹³¹

To avoid overdeterrence, where the Source's economic loss is the Gatherer's economic gain, the restitution damages should be netted out. For example,

131. For many Takings of Data, restitution damages (the amount that the Gatherer or Third Party saves by the Taking) will be close to disgorgement damages. For example, assume that the ordinary rental value of Tony's name in the open market is 8 cents (restitution value), and that Spikeheels.com Takes it and is able to rent it to Redolent for 16 cents. Even with the 100% markup, disgorgement damages are still only 16 cents.

if Tony had planned to go on the Jerry Springer Show for a segment titled "Freaks Who Play Fashionistas' Fendis" to discuss his foot fetishism for scale of \$100 (wearing a stocking mask to disguise his identity), but is dropped from the guest list after Dr. Pump agrees to appear and out him, then Tony would not be entitled to the damages for his lost appearance, since he is entitled to collect Dr. Pump's scale fee for her appearance.¹³²

D.7.c(2) Disgorgement of Illicit Gain

Disgorgement, however, does not take into account the Gatherer's subjective value. Even if the Gatherer is not making a monetary profit, it may still have what Polinsky and Shavell have called illicit gain.¹³³ If Dr. Pump appears on the Jerry Springer Show, she may receive two types of illicit gain. First, she may derive spiteful utility from disclosing Tony's secret, cackling over the awful consequences that will befall him. Second, Dr. Pump may be indifferent to his fate but derive utility from her 15 minutes of fame.¹³⁴ Either way, the monetary earnings from her Taking are likely to be minimal (scale for appearing on trash TV, unless she parlays her appearance into a Dr. Laura-style career) compared to her illicit gain. Property rule damages can remove this illicit gain by being tied to the outrageousness or intent of the defendant's act¹³⁵ or the defendant's profit from its bad act, but they are best tailored to the defendant's wealth (also taking the outrageousness of the act into account).¹³⁶ If Dr. Pump is a billionaire and dis-

132. Netting is also used when there is trademark infringement, Blair and Cotter, 39 Wm & Mary L Rev at 1609–10 (cited in note 13). One could make the same argument for netting if Dr. Pump derives spiteful utility from Tony's damages, since her pleasure is dependent on Tony's pain. But unlike the trash TV hypothetical, where the Gatherer Takes a resource that only one person can profit from (the payment of scale for the appearance on the show), the Gatherer's spiteful utility creates an externality for the Source where none existed before. It is therefore appropriate for the Gatherer to pay the full cost of the externality (the Source's liability rule damages) plus the value of its spiteful utility.

Where disgorgement damages (the Gatherer's profits) are lower than restitution damages (the Source's value), a property rule would produce lower damages than applying a liability rule for the restitution part of the Source's claim. In these cases, the restitution rule would apply.

133. Polinsky and Shavell, 111 Harv L Rev at 908–09 (cited in note 103).

134. Polinsky and Shavell suggest that, in addition to arising out of spite, illicit gain can arise out of pleasurable activity that has no social value, using the example of joyriding. Id at 910 n127. This article follows that definition, although this second meaning of illicit gain only works when the Source's interest is protected by a property rule (significantly, joyriding usually involves a stolen car). For example, if Tony's interest were protected by a liability rule and Dr. Pump derived sufficient utility from her 15 minutes of fame, standard law and economics theory would find a net social gain if she Takes and pays liability rule damages.

135. See below at Part D.7.e.

136. Doctrinally, property rule damages for breach of confidentiality are awarded in the form of punitive damages or disgorgement. See below at Part F.1. The law and economics literature generally disfavors punitive damages tied to the wealth of the tortfeasor, but supports punitive damages tied to the tortfeasor's profit from its bad action. Polinsky and Shavell, 111 Harv L Rev at 910 text accompanying n131 (cited in note 103); Cooter, 40 Ala L Rev at 1177 (cited in note 110). Polinsky and Shavell contend that the wealth of the Gatherer should be considered only where there is illicit gain. Polinsky and Shavell, 111 Harv L Rev at 909, 947, 955 (cited in note 103). In contrast, Keith Hylton argues that if the Gatherer's gain

closes Tony's foot fetishism out of spite, \$50,000 in property rule damages is unlikely to deter her. If Dr. Pump's net worth is \$100,000, the same \$50,000 in property rule damages probably will deter her.

D.7.c(3) Fencing Costs

When Data subject to a property rule is Taken, the Gatherer destabilizes property interests, creating an externality in addition to those discussed in the proximate cause section.¹³⁷ This can be seen by assuming that a Gatherer systematically Takes for profit, with no illicit gains. In the absence of fencing cost liability, the Gatherer may choose to gamble on enforcement error and assessment error, figuring that at best it can profit and at worst it must give up its gains.¹³⁸

If the resulting increased fencing costs are an element of damages, the Gatherer will be forced to internalize them. There are three elements. First is the Source's actual cost, such as the cost of disguising identity or of buying computer security software. Second is the Source's anticipated future cost, such as the cost of negotiating detailed confidentiality agreements. Third is an externality not directly related to the Source's fencing costs: an amount to deter the Gatherer from destabilizing property rights in general. If the Gatherer Takes, then, in addition to the harm caused to the Source, other Sources will incur fencing costs

(monetary or illicit) is probably less than or equal to the Source's loss, the punitive award should aim to eliminate the Gatherer's prospect of gain, with few upper bounds on penalties. Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 Georgetown L J 421 (1998).

While scholars agree that punitive damages should be available for torts committed with specific intent, there is disagreement about their appropriateness in products liability cases and negligent environmental torts. Recent additions to the vast literature also include: Stephen Daniels and Joanne Martin, *Punitive Damages, Change, and The Politics of Ideas: Defining Public Policy Problems*, 1998 Wisc L Rev 71; Dodge, 48 Duke L J (cited in note 71); Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 Wisc L Rev 1; Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 Wisc L Rev 237; Mark F. Grady, *Efficient Negligence*, 87 Georgetown L J 397 (1998); Herbert M. Kritzer and Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View*, 1998 Wisc L Rev 157; Moller et al, 28 J Legal Stud (cited in note 71); Edward L. Rubin, *Punitive Damages: Reconceptualizing The Runcible Remedies of Common Law*, 1998 Wisc L Rev 131; Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc L Rev 15; Michael Rustad and Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters"*, 47 Rutgers L Rev 975 (1995); Sunstein et al, 107 Yale L J, (cited in note 116); W. Kip Viscusi, *The Social Costs of Punitive Damages against Corporations in Environmental and Safety Torts*, 87 Georgetown L J 285 (1998); *Developments in the Law—The Paths of Civil Litigation III. Problems and Proposals in Punitive Damages Reform*, 113 Harv L Rev 1783 (2000); Viscusi, 30 J Legal Stud (cited in note 113).

137. See below at Part D.2.b.

138. This is consistent with Hylton's argument that when the Gatherer Takes and earns a profit less than the Source's loss, high punitive damages are needed. Hylton, 87 Georgetown L J (cited in note 136). In contrast, Blair and Cotter, 39 Wm & Mary L Rev at 1590 (cited in note 13), contend that in intellectual property cases, the Gatherer should pay damages equal to the higher of the Gatherer's gain or the Source's liability rule damages, including an adjustment for enforcement error: if gain is eliminated, the Gatherer will never Take.

for fear of a similar Taking.¹³⁹ The fencing externality can be seen in the post-1965 United States, where rising crime led to rising expenditures on gated residential communities, car alarms, pepper spray, and security guards.

Compensation for the third element of fencing externality damages should be tied to liability rule damages: the higher the liability rule damages, the greater the likely fencing externality. In other words, train wrecks are more likely than pinpricks to cause the victim of the Taking and other Sources to invest heavily in future fencing expenditures.¹⁴⁰

D.7.d. Relaxing Assumptions of Zero Assessment-Error, Enforcement-Error and Enforcement Cost: the Correcting Amount

If we relax the assumptions of zero assessment error and enforcement error at once, the property rule kicker becomes difficult to calculate accurately. The reasons are parallel to those given in the discussion of liability rules, and the solutions are subject to the same limitations.¹⁴¹ It will be difficult to arrive at appropriate multipliers to correct for enforcement error (whether a property rule should be applied at all) and assessment error (kicker amount). In order to compensate for these factors, the kicker will have to include some additional hard-to-determine correcting amount. If the correcting amount is too high, Gatherers will either take inefficient precautions (for example, refusing to disclose anything without written authorization from the Source, even when disclosure is legally permitted), exit the market or incorporate the excess costs of wrongful liability into their fees.¹⁴²

A further problem in calculating the level of damages is that, as with liability rules, any regime of enforcement costs yields distortion. Attorneys' fees are sometimes granted to plaintiffs who successfully sue for property rule damages, but successful defendants generally do not receive them from the plaintiffs. In-

139. Polinsky and Shavell similarly note that additional punitive damages are needed where the Gatherer Takes a property interest and bargaining is possible. Polinsky and Shavell, 111 Harv L Rev at 909, 947, 955 (cited in note 103).

140. Fencing cost damages that are tied to Gatherer wealth may be above or below the amount that forces the internalization of all costs of the Taking.

141. See above at Part D.6.

142. Cf Viscusi, 87 Georgetown L J at text accompanying n59 (cited in note 136), arguing that in the context of corporate environmental and safety torts (which are ordinarily strict liability or negligence cases governed by a liability rule), punitive awards provide excessive insurance, resulting in higher product prices than consumers would prefer. Viscusi was not dealing with the Taking of a property interest, however.

Courts reduce punitive damages awards when they consider them too high in relation to the gravity of the offense, see Rustad, 1998 Wisc L Rev at 40-44 (cited in note 136). Very high multipliers for low-value Takings violate the Eighth Amendment. *BMW of North America, Inc. v Gore*, 517 US 559 (1996) (invalidating punitive damages verdict because of excessive multiple of harm). Whether these judicial reductions eliminate overdeterrence is debated, see generally articles cited above at note 136. Cf Kevin M. Clermont and Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 Am L & Econ Rev 125 (2001) (empirical study of all federal civil cases terminated from fiscal 1988-97 reveals appellate pro-defendant bias).

nocent Gatherers will thus be overdeterred by enforcement costs because they always must pay their own enforcement costs and sometimes must erroneously pay the Source's costs as well.

D.7.e. Effect of Intent and Positive Externalities

Given the inherently split ownership of Data, there will be close questions of when use is permissible, with a concomitant higher risk of error. One mechanism for reducing assessment error in the imposition of property rule damages is the use of intent as a screen. More culpable levels of intent (requiring higher levels of proof) would be required for higher property rule kickers.¹⁴³

Intent to Take can have many meanings. In increasing order of turpitude, consider: (1) a level of precaution so low that some Takings will occur;¹⁴⁴ (2) a reasonable, but wrong, belief that the Gatherer has the right to the Data; (3) an unreasonable good faith belief that the Gatherer has the right to the Data; (4) knowledge that the Source owns the Data (specific intent); and (5) knowledge that the Source owns the Data together with a desire to do harm (malice, or in our context, seeking illicit gain).

Although property rule damages should generally be available at all levels of intent—even lack of precaution—higher kickers should be reserved for higher levels of intent. Given the split nature of Data ownership, the reasonableness of the Gatherer's belief in its right to the Data becomes important. This is easy (and fits with traditional doctrine) when a Gatherer Takes with specific intent (level 4), but less clear at lower levels of intent. Assume that Spikeheels.com and Cornbuster want to share Data in connection with a Bigfoot promotion, no court in their jurisdiction has considered the issue and ultimately, after litigation, the court in their jurisdiction holds that the Source has the property right. If, before the Taking, 100% of the courts in other jurisdictions had held that the Source has the property right, a high kicker would seem appropriate. This would probably still be appropriate if courts in other jurisdictions had split 50/50. But if courts in other jurisdictions were split 60/40 in the Gatherers' favor, it is harder to justify a high kicker. (A Gatherer's belief, based on a preponderance of the legal authority, that it has a property right in the Data, is referred to as "strong support."¹⁴⁵) Of course, it will be difficult to determine what constitutes

143. Ronald Cass and Keith Hylton suggest that specific intent rules in antitrust and tort cases can reduce net judicial error in determining liability. This is particularly important when a false conviction will result in overdeterrence of socially valuable activity, as when false defamation convictions chill free expression. Ronald A. Cass and Keith N. Hylton, *Antitrust Intent*, 74 S Cal L Rev 657, 693–97, 735–36 (2001).

144. An extremely low level of precaution may be reckless (generally treated as equivalent to an intentional act), as with the driver who has no desire to kill, but closes her eyes and drives onto a crowded sidewalk.

145. Hindsight bias may be a problem in accurately assessing whether there was strong support. If the finder of fact determines that the Gatherer Took the Data, it will be hard to resist the conclusion that the Gatherer lacked strong support for believing that it owned the Data. Jolls et al, 50 Stan L Rev at 1523–

strong support—cases may be scattered and are unlikely to arrange themselves in a neat statistical pattern.

Not all elements of property rule damages should be affected by the level of intent: disgorgement, enforcement costs and the correcting factor all move independently of it. Fencing costs, however, are likely to rise with it (the less reasonable the Gatherer's belief in its right to the Data, the more likely that the Taking will destabilize property interests). Illicit gain damages also present issues: it is clear that a high kicker is appropriate when there is a malicious Taking with knowledge that Source owns the Data (level 5), but illicit gain may also be present at lesser levels of intent. For example, a health insurer could have strong support but still Take maliciously. Given that the health insurer ultimately was found to have no right to Take the Data, it could be argued that disgorgement of illicit gain is appropriate. But the threat of potentially huge illicit gain damages tied to wealth might overdetter, defeating the Gatherer's investment incentives. This argues for limiting illicit gain damages to cases where (a) the Gatherer lacks strong support for its right to the Data, or (b) the Gatherer has strong support for its right to the Data, but no reasonable expectation of gain from the Taking other than illicit gain.

A Gatherer who Takes with less culpability than the appropriate intent threshold should be subject to a lower kicker.¹⁴⁶ Assume that a bank has broad rights to use Data while the Source is an active customer, but that the rights diminish after the Source closes its account. If the bank Takes Data, believing that the Source is still a customer, it intends to use the Data, but doesn't intend to Take wrongfully. This type of Taking might be from a lack of precaution—the bank didn't check its current customer records, and wouldn't have Taken if it had discovered that the Source was an ex-customer. But a Taking might also arise with ample precaution—the bank might have had no easy way to learn of an obscure new state statute that barred the Taking. Both types of Taking will be referred to as negligent, though the latter has elements of strict liability.

The reduced negligence kicker would continue to contain standard property rule elements, including disgorgement, enforcement costs and a correction factor for enforcement error and assessment error.¹⁴⁷ If the Taking was due to lack of precaution, then, because there would be no intent to cause harm, there would be no illicit gain. Illicit gain damages are conceivable in a strict liability setting where the Gatherer Takes out of a desire to harm the Source and be-

27 (cited in note 31). But cf *Big Seven Music Corp. v Lennon*, 554 F2d 504, 512–14 (2d Cir 1977) (no punitive damages where rights to Data were unclear beforehand and there was no malice).

146. The level of intent needed for a high kicker should also vary with the relationship between Source and Gatherer. High kicker damages would be available at relatively low levels of intent for Takings by classic fiduciaries. See below at Part E.1.

147. Landes and Posner, *Tort Law* at 161 (cited in note 74), contend that when there is no intent to Take, enforcement costs should be awarded, and that punitive damages may be justified because of the cost of accurately measuring actual damages in the absence of a market transaction.

believes that it has the right to the Data, but has no way to reasonably determine that it actually lacks the right. Fencing cost damages should be low where the necessary intent is lacking. This standard will encourage precaution up to the combined amount of the Source's loss, enforcement costs, the Gatherer's monetary gain and the reduced fencing cost damages. This is more precaution than a Gatherer would take if a liability rule applied (the tortfeasor there will only take precaution up to the amount of restitution and proximate cause damages).

Intent should reduce property rule damages when a Taking aims to produce a positive externality—a social gain of greater value than the Source's property right. Sometimes it will be easy to identify positive externalities, as with the recent revelation of Pulitzer Prize-winning historian Joseph Ellis's fabrications of his Vietnam War experiences, which warned the public that his best-selling books might contain similar fictions. Sometimes, however, it may be hard to distinguish positive from negative externalities.¹⁴⁸ Most jurisdictions seal the records of reformed juvenile criminals, yet this information is relevant to people who later deal with them.¹⁴⁹ Damages for Takings caused by a lack of precaution should not be reduced for positive externalities—the Gatherer wasn't trying to create positive externalities, and its negligence should not be encouraged.

D.7.f. Mapping Problems

The difficulty of determining the perfect property rule for each Taking creates mapping problems. Empirical studies of punitive damages have shown that triers of fact consistently agree on the contumaciousness of conduct, but not on how to fit it onto a dollar scale. The best solution may be a grid, similar to the Federal Sentencing Guidelines, that weighs the factors and assigns appropriate increases or decreases to damages.¹⁵⁰ This would explicitly tailor the damages to each wrongdoer's acts—effectively creating a more finely graded form of property rule presumed damages.

D.8. SUMMARY

A liability rule for a Taking of Data consists of restitution and proximate cause damages to the Source. A property rule would include liability rule dam-

148. Even in Ellis' case, his boss, Mount Holyoke College President Joanne V. Creighton, initially denounced the revelation as not serving the "public interest." Apparently a born cover-up artist, Creighton also made some socially wasteful fencing expenditures, puffing her star professor's now-exploded "reputation for great integrity, honesty and honor." Janny Scott, *Prominent Historian Admits He Misled Students into Believing He Served in Vietnam*, NY Times, June 19, 2001, at A19.

149. So claimed New York City Mayor Rudolph Giuliani, whose undercover drug police provoked and killed the unarmed, innocent Patrick Dorismond. To show that Dorismond was not "an altar boy," Giuliani illegally disclosed Dorismond's juvenile arrest record, leading to widespread anger at the Mayor. Elisabeth Bumiller, *Giuliani's Tone over Shooting Worries Republican Strategists*, NY Times, Mar 23, 2000, at A1.

150. See Sunstein et al, 107 Yale L J at 2139–40, 2142 (cited in note 116).

ages plus enforcement costs, disgorgement of monetary and illicit gain, fencing costs and a correcting factor for assessment error and enforcement error. There would be adjustments up for more culpable levels of intent and down for Takings that create positive externalities. A grid tailoring property rule damages to the acts of individual Gatherers and adjusting for assessment error and enforcement error could approximate optimal deterrence.

To give an example, assume that Dr. Pump outs Tony on Jerry Springer. Assume further that Tony suffers \$100 in *Hadley* damages (the loss of scale for his own planned trash TV appearance), \$50,000 in proximate cause damages (emotional distress and job loss), \$25,000 in fencing costs and \$30,000 enforcement costs. If Dr. Pump earns \$100 scale for her appearance and \$10,000 in illicit gains from the disclosure, and the correcting factor is a multiple of 2, then property rule damages would be:

$$(\$100 + \$50,000 + \$25,000 + \$100 + \$30,000 + \$10,000 - \$100) \times 2 \\ = \$230,200$$

It may be impossible to exactly describe the appropriate property rule for each Taking of Data, but we can determine whether one is appropriate and, with some trepidation, its contours. As Richard Craswell and John Calfee remarked about the difficulties of determining appropriate levels of deterrence given legal uncertainty:

It is no doubt . . . very difficult to make all the trade-offs involved in designing a safe and affordable automobile . . . but few would have any sympathy for the automobile manufacturer who, facing those complexities, decided to ignore safety and concentrate instead on making a car that looked sporty.¹⁵¹

We will make those trade-offs in the next section. The results will not look sporty.

151. Craswell and Calfee, 70 Va L Rev at 299 (cited in note 101).

E. PROPERTY/LIABILITY RULE ANALYSIS APPLIED TO DAMAGES IN DIFFERENT RELATIONSHIPS INVOLVING DATA

E.1. CLASSIC FIDUCIARY RELATIONSHIPS

E.1.a. Level of Protection of Data

In classic fiduciary relationships such as doctor-patient and lawyer-client, the Gatherer owes, in Cardozo's gaseous phrase, "the punctilio of an honor most sensitive."¹⁵² In these relationships, a Source shares Data with a Gatherer in reliance on the Gatherer's expertise, and with the expectation that the Gatherer will act disinterestedly on the Source's behalf. The expectation of disinterestedness includes the obligation not to disclose Data.¹⁵³ Not even the pragmatists have argued that a classic fiduciary can freely disclose a Source's Data.¹⁵⁴

The law creates these rigid obligations in order to encourage trust by the Source in the Gatherer. The classic fiduciary Gatherer's gain from a Taking is presumed to be less than the value of the Data to the Source. Less abstractly, this is the rationale for the attorney-client, physician-patient and psychologist-patient privileges. The stringent nondisclosure rules exist because classic fiduciary relationships are subject to an especially severe information oligopoly. Except for sophisticated clients, who usually form a small part of the pool, Sources

152. *Meinhard v Salmon*, 249 NY 458, 464, 164 NE 545, 546 (1928).

153. See, for example, Model Rules of Professional Conduct Rule 1.6 (1998) ("A lawyer shall not reveal information relating to representation of a client . . ."); Am. Med. Ass'n, Principles of Medical Ethics 5.05 (1992) ("[I]nformation disclosed to a physician during the course of the relationship between the physician and patient is confidential to the greatest possible degree. . .").

154. Frank Easterbrook and Daniel Fischel maintain that the fiduciary relationship is a subspecies of contract, with terms that can vary. They argue that classic fiduciaries have a much higher standard of duty than fiduciaries in other relationships, such partners or corporate executives. Frank H. Easterbrook and Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J L & Econ 425 (1993). This article follows Easterbrook and Fischel, but does not contend that because the relationships are contractual, all aspects should be freely negotiable.

Other writers hew to Cardozo's moralistic formulation, which translates into something like Justice Potter Stewart's definition of pornography: "I know it when I see it." Recent articles taking a variety of approaches include Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 Cornell L Rev 767 (2000); Cooter and Freedman, 66 NYU L Rev (cited in note 110); Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty and Permitted Harm*, 22 Fla St U L Rev 955 (1995); Scott Fitzgibbon, *Fiduciary Relationships Are Not Contracts*, 82 Marq L Rev 303 (1999); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 Or L Rev 1209 (1995); Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and The Law of Agency*, 54 Wash & Lee L Rev 439 (1997); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L J 625 (1995).

What some of these other commentators also characterize as fiduciary relationships—relationships such as lender/borrower, partner/partner or corporation/employee, where the so-called fiduciary has some duties to its beneficiary, but is also entitled to act on its own behalf in many circumstances—this article characterizes as arm's length relationships. See below at Part E.2.

are heavily reliant on the Gatherers' professional expertise, leaving them especially ill equipped to compare and negotiate confidentiality regimes.

Notwithstanding this strong protection for Data, the classic fiduciary is still permitted some personal use. A lawyer can recycle a client's contract provisions through a form file. A physician can share with colleagues Data gleaned from work with a patient. There can be liability for the re-use, however, unless the Gatherer conceals the identity of the client or patient.¹⁵⁵ And the confidentiality of the Data is not unlimited: in narrow circumstances where the positive externality of a disclosure exceeds the value to the Source, the Gatherer may be privileged or compelled to disclose certain Data, as in a psychiatrist's duty to warn of the imminent danger that his client poses to others.¹⁵⁶

E.1.b. Intentional Takings

E.1.b(1) The Default Rule Should Be a Strong Property Rule

A strong property rule should protect against a classic fiduciary's intentional Taking of Data. Intentional, in this context, should include any Taking with intent greater than lack of precaution, because the classic fiduciary should err on the side of protecting confidentiality. A Source and a classic fiduciary can virtually always negotiate beforehand for a waiver of the confidentiality right at low cost: many of these relationships are one-on-one and personal. As in our general analysis, the externality/thing distinction remains unclear for Data. The Taking will often create correlated externalities for the Source, pointing toward a property rule.

Investment incentives are mostly with the Source. Without strong property rule protection, Sources would be discouraged from maximizing the value of the Data by investing in the classic fiduciary's services.¹⁵⁷ The potential loss of the Data could result in an inability to conclude a transaction on the terms desired (disclosure of a bottom-line price to an opposing party), inefficient fencing expenditures (negotiating an elaborate confidentiality agreement with the Gatherer) or withdrawal from otherwise efficient transactions. If Dr. Pump can sell Tony down the river for cash, he will refuse to use her services. The Gatherer has few investment incentives: its permitted uses of the Data are incidental and

155. *Doe v Roe*, 400 NYS2d 668 (Sup Ct 1977) (psychiatrist writes book containing case study of pseudonymous patient so thinly disguised that identity is clear).

156. *Tarasoff v Regents of U. of Cal.*, 17 Cal 3d 425, 551 P2d 334 (1976).

157. Cf Posner, *Economic Analysis* at § 4.6, at 126 (cited in note 43) ("By imposing a duty of utmost good faith rather than the standard contractual duty of ordinary good faith, [the rule requiring fiduciaries to disclose risks] minimizes the costs of self-protection to the fiduciary's principal.") The point is equally applicable to the confidentiality of Data: to paraphrase Posner, the rule of classic fiduciary confidentiality minimizes the Source's costs of self-protection in using the Data.

subordinate to the Source's uses. Thus, the imposition of a property rule would create little risk that strategic bargaining would prevent efficient trade in the Data.

E.1.b(2) Which Property Rule to Apply?

Because there are fewer concerns about overdeterrence, the property rule would include damages for restitution and proximate cause, the Gatherer's monetary gain (less any overlap with restitution damages) and its illicit gain. The fencing cost factor should be high, given the especially destabilizing effect of a Taking by a classic fiduciary. The Source should also receive its enforcement costs and an appropriate correction factor.¹⁵⁸

Damages should be lowered when the intent is to create a positive externality—as when Dr. Pump, incorrectly fearing that Tony may resume his shoe-slashing ways, warns Nancy Sinatra that her boots, although made for walking, are in danger. Another type of positive externality is when the Taking is with the intent to increase the Source's gains from trade. For example, if the Source is an overly tough negotiator, the Gatherer's disclosure of the Data to a Third Party might overcome strategic bargaining obstacles, leading to gains from trade that would otherwise be foregone.¹⁵⁹ Given the classic fiduciary's obligations to think of the Source's interest first, courts should be cautious about finding positive externalities.

E.1.b(3) Contractual Modification of Default Rule

It may seem counterintuitive that the default strong property rule for an intentional Gatherer/classic fiduciary should sometimes be waivable. But a complete waiver of damages for intentional disclosure of the Data amounts to a transfer of the Source's property right to the Gatherer.¹⁶⁰ For example, Tony

158. Cooter and Freedman, 66 NYU L Rev (cited in note 110), argue that in a fiduciary setting, the appropriate measure of damages for breach of duty of loyalty is the greater of the disgorgement of the Gatherer's profits or the payment of the Source's losses, adjusted by a correcting factor. This is, in effect, a weak property rule that fails to incorporate fencing costs. It underdeters for the reasons discussed above at Part D.7.c(3).

159. In the real world, brokers or lawyers may tip off the other side when they believe their client is being unreasonable. The Gatherer usually avoids liability by not explicitly stating that the Source's real bottom line is different from its purported one. Cf George Lefcoe, *Real Estate Transactions* 25 (Lexis, 3d ed 1999) (broker should encourage prospective buyer to make offer below listing price to keep buyer in play). This greasing of the wheels is a form of transaction cost engineering, see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L J 239 (1984), in which the Gatherer substitutes its judgment for that of the Source in determining whether to transact and how to maximize the Source's gains from trade in the negotiation. The Gatherer may extract profits from this—for example, a broker generally earns a commission on a real estate transaction only if it closes, and sharing Data may make a closing less likely to blow up (though more likely to come in at a lower price than the Source wanted).

160. Landes and Posner, *Tort Law* at 160–61 (cited in note 74), observe that punitive damages are available for intentional torts in order to force them into the market. There is sometimes a real market:

could agree that Dr. Pump is not liable in damages regardless of whom she discloses Data to, up to and including her Jerry Springer appearance. And a partial waiver of damages—say an agreement that if there is a breach by the Gatherer, damages would be calculated based on a liability rule rather than a property rule—would arguably allow the Gatherer to offer lower prices because it would not have to, in effect, insure Sources against their losses.¹⁶¹

These arguments must be treated with caution, given the classic fiduciary's tight information oligopoly and society's policy of encouraging the Source's full disclosure. A waiver followed by a Taking that seriously harms the Source will often be Gatherer self-dealing, and not likely to encourage trust in future dealings with classic fiduciaries. In most circumstances, the property rule should be inalienable. Where self-dealing is permitted, as between sophisticated parties with full disclosure, a waiver should be enforced.

E.1.c. Negligent Takings

E.1.c(1) The Default Rule Should Be a Medium Property Rule

A negligent Taking by a classic fiduciary would be a Taking caused by a lack of precaution. The analysis is similar to that in the general discussion of negligent Takings.¹⁶²

E.1.c(2) Contractual Modification of Default Rule

As with the property rule for intentional Takings by classic fiduciary Gatherers, the default rule should be inalienable for unsophisticated Sources. Sophisticated Sources, however, should be permitted to contract for other rules, such as a higher kicker or less protection (e.g. restitution damages only) in exchange for a lower price.

boxers consent to battery.

161. Cf Richard Craswell, *Against Fuller And Perdue*, 67 U Chi L Rev 99, at text accompanying 153 n180, 157 n193, 160 n197 (2000) (different levels of contractual damages offer different levels of insurance); Cooter, 73 Cal L Rev at 39–40, 43 (cited in note 74) (contract damages rules and strict liability as forms of insurance); Viscusi, 87 Georgetown L J at text accompanying n59 (cited in note 136) (punitives provide a form of unwanted insurance to tort victims).

162. See above at Part D.7.e.

E.2. ARM'S LENGTH RELATIONSHIPS

E.2.a. Level of Protection of Data

In a classic fiduciary relationship, the Gatherer is engaged to act disinterestedly on the Source's behalf. Arm's length relationships, including policy-holder/health insurer and website visitor/web site owner, lack that characteristic and have adversarial aspects. In these relationships, the Gatherer may use the Source's Data for the Gatherer's own purposes, but does not have free use of the Data for all purposes.¹⁶³ The greatest social gain will result if the arm's length Gatherer makes the greatest possible use of the Data short of interfering with the Source's rights.

The Source should not trust an arm's length Gatherer as much as a classic fiduciary. Tony should recognize that Spikeheels.com or Cornbuster are merchants primarily interested in turning a buck, and should take more precautions in dealing with them than with Dr. Pump. In contrast to Takings by classic fiduciaries, the social value of an arm's length Gatherer's Taking will often exceed the Source's liability rule damages. The Source's Data deserves substantial protection, however, because arm's length Gatherers have an information oligopoly, although it is less severe than that of classic fiduciary Gatherers because the Source should know that arm's length Gatherers will not act exclusively in the Source's interest.

E.2.b. Intentional Takings

E.2.b(1) The Default Rule Should Be a Medium Property Rule

A medium property rule is appropriate for protecting against the intentional disclosure of Data by an arm's length Gatherer.¹⁶⁴ Intentional in this context means with less than strong support for the Gatherer's right (with malice or specific intent, or without a preponderance of authority supporting the Gatherer's use of the Data).

Negotiation is possible beforehand, since the Gatherer and the Source are in contact. In a database setting, a check-the-box "Do you want me to share your data?" may be cost-effective. In one-on-one contacts, agreements can be hand-

163. Even in *Meinhard v Salmon*, Judge Cardozo quietly conceded that a partner was not expected to act solely for the partnership under all circumstances, 249 NY at 468, 164 NE at 548.

164. Cf Kang, 50 Stan L Rev at 1272 (cited in note 38) (proposing property rule to protect against Takings by arm's length Gatherers in cyberspace transactions in order to protect Sources' subjective valuations).

tailored. But in arm's length relationships involving low-value Data, the cost of negotiation will often swamp the value of the Data. It will be economical for a lender in a \$100 million commercial loan transaction to negotiate a detailed confidentiality agreement, but not for a lender offering a \$20,000 car loan, let alone a for merchant who logs a Source's visit to a website that doesn't result in a transaction.¹⁶⁵ Where transaction costs are high relative to the value of the Data (high ratio cases), if a Taking is viewed as creating an externality, this weighs on the side of a liability rule, but if Taking is viewed as the taking of a thing, this weighs for a property rule. Since this is inconclusive, it throws us to the next level of analysis.

As in the classic fiduciary setting, correlated externalities will often favor a property rule, but investment incentives are more divided. The split ownership of the Data increases the risk of strategic bargaining if a property rule applies, particularly in high ratio cases, where the first round of confidentiality negotiations will probably be the last. Although the Source risks increasing marginal damages from disclosure, the Gatherer faces increasing marginal damages of another kind: in a database setting, the more Sources whose Data drops out due to bargaining failure, the less complete and valuable the database will be. This, too, weighs on the side of a liability rule.

Given the mixed effects in an arm's length setting, a strong property rule will overdeter the Gatherer from efficiently investing in the Data. A liability rule, however, will not be sufficient to force intentional Takings of Data to the marketplace if the parties have the ability to negotiate beforehand. A medium property rule is the best compromise.

E.2.b(2) Contours of the Medium Property Rule

The analysis is similar to that for an intentional Taking by a classic fiduciary, but fencing damages should be assessed at a medium level because the Source is on notice and the Gatherer has its own investment incentives. In high ratio cases, fencing damages should shade lower because of the difficulty of negotiating a successful consensual transfer and the possibility of enforcement and assessment error. In low ratio cases (where negotiation costs are a low percentage

165. A New York Times electronic media executive estimated a \$5 per user cost for tailoring its website to provide privacy to subscribers who requested it. Sovern, 74 Wash L Rev at 1082 n250 (cited in note 68). A Brookings Institution/American Enterprise Institute study estimated a typical company's cost of installing a system to track how personal data is handled (necessary for confirming that privacy is maintained, and for implementing any negotiated bargains with consumers on how Data is handled) at \$46,000 to \$670,000, with total costs to the U.S. economy of \$9 to \$36 billion. *Internet Privacy Rules Could Cost Business as Much as \$36 Billion*, Wall St J, May 8, 2001, at B5. Both the New York Times executive and the funders of the Brookings/AEI study had an interest in exaggerating costs to stave off further regulation, however. In the workplace safety area, a 1995 Congressional Office of Technology Assessment study found that the actual costs of compliance with OSHA regulations were often only 2 to 4% of industry estimates. Mary Williams Walsh, *Keeping Workers Safe, but at What Cost?*, NY Times, Dec 20, 2000, at G1.

of the value of the Data), fencing damages should be higher. Often, this will reduce itself to whether the Source-arm's length Gatherer relationship is personal (the plumber gives your name to a local insurance agent; low ratio likely) or impersonal (Spikeheels.com sells Tony's name to Redolent; high ratio likely if the Source-Gatherer negotiation goes beyond a privacy checkbox on the website). The weaker the support for the Gatherer's belief in its right to Take, the higher fencing damages should be. As compared to an intentional Taking by a classic fiduciary, positive externalities should lower damages more.

E.2.b(3) Contractual Modification of Default Rule

In an arm's length relationship, there is more reason to permit modification of the default rule for intentional Takings. Nonetheless, the information oligopoly persists, and the Gatherer's efforts to obtain a waiver from the Source are likely to lead to an undesirable separating equilibrium, with the same analysis as for a waiver of proximate cause damages.¹⁶⁶ Waiver should be permitted where there is no information oligopoly and Sources are sophisticated.

E.2.c. Negligent Takings

For an arm's length Gatherer, negligence is a Taking with less than strong support for the Gatherer's right to the Data. The analysis is the same as that in the general discussion of negligent Takings.¹⁶⁷ This weak property rule should be inalienable except for sophisticated Sources.

E.3. OWNER-GATHERERS WHO PROMISE CONFIDENTIALITY TO THE SOURCE

Since 2000, with the rise of public concern about privacy, many arm's length Gatherers have voluntarily offered website privacy policies in order to forestall government regulation and attract business from Sources who would otherwise decline due to confidentiality concerns.¹⁶⁸ In these cases, a Gatherer would ordinarily have a full right to transfer the Source's Data to Third Parties (an

166. See above at Part D.2.b.

167. See above at Part D.7.e.

168. In addition to these voluntary privacy policies, the Gramm-Leach-Bliley Financial Services Modernization Act, 15 USCA § 6802 (West Supp 2000), requires financial services companies to offer a right to privacy in the form of an "opt-out." Initially, the Gatherer is an Owner-Gatherer with a Third Party transfer right. The opt-out is a call option giving the Source the right to take the Third Party transfer right, converting the Owner-Gatherer to an arm's length Gatherer. See also Sovern, 74 Wash L Rev (cited in note 68). The opt-out is a rare real-world example of Calabresi and Melamed's Rule 4, except that the right is transferred by mailing a letter rather than producing cold, hard cash. See above at note 41; Calabresi and Melamed, 85 Harv L Rev at 1115-16 (cited in note 39).

“Owner-Gatherer” and a “Third Party transfer right”),¹⁶⁹ but limits the Third Party transfer right by the privacy promise.

E.3.a. Level of Protection of Data

The analysis is similar to that for an arm’s length Gatherer, except the information oligopoly is less severe: not only is the Source aware that the Owner-Gatherer will not act exclusively in the Source’s interest, but by declaring a privacy policy, the Owner-Gatherer is negotiating the conveyance of the Third Party transfer right to the Source. In effect, the Owner-Gatherer is offering better terms than someone who does not offer a privacy policy. Nonetheless, the information oligopoly persists in a weaker form.

E.3.b. Intentional Takings

E.3.b(1) The Default Rule Should Be a Weak Property Rule

A weak property rule is appropriate for protecting against the intentional Taking of Data by an Owner-Gatherer. Investment incentives are originally all with the Owner-Gatherer, which started with the property right. Those Sources who enter into a transaction with the Owner-Gatherer based on the privacy promise (“high-valuing Sources”), however, gain investment incentives that would be defeated by a Taking, and will value the Data more highly beforehand than those Sources who are indifferent to the privacy promise (“low-valuing Sources”).

After the privacy promise, the split nature of the Data presents a modest risk of strategic bargaining, pointing towards a property rule: the Owner-Gatherer would not have offered the privacy policy if the gains from entering into a transaction with a Source were less than the potential loss from future strategic bargaining. In practice, this means that the Owner will only offer a privacy policy if it does not expect to violate it. High-valuing Sources will risk increasing marginal damages from disclosure of the Data, also pointing toward a property rule. (So will low-valuing Sources, but they were initially willing to risk that by transferring the Data to the Owner-Gatherer without a privacy policy.)

These factors might justify a medium property rule similar to that for arm’s length Gatherers. But if the Owner-Gatherer is faced with this, then, given assessment error and enforcement error, it may simply choose not to offer a pri-

169. It is actually not the transfer of a full property interest because the Source retains some personal rights. If Tony gives his video preferences to Cornbuster, he can still share them with Spikeheels.com.

vacy policy, which will prevent efficient transactions from being made. A liability rule would also be troublesome, however, because it would enable the Owner-Gatherer to obtain Data from a high-valuing Source, intentionally Take it and then keep any profit.

This argues for a weak property rule. Although ideally, high-valuing Sources should receive stronger protection than low-valuing Sources, there is no way to separate them beforehand when all Sources are offered voluntary privacy policies at the time of contract.¹⁷⁰ Nor will they be easy to separate in litigation, which is likeliest to occur after a train wreck. There are no atheists in foxholes, and after a train wreck there will be few Sources who admit to having been low-valuing. This will create substantial assessment error.

A Taking without strong support should be treated as intentional, since after the conveyance of the Third Party transfer right, the Owner-Gatherer becomes an arm's length Gatherer and should be subject to the arm's length Gatherer standard.

E.3.b(2) Contours of the Weak Property Rule

The weak property rule for an intentional Taking by an Owner-Gatherer should be similar to that for an arm's length Gatherer, with two exceptions. Fencing costs should be omitted because Sources should expect to be on their guard with an Owner-Gatherer. Enforcement costs should be eliminated to screen out pinprick claims except for large-scale database Takings that will support class actions. This will underprotect high-valuing Sources, who will have to deduct enforcement costs from any judgment, but a relatively high proportion of claims from high-valuing Sources will be train wrecks and not screened out. The alternative—imposing enforcement costs on the Owner-Gatherer—will overdeter. The lower damages level under the rule will be counterbalanced by reputation damage if the Owner-Gatherer is discovered to be intentionally violating its own privacy policy.¹⁷¹

Liability for illicit gain could make some Owner-Gatherers reluctant to offer a privacy policy, given assessment error and enforcement error. The alternative, in which an Owner-Gatherer without strong support Takes, receives illicit gain

170. A separation could take place if the Gatherer offered a lower price to low-valuing Sources. This does not appear to be widespread, but cf Slatalla, *Giving Up Privacy* (cited in note 68) (dot-com retailer offers \$5 discount coupon to customers who agree to transfer their personal information).

171. The Ford Explorer's rollover problems with Bridgestone tires provide an example of reputation damage from perceived bad behavior. Explorer sales collapsed by 21% in the first half of 2001 even though, as of this writing, it is not clear that Ford was at fault. Joann Muller, *Ford: Why It's Worse Than You Think*, *Bus Wk*, June 25, 2001, at 80–89. See generally Robert Cooter and Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 *J Legal Stud* 401 (2001) (answering yes); Viscusi, 87 *Georgetown L J* at text accompanying n64 (cited in note 136). Cf Andrea Petersen, *A Privacy Firestorm at Doubleclick*, *Wall St J*, Feb 23, 2000, at B1 (outcry over internet advertising firm's plan to match records of website visits with detailed consumer database; plan ultimately abandoned).

and does not have to compensate the Source, seems worse.

E.3.b(3) Contractual Modification of Default Rule

The Owner-Gatherer may want to modify the weak property default rule for intentional Takings. Spikeheels.com might adopt a voluntary Internet privacy policy and attempt to limit liability through an adhesion contract. ("By using my site, you agree that, if I breach my privacy policy, your damages are limited to restitution.")¹⁷² The argument for permitting modification is that the Owner-Gatherer may find it uneconomical to offer the privacy policy if the potential damages are too high. This is unpersuasive for a Taking without strong support for the Owner-Gatherer's right to the Data, particularly given that the Owner-Gatherer drafted the privacy terms and that the default rule screens out pinprick claims by not awarding enforcement costs. If modification is allowed, the privacy policy may act as a kind of fraudulent inducement, in which the privacy policy entices a high-valuing Source to part with her Data, the Owner-Gatherer intentionally Takes it, and the high-valuing Source is left without compensation for most of her damages. Modification should be permitted between sophisticated parties: confidentiality agreements between businesses often stringently limit damages.

E.3.c. Negligent Takings

The analysis is similar to that for negligent breaches of an ordinary contract. After the privacy promise, both the Owner-Gatherer and the Source have substantial investment incentives in the Data. It will not be efficient for the Owner-Gatherer to invest more in precaution than the potential damage to the Source, which argues for a liability rule consisting of restitution and (unlike an ordinary contract) proximate cause damages. Since the Source had no initial right to the Data and therefore no prior investment incentive, it should not be entitled to collect enforcement costs on a successful suit: like any other party, it risks non-performance when entering into a contract. This liability rule should be inalienable except for sophisticated Sources.

172. Some major online businesses employ well-hidden damage disclaimer provisions in adhesion contracts. See, for example, America Online, *Member Agreement* § 5 (Warranty) <AOL Keyword: Terms of Service> (visited July 17, 2001) (disclaiming consequential damages from use); Yahoo, *Terms of Service* § 18(iii) (Limitation of Liability) <<http://docs.yahoo.com/info/terms/>> (visited July 17, 2001) (disclaiming all damages); Amazon.com, *Conditions of Use, Disclaimer of Warranties and Limitation of Liability* <<http://www.amazon.com/exec/obidos/tg/browse/-/508088/103-1646697-6155067>> (visited July 17, 2001) (disclaiming damages from use). The effect of the AOL and Yahoo disclaimers is limited by the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 USC § 2707, see below at Parts F.3.a(1), F.3.b.

E.4. CONVERSION BY THIRD PARTIES

E.4.a. Intentional Takings

E.4.a(1) The Default Rule Should Be a Medium Property Rule

Conversion occurs when a Third Party, without any right, takes a Source's Data, as when Last Judgment breaks into Dr. Pump's office and examines her files on Tony. Like an arm's length Gatherer, a Third Party often has a legitimate incentive to seek Data on Sources. For example, it is critical for shoe manufacturers to gain information on competitors' prices, and illegal under anti-trust laws to do so by going directly to the competitors. Third Parties also need negative reputational information: before sending out a solicitation offering credit cards, an issuer must weed out the deadbeats. Therefore, intent should be assessed by the same standards as for a Taking without strong support by an arm's length Gatherer. Strong support would include a belief, based on the preponderance of the evidence, that the Gatherer from whom the Data is obtained had a Third Party transfer right.

E.4.a(2) Contours of Property Rule

Despite these similarities to the needs of arm's length Gatherers, if the Third Party Takes without strong support, the damages applied should be the same as those for Takings by classic fiduciaries. A Third Party's rights in the Data are weak (often nonexistent), and investment incentives are predominantly with the Source.

E.4.a(3) Contractual Modification of Default Rule

This does not apply, since the Third Party and the Source have no legal relationship before the Data is Taken.

E.4.b. Negligent Takings

The analysis should be similar to that for a negligent Taking by an arm's length Gatherer, resulting in a weak property rule. Third Parties should be encouraged to obtain Data without taking inefficient precautions. Since the Third Party has no direct relationship and will Take in the belief that there is no need to contact the Source beforehand, prior negotiation will be virtually impossible.

E.5. SUMMARY OF ANALYSIS

Our analysis so far can be summarized in two equations:

$$DL = RES + SLG + ED + REP + H + C$$

$$DP = DL + GMG - O + GIG + F - PE + EC + C.$$

The terms are the ones we have been discussing in text form throughout. While investment incentives and intent drive the content of each proposed rule, most of the variation comes in the weight given to fencing costs and positive externalities.

TABLE 2: DEFINITIONS FOR EQUATION TERMS

Liability rule damages	Property rule damages
DL = liability rule damages	DP = property rule damages
RES = restitution	GMG = Gatherer's monetary gain
SLG = Source's lost gains from trade in existing transactions	O = overlap between REP and GMG
ED = emotional distress	GIG = Gatherer's illicit gain
REP = reputation damage	F = fencing costs
H = hassle factor	PE = positive externalities
C = correcting factor for assessment error and enforcement error	EC = enforcement costs
	C = correcting factor for assessment error and enforcement error

The next table summarizes the discussion so far by detailing how courts and legislatures should treat breach of confidentiality cases.

TABLE 3: DETAILED ANALYSIS OF PROPOSED DAMAGES RULES

	I	Rule Type	RES	SLG	ED	REP	H	GMG	O	GIG*	F†	-PE	CEC
Classic fiduciary intentional	With incorrect belief that Gatherer owns or higher	Strong property	Y	Y	Y	Y	Y	Y	Y	Y	High	Weak	Y
Arms' length intentional	Without strong support	Medium property	Y	Y	Y	Y	Y	Y	Y	Y	Medium	Strong	Y
Owner-Gatherer intentional	Without strong support	Weak property	Y	Y	Y	Y	Y	Y	Y	Y	N	Strong	N
Third Party intentional	Without strong support	Strong property	Y	Y	Y	Y	Y	Y	Y	Y	High	Strong	Y
Classic fiduciary negligent	Inadequate precaution	Medium property	Y	Y	Y	Y	Y	Y	Y	N	Medium	N	Y
Arms' length negligent	With strong support or lower	Weak property	Y	Y	Y	Y	Y	Y	Y	Y/N [§]	Low	Strong/N [‡]	Y
Owner-Gatherer negligent	With strong support or lower	Liability	Y	Y	Y	Y	Y	N	N	Y/N [§]	N	Strong/N [‡]	N
Third Party negligent	With strong support or lower	Weak property	Y	Y	Y	Y	Y	Y	Y	Y/N [§]	Low	Strong/N [‡]	Y

* Tied to Gatherer wealth.

§ Yes where strong support and sole reason for Taking is illicit gain; no otherwise.

† Tied to liability rule damages

‡ Strong where strong support; no where lack of precaution.

F. DOCTRINAL TURMOIL

While property/liability theory does not precisely calibrate the protection of confidentiality interests, it is a model of clarity compared to the case law's smorgasbord of theories for assessing damages for Takings of Data, including contract,¹⁷³ implied contract,¹⁷⁴ promissory estoppel,¹⁷⁵ breach of confidentiality,¹⁷⁶ fiduciary duty,¹⁷⁷ malpractice,¹⁷⁸ invasion of privacy,¹⁷⁹ intrusion,¹⁸⁰ false light,¹⁸¹ commercial misappropriation,¹⁸² right of publicity,¹⁸³ trespass,¹⁸⁴ and breach of duty of loyalty.¹⁸⁵ Courts award damages based on which doctrinal box they happen to open.

One orderly attempt to assess damages is found in Judge Richard Posner's opinion in *Douglass v Hustler Magazine, Inc.*¹⁸⁶ As a sitting judge, even as eminent a law and economics scholar as Judge Posner is constrained by doctrinal niceties—here, those of invasion of privacy and false light—but he nonetheless manages to identify the key issues.

The plaintiff, Robyn Douglass, had done nude modeling for a photogra-

173. See, for example, *Coben v Cowles Media Co.*, 479 NW2d 387 (Minn 1992); *Doe v Roe*, 190 AD2d 463, 599 NYS2d 350 (1993); *Judwin Properties, Inc., v Griggs and Harrison, P.C.*, 911 SW2d 498 (Tex App 1995).

174. See, for example, *Martino v Family Serv. Agency of Adams Co.*, 112 Ill App 3d 593, 445 NE2d 6 (1982); *Leger v Spurlock*, 589 S2d 40 (La Ct App 1991); *Stubbs v N. Mem'l Med. Ctr.*, 448 NW2d 78 (Minn Ct App 1989).

175. See, for example, *Tlapek v Chevron Oil Co.*, 407 F2d 1129 (8th Cir 1969); *Coben v Cowles Media Co.*, 479 NW2d 387.

176. See, for example, *Leger v Spurlock*, 589 S2d 40 (state statutory duty); *Estate of Behringer v Medical Ctr. at Princeton*, 249 NJ Super 597, 592 A2d 1251 (Law Div 1991); *McCormick v England*, 494 SE2d 431 (SC Ct App 1997). See also the articles cited above at note 12.

177. See, for example, *Barnett Bank, N.A., v Shirey*, 655 S2d 1156 (Fla Dist Ct App 1995); *Tante v Her-ring*, 264 Ga 694, 453 SE2d 686 (1994); *Brandt v Medical Defense Associates*, 856 SW2d 667 (Mo 1993).

178. See, for example, *Kohn v Schiappa*, 281 NJ Super 235, 656 A2d 1322 (Law Div 1995); *Judwin Properties, Inc., v Griggs & Harrison, P.C.*, 911 SW2d 498 (Tex App 1995); *Pierce v Caday*, 422 SE2d 371 (Va 1992).

179. See, for example, *Doe v SEPTA*, 72 F3d 1133 (3d Cir 1995); *Sheets v Salt Lake Co.*, 45 F3d 1383 (10th. Cir 1995); *Reid v Pierce Co.*, 136 Wash 2d 195, 961 P2d 333 (1998) (privacy and outrage sub tort).

180. See, for example, *Sbulman v Group W Productions, Inc.*, 18 Cal 4th 200, 955 P2d 469 (1998); *Miller v NBC*, 187 Cal App 3d 1463, 232 Cal Rptr 668 (1986).

181. See, for example, *Peoples Bank and Trust Co. v Globe Int'l Publ'g, Inc.*, 978 F2d 1065 (8th Cir 1992); *Douglass v Hustler Magazine, Inc.*, 769 F2d 1128 (7th Cir 1985); *Vassiliades v Garfinckel's*, 492 A2d 580 (DC 1985).

182. See, for example, *Abdul-Jabbar v General Motors Corp.*, 85 F3d 407 (9th Cir 1996); *Neva, Inc. v Christian Duplications Int'l, Inc.*, 743 F Supp 1533 (M D Fla 1990); *Town & Country Properties, Inc. v Riggins*, 457 SE2d 356 (Va 1995).

183. See, for example, *Abdul-Jabbar v General Motors Corp.*, 85 F3d 407 (9th Cir 1996); *Ventura v Titan Sports, Inc.*, 65 F3d 725 (8th Cir 1995); *Waits v Frito-Lay, Inc.*, 978 F2d 1093 (9th Cir 1992). In addition, some commercially valuable confidential information may be protected under a trade secret theory. Blair and Cotter, 39 Wm & Mary L Rev (cited in note 13).

184. *Food Lion, Inc. v Capital Cities/ABC, Inc.*, 194 F3d 505 (4th Cir 1999).

185. *Id.*

186. 769 F2d 1128 (7th Cir 1985).

pher, and had given permission for use of the photographs in *Playboy* magazine, but not in the much raunchier *Hustler*. *Hustler* nevertheless used them, and Douglass sued. Douglass was a Source, in that she was necessary for the creation of the photographs (viewed as Data about her) and had a property right in any distribution of them beyond *Playboy*. The photographer was a Gatherer, and *Hustler* a Third Party. Douglass won \$1,000,000 in compensatory damages and \$1,500,000 in punitive damages at trial, although the trial judge remitted the punitives to \$100,000. *Hustler* appealed.

Returning to our earlier analysis, Douglass's total damages for an intentional Taking by a Third Party should be protected by a strong property rule,¹⁸⁷ whose components would include restitution, proximate cause damages, disgorgement of monetary gain (less any overlap with restitution), disgorgement of illicit gain, a fencing cost factor, a correcting factor for enforcement and assessment error, and enforcement costs.

Judge Posner did not address restitution damages—what Douglass would have earned from *Hustler* had she sold the photos to them. Because Judge Posner indicated that far larger disgorgement damages were available, he eliminated the need to subtract the overlap. Turning to proximate cause damages, Judge Posner held that emotional distress damages (about \$300,000) were excessive, and remanded this to the trial court for further determination. To arrive at this conclusion, he compared emotional distress damages in similar cases (less than half those awarded in *Douglass*), calling the *Douglass* jury's award "ridiculous" and "absurd." To deal with the mapping problems inherent in determining emotional distress damages, which can lead to assessment error,¹⁸⁸ Judge Posner thus used a heuristic (rule of thumb) based on other decisions that were not necessarily representative of actual emotional distress damages in all such cases.¹⁸⁹ Nor does the heuristic consider subjective feelings—who among us can truly feel Robyn Douglass's pain?¹⁹⁰

Douglass was not awarded reputation damages for lost future personal transactions, but did receive them for lost future commercial transactions, since her Chicago television commercial work declined. They were reduced, however, because the discount rate for Douglass's future lost work was too low to accurately reflect the riskiness of her income stream as a model and actress.¹⁹¹ Judge Posner brushed aside the hassle factor damages—all that Douglass endured

187. See above at Part E.4.a.

188. See above at Part D.3.a.

189. Wearing his academic hat, Posner observed, "It is entirely rational for people to rely on anecdotal evidence in the absence of better evidence." Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan L. Rev* 1551, 1572 (1998).

190. Not Judge Posner, who concluded that Douglass suffered "no severe or permanent psychiatric harm" and that given her previous *Playboy* history, she was "not a blushing violet." 769 F2d at 1144.

191. *Id.* at 1143. The opinion is not clear on whether these damages included lost gains from trade in existing transactions terminated as a result of the Taking.

were some "obscene phone calls stimulated by the [photos'] publication."¹⁹²

Judge Posner indicated that if the trier of fact found that punitive damages were appropriate, the starting point would be disgorgement.¹⁹³ These were tied to *Hustler's* profits from the Douglass pictorial, attempting to remove *Hustler's* incentive to Take Douglass's Data without compensation.¹⁹⁴ This test would not have worked if *Hustler* were unprofitable. Reflecting the standard doctrinal approach, there was no discussion of fencing costs or correcting factor damages.¹⁹⁵ Apparently nothing was awarded for enforcement costs.

The result may have been underdeterrence, notwithstanding Judge Posner's concern that a low punitive damages figure "might have little effect on [*Hustler's*] propensity, well documented in several . . . cases . . . , to invade people's legal rights."¹⁹⁶ With reputation, emotional distress and disgorgement damages limited to approximately actual economic amounts, the failure to award other damages and the absence of a correcting factor, this was probably the equivalent of a liability rule.¹⁹⁷ Regardless of the specific standards applied in *Douglass*, the repeated successful suits against *Hustler* for publishing misappropriated porn photos suggest that *Hustler* probably had not been deterred from Takings by the American court system as a whole.

Judge Posner's *Douglass* analysis has parallels to the analysis proposed in this article, but also illustrates how difficult it is to work with doctrinal ambiguities. And what Judge Posner makes lucid, others turn into a mess.

F.1. CATEGORIZING THE CASES AND STATUTES

The following sections fit cases and federal statutes¹⁹⁸ to the theoretical

192. Id at 1144.

193. Because it is unclear from the opinion whether *Hustler* senior executives knew that they had no right to use the photos, Judge Posner may have been reluctant to go beyond a disgorgement standard. The Gatherer/photographer, who had become a *Hustler* editor at the time of publication, acted with specific intent, but was dropped from the case after agreeing to testify in Douglass's favor. Id at 1132.

194. Id at 1144.

195. There may be less need to correct for enforcement error in nude photo cases, which McCarthy has called a "distinct category." McCarthy, 2 Rights of Publicity and Privacy at § 11.7[C] (cited in note 107). A high probability of detection reduces enforcement error, and nude photographs in a national magazine are often detected, judging from the cases and from the experience of former Morgan Stanley investment banker Christian Curry, who was fired after appearing in several gay porn magazines. Anita Raghavan, *Morgan Stanley Fires Analyst For Sexual Photos*, Wall St J Eur, Apr 28, 1998, at UK7B.

The proceedings in nude photo cases are often lurid. (See Judge Posner's memorable description of the slide show at trial, *Douglass*, 769 F2d at 1141-42.) This probably tilts triers of fact toward finding Gatherer liability. (Enforcement error may be tilted back, however, by First Amendment concerns.) It also suggests that assessment error will usually be on the high side.

196. *Douglass*, 769 F2d at 1145.

197. Judge Posner's statement that *Hustler's* profits from the use of the photos would be the "starting-point" for punitive damages leaves some wiggle room, however, as does the inherently foggy nature of emotional distress damages. Id.

198. I concentrate on federal statutes because there is some case law available and the number of statutes is manageable. There are hundreds of state privacy statutes. See Smith, *State and Federal Privacy Laws*

categories—a Procrustean task. I report the number of cases found supporting a position in order to give an idea of the weight of authority, generally treating cases as applying property rules when they award (1) disgorgement, (2) punitive damages (other than nominal damages), (3) emotional distress damages above the somewhat arbitrary figure of \$75,000,¹⁹⁹ (4) other compensatory damages above \$75,000 that are not tied to plausible economic loss, or (5) damages of greater than \$10,000 plus enforcement costs (attorneys' fees). Although property/liability theory indicates that full property rule damages should include a correcting factor, they are rarely available doctrinally, and in analyzing the cases I have not adjusted down on the property/liability continuum in their absence, even though this lowers effective damages. I assume instead that courts were trying to create a property rule with the doctrinal tools available to them. (With property rule damages, as with hideous gifts, it's the thought that counts.²⁰⁰) I consider as liability rule cases most of the remaining cases that award damages but do not fall within the property rule category. When damages are below \$10,000 and enforcement costs are not awarded,²⁰¹ however, enforcement costs will absorb virtually the entire judgment, and I have generally categorized these cases as creating a property right in the Gatherer or Third Party.²⁰² In cases involving multiple plaintiffs, I have aggregated damages and attorneys' fees, since a property rule is meant to remove gain from the Gatherer's or Third Party's perspective. When damages are reported as being "available," this means that we do not know the ultimate award, only the legal rule that applied. The cases are probably not the complete universe, so the weight of authority evaluations should be used with caution.

This article has also distinguished between train wrecks and pinpricks. Most cases categorized as train wrecks feature economic loss, although also included are a few outrageous noneconomic loss cases that would move even a utilitarian with a heart of stone. The vast majority of cases with solely noneconomic loss are treated as pinpricks.

(cited in note 82).

199. It appears that many finders of fact inflate emotional distress damages in order to escape doctrinal limits on punitive damages, so I have assumed that amounts greater than \$75,000 reflect this. I have also made eyeballed adjustments for (1) much older cases where inflation and damages levels were much lower, justifying a lower threshold for finding property rule damages and (2) recent cases that are especially outrageous, justifying a higher threshold for finding property rule damages.

200. If failure to award enforcement costs and a correction factor were taken into account, the overwhelming majority of the cases would have either a liability rule or a property right in the Gatherer or Third Party.

201. Except in much older cases decided in an era of lower price levels.

202. Particularly considering the nonmonetary opportunity costs of litigation. See above at p101.

F.2. CASE ANALYSIS: CLASSIC FIDUCIARY

F.2.a. Intentional Takings

According to our analysis, an intentional Taking by a classic fiduciary should be protected against by a property rule. We can test this hypothesis against a parade of sleazy professionals: lawyers, physicians, psychiatrists, and brokers. Twelve cases applied disgorgement property rules in self-dealing cases where the classic fiduciary profited from the information.²⁰³ Punitive damages were not awarded in the disgorgement cases, with no articulated reason, which reduced damages below a strong property rule. Because the disgorgement cases were commercial, no emotional distress damages appear to have been requested.²⁰⁴ Two cases not involving self-dealing built property rules by combining punitive damages with *Hadley*²⁰⁵ or emotional distress damages.²⁰⁶ Four cases applied

203. *Snepp v United States*, 444 US 507 (1980) (CIA ex-employee who writes book without preclearing with former employer, as required by employment contract, must disgorge \$60,000 book profits); *ABKCO Music, Inc., v Harrisongs Music, Ltd.*, 722 F2d 988 (2d Cir 1983) (manager, on behalf of ex-Beadle George Harrison, negotiates for settlement of infringement claim against Harrison; after management relationship terminates, manager acquires the infringement claim and negotiates against Harrison; Harrison may acquire the claim for the manager's \$587,000 acquisition cost); *Nucor Corp. v Tennessee Forging Steel Serv., Inc.*, 476 F2d 386 (8th Cir 1973) (employee departs, taking plans for steel plant, [not a trade secret], which are used to build competitor's steel plant); *Tlapek v Chevron Oil Co.*, 407 F2d 1129 (8th Cir 1969) (employee discovers geological formation that may contain oil and buys mineral rights interests after leaving); *Midstate Amusement Corp. v Rivers*, 54 F Supp 738 (E D Wash 1944) (theater manager acquires real estate sought by employer theater chain); *David Welch Co. v Erskine & Tulley*, 203 Cal App 3d 884, 250 Cal Rptr 339 (1988) (law firm representing debt collector steals client list and technique, causing loss of business; \$350,000 damages); *Fenton v King Hill Irrigation Dist.*, 186 P2d 477 (Idaho 1947) (irrigation district agent has friends acquire three judgments against district at discount); *Conant v Karris*, 165 Ill App 3d 783, 520 NE2d 757 (1987) (developer's broker gives confidential information about offer to broker's brother, who outbids developer and buys property); *Zeiden v Oliphant*, 54 NYS2d 27 (Sup Ct 1945) (lawyer learns of potential *cy pres* bequest to charity from estate while representing daughter in unsuccessful will contest; after being dropped as will contest counsel, lawyer offers to obtain estate's funds for the charity in exchange for contingent fee; daughter entitled to lawyer's \$5,000 fee, notwithstanding that she had no right to bequest); *Sherwood v South*, 29 SW2d 805 (Tex Civ App 1930) (lawyer represents clients facing litigation, buys resulting judgment against clients, then forecloses on judgment). Two quasi-disgorgement cases denied the Gatherer compensation that it would have ordinarily been entitled to: *Haymes v Rogers*, 70 Ariz 257, 219 P2d 339 (1950) (broker tips off buyers that seller will take less than asking price, and is denied \$425 commission), *rev'd* on other grounds, 70 Ariz 408, 222 P2d 789 (1950); *Alexander v Russo*, 1 Kan App 2d 546, 571 P2d 350 (1977) (lawyer denied reward for leading insurer to stolen platinum, which he did by informing on former client, the thief's mother, who also sought the reward).

204. In reality, a commercial Taking can produce emotional distress. It is hard to imagine that Charles and Walter Sherwood were not upset when their lawyer betrayed them, *Sherwood*, 29 SW2d 805. Making emotional distress damages available in disgorgement cases, however, might create undesired insurance by compelling Gatherers to raise prices to cover expected liability. See the articles discussed above at note 161. Yet courts often award emotional distress damages for conversions arising from commercial misappropriation, creating the same risk. See below at note 245. Courts must feel that a more personal interest is involved in commercial misappropriation.

205. *Spring v Geriatric Auth. of Holyoke*, 394 Mass 274, 445 NE2d 727 (1985) (family of incompetent man at nursing home obtains court order to stop dialysis; nurses intervene in court proceedings and tell

liability rules, using the absence of malice (a proxy for illicit gain) as a screen to defeat property rules.²⁰⁷ This is a higher standard of intent than the analysis suggests for the application of property rules, and underdeters.

F.2.b. Negligent Takings

In the few classic fiduciary negligence cases on point, contrary to the suggested approach of this article, courts underdeter by applying a liability rule including proximate cause damages.²⁰⁸

F.3. 4. STATUTE AND CASE ANALYSIS: ARM'S LENGTH GATHERERS

F.3.a. Intentional Takings

According to this article's theory, intentional Takings of Data by an arm's length Gatherer should be protected against by a medium property rule.

newspapers that man said "No" when asked if he wanted to die; \$1 breach of contract damages; \$100,000 trial court punitive damages verdict overturned for procedural reasons not relevant here).

In the following case, a potential property rule was available: *Doe v Roe*, 190 AD2d 463, 599 NYS2d 350 (1993) (physician gives information on HIV status to attorney for patient's employer in workers compensation suit; permits claims for breach of contract [noting that damages are more limited than tort damages], breach of physician-patient privilege and punitives). But cf *Wagenheim v Alexander Grant & Co.*, 19 Ohio App 3d 7, 482 NE2d 955 (1983) (positive externality case; accounting firm tells client's customers about client's cooked books; client goes bust. Doctrinal fig leaves: no damages without comparison of business value before and after Taking—an expectation-type measure; no punitives without malice.).

206. *Fierstein v DePaul Health Center*, 24 SW3d 220 (Mo Ct App 2000) (hospital releases patient's psychiatric records to husband before deposition without permission or notice; husband uses records in custody fight; \$10,000 emotional distress damages plus \$25,000 punitives).

207. *Dessel v Dessel*, 431 NW2d 359 (Iowa 1988) (lawyer represents the partner of a partnership in dissolution, then uses confidential information in suit against him; legal malpractice theory; lawyer liable for proximate cause damages [partner entitled to commissions of \$17,987] and partner's cost of defense in litigation; train wreck); *Stubbs v N. Mem'l Med. Ctr.*, 448 NW2d 78 (Minn Ct App 1989) (plastic surgeon uses patient's before and after photos in promotional publication; no emotional distress damages proved; implied contract claim survives; no punitives available for breach of implied contract; pinprick); *Levias v United Airlines*, 27 Ohio App 3d 222, 500 NE2d 370 (1985) (physician discloses information to patient's supervisor and husband; \$14,000 emotional distress damages; pinprick); *Wagenheim*, 482 NE2d 955 (positive externality case discussed in detail above at note 205).

208. *Vassiliades v Garfinkel's*, 492 A2d 580 (DC Ct App 1985) (plastic surgeon publicly displays patient's before and after pictures; court grants judgment n.o.v. as to \$350,000 jury verdict, but permits retrial on emotional distress and reputation damages); *Kohn v Schiappa*, 281 NJ Super 235, 656 A2d 1322 (Law Div 1995) (lawyer negligently discloses adoptive parents' names and addresses to birth parents; emotional distress claim available); *Doe v Roe*, 400 NYS2d 668 (Sup Ct 1977) (psychiatrist's book contains verbatim excerpts from therapy sessions without adequately disguising patient's identity; emotional distress damages of \$17,100; proximate cause damages [loss of clients of patient, herself a psychiatrist] of \$2,900; no punitives without malice; best read as a lack of precaution case; train wreck).

F.3.a(1) Statutes

TABLE 4: ANALYSIS OF FEDERAL STATUTORY DAMAGES FOR BREACH OF CONFIDENTIALITY

Statute	Cite	Level of Intent		Type of Damages ^[1]									
		Intentional	Negligent	Actual	Punitive	Attys Fees	Presumed	Presumed Dollar Amounts ^[2]	Emotl Disr	Repu-tation	Dis-gorge-ment	Resti-tution	
Children's Online Privacy Protection Act of 1998	15 USCA § 6504	Y	Y	Y	N	N	N	None	?	?	?	Y	
	47 USCA § 551	Y	Y	Y	Y	Y	Y	Greater of \$100/day or \$1,000	?	N	N	?	
Driver's Privacy Protection Act of 1994	18 USCA § 2724	Y	?	Y	Y	Y	Y	2500	?	?	?	?	
Electronic Communi- cations Privacy Act	18 USCA § 2520	Y	N	Y	Y	Y	Y	Greater of \$100/day or \$10,000	Y	N	Y	?	
Fair Credit Reporting Act of 1970	15 USCA § 1681n(a)	Y	N	Y	Y	Y	Y	Actual damages of not less than \$100 and not more than \$1,000	?	?	?	?	
Fair Credit Reporting Act of 1970	15 USCA § 1681o(a)	N	Y	Y	N	Y	N	None	?	?	?	?	
Right to Financial Privacy Act of 1978	12 USCA § 3417	Y	Y	Y	Y	Y	Y	100	?	?	N	?	
Privacy Act of 1974	5 USCA § 552a	Y	N	Y	N	Y	Y	1000	?	N	?	?	
Stored Wire and Electronic Communications and Transactional Records Access Act	18 USCA § 2707	Y	Y/N ^[3]	Y	Y	Y	Y	1000	?	?	Y	?	
Video Privacy Protection Act of 1988	18 USCA § 2710	Y	N	Y	Y	Y	Y	2500	?	?	?	?	

[1] Question marks mean that the answer is unclear. For emotional distress, reputation, disgorgement and restitution damages, the yes and no entries generally refer to court interpretations, while the question mark references reflect either split court authority or issues that have not yet been decided.

[2] Includes statutes where court "may" award presumed damages for violation (i.e. award of presumed damages not mandatory).

[3] Negligence liability for Third Party (the government), but not for Gatherer (online service provider or website operator).

Table 4 summarizes the federal statutes that provide civil liability for arms' length Gatherers who misuse Data, including cable operators who disclose subscriber records;²⁰⁹ online operators who obtain information from children;²¹⁰ state agencies that release driver records;²¹¹ credit agencies that release consumer credit reports;²¹² federal government agencies that release records on individuals;²¹³ financial institutions that release customer records to the government;²¹⁴ electronic communications services, such as online service providers, that divulge the contents of communications;²¹⁵ and video store operators who disclose information on customer rental preferences.²¹⁶

The patchwork of Data protected by the statutes²¹⁷ is matched by the patchwork of damages provisions, which vary with little apparent reason. Legislative history on the damages provisions is scanty, although that for the Cable Communications Policy Act of 1984 notes "the need to balance privacy issues with the need to not unreasonably impede flows of information necessary to provide service for subscribers," which is consistent with the theory that arm's length Gatherers should be given greater protection than classic fiduciary or Third Party Converter Gatherers.²¹⁸ Some of the statutes follow the structure of the Electronic Communications Privacy Act ("ECPA"), stating that the court "may" grant the greater of presumed damages or actual damages, and making punitive damages and enforcement costs available.²¹⁹ Others set minimum pre-

209. Cable Communications Privacy Act of 1984, 47 USCA § 551 (West Supp 2000).

210. Children's Online Privacy Protection Act of 1998, 15 USCA §§ 6502, 6504 (West Supp 2000).

211. Driver's Privacy Protection Act of 1994, 18 USCA §§ 2721, 2724 (West Supp 2000), upheld against constitutional challenge, *Reno v Condon*, 528 US 141 (2000).

212. Fair Credit Reporting Act of 1970, 15 USCA §§ 1681b(a), 1681n(a), 1681o(a) (West Supp 2000).

213. Privacy Act of 1974, 5 USCA § 552a(g)(4) (West Supp 2000).

214. Right to Financial Privacy Act of 1978, 12 USCA §§ 3402, 3417 (West Supp 2000).

215. Stored Wire and Electronic Communications and Transactions Records Access Act, 18 USCA §§ 2702, 2707 (West Supp 2000).

216. Video Privacy Protection Act of 1988, 18 USCA § 2710 (West Supp 2000).

217. Congress enacts privacy statutes on a movie-of-the-week basis, reacting to the latest horror story in the news. Thus, under the Video Privacy Protection Act, 18 USCA § 2710 (West Supp 2000), enacted in response to the revelation of Judge Robert Bork's rental habits when he was nominated for a position on the U.S. Supreme Court (G-rated, alas), it is illegal for Cornbuster to sell Tony's video preference records to Spikeheels.com, but perfectly legal for Spikeheels.com to sell a list of Tony's page views at its site to Cornbuster.

218. Cable Communications Policy Act of 1984 ("CCPA"). H Rep No 98-934, at 30 (1984), reprinted in 1984 USCCAN 4655, 4667. The legislative history goes on to note, H Rep No 98-934, at 78, 1984 USCCAN, at 4715, that the remedies are identical to those in the (pre-1986) Electronic Communications Privacy Act ("ECPA"), 18 USCA § 2520. The ECPA, however, as discussed below at p140, is primarily geared to Third Party converters and in its pre-1986 version provided for mandatory presumed damages. Congress presumably cared far less about the balancing of privacy with information flows when regulating illegal wiretaps under the ECPA, which makes the identical damages provisions puzzling. The statutes have since diverged. See above at Table 4 and Part E.4.a(1).

219. Video Privacy Protection Act of 1988, 18 USCA § 2710 (West Supp 2000); Driver's Privacy Protection Act of 1994, 18 USCA § 2724 (West Supp 2000); Cable Communications Policy Act, 47 USCA § 551 (West Supp 2000). As interpreted in Third Party cases, the "may" language generally results in a liability rule or a property right in the Gatherer, see the text accompanying notes 236-239. Cf Children's Online

sumed damages that are not high enough to create even a liability rule, considering the hassle of bringing suit.²²⁰ For intentional Takings, courts may award punitive damages²²¹ and attorneys' fees,²²² so they have the opportunity, but not a mandate, to create a property rule.

F.3.a(2) Cases

The cases do not consistently apply a property rule to intentional arm's length Gatherer Takings. Courts apply property rules when lenders self-deal with client information,²²³ but usually apply a liability rule or create a property right in the Gatherer in non-self-dealing contexts; positive externalities sometimes appear to be the reason.²²⁴ Courts similarly apply a liability rule or create a

Privacy Protection Act of 1998, 15 USCA § 6504(a)(1)(C) (West Supp 2000) (no private right of action; states may bring action to "obtain damage, restitution or other compensation," consistent with liability rule with punitives for intentional violation).

220. Privacy Act of 1974, 5 USCA § 552a (West Supp 2000) (requiring the greater of actual damages or \$1,000); Right to Financial Privacy Act, 12 USCA § 3417 (West Supp 2000) (\$100 plus actual damages); Fair Credit Reporting Act of 1970, 15 USCA § 1681n(a) (West Supp 2000) (requiring damages, but limiting presumed damages for intentional Takings to \$100 per day or \$1,000 unless actual damages are greater); The Stored Wire and Electronic Communications and Transactional Records Access Act, 18 USC § 2707 (West Supp 2000) (actuals plus profits, but no less than \$1,000).

221. See above at Table 4: Analysis of Federal Statutory Damages for Breach of Confidentiality. But see Privacy Act of 1974, 5 USC § 552a(g)(4) (West Supp 2000) (no punitives); *Houston v U.S. Dep't of Treasury*, 494 F Supp 24, 30 (D DC 1979) (discussing Congress's rejection at time of enactment, due to fear of drain on Treasury, of Privacy Act amendments providing for punitive damages).

222. See Table 4: Analysis of Federal Statutory Damages for Breach of Confidentiality. But see Children's Online Privacy Protection Act of 1998, 15 USCA § 6504(a)(1)(C) (West Supp 2000) (silent on attorneys' fees, perhaps because enforcement through civil actions left to state attorneys general).

223. *Delabany v First Penn. Bank, N.A.*, 464 A2d 1243 (Pa Super Ct 1983) (\$40,000 expectation [lost potential profits] and \$440,000 punitives; train wreck); *Warsofsky v Sherman*, 326 Mass 290, 93 NE2d 612 (1950) (disgorgement; train wreck); *Boling v Tenn. State Bank*, 890 SW2d 32 (Tenn 1994) (no proximate cause damages, but \$14,825 incidental and \$500,000 punitive damages; pinprick). See also *Henkin, Inc. v Berea Bank & Trust Co.*, 566 SW2d 420 (Ky Ct App 1978) (proximate cause and punitive damages available; train wreck). Self-dealing is, of course, also disfavored for classic fiduciary Gatherers.

224. Liability rule: *Suburban Trust Co. v Waller*, 44 Md App 335, 408 A2d 758 (1979) (bank goes to extreme lengths to erroneously finger depositor as bank robber, resulting in jail time and notoriety; \$50,000 breach of implied contract damages; train wreck; barely a positive externality case, particularly since, reading between the lines, there may have been racial profiling); *Barnett Bank, N.A. v Shirey*, 655 S2d 1156 (Fla Dist Ct App 1995) (lending officer discloses financial information to borrower's potential buyer; \$65,000 proximate cause damages for lower price on sale [quasi-expectation measure]; bank not liable for punitive damages when it did not negligently supervise).

Property right in Gatherer: *Neece v IRS*, 41 F3d 1396 (10th Cir 1994) (Right to Financial Privacy Act violation resulting in IRS seizure of cars; \$200 presumed damages, \$1,580 damages to cars; \$10,500 attorneys' fees; no punitives because not egregious; pinprick); *Duncan v Belcher*, 813 F2d 1335 (4th Cir 1987) (disclosure of credit card records to employer investigating expense account padding; \$100 presumed damages under Right to Financial Privacy Act; pinprick; positive externality); *Sun First Nat'l Bank v Stegall*, 395 S2d 1248 (Fla Dist Ct App 1981) (disclosure to another lender seeking credit history; \$0; pinprick; positive externality).

Potential property rule: *Rubenstein v S. Denver Nat'l Bank*, 762 P2d 755 (Colo Ct App 1988) (disclosure of impending cancellation of credit line to plaintiffs' customer and employee; proximate cause and punitive damages available; pinprick; arguable positive externality).

property right in the Gatherer when creditors seeking to collect a debt blare the debtor's deadbeat status (Data) all over town,²²⁵ reflecting the positive externality of sharing credit information. When employers disclose information about employees, liability rule are sometimes available, while sometimes there is a property right in the Gatherer.²²⁶ Cases dealing with other relationships split 4-2-1 between a property rule, a liability rule, and a property right in the Gatherer.²²⁷

225. Liability rule: *Brents v Morgan*, 221 Ky 765, 299 SW 967 (1927) (\$1,000 emotional distress and \$1,000 reputation in 1927 dollars; pinprick); *Housh v Peth*, 165 Ohio St 35, 133 NE2d 340 (1956) (\$2,000 combined emotional distress and punitives in 1956 dollars; pinprick).

Property right in Gatherer: *Boudreaux v Allstate Fin. Corp.*, 217 S2d 439 (La Ct App 1968) (\$1,000 emotional distress; pinprick); *Quina v Robert's*, 16 S2d 558 (La Ct App 1944) (\$100 emotional distress; pinprick).

Potential property rule: *Biederman's of Springfield, Inc., v Wright*, 322 SW2d 892 (Mo 1959) (proximate cause and punitive damages available; pinprick); *Mason v Williams Discount Ctr., Inc.*, 639 SW2d 836 (Mo Ct App 1982) (emotional distress and punitive damages available; pinprick).

226. *Payton v City of Santa Clara*, 132 Cal App 3d, 183 Cal Rptr 17 (1982) ("general damages" [meaning presumed damages by analogy to defamation cases?] available; potential liability rule). Many of the cases are under the Privacy Act of 1974, 5 USCA § 552a (West Supp 2000), which covers the government as an employer, but as discussed below at note 253, the Privacy Act excludes punitive damages for Takings due to Congressional fear of budget impact. Compare *Parks v IRS*, 618 F2d 677 (10th Cir 1980) (potential liability rule; emotional distress and presumed damages available) with the following cases creating a property right in the Gatherer: *Fitzpatrick v IRS*, 665 F2d 327 (11th Cir 1982) (\$1,000 presumed damages and \$3,000 attorneys' fees; pinprick); *DiMura v FBI*, 823 F Supp 45 (D Mass 1993) (\$0; pinprick); *Pope v Bond*, 641 F Supp 489, 501 (D DC 1986) (limiting damages to the greater of statutory presumed damages or out-of-pocket pecuniary loss to the Source [Hadley damages] and barring emotional distress damages). See generally Note, *Damages Under The Privacy Act Of 1974: Compensation And Deterrence*, 52 Fordham L Rev 611 (1984).

227. Property rule: *Universal Gym Equipment, Inc., v ERWA Exercise Equip. Ltd.*, 827 F2d 1542 (Fed Cir 1987) (Manufacturer 1 provides non-trade secret plans and specifications to Manufacturer 2 in exchange for Manufacturer 2's agreement that, on termination of contract, Manufacturer 2 will not use Data previously provided to compete with Manufacturer 1. Manufacturer 2 violates agreement; disgorgement; train wreck); *Neva, Inc. v Christian Duplications Int'l, Inc.*, 743 F Supp 1533 (M D Fla 1990) (actor Alexander Scourby's recordings, made for charity at reduced fee, sold without permission for profit; \$172,000 disgorgement damages, presumably limited because Gatherer is a charity; because court assessed huge punitive damages against commercial Third Party, see below at note 245, it may have felt there was sufficient deterrence); *Sanders v ABC, Inc.*, 20 Cal 4th 907, 978 P2d 67 (1999) (TV reporter with hidden video camera at telephone psychic's office; \$335,000 proximate cause and \$300,000 punitive damages; case remanded on non-privacy grounds; pinprick); *Boyles v Kerr*, 806 SW2d 255 (Tex Ct App 1991) (teenaged boy secretly videotapes himself having sex with girlfriend, then exhibits videotape, which becomes the talk of local colleges; girlfriend sues; \$500,000 mental distress and \$500,000 in punitive damages; brought as negligence claim to take advantage of boy's insurance, but best read as intentional; train wreck), rev'd on other grounds, 855 SW2d 593 (Tex 1993). See also *Urbaniak v Newton*, 226 Cal App 3d 1128, 277 Cal Rptr 354 (1991) (potential property rule; HIV-positive patient discloses condition to workers compensation doctor representing insurance company on condition that it not be disclosed to insurer; doctor discloses it anyway; proximate cause and punitive damages available; no emotional distress damages under circumstances of this case; pinprick).

Liability rule: *Douglas v Stokes*, 149 Ky 506, 149 SW 849 (1912) (parents engage photographer to photograph nude corpse of infant Siamese twin sons and make only 12 copies; photographer copyrights photograph instead and distributes; \$2,500 emotional distress damages in 1912 dollars; pinprick); *Cohen v Cowles Media Co.*, 479 NW2d 387 (Minn 1992) (newspaper breaks confidentiality agreement to political consultant who provided information on gubernatorial race; First Amendment positive externality; contract theory; \$200,000 proximate cause damages resulting from job loss; train wreck).

Property right in Gatherer: *Keltner v Washington Co.*, 310 Ore 499, 800 P2d 752 (1990) (police promise

F.3.b. Negligent Takings

The Fair Credit Reporting Act potentially applies a weak property rule to negligent takings by arm's length Gatherers,²²⁸ but elsewhere there is confusion. For example, the Cable Communications Policy Act of 1984 permits a court to award punitive damages even in the absence of fault,²²⁹ though there have been no cases on point and the negligent conversion cases suggest that courts will be reluctant to do so.²³⁰ Other statutes completely exclude negligent acts from their coverage, effectively creating a property right in the Gatherer for them.²³¹ One common law case applies a property rule,²³² while others create a property right in the Gatherer.²³³

confidentiality to 14-year-old girl informant if she provides information on murder, then disclose name to the accused; court applies implied contract theory, permitting only *Hadley* expectation damages, which do not exist; no emotional distress damages allowed; pinprick).

228. Fair Credit Reporting Act of 1970, 15 USCA § 1681o(a) (West Supp 2000) (actuals and attorneys' fees).

229. Under the Cable Communications Policy Act of 1984, 47 USCA §§ 551(c)(1), 551(f)(2) (West Supp 2000), cable operators "shall not disclose" subscriber information. If they do, the court may award actual damages, liquidated damages, punitive damages and attorneys' fees. See also Right to Financial Privacy Act of 1978, 12 USCA §§ 3402, 3417 (West Supp 2000) (excludes punitives for non-intentional violations, but otherwise same damages scheme as for intentional violation); Children's Online Privacy Protection Act of 1998, 15 USCA § 6502 (West Supp 2000) and regulations at 16 CFR Part 312 (2000) (operator of website or online service who knowingly markets to children or knowingly collects information from children has liability for collecting information in violation of regulations; negligence or even strict liability for such violations presumably would apply), and § 6504 (West Supp 2000) (leaves for common law determination measure of damages in state attorney general suit); Electronic Communications Privacy Act 18 USCA § 2511 (West Supp 2000) (disclosure by person negligently unaware that information disclosed was product of illegal wiretap) and 18 USCA § 2520 (West Supp 2000) (same damages scheme as for intentional disclosure); Driver's Privacy Protection Act of 1994, 18 USCA § 2721(a) (West Supp 2000) (arguably covers negligently "otherwise mak[ing] available" driver records) and 18 USCA § 2724(b) (West Supp 2000) (if so, punitive damages excluded but actual damages, liquidated damages and attorneys' fees available).

230. See below at Part E.4.b.

231. Privacy Act of 1974, 5 USCA § 552a(g)(4) (West Supp 2000); Video Privacy Protection Act of 1988, 18 USCA § 2710 (West Supp 2000); Stored Wire and Electronic Communications and Transactional Records Access Act, 18 USCA § 2702 (West Supp 2000) (providers of e-mail services or computer bulletin boards liable only for knowing disclosure) and § 2707(a) (West Supp 2000) ("knowing or intentional" violation). But cf 18 USCA § 2703 (West Supp 2000) (government liable for seizure without properly obtained warrant; no requirement that improper action be knowing or intentional) and *Steve Jackson Games Inc., v U.S. Secret Svc.*, 816 F Supp 432 (W D Tex 1993) (liability under § 2707 for negligent conversion, discussed in detail below at note 254).

232. *Multimedia WMAZ, Inc. v Kubach*, 212 Ga App 707, 443 SE2d 491 (1994) (AIDS patient agrees to appear on TV based on promised digitization of his image, but TV station negligently broadcasts undigitized image for 7 seconds, resulting in harassment, leaving job, mental distress and physical symptoms; court upholds \$500,000 actual damages but strikes down \$100 punitive damages because of lack of intent). But cf *Barnett Bank, N.A. v Shirey*, 655 S2d 1156 (Fla Dist Ct App 1995) (lending officer discloses financial information to borrower's potential buyer; no punitives against bank because it didn't negligently supervise lending officer).

233. *Skrzypiec v Noonan*, 228 Conn 1, 633 A2d 716 (1993) (psychiatrist negligently sends report on fireman to fireman's employer; emotional distress claim; \$0 damages); *Montinieri v Southern New England Tel. Co.*, 175 Conn 337, 398 A2d 1180 (1978) (phone company negligently gives address to kidnapper, who

F.4. STATUTE & CASE ANALYSIS: CONVERSION BY THIRD PARTIES

F.4.a. Intentional Conversion

An intentional Taking should be protected against by a strong property rule. Despite this, many courts apply liability rule damages in pinprick cases.

F.4.a(1) Electronic Communications Privacy Act

The Electronic Communications Privacy Act (“ECPA”) deals with illegal wiretaps and other interceptions of communications (i.e. the Third Party’s wiretap Takes Data from the Source). As written, the statute creates a potential property rule:

- (2) . . . the court *may* assess as damages whichever is the greater of—
- (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
 - (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000,²³⁴ (Emphasis added.)

The statute also permits punitive damages and reasonable attorneys’ fees.²³⁵

As interpreted by the courts, this potential property rule (awarding Sources (a) the greater of (1) restitution, proximate cause, and disgorgement of monetary gain, or (2) presumed damages if higher, plus (b) punitive damages and enforcement costs) usually isn’t one.²³⁶ To judge from the reported cases, the federal courts are filled with conniving spouses who get caught wiretapping their soon-to-be exes. Courts, disgusted with the parties and believing that compensa-

terrorizes family; \$0 for emotional distress and property damage upheld on theory that defendant could not anticipate unreasonable risk); *Burford v First Nat’l Bank*, 557 S2d 1147 (La Ct App 1990) (bank discloses husband’s financial records to wife, who uses them in separation proceeding; silent on whether disclosure intentional or negligent; \$500 damages because no harm). See also *Florida Star v B.J.F.*, 491 US 524, 528 (1989) (Sheriff’s Department’s inadequate precaution results in disclosure of rape victim’s name; \$2,500 settlement).

234. 18 USCA § 2511 (West Supp 2000). For a similar damages scheme, see the Stored Wire and Electronic Communications and Transactional Records Access Act (“SWECTRAA”), which prohibits federal government review and seizures of e-mail and electronic bulletin boards (Data) except under specified circumstances. SWECTRAA provides that the court “may” award actual damages plus profits, but no less than presumed damages of \$1,000. 18 USCA §§ 2702, 2707, 2711 (West Supp 2000).

235. 18 USCA § 2520 (West Supp 2000).

236. Before 1986, the law mandated the greater of presumed damages or actual damages, and also made punitives and attorneys’ fees available. The legislative history supported a disgorgement property rule: “The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.” S Rep No 90-1097 (1968), reprinted in 1968 USCCAN 2112, 2156.

tion issues are better addressed in state divorce proceedings, often rely on the statute's "may" language to grant no damages at all.²³⁷ This creates a property rule in the wiretapping spouses, in effect giving them a right to wiretap despite the law.²³⁸ Courts have leaned toward property rule damages for non-spouse plaintiffs.²³⁹ In two related cases involving positive externalities, presumed damages created a weak property rule.

F.4.a(2) Fair Credit Reporting Act

Somewhat more protective is the Fair Credit Reporting Act of 1970 ("FCRA"). Under its scheme, a Third Party converter who knowingly procures a credit report (Data) under false pretenses is liable to the Source for the greater of actual damages or \$1000.²⁴⁰ The Third Party is also liable for punitive dam-

237. *Culbertson v Culbertson*, 143 F3d 825 (4th Cir 1998); *Nalley v Nalley*, 53 F3d 649 (4th Cir 1995); *Romano v Terdik*, 939 F Supp 144 (D Conn 1996); *Shaver v Shaver*, 799 F Supp 576 (E D NC 1992); *Citron v Citron*, 539 F Supp 621 (S D NY 1982) (all \$0 damages). But see *Biton v Menda*, 812 F Supp 283 (D PR 1993) (wiretapping spouse; post-1986 law; \$20,000 presumed damages; liability rule).

238. The Fifth Circuit recognized this property right explicitly, *Simpson v Simpson*, 490 F2d 803, 807 (5th Cir 1974). The judicial efficiency of addressing all slimy spousal behavior in a single state divorce proceeding outweighs the negative consequences of this unlvely property right. See the *cri de coeur* in *Shaver v Shaver*, 799 F Supp 576 (E D NC 1992).

239. Property rule: *Dunn v Blue Ridge Tel. Co.*, 868 F2d 1578 (11th Cir 1989) (grandfather wiretaps grandson/business competitor; \$1,000 presumed damages and \$50,000 punitives; pinprick), vacated on grant of rehearing en banc, 888 F2d 731 (1989); *Deal v Spears*, 780 F Supp 618 (W D Ark. 1991), aff'd 980 F2d 1153 (8th Cir 1992), and *Reynolds v Spears*, 857 F Supp 1341 (W D Ark. 1994), which were related cases featuring a Clintonesque combination of Arkansas, sex and wiretaps. In *Deal* and *Reynolds*, a husband and wife wiretapped the phone of their Arkansas liquor store to see who had stolen \$16,000. The wiretap instead caught explicit sexual conversations between an employee and her disabled boyfriend and revealed a sweetheart deal where the boyfriend was sold a keg at cost. The storeowner wife described the conversations to the cheated-on spouses of the employee and boyfriend (a previous consensual spouse swap had ended, 980 F2d at 1156 n2), leading to double divorces. The employee was fired. The court awarded the employee and boyfriend \$20,000 presumed damages each, plus attorneys' fees, but not punitive damages because the behavior was not wanton or malicious: a sheriff's office investigator had erroneously told the storeowner husband that the wiretap was legal, 980 F2d at 1159. The courts also identified positive externalities: the effort to catch the thief of the \$16,000, 857 F Supp at 1348, and the revelation of adultery to the cheated-on spouses, 980 F2d at 1159.

Liability rule: *Rodgers v Wood*, 910 F2d 444 (7th Cir 1990) (a fence of stolen goods wiretaps his own barn phone, overhearing sleazy police officers who (1) execute a search warrant against the fence, and (2) use the fence's barn phone to tip off "Crime Line Anonymous" TV program about the fence's activities; police officers win \$20,000 presumed damages on pinprick claim, court holds that damages remain mandatory under post-1986 statute despite "may" language).

See also the following pre-1986 ECPA cases:

Property right in Gatherer: *Bess v Bess*, 929 F2d 1332 (8th Cir 1991) (wiretapping spouse; \$1,200 presumed damages and attorneys' fees but no punitives); *Campiti v Walonis*, 467 F Supp 464 (D Mass 1979) (prison official wiretaps inmate; \$1,000 presumed damages and attorneys' fees but no punitives).

Potential property rule: *Gerrard v Blackman*, 401 F Supp 1189 (N D Ill 1975) (psychiatrist tapes conversations between patient and patient's lawyer in mental hospital; greater of emotional distress, actual damages or statutory damages available; punitives can be awarded without actual damages).

240. 15 USCA § 1681n(a)(1)(B) (West Supp 2000).

ages and attorneys' fees in the court's discretion,²⁴¹ which can be used for a kicker sufficient to create a property rule. Under the FCRA, Third Party intentional converters, who have no right to the Data, are more heavily penalized than Gatherers, as this article suggests they should be—although the presumed damages dollar amounts are too tiny to make a difference.²⁴² Courts in FCRA cases have been more generous in awarding punitive damages than in the wiretap cases, but maybe not generous enough: courts have split 3-1-1 between a property rule, a liability rule and a property right in the Gatherer.²⁴³ The Right to Financial Privacy Act of 1978, which deals with disclosure of financial records by and to the U.S. government, is similar to the Fair Credit Reporting Act, except that it provides strict liability for illegal disclosures.²⁴⁴

F.4.a(3) Common Law

In a rare example of courts following this article's theory, at common law, nine intentional conversion cases applied a property rule, while only four applied a liability rule.²⁴⁵

241. 15 USCA § 1681n(a)(2)–(3) (West Supp 2000).

242. A Gatherer is liable for actual damages or for presumed damages of between \$100 and \$1000, while the Third Party is liable for \$1000 if actual damages are less.

243. Property rule: *Bakker v McKinnon*, 152 F3d 1007 (8th Cir 1998) (Javert-like litigator obtains three opposing parties' credit records; for each opposing party, \$500 emotional distress and \$5,000 punitives, for \$16,500 total; weak property rule); *Yohay v City of Alexandria Employees Credit Union, Inc.*, 827 F2d 967, 974 (4th Cir 1987) (spouse in custody battle obtains husband's credit records; husband doesn't seek actual damages, but court awards \$10,000 in punitives and \$33,369 in attorneys' fees. But cf above at p144 text accompanying notes 237–238 for the general refusal to award damages in ECPA spouse wiretap cases. *Yohay* is also a rare case where the court explicitly tries to minimize enforcement error: "Since there will rarely be extensive damages in an FCRA action, requiring that attorney's fees be proportionate to the amount recovered would discourage vigorous enforcement of the Act"); *Anderson v Conwood Co.*, 34 F Supp 2d 650 (W D Tenn 1999) (lawyer obtains credit records of opposing party; \$100,000 actual damages to two plaintiffs combined for weakly proven emotional distress, plus attorneys' fees; no punitives because behavior not reprehensible).

Liability rule: *Zamora v Valley Fed. Sav. & Loan Ass'n*, 811 F2d 1368 (10th Cir 1987) (employer obtains credit records of employee's husband; \$61,500 actual damages for emotional distress and severe marital disruption; trial court jury apparently did not award punitives).

Property right in Third Party: *Pappas v Calumet City*, 9 F Supp 2d 943 (N D Ill 1998) (government agency obtains contractor's credit records; \$500 actual damages, \$5000 punitive damages plus attorneys' fees; court does not go higher because agency had a legitimate need to determine if contractor was corrupt; positive externality).

244. 12 USCA § 3417 (West Supp 2000).

Property right in Third Party: *Duncan v Belcher*, 813 F2d 1335 (4th Cir 1987) (disclosure of credit card records to employer; \$100 presumed damages; pinprick).

245. Property rule: *Waits v Frito-Lay, Inc.*, 978 F2d 1093 (9th Cir 1992) (use of sound-alike for singer Tom Waits in Doritos commercial; \$100,000 restitution damages, \$200,000 emotional distress damages, \$75,000 punitives; train wreck); *Peoples Bank and Trust Co. v Globe Int'l Publ'g, Inc.*, 978 F2d 1065 (8th Cir 1992) (to illustrate fictitious article about 101-year-old newspaper deliverywoman impregnated by millionaire customer, tabloid uses photograph of actual 96-year-old newspaper deliverywoman in small Arkansas town; reputation and emotional distress damages available, but court remands because \$650,000 compensatory damages found at trial were excessive; affirms \$850,000 punitives; pinprick); *Sinatra v National Enquirer*,

F.4.a(4) *Stilson and Database Takings*

The general rule on intentional conversions may not be applied where it is most needed in light of current concerns about database privacy: large-scale, low-value Takings. In *Stilson v Reader's Digest Association, Inc.*,²⁴⁶ a direct mail promotion listed the names of three "winners," one of whom was the recipient. Each "winner" got to see the names of two other "winners." *Reader's Digest* used the other two names without permission in order to profit, which, if proven, would clearly have been commercial misappropriation.²⁴⁷ California ordinarily

Inc., 854 F2d 1191 (9th Cir 1988) (Swiss clinic claims that Frank Sinatra is patient; affirms \$350,000 restitution damages and \$100,000 punitives with little discussion; train wreck); *Douglass v Hustler Magazine, Inc.*, 769 F2d 1128 (7th Cir 1985) (*Hustler* uses nude photos without permission; discussed in detail above at pp133–135; emotional distress and reputation damages available; punitive damages tied to disgorgement available, train wreck); *Braun v Flynt*, 726 F2d 245 (5th Cir 1984) (performer's act involves feeding a baby bottle to a diving pig in a pool; porn magazine obtains photo of act by claiming a readership similar to McCall's; magazine publishes accurately captioned photo on a page with sexual material; \$15,000 emotional distress and \$50,000 punitives; pinprick); *Ohio Oil Co. v Sharp*, 135 F2d 303 (10th Cir 1943) (oil company contractor performs geological tests; contractor's employee tips off third party who acquires oil and gas leases based on the information; constructive trust claim available; punitives apparently not sought; train wreck); *Neva, Inc. v Christian Duplications Int'l, Inc.*, 743 F Supp 1533 (M D Fla 1990) (actor's recordings, made for charity at reduced fee, sold without permission for profit; suits against commercial distributor under Lanham Act and common law commercial misappropriation; duplicative disgorgement damages totaling \$1,417,946 upheld due to procedural quirk; \$275,000 punitives on commercial misappropriation theory; attorneys' fees awarded under Lanham Act; train wreck); *Clark v Celeb Publ'g, Inc.*, 530 F Supp 979 (S D NY 1981) (cheesy porn magazine publishes photos of model who has appeared in the more upscale Penthouse and in mainstream advertising; \$25,000 emotional distress, \$6,750 restitution, \$7,000 reputation [lost future modeling jobs] and \$25,000 punitives; no discussion of disgorgement; train wreck); *Coben v Hallmark Cards, Inc.*, 45 NY2d 493, 382 NE2d 1145 (1978) (Hallmark uses photographs of professional model without obtaining release after receiving notice to stop; nominal compensatory damages plus \$50,000 punitives; can be read as negligence case; train wreck).

Liability rule: *Moore v Big Picture Co.*, 828 F2d 270 (5th Cir 1987) (as part of sales pitch, contract bidder uses name of employee of existing contractor; \$10,000 emotional distress, \$21,000 reputation damages [unable to find future job in industry]; no punitives because not malicious; commercial misappropriation; train wreck); *Continental Optical Co. v Reed*, 119 Ind App 643, 86 NE2d 306 (1949) (lens grinder's picture misappropriated for advertisement, \$1,000 awarded in 1949 dollars, apparently on restitution theory; train wreck); *Trammell v Citizens News Co., Inc.*, 285 Ky 529, 148 SW2d 708 (1941) (newspaper publishes creditor's notice of Source's debt; positive externality; emotional distress and reputation damages available; pinprick); *Faber v Condecor, Inc.*, 195 NJ Super 81, 477 A2d 1289 (App Div 1984) (family photo used for picture frame promotion; unclear if original Taking is negligent or intentional; use continues after Source requests halt, although Third Party's senior management had unsuccessfully attempted to end use; \$45,000 emotional distress damages that are partly a surrogate for reputation damage [photographic consultant whose business potentially suffered] and loss of current transactions [consultant's 8-year-old son loses Boy Scout patrol leader position]; train wreck).

One case made emotional distress damages, but not punitives, available, without addressing which rule applied: *Halperin v Kissinger*, 434 F Supp 1193 (D DC 1977) (wiretap of government official suspected of leaking information; no presumed damages or punitive damages without malice; non-ECPA case; positive externality bars punitives because of national security concerns; pinprick); rev'd in part, 606 F2d 1192 (DC Cir 1979) (emotional distress damages available). See generally McCarthy, 2 *Rights of Publicity and Privacy* at §§ 11.7–11.10 (cited in note 107).

246. 28 Cal App 3d 270, 104 Cal Rptr 581 (1972).

247. Prosser, 48 Cal L Rev at 389 (cited in note 10). Cf McCarthy, 2 *Rights of Publicity and Privacy* at §§

permitted nominal damages (\$.01 to \$1) for this type of Taking and permitted Sources to show economic loss and mental distress. But the court denied class certification, effectively ending the case, because nominal damages were tiny and determining actual (economic and emotional distress) loss for the potential 21–50 million plaintiffs would be daunting. This effectively transferred the property right to the Gatherer, even though the Gatherer's actions were on a massive scale, profitable and allegedly intentional.

Even if the court had certified the class, however, the question of the appropriate level of presumed damages for Takings from massive databases would remain. If Spikeheels.com has a million visitors whose Data it Takes, and liability rule damages per visitor are \$1, total damages would be \$1 million. If a \$9,999 property rule kicker is applied for each Taking, Spikeheels.com would incur damages of \$10 billion. Given the risk of enforcement error, this might cause Spikeheels.com to exit the business. But a liability rule (let alone the rule in *Stilson*) effectively creates a property right in the Gatherer in pinprick cases, which is also inefficient, leading to fencing costs. What is needed is a bifurcation of damages rules. Where intentional Takings are the result of actions that damage a few Sources, strong property rules should apply. This will raise damages for intentional Takings high enough to deter them.

When Gatherers systematically misuse massive amounts of database Data, overdeterrence is not the only risk; so, as the *Stilson* court noted, is inefficient use of judicial resources. The inefficiency problem could be solved by imposing low presumed damages per Taking to cover liability rule damages plus a low property rule kicker. In a successful class action, the damages would be painful to the Gatherer, but not so high as to cause all Gatherers to exit the business. Tailored actual damages could still be made available for Sources suffering train wrecks from the Taking if they meet an initial burden of production of evidence.

Enforcement costs in database settings could also be reduced if Data were given explicit status as property and Sources participated in an ASCAP-style central monitoring agency that licensed Gatherers and Third Parties to use Data for a fee.²⁴⁸ In effect, this would transform the Source's interest from one pro-

5.8, 11.8 (cited in note 107) (finding a right of publicity which, doctrinally, is nearly identical to the right to recovery for commercial misappropriation).

248. ASCAP and BMI are familiar examples in the music business, but such agencies play roles in several intellectual property areas. *Merges*, 84 Cal L Rev (cited in note 39); *Merges*, 94 Colum L Rev (cited in note 39). The Copyright Clearance Center offers a similar service for professors assembling coursepacks. The first signs of an ASCAP-type solution for Data can be seen in the emerging business of "infomediaries," information brokers who collect detailed personal information from Sources (with permission) and pass it on to Third Party marketers. One firm paid Sources 80% of the fees received from marketers. *Lach, The New Gatekeepers* (cited in note 9). Or Sources may simply sell the right to use their Data, like the customers who accepted eToys' offer of a \$5 discount coupon in exchange for the transfer of their personal information to KBkids.com. *Slatalla, Giving Up Privacy* (cited in note 68). Scott Shorr has proposed a similar solution with credit bureaus as the central agency. Note, *Personal Information Contracts: How to Protect Privacy without Violating the First Amendment*, 80 Cornell L Rev 1756 (1995).

ected by a property rule to one protected by a liability rule—contracting into a liability rule, in Robert Merges' phrase.²⁴⁹ By constantly monitoring database Gatherers and Third Parties, the agency would raise the probability of detection of Takings. By spreading the cost of litigation (in effect insuring Sources for it), the agency could credibly threaten litigation for low-value Takings.²⁵⁰ If this scheme were accompanied by a legislative transfer of property rights in Data to Sources,²⁵¹ this would raise the cost of Data and reduce traffic in it. This frank acknowledgment that Data is property might finally drive a stake through the hearts of Warren and Brandeis, privacy law's undead.²⁵²

F.4.b. Negligent Conversion.

The theory suggests that negligent conversion by a Third Party should be protected by a weak property rule. The statutes addressing negligent conversion largely track their damages schemes for intentional conversion,²⁵³ although it is doubtful that courts will award punitive damages in these situations. In a Stored Wire and Electronic Communications and Transactional Records Access Act lack of precaution case, the court effectively applied a property rule.²⁵⁴ An

249. Merges, 84 Cal L Rev (cited in note 39); Merges, 94 Colum L Rev (cited in note 39).

250. Even in the music industry, however, enforcement costs can be high compared to the value of the Data. See Blair and Cotter, 39 Wm & Mary L Rev at 1667 n276 (cited in note 13).

251. A popular proposal. See Kang, 50 Stan L Rev (cited in note 38); Mell, 11 Berkeley Tech L J (cited in note 53); James Rule and Lawrence Hunter, *Towards Property Rights in Personal Data*, in Colin Bennett and Rebecca Grant, eds, *Visions of Privacy: Policy Choices for the Digital Age* 168 (Toronto 1999); Schwartz, 76 Tex L Rev (cited in note 18); Sovern, 74 Wash L Rev (cited in note 68); Note, *A Contractual Approach to Data Privacy*, 17 Harv J L & Pub. Pol'y 591, 606–07 (1994); Note, 80 Cornell L Rev (cited in note 248). Don't expect to see opt-in (in which Gatherer has no Third Party transfer right unless expressly granted by the Source) triumphing soon, however. The financial services industry successfully lobbied for opt-out (Gatherer has Third Party transfer right unless Source provides notice to stop) in the Gramm-Leach-Bliley Financial Services Modernization Act, 15 USCA § 6802 (West Supp 2000), and is trying to make it as difficult as possible for Sources to stop their Data from being sold, see above at note 81.

252. Warren and Brandeis, 4 Harv L Rev (cited in note 7) (advocating tort rather than property treatment). Cf Jessica Litman, *Information Privacy/Information Property*, 52 Stan L Rev 1283 (2000) (advocating tort treatment of privacy rights for Takings of database information as less commoditizing than property treatment, but preferring federal regulatory scheme). From an economic perspective, tort treatment will not prevent commoditization, since the Gatherer could negotiate for the waiver of the Source's tort protections. See above at Part E.1.b(3) (Source can consent to Taking); Kaplow and Shavell, 109 Harv L Rev at 763–65 (cited in note 4) (if transaction costs are low, parties can transact around liability rules as easily as property rules).

253. Right to Financial Privacy Act of 1978, 12 USCA §§ 3402, 3417 (West Supp 2000) (excludes punitives for non-intentional violations, but otherwise same damages scheme as for intentional violation); Electronic Communications Privacy Act, 18 USCA §§ 2511, 2520 (West Supp 2000) (intentional disclosure by person negligently unaware that information disclosed was product of illegal wiretap; same damages scheme as for intentional disclosure).

254. *Steve Jackson Games Inc., v U.S. Secret Serv.*, 816 F Supp 432 (W D Tex 1993) (Government intentionally obtains a warrant for seizure of the e-mail and bulletin board communications of a computer games publisher, but is negligently unaware that the statute applies and that seizure is not permissible; \$4,000 total statutory presumed damages for four plaintiffs; attorneys' fees available; in addition, under the Privacy Protection Act, 42 USCA § 2000aa (West Supp 2000), the court awarded \$8,781 out of pocket

ECPA lack of precaution case applied presumed damages under pre-1986 law, but this resulted in a weak property rule.²⁵⁵ In the case of negligence under the FCRA, both the Gatherer and the Third Party converter are liable only for actual damages plus attorneys' fees, but not punitive damages. This approximates a weak property rule.²⁵⁶ At common law, negligent conversion of Data has usually received property rule treatment in nude photo cases. Otherwise, there has been liability rule treatment or the creation of a property right in the Gatherer.²⁵⁷

F.5. EFFECT OF POSITIVE EXTERNALITIES

Courts sometimes apply liability rule damages rather than property rule damages or create a property right in the Gatherer when a Taking creates a positive externality, as when the disclosure helps Third Parties to avoid fraud or crime,²⁵⁸ informs them of deadbeats,²⁵⁹ bolsters national security,²⁶⁰ or supports

expenses and \$42,259 in lost profits to the corporate Source for physical seizure of the Source's equipment, which caused the Source's business to shut down).

255. *Jacobson v Bell Tel. Co.*, 592 F2d 515 (9th Cir 1978) (district attorney and phone company negligently wiretap after end date of court order; seven defendants jointly and severally liable to five plaintiffs for \$12,000 total presumed damages and \$12,000 total attorneys' fees).

256. 15 USCA § 1681o(a) (West Supp 2000).

257. Property rule: *Wood v Hustler Magazine, Inc.*, 736 F2d 1084 (5th Cir 1984) (neighbor breaks into apartment, steals nude pictures from dresser drawer and sends to *Hustler*, which is negligent in determining that Source did not give consent; false light theory; \$150,000 emotional distress damages including hassle factor [obscene calls]; no punitives because of First Amendment positive externality [intent lacking]; Source apparently doesn't ask for restitution, although *Hustler* ordinarily gives \$50 fee for appearances; pinprick); *Genesis Publications, Inc. v Goss*, 437 S2d 169 (Fla Dist Ct App 1983) (porn magazine obtains model's photo from advertising agency; in accordance with industry practice, porn magazine executive relies on ad agency for permission; commercial misappropriation case; \$100,000 compensatory damages [basis unclear]; no punitives because conduct not malicious; court finds conduct intentional, but better read as lack of precaution; train wreck). Cf Epstein, 32 Val U L Rev (cited in note 39) (victim of negligent conversion may force sale of item to taker; weak property rule).

Liability rule: *Barber v Time, Inc.*, 159 SW2d 291 (Mo 1942) (Time Magazine publishes photo by unaffiliated Gatherer photographer of a woman with an eating disorder, captioned as the "Starving Glutton." Time negligently fails to ascertain woman's lack of consent; actual damages of \$1,500 in 1941 dollars; court denies punitives in absence of malice; arguable positive externality supporting First Amendment values); *Myers v U.S. Camera Publ'g Corp.*, 9 Misc 2d 765, 167 NYS2d 771 (City Ct 1957) (publisher negligently relies on agent for permission to use nude photo, though court calls this grossly negligent and reckless; \$1,500 emotional distress damages in 1957 dollars; no reputation loss proved).

Property right in Gatherer: *Flake v Greensboro News Co.*, 212 NC 780, 195 SE 55 (1938) (newspaper negligently inserts singer's photo into burlesque show ad; court recognizes commercial misappropriation cause of action without considering whether singer is entitled to value of likeness; nominal damages because no emotional distress or other special damages shown; pinprick).

258. Property right in Gatherer: *Duncan v Belcher*, 813 F2d 1335 (4th Cir 1987) (employee credit card records disclosed to employer investigating expense account padding; \$100 presumed damages under Right to Financial Privacy Act; pinprick); *Campiti v Walonis*, 467 F Supp 464 (D Mass 1979) (prison official wiretaps inmate; \$1,000 presumed damages and attorneys' fees under pre-1986 ECPA but no punitives; pinprick); *Wagenheim v Alexander Grant & Co.*, 19 Ohio App 3d 7, 482 NE2d 955 (1983) (accounting firm tells client's customers about client's cooked books; \$0 damages).

Liability rule: *Suburban Trust Co. v Waller*, 44 Md App 335, 408 A2d 758 (1979) (bank fingers depositor as bank robber, \$50,000 breach of implied contract damages; train wreck; barely a positive externality case,

the First Amendment value of public discourse. The First Amendment forbids property rule damages against journalists for Takings of Data without malice, although malice's meaning when applied to breach of confidentiality is unclear.²⁶¹ Some other positive externality cases also eliminate property rule dam-

given the outrageous lengths the bank went to); *Sistok v Northwestern Tel. Sys.*, 189 Mont 82, 615 P2d 176 (1980) (phone company wiretaps party line due to harassment complaints; punitives not available without malice; pinprick). Cf *Tarasoff v Regents of U. of Cal.*, 17 Cal 3d 425, 551 P2d 334 (1976) (psychiatrist can be liable for not disclosing when patient poses imminent danger to third party).

Property rule: *Deal v Spears*, 780 F Supp 618 (W D Ark. 1991), aff'd 980 F2d 1153 (8th Cir 1992), and *Reynolds v Spears*, 857 F Supp 1341, 1348 (W D Ark. 1994) (court applies weak property rule because of positive externalities; related cases; wiretap of Arkansas liquor store to catch thief; \$40,000 presumed damages and attorneys' fees; discussed in detail above at note 239). See also *Urbaniak v Newton*, 226 Cal App 3d 1128, 277 Cal Rptr 354 (1991) (potential property rule; workers compensation doctor discloses patient's HIV-positive status to insurer that arguably needs information to identify cases covered under policy; proximate cause and punitive damages available; pinprick).

259. Most courts refuse to apply a property rule. Property right in Gatherer: *Sun First Nat'l Bank v Stegall*, 395 S2d 1248 (Fla Dist Ct App 1981) (disclosure to another lender seeking credit history; \$0; pinprick; weak liability rule); *Boudreaux v Allstate Fin. Corp.*, 217 S2d 439 (La Ct App 1968) (\$1000 emotional distress damages in 1968 dollars; pinprick); *Quina v Robert's*, 16 S2d 558 (La Ct App 1944) (\$100 emotional distress damages; pinprick).

Liability rule: *Brents v Morgan*, 221 Ky 765, 299 SW 967 (1927) (\$1,000 combined emotional distress and reputation damages in 1927 dollars; pinprick); *Pack v Wise*, 155 S2d 909 (La Ct App 1963) (\$2,000 for job loss, \$3,000 for combined emotional distress, reputation, general and special damages in 1963 dollars; train wreck). See also *Trammell v Citizens News Co., Inc.*, 285 Ky 529, 148 SW2d 708 (1941) (newspaper publishes creditor's notice of Source's debt; emotional distress and reputation damages available; pinprick).

Property rule: *Housh v Peth*, 165 Ohio St 35, 133 NE2d 340 (1956) (\$2,000 in 1956 dollars for combined emotional distress and punitive damages, plus attorneys' fees; pinprick). See also the following cases applying a potential property rule: *Rubenstein v S. Denver Nat'l Bank*, 762 P2d 755 (Colo Ct App 1988) (disclosure of impending cancellation of credit line; proximate cause and punitive damages available; pinprick); *Biederman's of Springfield, Inc., v Wright*, 322 SW2d 892 (Mo 1959) (proximate cause and punitive damages claims available; pinprick); *Mason v Williams Discount Ctr., Inc.*, 639 SW2d 836 (Mo Ct App 1982) (emotional distress and punitive damages claims available; pinprick).

260. *Halperin v Kissinger*, 434 F Supp 1193 (D DC 1977) (wiretap of government official suspected of leaking information; punitives barred because of "justifiably grave concern . . . over the leaking of confidential foreign policy information", 434 F Supp at 1195; pinprick), rev'd in part, 606 F2d 1192 (DC Cir 1979) (emotional distress damages available).

261. When applied in defamation cases, the First Amendment malice test (knowing or reckless falsehood) helps advance public debate by limiting defamation liability for false statements. The First Amendment definition does not work in breach of confidentiality cases, where the statements are always true. Courts nonetheless continue to use malice as a First Amendment standard in the confidentiality context, interpreting it as a Taking with intent to harm or a Taking with knowledge of no right in the Data.

First Amendment cases barring punitives without malice: *Peoples Bank & Trust Co. v Globe Int'l Publ'g, Inc.*, 978 F2d 1065, 1071 (8th Cir 1992) (tabloid uses 96 year old woman's photograph to illustrate embarrassing fictionalized article; reputation and emotional distress damages available, but court remands because \$650,000 compensatory damages found at trial were excessive; affirms \$850,000 punitives; pinprick); *Braun v Flynt*, 726 F2d 245, 257 (5th Cir 1984) (porn magazine obtains photo under false pretenses, supporting recklessness finding; \$15,000 emotional distress and \$50,000 punitives; pinprick); *Barber v Time, Inc.*, 159 SW2d 291, 295-96 (Mo 1942) (Time Magazine negligently fails to ascertain lack of consent for published photo; \$1,500 actual damages in 1942 dollars). But cf the following cases, which decline to award punitive damages without malice, but award proximate cause damages so high as to create a property rule: *Wood v Hustler Magazine, Inc.*, 736 F2d 1084, 1090 (5th Cir 1984) (porn magazine negligently fails to ascertain lack of consent for published photo; false light theory; \$150,000 emotional distress damages including hassle factor [obscene calls]; pinprick); *Genesis Publications, Inc. v Goss*, 437 S2d 169 (Fla Dist Ct App 1983) (porn

ages without malice.²⁶² In addition, the First Amendment limits proximate cause damages for Takings without malice when the Source is a public figure or corporation,²⁶³ but not for Takings from private figures.²⁶⁴ They sometimes give too much scope to the concept of a positive externality, finding liability rule damages or creating a property right in the Gatherer, even though the Gatherer probably could have negotiated beforehand to use the Data legally.²⁶⁵

F.6. CLARIFYING PUNITIVE DAMAGES

Nearly a half-century ago, Prosser showed that the privacy tort was incoherent.²⁶⁶ Punitive damages are also a doctrinal category worthy of Humpty Dumpty, who said, "When I use a word, . . . it means just what I choose it to

magazine negligently fails to ascertain lack of consent for published photo; commercial misappropriation case; \$100,000 compensatory damages [basis unclear]; train wreck; First Amendment not considered).

262. *Sistok v Northwestern Tel. Sys.*, 189 Mont 82, 615 P2d 176 (1980) (phone company wiretaps party line due to harassment complaints; pinprick); *Wagenheim v Alexander Grant & Co.*, 19 Ohio App 3d 7, 482 NE2d 955 (1983) (accounting firm tells client's customers about client's cooked books without permission; client goes bust). See also *Campiti v W'alonis*, 467 F Supp 464 (D Mass 1979) (prison official wiretaps inmate; no punitives where incorrect belief that conduct was lawful). But cf *Deal v Spears*, 780 F Supp 618 (W D Ark. 1991), aff'd 980 F2d 1153 (8th Cir 1992), and *Reynolds v Spears*, 857 F Supp 1341 (W D Ark. 1994) (no malice when liquor store phone is wiretapped to catch thief, and store owner, with good intentions, discloses adultery to cheated-on spouses; weak property rule damages but no punitives; discussed in detail above at note 239).

263. *Cohen v Cowles Media Co.*, 501 US 663, 671 (1991) (confidentiality promised to public figure; promise broken; job loss damages allowed, but no emotional distress or reputation damages); *Food Lion, Inc. v Capital Cities/ABC, Inc.*, 194 F3d 505 (4th Cir 1999) (reporters get hired by supermarket and do behind-the-scenes exposé, videotaping allegedly unsafe practices; \$2 nominal damages for trespass and breach of duty of loyalty). But see *Sanders v ABC*, 20 Cal 4th 907, 978 P2d 67 (1999) (TV reporter with hidden video camera at telephone psychic's office; \$335,000 proximate cause and \$300,000 punitive damages; pinprick; intentional).

264. *Miller v NBC*, 187 Cal App 3d 1463, 232 Cal Rptr 668 (1986) (news crew accompanies paramedics, enters apartment without permission to film attempt to revive heart attack victim, then broadcasts film; intentional infliction of emotional distress claim available; private figure; pinprick); *Multimedia WMAZ, Inc. v Kubach*, 212 Ga App 707, 443 SE2d 491 (1994) (TV station negligently broadcasts undigitized image of AIDS patient for seven seconds, resulting in harassment, leaving job, mental distress and physical symptoms. Court upholds \$500,000 actual damages but strikes down \$100 punitive damages because of lack of intent; arguable property rule).

265. Liability rule: *Zamora v Valley Fed. Sav. & Loan Ass'n*, 811 F2d 1368 (10th Cir 1987) (employer, considering possible promotion for employee, obtains credit records of employee's husband; major marital disruption; \$61,500 emotional distress damages).

Property right in Gatherer: *Pappas v Calumet City*, 9 F Supp 2d 943 (N D Ill 1998) (government agency obtains contractor's credit records to determine if contractor is corrupt; \$5500 actual and punitive damages).

Similarly, courts also may reduce damages when the Data is likely to be disclosed in subsequent litigation. *Burford v First Nat'l Bank*, 557 S2d 1147 (La Ct App 1990) (bank wrongfully discloses husband's financial records to wife, who uses them in separation proceeding; \$500 damages); *Keltner v Washington Co.*, 310 Ore 499, 800 P2d 752 (1990) (police promise confidentiality to 14-year-old girl informant if she provides information on murder, then disclose name to the accused; only *Hadley* expectation damages allowed).

266. Prosser, 48 Cal L Rev (cited in note 10).

mean, neither more nor less.”²⁶⁷ Occasionally, it is possible to identify cases where punitive damages are assessed for disgorgement,²⁶⁸ illicit gain²⁶⁹ or a correcting factor.²⁷⁰ There is probably some element of compensation for fencing costs when punitive damages are awarded in the absence of illicit gain, although these unspecified damages could also include disgorgement and a correcting factor.²⁷¹ But courts often use an intent test for punitive damages with little analysis.²⁷²

Just as Prosser clarified privacy law by identifying four analytically coherent subtypes,²⁷³ punitive damages law can be clarified by tying it to specific interests

267. Lewis Carroll, *Through the Looking Glass* (1871), in Roger Lancelyn Green, ed, *The Works of Lewis Carroll* 111, 174 (Paul Hamlyn 1965) (internal quotations omitted).

268. *Douglass v Hustler Magazine, Inc.*, 769 F2d 1128 (7th Cir 1985) (*Hustler* uses nude photos without permission; discussed in detail above at pp133–135).

269. *Boyles v Kerr*, 806 SW2d 255 (Tex Ct App 1991) (teenaged boy secretly videotapes himself having sex with girlfriend, then exhibits videotape; brought as negligence claim to take advantage of boy's insurance, but best read as intentional), rev'd on other grounds, 855 SW2d 593 (Tex 1993).

270. *Delabanty v First Penn. Bank, N.A.*, 464 A2d 1243, 1267 (Pa Super Ct 1983) (self-dealing lender; court includes correcting factor by setting punitives high enough to deter “all similar defendants” without detailed analysis).

271. See, for example, *Bakker v McKinnon*, 152 F3d 1007 (8th Cir 1998) (litigator obtains opposing parties' credit records); *Waits v Frito-Lay, Inc.*, 978 F2d 1093 (9th Cir 1992) (use of sound-alike for singer Tom Waits in Doritos commercial); *Peoples Bank and Trust Co. v Globe Int'l Publ'g, Inc.*, 978 F2d 1065 (8th Cir 1992) (tabloid uses photograph of 96-year-old newspaper deliverywoman in embarrassing fictionalized article); *Braun v Flynt*, 726 F2d 245 (5th Cir 1984) (porn magazine publishes accurately captioned nonsexual photo on page with sexual material); *Neva, Inc. v Christian Duplications Int'l, Inc.*, 743 F Supp 1533 (M D Fla 1990) (recordings, made for charity at reduced fee, sold without permission for profit); *Clark v Celeb Publ'g, Inc.*, 530 F Supp 979 (S D NY 1981) (porn magazine publishes photos of model without permission); *Gerrard v Blackman*, 401 F Supp 1189 (N D Ill 1975) (psychiatrist tapes conversations between patient and patient's lawyer in mental hospital); *Sanders v ABC*, 20 Cal 4th 907, 978 P2d 67 (1999) (TV reporter with hidden video camera at telephone psychic's office; punitive damages available); *Urbaniak v Newton*, 226 Cal App 3d 1128, 277 Cal Rptr 354 (1991) (workers compensation doctor discloses HIV-positive status to patient's employer; punitive damages available); *Henkin, Inc. v Berea Bank & Trust Co.*, 566 SW2d 420 (Ky Ct App 1978) (self-dealing lender; punitive damages available); *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 382 NE2d 1145 (1978) (photographs of professional model used without permission); *Boling v Tenn. State Bank*, 890 SW2d 32 (Tenn 1994) (self-dealing lender).

272. See, for example, *Bakker v McKinnon*, 152 F3d 1007 (8th Cir 1998); *Braun v Flynt*, 726 F2d 245 (5th Cir 1984) (porn magazine's reckless disregard of performer's reputation); *Jacobson v Bell Tel. Co.*, 592 F2d 515, 518, 520 (9th Cir 1978) (lack of precaution or reasonable belief in strong support result in wiretap under expired court order; no punitives where not reckless, wanton or malicious). *Pappas v Calumet City*, 9 F Supp 2d 943 (N D Ill 1998) (Third Party obtains credit records); *Multimedia WMAZ, Inc. v Kubach*, 212 Ga App 707, 443 SE2d 491 (1994) (lack of precaution case; no punitive damages without intent); *Fierstein v DePaul Health Center*, 24 SW3d 220 (Mo Ct App 2000) (reckless indifference); *Boling v Tenn. State Bank*, 890 SW2d 32 (Tenn 1994) (lender self-dealing). On intent, see above at Part D.7.e.

A few courts did perform this analysis, however. Compare *Big Seven Music Corp. v Lennon*, 554 F2d 504, 512–14 (2d Cir 1977) (no punitive damages where rights to market album were unclear beforehand); *Campiti v Wlonis*, 467 F Supp 464, 466 (D Mass 1979) (no punitive damages where prison official investigating corruption wiretaps inmate with good faith belief in right) with *Waits v Frito-Lay, Inc.*, 978 F2d 1093, 1105 (9th Cir 1992) (punitive damages justified where California law clear that use of sound-alike singer in radio commercial is a Taking, notwithstanding Third Party's claim of good faith belief that issue had not been resolved).

273. Prosser, 48 Cal L Rev at 389 (cited in note 10).

and levels of intent protected by property rule damages, as this article has attempted to do. If nothing else, this would encourage courts to develop usable precedent.

G. CONCLUSION

This article has employed property/liability theory to examine the measure of damages for a breach of confidentiality, concluding that a property rule generally applies. The level of damages rules will be driven by the investment incentives of the parties. Damages must be adjusted to address assessment-error, enforcement-error and enforcement costs. The current doctrinal law of damages appears to encourage excessive Takings of Data, with adverse consequences for Sources. This article argues for a theoretical framework that can redress that imbalance.