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PROPERTY AND PROJECTION

Maureen E. Brady

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Maureen E. Brady[*]

In cities across the country, artists, protesters, and businesses are using light projections to turn any building's facade into a billboard without the owner's consent. Examples are legion: "Believe Women" on a New York City Best Buy; a scantily clad male model on the side of an apartment building; a nativity scene on the Los Angeles chapter of the American Civil Liberties Union. Two courts have considered claims by owners seeking to stop these projections under theories of trespass and nuisance. In each case, the court held that because light is intangible and the projections resulted in no economic harm to the property, the common law affords no relief. This Article argues that property law can and should authorize projection claims by private owners. It traces the history of property tort claims involving light, explaining how the law developed to emphasize economic and physical harm and identifying the forgotten strands of doctrine that nonetheless support liability for targeted projections. Projections are forms of appropriation: not only do they disrupt the owner's use and control, but they also cause dignity and privacy harms by exploiting the owner's realty toward unwanted ends. Protections for these noneconomic interests have long been parasitic on trespass and nuisance, but the light projections expose a gap between the two forms of action. This Article argues that, despite hurdles in both nuisance and First Amendment law, tort law can mend this gap by more flexibly defining harm to encompass activity without economic or physical consequences that would nonetheless be perceived as harmful by ordinary citizens, particularly if intentional and limited in independent utility. More generally, the projection cases teach broader lessons about the development of the property torts, the concept of appropriative harm, the relationship between privacy and property, and the nature of property itself.

INTRODUCTION

In recent years, a unique form of protest has grown in popularity: projecting messages onto buildings with light.[1] During a labor dispute in Nevada, union members put a message that noted a restaurant's

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[1] This form of protest has been used with increasing frequency since the 1960s, but many of the controversies have occurred in the last five years, perhaps because the cost of projecting is lower

health code violations onto the restaurant.[2] In 2013, Kanye West debuted his music video for the song "New Slaves" on sixty-six buildings,[3] in at least some instances without required permits.[4] The group Survivors of the Abortion Holocaust routinely projects graphic images on restaurants and Planned Parenthood facilities and, in one case, put a nativity scene on the local American Civil Liberties Union.[5] T-Mobile has tried to create viral content for its social media pages by projecting its logo and advertisements onto the side of Comcast's Philadelphia headquarters.[6] And, perhaps most famously, protesters have used projectors to place "Emoluments Welcome" over the doors of President Donald Trump's D.C. hotel.[7]

At least two courts have considered tort claims by private property owners seeking to stop displays like these — targeted projections, also known as projection bombing or guerrilla projections[8] — and neither decision came out favorably for the owner.[9] Indeed, targeted projections

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than it was decades ago. *See* Corinne Segal, *Projection Artists Bring Light to Social Issues with Attention-Grabbing Protests*, PBS NEWSHOUR (Sept. 17, 2017, 2:44 PM), https://www.pbs.org/newshour/arts/projection-light-artists-protest [https://perma.cc/ZXH7-MQG5]. Projector machines are also smaller — the Nomadix iProjector, developed in the United Kingdom, is wearable. *See iProjector*, NOMADIX MEDIA, http://www.nomadixmedia.co.uk/iProjector [https://perma.cc/2SNE-ES6R].

[2] Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940, at *1 (Nev. Ct. App. Aug. 18, 2016).

[3] Miriam Coleman, *Kanye West Premieres "New Slaves" with Video Projections Around the World*, ROLLING STONE (May 18, 2013, 1:22 PM), https://www.rollingstone.com/music/music-news/kanye-west-premieres-new-slaves-with-video-projections-around-the-world-171436 [https://perma.cc/L7NM-Q4NB].

[4] Brandon Soderberg, *Cops Shut Down Kanye West's "New Slaves" Projections in Two Cities*, SPIN (May 28, 2013), https://www.spin.com/2013/05/kanye-west-new-slaves-projections-shut-down-police-houston-baltimore/ [https://perma.cc/GN7D-PSMW].

[5] *See* Survivors of the Abortion Holocaust, FACEBOOK (Jan. 19, 2019, 6:13 PM), https://www.facebook.com/WeAreSurvivors/posts/10155905269771080 [https://perma.cc/NV8N-C7Z6] (restaurant); Survivors of the Abortion Holocaust, FACEBOOK (Jan. 17, 2019, 4:00 PM), https://www.facebook.com/WeAreSurvivors/posts/10155901009096080 [https://perma.cc/944S-TJHD] (Planned Parenthood); Survivors of the Abortion Holocaust, *ACLU Christmas Eve Nativity Projection*, FACEBOOK (Dec. 24, 2018), https://www.facebook.com/events/773353426334741 [https://perma.cc/P3E3-7Y5K].

[6] John Legere (@JohnLegere), TWITTER (Oct. 22, 2018, 11:27 AM), https://twitter.com/JohnLegere/status/1054439033420505093 [https://perma.cc/RE49-RJTG].

[7] Nicole Hensley, *Artists Project "Emoluments Clause" on Trump International Hotel in D.C.*, N.Y. DAILY NEWS (May 15, 2017, 11:53 PM), http://www.nydailynews.com/news/politics/artists-project-emoluments-clause-trump-hotel-article-1.3169102 [https://perma.cc/45VT-RC2W].

[8] Samantha Corbin & Mark Read, *Tactic: Guerrilla Projection*, BEAUTIFUL TROUBLE, https://beautifultrouble.org/tactic/guerrilla-projection/ [https://perma.cc/XLT9-QXYW]; Cindy Davis, *Projection Powers Protest Movements*, SYSTEMS CONTRACTOR NEWS (Mar. 6, 2018), https://www.avnetwork.com/systems-contractor-news/projection-powers-protest-movements [https://perma.cc/EBJ9-C3X9].

[9] Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940, at *3 (Nev. Ct. App. Aug. 18, 2016); Urban Phila. Liberty Tr. v. Ctr.

do not seem to give rise neatly to liability under any property tort framework. Courts in most states have held that invasions of property by particulates like noise, smoke, odor, and light are not trespasses.[10] And if owners try to claim that projections are private nuisances — or even trespass in the few states that would consider light under that rubric — the relevant tests require physical harm, actual damage, or significant interferences with the use of property, harms that temporary projections do not typically cause. Because the projections are often fairly short in duration and do not cause lasting damage to the structure or its value, they will not support nuisance claims.[11] Efforts to combat light projections outside the common law — say, through existing local ordinances on light pollution, graffiti, or the "unlawful posting of advertisements" — have tended to fail to prevent targeted projections, whether because they have been construed to apply only to physical postings,[12] because they cover advertisements but not all forms of messaging, or because they contain other limitations.[13]

To date, light protests on private property have occurred primarily on the sides of commercial buildings.[14] Future projections might be

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City Organized for Responsible Dev., Nos. 171002675, 3686 EDA 2017, 2017 WL 7313667, at *7–10, *8 n.7 (Pa. Ct. Com. Pl. Dec. 28, 2017).

[10] *But see* Borland v. Sanders Lead Co., 369 So. 2d 523, 527–28 (Ala. 1979) (recognizing intangible trespass); Martin v. Reynolds Metals Co., 342 P.2d 790, 792–94 (Or. 1959) (same); Bradley v. Am. Smelting & Ref. Co., 709 P.2d 782, 787–88 (Wash. 1985) (same).

[11] *See* RESTATEMENT (SECOND) OF TORTS §§ 821F, 827 (AM. LAW INST. 1979).

[12] *See* Segal, *supra* note 1 (describing a court rejecting application of the unlawful advertising ordinance because it was "'intended to cover only the physical placement of tangible objects or substances,' and did not cover the use of light"). Indeed, in that case, New York City ended up *paying* the light protesters $4,500 to settle after the court found no grounds for arresting them for projecting a message onto the Metropolitan Museum of Art. *Id.*

[13] A Chula Vista light ordinance, for example, forbids "commercial or industrial operation[s] to display lights in such a manner so that the beams or the rays from the light source shall be directed to and unshielded from adjacent residential properties." CHULA VISTA, CAL., MUNICIPAL CODE § 17.28.020 (2019), https://chulavista.municipal.codes/CVMC/17.28.020 [https://perma.cc/KRE4-J8GT]. This would not seem to cover the sorts of light projections at issue here because of the use categories. *See also* N.Y. PENAL LAW § 145.60 (McKinney 2019) (defining misdemeanor graffiti as "etching, painting, covering, drawing upon or otherwise placing . . . a mark upon public or private property with intent to damage such property," which would not seem to cover uses of light).

[14] This Article is limited to examining projections on private rather than public property. Projections on public property are no doubt occurring, *see, e.g.*, John Walsh, *Activists Projected the Phrase, "Kavanaugh Is a Sexual Predator" onto a Courthouse Building in Washington*, BUS. INSIDER (Sept. 26, 2018, 2:39 AM), https://www.businessinsider.com/activists-projected-kavanaugh-is-a-sexual-predator-onto-washington-courthouse-2018-9 [https://perma.cc/3KM3-2XS3], but they raise different questions, such as how to categorize government facades under public forum doctrine and how to assess the reasonableness of restrictions on the time, place, or manner of projections, *see* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–48 (1983); Lehman v. City of Shaker Heights, 418 U.S. 298, 303–04 (1974) (plurality opinion). Despite this distinction, in its capacity as an owner, the government has property rights that support the traditional tort actions of trespass and nuisance. *See* City of Providence v. Doe, 21 A.3d 315, 320 (R.I. 2011). While some of the interests described

turned on residences and homes. While many of the projections so far are political, one can imagine other light messages, ranging from the critical to the commercial to the idiosyncratic. Imagine, for example, PepsiCo choosing to project its logo on New York facades instead of buying billboards, or an exuberant neighbor deciding to light up all the houses on the street with falling snowflakes during the holiday season.

This Article uses the light projection cases to diagnose larger problems in the development of property law. It examines how light came to escape the coverage of the property torts, identifies the dormant property interests that these new uses of light bring into focus, and, finally, uses the projection cases to reveal broader lessons about the relationship between privacy and property and the development of the property torts. Using decades of doctrine, this Article marshals support for the ideas that intentional projection is a harm and that owners can prevent appropriations of property that displace their control and commandeer property to others' communicative purposes.[15] The interferences caused by projection belong to a new class of appropriative harms: those that disrupt the owner's authority over property and exploit it toward the appropriator's ends. These sorts of harms may arise outside the context of projection, in other places where new technologies permit others to modify the appearance of or communications from land, buildings, or airspace without physically traversing boundary lines,[16] making the framework outlined here useful for reasoning about how the law might also extend to cover those circumstances.

The only work on light projection to date suggests that high-level theories of property offer limited tools for addressing the problems posed by targeted projection.[17] This Article takes a different position by beginning from the ground up. It critically examines strands of doctrinal evidence — real property cases, tort law and treatises, criminal and even constitutional rules — to argue that the law already recognizes a private owner's paramount rights to prevent communicative appropriation, whether tangible or not. Because these rights against appropriation —

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in this Article sound in personality, others are more property-based, so the insights generated might prove useful in analyzing restrictions on projection in that context. The debate over why we extend some tort protections to governments versus the persons they ordinarily protect is a rich one, and an excellent recent treatment is Paul B. Miller & Jeffrey A. Pojanowski, *Torts Against the State*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW (Paul B. Miller & John F.K. Oberdiek eds., forthcoming 2020) (on file with Harvard Law School Library).

[15] Although I use the term "owner" as shorthand throughout this Article, the property torts can protect the interests of parties in possession, including tenants. *See* Gaetan v. Weber, 729 A.2d 895, 898 (D.C. 1999) (collecting citations).

[16] *See supra* notes 2–4 and accompanying text.

[17] R. George Wright, *The Projected Light Message Cases: A Study in the General Erosion of Free Speech Theory*, 51 IND. L. REV. 583, 583–84 (2018).

part privacy, part property — have long been parasitic on physical trespass for protection, the light cases now expose a glaring lag in the property torts. To remedy this lag, nuisance law offers a flexible pathway for protecting an owner's communicative interests against intentional interference. Alternatively, nuisance principles can help form a foundation for legislation regulating projection. In legislation governing land use and property rights, the common law of nuisance has often been used as a backdrop for establishing that the primary purpose of regulation is to prevent systematically what the law already recognizes as harmful.[18]

The approach in this Article is modeled, in part, on a time-honored method for sensing the precipice of a shift in tort law. In 1890, Samuel Warren and future-Justice Louis Brandeis authored *The Right to Privacy*, assembling out of a mass of tort, contract, and property doctrine an inchoate interest deserving of independent protection.[19] In fact, they styled themselves as part of a much longer evolutionary history in tort law, explaining growth from the starting point of trespass to more modern torts involving unfair competition as the result of economic, social, and technological pressures.[20] The authors explained that technological and social change forced this privacy interest to the fore: trends in photography, recording devices, and the newspaper trade set them to examining "whether the existing law affords a principle which can properly be invoked to protect . . . the individual," a question that they answered in the affirmative.[21] In the late 1930s, legal scholars including Professor William Prosser collected evidence that courts were close to recognizing an action for intentional infliction of emotional distress, despite protestations to the contrary and "strained" efforts to bring these actions within the ambit of property or other tort claims.[22] This shift occurred at the same time as even legal scholars began taking notice of advances in scientific understanding of the connection between mental distress and behavioral and physical consequences.[23] In both examples, courts and legislatures ultimately took up the call to recognize the harms and interests that scholars had traced in response to new pressures. This Article proceeds in a similar vein: it examines the trajectory that led to this point, treats new problems as a call to search for deeper principles,

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[18] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 28 (1992); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155–61 (1971).

[19] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[20] *Id.* at 193–95.

[21] *Id.* at 197; *see id.* at 195–97.

[22] William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874, 880 (1939); *see* Fowler V. Harper & Mary Coate McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 429; Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936); Prosser, *supra*, at 874.

[23] Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 500–01 (1922).

and uses those principles to prescribe how the law should change to solve the underlying problems.

Part I explores the doctrinal history surrounding light claims in property law: how the cases came to require economic or sensory harm for relief, though with stray language about the potential differences should light cases ever involve targeted projections rather than bright ambient glare. This Part also examines the cases decided in the past few years where courts have considered targeted projections specifically. These courts have emphasized the lack of physical, sensory, or pecuniary harm in finding projections generally nonactionable.

Part II takes up the resulting invitation to examine whether property law should afford owners protection against unwanted communications on their land or buildings. It broadens the lens to a wider range of doctrine outside trespass and nuisance — other areas of property, tort, criminal, and constitutional law — locating evidence that the law has generally prohibited communicative uses of another's land or buildings and protected the image or presentation of property crafted by the owner. In each case, strands of doctrine support the idea that intentional interferences with these owner interests are or should be actionable. But the strictures of trespass and nuisance law leave affected owners no obvious pathway for relief. The Part concludes by defining the injury accompanying projection as appropriative harm. The term appropriation is used in both property and privacy law to describe exploitation of something belonging to another, as well as a loss of control on the part of the owner. The projection cases highlight the connection between privacy and property and a paradox in property's failure to recognize projections as the basis for a cause of action. Projections cause harm to property owners both by diminishing the property's use and by affronting the owner's dignity and privacy interests by making him or her an unwitting billboard. Though privacy interests are often described by analogy to real property, the increasingly economic focus of trespass and nuisance law has oddly left dignity and privacy interests without protection where real property is concerned.

Part III turns to the ways the law might grow to provide redress for appropriative harms. It explains that appropriative harms are likely to occur in other contexts and defends using a tort law framework — nuisance — to prevent unauthorized communicative uses. At a minimum, tort principles can be used to lay groundwork for future legislation governing projection. But, as this Part explains, with little change, the traditional nuisance test can be more expansively interpreted to recognize and compensate for unwanted projections.

Part III concludes by considering a looming problem whenever either judicial action or legislation threatens to impede communicative activity: the prospect that the First Amendment's freedom of speech guarantee should immunize potential wrongdoers from liability. Already, fear of First Amendment consequences is creeping into courts'

analyses of whether to find targeted projections actionable. The final section defines the relevant interfaces between the First Amendment and tort cases involving projection, explaining the puzzles relating to state action and free speech easements on private property that the projection cases might newly raise. Importantly, however, there are First Amendment values on both sides here: permitting projections evokes compelled speech doctrine and the harms associated with misattribution and manipulation of one's self-presentation to the public. While there are valid objections to assigning default communicative rights to property owners — the distributional inequities of underlying property entitlements, for example — there are equally powerful reasons to fear that proliferated projection rights will undermine the goals of free expression as much as they would undermine settled property expectations. Put another way, the First Amendment, like nuisance itself, may provide a safety valve for some projections in limited circumstances, but in most cases, the owner's communications on his or her property deserve primacy.

I. THE DILEMMA POSED BY PROJECTION

A. Historical Approaches to Property and Light

This section traces the ways that lights cast onto property have historically been treated in the context of the dominant real property tort actions of nuisance and trespass. While there is some legislation governing light — for example, light pollution ordinances — it is often difficult to enforce, drafted vaguely, or inapplicable to projections.[24] Accordingly, this section outlines the common law approaches to light conflicts and the doctrinal limitations that have emerged over time. It begins with the cause of action in which the most light-related claims have been brought: nuisance.

1. Nuisance. — The phenomenon of targeted projection may be relatively new, but nuisance cases relating to unwanted light on property are nearly as old as the lightbulb itself.[25] The oldest American case involving light cast onto neighboring land is *Akers v. Marsh*,[26] which involved late-night croquet games in the summer of 1899 in a vacant lot in the District of Columbia.[27] The players had apparently rigged the

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[24] Kristen M. Ploetz, Note, *Light Pollution in the United States: An Overview of the Inadequacies of the Common Law and State and Local Regulation*, 36 NEW ENG. L. REV. 985, 1017–18, 1029 (2002). Granted, some light pollution ordinances could apply directly to projections, such as those that prohibit aiming lights at residential property. *See* NEWPORT, R.I., GENERAL ORDINANCES § 17.96.020(H) (2019). Still, given enforcement difficulties and other limitations, these might not offer much protection from targeted projections.

[25] Ploetz, *supra* note 24, at 985 n.2, 1001 nn.95–96.

[26] 19 App. D.C. 28 (1901).

[27] *Id.* at 30–31.

croquet wickets with oil lamps that emitted not only "fumes and vapors," but also flickering torchlight (not electricity).[28] Though many of defendants' neighbors allegedly enjoyed or took part in these games,[29] a husband and his pregnant wife were disturbed by the associated noise, smoke, and light coming through their windows.[30]

This fact pattern presents the classic nuisance problem: one owner's use and enjoyment of property interferes with the use or enjoyment of property by another.[31] Various tests for determining what counts as a nuisance have emerged over time,[32] and fastening down a precise test in even a single jurisdiction can be a challenge.[33] The Restatement (Second) of Torts approach to nuisance has been "widely followed."[34] It provides that "[t]here is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."[35] Put differently, there is no liability in nuisance for mere "trifles" or petty inconveniences,[36] nor is there liability if the plaintiff is peculiarly sensitive and thus more affected by an otherwise unobjectionable use than an ordinary person would be.[37]

Under section 822(a) of the Restatement (Second), the invasion of the plaintiff's interest must also be "unreasonable" to be actionable.[38] The Restatement (Second) directs courts to examine a variety of contextual factors to decide what is an unreasonable use of property under the circumstances, typically by assessing the harm to the plaintiff in comparison to the utility or value of the defendant's conduct.[39] Though the

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[28] *Id.* at 31.

[29] *Id.* at 33.

[30] *Id.* at 31–33.

[31] *See* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 403 (1974). Nuisances may be categorized as either public or private. In this Article, I focus on private nuisances, because these are the conflicts most relevant for the light projection cases (where one individual is targeted). Public nuisances tend to be land uses that damage a broad range of others. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 566 (4th ed. 2013).

[32] *See* Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 26–35 (1985).

[33] Even in the early 1900s, sections of a leading nuisance treatise contained headings like "Precise, technical definition of nuisance impracticable" and "Difficult to determine whether nuisance is public or private . . . ." JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES, at v (1906); *see also* Henry Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970 (2004) (noting "conflicting strains of thought about nuisance" and the pejorative terms others have used in describing this area of law).

[34] Merrill, *supra* note 32, at 17.

[35] RESTATEMENT (SECOND) OF TORTS § 821F (AM. LAW INST. 1979).

[36] *Id.* cmt. c.

[37] *Id.* cmt. d.

[38] *Id.* § 822(a).

[39] *Id.* §§ 826–831. The requirement of unreasonableness applies to "invasion[s] of another's interest in the private use and enjoyment of land," *id.* § 822, that are "intentional," *id.* § 822(a). Intentionality here is satisfied where the actor knew that an invasion was likely to result from his

Restatement (Second) project postdates several of the cases discussed in this section, antecedents of these principles are visible in late-nineteenth- and early-twentieth-century nuisance cases and treatises. Courts even then tended to examine the surrounding circumstances — including the time, the character of the neighborhood, and the importance of the defendant's business use — in assessing whether to enjoin an activity.[40] Likewise, early cases recognized that abnormally sensitive plaintiffs or those suffering trivial harms should not prevail in nuisance cases.[41]

The suffering neighbors of the late-night croquet game were initially successful in the trial court on their nuisance claim. The trial judge found that "the flickering glare from these lamps located upon this lot directly opposite to the complainants' house . . . would be a matter of considerable inconvenience . . . in the time ordinarily devoted to sleep . . . ."[42] Unfortunately for the plaintiffs, however, that finding was reversed on appeal.[43] The court determined that the light was no more obtrusive than "the street lamps near the dwelling, or the lights glaring from a neighbor's windows."[44] And the court went on to find that the complaining couple was unusually sensitive given the wife's pregnancy: "[S]he was rendered very sensitive, and was very susceptible of strong and emotional impressions made by all kinds of petty annoyances."[45] Furthermore, the court noted that although the croquet players should have given her "kind consideration" in her condition, there was "nothing in the evidence to justify the conclusion that the parties . . . wilfully persisted in playing the game with a malicious motive of annoying the complainants."[46] Absent such maliciousness, the court suggested, the light, noise, and smoke associated with the game did not cause a nuisance.[47]

The holding and reasoning in *Akers* foreshadowed the fate of future light nuisance claims. Courts deciding cases on light and nuisance from *Akers* onward have restated these three premises: (1) intentionally annoying uses of light might be actionable; (2) light is most likely, or

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conduct; it does not require any "desire to cause harm." *Id.* § 825 cmt. c; *see id.* § 825. While inapplicable in the context of projections, the Restatement (Second) also allows for certain unintentional nuisances to be actionable. *Id.* § 822(b). This balancing approach is discussed in greater depth later in the Article.

40 *See* St. Helen's Smelting Co. v. Tipping (1865) 11 Eng. Rep. 1483, 1485; 11 H.L.C. 642, 647; JOYCE & JOYCE, *supra* note 33, §§ 33–36, 51–57. *But see* G. EDWARD WHITE, TORT LAW IN AMERICA 155–63 (2003) (discussing the ideology of the Reporter of the Restatement (Second) of Torts, Prosser, and whether his pronouncements of tort law were consistent with underlying doctrine).

41 JOYCE & JOYCE, *supra* note 33, §§ 20–21, 26, 32–35.

42 Akers v. Marsh, 19 App. D.C. 28, 36 (1901).

43 *Id.* at 48.

44 *Id.* at 46.

45 *Id.*

46 *Id.*

47 *Id.*

perhaps only, a significant interference when interior occupants of a residence are affected, typically during sleep; and (3) light may reach the significance threshold when accompanied by other elements like noise or smoke, but should rarely (if ever) constitute a nuisance on its own. After *Akers*, cases from the 1920s and 1930s tended to award relief only when bright lights from nearby land uses — gas stations, parking lots, and the bright automobile headlights associated with them,[48] or entertainment uses like boxing stadiums, baseball games, or amusement parks[49] — disturbed sleep or combined with loud sounds and choking air. Only two courts from before midcentury even considered nuisance claims based on light alone: in one case awarding relief when a giant Colgate advertising sign shone into hotel guests' windows,[50] and in another denying relief when the glare off a tall silo painted brilliant white merely "offend[ed] the sensibilities of plaintiff in the exercise and enjoyment of his front porch on a sunny afternoon!"[51]

In 1948, the Oregon Supreme Court decided *Amphitheaters, Inc. v. Portland Meadows*,[52] a more famous light case that rearticulated two of these principles — that light might be actionable if disturbing interior occupants or combined with other elements — but left out the third, intentional projections.[53] *Amphitheaters* involved a land-use conflict between two businesses: the defendant's racetrack lights illuminated the

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[48] *E.g.*, Bloch v. McCown, 123 So. 213, 214 (Ala. 1929) (gas station); Indian Ref. Co. v. Berry, 10 S.W.2d 630, 631 (Ky. 1928) (also gas station); Nat'l Ref. Co. v. Batte, 100 So. 388, 389 (Miss. 1924) (also gas station); Greene v. Spinning, 48 S.W.2d 51, 52–53 (Mo. Ct. App. 1931) (also gas station); Brown v. Easterday, 194 N.W. 798, 798 (Neb. 1923) (also gas station); Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 423–24 (Sup. Ct. 1937) (parking lot); McPherson v. First Presbyterian Church of Woodward, 248 P. 561, 563 (Okla. 1926) (gas station).

[49] *E.g.*, Hansen v. Indep. Sch. Dist. No. 1, 98 P.2d 959, 960 (Idaho 1939) (baseball stadium), *amended on reh'g*, 98 P.2d 962 (1940); Kellogg v. Mertens, 30 So. 2d 777, 777–78 (La. Ct. App. 1947) (rodeos and wild west shows); Russell v. Nostrand Athletic Club, Inc., 209 N.Y.S. 76, 77 (App. Div. 1925) (boxing); Edmunds v. Duff, 124 A. 489, 489 (Pa. 1924) (amusement park); Weber v. Mann, 42 S.W.2d 492, 492 (Tex. Civ. App. 1931) (root beer stand).

[50] Shelburne, Inc. v. Crossan Corp., 122 A. 749, 749–50 (N.J. Ch. 1923).

[51] Shepler v. Kan. Milling Co., 278 P. 757, 757 (Kan. 1929). One wonders if the case might have come out differently had the plaintiffs alleged other physical harms. For example, in 2016, the Vdara Hotel in Las Vegas famously began reflecting a "death ray" at certain hours of the afternoon that sunburned poolgoers. *See* Leanna Garfield, *The "Death Ray Hotel" Burning Las Vegas Visitors Came Up with a Simple Fix*, BUS. INSIDER (June 30, 2016, 6:50 PM), https://www.businessinsider.com/the-vdara-death-ray-hotel-is-still-burning-people-in-las-vegas-2016-6 [https://perma.cc/63Z9-Y78Z].

[52] 198 P.2d 847 (Or. 1948).

[53] *Id.* at 857–58. *Amphitheaters* generated a flurry of interest after its publication. Case Noted, 3 MIAMI L.Q. 316, 316 (1949); James E. Horigan, Note, *Torts: Light as a Private Nuisance*, 2 OKLA. L. REV. 259, 259 (1949); William G. Mahoney, Jr., Recent Decision, Amphitheaters, Inc. v. Portland Meadows, a Corporation, *47 Ore. 77, 198 P. (2d) 847 (1948)*, 24 NOTRE DAME LAW. 254, 254 (1949); Wally P. Martin & Donald F. Myrick, Recent Case, 28 OR. L. REV. 193, 193 (1949); Note, 23 TUL. L. REV. 415, 415–16 (1949); John M. Patterson, Case Note, Amphitheaters, Inc. v. Portland Meadows et al, *Ore. 1948*, 1 ALA. L. REV. 314, 314 (1949).

screen of a drive-in movie theater, making it very difficult to view the films.[54] The Oregon Supreme Court rehearsed the familiar refrains in reaching its decision that the drive-in theater operators could not prevail on the nuisance claim: first, the plaintiff's business was unusually sensitive to ambient light and for most the lights would not be significant;[55] second, "light alone" could not often suffice to create a nuisance in the absence of other elements;[56] and third, cases that found light to be a nuisance involved disturbances to sleep in residential areas.[57] These have proven to be the general rules ever since.[58]

Akers's final observation — that light cast specifically to disturb or annoy the plaintiff might be actionable — was not directly analyzed for over a hundred years. But courts have come close to considering it. In the 1997 case of *Hildebrand v. Watts*,[59] plaintiffs alleged that their neighbors put a light on the neighbors' roof to shine into the plaintiffs' kitchen and bathroom and flickered it to irritate them.[60] The master in chancery noted that the neighbors categorically denied this, claiming instead that the floodlight was installed for safety and to light a children's play area.[61] The master (and in adopting the report, the chancellor[62]) determined there was not enough evidence to support these allegations of intentional irritation, and because the plaintiffs alleged only minor harms (and no interference with sleep), the overall analysis of the circumstances favored the defendants.[63] A 2011 case from Indiana — *Lesh v. Chandler*[64] — also came close but ultimately averted the issue. The defendant not only intentionally shone a spotlight directly at the

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54 198 P.2d at 850.

55 *Id.* at 854.

56 *Id.* at 857.

57 *See id.* at 855–57.

58 *See* Osborne v. Power, 890 S.W.2d 570, 571 (Ark. 1994); Toyo Tire N. Am. Mfg., Inc. v. Davis, 787 S.E.2d 171, 177 (Ga. 2016); Rodrigue v. Copeland, 475 So. 2d 1071, 1079 (La. 1985); Five Oaks Corp. v. Gathmann, 58 A.2d 656, 660 (Md. 1948); Fontanella v. Leonetti, 33 Pa. D. & C.2d 73, 74 (Ct. Com. Pl. 1963); GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet, 61 S.W.3d 599, 616 (Tex. App. 2001); Martin v. Williams, 93 S.E.2d 835, 841 (W. Va. 1956). On sleep, see *169 East 69th Street Corp. v. Leland*, 594 N.Y.S.2d 531, 534 (Civ. Ct. 1992); and compare *Kohr v. Weber*, 166 A.2d 871 (Pa. 1960), in which the court stated: "One of the most poignant utterances in all literature is the tragic lament of Macbeth that he had murdered sleep. To dangle restful sleep before a desperately exhausted mortal and never allow him to taste of its reviving and refreshing juices constitutes one of the most torturesome experiences of mankind," *id.* at 874; and *MJD Properties, LLC v. Haley*, 358 P.3d 476 (Wash. Ct. App. 2015), in which the court found that plaintiff's assertion that light shone into "bedroom windows" stated a claim for nuisance, *id.* at 478.

59 No. 13988, 1997 WL 124150 (Del. Ch. Feb. 18, 1997).

60 *Id.* at *5.

61 *Id.* at *2.

62 *Id.* at *1.

63 *Id.* at *7.

64 944 N.E.2d 942 (Ind. Ct. App. 2011).

plaintiffs' property, but also occasionally engaged in other spiteful activities, like playing music, so the court rested its finding of a nuisance on the combination of irritants.[65] Further, the plaintiffs alleged that they suffered headaches as a result of the light and noise,[66] which would be significant enough to support a nuisance action under more traditional rules.

Apart from these factors that courts have considered relevant in light cases, courts have also suggested a final relevant factor: the plaintiff's ability to block the light. Plaintiffs can always use their own property to try to mitigate nuisances from adjoining property; theorists have proposed colorful examples, like giant fans that blow smoke away, or other changes to behavior that lessen the harm, like shutting the windows.[67] Of course, such activities — particularly giant fans — are not costless.[68] But courts sometimes take the costs of these mitigation efforts into account in deciding who has the entitlement; if abating an alleged nuisance would be socially costly, but the suffering neighbors could avoid all their welfare losses merely by closing the window during some hours of operation, that might counsel in favor of allocating the entitlement to continue to the nuisance-causer and the responsibility of using self-help to the neighbors.[69]

In the light context, courts have occasionally pointed to cheap self-help as a reason not to find light to be a nuisance. In a 1940s case from Louisiana involving light, the court noted that the "plaintiffs, at very slight expense, could place a screen on the back porch, across which the light must shine, and thereby prevent the rays of the light from entering the room."[70] In a 1992 case from New York involving a lighted awning, the court denied the claim and noted that "respondent could eliminate the perceived problem simply by closing the curtains of his bedroom window."[71] Though these judges were not entirely clear about the mechanism by which they took the ease of mitigation into account, in each case, the plaintiff's ability to cheaply avoid some of the resulting harm

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[65] *Id.* at 952.

[66] *Id.* at 948.

[67] *See* Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1408 (2007); Smith, *supra* note 33, at 1012.

[68] Fennell, *supra* note 67, at 1408; Smith, *supra* note 33, at 1012.

[69] *See* Fennell, *supra* note 67, at 1408.

[70] Hobson v. Walker, 41 So. 2d 789, 792 (La. Ct. App. 1949). The court likewise noted that the nuisance could be "completely eliminated by the placing of a shade on the light by defendant," yet held for the defendant. *Id.* *But see Lesh*, 944 N.E.2d at 955 (finding a nuisance when plaintiffs "had to install heavy curtains").

[71] 169 E. 69th St. Corp. v. Leland, 594 N.Y.S.2d 531, 532 (Civ. Ct. 1992); *see also* Martin v. Williams, 93 S.E.2d 835, 848–49 (W. Va. 1956) (Haymond, J., dissenting) (asserting that an injunction should not have been sustained against the defendants as light cast into plaintiffs' residences by the defendants could have been easily prevented with drapes or shades).

seemed to factor into the court's overall analysis of reasonableness and thus whether to recognize the lighting as a nuisance.

Overall, both before and after the leading *Amphitheaters* case, successful nuisance actions have tended to involve interferences with sleep or offensive lights in combination with sounds and other irritants; lesser harms are considered inconveniences that fall short of significant harm or unreasonable interference. Courts have occasionally discussed the possibility of malicious light use and suggested that plaintiffs use self-help to block offending light, but without clearly explaining how those considerations should affect the nuisance calculus.

2. Trespass. — The plaintiff in *Amphitheaters* — the Oregon decision involving the racetrack and the drive-in theater — had attempted to bring its case not just as a nuisance action, but also as a trespass action.[72] The Restatement (Second) states that an individual is liable in trespass "irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so."[73] Recasting the *Amphitheaters* plaintiff's argument in the language of this later definition, the plaintiff seems to have claimed that light is a "thing" that can "enter land."[74] The substantial advantage to bringing a claim in trespass, rather than nuisance, is that a trespass need not cause harm to be actionable; trespass is a strict liability tort, meaning the boundary crossing alone will suffice.[75] In contrast, nuisance involves murky reasonableness balancing, and "significant harm" is a prerequisite to relief.[76] There may be still other advantages to trespass related to statutes of limitations or the availability of nominal damages.[77]

Distinguishing what claims should be brought in trespass versus nuisance has proven to be a thornier endeavor than it might appear. As Professor Thomas Merrill has observed, courts have used multiple tests over time, often in combination, and each of these approaches has tended to create new problems as it solves others.[78] In the Middle Ages, the location of the offending act was dispositive.[79] Acts undertaken by

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[72] Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 850 (Or. 1948).

[73] RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965). There are a variety of other sections dealing with negligent or accidental entries onto land. *See, e.g.*, *id.* §§ 165–66. "Intentional" here only means intent to commit the act that causes the trespass, rather than intending the trespass itself. *See* Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1392 (2010).

[74] *See Amphitheaters*, 198 P.2d at 850–51.

[75] *See* RESTATEMENT (SECOND) OF TORTS § 158.

[76] RESTATEMENT (SECOND) OF TORTS § 821F (AM. LAW INST. 1979); *see supra* pp. 1151–52.

[77] *See* Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 476 (S.C. 2013); Merrill, *supra* note 32, at 15 n.8.

[78] *See* Merrill, *supra* note 32, at 26–27.

[79] *See id.* at 27.

another on the plaintiff's land were trespasses, while acts on the defendant's own land constituted nuisances.[80] This formalist distinction collapsed when courts began considering activities originating off-site, like pouring water or releasing animals onto someone else's land, to be trespasses.[81] Accordingly, a second test emerged, distinguishing trespasses as "direct" rather than "indirect" harms.[82] However, activities like spitefully aiming sound waves at another's house remained nuisances even though direct, exposing the difficulties of distinguishing direct harms from consequential, indirect ones.[83]

Courts then began resorting to tangibility or visibility, finding that particles visible to the naked eye, like "rocks and shotgun pellets,"[84] are trespasses, while "smoke, noise, odors, shining light" and other intangible harms are nuisances.[85] To be sure, there are issues with this tangibility or visibility test. Where does trespass end and nuisance begin: a rock, a stray golf ball, sediment, dust? As it turns out, courts in different states have interchangeably used both trespass and nuisance frameworks to determine liability for golf balls crossing bounds.[86] Despite its imperfections, the tangibility approach has enjoyed favor from courts and scholars.[87] Its favor is reflected in the Restatement (Second), which classifies trespass as an interference with "possession" of property but nuisance as an interference with "use."[88] A physical intrusion onto property will prevent the owner from occupying that space, whereas the presence of a noise or scent will permit them to possess it simultaneously, though their enjoyment may be diminished.[89]

The *Amphitheaters* court ostensibly endorsed the tangibility or visibility approach when it decided that the light rays emitted from the racetrack were "'non trespassory' invasions" and properly belonged in the category of nuisance.[90] The court distinguished the trespass cases

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[80] *Id.*

[81] *See id.* at 27–28.

[82] *Id.*

[83] *Id.* at 28; *see also* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1181 (2016) (noting that many nineteenth-century courts likewise found seemingly "direct damage" to buildings to be "consequential," or indirect, in takings cases that denied relief to property damaged by government actions).

[84] Merrill, *supra* note 32, at 28.

[85] *Id.* at 29. I call this the tangibility or visibility test, though it has also been called the "dimensional test." *Id.* at 28; *see, e.g.*, Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 477 (S.C. 2013).

[86] *Compare* Nussbaum v. Lacopo, 265 N.E.2d 762, 765 (N.Y. 1970) (evaluating as nuisance), *and* Weishner v. Washington Cty. Golf & Country Club, 11 Pa. D. & C.3d 458, 458 (Ct. Com. Pl. 1979) (same), *with* Amaral v. Cuppels, 831 N.E.2d 915, 916 (Mass. App. Ct. 2005) (evaluating as trespass).

[87] *See Babb*, 747 S.E.2d at 479–80; Merrill, *supra* note 32, at 29, 33–34.

[88] Merrill, *supra* note 32, at 29 (quoting RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (AM. LAW INST. 1979)).

[89] *See id.*

[90] Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 850 (Or. 1948) (citing RESTATEMENT OF TORTS ch. 40 (AM. LAW INST. 1939)).

cited by the plaintiff, which involved airplane overflights and repeated artillery fire over property, by declining to "argue the distinction between a cannon ball and a ray of light."[91]

However, a decade after *Amphitheaters*, the Oregon Supreme Court began recognizing *intangible* intrusions onto property as subject to trespass claims[92] under what is now sometimes called the "modern" approach.[93] The case was *Martin v. Reynolds Metals Co.*,[94] in which the court proposed a new method for distinguishing trespass from nuisance and significantly broadened the scope of trespass liability.[95] The crux of the claim in *Martin* was that microscopic particulates from a nearby aluminum smelter, including fluoride, had settled on the plaintiff's land.[96] Citing cases involving soot, lead, buckshot, and air molecules, the court held that the size of a particle should not determine whether an action is trespass or nuisance.[97] Writing in 1959, the court observed that "in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released."[98] Rather than adopt the strict liability framework of ordinary trespass, the Oregon Supreme Court held that if the intrusion is intangible, the interference with the plaintiff's use must be "substantial" and must interfere with a "legally protected interest in the particular possessory use as against the particular conduct of the defendant."[99] In other words, assessing an intangible intrusion involves "a weighing process, similar to that involved in the law of nuisance," though directed at examining whether the intrusion has harmed the plaintiff's interest in exclusive possession.[100]

The Oregon Supreme Court's discussion of the earlier *Amphitheaters* case in *Martin* is worth unpacking because it specifically engages the question whether light could be subject to a trespass action. The court noted that the *Amphitheaters* case could be viewed in one of two ways.[101] First, it could be "a pronouncement that a possessor's interest is not invaded by an intrusion which is so trifling that it cannot be recognized by the law."[102] In other words, the harm in *Amphitheaters* could be viewed as trivial or insubstantial — like candlelight on a projection

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91 *Id.* at 851.

92 *See* Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (Or. 1959).

93 *E.g.*, Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 220 (Mich. Ct. App. 1999) (describing the "so-called modern view of trespass").

94 342 P.2d 790.

95 *See id.* at 794.

96 *See id.* at 791.

97 *See id.* at 792–94.

98 *Id.* at 793.

99 *Id.* at 794.

100 *Id.* at 795.

101 *See id.* at 794–95.

102 *Id.* at 795.

screen, which would not be actionable under the new intangible trespass test.[103] Alternatively, *Amphitheaters* could be viewed as an example of a defendant winning in the "weighing process"[104]: "[T]he glare of the defendant's lights could be regarded as an intrusion within the law of trespass, but . . . the plaintiff had no right to treat the intrusion as actionable in view of the nature of plaintiff's use" and the social desirability and reasonableness of the defendant's.[105]

The court then recited two stronger examples of when light might be considered actionable in trespass, both of which are reminiscent of nuisance premises.[106] First, light might be considered a trespass if it were to interfere with sleep or causes physical damage, which might be more likely to occur if the rays were "so concentrated that their entry upon the possessor's land would result in a trespassory invasion."[107] It then cited as an example a hypothetical from an Iowa case that is oddly evocative of the childhood pastime of frying bugs with a magnifying glass:

> If, for example, a person interests himself in solar phenomena, and, while experimenting with a powerful sunglass, he accidentally focuses the instrument upon some inflammable material on the lot of his nextdoor neighbor, starting a blaze which results in injury and loss to the latter, can it be said there was no trespass, no actual invasion of the neighbor's premises?[108]

Because this would cause "actual damage," the court suggested these types of harms resulting from light would count as intangible trespass.[109]

Second, if the light were aimed intentionally to disrupt the plaintiff's use of property, that might also constitute a trespass.[110] The *Martin* court observed that, had the defendant racetrack in *Amphitheaters* intentionally aimed light at the drive-in theater, the defendant might also have lost the weighing test: "Had the defendant purposely, and not as an incidence of his own legitimate use, directed the rays of light against the plaintiff's screen the court might well have taken the position that the plaintiff could have recovered in a trespass action."[111] In other words, the *Martin* discussion of intangible trespass suggests that light can properly be the subject of trespass claims in a few different scenarios: if the interference is significant or substantial and unreasonable, which it might be if the light caused physical harms, or, alternatively, if it was

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103 *See id.* at 794.
104 *Id.* at 795.
105 *Id.* at 794–95.
106 *See id.* at 795–96.
107 *Id.* at 795.
108 *Id.* (quoting Watson v. Miss. River Power Co., 156 N.W. 188, 191–92 (Iowa 1916)).
109 *Id.*; *see id.* at 795–96.
110 *See id.* at 795.
111 *Id.*

"purposely, and not as an incidence of . . . legitimate use" aimed at the plaintiff's property.[112]

A handful of courts have adopted some version of *Martin*'s "modern view"[113] or "modern theory" of trespass.[114] Some have expressly rejected it in favor of the "traditional" or tangibility approach.[115] Some have expressly left the question open for resolution in the future.[116] But since the *Martin* case, almost no courts have specifically considered cases where light alone forms the basis of the trespass action.[117] And there may be obstacles to bringing claims about light in trespass, even in courts that follow the modern theory. Some courts have articulated their modern trespass tests in ways that could be read to limit their adoption of the modern theory to certain kinds of intangibles, like airborne pollutants or particles.[118] In other instances, courts following the modern theory have suggested intrusions are only actionable if the offending agent causes "physical damage" or constructive ouster, bars that light is unlikely to clear (except, of course, the magnifying glass example from above where concentrated light set the house on fire).[119]

Put another way, the first pronouncement of *Martin* with respect to light may have survived: that light intrusions might be actionable in trespass if they cause substantial harm, though many states' courts may require serious physical damage. The second pronouncement in *Martin* — that light *purposely* directed at the defendant's activity might be actionable — has not received serious consideration since that decision,

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[112] *Id.*

[113] Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 221 (Mich. Ct. App. 1999).

[114] John Larkin, Inc. v. Marceau, 959 A.2d 551, 554 (Vt. 2008); *see* Borland v. Sanders Lead Co., 369 So. 2d 523, 525–26 (Ala. 1979); Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 390 (Colo. 2001); Bradley v. Am. Smelting & Ref. Co., 709 P.2d 782, 790 (Wash. 1985); *see also* Stevenson v. E.I. DuPont de Nemours & Co., 327 F.3d 400, 406 (5th Cir. 2003) (trying to predict Texas law and seemingly using the modern approach); Mercer v. Rockwell Int'l Corp., 24 F. Supp. 2d 735, 743 (W.D. Ky. 1998) (same with respect to Kentucky law).

[115] *Adams*, 602 N.W.2d at 222; *see, e.g.*, *id.* at 221–23; Johnson v. Paynesville Farmers Union Coop. Oil Co., 817 N.W.2d 693, 705 (Minn. 2012); Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 479–80 (S.C. 2013).

[116] *See, e.g.*, Darney v. Dragon Prods. Co., 771 F. Supp. 2d 91, 106 (D. Me. 2011); *John Larkin, Inc.*, 959 A.2d at 555.

[117] A New York case cryptically asserted in dicta that "[a] source of light can be the basis of a cause of action in trespass." 169 E. 69th St. Corp. v. Leland, 594 N.Y.S.2d 531, 533 (Civ. Ct. 1992). *But see* Celebrity Studios, Inc. v. Civetta Excavating Inc., 340 N.Y.S.2d 694, 704 (Sup. Ct. 1973) ("[I]t is not a trespass to project light, noise, or vibrations across or onto the land of another because there is no occupancy of space even for a brief period." (quoting Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 468 (1959))).

[118] *See, e.g.*, *Borland*, 369 So. 2d at 529–30; San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 695 (Cal. 1996); Williams v. Oeder, 659 N.E.2d 379, 383 (Ohio Ct. App. 1995); *Bradley*, 709 P.2d at 791; *see also Van Wyk*, 27 P.3d at 390 (collecting cases).

[119] *San Diego Gas & Elec. Co.*, 920 P.2d at 695; *Van Wyk*, 27 P.3d at 391.

though courts that emphasize physical damage might implicitly reject purposeful, nondamaging projection as actionable.[120]

In short, then, there are few cases helpful in evaluating whether and how light might give rise to a trespass claim. In jurisdictions that follow the "traditional" approach to trespass where tangibility or visibility is required, light is intangible and thus not actionable; in jurisdictions following the "modern view" of trespass, though there is a possibility that light alone can form the basis of a trespass claim, no court has adopted such a theory to award relief. Instead, most cases involving unwanted or offensive light have been brought as nuisance actions — but the "significance" threshold has prevented light from being actionable unless found in combination with other elements or found to be interfering with sleep, some stray language notwithstanding.

B. Lower Court Cases on Targeted Projection

The history up until this point has overwhelmingly covered a particular sort of light conflict: plaintiffs challenging excessive light emitted by a neighboring defendant business or resident. But, more recently, a different use of light has come to the fore. Here, the light is not emitted in the course of ongoing residential or business activity (like light from a racetrack or a garage floodlight). Instead, the light is directed at adjoining facades specifically to create a display on neighboring property.

Judges have considered challenges involving these sorts of unwanted light projection in at least three states: New Jersey, Pennsylvania, and Nevada. The New Jersey case involved protesters affiliated with a casino and hotel employees' union projecting "Shame On"[121] and "Boycott" on the Trump Taj Mahal casino complex in Atlantic City.[122] Attorneys called the projection "digital graffiti" and alleged it constituted a trespass, nuisance, taking, and conversion,[123] and a New Jersey

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120 The closest one might find to a direct rejection of the intentionality principle is in an Alabama case. *See Borland*, 369 So. 2d at 529. The court discussed a strange case where light waves emanating off a neighbor's middle finger (that the plaintiff's eyes received) constituted the possible trespass. *Id.* at 528–29 (citing Wilson v. Parent, 365 P.2d 72, 75 (Or. 1961)); *see Wilson*, 365 P.2d at 74. The Alabama court indicated that only "intensity" of light could give rise to a trespass action, not vulgar meanings. *Borland*, 369 So. 2d at 529. Obviously, this case could be distinguished because the finger-giving defendant was not purposely aiming light into adjoining property.

121 Verified Complaint at 3, Trump Entm't Resorts, Inc. v. Unite Here, Local 54, No. ATL-C-57-15 (N.J. Super. Ct. Ch. Div. Aug. 28, 2015).

122 *Id.* at 4. The Trump Taj Mahal was eventually closed and sold to Hard Rock International. *See Trump Taj Mahal Casino Sold for 4 Cents on the Dollar*, L.A. TIMES (May 9, 2017, 11:54 AM), https://www.latimes.com/business/la-fi-trump-taj-mahal-20170509-story.html [https://perma.cc/956L-VNBC]; Lori M. Nichols, *After 26 Years, Trump Taj Mahal Casino Folds*, NJ.COM (Jan. 16, 2019), https://www.nj.com/atlantic/index.ssf/2016/10/closed_trump_taj_mahal_shutters_its_doors.html [https://perma.cc/4P8R-LQRR]. Disputes beyond just the projections continued between the Taj Mahal and the union until closure. *See id.*

123 Verified Complaint, *supra* note 121, at 7.

court enjoined the projection without further discussion of the merits of the plaintiffs' claims.[124] Plaintiffs in a Nevada case were likewise successful at the preliminary injunction stage in a case brought around the same time. A local Sheet Metal Workers International union projected a ten-by-ten, neon-green image on various buildings of the Tropicana hotel in Las Vegas that said: "Where are you sleeping? Health inspectors REPEATEDLY found bodily fluid stains on the bed linens here."[125] On March 6, 2015, a Nevada trial court judge granted a temporary restraining order restricting some of these projections, but indicated that others could still take place on some surfaces, including a pedestrian bridge.[126] It is not apparent from the order why some projections were allowed but not others. The case was eventually stayed before further proceedings, ostensibly because another case was winding its way through the Nevada courts.[127]

The other Nevada case eventually generated the first written opinion on property and projection. During June of 2014, a painters' union used light to protest the use of nonunion labor in a construction project at Tivoli Village, "an upscale shopping mall with office space" in Las Vegas.[128] From a public sidewalk, union representatives projected onto a building facade a message about the tenant restaurant's health code violations.[129] The proprietor of Tivoli Village, Great Wash Park, LLC, filed a trespass action, and again, a Nevada trial court judge granted a preliminary injunction preventing the union from trespassing by "projecting images on the façade of the [Tivoli Village] building."[130] This time, however, the union and building owner continued to litigate the

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[124] *Trump Entm't Resorts*, slip op. at 2.

[125] Complaint for Injunctive Relief at 3 n.1, Tropicana Las Vegas, Inc. v. Sheet Metal Workers Int'l Ass'n, Local #88, No. A-15-714843-B (Nev. Dist. Ct. Mar. 6, 2015) [hereinafter Local #88 Complaint]; *see id.* at 3. A year earlier, in March of 2014, a union representing painters employed at Tropicana had projected the same image; Tropicana also filed an action then, though it was voluntarily dismissed before the dispute with the steelworkers. Complaint for Injunctive Relief at 3–6, Tropicana Las Vegas, Inc. v. Int'l Union of Painters & Allied Trades Dist. Council 15, No. A-14-698505-B (Nev. Dist. Ct. Mar. 31, 2014).

[126] *Sheet Metal Workers Int'l Ass'n*, slip op. at 2 (order granting temporary restraining order).

[127] Order Granting Joint Stipulation for Stay Pending Appeal in Related Matter and for Continuance of Status Check, Tropicana Las Vegas, Inc. v. Sheet Metal Workers Int'l Ass'n, Local #88, No. A-15-714843-B (Nev. Dist. Ct. Mar. 15, 2016).

[128] Appellant's Opening Brief at 2, Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453 (Nev. July 1, 2015).

[129] *Id.* at 3–5.

[130] Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940, at *1 (Nev. Ct. App. Aug. 18, 2016) (quoting Great Wash Park, LLC v. Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159, No. 14A705268, 2015 WL 12743749, at *3 (Nev. Dist. Ct. Jan. 28, 2015)).

case; the union appealed the injunction and ended up in front of the Nevada Court of Appeals.[131]

The sole question involved in *International Union of Painters & Allied Trades District Council 15 Local 159 v. Great Wash Park, LLC*[132] was whether the union's light projections could legally constitute a trespass.[133] If not, then the district court judge erred by issuing the injunction.[134] The court of appeals noted that the state supreme court had not squarely confronted whether light could form the basis of a trespass claim.[135] However, the court of appeals cited precedents both from states following a traditional approach — no intangible trespass — and from states following the modern approach — that intangible trespasses are sometimes actionable — and noted that the plaintiff would fail under either line of precedents.[136] Because neither theory would afford relief, the court reversed the lower court's injunction and remanded for further proceedings, though without deciding which approach to light to adopt.[137] The case was dismissed a few months later.[138]

The short majority opinion in *Great Wash Park* is less interesting than the concurrence authored by Judge Tao. Judge Tao noted the potential distinction between the projection in this case and the projection in other tort cases about light: this "beam of light [was] specifically and intentionally directed at the . . . property and nowhere else [and] served no purpose other than to intentionally light up the . . . building the way the Union wanted."[139] He viewed the building owner as having shifted away from arguments based on these characteristics and wrote separately to explain what might make projections actionable, had other theories been squarely presented.[140]

Judge Tao discussed several factors that might make projections actionable: (1) the intentionality of the projection;[141] (2) its specificity, or whether the projection targeted the single property or scattered over

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131 *Id.* The Nevada Court of Appeals is a relatively new court created to offload cases from the Nevada Supreme Court, which is required to hear all appellate cases. *See* James W. Hardesty & Jordan T. Smith, *The Nevada Court of Appeals Delivers on its Promise*, NEV. LAW., Mar. 2016, at 8, 8.

132 2016 WL 4499940.

133 Appellant's Opening Brief, *supra* note 128, at 39 n.17.

134 *Great Wash Park*, 2016 WL 4499940, at *2.

135 *Id.*

136 *Id.* (first citing Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 477 (S.C. 2013); and then citing Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 390 (Colo. 2001)).

137 *Id.* at *3.

138 Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453 (Nev. Dec. 12, 2016) (order denying petition for review), *dismissed per stipulation*, No. A-14–705268-C (Nev. Dist. Ct. Feb. 10, 2017).

139 *Great Wash Park*, 2016 WL 4499940, at *3 (Tao, J., concurring).

140 *Id.* at *3–4.

141 *Id.* at *3.

several;[142] (3) the absence of any other purpose, which would distinguish targeted projections from ambient lighting;[143] and (4) whether the projection involved text.[144] Judge Tao concluded, however, that light claims should be brought as nuisances rather than trespasses because trespass is an absolutist doctrine and would not allow for consideration of these fine-grained distinctions demarcating innocent, ambient light from more objectionable light projections.[145] In contrast, nuisance allows for "balancing of competing interests," which would in his view allow for examining whether the "intensity, duration, or other qualities of the projection were unreasonable or excessive."[146] Judge Tao also viewed the building owner's arguments under an absolutist trespass theory as unpersuasive.[147] First, claims based on a right to control the appearance of the exterior would be too broad in encompassing some ambient light.[148] Second, Judge Tao characterized the owner's claims that light is indeed physical and particulate and thus an ordinary physical trespass as "superficial pseudo-science."[149]

Though Judge Tao's concurrence suggested that a nuisance theory might be more availing for owners targeted by projections, the next court decision about targeted projection rejected just such a theory as a basis for relief. In *Urban Philadelphia Liberty Trust v. Center City Organized for Responsible Development*,[150] the owner of the Aloft Philadelphia Downtown Hotel had — in what is now a familiar refrain — been targeted with a projection by a union frustrated that the hotel had not included a promised restaurant that would have employed unionized labor.[151] On a few occasions in the fall of 2017, the union projected a parody "Aloss" logo and the URL "lostjobs.org" onto the facade of the hotel.[152] The hotel owners sought a preliminary injunction premised on both trespass and nuisance.[153] With respect to the trespass claim, the Pennsylvania court "adopted the analysis of the Nevada ap-

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142 *Id.* at *4 (describing the potential significance of "whether the lighting went into many different directions and lit other properties in addition to this one").

143 *Id.*

144 *Id.* (suggesting that it would be less objectionable if the projection involved "a monochromatic beam [rather than] a textual light image" and citing the existence of "readable message" as significant).

145 *Id.* at *7–8.

146 *Id.* at *8.

147 *Id.* at *5.

148 *Id.* at *4.

149 *Id.* at *5.

150 Nos. 171002675, 3686 EDA 2017, 2017 WL 7313667 (Pa. Ct. Com. Pl. Dec. 28, 2017).

151 *Id.* at *1–2.

152 *Id.* at *2.

153 *Id.* at *8–9. The plaintiff also brought a conversion claim, but the court did not much discuss it. *Id.* at *10.

pellate court" in *Great Wash Park*, finding that light without corresponding damage could not form the basis of a trespass action and thus could not support a preliminary injunction.[154]

On the nuisance action, however, the Pennsylvania Court of Common Pleas ventured into new territory. The court noted that Pennsylvania follows the Restatement (Second), which "makes significant harm a prerequisite for any legally actionable nuisance" and rejects liability for mere annoyances or inconveniences.[155] The court found that there was no significant harm here — the union representatives "were careful to project these images onto blank or unused portions of the Hotel's façade rather than into any Hotel rooms or on [the Hotel's] signage."[156] In discussing significant harm, the court also cryptically stated that:

> [P]ublic protests typically involve activity or expressive conduct that is designed to call attention to the protesters' message, which is the very essence of the First Amendment. . . . Given that this conduct is constitutionally protected by the First Amendment, . . . it did not rise to the level of significant harm required for a nuisance even if some persons might consider it a slight inconvenience or petty annoyance.[157]

In other words, because there was no "significant harm" from the temporary projections, and perhaps because of the important expressive conduct involved, the hotel owner was just as unlikely to succeed on the nuisance claim as the trespass claim. Though the property owner initially appealed the denial of the injunction, the case was eventually discontinued at the appellant's request in the summer of 2018.[158]

The fate of the projection cases follows from the history of light cases more generally. Despite some dicta, no case has found light to be a trespass. And early light cases suggested that light alone could be actionable in nuisance only if it caused significant harm: typically, interferences with sleep, or maybe in the most unusual of circumstances, some physical damage.[159] Because temporary projections have not caused these harms, courts have found nuisance and trespass not to apply.

II. THE EMERGENCE OF APPROPRIATIVE HARMS

Current law is not protecting owners against any projections, but the relevant question is whether and when it should. This Part marshals doctrinal and theoretical support for the idea that projections should be actionable. The first section disaggregates projections into categories, explaining the different sorts of interferences different projections might

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[154] *Id.* at *8.

[155] *Id.* at *8–9 (citing RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (AM. LAW INST. 1979)).

[156] *Id.* at *9.

[157] *Id.* at *9–10.

[158] Urban Phila. Liberty Tr. v. Ctr. City Organized for Responsible Dev., No. 3686 EDA 2017 (Pa. Super. Ct. Aug. 22, 2018) (order discontinuing case).

[159] *See supra* notes 108–109 and accompanying text.

cause. The second section finds affirmation of the varied owner interests affected by these interferences in extant doctrine, specifically in cases recognizing the owner's interests in communicative uses of property and control over the presentation or image thereof. Connecting these two strands, the final section defines a category of appropriative harms in real property: those occurring when property is commandeered toward others' ends from beyond the boundary, disrupting the owner's control and risking other downstream harms.

A. The Interferences Caused by Projection

The most basic interference associated with projection is a disruption in the owner's use and control. Property owners are the editors and architects of their realty: officers with primary control over the content and arrangement of what appears there.[160] All targeted projections interfere with that control by creating a display to which the owner has neither contributed nor consented. These displays are violations of and intrusions on the owner's sovereignty — intangible ones, yes, but intrusions nonetheless.

Unwanted projections also interfere with the owner's sovereignty in two other related ways. First, projections onto property by others can deprive the owners of the ability to express themselves on their own property. In this regard, images created with light may be even more problematic than more traditional, physical forms of communication: if an owner wishes to use the same facade to project a different image, the two messages will both be rendered invisible. One need only look at a recent incident in Sydney, Australia, to see how this works. Controversially, the Sydney government permitted a horse racing company to advertise on the sails of the famed Sydney Opera House.[161] Sydney residents who were angry about the Opera House being turned into a "billboard" organized a protest involving flashlights and projections, attempting to obscure the advertisement (with some success).[162] Targeted projections thus limit owners' capacity for competing forms of communication or expression.

Second, light also impedes the owner's ability to resist communicating at all. If an individual (counterfactually) had the capacity to put

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[160] *See* Claeys, *supra* note 73, at 1398 (describing trespass and nuisance law as "aim[ing] to secure to each owner a domain of practical discretion in which he may choose freely how to use his land"); *cf.* Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1436 (2011) (noting that the right to exclude acts to "protect messages, not simply to deliver them").

[161] Ben Westcott, *Sydney Opera House Protesters Disrupt Horse Racing Advertisement*, CNN (Oct. 9, 2018, 5:58 AM), https://www.cnn.com/2018/10/09/australia/sydney-opera-house-advertisement-protests-intl/index.html [https://perma.cc/5HSU-695U].

[162] *Id.*; *see also* Kevin Nguyen & Nick Dole, *Sydney Opera House Painted with Light from Torches, Lamps to Disrupt Everest Promotion*, ABC NEWS (Oct. 29, 2018, 8:46 AM), https://www.abc.net.au/news/2018-10-09/opera-house-everest-protest/10357074 [https://perma.cc/P4ZV-T4HB].

a physical sign up on another's building without trespass or other liability, an objecting owner could remove it, cover it with another sign, or put additional messaging nearby. When it comes to light, it is harder for an owner to remove or obstruct the image created by light without either illuminating the same facade, which itself might not be the owner's desired expressive aesthetic, or blocking the incoming rays, which might not be feasible depending on the source of the projection.[163] One could perhaps cast some targeted projections in terms of unjust enrichment.[164] Since building owners sometimes license the facade for advertising or artistic purposes, targeted projections foist an advertisement upon them without payment.[165]

Certain messages or displays may cause other interferences, depending on context. Any outside projection disrupts the owner's control over property because of the unwanted communications on and exploitation of his or her thing, but some owners may find certain displays or messages (or all displays or messages) particularly objectionable. There are of course messages that most would find offensive, strange, or upsetting, or messages that are likely to hurt the specific owner (harming their business, disparaging them personally, or the like). In addition to messages delivered through text, otherwise neutral symbols or displays can develop hurtful meanings based on context.[166] Even monochromatic beams could be objectionable to property owners if imbued with communicative significance. Imagine the Green Bay Packers's colors displayed on Chicago homes, the T-Mobile shade of magenta displayed on AT&T stores, or red and green strobes pointed at the homes of non-

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163 Imagine, for example, that the light is being projected from a high window on private property. To block a large projection, an owner would be stuck either constructing something large to shade or scramble the rays, or trespassing on another's property to get close to the source.

164 *See* 66 AM. JUR. 2d *Restitution and Implied Contracts* § 3 (2019) ("'Unjust enrichment' is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice and equity or good conscience.").

165 The Sydney Opera House and other examples indicate that owners are commercializing their facades in this way. Of course, on the flip side, a variety of "guerilla projection" companies now market themselves to companies as capable of projecting ads on others' structures. *E.g.*, *Projection Mapping*, CREATIVE GUERRILLA MARKETING, http://www.creativeguerrillamarketing.com/projection-mapping/ [https://perma.cc/P9SR-BU8Q].

166 *Cf.* Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 822–23 (2014) (arguing that religious symbols can communicate just as intensively as religious text); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1109 (2003) ("Representations of all kinds — symbols, diagrams, and even situations in the world — carry information."). Judge Tao's concurrence in *Great Wash Park* suggested that courts should consider whether the projection involved readable text in deciding whether targeted projections are actionable. Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940, at *3–4 (Nev. Ct. App. Aug. 18, 2016) (Tao, J., concurring). It is not clear that text is inherently more harmful, wrongful, or offensive than symbols or even single-colored lights. Instead, the impulse to treat text as significant seems to derive from the text's communicative aspect, certainly as compared to ambient light.

Christians during the Christmas season. In other cases still, owners may not find the message or symbol objectionable, but they simply might not want to be associated with it, let alone broadcast it from their structure.

Across this spectrum, messages and displays will also have different effects on onlookers. Some displays are obviously the result of third parties projecting onto property: artists may sign their work, and even without signatures, few would assume that a hotel would choose to publicize that health inspectors found stained sheets on its beds (to borrow an earlier example).[167] But some displays are more ambiguous. A holiday snowflake show or a random advertisement, or even a signed artistic projection, may suggest to outsiders that the owner consented. The owner might be embarrassed by association with an advertisement, message, or light display that he or she simply would not have installed himself or herself.

In other words, some projections may foist another's communication or aesthetic onto the owner in ways that falsely attribute to him or her certain characteristics or views. This sort of harm appears more reputational and image related, more personal than property based.[168] But it is the *site* of the communication — the owner's property — that is intertwined with the content of the communication and causes an owner further harm beyond loss of control over the realty. Granted, onlookers may form opinions of property owners based upon all sorts of symbols and objects that are located outside their property's boundaries: a neighborhood full of campaign signs for one candidate may lead those driving through to assume certain things about nearby owners with no signs of their own (and it may indeed be unclear where one property begins and another ends). But the initial intrusion, accompanied by further embarrassment, makes the harm of projection especially acute. Furthermore, even if lawn signs near boundaries may not be clearly attributable to one party or another, buildings, at least, are especially connected to their occupants and owners.[169] Whereas passersby know that the owner of one parcel does not control what goes on inside a neighboring one, most probably presume that owners or occupants are in charge of building exteriors and whatever they display.

To be sure, other torts outside the property context might cover some interferences caused by projections, depending on the individual case: a defamatory statement on a facade is still a defamatory statement. While defamation is an obvious potential candidate, other torts may likewise cover some projections. The aptly named tort of "false light" originated

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[167] Local #88 Complaint, *supra* note 125, at 1–3 & 3 n.1.

[168] *See* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1421 (2011).

[169] For an argument that property law protections vary by proximity to edge or center, see generally David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753 (2019).

to protect individuals from being portrayed publicly in a manner that is false, misleading, or offensive.[170] Businesses also have some causes of action, like "tortious interference with business relationships,"[171] "tortious interference with prospective economic advantage,"[172] or related torts like "trade libel,"[173] all of which emerged to address disparagement and misappropriation respecting business enterprises. Like the personal image torts that protect an individual's investment in his or her good name and status in the community, these analogous torts protect against unfair interferences with investments in business goodwill and reputation. But in many instances, there are hurdles, and none of these other torts will cover every instance of projection. Torts referring to appropriation of one's "name or likeness" would probably not extend to messages on one's facade that do not use that name or likeness, even if the building were deeply associated with its owner.[174] And defamation, false light, and all the related actions have other requirements: that statements be false, factual, recklessly made, outrageous, highly offensive to a reasonable person, or involve commercial exploitation of identity, as examples.[175]

One can imagine many unwanted projections that would not meet those requirements. For instance, there is a well-known phenomenon among Harvard graduates — obnoxious though it may be — of avoiding casually mentioning having graduated from Harvard, including going so far as to say only that they "went to college in Boston."[176] A Harvard graduate might not want a projection that says "I went to Harvard" on his or her house, no matter how well-meaning his or her neighbor — and such a statement would not be false, nor commercial, nor offensive. It may also cause misattribution: it gives a false impression that the owner wishes to communicate or endorse this message to the world.[177] Even if the neighbor were clearly the source of the

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170 *See* Samantha Barbas, *The Laws of Image*, 47 NEW ENG. L. REV. 23, 77–81 (2012). This tort does not exist in every state. *See, e.g.*, Denver Pub. Co. v. Bueno, 54 P.3d 893, 894 (Colo. 2002).

171 Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990).

172 Holloway Sportswear, Inc. v. Transp. Ins. Co., 58 F. App'x 172, 174 (6th Cir. 2003).

173 Erlich v. Etner, 36 Cal. Rptr. 256, 258 (Ct. App. 1964).

174 *E.g.*, RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

175 *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); RESTATEMENT (SECOND) OF TORTS §§ 566, 581A, 652E (AM. LAW INST. 1977); RESTATEMENT (SECOND) OF TORTS § 772 (AM. LAW INST. 1979).

176 L.V. Anderson, *People Still Say They "Went to College in Boston," Meaning Harvard? Please Stop Doing This*, SLATE (May 30, 2014, 10:15 AM), https://slate.com/culture/2014/05/harvard-grads-say-i-went-to-college-in-boston-and-call-it-the-h-bomb-get-over-yourselves-ivy-leaguers.html [https://perma.cc/KQ4F-2EYE]. The phenomenon of mentioning one's alma mater is sometimes called (equally absurdly) "dropping the H-bomb." *Id.*

177 *Cf.* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 611–14 (2008) (analyzing protections against misattribution across trademark and First Amendment law).

message — "John went to Harvard! — Proud Neighbor" — the display on the property might suggest the owner's consent or acceptance in a way that the display of an identical message on the neighbor's property would not. And to return to the primary point, any projection interferes with the owner's capacity to control activities on his or her property, one of the foundational attributes of an owner's sovereignty.[178]

Depending on context, motive, and content, projections thus cause different types of interferences. At the most basic level, all projections disrupt the owner's control over property in ways that prevent removal or obstruction of the offending display and impede the owner's ability to construct a display himself or herself. Numerous projections cause the owner to suffer unwanted association or risks of misattribution. The next section explores doctrinal recognition that these sorts of interferences warrant legal intervention. Existing doctrine recognizes the benefits of protecting owner control over explicitly communicative uses of property and owner discretion over the aesthetic or presentation of property as against assertions of control by others. The next section takes those themes in turn.

B. Doctrinal Links

1. Interference with Communicative Use. — Targeted projection is an unauthorized communicative use of the owner's facade. In all other circumstances, communicative uses of private space by someone other than its owner have typically required easements, leases, licenses, or other forms of property relationships. For decades, businesses seeking advertising space on neighboring facades or fencing have executed agreements to do so.[179] While there have been occasional disputes in courts about the types of property relationships these agreements created and how those relationships could be terminated,[180] I have located no disputes about whether such an agreement would be necessary in the first instance. Instead, the ordinary practice of those seeking to advertise or post signage on property not belonging to them is to negotiate

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[178] *See* Larissa Katz, *Property's Sovereignty*, 18 THEORETICAL INQUIRIES L. 299, 328 (2017) (defining the sovereignty of ownership as "a carve-out of authority within the constitutional order for private actors to make decisions with respect to things"). In this regard, one's dignitary interests in the presentation of property look like some hybrid of personality rights and "moral rights" — rights that "allow[] the author [of a work] to prevent any deforming or mutilating changes to his work." Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 48 (1st Cir. 2010) (quoting Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995)). While it may be odd to conceptualize real property as artistic work, the analogy is not altogether inapt, though it has its limits, *see infra* note 390 and accompanying text.

[179] *See, e.g.*, XAR Corp. v. Di Donato, 429 N.Y.S.2d 59, 60 (App. Div. 1980).

[180] *See id. See generally* Note, *Contracts for Display Advertisements*, 19 HARV. L. REV. 526 (1906); Annotation, *Nature and Extent of Right Granted by Contract for Use of Wall or Roof for Advertising Purposes*, 10 A.L.R. 1108 (1921).

with the owner for an easement in gross or some other right entitling them to use of the structure for that purpose.[181]

Scattered criminal laws also protect owners' rights to use or prohibit the commercial or communicative use of facades by others. Criminal laws targeting graffiti are widespread.[182] While the harm caused by graffiti is often physical — an owner will have to wash or paint over it in most instances — several courts have discussed the harm in terms of loss of use rather than lasting damage.[183] At least one opinion contemplated graffiti laws as targeting visual "blight."[184] In addition to graffiti laws, a multitude of additional state and local laws ban the posting of advertisements on property "without the consent of the owner, lessee, or person in lawful possession of such property."[185] In at least one state — New York — the law is drafted broadly enough to include not just commercial advertisements but also communications on others' property directed at public promotion of an idea.[186] Both graffiti and unwanted advertising communicate on or from another's property, altering onlookers' perceptions of the place and thus creating different harms to owners than those that would result from unwanted mail or art privately slipped under the door.[187]

Apart from these sources, the idea that owners should control what is communicated on their land and buildings is also made explicit in the tort rules that govern liability for defamatory communications on property. The Restatement (Second) provides that "[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to

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[181] There is a single, interesting case in which the company that painted a sign on the wall refused to remove it at the expiration of the agreement. *See* Goldman v. N.Y. Advert. Co., 60 N.Y.S. 275, 275 (App. Term 1899). The owner of the home sued, and the court determined that because the agreement was not a lease, there was no obligation on the part of the sign painter to paint over the sign. *Id.* at 275–77. There was no question, however, that the initial placement was pursuant to an agreement. *Id.* at 276.

[182] *E.g.*, N.Y. PENAL LAW § 145.60 (McKinney 2019).

[183] *E.g.*, People v. Acevedo, 65 N.Y.S.3d 673, 676 (Crim. Ct. 2017) (describing intent-to-damage element of graffiti law as met if person intends to mark property "in a manner that would impair the value, *usefulness*, or normal function of the property" (emphasis added)); People v. Torres, 708 N.Y.S.2d 578, 583 (Crim. Ct. 2000) (noting that the use of glue in graffiti could have caused damages because glue "has the potential not only to lower [property's] value but also to result in some loss of use").

[184] People v. Vinolas, 667 N.Y.S.2d 198, 201 (Crim. Ct. 1997).

[185] CAL. PENAL CODE § 556.1 (West 2019); *see also* N.Y. PENAL LAW § 145.30(1) (McKinney 2019) ("A person is guilty of unlawfully posting advertisements when, having no right to do so nor any reasonable ground to believe that he has such right, he posts, paints or otherwise affixes to the property of another person any advertisement, poster, notice or other matter designed to benefit a person other than the owner of the property.").

[186] *In re* Charles W., 339 N.Y.S.2d 193, 195 (Fam. Ct. 1972) (defining advertisement as "all forms of public announcement which are intended to aid directly or indirectly in the furtherance or promulgation of an idea, or in directing attention to a business, commodity, service or entertainment").

[187] *See* Daniel E. Lungren, Att'y Gen. of Cal., & Gregory L. Gonot, Deputy Att'y Gen. of Cal., Opinion Letter (Aug. 3, 1994), *as reprinted in* 77 OPINIONS ATT'Y GEN. CAL. 193 (1994).

be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication."[188] To illustrate this point, the Restatement (Second) uses the illustration of A writing something defamatory on B's bathroom wall about C; if, after being alerted to the writing, B does not remove it, B will be liable for that continued publication.[189] Not every court has found the owners of buildings liable for defamatory graffiti displayed on their premises,[190] and owners must only "exercise reasonable care to abate the defamation."[191] Still, however, the assumption latent in this default rule is that the owner of private property bears responsibility for and association with the communications that appear on land and buildings.

Along with these aspects of property, tort, and criminal law, other doctrinal areas also illustrate the connection between communicative uses of property and owner sovereignty. In the First Amendment context, when discussing the importance of the owner's rights to resist government interference with communications on or from property, the Supreme Court has discussed both the importance of communicative rights and the idea that owners should be free even from interfering communications from private parties. Discussing the importance of communicative rights, particularly in residences, the Court stated in *City of Ladue v. Gilleo*[192] that "[a] special respect for individual liberty in the home has long been part of our culture and our law" and that the owner's ability to "*speak* there" "has special resonance."[193] But the Court went further, noting that leaving owners control over the signage and messages displayed on their own property appropriately puts the externalities associated with that speech on those owners: "[I]ndividual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods."[194] In an earlier case — *Members of the City Council v. Taxpayers for Vincent*[195] — the Court likewise emphasized the importance of the private citizen's right to communicate on or from his or her property. *Taxpayers for Vincent* concerned the validity of an ordinance banning the posting of signs on public property but permitting

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188 RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. LAW INST. 1977).

189 *Id.* cmt. p, illus. 15; *see also* Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952); Annotation, *Liability for Permitting Walls or Other Portions of Place of Public Resort to Be Occupied with Matter Defamatory of Plaintiff*, 28 A.L.R.2d 1454 (1953).

190 Scott v. Hull, 259 N.E.2d 160, 162 (Ohio Ct. App. 1970).

191 RESTATEMENT (SECOND) OF TORTS § 577 cmt. p ("[If,] for example, the defamatory matter might be carved in stone in letters a foot deep, it is possible that the defendant may not be required to take any action.").

192 512 U.S. 43 (1994).

193 *Id.* at 58.

194 *Id.*

195 466 U.S. 789 (1984).

postings on private property.[196] In upholding the ordinance despite this disparate treatment, the Court struck a similar chord as it did in *Ladue*, first noting that "[t]he private citizen's interest in controlling the use of his own property" — in other words, dictating the expression from there — "justifies the disparate treatment" of private and public property, and also noting that "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds."[197]

While this strand of First Amendment doctrine suggests there are reasons to award owners strong affirmative rights to communicate on their property, a second strand of First Amendment case law also supports the idea that owners should be able to resist unwanted communications. In *Ladue*, the Court noted that the incentives relating to communication would be "markedly different" for "*persons who erect signs on others' land*, in others' neighborhoods, or on public property."[198] Indeed, even if most neighbors might be deterred by the threat of social sanctions from visually cluttering neighbors' structures with projections,[199] projections done from vans on public streets permit anyone from outside a community to communicate on and within it while the effects of those communicative uses fall on owners.

The case for granting owners strong negative rights to prevent unwanted communications is even stronger where those incoming messages would change or dilute the owner's own expression — even where that expression comes in the form of silence. The facts involved in many targeted projection cases directly evoke First Amendment compelled speech doctrine. Of course, compelled speech raises different state action concerns than do projections: in the typical compelled speech case, the plaintiffs are being required by the government to host speech, rather than having another party foist speech on them directly.[200] While questions about state action are important for evaluating how the First Amendment applies to the projection problem,[201] the cases about compelled speech are nonetheless useful more generally for their illustration of the problems associated with others interfering with one's own communications and expressions.[202]

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196 *Id.* at 811.

197 *Id.*

198 512 U.S. at 58 (emphasis added).

199 *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW 124–26 (1991) (overviewing how social control systems — rewards and punishments — operate to constrain behavior in the absence of legal rules). As the history of spiteful neighbor battles illustrates, social controls do not always work effectively in soured relationships.

200 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (distinguishing state-compelled speech and state-protected third party speech).

201 *See infra* section III.C, pp. 1202–13.

202 There are ample fears about the expanding reach of compelled speech doctrine over the past decade, but this Article uses compelled speech cases merely to elaborate the interests of property owners in controlling expression. For an overview of many recent decisions viewed as expanding

A significant body of this free speech case law addresses why it is harmful for individuals to be forced to speak when they wish to remain silent or disagree with the views they are being forced to express. In this line are cases about children forced to say the Pledge of Allegiance;[203] a law that required individuals not to obstruct the state motto "Live Free or Die" on their license plates;[204] and government-enforced requirements to publish mandated content in newspapers.[205] In each case, the speaker suffers a range of harms by being associated with a view or statement he or she does not hold or wish to convey, which can impinge on both the speaker's self-presentation and his or her autonomy.[206] And compelled speech can deceive listeners or onlookers, too, in ways that are socially harmful. Listeners may have difficulty deciding whether the speech or a disclaimer is true and may misattribute beliefs to individuals who do not hold them.[207] The harms associated with compelled speech bear strong similarities to the harms suffered by owners enduring unwanted projections. Being forced to display a message, symbol, or light show without consent impinges on the owner's autonomy and self-authorship and may undermine viewers' abilities to trust and interpret what they see.

2. Interference with Presentation. — At a highly general level, the appearance of real property, including the communications thereon, informs onlookers about the identity of the property's owner. One makes different assumptions about the occupants of a house painted purple, a house covered in signage, a house with a lawn made up of flowers rather than grass, and a colonial brick house. Likewise, whether projections contain text, change the house color, or illuminate a door, they affect onlookers' interpretations.

It is difficult to identify a term that captures what attribute of property ownership this is, but the term "presentation" may suffice. Presentation is defined as "the manner or style in which something is given, offered, or displayed."[208] Property owners present their property in

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compelled speech doctrine and an overview of the doctrine itself, see Eugene Volokh, Essay, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

[203] *E.g.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[204] Wooley v. Maynard, 430 U.S. 705, 707 (1977).

[205] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

[206] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 575–76 (1995); Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 151, 153–54 (2006). Professor Larry Alexander finds the exact harm suffered by individuals in the compelled speech cases "elusive," *id.* at 148, but notes the "prevalence of the belief that they *are* harmed," *id.* at 161.

[207] *See* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 385 (2008). *But see* Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1804–05 (2017) (noting the challenges with locating compelled speech doctrine as a matter of either listeners' or speakers' rights).

[208] *Presentation*, LEXICO, https://www.lexico.com/en/definition/presentation [https://perma.cc/EQ9Z-7FGC].

ways that communicate their identities. One's possessions communicate status, values, style, and creativity.[209] In the words of property scholar Professor Robert Ellickson, "[b]izarre architecture or landscaping may be as significant a mode of self-expression as unusual clothing or hairstyles."[210] Houses, in particular, "are modified and decorated to communicate the social identity of their owners."[211]

While it is an obvious point, what appears on property communicates about and from its owner, rather than anyone else.[212] The Supreme Court has said as much in the First Amendment context:

> It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. . . . [P]ersons who observe donated monuments routinely — and reasonably — interpret them as conveying some message on the property owner's behalf.[213]

If a person wants to build or display something strange or offensive on his or her property to annoy a neighbor, or simply paint the house a putrid shade of pea green, he or she is still the one with the strange or offensive thing on his or her lawn.[214] Because people form their own identities through the presentation of their own property, "people form understandings of others' identities at least in part the same way."[215]

Ambient light may cause neighboring property to appear more illuminated, but it is hard to imagine ambient light substantially transforming the presentation of the property. On the other hand, by commandeering the facade, targeted projections do transform the owner's presentation of the exterior: polka dots, text, and video each change the appearance in ways that may change interpretations by observers, even if those alterations are impermanent. Outside the context of light, these sorts of

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[209] *See* Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 779–82 (2009).

[210] Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 749 (1973).

[211] Edward K. Sadalla et al., *Identity Symbolism in Housing*, 19 ENV'T & BEHAV. 569, 572 (1987). Even building materials have been shown to be connected to perceptions and values of owners. *See* Edward K. Sadalla & Virgil L. Sheets, *Symbolism in Building Materials: Self-Presentational and Cognitive Components*, 25 ENV'T & BEHAV. 155, 175 (1993).

[212] *Cf.* People v. Stover, 191 N.E.2d 272, 273, 276 (N.Y. 1963) (considering owners' erection of clotheslines containing "tattered clothing, old uniforms, underwear, rags and scarecrows," *id.* at 273, as "nonverbal expression," *id.* at 276, of protest "against the high taxes imposed by the city," *id.* at 273).

[213] Pleasant Grove City v. Summum, 555 U.S. 460, 471 (2009); *see* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 626 n.200 (2011) (discussing classification of monuments and religious symbols on property as private or public).

[214] For examples of people building on their own property to spite neighbors, see Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 701–04 (2010); Larissa Katz, Essay, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1446, 1470 (2013); and Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357, 384–98 (2016).

[215] Davidson, *supra* note 209, at 782.

visible interferences with the presentation of property have been actionable in nuisance for a long time: early industrial nuisance cases discussed the harms associated with discoloration from soot, smoke, and sawdust, albeit always accompanied by other sorts of physical damage or smoke inhalation.[216] More recently, plaintiffs have prevailed in nuisance actions where the invisible chemical by-products of activity caused exteriors to change colors or peel or appear dirty,[217] suggesting that the visual presentation of property — even ornamental things like flowers and paint colors — is worthy of protection against changes caused by neighbors. But, because these changes have still had some sort of economic effect on owners, however small, the applicability of these visual harm cases to projections is unclear.[218]

There is another surprising source of recognition for owners' presentation interests, though: it comes not when they are nuisance plaintiffs, but rather when they are nuisance defendants. Aesthetic nuisance cases usually involve a plaintiff neighbor whose property values or enjoyment of property has suffered as a result of something unsightly or offensive on the defendant's land. Aesthetic nuisance cases have involved plaintiffs challenging a range of allegedly ugly features: a 110-foot-tall cell

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[216] For cases where soot, smoke, or sawdust discolored property and land, see *Whitney v. Bartholomew*, 21 Conn. 212, 213 (1851), discussing a blacksmith shop that made it "impossible for [plaintiff's] tenants, living in her house, to dry their clothes, when washed, upon her premises, without having them soiled and injured, by the cinders and ashes thrown upon them"; *Cooper v. Randall*, 53 Ill. 24, 26 (1869); *Hennessey v. Carmony*, 25 A. 374, 375 (N.J. Ch. 1892), which discussed "filth" on "washed clothing from the spray from [factory] exhausts"; *Ross v. Butler*, 19 N.J. Eq. 294, 299–300 (Ch. 1868); *Collar v. Ulster & D.R. Co.*, 131 N.Y.S. 56, 58 (Ostego Cty. Ct. 1911); *Hutchins v. Smith*, 63 Barb. 251, 258 (N.Y. Onondoga Special Term 1872); and 1 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS 696 (3d ed. 1893).

[217] *See, e.g.*, Sam Finley, Inc. v. Russell, 42 S.E.2d 452, 456 (Ga. Ct. App. 1947); Codding v. Braswell Supply, Inc., 54 So. 2d 852, 854–56 (La. Ct. App. 1951); McKenna v. Allied Chem. & Dye Corp., 188 N.Y.S.2d 919, 921–22 (App. Div. 1959); *see also* Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 868 (W.D. Ky. 2014), *aff'd*, 805 F.3d 685 (6th Cir. 2015) (discussing nuisance actions surrounding whiskey fungus dirtying properties, albeit in connection with questions of federal statutory preemption of common law action); Waschak v. Moffat, 109 A.2d 310, 318 (Pa. 1954) (Musmanno, J., dissenting) (criticizing majority's failure to find an intentional nuisance in case where chemicals had caused paint to "burst into a silvery sheen, and then, as if this were its last dying gasp . . . assume[] a blackish cast").

[218] *See Sam Finley, Inc.*, 42 S.E.2d at 454 (alleging reduction in value of property of $300 and excess laundering costs for materials on clothesline as $300); *Codding*, 54 So. 2d at 853 (noting that it would "require the sum of $902.05 for labor and material to remedy" discoloration of plaintiff's trailers); Cooper Tire & Rubber Co. v. Johnston, 106 So. 2d 889, 892 (Miss. 1958) (noting change in value of property and cost of painting as a result of carbon black staining buildings black). At least one court has rejected an aesthetic modification to trees alone as a basis for nuisance liability, in part because the "ornamental value" of the property was not changed. *See* Ladd v. Granite State Brick Co., 37 A. 1041, 1041 (N.H. 1895) (upholding judgment for defendant where plaintiff's white pine trees were turned reddish brown). There was also a case where a racetrack's lights changed the "ambiance" of a historic structure for about seventy-two hours a year by rendering the paint color different in appearance. Welcker v. Fair Grounds Corp., 577 So. 2d 301, 302 (La. Ct. App. 1991). The trial court's judgment that this was a nuisance was reversed on appeal. *Id.* at 304.

tower,[219] a few junked cars,[220] commercial solar-panel arrays,[221] rows of headstones at a local cemetery,[222] orange plastic construction fencing reinforced with license plates and vinyl,[223] vulgar graffiti,[224] and even a toilet suspended in midair.[225]

Despite occasional scholarly hopes to the contrary,[226] courts have declined to recognize aesthetic nuisance claims,[227] and they have done so largely out of concern about impinging on defendants' interests in presenting their property as they see fit.[228] One state court worried that permitting neighbors to police other neighbors' aesthetics would "unduly circumscrib[e] inherent rights of ownership of property": "One man's pleasure may be another man's perturbation, and vice versa. What is aesthetically pleasing to one may totally displease another — 'beauty is in the eye of the beholder.'"[229] True, aesthetic harms are subjective and thus difficult for judges to assess.[230] But courts have also recognized that individuals have the right to use and enjoy property in ways that satisfy their aesthetic preferences, and courts should be hesitant to interfere with those choices.[231] As one New York Court of

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[219] Oliver v. AT&T Wireless Servs., 90 Cal. Rptr. 2d 491, 494 (Ct. App. 1999).

[220] Foley v. Harris, 286 S.E.2d 186, 191 (Va. 1982).

[221] Myrick v. Peck Elec. Co., 164 A.3d 658, 660 (Vt. 2017).

[222] McCaw v. Harrison, 259 S.W.2d 457, 458 (Ky. 1953).

[223] Wernke v. Halas, 600 N.E.2d 117, 119 (Ind. Ct. App. 1992).

[224] *Id.*

[225] *Id.*

[226] *See, e.g.*, Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 141–42 (1987); Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 3 (2002); Stephen E. Woodbury, *Aesthetic Nuisance: The Time Has Come to Recognize It*, 27 NAT. RESOURCES J. 877 (1987).

[227] *See* Myrick v. Peck Elec. Co., 164 A.3d 658, 663 n.* (Vt. 2017); Coletta, *supra* note 226, at 141; John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 281–82 (2001); George P. Smith II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 54 (1991); Smith, *supra* note 33, at 999–1000; Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1080 (1970).

[228] *See* Woodbury, *supra* note 226, at 878 ("[C]ourts traditionally have held that a landowner has the right to do what he will with his property, and a judge should not use . . . subjective notions of ugliness to interfere with that property right."); Stephanie L. Bunting, Note, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in* City of Ladue v. Gilleo, 20 HARV. ENVTL. L. REV. 473, 508 n.199 (1996) (describing "the preferred status of homeowners' rights" in this "history of judicial reluctance" in aesthetics cases).

[229] Ness v. Albert, 665 S.W.2d 1, 2 (Mo. Ct. App. 1983); *see Wernke*, 600 N.E.2d at 122 ("It may be the ugliest bird house in Indiana, or it may merely be a toilet seat on a post. The distinction is irrelevant, however; Wernke's tasteless decoration is merely an aesthetic annoyance, and we are not engaged in the incommodious task of judging aesthetics."); Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008); *Myrick*, 164 A.3d at 662.

[230] *See* Green v. Castle Concrete Co., 509 P.2d 588, 591 (Colo. 1973) ("Given our myriad and disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for such complaints would cause inexorable confusion.").

[231] Oliver v. AT&T Wireless Servs., 90 Cal. Rptr. 2d 491, 501 (Ct. App. 1999) ("[W]hile plaintiffs may understandably be frustrated at the presence of a large transmission tower adjacent to their

Appeals judge put it, policing owners' decisions about the appearance of property allows "trespass through aesthetics on the human personality."[232]

Owner control over presentation is, of course, not absolute. Courts across the country have declared that legislatively enacted aesthetic regulations are both legitimate uses of the police power and permissible restrictions on otherwise constitutionally protected expression.[233] Furthermore, landowners routinely bind themselves — through homeowners' association restrictions, covenants, and other contractual devices — to aesthetic standards.[234] But there are important distinctions among aesthetic regulations, contractually agreed-upon aesthetic restrictions, judicial determinations in aesthetic nuisance actions, and unilateral, privately imposed aesthetic control foisted on another outside legal channels. Some of these mechanisms offer owners options to voice preferences in broadly applicable rules or to agree upon restrictions ex ante;[235] others, like aesthetic nuisance actions, leave individuals singled out for restriction and less able to seek modification. The judges of several courts have recognized these differences among regulation, contract law, and tort law on multiple occasions. Several opinions note that aesthetic regulation is democratically responsive, whereas judges should typically be reticent to interfere with owners' property rights by unduly policing aesthetic choices through nuisance law.[236] Likewise, judges have deferred readily to reasonable, contractually agreed-upon aesthetic restrictions, in part because owners have typically agreed to those restrictions and have mechanisms for modifying them through homeowners' associations or renegotiation.[237] In other words, judges seem cognizant that aesthetic controls that are legislatively or contractually imposed offer opportunities for modification. Likewise, they may offer

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property, they surely can see the converse mischief (and infringement) on a homeowner's property rights if homeowners could prevent their neighbors from construction deemed unattractive.").

232 People v. Stover, 191 N.E.2d 272, 278 (N.Y. 1963) (Van Voorhis, J., dissenting).

233 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 498 & n.7 (1981) (plurality opinion); *Stover*, 191 N.E.2d at 275–77.

234 *See* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 838.

235 *See id.*

236 Mathewson v. Primeau, 395 P.2d 183, 189 (Wash. 1964) ("[I]njunctive action for aesthetic reasons, not based on legislative action (by state, county, or city), ' . . . is a great enlargement of the powers of the courts over the properties and customs of the people, and it constitutes an encroachment by the courts into a field that should be occupied by the direct legislative representatives of the people.'" (quoting Parkersburg Builders Material Co. v. Barrack, 192 S.E. 291, 293 (W. Va. 1937) (Kenna, President, concurring))).

237 *See* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1073 (N.J. 2007) (indicating that the reciprocal nature of the agreements among the homeowners weighed against finding that the rules and regulations violated the plaintiffs' constitutional rights); *cf.* Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) ("Aesthetic values are inherently subjective; if landowners in a given neighborhood or development wish to contract among themselves for the appearance of their homes, the courts stand ready, within well-settled limits, to provide enforcement.").

reciprocal benefits to the burdened owner because the broadly applicable control may prevent others from engaging in behavior the burdened owner would find aesthetically harmful. In contrast, aesthetic controls imposed from the bench apply only to individual defendants and offer limited opportunity for change.

If judges are concerned about the democratic illegitimacy and targeted feel of imposing aesthetic standards on individuals through nuisance law, then the problems with a single motivated group or individual imposing aesthetic choices on another are obvious. A court once described recognition of aesthetic nuisance actions as risking privatization of the "right to zone . . . surrounding property."[238] Nuisance actions are at least mediated through judges; permitting property owners to alter the presentation of neighboring properties seems even more foreign than granting a private zoning right. To condone such a thing would be akin to giving an individual the ability to change the entire neighborhood's paint color to suit idiosyncratic whims. At a minimum, it seems odd to protect owners' interests in the presentation of property from overbearing neighbors when the owner is a *defendant* in a nuisance action, but not when the owner is a *plaintiff*.

To summarize, there is support across areas of the law for the idea that owners have interests in controlling the presentation of and communication on their real property to the public. These interests emerge both when owners are plaintiffs and when they are defendants in nuisance suits. Still, because these rights either have emerged defensively or have been accompanied by economic harms, how a court should recognize them as a basis for challenging projections remains unclear.

C. Defining Appropriative Harms in Real Property Law

Projections interfere with the owner's control over property, as well as the owner's authority over communicative use and presentation. The term that most accurately captures both these species of interferences is "appropriation." The older meaning of the term, one arising out of real property doctrine, is "[t]he exercise of control over property, esp. without permission; a taking of possession."[239] Though appropriation has typi-

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[238] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008).

[239] *Appropriation*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881) ("Unless [awarding the whale to the harpooner] is sustained, this branch of [the whaling] industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder."); Haslem v. Lockwood, 37 Conn. 500, 506 (1871) ("[H]e seized and appropriated to his own use the fruits of the plaintiff's outlay . . . ."); Wetherbee v. Green, 22 Mich. 311, 314 (1871) (discussing an appropriation of timber from the plaintiff's land); 1 OXFORD ENGLISH DICTIONARY 586 (2d ed. 1989) ("To make (a thing) the private property of any one, to make it over to him as his own; to set apart.").

cally gone hand-in-hand with torts protecting possession rather than unwanted use,[240] its key attribute is disruption of control: the taking of something belonging to another and applied to the wrongdoer's purposes.

While appropriation is still used occasionally to refer to government takings of property,[241] it is not often used in real property conflicts apart from that context.[242] Instead, "appropriation" is now more commonly associated with a wrong outside real property law: the use of one's name or likeness for unauthorized (and often commercial) purposes.[243] The use of the term in that context indicates that like property, identity can be appropriated, or taken and used by others in damaging ways.

The tort of appropriation is a member of a much broader class of torts protecting identity and dignitary interests: the privacy torts, some of which have already been mentioned as potentially applicable to certain projections.[244] Their genesis is well known. In 1890, a law review article by Samuel Warren and future-Justice Louis Brandeis famously introduced "the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality."[245] The privacy torts grew to include the public disclosure of facts concerning others' private lives, the tort of false light, and of course, appropriation, which protects against unwanted uses or assumptions of personal identity, particularly for pecuniary gain.[246]

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[240] Trespass and conversion both protect possession against claims of possession by another. *See Conversion*, BLACK'S LAW DICTIONARY, *supra* note 239; *Trespass to Try Title*, BLACK'S LAW DICTIONARY, *supra* note 239.

[241] *See, e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015); Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 348 & n.18 (2018).

[242] An exception not relevant here may be the conversion of something unowned to owned — for example, a person who appropriates to his own use an animal or water flow. *See, e.g.*, *Ghen*, 8 F. at 160 (referring to "marks of appropriation" as distinguishing claimed whales from unclaimed ones); Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882) (discussing appropriation of water); 2 WILLIAM BLACKSTONE, COMMENTARIES *4, *9, *270, *395.

[243] *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992); *Appropriation*, *supra* note 239. Appropriation — or rather "misappropriation" — is also used in subjects typically associated with intellectual property law, for example, in trade secret and unfair competition law. *See Misappropriation*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Misappropriation" and "appropriation" are often used interchangeably, *see* Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994), though the preference for the prefix "mis" may signal the role of dishonesty, *see Misappropriation*, *supra*, and salient differences between real and intellectual property law, such as more difficult boundary ascertainment and doctrines affirmatively protecting accretive uses of others' subject matter in intellectual property, *see* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1771, 1799 (2007).

[244] *See supra* notes 170–178 and accompanying text.

[245] Warren & Brandeis, *supra* note 19, at 207.

[246] Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 339–40 (2019); *see White*, 971 F.2d at 1397; Jonathan Kahn, *What's in a Name? Law's Identity Under the Tort of Appropriation*, 74 TEMP. L. REV. 263, 285–86 (2001). The tort of defamation may also protect against impersonation. *See* Gardella v. Log Cabin Prod. Co., 89 F.2d 891, 896 (2d Cir. 1937); 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 4:54 & n.4 (2d ed. 2019).

Liberty and autonomy interests are the more general interests protected by these privacy and image-related torts.[247] Unwanted association or publicity harms the individual's freedom to craft and control his or her presentation to the world.[248] While association with some falsehoods seems inherently harmful — being erroneously portrayed as a murderer, for instance — there are smaller falsehoods, such as uses of one's image or identity in ways that give others a false impression about one's values or beliefs. Several privacy tort cases involve individuals who simply wished not to be associated with some product, message, or statement.[249] In society, we are partially defined by others' perceptions of us,[250] and some interferences with self-presentation both affect an individual's standing in the community and exhibit incivility and disrespect that threaten the community itself.[251]

As this discussion suggests, the harms and interferences resulting from projection are appropriations in both that term's privacy and its property senses. Projections appropriate the facade of a building for communicative purposes that may threaten the owner's reputation or falsely attribute to the owner either a willingness to be used as a billboard or the particular message itself, given the traditional association between owner and communication on the thing. The resulting distress, embarrassment, or unwanted association that the property owner may suffer will occur in a public-facing way. This is the primary concern of other privacy or image-related torts: the public mischaracterization of the identity the individual has worked to build. It is also an appropriation in the property sense of the word: an exercise of control over property from outside the boundaries, a taking of the facade for the communicator's ends. Appropriative harms result from nontrespassory interferences with real property that commandeer it to another's purposes, disrupting the owner's control over property and risking other dignitary, personal, or pecuniary harm.

Targeted projections thus affect two types of interests: the property and the personal. Of course, those interests are deeply (and often inextricably) intertwined. As Justice Marshall once put it, "*one* of the purposes of the law of real property . . . is to define and enforce privacy

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247 Abraham & White, *supra* note 246, at 354–56; Barbas, *supra* note 170, at 51–52.

248 Barbas, *supra* note 170, at 53–54.

249 *See* Faegre & Benson, LLP v. Purdy, 447 F. Supp. 2d 1008, 1014 (D. Minn. 2006); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 81 (Ga. 1905); Felsher v. Univ. of Evansville, 755 N.E. 2d 589, 597 (Ind. 2001). For a discussion of the idea that there is "privacy we perform in public" for associational reasons or to resist surveillance by others, see generally Scott Skinner-Thompson, *Performative Privacy*, 50 UC DAVIS L. REV. 1673, 1675 (2017).

250 *See* Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 69 (2012).

251 *Cf.* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 968 (1989).

interests — to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities."[252] Scholars, too, have long recognized that property interests generally envelop privacy interests.[253] The right to exclude others from physically entering property ordinarily carries with it a concomitant right to seclusion and privacy in that realm.[254] Other potentially available rights associated with property ownership — the right to destroy, for example — may also guard privacy rights.[255]

This connection between property and privacy is central to Professor Margaret Jane Radin's work on the concept of "personhood."[256] The personhood perspective considers property a fundamental way in which individuals achieve self-development.[257] While Radin's focus is primarily on the home,[258] her identification of personhood as a value emphasizes the role of property in protecting "liberty, privacy, and freedom of association," as well as expression.[259] Radin considers some property rights inalienable because of their strong connection to personhood,[260] but facades and other aesthetic features of property do not need quite that level of protection. An owner can open a facade to painters, projectors, or landscape architects, or delegate control over the facade to someone else entirely. The point is that owners have the control and discretion to make the choice of what (and who) will create the image of them that others perceive.

Privacy interests and harms relating to personality have often been conceptualized in real property terms, even when unconnected to any

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[252] Oliver v. United States, 466 U.S. 170, 190 n.10 (1984) (Marshall, J., dissenting).

[253] *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 987–88, 990 (2016) (noting how interferences with personal property were perceived in the Founding era as affecting privacy and dignitary interests); Elizabeth G. Patterson, *Property Rights in the Balance — The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 535 (1984).

[254] HANNAH ARENDT, THE HUMAN CONDITION 71 (2d ed. 1958); Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1256 (2012); Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 107 & n.153 (2019).

[255] Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 823 (2005).

[256] *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[257] *Id.* at 957.

[258] *See, e.g.*, *id.* at 991–96. Radin notes that the personhood perspective creates hard cases where commercial property is concerned. While her article suggests that some public accommodations or large commercial properties should have comparatively weak exclusion rights given the weaker personhood interests associated with those uses, Radin notes that small business owners may have strong personhood interests. *See id.* at 1009–11. This Article returns to the significance of those different types of interests in section III.C, pp. 1202–13.

[259] Radin, *supra* note 256, at 991; *see id.* at 1001; *see also* Blocher, *supra* note 160, at 1435–37 (noting the ways in which property rights protect expression).

[260] *See* Radin, *supra* note 256, at 986.

realty.[261] Privacy harms are often described as "intrusion[s]"[262] or "invasion[s],"[263] language that clearly evokes trespass. Historically, plaintiffs bringing actions relating to identity and misappropriation have sometimes cast their bodies and identities as "property" in order to present stronger claims of wrongdoing than personality rights might afford.[264] And privacy, reputational, and publicity rights have historically been and still are discussed or critiqued as forms of "property."[265] Indeed, some have argued that the very motivation for the recognition of privacy torts was to separate privacy rights from the property interests on which they historically depended.[266] This symbiotic relationship between privacy and property reoccurs inside and outside of tort law. Even in the Fourth Amendment context, the Supreme Court's articulation of a new, privacy-centric framework for evaluating the constitutionality of government searches and seizures evolved out of the privacy interests threatened by intrusions on forms of property: houses, papers, and effects.[267]

It is paradoxical that personality and privacy rights are frequently analogized to property interests, yet real property torts now do not protect against appropriative harms to real property that can impinge on

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[261] There is a rich debate in the intellectual property and right of publicity literatures about the relationship between privacy and property, and specifically, about how to consider the historical relationship between the two. *See, e.g.*, JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 45–48 (2018); Lauren Henry Scholz, *Privacy as Quasi-property*, 101 IOWA L. REV. 1113, 1123–28 (2016); Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1154–59 (2019) (reviewing ROTHMAN, *supra*). I do not mean to take sides in this debate; instead, I note only that privacy has often been analogized to property, regardless of whether privacy and publicity rights emerged from property interests or were always independent.

[262] RESTATEMENT (SECOND) OF TORTS § 652H cmt. a (AM. LAW INST. 1977).

[263] Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 79 (Ga. 1905); RESTATEMENT (SECOND) OF TORTS § 652H.

[264] Vanderbilt v. Mitchell, 67 A. 97, 100 (N.J. 1907); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 450 (N.Y. 1902) (Gray, J., dissenting), *superseded by statute*, N.Y. CIV. RIGHTS LAW § 50 (McKinney 2019), *as recognized in* Lohan v. Take-Two Interactive Software, Inc., 97 N.E.3d 389 (N.Y. 2018); *see also* Lawrence Lessig, *Privacy as Property*, 69 SOC. RES. 247, 247 (2002) (arguing that "[p]roperty talk" would lend "rhetorical force" to privacy).

[265] George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 465 (1991); Post, *supra* note 251, at 997; William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960). At least one scholar views the rise of the image torts as the result of another historical change: landlessness among the urban poor and others who could "live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer." Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 220–21 (1999) (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION 23, 29 (Jack N. Rakove ed., 1990)).

[266] *See* Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 648 (1991).

[267] *See* Brady, *supra* note 253, at 949–50.

personality interests.[268] Current frameworks for dealing with light projections fail to protect adequately these combined personal and property interests relating to communication. And, intriguingly, the real property torts are not the only area where the ascendance of privacy coincides with weaker protections afforded to traditional property. In the Fourth Amendment search and seizure context, too, recognition of constitutional privacy rights paradoxically left property interests with lesser protection, even though the privacy rights originated from them.[269] A similar mismatch is now present in real property law. Protections against appropriation of real property have long been parasitic on trespass and, perhaps to a lesser extent, nuisance.[270] And the privacy torts evolved to protect personality in situations not covered by existing property law. But now, with the technological capabilities afforded by projection, neither the privacy nor the property torts are protecting against unwanted exploitations of land and buildings. The next section explores how and why the property torts might grow to protect against appropriations and what this reveals about tort and property law.

III. REDRESSING APPROPRIATIVE HARMS

A. Filling the Trespass-Nuisance Gap

Property theorists sometimes speak of the coverage of trespass and nuisance in terms of a "[d]ivide."[271] Nuisance is sometimes defined as "nontrespassory" harm,[272] and this gives the impression that trespass and nuisance provide full coverage of the actionable harms involving real property. When used this way, "divide" is meant to indicate the demarcation line between the two torts. However, there is another definition of divide: a chasm, a deep rift or gulf in coverage. The light projections illustrate how appropriative harms fall into the space between the real property torts.

Until recently, using another's property to install unwanted messaging would require physically crossing the boundary. Light projections have rendered that unnecessary. And they are unlikely to be the last technological advance that has that characteristic. Without getting too far into the realm of science fiction, holograms, chemicals, and other

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[268] For another recent article also examining how the ascendance of privacy has not been matched by recognition of similar values in real property law, see Abraham Bell & Gideon Parchomovsky, *The Privacy Interest in Property*, 167 U. PA. L. REV. 869 (2019).

[269] *See* Brady, *supra* note 253, at 950.

[270] Some of the "moral nuisance" claims might be claims about unwanted association with nearby messages or activities, though that is distinct from the harm associated with having that thing emanating from one's own property. *See generally* Nagle, *supra* note 227.

[271] THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 24 (3d ed. 2017); Smith, *supra* note 243, at 1746.

[272] RESTATEMENT (SECOND) OF TORTS § 821D (AM. LAW INST. 1979).

only imaginable technologies may soon enable other interferences that can put messaging or imagery on real property in ways that are visible to passersby.

Other technologies are already starting to raise similar prospects of appropriative harm. Drone and satellite technology are already capable of enabling communications from an owner's airspace, without need for a building or facade at all.[273] Cases outside traditional property law teach that heat, other radiation, and vibrations can be used to peer into property without accompanying trespass,[274] and vibrations, sound, heat, or other elements might likewise be used to create communications on or appearing to come from another's land.[275] It is debatable whether other privacy torts, such as intrusion upon seclusion, would cover this conduct.[276]

Augmented reality games may also enable others to "use" and exploit property toward their own ends. Using geolocation and other tools, participants in an augmented reality game or application may see virtual objects on real property as witnessed from a phone screen.[277] Numerous articles came out in the aftermath of the popular augmented reality game "Pokémon Go," which uses smartphones to let users view creatures through the game as though the creatures are on or near real-world property.[278] These articles tackled whether the placement of virtual creatures on properties (and the attendant game-players flocking to those locations) should create trespass or nuisance liability, as multiple lawsuits alleged.[279] The creators of the game recently settled a large

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[273] *Cf.* Jon Christian, *Pepsi Plans to Project a Giant Ad in the Night Sky Using Cubesats*, FUTURISM (Apr. 13, 2019), https://futurism.com/pepsi-orbital-billboard-night-sky [https://perma.cc/R4Z5-WCE8] (describing prospect of an "orbital billboard").

[274] *See* Kyllo v. United States, 533 U.S. 27, 29 (2001) (discussing thermal imaging of a home); Phillips Petroleum Co. v. Cowden, 241 F.2d 586, 589 (5th Cir. 1957) (discussing seismograph used to provide "geophysical and geological information" from subsurface of plaintiff's property).

[275] Although it has not yet generated a case, the use of sound so that it appears to come from other property is no longer just a hypothetical. *See* Alex Horton, *Art Installations Blast Audio of Sobbing, Detained Children Across New York City*, WASH. POST (June 12, 2019, 12:18 PM), https://www.washingtonpost.com/nation/2019/06/12/art-installations-blast-audio-sobbing-detained-children-across-new-york-city/ [https://perma.cc/R3SZ-B2QF].

[276] *See* Ritchie v. Walker Mfg. Co., No. CV90-L-329, 1991 WL 337615, at *3 (D. Neb. Jan. 4, 1991); John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1678 (2009).

[277] *See* Joshua A.T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L.J. 55, 73 (2012). Some augmented reality games, such as Ingress, use maps and real-world locations as part of gameplay, but do not use any depictions of property. *See Interacting with Portals*, INGRESS, https://ingress.com/support [https://perma.cc/3MMN-PD4G] (follow "Interacting with Portals" hyperlink). Interestingly, Ingress refuses to recognize "private residential property" as a candidate for inclusion in gameplay. *Ingress Portal Criteria*, INGRESS, https://ingress.com/support [https://perma.cc/3MMN-PD4G] (follow "Ingress Portal Criteria" hyperlink).

[278] Donald J. Kochan, *Playing with Real Property Inside Augmented Reality: Pokemon Go, Trespass, and Law's Limitations*, WHITTIER L. REV., Spring 2018, at 70, 75.

[279] *See, e.g.*, *id.*; Ryan Mitchell, Comment, *Pokémon Go-es Directly to Court: How Pokémon Go Illustrates the Issue of Virtual Trespass and the Need for Evolved Tort Laws*, 49 TEX. TECH L. REV. 959 (2017).

class action suit and agreed to give all property owners more control over the incorporation of their properties; further, "[o]wners of single-family residential properties get rights of removal within 40 meters" of their land and buildings.[280] Augmented reality is distinguishable from projection in some respects: the portrayal is virtual rather than witnessed by ordinary observers, "use" of the property does not interfere as directly with the owner's expressive or communicative uses, and onlookers would not likely make the same assumptions about owner acquiescence in virtual contexts as they might in real ones. While these and other distinguishing features mean augmented reality and other technologies may not give rise to appropriative harms in all instances, augmented reality is, at minimum, another area of potential application.

Moving from real property to personal property, it is also worth noting that projections are now occurring on chattels as well as on homes, as exemplified by recent instances where activists have projected Confederate flags onto police cars.[281] The rise of the "Internet of Things" may also create opportunities for appropriative harm.[282] Devices as disparate as jean jackets and doghouses can now be directly connected to the Internet, with all the promise and peril that entails.[283] Companies or third parties can commandeer these devices remotely,[284] and an analog to projection might be a hacker who reconfigures your smart doorbell to start yelling profanities at the neighborhood children on Halloween. Trespass and nuisance are real property torts, but the recognition of appropriative harm in the real property context might support an extension of the tort of trespass to chattels in the Internet of

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[280] Eriq Gardner, *"Pokemon Go" Creator Agrees to Tighter Leash on Virtual Creatures to End Class Action*, HOLLYWOOD REP. (Feb. 15, 2019, 7:23 AM), https://www.hollywoodreporter.com/thr-esq/pokemon-go-creator-agrees-tighter-leash-virtual-creatures-end-class-action-1187097 [https://perma.cc/FG68-2SXM]; *see also* Plaintiffs' Motion in Support of Preliminary Approval of Settlement at 6–8, *In re* Pokémon Go Nuisance Litig., No. 16-cv-04300 (N.D. Cal. Aug. 30, 2019), https://www.documentcloud.org/documents/5740353-Pokemongo.html [https://perma.cc/YL96-4HZF].

[281] *See* Rebecca Rivas, *Activists Project Cops' Bigoted Social Media Posts on Police HQ and Cruisers*, ST. LOUIS AM. (June 6, 2019), http://www.stlamerican.com/news/local_news/activists-project-cops-bigoted-social-media-posts-on-police-hq/article_d61a2f9a-8886-11e9-ad10-9f39fcf6af40.html [https://perma.cc/2UB9-5QZD]. Since the automobiles are government property, analysis of this problem is largely outside the purview of this Article. But another intriguing wrinkle in this story is that the activists projected police officers' own Facebook posts onto the cruisers, *see id.* — not quite the typical projection causing a risk of misattribution.

[282] Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 585 (2019).

[283] *See, e.g.*, *id.* at 594 n.41.

[284] *See id.* at 609. A recent example of such commandeering of networked property involved two individuals who hacked a roadside digital billboard to display an explicit film. Charles E. Ramirez & Evan Carter, *Video: 2 Broke into Building to Put Porn on I-75 Billboard*, DET. NEWS (Sept. 30, 2019, 6:13 PM), https://www.detroitnews.com/story/news/local/oakland-county/2019/09/30/auburn-hills-billboard-displays-porn-saturday/3820507002/ [https://perma.cc/D9WJ-9UBE].

Things context, perhaps by recognizing some remote interferences sufficiently damaging to award relief.[285]

This discussion suggests that appropriative harms are likely to be caused by a broader range of activities than projections alone. That is one reason why adapting some tort paradigm is an attractive solution to the projection problem: tort law often evolves to address new iterations of the same general problem. Still, to be sure, legislation could respond to the specific problems posed by projection.[286] An enterprising city council could modify its "unlawful advertising" ordinance or light pollution law to try to address light projections at any time.[287] Indeed, some governments have begun using legislative or administrative pronouncements to prohibit projecting onto certain public buildings without a permit,[288] though these decisionmakers have not yet extended similar protections and powers to private owners.

Nevertheless, trespass and nuisance remain relevant. First, many statutes follow on the heels of common law cases or make use of common law principles to articulate rules and standards.[289] Legislation and adjudication can be in a complementary relationship when it comes to defining and redressing harm, with legislators and courts engaged in an iterative process to fill gaps and fix shortcomings.[290] This relationship between tort law and statutes carries special force in the land use context, where old property torts like nuisance have long been used to

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[285] *See* Crootof, *supra* note 282, at 620 (defining trespass to chattels as typically requiring impairment of the chattel's condition or quality or value). Professor Rebecca Crootof's article is primarily concerned with company-consumer relationships, *see id.* at 608–09, and she rightly notes that contracts may make trespass to chattels actions unavailable, *id.* at 615–18.

[286] *See* Lee Anne Fennell, *Owning Bad: Leverage and Spite in Property Law*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW, *supra* note 14 (manuscript at 16–17), https://ssrn.com/abstract=3262836 [https://perma.cc/93V3-PLVL] (suggesting that legislation may be the preferable way of adjusting owners' rights, particularly when one owner's motives are in question).

[287] Such ordinances, however, would raise different First Amendment concerns than any given court decision, *see infra* section III.C, pp. 1202–13, and a key issue would become whether they could survive that analysis.

[288] *See, e.g.*, Natalie Delgadillo, *A Week After Capitol Police Confiscated His Equipment, Protest Artist Robin Bell Is Back in Business*, DCIST (Mar. 21, 2019, 2:56 PM), https://dcist.com/story/19/03/21/a-week-after-capitol-police-confiscated-his-equipment-protest-artist-robin-bell-is-back-in-business [https://perma.cc/FUB8-U6PQ]; Kevin Miller, *Lawmakers Turn out the Lights on Political Messages Projected on State House*, PORTLAND PRESS HERALD (Sept. 21, 2018), https://www.pressherald.com/2018/09/20/top-lawmakers-vote-to-ban-projected-messages-on-maine-state-house [https://perma.cc/C2GB-H454].

[289] *See, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952) (explaining the maxim that a statutory term is generally presumed to take its common law meaning). *See generally* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957 (2014) (defining different relationships between the common law and statutes, including complementary ones).

[290] This is not to say that legislation *cannot* declare something a harm that the common law would not recognize, but rather to indicate that legislatures have often built upon common law doctrine to justify and shape interventions.

justify and influence modern energy, environmental, and speech regulation.[291] Further development and exploration of common law concepts can help to articulate precisely the nature of the harm and offer tools for thinking about how rights-holders should be protected.[292] While comprehensive legislation — rather than myriad tort suits to address each individual projection — may well be a more efficient solution for projection's ambiguities in the long term, private parties can at least use the common law of torts to obtain relief in the face of legislative inertia.[293] In other words, legislation may come to regulate projection, but the common law is likely either to prompt that intervention or to be invoked as it is shaped.

In the past, tort law has tended to adapt under the set of dual conditions present here: courts adhering to the straitjacket of some old common law pronouncement about physical or economic harm in a particular case, while at the same time beginning to recognize a set of inchoate interests deserving of protection. For example, in the 1930s, legal scholars noticed that courts had begun deciding cases involving intentional acts that caused only emotional or mental distress, rather than pecuniary harm.[294] This dovetailed with changes external to law: lawyers and doctors were becoming aware of the fine line between some psychological harms and their potential physical consequences.[295] Though styled as more classical tort suits, these actions alleged as a primary basis of liability harm caused by shock, fright, and humiliation, unaccompanied by economic damage.[296] Legal scholars recognized that such harms to thought and emotions, though "'parasitic' upon a cause

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[291] *See* WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (1977) ("The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law."); James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T 29, 29 (1990) ("[M]any of the environmental statutes enacted in the past twenty years have some roots in centuries of common-law principles."); *see also* Katherine Dunn Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1558 (1995). A separate question outside the scope of this Article is whether criminal liability should attach for projections, akin to the criminal trespass statutes. Given the insubstantial penalties attached to criminal trespass statutes, their main effect may be to prevent owners from engaging in violent self-help. *See* MERRILL & SMITH, *supra* note 271, at 335–37. Landowners combating projections have other forms of self-help available, suggesting criminal trespass laws are unnecessary, but the possibility that an aggrieved owner might attack projectors (or their equipment) in the street is not altogether remote.

[292] For an argument that first attempts at legislation governing new problems can be overinclusive, whereas the common law permits more incremental development through tailored solutions, see Adam Mossoff, *Spam — Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 639–40 (2004).

[293] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 147–49, 166 (1982).

[294] *See* Magruder, *supra* note 22, at 1034–35; Prosser, *supra* note 22, at 881–86.

[295] *See* Goodrich, *supra* note 23, at 501.

[296] *See* Barbas, *supra* note 170, at 58–59.

of action for the violation of some other recognized legal right,"[297] seemed like a new form of action rather than a mutation of older torts.[298] Noting that mental distress had long been considered relevant for damages calculations in multiple tort contexts, these theorists observed that "[a] factor which is to-day recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability."[299]

The recognition of intentional infliction of emotional distress as an independent source of tort liability occurred at around the same time that the privacy torts gained definition.[300] As with intentional infliction of emotional distress, the privacy torts emerged as a variety of societal changes, both internal and external to law, took place. Technologically, advances in photography, recording, and advertising mediums left individuals subject to exploitation and more image-conscious than before.[301] And across legal doctrine, theorists observed that courts were starting to recognize privacy interests, but unsystematically and by shoving them uncomfortably into the constraints of old torts.[302] Further, while some of the privacy harms — like commercial appropriation — were pecuniary, others sounded only in embarrassment or mental distress.[303] Together with some older torts like defamation,[304] the privacy torts came to recognize "personal image and the perceived right to control one's image" as interests worthy of legal protection.[305] Legal scholars worked both to bring coherence to incomplete and scattered privacy interests and to explain how and why tort law should change to recognize them and "fill in the gaps left by trespass, nuisance," and other tort actions.[306]

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[297] Magruder, *supra* note 22, at 1048.

[298] *See* Prosser, *supra* note 22, at 874.

[299] Magruder, *supra* note 22, at 1049 (quoting 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)).

[300] *See* Barbas, *supra* note 170, at 52, 58.

[301] *Id.* at 89–92.

[302] *See* Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 335 (1966).

[303] *See* Prosser, *supra* note 265, at 390, 405 n.180. Warren and Justice Brandeis have a tension in their work between acknowledging that mental harm alone is damage without a legal injury, *see* Warren & Brandeis, *supra* note 19, at 197–98, and alleging that nonpecuniary, mental harm could inflict greater distress than "mere bodily injury" and was occasionally redressable, *id.* at 196; *see id.* at 197 n.1.

[304] *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation.*, 3 COLUM. L. REV. 546, 563 (1903) (noting that defamation protects against injuries to feeling and reputation).

[305] Barbas, *supra* note 170, at 52.

[306] Prosser, *supra* note 265, at 392; *see also* Warren & Brandeis, *supra* note 19, at 213 (explaining that the rights were not really property or trust related, despite emerging out of those types of cases, because instead "[t]he principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise").

Similar pressures to those that prefigured the dignitary torts are now present with respect to projection and the issues raised by it. Courts deciding nuisance and trespass cases demand economic or physical harm to award relief to real property owners,[307] even as strands in disparate areas of law recognize that owners have control over and responsibility for communications on property they own. In numerous cases, courts have hesitated to interfere with the owner's dignitary or privacy interests in crafting an image through property and having the capacity to express themselves there.[308] Across positive law, in circumstances ranging from aesthetic nuisance to easement rules to First Amendment cases, both judicial opinions and criminal statutes recognize that owners have protected interests in controlling the communicative uses of property.[309] Whether textual or aesthetic, these communications provide information about the owner's beliefs and values; property is itself an image that the owner creates through labor or inaction. Just as it was with the other torts, these nonpecuniary interests of the owner are recognized across legal areas, but the forms of action have simply not caught up.

What should happen to the property torts if these interests are worth protecting? There are a variety of options, but the least necessary or attractive — perhaps surprisingly, given the analogy drawn to the dignitary torts — would be the recognition of a new form of action. There are two reasons this option is least appealing: one internal to property theory, the other more practical. With respect to property theory, trespass and nuisance have been the primary forms of action for a long time for a reason. As Professor Merrill and Professor Henry Smith have observed, property's in rem features — the fact that the world, rather than a smaller set of individuals, must respect a property right — mean that the information costs to third parties must be considered in any decisions about the scope of rights and property claims.[310] The invention of a new property tort that any owner could bring against any third party would be undesirable from this perspective. More practically, it would also be unnecessary: the elements of the existing torts, and nuisance in particular, are both flexible and nuanced enough to combat problematic projections. It would be nonsensical to invent a new land-use tort with the same elements simply because the type of harm is less physical and existing tests have been inadequately applied.

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[307] *See supra* section I.A, pp. 1150–61.

[308] *See supra* section II.B, pp. 1170–79.

[309] *See supra* section II.B, pp. 1170–79.

[310] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 8, 55 (2000).

That leaves a remaining question to settle: Which of the property torts is the better fit? Many areas of law have a rules-standards dichotomy, and with limited and rare exception,[311] trespass and nuisance are property's. Traditional trespass is a difficult fit for light cases because of its strict binary: light emissions are either trespasses or not, which raises vexing questions. For instance, imagine my dog goes missing, and I shine my light over into my neighbor's yard to see if he is there and make incidental contact with the facade. It seems that this should not be actionable given the nature of the owner's interest: neither is there communicative use, nor is the owner's presentation of the property transformed for more than a moment. Trespass, though, is typically represented by a "simple on/off signal[]" that this boundary crossing would either implicate or not,[312] even if most neighbors would probably be discouraged by social norms and litigation costs from bringing a trespass action. But it is not enough to say that most landowners would not sue the emitter of a stray flashlight or headlight. Property has enough cases where owners have stood on their rights in trespass to suggest there is reason for caution.[313]

In contrast, nuisance offers more flexibility by openly permitting examination of a range of contextual factors surrounding projection and its results.[314] Still, it need not be fully ad hoc: projection cases involve the projectors and the owners, meaning lower transaction costs than the ordinary nuisance where, say, one polluting factory affects myriad individuals in the area. These lower transaction costs could enable nuisance rules surrounding projections to be defined in ways that are more mechanical and trespass-like,[315] while still retaining flexibility to exclude truly harmless light-related conflicts. Nuisance can provide "an off-the-

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311 *See supra* notes 92–100 and accompanying text. New Jersey is also often cited as a jurisdiction with a more standards-based approach to trespass, and scholars have occasionally used New Jersey cases to argue that trespass should become a more standards-based tort. *See* Ben Depoorter, Essay, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1093–94, 1104–09 (2011) (relying on New Jersey caselaw to justify a proposal that trespass cases be decided according to a balancing approach similar to fair use in copyright law). As Professor Ben Depoorter notes, the flexibility provided by standards looks similar to the flexibility provided by defenses to trespass and rules about damages in trespass, and both these defenses and any modification to trespass itself are vulnerable to a criticism of indeterminacy. *See id.* at 1099 (suggesting a fair trespass approach provides more "ex ante" coherence than the flexibility provided by defenses to trespass); *id.* at 1131–33 (noting that the flexibility of the fair trespass approach "comes at the expense of overall predictability," *id.* at 1133); *see also* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1717 (2012) (criticizing fair trespass approach as "ignoring the cost of delineation in the process of serving the purposes of property").

312 Smith, *supra* note 33, at 973.

313 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997).

314 Smith, *supra* note 33, at 973. In the states that have adopted the modern, nuisance-like theory of trespass, the resulting balancing approach might also offer a flexible governance strategy. *See supra* section I.A.2, pp. 1156–61.

315 *See* Merrill, *supra* note 32.

rack scheme for proper use": a presumptive right for the owner to stop projections, but with some flexibility built in at the margins.[316] Even if some sorts of projections will nearly always be actionable under a nuisance framework, that is not itself a reason to recognize some subset of projections — say, those on residential property — as trespasses and others as nuisances. The law typically does not channel identical conduct that is harmful for identical reasons into two different torts based on the identity of the plaintiff. And, moreover, nuisance is fully capable of being sensitive to context, as it has long recognized the relevance of distinctions between types of properties, neighborhoods, and plaintiffs.[317]

Nuisance is also the tort that has traditionally operated to protect owners' rights to use property, whereas trespass prevents interferences with possession.[318] Admittedly, light chafes at the possession-use distinction. A concept nearly as thorny as possession may offer some help in differentiating possession from use: rivalry, the idea that a thing cannot be simultaneously occupied or consumed by two people.[319] The concept of rivalry may explain the widespread popularity of the tangibility test for differentiating trespass and nuisance, despite its drawbacks. Trespasses generally prevent simultaneous use and control of a specific space by the owner in possession; nuisances generally do not (though they may frustrate the precise use the possessor wishes to engage in). The question in nuisance is whether the interference is or would be experienced as unreasonable: whether those disturbed or frustrated in a particular use are outside the norm or else in need of law's protection. Light better fits this paradigm of use than the paradigm of possession. Projection certainly interferes with the owner's use and expression on the facade. As an intangible, though, it does not affect the owner's other activities associated with possession of that specific space.

Granted, some readers may still believe trespass is a better doctrinal framework — or rhetorical device — for the problems posed by projection.[320] And, as this Article has discussed, some states have already

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316 Smith, *supra* note 33, at 1047.

317 Wilbur Larremore, *Public Æsthetics*, 20 HARV. L. REV. 35, 44 (1906).

318 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87, at 622 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON THE LAW OF TORTS].

319 An excellent recent overview of rivalry is contained in James Y. Stern, Intellectual Property & the Myth of Nonrivalry (2019) (unpublished manuscript) (on file with the Harvard Law School Library). The author is primarily concerned with justifying intellectual property despite its "nonrivalry" by redefining rivalry as characterized by conflicts over use (rather than capacity for simultaneous consumption). *Id.* (manuscript at 26–43). These two definitions of rivalry may also illustrate the distinction between trespass law and nuisance law: trespass law protects against consumption or occupation of a particular space that the owner in possession is authorized to consume or occupy, while nuisance law mediates conflicts over use without the need for consumption or occupation.

320 As an example, this account draws heavily upon existing American doctrine. The law in other jurisdictions may be subject to different constraints and dominant theories. *See, e.g.*, Donal Nolan, *"A Tort Against Land": Private Nuisance as a Property Tort*, *in* RIGHTS AND PRIVATE LAW 459,

blurred the lines.[321] In this author's view, it is better to make nuisance more trespass-like where projections are concerned — creating strong presumptions in favor of owners with some subsequent weighing — than to make trespass a superficial cover for another tort. Nevertheless, the distinction between trespass and nuisance is not without a more practical difference: trespass and nuisance carry different statutes of limitations, and trespass may offer other perks for plaintiffs, like punitive damages.[322]

But that distinction and the theoretical virtues of separating the torts aside, the most important point is that appropriative harms should be actionable. The next section turns to the elements that can distinguish problematic from unproblematic projections: essentially, those elements that nuisance provides. This is further proof that nuisance is the right framework for projection (or trespass, in states that use similar elements in a standards-based approach to that wrong).

B. Expanding the Nuisance Inquiry

Nuisance — or its modern trespass analog — offers a few potential pathways for protecting the interests described in this Article. Again, the test for what constitutes a nuisance varies in particulars by state,[323] but many courts have found the Restatement (Second) approach useful.[324] The touchstone of that approach is whether an action unreasonably interferes with another's use and enjoyment of property,[325] and in assessing "[u]nreasonableness," the Restatement (Second) calls for an examination of whether "the gravity of the harm outweighs the utility of the actor's conduct."[326] Determining the utility of the actor's conduct involves examining a set of factors relating to the alleged nuisance: the social value of the activity, the suitability of that activity in the area, and the feasibility of measures the actor could take to prevent the resulting harm.[327] The Restatement (Second) also notes that "[i]f one's sole purpose in what he is doing is to annoy and harm his neighbor, his conduct has no utility that the law will recognize."[328]

As this passage suggests, an actor's intent is theoretically relevant in assigning liability for nuisance. In particular, judges deciding nuisance

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459–60, 480–83 (Donal Nolan & Andrew Robertson eds., 2012) (discussing trespass-nuisance distinction in English law).

321 *See supra* notes 92–100 and accompanying text.

322 Merrill, *supra* note 32, at 15 n.8, 18.

323 *See* Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 702 (2019).

324 Merrill, *supra* note 32, at 17.

325 RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979).

326 *Id.* § 826.

327 *Id.* § 828.

328 *Id.* § 829 cmt. c.

cases have taken into consideration whether the person creating the harm is doing so out of spite or malice.[329] The classic example is "spite fences," walls constructed on one's own property just to shade or block the view of another.[330]

The role of intent in nuisance analyses, however, proves slippery.[331] While some cases treat spiteful or malicious motives as salient to a determination of whether conduct is a nuisance, there are others where courts minimize the spiteful or malicious motive of the defendant in interfering with the use if the interference nonetheless serves some valid purpose.[332] Even in the prototypical example of spite fences, courts have collapsed "spite" inquiries into broader "utility" examinations about whether the fence is useful.[333] Whether due to the difficulties of assessing motive or the desirability of even spiteful acts that are otherwise beneficial, courts have tended not to award relief to plaintiffs suffering the spite of their neighbors unless the conduct is otherwise devoid of usefulness.[334] Indeed, spite is an uneasy fit even just for projections.

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[329] *See, e.g.*, Coty v. Ramsey Assocs., Inc., 546 A.2d 196, 202 (Vt. 1988); *see also* Myrick v. Peck Elec. Co., 164 A.3d 658, 663 n.* (Vt. 2017) (declining to "address the role of aesthetics in the context of a spite case").

[330] *See* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1667 (2011). This inquiry into motive and avoidability is consonant with utilitarian theories of nuisance. Given that it creates liability for uses of land, nuisance paradoxically has a live-and-let-live flavor: people have presumptive rights to use their own property on the theory that removing liability for trifling interferences will allow more and better uses to flourish overall. *See* Bamford v. Turnley (1862) 122 Eng. Rep. 27, 33; 3 B. & S. 66, 83 (opinion of Bramwell, B.). That principle, however, has a flip side: those presumptions can be overridden when something about the nature of the interference, like its motive or ultimate effect, in fact decreases overall welfare. A classic case in this vein is *Keeble v. Hickeringill* (1707) 103 Eng. Rep. 1127; 11 East 574, wherein a defendant was found liable for shooting guns on his property solely to interfere with the plaintiff's ability to capture ducks (preventing the socially valuable capture of ducks for no socially valuable purpose). *See id.* at 1128; 11 East at 575–76. For further discussions of this principle, see Claeys, *supra* note 73, at 1419–22; and Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 94–96 (1979). *See also* Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 985–99, 986 n.88 (2012) (noting in the IP context that rules awarding injurers rights perversely incentivize greater harm in order to extract maximum rents from the victims).

[331] *Compare* Shoked, *supra* note 214, at 372–73 (suggesting that spiteful motivations play a very limited role in the outcome of various nuisance and property cases), *with* Katz, *supra* note 214, at 1453 ("Although there are such clear general statements of the irrelevance of reasons in the law of property, there are many cases throughout the common law world that point in quite the opposite direction."). *See generally* di Robilant, *supra* note 214, at 701–03; Fennell, *supra* note 67, at 1419–20, 1419 n.62 (suggesting that actions intended specifically to cause harm, as opposed to actions that merely create a risk of harm, are more likely to be prohibited and create liability in the actor).

[332] *See* Shoked, *supra* note 214, at 372–73; *see also* 44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576, 580 (Mo. Ct. App. 1992) (rejecting adoption of malice inquiry from Restatement (Second)).

[333] *See* Shoked, *supra* note 214, at 391–92.

[334] *Id.* at 377–78, 391–93, 400–01, 403–04; *see also* di Robilant, *supra* note 214, at 723–25, 739–41 (noting the transition toward examining usefulness and reasonableness over attention to malice and spite and changes in the understanding of malice). *But see* Katz, *supra* note 214, at 1448–72

While some projections might be intended only to hurt the owner, others, such as those by unions, have broader, often more laudable purposes, such as obtaining leverage in deeply unequal bargaining situations.[335] The law lacks good terminology for this kind of activity, given the negative connotations associated with "spite" and the fact that the result is identical to what would occur were the act motived by pure malice.[336]

Nevertheless, there are surely precedents in scattered cases for the idea that light intentionally directed at a structure to produce an effect — spitefully motivated or not — is of a different quality or character than ambient light emitted from an otherwise independently productive use.[337] As section I.A demonstrated, most of the historical light cases involved defendants engaged in illuminated activity serving a purpose on their own properties: advertisements, safety features, or even just the glare off buildings in use. In contrast, targeted projections serve no independent purpose at the location of the projection. The sole purpose of the projection is to create an image on a nearby building; the purpose cannot be served until the light hits the facade. Just among historical light cases, an Oregon case suggests that light intentionally directed at property might be a trespass,[338] and another handful of cases suggest that maliciously or intentionally directing light at adjoining property should create liability for nuisance.[339] The lack of utility to the defendant absent the appropriation of the plaintiff's property offers a way of distinguishing between most ambient or fleeting light cases and those involving targeted projection, and nuisance could recognize this. This definition of utility would also helpfully distinguish the cases where an emitter illuminates a facade incidentally with a headlight or flashlight: the emitter has an independent purpose (search) that does not require use of the wall. From the point of view of nuisance, there is scant

(collecting broader range of Anglo-American abuse of right cases and explaining them through a jurisdictional theory, noting that rote utility promotion does not seem to explain why courts sometimes treat animus or leverage motivations as relevant in trespass cases). The deemphasis of spite or malice as a relevant consideration in utility assessments is even visible in contemporary treatises, which formerly mentioned spite but do not do so any longer. *Compare* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89, at 598–99 (4th ed. 1971), *with* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 318, § 87, at 624 n.65.

335 *See* Katz, *supra* note 214, at 1454 (connecting purely spiteful cases to those where the harm is caused in service of a "valuable goal" or "desirable end").

336 A recent article points out that individuals sometimes do act in spiteful ways to ameliorate perceived unfairness, which might force more socially optimal conduct. Jeffrey L. Harrison, *Spite: Legal and Social Implications*, 22 LEWIS & CLARK L. REV. 991, 996–99 (2018).

337 *See* Hildebrand v. Watts, No. 13988, 1997 WL 124150, at *5, *7 (Del. Ch. Feb. 18, 1997); Akers v. Marsh, 19 App. D.C. 28, 30–31, 46 (1901); Lesh v. Chandler, 944 N.E.2d 942, 948, 952 (Ind. Ct. App. 2011); Martin v. Reynolds Metals Co., 342 P.2d 790, 795 (Or. 1959).

338 *See supra* note 111 and accompanying text.

339 *See supra* pp. 1154–55.

independent utility in projections that require another's property to fulfill their intended purpose.

While utility might be understood to apply to projections in this way, there are additional bars to recognizing liability for even admittedly intentional projections, bars that have already proven consequential in the few light cases to date. Recall that nuisance liability attaches only to interferences that are "significant" or substantial.[340] "The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests" to support an action.[341] The significance requirement is meant to weed out trivial claims. It derives from equitable doctrines meant to discourage frivolous lawsuits and the waste of valuable administrative resources on small cases.[342] And the significance bar may prove a hurdle to liability for even intentional, spiteful activities. As a dominant torts treatise puts it, "[a]cting with the intention of causing mental distress is, therefore, not a tort and acting with the intention of annoying someone in the use and enjoyment of his property is not in and of itself a tort. The interference must be substantial . . . ."[343]

The substantiality of the interference in fact counts twice against plaintiffs in nuisance cases: not only at the threshold "significance" stage, but also in the overall "[u]nreasonableness" assessment, which typically involves balancing utility against the gravity of the harm.[344] While looking at utility requires examining the allegedly offensive activity, determining the gravity of the harm involves an examination of a number of factors on the victim's side: the extent and character of harm, the nature of the victim's use, the burden on the victim, and the victim's capacity to avoid the harm, among others.[345]

Both the gravity and the significance of the harm are typically measured according to a combination of physical manifestations and economic effects. Actual, physical damage to property is most likely to prove significant or grave: cracks in buildings, physical damage to crops, and the like.[346] Some courts have required a higher threshold than physical effects alone, requiring consequences on adjoining property, such as

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340 Van Baalen v. Jones, No. 1 CA-CV 13-0411, 2014 WL 3881985, ¶ 18, at *3 (Ariz. Ct. App. July 31, 2014) (avoiding question of whether to adopt Restatement (Second)'s inquiry into malice because of requirement that harm be significant); RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (AM. LAW INST. 1979).

341 RESTATEMENT (SECOND) OF TORTS § 821F cmt. c.

342 *See* Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 323–24 (2001).

343 PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 318, § 88, at 626; *see also* PROSSER, *supra* note 334, § 87, at 577.

344 RESTATEMENT (SECOND) OF TORTS § 826.

345 *Id.* § 827.

346 *See, e.g.*, Jost v. Dairyland Power Coop., 172 N.W.2d 647, 650 (Wis. 1969) (finding a nuisance where the plaintiff's crops had been damaged by discharge of sulfur fumes).

those caused by vibrations, to reach a certain magnitude of harm.[347] While they do not always have strictly physical manifestations, sensory harms — smoke that leads to coughing, scents that cause occupants great discomfort — may too create liability, though again, only when they reach a certain magnitude.[348] The typical metric for evaluating magnitude is depreciation in rental or market value, and courts have tended to evaluate both the gravity of the harm and its significance through this economic lens.[349] A decline in market value is perhaps a necessary component of most nuisance claims, but not a sufficient one.[350] Accordingly, diminutions in value caused by the stigma associated with a defendant's activity — say, rumors of contamination or perceptions of dangerousness — are not generally actionable.[351] Relatedly, "emotional" harms without physical or sensory consequences are not often actionable.[352]

The light projection cases decided to date illustrate how this factor has tanked plaintiffs' nuisance claims. The economic and physical focus of both the significance and the substantiality inquiries gives the victims of even admittedly targeted projections sizable hurdles to overcome.[353] The projections have no lasting physical consequences and are designed not to interfere with the senses of building occupants or owners. They are temporary and do not affect the market value of property, except

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[347] *See* Meyer v. Kemper Ice Co., 158 So. 378, 379, 381 (La. 1934) (finding no nuisance where allegations relating to vibrations included "causing the foundations and floors to give way, the doors to sag, and the wall paper to split and fall away from the walls," *id.* at 379, though the court held the victim had not proved those allegations, and suggesting "material damage," *id.* at 381, from vibration must be shown); Crutcher v. Taystee Bread Co., 174 S.W.2d 801, 803, 805 (Mo. 1943); Straus v. Barnett, 21 A. 253, 253 (Pa. 1891) (per curiam).

[348] Nagle, *supra* note 227, at 282.

[349] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 318, § 88, at 627 (noting that courts tend to find substantial and unreasonable harm met when conduct "has affected to any measurable extent the rental or market value of the plaintiff's land" and that an "annoyance cannot amount to unreasonable interference until it results in a depreciation" in value).

[350] Nagle, *supra* note 227, at 299.

[351] Mercer v. Rockwell Int'l Corp., 24 F. Supp. 2d 735, 744 (W.D. Ky. 1998) ("[H]ome owners could not receive decreased fair market value if a group home for the disabled moves into the neighborhood or when someone with AIDS moves next door."); Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 727 (Mich. 1992) (holding that property owners adjacent to a chemical hazard but not directly affected by it could not recover on a theory of "public fears of exposure caus[ing] property depreciation").

[352] RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (AM. LAW INST. 1979); *see* Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 473 (S.C. 2013) (explaining that, in nuisance actions, courts discuss "annoyance, discomfort, interference with the enjoyment of property, loss of enjoyment of life, or interference with mental tranquility" only in the context of "injury to one's property interest in the use and enjoyment of property"); *see also* Gumz v. N. States Power Co., 721 N.W.2d 515, 521 (Wis. Ct. App. 2006) (stating that "claims for annoyance and inconvenience" are "recoverable in a nuisance action" but "do not encompass emotional distress" (quoting Krueger v. Mitchell, 332 N.W.2d 733, 742 (Wis. 1983))).

[353] *See supra* pp. 1163, 1165.

insofar as the stigma from the projection might, but that is of no consequence. And even if the property owner suffers deep personal distress as a result of the projection, that is exactly the type of injury that courts have tended to reject as a basis for nuisance claims. These statements hold true even if the intent of the projection is admittedly malicious or spiteful: if an injury is deemed insignificant and the harm slight or nonexistent, as is likely in the projection cases, then property owners are afforded no relief.[354]

As with utility, courts need only narrowly expand their understanding of what counts as significant to recognize projection claims. As previously mentioned, courts have historically been hostile to recognizing emotional or mental distress claims as sufficiently grave or significant in nuisance: assertions that a nearby cemetery causes fears about death, or objections to uses that cause plaintiffs to worry about environmental or social ills, are typically rejected.[355] But there are some important caveats to this general point. First, even where fears and feelings are concerned, courts have considered reasonableness the touchstone: uses that would offend and irritate those of ordinary sensibility are still actionable, but those that are irrational or particular to the individual are not.[356] Privacy, too, is deeply bound up with social norms and values.[357] It is not hard to imagine a court finding conscription of one's property for light messages to cause significant harm because of the ways it offends norms relating to privacy and property that are widely held; this call to evaluate social norms also enables courts to distinguish between fleeting, noncommunicative light emissions onto property and those which are appropriations of the owner's structure. Second, and relatedly, despite the emphasis on economic harm and physicality in the light

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354 Claims relating to light have raised similar issues in the context of another form of action: battery, which creates criminal or civil liability for unwanted touching. Several cases have set a harm threshold to determine whether shining a light at another is a battery. *See* Robles v. In the Name of Humanity, We REFUSE to Accept a Fascist Am., No. 17-CV-04864, 2018 WL 2554740, at *6 (N.D. Cal. June 4, 2018) (holding that "common-law battery may be accomplished by using an intangible substance, such as light," but that it must involve physical harm (citing United States v. Castleman, 134 S. Ct. 1405, 1414–15 (2014))); Adams v. Commonwealth, 534 S.E.2d 347, 351 (Va. Ct. App. 2000) ("[T]o prove a touching [by light or sound], the evidence must prove . . . objectively offensive or forcible contact with the victim's person resulting in some manifestation of a physical consequence or corporeal hurt.").

355 *See* RESTATEMENT (SECOND) OF TORTS § 821D cmt. b ("This interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability of land and, although it involves an element of personal tastes and sensibilities, it receives much greater legal protection." (citation omitted)); PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 318, § 88, at 629.

356 PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 318, § 88, at 628–29 (suggesting "[f]ears and feelings common to most of the community," *id.* at 629, are actionable); Nagle, *supra* note 227, at 289–94.

357 Post, *supra* note 251, at 963–64.

cases, the key question is whether the interference affects the "usability of land" rather than just an "interest of personality."[358] If strong enough feelings of embarrassment or fear can rise to the level of affecting use, then certainly exploitative illuminations of property (and the displacement associated with them) can qualify as significant interferences, too.

The position of this Article is that barring application of the First Amendment or other law, and given their limited independent utility, most intentional projections on private property are likely nuisances. But, should a court still decide that some projections are reasonable on balance in light of more localized social norms, nuisance's examination of "harm" allows for still more relevant inquiries that would permit some projections but not others, preventing the bluntness of the current outcome (which is that no projections are actionable in trespass or nuisance at all). Courts evaluating gravity or overall reasonableness would be free to take into account the length of a projection, the extent of the harm suffered by the owner, and the communicative nature and effect of the projector's use. These inquiries relate directly to the interests articulated in Part II: the owner's interests in preventing communicative uses and interferences with presentation or image. On the first point, a projection that occurs for a split second is different from one that occurs long enough for others to see. Further, by examining the nature of the projection, courts can use the harm prong to assess whether a projection meaningfully affects the facade and structure, even if temporarily.[359] And public-facing projections cause a different sort of harm than projections only the owner or a single neighbor can see. Projectors are not quietly slipping a message into a mailbox; the value of the projection is in changing the appearance of the property to the world at large, often in ways that cause a risk of misattribution or embarrassment to the property owner, and this distinction might be weighed by courts.

The case of *Intel Corp. v. Hamidi*[360] is useful for conceptualizing the significance of public-facing harm and the risk of misattribution. In *Intel*, the company brought a trespass to chattels claim against Hamidi, the sender of unwanted spam e-mail, premised on the fact that the spam interfered with Intel's property: its servers.[361] Trespass to chattels actions are more like nuisance than the name would indicate. Both are

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[358] RESTATEMENT (SECOND) OF TORTS § 821D cmt. b.

[359] An example of a harm that was found not to be cognizable under the standard nuisance framework and that still might not be found compensable under this analysis is the harm in *Welcker v. Fair Grounds Corp.*, 577 So. 2d 301 (La. Ct. App. 1991). This case involved racetrack lights affecting the "ambiance of an historic structure." *Id.* at 303. For one thing, this is not a typical harm that the average community member would recognize; for another, it is not clear that mere ambient illumination would "transform" a facade the same way a targeted light show might.

[360] 71 P.3d 296 (Cal. 2003).

[361] *Id.* at 299–300. The claim had also been brought in nuisance, but Intel later waived that claim. *Id.* at 301.

more balancing than bright-line: in the trespass to chattels context, courts weigh the substantiality of the interference with the plaintiff's possession.[362] While Intel's case failed like many nuisance cases do — mostly due to lack of economic harm — the opinions in the case are instructive in that they illustrate the difference between public-facing uses of property that pose a risk of misattribution and contacts with property that do not. In finding that Hamidi had not committed trespass to chattels, the majority pointed out that Hamidi was not "on Intel property";[363] he was more like a "protester holding a sign or shouting through a bullhorn . . . , posting a letter . . . , or telephoning."[364] In other words, his activities bore no risk of attribution to or presumed consent of the owner. In contrast, one of the examples discussed by the *Intel* dissent would create such a risk: candidate *A* spray painting a "water soluble message" endorsing candidate *A* on candidate *B*'s bumper, which the authoring Justice thought would problematically not constitute a trespass to chattels under the majority's approach.[365] The majority and dissent's examples of real-world analogs are qualitatively different because of the potential for misattribution, which might make the dissent's analogy less apt than it otherwise appears. In the dissent's example, there is a use of the property that creates the risk of misattribution, because the message on the bumper appears to come from the property owner or occupant. Had Hamidi used Intel's servers to send e-mails that appeared to come from Intel, that would be more apposite to the situation with projection. It is far from clear that the majority would have found Hamidi's interference with Intel's property insubstantial in that circumstance, given the different personal and property interests involved.

The public-facing nature of the harm is significant in part because, again, nuisance is deeply connected to social norms and reasonable behavior.[366] Elsewhere in the law of nuisance, the general baseline is what others would find offensive or unreasonable.[367] While admittedly subjective, the use of a large portion of a facade for another's publicity is outside the realm of currently sociable behavior (as the "guerrilla" label attached to most projection and projection companies would seem to suggest).[368]

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[362] Steven Kam, Note, Intel Corp. v. Hamidi*: Trespass to Chattels and a Doctrine of Cyber-Nuisance*, 19 BERKELEY TECH. L.J. 427, 443 (2004).

[363] *Intel*, 71 P.3d at 311.

[364] *Id.* at 312.

[365] *Id.* at 313 (Brown, J., dissenting).

[366] *See* Ellickson, *supra* note 210, at 728–33; *see also* Claeys, *supra* note 73, at 1391 (noting that "[n]uisance doctrine tracks commonsense perceptions" that do not always line up with economic conceptions of externalities).

[367] *See supra* note 356 and accompanying text.

[368] The definition of "guerrilla" is "[a]n irregular war carried on by small bodies of men acting independently." 6 OXFORD ENGLISH DICTIONARY, *supra* note 239, at 923. War is, if anything, not social.

Redressing some or all projections thus requires only minimal reconceptualization of utility and gravity or significance. Utility has traditionally meant not just socially valuable activity, but also activity that is valuable independently — in other words, emissions that are for some other purpose than causing an effect on nearby property. Moreover, gravity and significance need not have the strict pecuniary and physical interpretations they currently have. Owners do suffer grave and significant harm when their control is disrupted in ways that most members of the community would find offensive or intrusive. More fine-grained inquiries into duration, effect, and nature are further factors courts may use to distinguish the offenses most would find problematic from those invasions by light that should not support a cause of action. True, many of the projections that have occurred to date might be actionable under this framework. It is important to note, however, that finding a projection to be tortious is not the end of the inquiry. There may be other possible safety valves and alternatives, ones that are described in the next section.

Two other doctrinal clarifications are briefly in order. Sophisticated readers may wonder how private nuisance should apply to this sort of action, given that projection sometimes occurs from a public street rather than other private land. While nuisance was traditionally a tort between freeholders,[369] this is not an obstacle; in the overflight context, for example, owners have been able to maintain private nuisance actions against those engaging in offensive activity in public airspace.[370] Second, readers may wonder whether using nuisance to evaluate projections affects the available remedies. Without delving into a full justification and elaboration of a remedial scheme, nuisances may be remedied by both injunctions and damages.[371] Courts may use their typical standards for deciding which is appropriate and in what fashion or amount based on the facts of any given projection, informed, perhaps, by the remedies available and implemented in the contexts of nuisance, unjust enrichment, and other analogous tort contexts.[372]

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[369] *See* Nolan, *supra* note 320, at 476.

[370] *See, e.g.*, Seale v. Pearson, 736 So. 2d 1108, 1113 (Ala. Civ. App. 1999).

[371] *See* A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1075 (1980). Another interesting proposition raised in recent scholarship — relevant given this Article's discussion of the First Amendment, *see infra* section III.C, pp. 1202–13 — would be to use remedial flexibility to take account of the speech interests some projections may raise. While, as indicated, a full discussion of remedies is beyond the scope of this Article, see David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, for more on this sort of proposal.

[372] Some jurisdictions permit punitive damages in nuisance actions if the offending conduct is malicious, for example. *See, e.g.*, *Seale*, 736 So. 2d at 1113. In right of publicity cases, plaintiffs are often entitled to compensatory damages for the unjust enrichment portion of the claim — perhaps, here, the putative cost of advertising or using the facade — and sometimes punitive damages

C. The Role of the First Amendment

The primary purpose of this Article has been to demonstrate how targeted projections interfere with recognized interests of property owners, to explain how nuisance might grow to encompass projections, and to analyze what this trajectory reveals about property more broadly. However, there is an important coda. The First Amendment has already begun to play a role in the limited litigation involving targeted projections to date.[373] Ostensibly, the claim is that projectors have speech and expression interests that entitle them to override the owners' communicative interests in some or all circumstances.

There are a number of moving parts to the First Amendment problem — and a number of reasons to caution against treating the projectors' interests as superior to the owners'. The remainder of this section explains the relevant interfaces between the projectors' and owners' rights and some preliminary tools for thinking about resulting puzzles. It takes up three key issues: first, how to conceive of the interactions between nuisance decisions and the First Amendment; second, the underlying distinctions among states, speakers, and buildings that may ultimately affect how the First Amendment applies in any given case, which may relieve some of the distributional pressure created by liability; and finally, the First Amendment interests on both sides of this problem that make its resolution more complex than in other typical battles between owners and unwanted speakers.

First, how should private nuisance and the First Amendment interact? An initial puzzle is where the state action occurs. The Supreme Court has held that the Free Speech Clause can "serve as a defense in state tort suits," preventing recovery for otherwise tortious conduct.[374] This is on the theory that government actions that circumscribe speech rights — whether in the form of legislation or judicial action — should be considered state actions that trigger the First Amendment's protections.[375] While the First Amendment and the dignitary torts are common antagonists — defamation and the public disclosure of private

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or fees for more harmful conduct. *See* Andrew T. Coyle, Note, *Finding a Better Analogy for the Right of Publicity*, 77 BROOK. L. REV. 1133, 1154 (2012).

373 *See supra* notes 155–158 and accompanying text.

374 Snyder v. Phelps, 562 U.S. 443, 451 (2011); *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1356 (1992). *But see* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1663–64, 1685–700 (2009) (suggesting that property tort and contract cases involving speech generally do not implicate the Free Speech Clause and arguing that property tort cases should).

375 Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 755–56 (2004).

facts, as examples, both pit the rights of the speaker against the privacy and personality interests of the subject[376] — the First Amendment's application to trespass and nuisance actions operates in a trickier thicket. The Supreme Court has considered the First Amendment a constraint on the enforcement of some criminal trespass statutes and public nuisance laws.[377] But courts and commentators have disagreed about when and how strongly the First Amendment does and should provide a defense to private common law trespass actions or to one private party seeking to kick another out for nondiscriminatory reasons.[378] Even as compared to trespass, private nuisance actions involving real property have had little to no interaction with the First Amendment. Injunctions against loud music, chatty neighbors, or shrill broadcasts have not been met with First Amendment claims by the emitters asserting that the decisions violate their expressive rights. Assuming, though, that an injunction against projection could constitute state action triggering First Amendment scrutiny, there are remaining issues about where exactly the amendment should come into consideration.

The First Amendment is already playing a role in how courts approach projections, but at an earlier stage than does a typical defense. At least one judge deciding a projection case weighed the First Amendment's protections for speech as a reason that the harm to a property owner was not "significant."[379] Recall that nuisance, in its command to assess the significance and gravity of the harm, tends to measure those variables in terms of serious physical consequences and economic loss, hurdles that may already be difficult for owners suffering projections to clear. On the opposite side of the equation, courts are supposed to balance the harm against the utility of the defendant's conduct. And utility is explicitly noneconomic. One of the factors that the Restatement (Second) considers in determining "utility" is "the social value" of the

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376 Abraham & White, *supra* note 246, at 367–72.

377 *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976); Marsh v. Alabama, 326 U.S. 501, 511 (1946) (Frankfurter, J., concurring).

378 *Compare* Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."), *and* Solove & Richards, *supra* note 374, at 1663–64 (contending that trespass tort actions lie largely outside the First Amendment's scope), *with* Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 483–84 (2018) (arguing that all allocations of property rights involve state action). *See generally* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1143–46 (2013) (assessing critically the expansion of state action doctrine from cases involving the use of private law by public officials to purely private disputes).

379 Urban Phila. Liberty Tr. v. Ctr. City Organized for Responsible Dev., Nos. 171002675, 3686 EDA 2017, 2017 WL 7313667, at *9 (Pa. Ct. Com. Pl. Dec. 28, 2017).

defendant's conduct.[380] The Restatement (Second) includes in its definition of social value the "free play of individual initiative" and states that "freedom of conduct has some social value although in the particular case the conduct may not produce any immediate or direct public benefit."[381] In that single projection case, the court seemed to be suggesting that speech is a value that may be weighed in the utility calculus[382]: the benefits of free speech are so large when compared to the harm to the single owner that projections must be allowed to continue.

This is a convoluted view of what matters in nuisance. At the outset, it is problematic that harm and benefit are being measured on such different scales: a defendant can count freedom and a plethora of noneconomic activities on the utility side of the equation, but the plaintiff can typically count only economic and physical harm on the other side. In a more banal sense, speech has been utterly irrelevant in nuisance calculations up until this point. I have yet to locate a case involving loud music or yelling next door where the defendant got to count the social value of free expression or musical experimentation against the serious interferences suffered by neighbors.[383] More fundamentally, it is improper to consider the speech values twice: first, in the utility calculus affecting the decision whether the conduct is tortious in the first instance, and then again, in considering whether the First Amendment should be a defense to the tort. Counting free speech as a form of utility leaves owners doubly hurt: a property owner who suffers dignitary, privacy, and appropriative harms is prevented from asserting those harms as a basis for a nuisance claim and must also go up twice against the Goliath of unarticulated First Amendment values. It would provide clarity to consider the First Amendment in one place: if at all, as in other tort contexts, as a potential defense to what would otherwise be considered a nuisance.

This brings up the second key issue: the potential of some sort of defense for projections, which itself might be justified by the distributional implications of tethering communicative rights to ownership. To be sure, any rule that privileges the property owner's speech on his or her property will have distributional effects on speech because of inequities in property holdings.[384] Through ownership, a subset of the population

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380 RESTATEMENT (SECOND) OF TORTS § 828 (AM. LAW INST. 1979).

381 *Id.* cmt. e.

382 *See Urban Phila. Liberty Tr.*, 2017 WL 7313667, at *9.

383 Courts have sometimes weighed the value of different expressive emissions, to be sure, *see, e.g.*, Christie v. Davey [1893] 1 Ch 316 at 325–27 (North J) (Eng.) (enjoining neighbor's shrieks and whistles in response to instrumental noise from musical lessons), but none have considered the expressive value of conduct a reason not to impose nuisance liability.

384 *See* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1542–43 (2008) (putting forth the propositions that all speech requires the use of some property and that free speech generally does not include the right to use another person's property in order to convey one's message).

may monopolize the conversation. Projections democratize speech, unmooring the ability to speak from title and its distributional consequences. Those who can afford a projector may not be able to afford ad space in Times Square. Indeed, this is the view of those who endorse projection and other forms of "guerrilla art" as desirable incursions on property interests.[385]

Property entitlements are not neutral, to be sure,[386] but the numerous alternatives to projection weaken the case that property rights must yield in this particular instance. Protestors wishing to target a particular building may use any other form of nearby demonstration that does not involve a nonconsenting owner's facade, using light, signs, or otherwise — from public or, with permission, private property — to disseminate a message. A more direct solution to inequities in sites for communication may be to expand and protect public fora for expression, rather than presumptively opening private facades or adopting other overinclusive solutions.[387] Already, there are permitting processes in place for allowing projections on several prominent public sites that are subject to traditional First Amendment scrutiny.[388] Furthermore, projection may not be as immune to distributional inequities as it appears. Projection even for protest is becoming a significant business,[389] and should competition for facades intensify, the brightest bulbs and most

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[385] *See, e.g.*, Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 U. MICH. J.L. REFORM 245, 277 (2010); Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1288–91 (2019); Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 495–96 (2006); Kelly Oeltjenbruns, Note, *Legal Defiance: Government-Sanctioned Graffiti Walls and the First Amendment*, 95 WASH. U. L. REV. 1479, 1483–84 (2018).

[386] *See* B. Jessie Hill, Essay, *Property and the Public Forum: An Essay on* Christian Legal Society v. Martinez, 6 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 49, 53 (2010) (noting that property's appearance of "glittering neutrality . . . is deceptive").

[387] *See* Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440 (2006) (arguing that alongside the retreat of speech "into private realms and spaces," the value and importance of "public physical places" has been ignored).

[388] *See* Miller, *supra* note 288. As explained above, projections onto government property are outside the scope of this private law Article. *See supra* note 14. It is notable, though, that at least one former Supreme Court Justice thought that projecting onto public property should be preventable. In *Texas v. Johnson*, 491 U.S. 397 (1989), Justice Stevens wrote in a dissent that had a protester:

> chosen to spray-paint — or perhaps convey with a motion picture projector — his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset.

Id. at 438–39 (Stevens, J., dissenting). It may be desirable in light of the framework proposed here that the government maintain and open public spaces for expression, including projection, subject to First Amendment rules and limitations, though it is plausible that not every site (for example, memorials commemorating tragedies) would be so opened.

[389] *See Anti-Trump Images Become Big Business for DC Projectionist*, CBS NEWS (Aug. 21, 2018, 8:12 AM), https://www.cbsnews.com/news/anti-trump-images-become-big-business-for-dc-projectionist [https://perma.cc/AVY3-5JSL].

sophisticated technology may yet belong to those advertisers or speakers most able to pay.

In addition to the other real-time opportunities available on every sidewalk, building, and street abutting a facade, protesters have another potential outlet: they may be able to replicate for distribution the image a projection can cause without interfering with the owners' own uses and communicative rights. While other legal limitations like defamation law may apply, real property law does nothing to prevent a speaker from digitally manipulating and distributing a photograph of a building — say, the Trump Hotel — with whatever an illicit projection would have said. Such a manipulation falls squarely within the realm of intellectual property law,[390] and digital annotation of a photograph is not a "use" of the building or property in remotely the same way that a real-time projection is. Put another way, this Article should not be read to argue that owners have unlimited rights to control depictions of their realty. Instead, it claims that owners have rights to prevent *uses* of their realty, particularly when those uses are unreasonable and cause other associated harms. This clarification may soften the broader distributional effects that would result if real estate owners had some sort of moral rights in all depictions of their land and buildings.

Both property and First Amendment law may nevertheless contain safety valves for some kinds of projections should these distributional consequences ever become extreme. Labor law is an obvious example; federal law can sometimes give employees privileges to access property or preempt state causes of action when enforcement would impede federally permitted organizing activity.[391] Courts have often declined to

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[390] An example of a recent controversy along these lines was the threatened copyright and contract lawsuit by real estate website Zillow against the author of the blog "McMansion Hell," which digitally annotates photos of tacky modern architecture to make fun of it. *See* Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141, 1207 n.287 (2017); *About*, MCMANSION HELL, https://mcmansionhell.com/about [https://perma.cc/QYZ4-6Y3L]. The letter drew criticism from digital-civil-liberties lawyers and the public, and Zillow quickly reversed course. *See* Rub, *supra*, at 1207 n.287. Zillow did not own the photographs of the buildings, among numerous other problems with the suit. Nilay Patel, *Zillow Doesn't Even Own the Photos It Threatened to Sue a Popular Blogger Over*, THE VERGE (June 27, 2017, 3:07 PM), https://www.theverge.com/2017/6/27/15880934/zillow-mcmansion-hell-copyright-kate-wagner [https://perma.cc/27TE-477F]. While specific photographs of buildings may be protected by copyright law, architects and owners of buildings cannot bring copyright claims against those who take photos of buildings from public space. *See* Robinson v. HSBC Bank USA, 732 F. Supp. 2d 976, 982 (N.D. Cal. 2010). For a discussion of the interactions between privacy and reputational interests and copyright law more generally, see Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, BYU L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3351348 [https://perma.cc/8LEP-EANA].

[391] Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 430–34 (1998). Though employee access rights are directly protected by labor law, nonemployee organizers' access rights are much more limited; the key standards are discussed in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). *See generally* Cynthia L. Estlund, *Labor, Property,*

find federal preemption where trespass and nuisance are concerned,[392] but if there are no other reasonable means of communication or if the building owner specifically discriminates against union activity,[393] labor law may privilege projections in some instances.

The First Amendment may in limited circumstances provide a defense to projectors, too. Past court decisions have sometimes used public law to create private law entitlements — something like a rule that would entitle projectors to use of the facade. Various courts, including the Supreme Court, have identified circumstances that can give rise to a "free speech easement": because of the nature of the property use, private property owners have sometimes been required to open segments of property at some periods to those who would otherwise be trespassers.[394] The doctrine has its roots in *Marsh v. Alabama*,[395] in which the Supreme Court applied the First Amendment's protections to empower an individual seeking to distribute religious literature on the sidewalks of private property: a company-owned town.[396] Subsequent cases involving private shopping malls and centers gave would-be trespassers limited speech rights on private property, particularly when the private property operates like a public square and has become the "functional equivalent" of municipal space.[397]

The availability of such easements on private property — at least as a matter of federal law — has been sharply limited since their heyday.[398]

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and Sovereignty After Lechmere, 46 STAN. L. REV. 305, 325–35 (1994) (criticizing *Lechmere*'s narrow view of nonemployee organizers' rights). The relevant rules governing labor law's preemption of state tort law actions flow from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245–48 (1959).

392 *See* Retail Prop. Tr. v. United Bhd. of Carpenters, 768 F.3d 938, 960 (9th Cir. 2014); Helmsley-Spear, Inc. v. Fishman, 900 N.E.2d 934, 938 (N.Y. 2008); United Food Workers Int'l Union v. Wal-Mart Stores, Inc., No. 02-15-00374-CV, 2016 WL 6277370, at *6 (Tex. App. Oct. 27, 2016). This passage from *Retail Property Trust v. United Brotherhood of Carpenters*, 768 F.3d 938, which held that trespass and nuisance acted only as time, place, and manner restrictions on union organizing activity, explains the reason: "[A]s a general matter, trespass and nuisance are labor-neutral torts . . . . Instead of directly regulating relations between unions and employers, trespass and nuisance law instead largely touch on noneconomic 'interests . . . deeply rooted in local feeling and responsibility.'" *Id.* at 960 (omission in original) (quoting Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters, 436 U.S. 180, 195 (1978); Hotel Emps. Union, Local 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 212 n.4 (3d Cir. 2004)).

393 *See Sears*, 436 U.S. at 205.

394 *See* RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 52–63 (2019) (overviewing the development of the law of free speech easements); *see also* Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 348–49 (2011) (describing these cases as the state "allow[ing] others to use [an individual's] physical property to espouse . . . views she rejects").

395 326 U.S. 501 (1946).

396 *Id.* at 508.

397 Hudgens v. NLRB, 424 U.S. 507, 520 (1976); *see id.* at 518–20 (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 562 (1972)) (overruling *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), which had imposed a broader free speech easement).

398 *See id.*

But if speech easement doctrine were to become resurgent, different types of buildings could be more open or less available for projections. Ownership may be so concentrated in some parts of New York City, for example, that the need for projection space is stronger there — more like the "company town" than places where ownership is disaggregated, certainly. Furthermore, buildings might be viewed on a spectrum from the most private and unavailable for projection to functionally public, mapping onto the different personhood interests between the home and a corporate skyscraper that routinely opens its facade for different types of messages but discriminates against some.[399] In many First Amendment cases, the Supreme Court has affirmed the sanctity of the home against both the unwanted speech of others and attempts to restrict or influence owner speech there.[400] This idea of a spectrum between functionally public space and residential property mirrors nicely the strength of the owners' personality interests relating to communication and presentation: the harm to individual privacy and personhood caused by a given projection is likely much less in the former context than in the latter.

Underlying state laws might also affect the availability of free speech easements. The Supreme Court observed this in *PruneYard Shopping Center v. Robins*.[401] The Court noted that its narrow, federal free speech easement cases would not necessarily have given rise to an easement on behalf of the pamphleteers that the shopping center in that case was seeking to eject.[402] However, the Court said that California was free to recognize broader free speech entitlements to private property under its constitution (which it had) so long as those entitlements would not run afoul of other federal constitutional provisions (which the Court held the entitlements did not).[403] New Jersey has also created more liberal entitlements for third-party speakers to engage in what would otherwise be trespasses as a matter of state law,[404] though even where such conduct is permitted, owners still retain significant control over others' exercise of expressive rights, particularly where there are available

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399 *See* Wright, *supra* note 17, at 589–90, 597, 609–11 (discussing potential categories and subcategories of buildings).

400 *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law . . . ."); Frisby v. Schultz, 487 U.S. 474, 484–85 (1988) (describing the sanctity of the home and privacy and noting that "unwilling listener[s]," *id.* at 484, are protected from becoming "captives," *id.* (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)), in their own homes).

401 447 U.S. 74, 81 (1980) (noting importance of underlying "state constitutional or statutory provision[s] . . . construed to create rights to the use of private property by strangers" in determination of scope of expressive rights of outsiders on private property).

402 *Id.*

403 *Id.* at 81, 88.

404 *See* State v. Shack, 277 A.2d 369, 374–75 (N.J. 1971).

alternatives.[405] Without canvassing the gamut of state constitutional and common law,[406] it is plausible that some states might determine that state constitutional speech rights of projectors are indeed weighty enough to defeat owners' property interests in some circumstances.[407]

Lastly, different types of speech have occasionally received different levels of protection (for example, commercial or political speech, or speech on matters of public versus private concern).[408] Some recent decisions have called into question the continued viability of different treatment for different categories of speech,[409] and these distinctions have in any case not often played a role in the decision whether to create a free speech easement;[410] instead, they are typically invoked when assessing the constitutionality of government regulation.[411] Still, it is plausible that a court might consider different types of speech relevant in deciding projection cases, perhaps especially in states like the few just mentioned where the social benefit of otherwise tortious conduct is weighed against owners' rights. For example, a court might be more likely to recognize a First Amendment defense for political projections connected to the site rather than one for a randomly placed advertisement.

All that said, there are countervailing principles that make these speech cases less broadly applicable than they might appear. As an initial matter, most of the easement cases apply only to a narrow range of properties: those where the building is plausibly public enough (or property holdings sufficiently concentrated enough) to resemble a company

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405 *See* State v. Schmid, 423 A.2d 615, 630 (N.J. 1980) (announcing a multifactor test for whether "in a given case owners of private property may be required to permit . . . the reasonable exercise by individuals of the constitutional freedoms of speech and assembly," but observing that an owner "is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property").

406 For an admirable attempt to canvas state shopping mall cases, see *People v. DiGuida*, 604 N.E.2d 336, 338–42 (Ill. 1992).

407 The federal Takings Clause would also form an important limitation on any state-created free speech easement. While the Court in *PruneYard* found that the easement in favor of the pamphleteers was not a taking in part because it had no effect on the "use or economic value" of the property, 447 U.S. at 84, it is not clear that a projection would be treated favorably under Takings Clause rules, *see infra* notes 414–15 and accompanying text.

408 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451 (2011) (noting that whether the First Amendment provided a defense to tort liability depended on whether the speech in question was of public, rather than private, concern); Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 WM. & MARY BILL RTS. J. 965, 966–68 (2017) (overviewing the trajectory of commercial speech doctrine).

409 *See* Schauer, *supra* note 408, at 969–70.

410 The lower court in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), did craft its injunction in a way that suggested the relevance of speech categories to the easement analysis. The court enjoined Lloyd Corp. (the shopping-center owner) from interfering with any "non-commercial" flyering, presumably allowing the shopping center to stop commercial advertisers on its premises. *Id.* at 564 n.11. This injunction was overturned on appeal. *Id.* at 570.

411 *See* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1990–92 (2016).

town or shopping mall, which would exclude most residential and probably significant amounts of commercial property to which projectors might be seeking access.[412] But there are other reasons to caution against overreading the cases as strongly permissive toward targeted projections.

For one thing, a free speech easement in the projection context would entitle the projector to a particular segment of the property — the facade — in ways that chafe against core tenets of other property and First Amendment doctrines. When deciding constitutional cases involving the government's power of eminent domain, for example, the Supreme Court has been hostile to this sort of claim to specific space. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[413] the Court considered whether a state regulation requiring a landlord to suffer a tiny cable on the exterior and roof was a "taking" of her property within the meaning of the Fifth Amendment.[414] Answering in the affirmative, the Court drew distinctions between the cable regulation at issue and regulations requiring owners to have mailboxes or smoke detectors.[415] The Court noted that the cable regulation was suspect in part because it gave the third-party company control over the placement of the cable; had the regulation simply required landlords to provide cable instead, "[t]he *landlord* would decide how to comply . . . and therefore could minimize the physical, esthetic, and other effects of the installation."[416] This language suggests that the Court is skeptical of third-party entitlements to *particular* spaces on property. In this and other cases, courts have permitted property owners' "reasonable regulations" of the spaces where unwanted speakers can congregate to express themselves, which might include permitting unwanted speakers in some places but not others because of the owners' countervailing desires and uses.[417]

As this last sentence suggests, claimed entitlements to facades are not necessarily consonant even with First Amendment doctrine. Speakers do not always get to choose the best or most visible site for their speech, and courts consider the availability of alternatives in deciding whether a speaker can claim an entitlement to a particular place.[418] Granted,

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[412] *See Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1305–07 (2010).

[413] 458 U.S. 419 (1982).

[414] *Id.* at 421.

[415] *Id.* at 440.

[416] *Id.* at 440 n.19.

[417] *See* Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).

[418] *See* Wright, *supra* note 17, at 604 & n.129; Zick, *supra* note 387, at 453; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 577–78 (1995) (noting that although "the size and success of petitioners' [private] parade makes it an enviable vehicle," *id.* at 577, for views of an excluded group, the group could obtain its own permit and disseminate message via other channels).

the speaker's interests might be especially strong when the message has a close nexus to the property or its occupant; with projections, the point of putting the messages on buildings, rather than on a van or banner outside, is that doing so visually conveys the connection between target and message.[419] But every parcel offers ample alternative channels besides the facade, including locations that eliminate the risk of misattribution or invasion of rights: sidewalks, roadways, billboards, and neighboring structures whose owners might consent to even unneighborly displays.

Furthermore, even in the cases most permissive to outsiders' speech on private property, an entitlement to speak on another's property has limits. Those limits minimize harm to the owner's communicative interests and would affect many projections. *PruneYard Shopping Center v. Robins*, the case involving pamphleteers seeking access to a shopping center in California, is instructive. The shopping center owners claimed that entitling pamphleteers to use their courtyard violated their First Amendment rights relating to compelled speech by "forc[ing them] . . . to use [their] property as a forum for the speech of others."[420] The Court distinguished the shopping center's claim from its other compelled speech precedents on a number of axes, two relevant here: first, the opinions of the pamphleteers were "not likely [to] be identified with those of the owner" because of the property's public nature; and second, the owner could "expressly disavow any connection with the message by simply posting signs in the area where the speakers . . . stand" disclaiming sponsorship or association.[421]

Projections raise significant problems when these considerations in *PruneYard* are taken into account. With pamphleteers and picketers in public places, the unwanted speech can easily be identified with the unwanted speaker; as the previous Part discussed, projections disassociate speech from speaker, in some cases creating heightened risks of misattribution or confusion in speaker identification. Furthermore, projections may render owners less capable of disassociating themselves from unwanted speech than do other forms of communication. Light projections make facades rivalrous: display of one message thwarts display of another. It may be difficult for owners to adequately disassociate themselves from large displays with adjacent physical signage alone.

To be sure, a finding of no trespass or no nuisance is absolutely not the First Amendment problem that an injunction against future projections would be, because the level of state action is different. If projections are banned, the coercive power of the state will be involved in

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[419] *See* Frisby v. Schultz, 487 U.S. 474, 487–88 (1988) (upholding ordinance that banned picketing at residences, even though it deprived picketers of the ability to picket at the home of a doctor who performed abortions).

[420] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85 (1980); *see id.* at 85–86, 85 n.9.

[421] *Id.* at 87.

suppressing that expression; if they are allowed, the losing property owner will not be coerced into hosting the message because he or she remains ostensibly free to use some form of self-help to interfere with it (by lighting the entire facade, for example). Nevertheless, while a court order refusing to grant an owner relief does not mean the owner's First Amendment rights have been violated, First Amendment cases still illustrate the deep inconsistencies that would result were all or most projections allowed. Court decisions that allow projections to continue offer owners this Morton's fork: either suffer the speech of your neighbor or expend time and resources to transform your property in a way you otherwise would not. Here, even the self-help forces the owner to act against presentation interests. Neither option looks desirable if reasoning from First Amendment principles.

There are other social losses from allowing projections besides those associated with misattribution or compulsion. More messaging, whether light or otherwise, is not an unadulterated good. Over the course of the twentieth century, much of our land-use and First Amendment law evolved to regulate billboards and other signage: sources of messaging that had come to be associated with "visual blight."[422] If dormant physical signage can be considered "intrusive,"[423] one wonders how the glare from competing light beams will come to be regarded, particularly because of light's effects on quiet enjoyment of property and use of the natural environment, as well as interference with wildlife and human health.[424] Finally, freely allowing more projections threatens to reduce the means for communication overall. Without the capacity to control what is displayed, some prominent sites might become the target of competing projections that render all projections invisible, ultimately degrading the level of discourse below what would result if individuals retained primary control over licensing their facades for communicative purposes.

In closing, while the state action may not be equal on both sides, there are at least some First Amendment values in favor of both projectors and owners — and that leaves property law an attractive source for assigning default (though rebuttable) entitlements to communicate. Troublingly, courts in the projection cases are already throwing around free speech values when declining protection to property owners. As this Article has chronicled, owners do have communicative interests and rights relating to self-presentation through property, interests that the

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[422] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984); *see id.* at 806–08.

[423] *Id.* at 806.

[424] These are the harms typically associated with light pollution. *See* Andrea L. Johnson, Student Article, *Blinded by the Light: Addressing the Growing Light Pollution Problem*, 2 TEX. A&M J. PROP. L. 461, 464–67 (2015); Ploetz, *supra* note 24, at 995–1000.

property torts can come to recognize if allowed to evolve. The image torts involving personality — defamation, intentional infliction of emotional distress, and others — grew in limited capacities before being curtailed by constitutional considerations.[425] The First Amendment is threatening to prevent any analogous harms involving real property from ever being recognized.

As this Part has explained, the competing considerations here compel a result that takes ownership rights more seriously. A presumption in modern First Amendment law is that "the freedom of speech does not include the right to use another person's property in order to convey one's message."[426] There may indeed be a role for the First Amendment (or other doctrinal safety valves) to permit projections, but the proper role may be back-end tinkering with the owners' presumptive control by examining differences in underlying state laws, speakers, and types of buildings, without imposing third-party speech rights any more broadly than current First Amendment doctrine would allow. Though projection enables messages to traverse boundaries alone — without speakers — the ordinary result that most owners can prevent unwanted speech and speakers need not change.

CONCLUSION

The projection cases are full of colorful facts. One cannot help but end up slack-jawed at the size and content of some of the messages that have ended up on restaurants and savings banks.[427] These colorful facts, however, lay bare deeper tensions in property law: underexplored harms, coalescing interests, and the growing chasm between the property torts of trespass and nuisance, at least where appropriative uses of property are concerned.

This Article began by considering how light was traditionally treated under property-tort frameworks — as a nuisance or trespass in limited circumstances — and how those limitations have rendered the projected messages largely beyond the purview of tort law because they do not cause economic, physical, or sensory harm. It located across a wide range of doctrine support for the ideas that owners have interests in communicative use and self-presentation through property, interests that should be protected from appropriative harms. Despite the recognition of those harms and interests across a variety of cases and contexts,

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425 Abraham & White, *supra* note 246, at 365–67.

426 Seidman, *supra* note 384, at 1542.

427 *See, e.g.*, Perry Stein & Holley Simmons, *A D.C. Neighborhood and Its Emoji-Filled, Anti-Subway Protest*, WASH. POST (June 18, 2015, 11:03 AM), https://www.washingtonpost.com/news/local/wp/2015/06/18/a-d-c-neighborhood-and-its-emoji-filled-anti-subway-protest [https://perma.cc/VKL4-LMQW]; Sydney Brownstone (@sydbrownstone), TWITTER (Jan. 5, 2017, 5:19 PM), https://twitter.com/sydbrownstone/status/817178845790904321 [https://perma.cc/E568-G66G].

there remain affirmative doctrinal hurdles to addressing those harms and unclear channels for protecting these interests.

Nuisance and trespass can evolve to protect the dignitary interests associated with property ownership that the projection cases help to bring into focus. By looking to the development of the privacy and dignitary torts, lessons can be gleaned both about why projections are harmful and about how tort law should change in response. Projections are harmful because they appropriate property in both its privacy and property senses: they exploit the property for another's message, transform the exterior, and eviscerate the owners' sovereignty and control. And tort law can change in response by more flexibly defining harm to encompass offending activity without economic or physical consequences that would be experienced as harmful by common, ordinary citizens, particularly when that activity is intentional and useful only insofar as it makes use of another's land or structure.

Because projections involve communications, the First Amendment would appear relevant — but it is far from clear that it supports the projectors' position. Instead, First Amendment doctrine has long protected the rights of owners to use their property toward their own communicative ends and to be free from compelled speech. Many arguments in favor of the social goods accomplished by unlimited projections are counterbalanced by significant social harms. In light of that equivalency, the typical rule should ordinarily apply: property rights define communicative entitlements, and individuals do not have rights to speak on or from private property that they do not own.

It may seem remote that projections could come to pose a significant problem in property law. As of now, they remain primarily the stuff of big cities and urban projection collectives. But any property or land use professor can find scores of examples of horrifying things people put on their own properties simply to irritate the people next door;[428] one shudders to imagine what the spiteful would do if they could vault those symbols onto their neighbors' property without consequence. On Facebook pages tracking projections around the country, individuals are already wondering whether they, too, can project what they want onto others' buildings.[429] Defining the rights surrounding projection now can avoid unclear entitlements — and proliferating light beams — that are sure to cause issues down the line.

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[428] *See* Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) (describing neighbor who, among other offenses, mounted a toilet seat with excrement painted inside facing a neighbor's yard); Shoked, *supra* note 214, at 358–59 (describing person who put middle finger statue on his land to irritate neighbor); Spencer Buell, *Sal's Pizza in Billerica Has a "Douchebag" Problem*, BOSTON (Jan. 16, 2018, 11:46 AM), https://www.bostonmagazine.com/news/2018/01/16/billerica-douchebag-problem [https://perma.cc/68ZF-E6P5] (describing man that painted "douchebag" in large letters on his house facing a neighboring pizza shop to protest the shop's failure to build a higher fence between them to obscure its operations).

[429] Survivors of the Abortion Holocaust, *supra* note 5 (containing comment by Vee Santiago, "What legalities should we be aware of to do this in our surrounding mills??").