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Trespassory Art

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I) Introduction

Art is being transformed. Artists are pushing their discipline in innovative and unexplored directions. This is nothing new. The history of art is replete with examples of artists who have broken from existing conventions and genres, redefining the meaning of art and its function in society. Seminal artists such as Pablo Picasso helped to break art free from its moorings in literal representation and query the meaning of representation itself. Eduard Manet, with paintings such as *Olympia*, challenged social mores and the meaning of beauty in nineteenth century French society.

The new art is not so much a creature of one artist, but rather a movement that seeks to appropriate cultural norms and cultural signals, reinterpreting them to create new meaning. Marcel DuChamp produced such a result when, in the early twentieth century, he took a urinal, signed his name to it, titled it *Fountain*, and called it art. René Magritte similarly challenged his audience when he attached the label “*ceci n’est pas une pipe*” (this is not a pipe) to a massive painting of a pipe. Other artists, such as Thomas Nast, have operated on the overtly political level—using a chosen art form (in Nast’s case, the cartoon) to shatter the political order.¹

Whether they employ 21st century technologies such as lasers, or the more familiar mediums of painting, sculpture and mosaic, music, or theatre, or merely the human body, these new artists share one thing in common. Integral to their art is the physical invasion of space, the trespass, often challenging our conventional ideas of location, time, ownership, and artistic expression. Their art requires not only borrowing the intellectual assets of others, but their physical assets. In a way these artists resemble Andy Warhol and Jeff Koons. Warhol’s art borrowed and reinterpreted the popular symbols of his era and before, giving them new meaning as pop icons. Think of a Campbell’s soup can. Koons, the controversial artist (and the subject of myriad court opinions), has controversially appropriated pop culture images, running afoul the copyright laws in the process. Other artists and groups have attempted to jam the signals and lines of transmission of mass media and pop culture and to reframe intellectual property. Their efforts are ably addressed elsewhere.²

Artists have increasingly used art not merely as a means to invade incorporeal property rights, but also tangible or real property rights. It is art without borders or boundaries. This is trespassory art – art that redefines and reinterprets space—art that gives new meaning to a park bench, to a billboard, to a wall, to space itself.³

¹ Thomas Nast’s political cartoons helped bring about the demise of William “Boss” Tweed and his corrupt rule over New York politics in the 1870s. *See generally* Kenneth Ackerman, BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK (2005) (describing the Tweed ring and the prominent role Nast played in exposing and ending it).

² *See* Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489 (2006).

³ Christian Hundertmark, the author of *THE ART OF REBELLION: WORLD OF STREET ART* intro (2005) notes that “part of the creativity of [rebellious art in the urban environment] is how it integrates within the environment, the chosen spot which gives it the finishing touch”

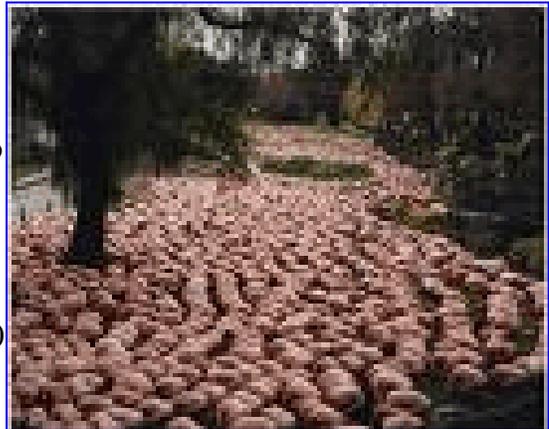
Our purpose in this article is to propose a modified regime in the law of trespass to make room for the many new forms of art with which we are concerned – art that is locationally dependent or site specific. In Part II we begin by briefly describing and characterizing these often-new artistic forms. This will provide a jumping off point for addressing the basic question this article seeks to address— should the law accommodate these new types of art, and if so, to what degree? In Part III we examine the law of trespass, with particular focus on real property, both public and private, but also with an eye to personal and intellectual property. We conclude that adjusting trespass remedies for artistic trespass through a set of common law privileges would better balance the competing interests of owners and artists than do current trespass rules. In Part IV we turn to a set of constitutional issues and conclude that our common law proposal is consistent with, and in some ways perhaps required by, the First Amendment. Finally, in Part V, we summarize our proposal and then revisit the value of trespassory art *as art* in our creative culture.

II) Five Examples of Trespassory Art

A) *Spencer Tunick*

Spencer Tunick has achieved considerable acclaim for what he calls “temporary site-specific installations of nude people forming abstract shapes.”⁴

In plain terms, Tunick assembles hundreds or thousands of naked people to pose in urban and rural settings around the globe. He has earned considerable acclaim and notoriety for his work.⁵ It is not difficult to understand why. In May 2007, he brought together 18,000 people in Mexico City’s main square, the Zocalo, for a nude shoot. He has executed similar projects in places like Buffalo, NY (1,800 nudes), Cleveland, Ohio (2,754), New Castle upon Tyne (1,700 nudes),⁶ Barcelona, Australia, and the list goes on. Recently, he collaborated with Greenpeace to create what he called a “living sculpture” on the Aletsch Glacier in Switzerland. They aimed to draw attention



‘Cool Cleveland,’ Spencer Tunick

⁴ Kathryn Rosenfield, *Taking it to the Streets*, NEW ART EXAMINER 1999.

⁵ See Dany Louise, *Spencer Tunick*, ART MONTHLY, Fall/Winter 2004, 294; Alison Green, *Spencer Tunick*, ART MONTHLY, Nov. 2001, p. 251 (describing Tunick as “fairly notorious for the photo shoots he organises where hundreds of people take off their clothes and lie down in the middle of a street or park or field.”).

⁶ See *Hundreds of Nudes Cross the Tyne*, BBC.COM, Jul. 17, 2005, <http://news.bbc.co.uk/1/hi/entertainment/arts/4689421.stm>.

to the problem of global warming and the prospect of the disappearance of the Swiss glaciers by the end of the century by creating a “symbiotic relationship” between the vulnerable glaciers and the human body.⁷

On location, Tunick acts as would a director on a film set, directing the placement of each naked person to form a tapestry of human forms. The images are striking. They plunge the viewer into what one critic describes as “a nihilistic world” that blurs “boundaries between the safe and familiar, and the horrors we know about but can’t face.”⁸ What is truly exceptional about Tunick’s work is not the nudity per se. Tunick characterizes the collection of naked bodies sprawled across the urban landscape as a non-sexual, sensual spectacle. But even so, throngs of nude people in places like New York or Cleveland is not something one is accustomed to seeing.

Although American law tends to distinguish between sensual nudity in the service of art from overtly sexual nudity that qualifies as obscene, Tunick has had his run-ins with the law. For example, a New York criminal statute on “exposure” prohibits nudity in public, but makes exception for the “breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.”⁹ Tunick’s work does not easily fit any of these categories. New York City authorities have tended to agree. Not surprisingly, therefore, Tunick and his nude subjects have been arrested several times.¹⁰

On April 25, 1999, Tunick attempted a nude photoshoot at West Forty-Seventh Street and Seventh Avenue. New York police arrested Tunick and several of his models before he was able to take any pictures. On June 6, 1999, Tunick applied for a permit to shoot from the Mayor’s Office of Film, Theater, and Broadcasting (“MOFTB”) to photograph persons on the sidewalk of Sixth Avenue between Fortieth and Forty-First Streets in the early morning hours. When the office refused to issue a permit for nude photography, Tunick proceeded anyway. He was met by the police, who threatened to arrest him if anyone derobed.¹¹ Tunick took his case to court, seeking permission to proceed with the shoot. The U.S. District Court for the Southern District of New York enjoined the City from interfering with Tunick’s photo shoot on the grounds that as applied to Tunick, the statute impermissibly interfered with his First Amendment rights, as nude photography qualified as “protected expression.”¹² The city argued that privacy interests of the residents of the neighborhood where Tunick intended to do the shoot, and the fact that they might object to seeing between 75 and 100 naked persons outside their windows, overrode Tunick’s freedom of expression.¹³ The District Court disagreed, stating that “the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer [;] the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.”¹⁴ The

⁷ See *Volunteers Strip Off to Fight Climate Change*, www.swissinfo.ch, Aug. 18, 2007.

⁸ Louise, *supra* note 5, at 295.

⁹ N.Y. Pen. Law §§ 245.01 (1999).

¹⁰ See *Tunick v. Safir*, No. 99 Civ. 5053, 1999 WL 511852, at *1 (S.D.N.Y. July 19, 1999).

¹¹ *Id.*

¹² *Id.* at *4.

¹³ *Id.* at *5.

¹⁴ *Id.* at *6 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975)).

Second Circuit ultimately agreed, and Tunick was allowed to proceed with his work.¹⁵

Tunick's work, and the judicial opinions attempting to deal with it, illustrate the challenge the artist poses to the law. It was only through case-by-case litigation under the First Amendment that he was allowed to proceed.¹⁶ Yet, the Supreme Court has struggled with art in its constitutional jurisprudence, unsure whether to treat it as speech, conduct, or neither. Tunick's work challenges a key element of traditional First Amendment analysis. When weighing the constitutionality of state action that threatens to suppress constitutionally protected speech, the court asks whether alternative avenues for the communication exist. The site specificity of Tunick's work complicates this inquiry.

The interaction of the nude forms and their surroundings is critical to Tunick's work. Each location provides new meaning. In this sense, Tunick's work carries on in the tradition of land artists, for whom the site is an indispensable part of the art.¹⁷ Tunick's Switzerland shoot, and the interaction between the human form and the glacier, created different symbiotal meaning than the Manhattan shoot produces, where human figures meet pavement. But Tunick could not capture his artistic message without access to the site that makes the message. He could not achieve his purposes were he consistently confined indoors. Filling the seats at Avery Fisher Hall at Lincoln Center would capture meanings, but ones that are necessarily different from an outdoor shoot. The site specificity of his work brushes up against the boundaries of free speech, and against the limits states and cities have imposed on public nudity and public assembly. Tunick's art demonstrates the critical importance of site and environment in these new forms of art.

B) Billboard Liberation, Shopdropping, and the Non-Propositional Urban Trespassory Art

The next two examples involve art forms that feature similar artistic elements and pose comparable legal dilemmas. Billboard alteration (or "liberation") and shopdropping represent two examples of a broad range of overtly trespassory art. They are illustrative of art that might at once be described as a type of groundbreaking social commentary, or rather, as mere vandalism. We turn first to billboard alteration, as practiced by the "Billboard Liberation Front."

Billboard alteration is one genre of the art with trespass at its core. The art form uses trespass as a vehicle to achieve the appropriation and reformulation of symbols. The Billboard Liberation Front is one of the most prominent of these groups. Others have also attempted to

¹⁵ Tunick v. Safir, 228 F.3d 135 (2d Cir. 2000).

¹⁶ *Id.* at 136 (describing Tunick's challenge to New York law that would allow him to proceed with shoot).

¹⁷ See Nellie Viner, *The New Jurisprudential Frontier: Art and the Changing Landscape of the First Amendment*, unpublished manuscript on file with authors ("For Spencer Tunick and his land artist ancestors, their work is embedded in the environment and landscape. For artists who gain inspiration and base their resulting work firmly in the soil or concrete of a specific location, it is impossible to transport their pieces to a different place.").

counteract objectionable mass-media messages through billboard or sign alteration. For example, the group Art Fux replaced a McDonald's billboard with the message (reminiscent of the DuPont Company's advertising slogan, better living through science) "McDonalds—Better Living Through Chemistry."¹⁸ A successor group, the Cicada Group, placed vinyl stencils of the word "hate" on STOP signs,¹⁹ and altered a Coca Cola billboard to display the following message: "Drink Coca-Cola—It Makes You Fart."²⁰

The Billboard Liberation Front (BLF) has itself been around since 1977, and in that time has developed a methodical approach to its art. Terming their objects "clients," BLF provides pro bono billboard alteration services. Consider one example of its work. In the wake of the Exxon Valdez disaster, BLF altered a billboard that read "Hits Happen. New X-100" to read "Shit Happens—New Exxon."²¹ More recently, the group pilloried one telecommunications giant for its collaboration with the government. After BLF was finished with it, one AT&T billboard read "AT&T Works in More Places Like NSA Headquarters."²² BLF argues (tongue-in-cheek, no doubt) that their billboard alteration is actually billboard "improvement," which is not illegal but "invoiceable." By that they mean that they bill their corporate "clients" for their work. The art of BLF is not vandalism in its true sense—the group makes the point that they don't damage the billboard itself. The law currently takes no account of such distinctions, and makes BLF potentially liable for trespass and vandalism. But theirs is a particular type of art-speech that interferes with one particular message, substituting another. Another practitioner of billboard alteration describes the goals of the art: to "throw a well aimed spanner into the media's gears, bring the image factor to a shuddering halt . . . [working] to unmask the real corporate activity behind the glamorous image, and to assault the billboard itself, to question its given function . . ."²³

Although their methods differ from those of BLF, "shopdropping" and "droplifting" are related phenomena. Like the BLF, shopdroppers and droplifters jam and reformulate cultural signals and messages. They are reverse shoplifters. Instead of removing an object from a store, they add to its shelves. Shopdroppers have made grocery stores their main target. They physically alter canned goods and similar merchandise. Shopdroppers leave the bar codes



Courtesy of Ryan Watkins-Hughes

¹⁸ CULTURE JAMMING—BETTER LIVING THROUGH ART (dvd).

¹⁹ *Id.* Thus, the message "STOP HATE."

²⁰ *Culture Jamming: Hacking, Slashing and Sniping in the Empire of Signs*, www.levity.com/markdery/culturjam.html.

²¹ *Id.*

²² A picture of the billboard is visible on BLF's website. The former billboard read "AT&T Works in More Places Like CHILONDOSCOW." See <http://www.billboardliberation.com/HQ.html>.

²³ *Smashing the Image Factory: A Complete Manual of Billboard Subversion & Destruction*, <http://www.urban75.com/Action/factory.html>.

and certain basic descriptions on the product, but alter everything else. In this manner, a customer can take the altered can of peas home. But instead of seeing the “Green Giant,” or the label “Goya Beans,” the customer leaves the store with something different altogether. Preprinted labels featuring landscape scenes or abstract designs replace the normal commercial message. The new labels are true works of art. Shopdroppers have done for canned goods what the Billboard Liberation Front and others have done for the street sign.

Ryan Watkins-Hughes, a practitioner of shopdropping, describes what it is all about:

Shopdropping strives to take back a share of the visual space we encounter on a daily basis. Similar to the way street art stakes a claim to public space for self expression . . . shopdropping . . . subverts commercial space for artistic use in an attempt to disrupt the mundane commercial process with a purely artistic moment. . . . The vibrant individuality of each image is a stark contrast to the repetitive, functional, package design that is replaced. Shopdropping gives voice to the pervasive disillusionment from our increasingly commercial society. A voice that is, paradoxically, made possible only by commercial technological advancements.²⁴

Droplifters also surreptitiously add merchandise to stores. They primarily target the large record store. Disseminating droplifting instructions over the web, droplifters encourage citizens to burn alternative music (which they make available on their website) onto a CD, print out a CD label, and then infiltrate any one of the many large, corporate music stores and slip the CD into record store bins.²⁵ What do droplifters aim to achieve? The choice of the large record store—usually one of the global chains such as Virgin or Tower—is not inadvertent. Droplifters add their own music to the ranks of artists sponsored by media conglomerates. Those corporations often own the rights to reproduce media and enforce their copyright restrictions ruthlessly. Because these companies have begun to sue, or seek criminal prosecution of, persons responsible for online music sharing systems (like Napster), droplifting music represents a new way to evade the music giants. The medium “calls into question the sorry state of the Music Industry Conglomerates, who determine the kinds of sound art that can be created by threatening legal actions and outdated interpretations of law the only effect of which is to stifle free expression and criticism in mass media forms . . . [the] distribution of a limited selection of cultural material by dominant corporate music retail giants,” and to stifle new voices, especially dissenting or critical ones.”²⁶

As culture jamming devices, shopdropping and droplifting follow in the tradition of groups such as Barbie Liberation Organization (BLO). That group achieved notoriety during the 1980s when they switched the computer chips in Barbie and G.I. Joe dolls. Following the BLO prank, children opened male G.I. Joe dolls hear them exclaim presumably-feminine thoughts

²⁴ www.shopdropping.net.

²⁵ DROPLIFT GUIDE, <http://www.droplift.org/guide.html>.

²⁶ *Id.*

such as “let’s plan our dream wedding,” and vice versa.²⁷ These groups switch, obstruct, and reformulate messages that our media culture disseminates to the masses. They practice the art of the *detournement*—as developed by the avant-garde artist group the Situationists, which was “committed to detouring the pre-existing political and commercial rhetorics in an effort to subvert and reclaim them.”²⁸

Billboard “liberation” and shopdroppers are the best examples among this group of “culture jamming” trespassory artists. Described by one author as a movement aimed against the “advertising-saturated corporate-ruled consumer culture,” culture jamming takes a number of forms, most of which are designed to twist and reformulate the pro-consumption corporate-based messages with which individuals are regularly bombarded.²⁹ Culture jammers like the BLF engage in so-called liberation art—freeing individuals to reject consumerism, and forge their own reality rather than to accept it in soundbytes from the media. Jammers provide a sort of “emancipator knowledge,” by identifying and distorting “hidden sources of oppression in individual lives and distortion of social relations among people.”³⁰ They seek to incite authenticity.³¹ Their technique—the reorientation and reinterpretation of visual symbols—is particularly effective because of the increasing centrality of visual culture in everyday life.³² One commentator has described these efforts as “semiotic Robin Hoodism.”³³ Another culture jammer articulates his vision of trespassory art in the cause of cultural liberation as the “symbolic obliteration of a one-way information pipeline that only transmits, never receives. It is an act of sympathetic magic performed in the name of all who are obliged to peer at the world through peepholes owned by multinational conglomerates for whom the profit margin is the bottom line.”³⁴



‘Crosswalk’ by Thundercut.com

Of course, those billboard liberation artists represent merely one species in the genus of

²⁷ Ian Urbina, *Anarchists in the Aisles*, NY TIMES, Dec. 24, 2007; *see also* <http://sniggle.net/barbie.php>. The BLO reprogrammed Barbie to say such things as “Eat Lead, Cobra.”

²⁸ Christine Harold, *Pranking Rhetoric: “Culture Jamming” as Media Activism*, CRITICAL STUDIES IN MEDIA COMMUNICATION, Vol. 21, No. 3, Sept. 2004, p. 192.

²⁹ Jennifer A. Sandlin, *Popular Culture, Culture Resistance, and Anticonsumption Activism: An Exploration of Culture Jamming As Critical Adult Education*, POPULAR CULTURE AND ENTERTAINMENT MEDIA,

³⁰ David Darts, *Visual Culture Jam: Art, Pedagogy, and Creative Resistance*, STUDIES IN ART EDUCATION, 2004, 45(4), 316.

³¹ *Id.* at 79.

³² Darts, *supra* note 30, at 315.

³³ *Id.* at 321 (citing N. Klein, NO LOGO. TAKING AIM AT THE BRAND BULLIES, 2000, p. 280).

³⁴ www.levity.com/markdery/culturjam.html.

urban, trespassory artists. Other groups employ similar techniques—alteration of billboard or other public structures—to achieve different, or at least, more abstract ends. Consider the group “Urban Blooz.” An art project that started in 2003, predominantly in Europe, Urban Blooz reclaims commercial advertising space on billboards. The message it recodes, however, is decidedly ambiguous and abstract. Rather than twisting a corporate message in favor of a punchy countercultural slogan, it attempts to recreate the view a bystander would have had the billboard never existed. For example, in lieu of a billboard for the French hamburger chain Quick (France’s indigenous version of McDonald’s) that stands in front of a 100 year old oak tree along a suburban road in southeastern France, Urban Blooz attempts to eliminate the billboard altogether. This is accomplished by pasting over the billboard a photograph of the portion of the tree that the billboard actually covers. Is the stunt a frontal assault on commercialism as a whole—a micro-abnegation of commercial culture—a message of disapproval of the particular corporate message that is wiped out, or the mere expression of an aesthetic preference?

Urban Blooz Project 2003



When the BLF obliterates an advertisement in favor of a counter-corporate slogan, the message is susceptible to only one meaning. BLF supplies that meaning. The work of Urban Blooz is by contrast non-propositional. The reworked billboard is purely creative insofar as it invites (but does not force) the viewer to ascribe meaning to it.



'Better Living Through Chemistry 1990,' courtesy of Ron English

The work of the BLF and other billboard-alteration groups differs from the droplifters. The former alters whereas the latter generally only add. From a legal perspective, however, they both engage in trespass. Although record and grocery stores generally open themselves to the general public, they decidedly do not welcome interference with their product line. In addition to the trespass to the store owner's real property, altering canned goods likely constitutes trespass to chattels, which creates liability for the wrongful interference with the personal property of another.³⁵ Shopdropping also invites regulatory sanction. By obscuring all but the barcode on a can of peaches or garbanzo beans, shopdroppers eliminate other information that state and federal agencies may or may not mandate that companies provide—such as health warnings, identification of the origin of the food, etc.³⁶ Finally, like the BLO, shopdroppers potentially run the risk of liability in connection with the unapproved alteration of manufacturers copyright and trademark rights in their products.

Not surprisingly, BLF and the shopdroppers/droplifters emphasize a common goal—don't get caught.

C) Graffiti and Laser Graffiti

Laser graffiti is a new phenomenon. But it is a new form of an ancient art with a deep (and controversial) history. From the caves in Lascaux, France to Roman ruins in Ephesus, Pompeii and elsewhere, to the great Buddha of Bamiyan, humanity has continuously sought to express itself through markings and inscriptions on natural and man-made features. In the United States, graffiti became particularly prominent in the 1970s and 1980s when hip-hop and rap music, and the proliferation of gangs in American cities, caused storefronts, subway cars and



Courtesy of Mike Epstein

Painted Freight Car, source unknown



³⁵ See generally PROSSER AND KEETON ON THE LAW OF TORTS 85–88 (Keeton, 5th ed. 1984).

³⁶ See Urbina, *supra* note 27.

alleys to suffer a scourge of spray-can graffiti. Graffiti can be art. It can also be a form of “tagging,” a marker denoting territorial control or identity.³⁷ Although graffiti still plagues certain urban areas, the art has been mainstreamed to a large degree. Graffiti artists congregate in specially designated outdoor areas, and now display their work in art galleries.³⁸



Courtesy of Evan Roth, evan-roth.com

Modern technology has altered the art of graffiti radically. Laser graffiti is perhaps its latest iteration. Laser graffiti is a high tech version of its despised cousin that has remedied the most objective element of graffiti—its permanence. Spray paint is difficult to remove and is time consuming to paint over. The concept of laser graffiti is simple. The art operates much like the traditional family slideshow, but permits the practitioner considerable artistic flexibility. By

³⁷ See THE WORDS: A GRAFFITI GLOSSARY, <http://www.graffiti.org/faq/graffiti.glossary.html>.

³⁸ See Suzanne Daley, *Paris Journal; Those Fickle Aesthetes! It's Time to Erase Graffiti*, N.Y. TIMES, Mar. 6, 2000, A4 (“Ten years ago, France debated the beauty of graffiti, with some of its most prominent politicians defending graffiti writers as artists of the pop culture. Such was the love affair with street art that exhibits sprang up around the country. One Paris museum even displayed a subway car covered with graffiti, along with videos of young spray painters explaining just how they do it.”).

connecting a laptop to a digital image projector, which the artists use to capture the trail of the laser pointer and to project it, the artist can point the laser pointer directly on the object where the image will be displayed and draw.³⁹ But like an Etch-A-Sketch, the artist can erase a message, then produce another. The technique effectively replicates traditional graffiti. And like traditional graffiti, it can be done anywhere and everywhere. Unlike traditional graffiti, however, it can be done on a massive scale. By altering the distance between the projector and the surface towards which the image is directed, the artist can create enormous images. For example, graffiti artists in Rotterdam have produced laser graffiti on the sides of buildings visible at great distances.⁴⁰

The legal issues are somewhat novel. First, does laser graffiti constitute a trespass? If not, is it a nuisance? Detractors might argue that artists commit a trespass by shining a laser beam at a building and projecting light onto it. Laser pointers are potentially dangerous for the eyes, while the projector light threatens to disturb and harass occupants. The practice raises interesting speech issues. If laser graffiti constitutes neither a trespass nor a nuisance, can a building be made to speak? That is to say, should the owner of the building have a right not to be associated with the speech or art displayed on his or her property? What result were graffiti artists to broadcast “End War!” on the side of the Pentagon?

D) *ImprovEverywhere*

ImprovEverywhere is an improvisational theatre group whose self-proclaimed mission is to “cause scenes.”⁴¹ Founded by improv comic Charlie Todd, ImprovEverywhere stages “missions” (or “stunts”) whose aim seems to be to raise eyebrows. The group’s missions have made national news in recent years. ImprovEverywhere organized the pantless ride on the subways of New York City. It also made headlines when it stationed a bathroom attendant in the lavatory of a mid-town New York City McDonalds, an unexpected presence which flummoxed guests with comedic results.

Other stunts are less overtly funny, but rather appear merely intended to confuse and or annoy. For example, the group organized roughly eighty participants (termed “agents”) who invaded the chain electronics store Best Buy. Each agent wore a blue shirt and khaki pants (similar to the uniforms of Best Buy employees). The agents did not purport to impersonate employees per se, but merely stood quietly or milled around the store to observe the reaction of customers and management.



Courtesy of ImprovEverywhere.com

³⁹ For instructions in creating laser graffiti, see <http://muonics.net/blog/index.php?postId=15>.

⁴⁰ *Id.* (showing picture of message broadcast on large building visible across a river from at least one mile away).

⁴¹ See <http://improveverywhere.com>.

Management did take notice, and a police encounter resulted, though none of the group was apparently arrested. More recently, in conjunction with NBC, the group showed up at a California Little League game along with cheering fans, a jumbotron, and a Goodyear blimp...just to create a scene. They also assembled 700 agents along the Brooklyn Bridge with cameras to create a “wave of light” that cascaded across the East River as each agent took a picture in timed succession.

The “missions” are hard to describe. The group has no self-described political or countercultural message. ImprovEverywhere’s stunts may be funny or serious, or just weird. The desire to reclaim public space united ImprovEverywhere’s agenda.⁴² According to Todd, “[i]f giant corporations can slap ads all over town, we should be able to blanket the city with comedy.”⁴³ Although the group’s founder maintains that he focuses on comedy rather than the culture jam, ImprovEverywhere’s “missions” frequently have that effect.⁴⁴

Particularly notable is their 2007 mission in Grand Central Station in New York City. Gathering two hundred agents, they entered the train station with one objective—to freeze in place for five minutes. With no direction from the group’s leadership, agents froze in various positions: consulting a map, tying a shoelace, holding hands, kissing, eating, looking at the clock. Predictably, the reactions of passersby varied. Some did not seem to notice. Others stared, took pictures, or tried to goad the frozen agents into moving. One employee driving a maintenance cart found his path obstructed, and appeared to call for backup. However, the stunt ended before anyone came to his aid. Viewing the mission from the videotape ImprovEverywhere shot and posted on its website is an eerie experience. Two hundred frozen objects below the bejeweled ceiling of Grand Central Station with scores of busy New Yorkers moving past creates a moving canvass of sorts. The stunt created an enchanting agglomeration of movement and stillness—a high-tech version of the beauty and energy of a Kandinsky painting at the expense of the New York Metropolitan Transit Authority.



**Grand Central Station,
ImprovEverywhere.com**

This stunt raises interesting questions about art and property, and presents a yet another form of trespassory art. Unlike the group’s missions in McDonalds and Best Buy—private spaces where owners can have unwanted visitors removed—Grand Central Station is effectively a public space. Thus, its owners cannot exclude undesirable guests as easily. Of course, were a person to chain him or herself to a train, the city and the railroad would have recourse to remove, arrest and

⁴² Dan Avery, *Street Fighters*, TIME OUT NEW YORK, available at <http://www.timeout.com/newyork/articles/museums-culture/11056/street-fighters>.

⁴³ *Id.*

⁴⁴ See Adam M. Bright, *Agent Provocateur*, GOOD, available at http://www.goodmagazine.com/section/Portraits/Agent_Provocateur.

detain the person for disorderly conduct. ImprovEverywhere's stunts are certainly not welcome at Grand Central. But the group's use of the terminal is not particularly inconsistent with the functioning of the train station. Travelers frequently stop to look at maps, talk on their mobile phones, or just people-watch. In other words, the stunt arguably caused no harm. Does the use become trespassory or impermissible where the loitering is organized and deliberate? A reasonable, content-neutral speech regulation⁴⁵ at the terminal prohibiting individuals from obstructing movement might pass constitutional muster under the existing free-speech analysis. However, such approach would also threaten to interfere with creative and minimally obstructive performance by groups such as ImprovEverywhere.

E) *Parkour*

Sonia Katyal, in an innovative and perceptive article, addressed culture jamming in her critique of intellectual property law.⁴⁶ Katyal describes the culture jammer's method: to "introduce noise into the signal as it passes from transmitter to receiver, encouraging idiosyncratic, unintended interpretations."⁴⁷ The cultural interference Katyal terms "semiotic disobedience" converts "a private act of criminal rebellion into a publicly declarative act of consumer rehabilitation."⁴⁸ Like the BLF's transformation of a McDonald's advertisement into a pithy retort mocking the fast-food giant, these practitioners of trespassory art produce messages that can be easily be understood by onlookers. The message is direct and simple; the speaker gets his or her point across.

But not all trespassory art effects a culture jam. As ImprovEverywhere's missions suggest, trespassory art can be decidedly abstract or ambiguous. The meaning of the group's stunt in Grand Central Station may have been beautiful, intriguing, or just plain odd (depending on who you ask). But any onlooker would agree that it lacked an identifiable political message. Like a Cezanne still-life, trespassory art can represent art for art's own sake, with no hidden or overt meanings. Indeed, possibly the most socially valuable forms of trespassory art are those that avoid the political in favor of the overtly artistic.

Like ImprovEverywhere, but to an even greater degree, our final example falls into this category of abstract trespassory art. It is the worldwide phenomenon known as "parkour," or "free

⁴⁵ As will be discussed later in the article, Grand Central Terminal might qualify as a public forum (areas such as parks or sidewalks which have historically been open to free speech) or a limited public forum (a government-owned area that the government has open for speech purposes) because of open access. However, because of safety concerns and insofar as the city has previously restricted speech activities at the station, it might also be considered a non-public forum in which case speech restrictions are subject to less exacting scrutiny.

⁴⁶ Katyal, *supra* note 2, at 489.

⁴⁷ *Id.* at 511.

⁴⁸ *Id.* at 520 (citing *Vandalism is Art*, *ADBUSTERS MAG.*, Spring 2000, at 43 (based on a philosophical essay by Andrew Stillman)).

running.”⁴⁹ Parkour resembles the French word for “obstacle course.”⁵⁰ Its followers also describe it as “l’art du déplacement” (art of displacement). The characterization is apt. Practitioners of parkour—who call themselves as “traceurs”—aim to overcome obstacles quickly and efficiently using the human body. What may look to some as an adult attempting to relive the glory days of his or her youth at the jungle gym—as a traceur leaps from object to object, surmounting concrete barriers in an effort to move smoothly from point A to point B—is in reality something much more sophisticated.

Parkour was born in the Parisian suburb of Lisless by David Belle, with the help of his childhood friend Sebastian Foucan. Foucan developed a related genre, known as “free running.”⁵¹ Parkour and free running are frequently described as “extreme sports” for they place participants at risk of grave injury. But for those who practice each discipline, they are more like a methodology, a way of life, or a “grueling meditative pursuit.”⁵² Parkour and free-running utilize a series of defined moves and jumps, mastery of which contributes to the achievement of a traceur’s goal—the efficient and unthinking surmounting



Wikipedia

of physical obstacles. Traceurs train relentlessly to master the series of moves, link them up into a seamless flow, and become “sufficiently fluent so that he can cross any terrain in flight without compromise.”⁵³ As such, parkour is an expression of utilitarianism: achieving an objective in the most direct, effortless way. Maximum output for minimal input.

Parkour and free running are disciplines that emphasize a relationship with the site. For traceurs, each motion—there is an identifiable vocabulary for parkour’s major moves—represents “a physical recodification of space, thereby allowing otherwise disenfranchised expression.”⁵⁴ The way traceurs overcome obstacles with efficiency and determination evokes feelings in the actor and the observer both. Parkour’s messages, unlike most speech, are non- propositional.⁵⁵

But they signify a defiance of existing boundaries and space. Consider, for example, the free-running exhibition Foucan and his colleagues performed in London for the BBC documentary *Jump London*. The documentary illustrated a difference between free-running and parkour, which emphasizes efficiency to a lesser degree in favor of reconceptualizing physical

⁴⁹ Parkour and free running are different disciplines, but share many similarities. For this reason, and because they pose similar questions about art and trespass, then will be dealt with together.

⁵⁰ See <http://www.americanparkour.com/content/view/10/27/>.

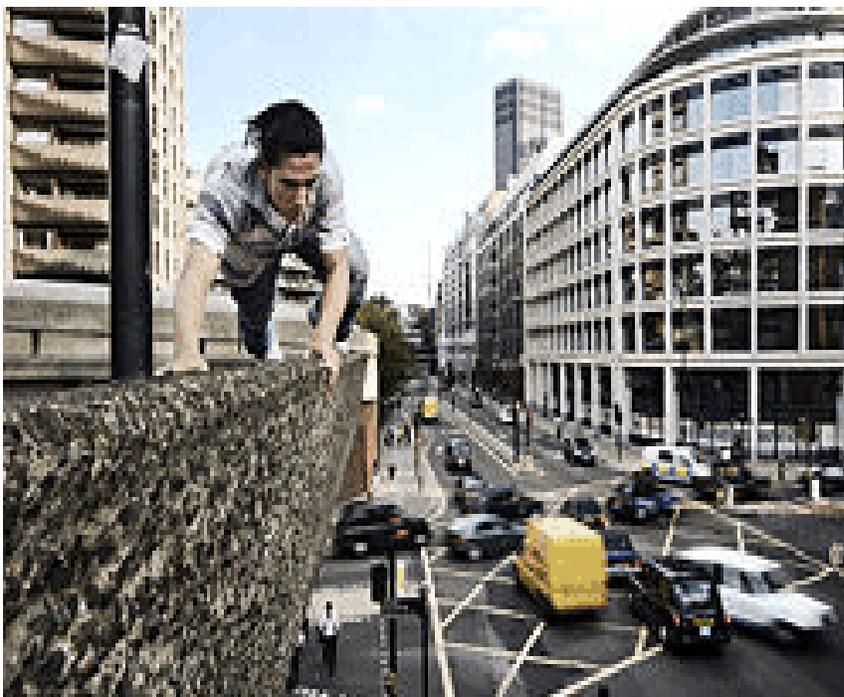
⁵¹ Alec Wilkinson, *No Obstacles*, NEW YORKER, Apr. 16, 2007.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ George T. Coulson, *This is Parkour! First Amendment Protection of Non-Propositional Expression with Property Implications* (2007) (unpublished manuscript on file with the authors).

⁵⁵ See generally RANDALL BEZANSON, ART AND FREEDOM OF SPEECH (2009) (discussing the distinction between propositional and non-propositional expression in the artistic context).



'Crossings', copyright 2009 Jonathan Lucas, www.jonathanlucas.com

space.⁵⁶ Foucan performed a handstand on the handrail of an exterior balcony of the Royal Museum in London, four or five stories up. With the counsel of a professional stunt team he also performed a jump from the bridge of a British battleship moored in the Thames, and in separate video jumped across the widening gap of the retractable roof of Millennium Stadium in Cardiff. Foucan's moves do not epitomize efficiency—there is nothing inherently efficient about the handstand—but rather

emphasize the redefinition of space. Highlighting the distinction between parkour and free-running illustrates the expressive content in each. For the traceur, whether of parkour or free-running, what is important is the harmony the expression creates between the traceur and the object he or she seeks to overcome.

In this sense, parkour presents an application of site-specific art.⁵⁷ Site-specificity, as an idea, grew out of the minimalist movement of the 1950s and 1960s.⁵⁸ Minimalism sought to reduce art to its fundamental components—to illustrate what lay at its core. Minimalist art, like site-specific art and parkour, are each introspective in this way. Site-specificity accepts the proposition that “the meanings of utterances, actions and events are affected by their ‘local position,’ by the *situation* of which they are a part,” and that a work of art can be “defined in relation to its place and position.”⁵⁹ The most famous example of site-specific art was Richard Serra's *Tilted Arc*. A General Services Administration (GSA) commission, Serra designed the artwork, a lengthy sheet of warped iron for a particular location: Federal Plaza, a popular lunch spot for employees working in downtown New York City. The complaints about the sculpture, which bisected the plaza, grew so vociferous that the GSA decided to remove it. That decision spawned a lengthy court battle (which the GSA eventually won), and landmark legislation protecting the rights of artists in the integrity of their work.⁶⁰

⁵⁶ *Id.* at 13.

⁵⁷ Site specificity is, we argue, important to each of the examples of trespassory art we describe.

⁵⁸ See HARRIET SENIE, *THE TILTED ARC CONTROVERSY: A DANGEROUS PRECEDENT?* 76 (2002).

⁵⁹ NICK KAYE, *SITE-SPECIFIC ART: PERFORMANCE, PLACE AND DOCUMENTATION 1* (2000).

⁶⁰ The United States had not until this time protected so-called “moral rights” of artists, long

Richard Serra argued that the art was inseparable from its location. When confronting *Tilted Arc*, Serra argued, “the viewer becomes aware of himself, his environment, and his movement through the plaza.”⁶¹ Serra designed the work to enhance the plaza, just as the plaza enhanced the meaning of the work.⁶² Site specificity thus creates a two part dialogue linking the art with the surroundings and the surroundings with the art: the two to be inseparable.⁶³ Altering the location simultaneously changes the meaning of the art and of the space.

It comes as no surprise, then, that parkour speaks particularly loudly in the environments of its birth—the Parisian suburbs. In the poorer areas of the suburban *banlieues* of the French capital, where urban planners build apartment complexes into concrete jungles, parkour may have special meaning. Practicing in this environment, the parkour traceur “rejects the concepts and constraints on life that architects and urban planners have put into place, and in so doing transforms space from an office plaza, or a park, into a canvas for expressive activity.”⁶⁴ The essence of parkour and free running is, in the words of Foucan, “*il y a toujours un chemin pour arriver à . . .*” (there is always a path to arrive at . . .).⁶⁵ Foucan adds that “*Le parkour est un moyen de combattre, de combattre la peur. Et, après, on peut le retranscrire dans la vie*” (Parkour is a means of combating, of combating fear. And, after, one can apply that to life”).

The aesthetic message of parkour may be difficult to grasp. The exercise of autonomy in parkour and the expressive character of its component movement, may be apparent to the practitioner, but difficult for the observer to detect. Watching any of the innumerable parkour demonstrations available on YouTube or the documentaries on the sport, however, provides some insight in to the power of the art form. For example, one critic commented on Foucan’s free running exhibition in London, in which he performed on some of the capital’s most venerated buildings. Foucan’s performance at the Royal Albert Hall, he argued, “corrupted” the building’s original use.⁶⁶ The performance was site specific in this way. Accordingly, the less well suited a particular location is to parkour or free running, the more powerful the venue as a platform for expression. The incongruity of parkour’s presence in a location provides its expressive power. Parkour emphasizes freedom, and expresses the belief that “[n]o obstacle, no barrier, no restraint

recognized in Europe. After the Serra controversy, which began in the mid-1980s, Congress passed the Visual Artists Rights Act (VARA), which gave artists certain rights in the integrity of their work. 17 U.S.C. § 106A (2006).

⁶¹ Hoffman, *Law for Art’s Sake in the Public Realm*, in *ART AND THE PUBLIC SPHERE* 116 (W.J.T. Mitchell, ed.)

⁶² SENIE, *supra* note 58, at 79.

⁶³ See *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89 (D. Mass. 2003) (noting that the theory of site-specific art holds that “because the location defines the art, site-specific sculpture is destroyed if it is moved from the site” and finding that because the location of the sculpture was an essential element of its message, removal would constitute alteration within the meaning of the Visual Artists Rights Act (VARA)). *Id.* at 95.

⁶⁴ *Id.*

⁶⁵ *JUMP LONDON* (Channel Four, UK) (2003).

⁶⁶ *Id.* See Coulson, *supra* note 54.

can stop the traceur; they continue moving forward in spite of, and in harmony with these.”⁶⁷ According to one North American practitioner of parkour, parkour is “a means of reclaiming what it means to be a human being. It teaches us to move using the natural methods that we should have learned from infancy. It teaches us to touch the world and interact with it, instead of being sheltered by it.”⁶⁸

Cities and towns in the United States are only now beginning to ban parkour-type activities along with skateboarding for public spaces, but parkour and free-running have not gone unnoticed on the bigscreen.⁶⁹ Foucan starred in the opening minutes of the latest James Bond film, *Casino Royale*, as a “bad guy” who uses parkour/free-running to escape from a chasing Daniel Craig. The French Film director Luc Besson cast Belle in his 2004 film *Banlieue 13*. A 2009 film, entitled *Parkour*, will tell the tale of an undercover New York police officer who infiltrates the world of parkour to catch a group of bank robbers.

Because of the ease by which directors can integrate it into any one of the multi-million dollar action movies Hollywood produces each summer, parkour’s appeal on the big screen is undeniable. The difficulty of parkour from a legal perspective, by contrast, is its abstraction. Does parkour merit protection under the First Amendment or otherwise, where its expressive qualities are so abstract? If parkour is about efficiency and free-running, about the recodification of space, does a Foucan *abre droit* (handstand) provide different meaning from a Foucan *saut* (jump)? Like the Rothko painting, artistic expression can be difficult to describe, but it still retains its expressive content.

'Shell Jump' by Bomb Dog, Jonathan Lucas



'Mesh Crawl' by Bomb Dog, Jonathan Lucas



⁶⁷ See <http://www.americanparkour.com/content/view/10/27/>.

⁶⁸ [Two Theories on Parkour Philosophy](#). PARKOUR NORTH AMERICA (Sept. 7, 2007).

⁶⁹ Wilkinson, *supra* note 51.

“The traceur rejects the concepts and constraints on life that architects and urban planners have put into place, and in so doing transforms space from an office plaza, or a park, into a canvas for expressive activity.”⁷⁰ As the genre thus emphasizes the physical recodification of space, and rejects property limitations, trespass is closely intertwined with parkour. For the traceur, how better way to achieve these objectives than by rejecting the landowner’s right to exclusive possession of land?

One may overemphasize the importance of site specificity in parkour, however. The importance of space and site in the traceur’s art is undeniable. As the performance at Royal Albert Hall and elsewhere reminds us, that message differs as the parkour artist performs in public vs. private space, etc. But are these differences significant? On the one hand, yes. Viewers appreciate an entirely different aesthetic sensibility when observing acrobatics and other parkour/free running moves performed on Shakespeare’s Globe theater than in an ordinary public park. Because of the Globe’s unique identity, a place where one would not expect a person to be found leaping from the rafters, the traceur sparks a two-way conversation about space, site and use he or she cannot replicate in the park setting. But as traceurs seek our new spaces in which to perform, and as those efforts intrude into protected public or even private spaces, how do we determine when the value of the artistic message prevails over property owner’s interest in avoiding the intrusion? The limitations of site specificity provide some insight. Consider the *Winged Victory*. This massive sculpture, which now sits triumphantly at the top of a long staircase near the entrance to the Louvre, was originally designed for a specific site, probably a Roman temple. Is the artistic message distorted? Probably, but how do we measure that distortion and is it significant? These questions have received much scholarly attention in the disputes over the Elgin Marbles and other works of art of unique cultural importance. No clear answers present themselves.

We return to a concrete example, to Sebastian Foucan and *Jump London*. Recall that his free-running on Royal Albert Hall was expressive for corrupting the original use of the building, and derived artistic merit from that message. But Foucan and his crew first received permission from the City of London. Determining how the presence of consent altered the expression is tricky. One can safely conclude however, that the message changed. Instead of “I reject the limitations of this space,” Foucan expressed something closer to “With your consent, I reject some of the limitations of this space.” Foucan therefore effectively conveyed a message despite having obeyed existing property and land-use regulations. That episode demonstrates that removing the trespassory element from parkour/free running or other genres does not strip them entirely of artistic content.

In summary, as this article weighs the value of trespassory art and how the legal system should accommodate it, the reader should bear in mind the importance and limitations of site-specificity. Trespass lies at the core of the art forms we have discussed. These artists engage in a trespass in much, if not all, of their work. But as to those works involving trespass, which we contend constitute valuable expressive conduct, property and tort law present a threat. Rules that entitle landowners to win damages for trespass absent proof of any harm, and to injunctive relief barring continuing and future artistic invasions, result, we contend, in the unjustified suppression

⁷⁰ Coulson, *supra* note 54, at 23.

of valuable artistic expression. We propose a new property/tort framework for dealing with the artistic trespass. It is to articulating that new framework to which we now turn.

III. Modifying the Common Law of Real Property and Tort—Trespass, Nuisance and Trespassory Art

In the following sections we outline our argument for modifying the common law of real property and tort to accommodate trespassory art. We propose that, in narrowly defined circumstances involving tangible invasions of private or public property that qualify as trespassory art, courts should apply a modified trespass analysis that borrows from the analytical framework of nuisance law. Our approach makes room for a valuable, evolving form of artistic expression. But, because it modifies the landowner's right to redress for injury to a nominal legal right absent a showing of actual harm, it does not produce significant negative externalities for property ownership. As prelude to this argument, and to place the modern law of trespass in appropriate context, a word about the origins of trespass is warranted.

A) Trespass and Nuisance in Historical Context

Before common law jurists developed the law of contract, they defined the rights and duties of individuals in respect of the most elemental and precious of commodities—land. Land was the source of sustenance and wealth in Britain. It formed the basis of the system of feudal tenures that developed following the imposition of Norman rule post-1066.

The common law developed various rules for descent and distribution of estates, and for adjudicating disputes among individuals with competing claims to land.⁷¹ A variety of remedies, termed forms of action, evolved to protect an individual's interest in personal property and in land. Trespass was among them. Early reports from the 14th century show that trespass was quasi-criminal in character. The remedy was available for a host of civil and criminal wrongs not amounting to felonies.⁷² Jurists viewed the disturbance of the right of possession of land as a breach of the peace.⁷³ From the plaintiff's perspective, trespass was particularly flexible. Unlike

⁷¹ See Joseph W. Singer, *Democratic Estates: Property Law in the Free and Democratic Society*, CORNELL L. REV. (2009), available at: <http://ssrn.com/abstract=1278136> (describing how the “estates” system bundled various property rights together).

⁷² Deiser, *Development of Principle in Trespass*, 27 YALE L. J. 220, 232 (1917).

⁷³ 8 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION 232 (Thomas ed., 2005) (“A trespass to land in early common law was perceived as a breach of the peace resulting from the unlawful entry onto the land of another.”). An action would be heard by the King's Bench where plaintiff would allege that the defendant had committed the wrong against him “vi et armis,” or “against the king's peace.” See also George Woodbine, *The Origins of the Action of Trespass, Part II*, 34 YALE L. J. 345, 358 (1925); FREDERICK G. KEMPIN, JR., HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 166 (1973).

the actions available to recover possession of land after an ouster, trespass was available to plaintiffs whose interest in possession had been disturbed but who remained in possession of the land.⁷⁴

During the 15th and 16th centuries, trespass became the “principal medium for disputing property rights.”⁷⁵ Control and possession of land was “central to social relations and the exercise of power in the middle ages.”⁷⁶ Because the law held “the property of every man so sacred, that no man can set foot upon his neighbor’s close without his leave,” the availability of a remedy for the unlicensed entry on land was an “ineradicable” component of the “deep structure of real property.”⁷⁷ The ability to exclude was deemed essential to any meaningful understanding of property rights.⁷⁸ A willingness to recognize the inviolability of property was a driving force in attracting settlers to the American colonies in the early days of our nation.⁷⁹ The robust protection for property rights in the common law thus easily found its way to American shores.

From its common law antecedents, trespass in American law developed defined characteristics. As a theoretical matter, these proved distinctive and easy to apply.⁸⁰ Trespass vindicates the interest in exclusive use and possession of real property. It provides a remedy for “direct” invasions of land. The right to redress arises not for the damage to the land, but for the interference with the landowner’s right to exclude.⁸¹ The common law viewed the violation of the right to exclude and to exclusive possession with sufficient alarm to award the successful

⁷⁴ SIR JOHN BAKER, VI THE OXFORD HISTORY OF THE LAWS OF ENGLAND 723 (2003).

⁷⁵ *Id.* at 720. Trespass by that time had splintered into three distinct actions: *vi et armis* (with force and arms) corresponding to trespass to the person; *de bonis asportatis* (taking of goods) corresponding to trespass to chattels; and, *quare clausum fregit* (breaching the close) corresponding to trespass to real property. KEMPIN, *supra* note 73, at 167.

⁷⁶ John Hudson, *Anglo-Norman Land Land and the Origins of Property*, in LAW AND GOVERNMENT IN MEDIEVAL ENGLAND AND NORMANDY 198 (George Garnett & John Hudson, eds. 1994).

⁷⁷ *Entick v. Carrington*, (1765), 2 Wils KB 275, at 291; KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 225 (4th ed. 2004) William Blackstone, described the property right as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2.

⁷⁸ Compare Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (describing right to exclude as *sine qua non* of property right) with Shyamkrishna Balanesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J. L. & PUB. POL’Y (2008) (suggesting that a property right means more than the right to exclude).

⁷⁹ JAMES ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 25 (2d ed. 1997); MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 288 (2d ed. 1981).

⁸⁰ As this article discusses *infra*, differentiating between facts giving rise to an action for trespass as opposed to

⁸¹ See, e.g., *Hadfield v. Oakland Co. Drain Comm’r.*, 422 N.W.2d 205 (Mich. 1988); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159 (Wis. 1997).

plaintiff damages without regard to actual injury.⁸² Because the law presumes damages from trespass, the plaintiff need only prove an intentional, unexcused intrusion.⁸³ Injunctive relief is available where the plaintiff can demonstrate a likelihood of future harm.⁸⁴ No showing of actual harm to the land is necessary.⁸⁵ One who enters the land of another may be liable even if he thinks the land is his own, or reasonably believes that he is otherwise privileged to enter.⁸⁶ Trespass is a harsh remedy, imposing liability without fault.⁸⁷ The modern trespass remedy is “colored by its past, and the idea that the peace of the community was put in danger by the trespasser’s conduct influenced the courts’ idea of the character of the tort.”⁸⁸ Its rigidity reflects the importance of land rights to the social and political order. In the aggrieved landowner’s entitlement to damages without proof of harm, however, we see a vestigial trait of trespass’ medieval past.⁸⁹

The cause of action for nuisance evolved alongside that of trespass, but in a different direction. Although Prosser has described nuisance as the most “impenetrable jungle” in the law, its basic distinctions are clear.⁹⁰ While trespass provides a remedy for direct invasions of land, nuisance is available for indirect entries. Trespass protects the right to exclude, nuisance protects the landowner’s right to use and enjoyment of the land. No physical invasion is necessary to

⁸² THOMPSON, *supra* note 73, at 235 (“The common law also assumed that . . . [trespass] resulted in damage to the property.”).

⁸³ *Burher v. Singh*, 28 A.D.3d 695, 698 (N.Y. App. Div. 2006) (“Furthermore, nominal damages are presumed from a trespass even where the owner has suffered no actual injury to his or her possessory interest.”); *Finlay v. Finlay*, 856 P.2d 183, 190 (Kan. App. 1993). Intention in the trespass context means what it does through the law of tort: the defendant need only intend to commit the act that leads to the trespass, or know that it is substantially certain to follow. She need not intend an unprivileged invasion.

⁸⁴ See REST 2D TORT § 163; *Brenner v. Heiler*, 91 N.E. 744, 745 (Ind. App. 1910) (“A threatened disturbance to an owner’s right of possession has been held to authorize an injunction.”).

⁸⁵ REST 2D TORT § 163, cmt. d (“The wrong for which a remedy is given under the rule stated in this Section consists of an interference with the possessor’s interest in excluding others from the land. Consequently, even a harmless entry or remaining, if intentional, is a trespass.”); *Polin v. Chung Cho*, 8 Cal. App. 3d 673 (2d Dist. 1970).

⁸⁶ REST 2D TORT § 164, cmt. a (“If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor.”); *Jordan v. Stallings*, 911 S.W.2d 653, 660 (Mo. Ct. App. S.D. 1995).

⁸⁷ See *Lloyd Corp., Ltd. V. Whiffen*, 773 P.2d 1294, 1311 (Or. 1989) (“[T]respass does not involve a weighing process; if an unprivileged intrusion invades the possessor’s protected interest in exclusive possession, strict liability for trespass results.”).

⁸⁸ *Martin v. Reynolds Metal Co.*, 342 P.2d 790, 796 (Or. 1959).

⁸⁹ For a brilliant and cogent discussion of the theoretical changes over time in the meaning of property and, inferentially, the nature of rights protected by trespass, see Singer, *supra* note 71.

⁹⁰ W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON TORTS, § 86 (5th ed. 1984).

maintain a nuisance action.⁹¹ Frequent examples of nuisances include the odor of neighboring slaughterhouses, or the dust from the operation of a cement plant.⁹² The critical distinction the common law drew between trespass and nuisance was that the trespassory invasion must be both tangible and visible. Incorporeal, invisible or otherwise intangible entries on land could not support an action in trespass.⁹³ An action for trespass would not lie for invasions of light, vibration or concussions of air from originating from adjacent land.

For our purposes, however, of particular importance is what courts do *not* do when addressing a trespass claim—they do not balance the plaintiff-landowner's use of the land against the defendant's.⁹⁴ Trespass's rigidity stands in marked contrast to nuisance. Courts decide nuisance claims by engaging in a complicated balancing of interests. Under this balancing approach, a nuisance is actionable where the defendant's conduct is the "legal cause of an invasion of another's interest in the private use and enjoyment of land" and "intentional and unreasonable."⁹⁵ The invasion must also be substantial.⁹⁶

The critical insight of nuisance is that the social utility of the defendant's conduct matters to the analysis. Courts inquire whether the harm the plaintiff suffers is "significant," whether the "particular use or enjoyment interfered with is well suited to the character of the locality," and whether the defendant's conduct is "suited to the character of that locality."⁹⁷ Where the injury (or inconvenience) to the plaintiff is slight and the value of defendant's conduct is significant, the court will refuse to impose damages or an injunction.⁹⁸ Accordingly, nuisance law aims to

⁹¹ See *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982) ("All intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass.").

⁹² See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (nuisance arising from operation of cement plant); *Conway v. Gampel*, 235 Mich. 511, 513 (MI. 1926) (noting that slaughterhouse in a residential neighborhood is a prima facie nuisance).

⁹³ See *Wilson*, 649 P. 2d at 924.

⁹⁴ See, e.g., *Davis v. Georgia-Pacific*, 251 Or 239, 243 (Or. 1968) ("[i]n a trespass case the social value of defendant's conduct, its efforts to prevent the harm and other circumstances that tend to justify an intrusion cannot be considered by the trier of the facts" in determining whether defendant's intrusion constitutes trespass). This is the general rule. We address in section C, *infra*, decisions in which courts have done the opposite.

⁹⁵ REST 2D TORTS § 822.

⁹⁶ Because the law does not concern itself with trifles, mere inconvenience to an adjoining landowner is not actionable in nuisance. See *Northwest Water Corp. v. Pennetta*, 479 P.2d 398 (Colo. App. 1970); REST 2D TORTS § 821F.

⁹⁷ *Id.*

⁹⁸ "Nuisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property." *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W. 2d 876, 881 (Mo. 1982). Where the interference is not unreasonable, there is no nuisance. See *Boyne v. Town of Glastonbury*, 955 A.2d 645, 655 (Conn. App. Ct. 2008) (finding that plaintiff failed on claim of private nuisance because he failed to present any evidence showing that town's storm drainage system constituted unreasonable interference with his land).

achieve a balance between competing uses for land that maximizes the land's productive use.

We have not attempted a comprehensive discussion of trespass or nuisance. But our abbreviated discussion demonstrates the critical distinctions between the two. The former developed in response to the need, apparent in feudal times, to protect the right to exclusive use and possession of land. Because land was at the heart of the system of government, strict rules ensured sociopolitical cohesion and continuity. As nuisance protects a right common law judges deemed less critical to the orderly functioning of society, they permitted a case-by-case balancing to determine the rights of competing claimants to the use of land.

B) A New Legal Framework for Trespassory Art—Reframing Trespass

In the pages that follow we address two causes of action, trespass and nuisance, in an artistic context. Recalling the earlier examples of what we term “trespassory art,” we address how these twin remedies should accommodate trespassory art. We attempt to demonstrate that the theoretical distinctions between trespass and nuisance outlined above, while rigid in theory, are not as neat in practice. Rather, courts have applied these remedies flexibly in response to the changing needs of society. These changes have been incremental in some cases, and fairly radical in others. We propose that courts modify the common law to accommodate another change. Trespassory art represents a type of expressive conduct that the current rules of property law and tort suppress unnecessarily. Trespassory art is valuable. Accordingly, we propose that the law of tort, and its remedies for the intentional intrusion on land, accommodate a limited privilege in the case of trespass for artistic purposes.

1) Why Trespassory Art?

Trespass imposes a form of strict liability for intentional intrusions on real property. However, courts have avoided imposing trespass liability in mechanical fashion in order to effectuate competing policy objectives. These courts have done so by means of a context-sensitive balancing approach resembling (explicitly or implicitly) nuisance. We argue that trespassory art warrants greater protection, and justifies importing the utility-balancing analysis of nuisance law to modify the strict liability elements of trespass.

Why does trespassory art call for this modification? The law now prevents a private citizen who wishes to express a political opinion from entering on private property, and most government property, from doing so. Why should trespassory art be treated differently?⁹⁹ An individual wishing to engage in political expression, to choose but one example, may generally do so with great effect from a number of locations—whether it be a street corner, a park, or the

⁹⁹ As discussed in a later part, we do not claim that analogous privilege claims could not be made for more cognitive speech acts. They could. But for reasons we outline later, we also believe that the nature of such speech claims and the criteria applicable to their adjudication will be sufficiently distinct to justify our not addressing them here. *See infra* Part V.

internet.¹⁰⁰ And the art, by contrast, constitutes an “individual act of liberty and free will” which deserves protection not only for the effect it has on the viewer, but for the importance of the expressive act for the artist and audience – especially the importance of the audience’s act of ascribing idiosyncratic meaning.¹⁰¹ Trespassory art, as we define it, differs from political speech, because it asserts a connection with a place.¹⁰² The examples of trespassory art we discuss above: (i) use the trespassory intrusion as a vehicle to convey meaning or (ii) employ the location in aid of the expression. Thus, unlike the political campaign sign or the painting meant to hang in a museum, trespassory artists present a special claim to access to real property for expressive purposes. Our proposal intends to accommodate this unique type of expression.

We argue that where art offers social value and connects with place, courts should modify their approach to trespassory art. The uniqueness of the artistic form of expression, the inability of the artist and landowner to bargain effectively, and the fundamental incompatibility of the art form with the type of private ordering a mechanical rule like trespass seeks to encourage, justify treating trespassory art as a special case. Trespass imposes per se liability—automatic entitlement to nominal damages with the prospect of injunctive relief. Because the virtues of the trespass remedy lie primarily in the action’s feudal past, we argue that the nuisance analysis furnishes the better analytical filter for addressing competing uses for land. The availability of automatic damages is a vestigial characteristic of the common law, one that should not prevail in the face of burgeoning avenues of expression.

Applying the remedies available for trespass—damages without proof of harm and injunctive relief—against an artist for whom the invasion is a critical element of the expression silences a range of unique expression. For the traceur, performing on the property of another imbues the act with a message of freedom and expresses the traceur’s ability to overcome all obstacles. Improv Everywhere’s mission in Grand Central Station put on a beautiful spectacle and conveyed a message of collective obstructionism by their defiance of social rules for behavior in public spaces. The expressiveness of the trespassory character of these examples—particularly parkour—can be abstract and elusive. But the movements are meaningful, either on the cognitive or non-cognitive level. As a legal matter, the emotive elements of art are

¹⁰⁰ This is, of course, not true in every case. See Lloyd, 773 P.2d at 1294.

¹⁰¹ BEZANSON, *supra* note 55.

¹⁰² We believe this generally to be the case. Of course, giving a speech on race relations will be more impactful in Birmingham, Alabama than in Fargo, North Dakota. The trespassory art we describe, however, takes site specificity beyond where most political speech does. Trespassory art uniquely incorporates not only site into the expression, but also the fact of the *trespass* to the site.

equally as important as its cognitive message.¹⁰³ As the Supreme Court has said about the First Amendment, the Constitution does not simply protect expressive conduct conveying a “particularized message,” but also expression such as the “painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”¹⁰⁴

We argue that a modification of the common law remedies available in trespass actions is necessary to accommodate this valuable art. Such a change is warranted for two reasons. First, as we have discussed above, trespassory art has independent artistic and expressive value.¹⁰⁵ The extant legal regime makes insufficient allowance for this type of art. Second, trespassory art fits into a larger class of expressive communication and conduct that seeks an outlet in the face of rules that regulate, or suppress it. The art this Article describes fits into what one commentator refers to as a “vastly underappreciated phenomenon that underlies the dynamic relationship between art and law” and that “shatter[s] the law’s presumed distinction between speaker and audience, between protected speech and unprotected conduct, and between the expressive functions of real and intellectual property.”¹⁰⁶

Much of this regulation is, of course, eminently sensible. Through its enumeration of three “fora” of public property for purposes of expression—public, limited public and non-public—the Supreme Court has attempted to balance society’s need for order in its public affairs with the freedom of expression guaranteed under the Constitution.¹⁰⁷ We, as a society, could not function if individuals could justify murder, battery and other crimes as protected First-Amendment expression.¹⁰⁸ The Court has accordingly voided government regulations when they suppress expression for an invalid purpose—based on its viewpoint or content, for example—or because the secondary effects of the speech cannot justify the restriction.¹⁰⁹

Under forum analysis, avenues for public, artistic expression are limited. Except for what

¹⁰³ See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (“[T]he emotive impact of speech on its audience is not a ‘secondary effect’ unrelated to the content of the expression itself.”).

¹⁰⁴ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

¹⁰⁵ See *supra* Part II (describing various examples of trespassory art and their expressive capacities).

¹⁰⁶ Katyal, *supra* note 2, at 569.

¹⁰⁷ See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 221 (S.D.N.Y. 2000) (noting that courts balance public interest in protecting speech when weighing constitutionality).

¹⁰⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence”).

¹⁰⁹ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (finding suppression of nude dancing not a violation of First Amendment because it was not directed at suppressing expression, but at public nudity); *Texas v. Johnson*, 491 U.S. 397 (1989) (reversing conviction of flag burner because criminal statute prohibiting flag desecration was directed at expression, and not content neutral); *City of Renton vs. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (finding that ordinance that prohibited adult entertainment within a certain distance from schools, churches, etc. was not designed to suppress expression, but to eliminate undesirable social effects of adult theaters).

the law considers to be traditional forums for public expression—sidewalks and parks—government has wide latitude to restrict speech when it can articulate a non-speech based reason for its actions,¹¹⁰ whether it be busking on a subway platform,¹¹¹ displaying art in federal buildings,¹¹² creating art on the sidewalk,¹¹³ or photographing hordes of nude models on city streets,¹¹⁴ artists constantly run up against government regulation of their expressive outlets. Trespassory art fits into this larger category of regulated expression.

With an awareness of the goal and expressive elements of trespassory art, critics might raise an obvious counter-argument: does the proposed modification, by eliminating the trespass, eliminate the expressive message that makes the art unique? We answer no. As we outline below, our proposal is not to eliminate the underlying tort or the trespass. The intentional, unprivileged invasion of the real property of another remains trespassory—whether done for artistic purposes, or for some other reason. We propose to alter the remedies available for the trespass, denying the landowner the right to certain relief where he or she suffers no harm from the artistic invasion. Accordingly, the trespassory character of the expression remains. We merely modify how landowners can respond to it.

Effecting an alteration to remedies for trespass on *private and public* property gives a voice to those who unsuccessfully seek to express their message in public.¹¹⁵ Expanding the outlets for meaningful artistic expression is a public good. Where that can be done without harm to property owners, which we argue it can, it should be so.¹¹⁶

2) Reframing Trespass for Art

We have identified *why* the law of real property and tort should accommodate trespassory art. We next address *how* courts should modify trespass to protect the art form.

Before our modified trespass analysis should apply, we contend, a court must determine that the trespassory art indeed qualifies as such. We view qualifying trespassory art as art that: (i)

¹¹⁰ See, e.g., *Sefick v. United States*, No. 98-C5301, 1999 WL 778588 (N.D. Ill. May 6, 1999) (upholding GSA decision not to display artwork featuring Monica Lewinsky in federal building because of disruption it would create).

¹¹¹ See *Jones v. City of Chicago*, No. 99 C 6082, 2000 WL 1139904 (N.D. Ill Aug. 10, 2000).

¹¹² See, e.g., *Claudio v. United States*, 836 F. Supp. 1230 (E.D.N.C. 1993) (finding that revocation of license of artist to display art in federal building did not violate First Amendment when art turned out to be portrait of nude woman undergoing abortion).

¹¹³ *People v. Bissinger*, 625 N.Y.S.2d 823 (NY City Crim. Ct. 1994).

¹¹⁴ *Tunick v. Safir*, No. 99 Civ. 5053(HB), 1999 WL 511852 (S.D.N.Y. July 19, 1999).

¹¹⁵ See, e.g., *Bissinger*, 625 N.Y.S. 2d 823.

¹¹⁶ If our analysis that increasing the contribution of artists to society can be accomplished without harming property owners, then the result is pareto-optimal. See *Specialty Tires of America, Inc. v. The CIT Group/Equipment Financing, Inc.*, 82 F. Supp.2d 434, 438 (W.D. Pa. 2000) (defining pareto-optimality as “an adjustment that makes some parties better off and none worse off than they were initially.”) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.5 (5th ed.1998)).

is expressive and, (ii) asserts a meaningful connection to place.¹¹⁷ Trespassory art that meets these criteria, we argue, merits consideration under a modified analytical framework. Having deemed the artistic invasion to be “qualifying” trespassory art, the court must then measure the harm the landowner suffers from the intrusion. Where “qualifying” trespassory art effects an invasion from which the landowner suffers no harm, or where such harm is *de minimis* (i.e., premised solely on the violation of the landowner’s exclusive right of possession) damages should not follow, nor should injunctive relief absent a showing of specific injury.

The first criterion of the initial qualification analysis may be easily satisfied. Most non-obscene art offers or evokes a message or furnishes some non-cognitive aesthetic of appreciable value. The second criterion is the critical variable. As an element of artistic expression, site-specificity provides a basis for trespassory art. The examples we discuss in the introduction occupy what Sonia Katyal terms “semiotic disobedience . . . spaces for political expression carved outside the boundaries of protected speech.”¹¹⁸ The expressive disobedience Katyal describes takes many forms. The law can and should make room for the narrow subset of these forms we identify—those that appropriate and recode signals with respect to real property. From an artistic perspective, the connection between the idea and the site justifies the intrusion. Art that asserts a connection with a particular place is unique. Site-specificity answers the question: “why this property?”

Site-specificity offers a principled basis for distinguishing trespassory art from the host of other communicative activities for which individuals might seek to access private property. Just as the threshold requirements for conduct to qualify as symbolic speech serve a gatekeeping role, so too does site-specificity constrain the availability of the modified trespass analysis.¹¹⁹ Site-specificity explains why “alternative avenues for communication,” such as parks or sidewalks, may indeed present no alternatives at all. We view our five examples of trespassory art as each asserting a claim to place.

The examples we have identified in Part II do not, of course, exhaust the range of artistic endeavors whose site specificity justify displacing an exclusionary legal rule. *People v. Bissinger* illustrates the point.¹²⁰ In *Bissinger*, a New York State court recognized the value of site specificity.¹²¹ The court reversed the conviction of a photographer for taking photographs of individuals at Times Square for money without a vendor license.¹²² Highlighting factors that suggested that defendant was, in fact, engaged in “performance art,” the court rejected the prosecution’s argument that taking pictures of individuals on the street was the equivalent of a

¹¹⁷ As we discuss *infra*, we propose that juries determine whether the challenged art constitutes qualifying trespassory art.

¹¹⁸ Katyal, *supra* note 2, at 510.

¹¹⁹ The Court has emphasized two factors in order for symbolic conduct to warrant protection: “An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

¹²⁰ 625 N.Y.S.2d 823 (NY City Crim. Ct. 1994).

¹²¹ *Id.*

¹²² *Id.* at 823

“shoe shine or sharpening shears.”¹²³ Rather, the defendant produced “‘festive’ and ‘joy[ous]’ figurative and literal ‘picture[s] of New York City for tourists and others, ‘in contrast to the cold, indifferent, rushing masses that often occupy our streets and heighten a visitor’s negative impression of our city.’”¹²⁴ Even though the prosecution argued that defendant was merely taking snapshots of people for money, the court concluded that it could not constitutionally apply the law to the vendor. Denying him street access at Times Square “effectively closes off the only method for defendant here to capture and communicate the idea he assertedly wishes to express—a performance and photographic memorialization, with street audience participation in a bustling street setting.”¹²⁵ No alternative sites were available because he “could not purchase the atmosphere of a particular Times Square area street corner at any price.”¹²⁶ The site specificity of the expression, in Bissinger’s case, made the expression worthy of First Amendment protection against attempts by New York authorities to regulate it. Our argument, though it has constitutional implications that we survey in Part IV, below, does not depend on the First Amendment.¹²⁷ The change in the common law this Article proposes finds justification in the comparatively inutile relief trespass offers for legally cognizable, but often illusory, injury.

The law, of course, should not facilitate all types of trespassory expression claimed to be artistic. Expression that does no more than deface or vandalize is generally not artistically expressive or socially valuable.¹²⁸ It may carry a cognitive message, but it does not aesthetically reframe or re-represent space, place, or object.¹²⁹ It is therefore not worth protecting as art from the blunt law of trespass. Graffiti as “tagging” seeks merely to erase a message, or to cover a message with another message.¹³⁰ The trespassory artist instead seeks to borrow “visual

¹²³ *Id.* at 824–25.

¹²⁴ *Id.* at 826.

¹²⁵ *Id.* at 826–27.

¹²⁶ *Id.*

¹²⁷ *See infra* Part IV.

¹²⁸ The line is fine, however. *See generally* Lior J. Strahilevitz, *The Right to Destroy*, 114 *YALE L. J.* 781 (2005) (describing how the act of destruction can be expressive). The distinction between vandalism and worthy trespassory art will be slippery. For example, an article appeared recently on how skateboarders, equipped with a “gas-powered pump, five-gallon buckets, shovels and a push broom” have taken over backyard pools left vacant across the country from the wave of home foreclosures. Jesse McKinley and Malia Wollan, *Skaters Jump In as Foreclosures Drain the Pool*, *N.Y. TIMES*, Dec. 29, 2008, A1. The skaters, the article recounts, risk trespass charges to play in the former icons of suburban success. Skateboarding is perhaps not artistic in the same way in which practitioners of parkour seek their own performances. But the line separating the two, or other such examples, may prove difficult to draw. The question, as we suggest, is for the jury.

¹²⁹ *See* BEZANSON, *supra* note 55.

¹³⁰ *See* Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 *DEPAUL LCA J. ART. & ENT. L.* 225, 226 (1995) (describing gang graffiti as one type of graffiti, and consisting of “primitive scrawls focusing on the gang name or symbol” intended to “mark territory, to insult other gangs, to warn away intruders...”).

legitimacy” from the message—whether it be a billboard or a can of vegetables—incorporating the message into a new message of the artist’s making.¹³¹ These are artists who trespass to beautify or alter harmlessly, whose work neither detracts from the commercial value or viability of an enterprise. This is art that turns a series of round haystacks in an empty field into a large cigarette (unlighted), art that turns the side of an otherwise ugly rail car into a futuristic landscape scene, art that transforms solitary cans of Green Giant® peas into a work of imagination that defies description, or laser graffiti that transforms a high-rise building into a message board.

Reorienting how courts deal with qualifying trespassory art does not require a complete turnabout from orthodoxy. Real property and tort law already intrude in various ways on the right of exclusive possession. And courts have long been in the business of reordering property rules.¹³² Courts have modified the law of trespass and nuisance as new public policy challenges have forced the law to adjust. The discussion that follows demonstrates that there is more room for our proposed modification than might at first appear.

We will first turn to limitations on the right to exclude that the common law already recognizes, and those new ones that courts have created. We rely in particular on these decisions for support. Second, we analogize our proposal with the fair-use defense to copyright infringement. Third, we address and respond to perceived objections from the law and economics movement. Finally, we discuss in greater depth elements of our proposed modification of trespass.

3) Property, Tort and the Flexibility of the Common Law

Earlier we discussed the development of the trespass remedy.¹³³ We explained why the common law provided, in the case of an offense to the right to exclude, an exceptional remedy in damages absent proof of harm. We contrasted trespass with nuisance, which empowers courts to perform a fact specific balancing of competing uses for land. The contrast between the two causes of action is stark. Trespass is generally unsparing. But these rules of trespass are not without exception. We turn first to the common-law exceptions to the otherwise “inviolable” right to exclude. These exceptions privilege uses that society has deemed valuable. Our discussion highlights the ways in which, over time, the common law has diluted the absolute nature of the right to exclude in favor of alternative uses for the use of land. The discussion highlights how the decisions have melded (if not totally obliterated) the distinctions between trespass and nuisance. The discussion demonstrates why we believe the common law and modern-day courts have created room for the change that we advance. It is no more adventuresome to shape the remedies to accommodate trespassory art than it was for courts to

¹³¹ Katyal, *supra* note 2, at 514–15 (citing NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 289 (1999)). Klein writes: “The most sophisticated culture jams are not stand-alone ad parodies but interceptions—counter-messages that hack into a corporation’s own method of communication to send a message starkly at odds with the one that was intended.” *Id.*

¹³² *See, e.g.*, *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (a case described *infra* in which the court reexamines trespass and nuisance).

¹³³ *See* text accompanying *supra* notes 71–89.

modify the law of trespass to meet the changing needs of commerce and society.¹³⁴ We thus attempt to fit the modification within these precedents.

i) Holes in the Armor—Implied Balancing in the Modern Restrictions on the Use of Land and the Right to Exclude

Courts have long conceived of property rights as original, fundamental and inviolable.¹³⁵ But as Justice Holmes recognized, and as every first-year law student knows, the property owner's "bundle of rights" is never complete and absolute.¹³⁶ Benjamin Franklin long ago recognized this truth when he commented that "[p]rivate [p]roperty. . . is a [c]reature of [s]ociety, and is subject to the [c]alls of that [s]ociety, whenever its [n]ecessities shall require it."¹³⁷

¹³⁴Hurtado v. California, 110 U.S. 516, 530 (1884) ("This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."); Caporaletti v. A-F Corp., 137 F. Supp. 14, 16 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957) ("It is the glory of the common law that it is not a rigid, immutable code. On the contrary, it is a vital, living force that endows with the breath of life a body of practical principles governing human rights and duties. These rules are subject to gradual modification and continuous adjustment to changing social and economic conditions and shifting needs of society. This characteristic is the life blood of the common law."); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.").

¹³⁵ See, e.g., CNL Resort Hotel, L.P. v. City of Doral, 991 So.2d 417 (Fla. App. 2008) ("Private property rights have long been viewed as sacrosanct and fundamentally immune from government interference."); Parham v. Justices of Inferior Court of Decatur County, 9 Ga. 341, 1851 WL 1437 (Ga. 1851) ("The sacredness of private property ought not to be confided to the uncertain virtue of those who govern."); I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 138 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land."); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 61–66 (1985) (describing Blackstone's view of property as "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

¹³⁶ Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) ("[All rights] in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.").

¹³⁷ Peter S. Menell, *The Property Rights Movements' Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 724 (2007) (citing BENJAMIN FRANKLIN, QUERIES AND REMARKS RESPECTING ALTERATIONS IN THE CONSTITUTION OF PENNSYLVANIA (1789), in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert H. Smyth ed., 1907)); see

Nuisance presents one obvious example of the truth of Franklin's maxim. The right to be free from a nuisance is, in fact, a property right.¹³⁸ It entitles the holder to limit the use of property of another. The principle, *sic utere tuo ut alienum non laedas* ("use your property so as not to damage another's") has a long history in domestic and international law.¹³⁹ Just as a landowner may be enjoined under the law of nuisance from diverting rainwater from her land onto that of another, the law imposes restrictions on the landowner's ability to exploit subsurface resources.¹⁴⁰ The property owner may not mine or otherwise disturb the earth so as to cause adjacent land to subside.¹⁴¹

Not only do nearby landowners have standing to limit a landowner's use of land, so do local political entities. Zoning may impose stringent limitations on the use of land—for health and safety reasons, but also for aesthetics and historical preservation.¹⁴² The government, without paying compensation, may zone or regulate nearly all of the economic value out of a parcel of property.¹⁴³ Other property rules such as the Rule Against Perpetuities, the prohibition on racially restrictive covenants, the doctrine of waste, present examples of ways in which the law, common law or otherwise, has limited the owner's rights to use his or her own land. These rules do not restrict the owner's use of her land for its own sake. They implement a perceived public good at the expense of individual property rights.

These restrictions extend to the greatest attribute of property ownership—the right to exclude.¹⁴⁴ As new conflicts develop over the use of natural resources, or between the demands of an evolving society and private landowners, the common law has often accommodated the

Singer, *supra* note 71.

¹³⁸ See *Thornburg v. Port of Portland*, 376 P.2d 100, 106–07 (Or. 1962) (“[A] landowner has a right to be free from unreasonable interference caused by noise . . .”).

¹³⁹ See, e.g., *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971).

¹⁴⁰ See *Raabe v. Messiah Evangelical Lutheran Church of Port Byron*, 615 N.E.2d 15, 19 (Ill. App. 1993) (noting that defendants' construction of parking lot, which caused flooding on adjacent property created continuing nuisance).

¹⁴¹ See *Ohio Collieries Co. v. Cocks Nat'l Coal Co.*, 140 N.E. 356 (Ohio 1923) (duty of owner of the mineral estate cannot remove minerals in such a way as to cause damage to the surface estate). Nor may landowners use their land in such a way as to cause adjacent property to cave in, violating the duty of lateral support. Epstein notes that “the law creates a set of reciprocal negative easements so that each person must leave his land in a position where it provides lateral support for the land of the neighbor.” Richard Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J. L. & ECON. 553, 575 (1993).

¹⁴² See, e.g., *People v. Stover*, 191 N.E. 2d 272 (N.Y. 1963) (upholding against constitutional challenge practice of hanging of laundry in front yard of any street-front property); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–90 (1926) (upholding comprehensive zoning under local police powers).

¹⁴³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (“As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (citations omitted)).

¹⁴⁴ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

intrusions. Common law courts have limited the landowner's ability to exclude in favor of a competing use it deemed more valuable. The law of oil and gas reserves is one example. Common law courts were long of the view that he who owns the soil owns from the depths up to the heavens.¹⁴⁵ In light of this venerable principle, the "rule of capture" facilitates a trespass. The rule of capture provides that owners of mineral rights in land overlaying the reservoir may drain the oil or gas from land beneath that of another owner.¹⁴⁶ Thus, the owner of the subsurface estate whose oil was drawn by a neighbor could not prevent him from doing so.¹⁴⁷

Because the owner of the soil was also historically seized of the airspace above the land, courts have treated overflight as a species of trespass.¹⁴⁸ In keeping with the trend of the common law accommodation of public needs, this right too has been compromised.¹⁴⁹ In *United States v. Causby*, the U.S. Supreme Court recognized that allowing individuals to press trespass claims against atmospherical intrusions would seriously interfere with public use of air channels.¹⁵⁰ Interference may be an actionable trespass (and constitute a taking if by the government), the rule now provides, where flight by aircraft "interferes substantially" with the landowner's use and enjoyment of the land.¹⁵¹ By abrogating the landowner's right to exclude in favor of the public's right to overfly land—a necessity of modern aviation—the courts prioritized competing uses.¹⁵² As such, a balancing analysis similar to that which courts apply in nuisance cases determines one's liability for a trespassory overflight.

The common law also deprived a landowner of a remedy for a trespass when use of private resources benefited the public without harm to the landowner.¹⁵³ Blackstone, for example, wrote that the "common law and custom of England" held that it was no trespass for the

¹⁴⁵ "cujus est solum, ejus est usque ad coelum et ad inferos" ("[w]hoever owns the soil owns everything up to the sky and down to the depths.") Black's Law Dictionary 1628 (7th ed. 1999).

¹⁴⁶ Many jurisdictions have altered this rule by statute.

¹⁴⁷ See THOMPSON, *supra* note 73, § 49.02(a) ("The 'Rule of Capture' is a negative rule of liability; the owner of an interest in the common pool will have no liability for draining oil and gas from beneath the land of another through a well on the interest-owner's property . . . If the well is properly located, however, the drainage is *damnum absque injuria*, which cannot be the subject for an action.")

¹⁴⁸ See *Smith v. New England Aircraft Co., Inc.*, 170 N.E. 385 (Mass. 1930) (collecting cases); *Ampitheaters, Inc. V. Portland Meadows*, 198 P.2d 847 (Or. 1948).

¹⁴⁹ The Restatement questioned whether the maxim was ever properly regarded as law. REST 2D TORTS § 159, cmt. § 2.

¹⁵⁰ *United States v. Causby*, 328 U.S. 256 (1946). The Court in *Causby* did recognize that the landowner was to have "exclusive control of the immediate reaches of the enveloping atmosphere," and commented that "invasions of it are in the same category as invasions of the surface," thus preserving trespass claims for certain invasions.

¹⁵¹ REST 2D TORTS § 159.

¹⁵² See Peter A. Winn, *The Guilty Eye: Unauthorized Access, Trespass and Privacy*, 62 BUS. L. 1395, 1422 (2007) ("Even in the context of a classic case of trespass to real property, the common law establishes a complex balance.")

¹⁵³ *Id.* at 1422.

poor to enter another's land after harvest to glean another's grounds.¹⁵⁴ The law in England in the 18th century, which the various states incorporated and displaced to varying degrees, denied the landowner a remedy against individuals who trespass on their unenclosed lands.¹⁵⁵ The Supreme Court, in *McKee v. Gratz*,¹⁵⁶ recognized that the:

strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.¹⁵⁷

Decisions on the state level recognized the same right.¹⁵⁸ Even now, the law implies consent to hunt or fish in the absence of a posting to the contrary, and many states require posting in order to exclude from land.¹⁵⁹ Whether these statutes preserve a civil remedy for landowners against those who trespass on unposted land is unclear. The view that those posting statutes deemed to eliminate the civil remedy in trespass for intrusions on unposted land would not effect a taking is tenable, given that an implied easement for hunting existed as a background principle in the common law.¹⁶⁰

¹⁵⁴ 3 BLACKSTONE'S COMMENTARIES 212 (1768).

¹⁵⁵ *Id.* at 136.

¹⁵⁶ 260 U.S. 127 (1922).

¹⁵⁷ *Id.*

¹⁵⁸ An early South Carolina case, *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 244 (1818), held "[t]he hunting of wild animals in the forests, and unenclosed lands of this country, is as ancient as its settlement, [and] the right to do so coeval therewith; [and] the owner of the soil, while his lands are unenclosed, cannot prohibit the exercise of it to others." *Id.* The Vermont Constitution afforded the right of individuals to hunt and fish on the private lands of others. *See Cabot v. Thomas*, 514 A.2d 1034, 1037–38 (Vt. 1986). Vermont also has a posting statute, which permits the landowner a cause of action for trespass where the hunter or fisher intrudes in disregard of a posted sign. VT. STAT. ANN. tit. 10, § 5201 (1997). *See* Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004).

¹⁵⁹ Sigmon, *supra* note 158, at 558–59; RESTATEMENT (SECOND) OF TORTS § 892 cmt. d (1979) ("[I]f . . . it is the custom in wooded or rural areas to permit the public to go hunting on private land . . . , anyone who goes hunting . . . may reasonably assume, in the absence of posted notice or other manifestation to the contrary, that there is the customary consent to his entry upon private land to hunt or fish."); Vincent M. Roche, *Road Hunting and Regulatory Takings: An Examination of the South Dakota Supreme Court's Opinion in Benson v. State*, 11 GREAT PLAINS NAT. RESOURCES J. 1 (2006–2007) ("For most of South Dakota's history, there were practically no limitations on the right to hunt. Indeed, up until 1973, the default rule was that hunters could freely enter and hunt upon private property.").

¹⁶⁰ *See* Sigmon, *supra* note, at; *Benson v. State*, 710 N.W.2d 131 (S.D. 2006) (finding no taking in permitting hunters to shoot birds flushed from a public way even when they cross into private property); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (finding that state can

Other limitations on the landowner's trespass remedies are well known.¹⁶¹ States have restricted a property owner from excluding the employee of a farmworker aid organization from entering his land to meet with migrant workers.¹⁶² Adverse possession and the law of easements represent two examples where the common law sacrificed the landowner's right to do as she pleases with the land for the public policy objective of fostering efficient use of real property. Adverse possession transfers title from the owner of land to one who, for the statutory period, possesses the land in a sufficiently open manner, hostile to the rights of the true owner.¹⁶³ The owner can thereby no longer maintain an action for trespass. The prescriptive easement operates in a similar manner.¹⁶⁴ The repeated non-possessory use of a tract of land has the effect of granting the user an easement for continued use. The easement by necessity, a related type of non-possessory entitlement to the use of property, arises over the grantor's land where the grantor deeds a tract of land that lacks a means of egress.¹⁶⁵

Adverse possession, in particular, provides the owner an incentive to make productive use of land. The doctrine effects a transfer from the party who values the land less to one who values it more.¹⁶⁶ As such, adverse possession may be seen as facilitating a sort of "efficient trespass."¹⁶⁷ We also see a privilege to trespass in the case of private necessity where the law prioritizes human life, and the inefficiency of destruction, above the landowner's unrestrained right to exclude.¹⁶⁸ In a case where a person reasonably believes that he, his land or his chattels would

regulate land so as to deprive owner of all economically beneficial use without paying compensation when limitation inhered as a background principle of property law imposed on title).

¹⁶¹ We also note that states restrict the ability of a landowner who opens an establishment to the general public have no right to unreasonably exclude individuals. *See Uston v. Resorts Intern. Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982) (noting that the law "recognizes implicitly that when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably.").

¹⁶² *State v. Shack*, 277 A.2d 369 (N.J. 1971) (rejecting the First Amendment as a basis for its holding, but finding that state trespass laws do not permit prosecution of an aid worker from entering property owner's land to confer with migrant farmworkers resident upon it).

¹⁶³ *See Hamlin v. Niedner*, 955 A.2d 251 (Me. 2008) (describing elements of adverse possession).

¹⁶⁴ *See Blackstead v. Price*, 190 P.3d 876 (Id. 2008) (describing elements to obtain easement by prescription).

¹⁶⁵ The common law disapproved of conveyances of land so as to render it useless. THOMPSON, *supra* note 73, § 60.03(b)(5)(i) (citing *Ghen v. Piasecki*, 401 A.2d 708, 712 (N.J. super. App. Div. 1980) ("[M]utual intent is not an essential element in the establishment of a way by necessity. Such an easement is created as a result of a strong public policy that no land be made inaccessible or useless.")).

¹⁶⁶ Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037 (2006).

¹⁶⁷ *Id.* at 1066 (arguing that a requirement of "bad faith" adverse possession makes adverse possession efficient).

¹⁶⁸ The privilege is qualified, however. The sea captain, for example, who takes refuge in the

suffer serious harm, an individual is privileged to enter or remain on land even though it would constitute a trespass.¹⁶⁹ Again, society's interest in preserving the absolute right to exclude is subservient to its interest in preventing otherwise avoidable harm to its members.

These examples bear out what Professor Powell, in his treatise on real property, described as society's evolving give and take between the right to exclude and the public good:

As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things.¹⁷⁰

Reflecting on the development of the common law over time, Powell further reflected that: “[t]he necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.”¹⁷¹ Even the *sine qua non* of property ownership, the right to exclude, is hardly absolute.

Over time, courts have granted limited privileges to intrude on private property in cases where the prospect of harm to the landowner is minimal, and the use socially valuable. The examples demonstrate the ebb and flow inherent in the common law's famed flexibility. Just as courts and state legislatures restricted hunters' access to private property as hunting declined in importance as a source of food and commerce in the United States, new uses—such as overflight by commercial aviation—prompted courts to restrict exclusionary rights in new ways. Accordingly, common law courts have repeatedly performed the interest balancing we propose, but to different ends. As the next section reveals, courts have transformed trespass into a nuisance-like action where the trespass framework has proved inadequate, and where the nuisance analysis was better able to balance the competing interests and prioritize the more socially valuable use of land.

ii) Trespass and Nuisance in the Modern Era—Blending the Common Law Distinctions

As a theoretical matter, trespass and nuisance provide separate remedies for interference with separate legal rights. But as the tangible intrusion approaches the intangible, the corporeal-incorporeal distinction breaks down as a matter of theory. This theoretical gray area between

private dock of another, and thereby trespasses, must pay damages to the extent that he damages the dock.

¹⁶⁹ REST 2D TORTS § 197.

¹⁷⁰ 5 POWELL, REAL PROPERTY (Rohan 1970) § 745, pp. 493–94.

¹⁷¹ *Id.* at § 746, pp. 494–96.

trespass and nuisance is present, *a fortiori*, in practice. Economic growth fuels innovation. The result is disputes between individuals and business involving real-life scenarios the drafters of the Restatements could not foresee. Courts must resolve these new conflicts.¹⁷² Courts have responded by tinkering with the common law distinctions between trespass and nuisance. We discuss these decisions next. They subject the trespass cause of action to an explicit balancing of competing uses in order to avoid subordinating, without critical evaluation, socially useful conduct to the landowner's right to exclude. As such, these decisions provide analogous precedents for our proposed modification.

The Supreme Court of Oregon decision in *Martin v. Reynolds Metals Co.* is an obvious starting point.¹⁷³ The case bears recounting in some detail. In *Martin*, plaintiffs brought an action against the Reynolds Corporation alleging that its aluminum reduction plant caused fluoride compounds, in the form of gases and particulate matter, to become airborne and settle on their land.¹⁷⁴ They argued a theory of trespass. Reynolds responded that trespass would lie only where there had been a "breaking and entering upon real property," constituting a direct, as opposed to a consequential, invasion of land.¹⁷⁵ The deposit of invisible or nearly-invisible particulate matter, in Reynolds' view, did not meet the definition of a direct invasion.

The Oregon Supreme Court recounted how the common law distinguished between the two causes of action, and observed that other courts had handled interference by smoke or cinders as non-trespassory.¹⁷⁶ But, in a marked departure from the prevailing rule that no trespass results from an invasion where "there is no 'thing' that can be seen with the naked eye," the court reformulated its notion of trespass to comport with modern science.¹⁷⁷ Cases adhering to the old rule no longer fit within the modern concept of the "direct" invasion. "It is quite possible," the court wrote, "that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion."¹⁷⁸

Having rejected what it viewed as an untenable definition of trespass, which excluded invasions of phenomena not capable of observation by the human eye, the court set down a new standard. A trespass can occur where the invasion takes the form of "energy which can be

¹⁷² Justice Cardozo famously addressed the act of judging. Judging entails more than the duty to "match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process." He added: "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20-21 (1921).

¹⁷³ 342 P.2d 790 (Or. 1959).

¹⁷⁴ *Id.*; see also Sfrona M. Powell, *Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases*, 21 REAL EST. L. J. 182, 197 (1992) (describing *Martin*).

¹⁷⁵ *Martin*, 342 P.2d at 791.

¹⁷⁶ *Id.* at 792-93.

¹⁷⁷ *Id.* at 793 (citing REST. FIRST TORTS § 158, cmt. (1934), and PROSSER, TORTS § 13 (2d Ed.1955)).

¹⁷⁸ *Id.* at 793.

measured only by the mathematical language of a physicist.”¹⁷⁹ The court recognized, however, that although its new rule corresponded with contemporary understandings of the atom, the extension of trespass to such cases was incompatible with the vestigial traits of the medieval cause of action for trespass. The court acknowledged that “[t]he modern law of trespass can be understood only as it is seen against its historical background.”¹⁸⁰ The century old principle that trespass would lie regardless of whether the plaintiff suffered actual harm was “colored by its past, and the idea that the peace of the community was put in danger by the trespasser’s conduct.”¹⁸¹ As such, though normally no “inquiry is made . . . as to whether the plaintiff’s interest in making a particular use of his property is within the protection provided for under the law of trespass,” the court altered this approach decisively. Citing the overflight cases,¹⁸² it held that the “tort of trespass involves a *weighing process*, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance, and for a different purpose, i. e., in the one case to define the possessor’s interest in exclusive possession, and in the other to define the possessor’s interest in use and enjoyment.”¹⁸³ The court’s trespass analysis would thereafter take account of the “nature of the plaintiff’s use and the manner in which the defendant interfered with it.”¹⁸⁴ Under this new rubric, the injury from the trespass must be “substantial” in order to be actionable.¹⁸⁵

Thus, the Oregon Supreme Court in *Martin* transformed trespass into a variant of nuisance. Why did it do so? One answer is equity. The plaintiffs, whose land had been damaged severely, would have been left without a remedy had the court not cast their action in trespass rather than in nuisance. The statute of limitations, longer for trespass than for nuisance, had already run on the nuisance action.¹⁸⁶ The more plausible explanation, however, is that the common law distinctions between trespass and nuisance, inherited from feudal times, made little sense in the context of industrial pollution in the twentieth century. Neither did granting the landowner an automatic judgment in a trespass action irrespective of the value of the use that produced the trespass. Balancing competing uses was appropriate and wise. The decision sacrificed clarity in favor of an approach that, at least in the court’s view, permitted a fact-specific, utility driven adjudication between competing uses of land.¹⁸⁷

In *Borland v. Sanders Lead Co.*, the Alabama Supreme Court reached a similar result,

¹⁷⁹ *Id.* at 794.

¹⁸⁰ *Id.* at 796.

¹⁸¹ *Id.*

¹⁸² *United States v. Causby*, 328 U.S. 256 (1946); *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948) (“Air travel over a plaintiff’s land is still recognized as trespass *prima facie* imposing liability but the rights of airplane travel are established or recognized by the doctrine of privilege.”).

¹⁸³ *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 795 (Or. 1959) (citing *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936) (emphasis added)).

¹⁸⁴ *Id.* at 795.

¹⁸⁵ *Id.* (“But there is a point where the entry is so lacking in substance that the law will refuse to recognize it, applying the maxim *de minimis non curat lex*.”).

¹⁸⁶ *Id.* at 791–92.

¹⁸⁷ See POWELL, *supra* note 170, at 201.

modifying the traditional understanding of trespass and nuisance.¹⁸⁸ *Borland* found the deposit of lead and sulfide particulates from the smokestack of a nearby lead smelter to constitute a trespass.¹⁸⁹ The court distinguished trespass from nuisance based on whether the invasion caused “substantial damage” to the land.¹⁹⁰ By considering the nature and extent of the plaintiff’s use of land and the damage it suffered, the *Borland* rule effects an implicit balancing inconsistent with the traditional trespass remedy. Other courts have since followed this approach,¹⁹¹ though some refuse to do so.¹⁹²

The line of decisions that *Martin* and *Borland* exemplify might logically be confined to cases of air pollution. The threats to health and livelihood air pollution presents might justify providing injured homeowners with a stronger remedy. But the distinction between trespass and nuisance is untenable at the margins. Even the Second Restatement, in explaining the distinction between trespass and nuisance, manages to confound.¹⁹³ Judges should not feel constrained by

¹⁸⁸ *Borland v. Sanders Lead Co.*, 369 So.2d 523 (Ala. 1979).

¹⁸⁹ *Id.* at 529.

¹⁹⁰ *Id.* at 530.

¹⁹¹ The Washington Supreme Court expressly adopted this analysis in *Bradley v. American Smelting and Refining Co.*, 709 P.2d 782 (Wash. 1985). The court in *Bradley* reinforced the view that invisible particular matter could constitute a trespass, but only where it caused “actual and substantial damages.” *Id.* at 791. In *Renken v. Harvey Aluminum*, plaintiffs again sued an aluminum plant to enjoin operations because it was allegedly depositing particulate matter on their lands. 226 F. Supp. 169 (D. Or. 1963). Relying on *Martin* and finding that plaintiffs had proven a trespass, the court placed the burden on defendant “to show that the use of its property, which caused the injury, was unavoidable or that it could not be prevented except by the expenditure of such vast sums of money as would substantially deprive it of the use of its property.” *Id.* at 176. The court then ordered defendant to install pollution control devices under threat of injunction. This remedy borrows explicitly from the remedies courts have imposed after finding an actionable nuisance. *See Boomer v. Atlantic Cement Co.*, 26 N.Y. 2d 219 (N.Y.1970).

¹⁹² *See Adams v. Cleveland-Cliffs Iron Company*, 602 N.W.2d. 215 (Mich. App. 1999). In a claim alleging trespass by an iron mine as a result of the noise, vibrations and particulate matter it produced, the Michigan Court of Appeals stated:

We do not welcome this redirection of trespass law toward nuisance law. The requirement that real and substantial damages be proved, and balanced against the usefulness of the offending activity, is appropriate where the issue is interference with one’s use or enjoyment of one’s land; applying it where a landowner has had to endure an unauthorized physical occupation of the landowner’s land, however, offends traditional principles of ownership.

Id. at 221.

¹⁹³ In two of its illustrations intended to illustrate the difference between trespass and nuisance, it analyzes what is effectively the same intentional, tangible invasion of land under different rubrics *Compare* REST 2D TORTS § 158, comment *h*, illust. 5 (where A knowingly erects a dam causing water to spill over onto B’s land, he causes a trespass), *with* REST 2D TORTS § 833, comment *a*,

trespass' outmoded straitjacket of strict liability for tangible invasions of land.

Because nuisance permits the court to tailor a remedy to maximize total utility, we do not think courts should confine their re-appraisal of trespass and nuisance to the case of environmental pollution.¹⁹⁴ Instead, judges should expand the trend to include trespassory art. Another decision of the Supreme Court of Oregon supports such an expansion. In *Lloyd Corp. Ltd. v. Whiffen*, the court addressed the rights of individuals to solicit signatures for a petition on the grounds of a private mall without the permission of the owner.¹⁹⁵ The case raised questions akin to those the U.S. Supreme Court addressed in *Robins v. Pruneyard Shopping Center*,¹⁹⁶ that is, whether the United States and State Constitutions permit individuals to exercise free speech rights in private malls despite the owner's practice of excluding such groups.¹⁹⁷ The *Lloyd* court specifically rejected such an approach in the case before it, just as we reject the *Pruneyard* analysis as a basis for increasing access to private and public property for trespassory artists.¹⁹⁸ Instead, the court decided the case on sub-constitutional grounds.¹⁹⁹ Plaintiff requested an injunction to prevent continuing and future trespasses.²⁰⁰ Finding that access to the mall would hinder the public interest in the exchange of ideas, the court balanced that interest against the interference the petitioners caused to business operations. The court concluded: "[P]laintiff is not entitled to an injunction to prohibit peaceful solicitation of signatures in the mall or on its

illustr. 1 (potential liability in nuisance results where A builds an embankment on his land causing water to flood B's land); see Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. at 466 (noting that these two illustrations are "apparently in conflict. Either the actor who erects the dam should be liable as a trespasser for the water damage in both instances without respect to the reasonableness of the interference, or he should not be liable unless the caused substantial damage and constituted . . . an unreasonable interference" with the flooded land).

¹⁹⁴ See *Atkinson v. Bernard, Inc.*, 355 P.2d at 229 (noting that "[t]he flexibility of nuisance law enables the trial judge to take into consideration . . . all relevant factors which will assist him in balancing the interests of the parties before the court in light of the relevant public interest."). We have contemplated objections from adherents to the law and economics school that our proposed rule, in fact, *reduces* efficiency because it forecloses efficient bargaining by the parties. This objection is powerful. As we discuss in the next section, however, we do not believe that it applies with its usual force in the case of trespassory art.

¹⁹⁵ *Lloyd Corp. Ltd. v. Whiffen*, 773 P.2d 1294 (Or. 1989).

¹⁹⁶ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)

¹⁹⁷ *Id.* at 1297. The court concluded that although the petitioners did not have a right under the U.S. or Oregon constitutions to petition on private property, neither did refusing plaintiffs request for an injunction to prevent further trespass constitute a taking. *Id.* at 1302 ("A proper order [enjoining prosecution for trespass] will not create an easement for signature-gatherers or anyone else, nor otherwise take plaintiff's property for public use without due process or just compensation contrary to Article I, section 18, of the Oregon Constitution to the Fourteenth Amendment") (citing *Pruneyard*, 447 U.S. 74).

¹⁹⁸ See *infra* Part IV.

¹⁹⁹ *Lloyd*, 773 P.2d at 1297 ("In this case, we conclude on a subconstitutional level that plaintiff is not entitled to the broad injunction it sought and received.")

²⁰⁰ *Lloyd*, 773 P.2d at 1298–1301.

walkways that does not substantially interfere with the commercial activity on the premises. . . . The public policy behind the signature-gathering process limits equitable enforcement of plaintiff's preferred total exclusion of signature solicitors."²⁰¹

In *Lloyd*, the plaintiff's right to a remedy for an unquestioned trespass turned on nuisance principles.²⁰² The court balanced the importance of the speech to the public against the inconvenience and injury to the landowner. *Martin* and *Lloyd* represent two more examples of the "public conversation" that has taken place from the beginning of American legal history "about the balance between individual rights and public rights with respect to the meaning of property."²⁰³ The concept of property has "evolved as community consensus about the individual-public balance has evolved."²⁰⁴

We argue that trespassory art has a place in this evolution. *Lloyd* and *Martin* present a blueprint for our analysis. The approach the court took in those cases provides room to protect property rights *and* afford trespassory art a platform for expression. Just as the *Lloyd* court considered the public importance of the solicitors' speech, so too should courts acknowledge the expressive character of trespassory art. Indeed, trespassory art presents an even more compelling basis for expanding the Oregon courts' nuisance-infused trespass analysis. Unlike most generic speech, the site-specific filter we suggest that courts impose to identify qualifying trespassory art furnishes a principled basis for excluding the majority of intruders. We avoid a principal criticism of *Lloyd*, that it provides no limiting criteria in order to avoid widespread dilution of property rights. Our proposal does not therefore threaten the institution of private property.

4) Privilege for Trespassory Art—The Boundaries of a "Fair Use" Defense for Artistic Trespass to Real Property

The approach this Article describes above, we believe, demonstrates the feasibility of analyzing art-directed invasions, which would remain trespasses (and thus subject to damages with proof of harm and possible injunctive relief), under the analytic and remedial rubric of nuisance principles. The related field of intellectual property also colors our perspective. Judges, practitioners and commentators are now battling to shape the scope of protection for intellectual property rights.²⁰⁵ Our discussion analyzes what lessons intellectual property holds for its

²⁰¹ *Id.* at 1301.

²⁰² Though it concedes that trespass law involves balancing in a "very narrow sense," the dissent accused the majority opinion of "blend[ing] continuing trespass law and nuisance law by citing two inapposite nuisance cases as support for this overbroad statement about continuing trespass law." *Id.* at 1306–07 (Carson, J., dissenting). The majority responded to the dissent's "fevered nightmare that the skies of trespass law are falling" by pointing out that the opinion concerned "not the law of trespass," but "the discretionary use of equitable injunctions" to conduct that a jury might find to be trespassory. *Id.* at 1302.

²⁰³ Mryl L. Duncan, *Property as a Public Conversation, Not a Lockean Solution: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL L. 1095, 1159 (1996).

²⁰⁴ *Id.*; see Singer, *supra* note 71.

²⁰⁵ The internet is a particularly fertile ground for this debate. The internet raises questions about

examination of trespassory art. It focuses, in particular, on the fair use defense to copyright infringement. We conceive of fair use as a useful analogy for the proposed privilege for trespassory art under the law of tort.

The fair use doctrine in copyright law is a natural potential analogue to our modified property law regime, but the analogy must be accompanied by a disclaimer. Real property and intellectual property are different. Real property is finite and rivalrous; intellectual property is not.²⁰⁶ Yet, we see a similarity between fair use and the nuisance-based trespassory art analysis. The fair use doctrine permits uses of copyrighted material that would otherwise constitute infringement to be deemed noninfringing because they advance the constitutional purposes of copyright law.²⁰⁷ These purposes include the “broad public availability of literature, music, and other arts.”²⁰⁸ Although Section 107 of the Copyright Act incorporates a fair use provision pursuant to a 1976 amendment, courts have long implied such a defense.²⁰⁹ The purpose of the fair use doctrine is to “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²¹⁰ The statutory factors that guide courts’ fair-use analysis consider the purpose and character of the use—with non-commercial uses being favored—the amount of copying, and the market for the copyrighted work. These factors favor a creative, transformative work undertaken for non-commercial purposes that borrows little from the underlying material. The inquiry effectively balances the value of the defendant’s creation against the injury to the plaintiff’s interest in the copyright in light of the object and purpose of copyright law.

We view our proposed modification to real property and tort law in similar terms. The fair-use inquiry, at its heart, focuses on whether the infringer has transformed the copyrighted material and has thereby added new value; the law does not privilege mere copying.²¹¹ The courts will also consider whether the transformed work will affect the market for the original.²¹² A fair

whether the law should subject trespasses on online “property” to the same right to exclude as real property, or whether the internet should approximate a commons. Whether the intellectual property be virtual or corporeal, the law has implied safety valves into the property holder’s ability to monopolize the market. Patents are of limited duration. Copyright enforcement is unavailable where the infringer successfully proves a fair use defense. *See* Peter S. Menzell, *Intellectual Property and the Property Rights Movement*, REGULATION (Fall 2007), pp. 36–38 (noting that property rights movement proponents “would shoehorn intellectual property into an idealized Blackstonian conception of property rights as exclusive and inviolate.”).

²⁰⁶ *Id.* (“Unlike tangible goods, knowledge and creative works are public goods in the sense that their use is nonrivalrous. One agent’s use does not limit another agent’s use. Indeed, in its natural state, knowledge is also “nonexcludable.”).

²⁰⁷ COPYRIGHT LAW, § 8:3.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (citing *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)).

²¹⁰ *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

²¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²¹² *See Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (noting, in applicable statutory fair-use factors under 17 U.S.C. § 107(4), that the court’s “concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but

use defense is less likely to succeed when the infringer denies the holder of the copyright a market for his or her work.²¹³ Commentators have argued that the current fair use analysis makes insufficient provision for new forms of art—those, for example, that “rely on pastiche, or the imitating of existing styles, in part to express the postmodern notion that it is no longer possible to create new styles.”²¹⁴ Appropriation art, a significant modern form of art which uses the work of others in its representations, may therefore go unprotected.²¹⁵

The Supreme Court’s opinion in *Campbell v. Acuff-Rose* protected appropriation for comedic use, parody in that case, but excluded from the protection of fair use satire and other types of art that criticize without parodying.²¹⁶ As Sonia Katyal points out, works that “contribute to, but do not transform, the original copyrighted work” do not receive fair use protection.²¹⁷ The push towards expanding the fair use defense to acknowledge and foster new, innovative art forms parallels the argument for a privilege for trespassory art on real property.

Katyal argues that intellectual property law should channel much of the transformative appropriative art, which currently exists outside the sanction of the law, within it.²¹⁸ This Article attempts a related argument under the common law of real property and tort. Like digital sampling of music, which appropriates, reinterprets and recodes copyrighted material, the trespassory artist effectively performs the same function with real property. Each of the examples of trespassory art—whether it be laser graffiti or parkour—demonstrates this function. The laser-graffiti or billboard-liberation artist does to the skyscraper or commercial billboard what Marcel DuChamp did to the urinal at the turn of the century.

A prong of the fair-use test measures the economic harm from the infringement from the copyright holder. The approach this Article proposes would have courts measure the injury to the landowner. Where the landowner suffers injury, damages are warranted and, where the prospect of continued intrusion is present, injunctive relief may be appropriate. But what is “harm?” Copyright law answers this question with relative ease: the court hears evidence on the effect of the infringing material on the market for the original.²¹⁹ The question is more difficult in the case of real property. The injury to a professor’s lawn when a college student cuts across it on his way to class is more elusive. The common law’s answer was simple: the student invaded the professor’s right to exclusive possession, and was at least liable for nominal damages. We answer

whether the secondary use usurps the market of the original work.”).

²¹³ *Id.* at 590 (describing fourth fair use factor, which considers the impact on the market for the copyrighted work).

²¹⁴ Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 281 (2005) (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 280 n.37 (1996)).

²¹⁵ Katyal, *supra* note 2, at 541–43.

²¹⁶ 510 U.S. 569 (1994); Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art’s Exclusion from Campbell v. Acuff-Rose, Inc.*, 60 BROOK. L. REV. 1653, 1653–54 (1994).

²¹⁷ *Id.* at 547.

²¹⁸ Katyal, *Semiotic Disobedience*, *supra* note 2.

²¹⁹ See *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006).

that the artist who produces qualifying trespassory art should enjoy a limited privilege from these damages. The collage artist may appropriate copyrighted material under fair use,²²⁰ and enjoys a limited right to trespass on an individual's right to publicity where the appropriation is transformative.²²¹ Similarly, the value of qualifying trespassory art may override, in limited cases, the social benefit society derives from allowing landowners to vindicate the interest in mere exclusion.

As to the landowner's entitlement to nominal damages, we replace a property rule with a rule of non-liability. Courts should not award damages in the face of a qualifying artistic trespassory invasion. Richard Epstein, among others, has questioned why a landowner would ever sue for nominal damages alone.²²² If this is true, then of what value is this entitlement? Because punitive damages, premised on nominal damages alone, are available in many jurisdictions, the modification would preclude courts from penalizing artists who do no *actual* harm to the land or landowner.²²³

Of course, the trespassory artist should not be privileged to impose injury on the land that would be compensable under other tort principles. Artistic installations that cause actual damage—such as where the artist digs a ditch to house or secure her art—justify an award of damages for injury and an injunction ordering its removal or repair. As Part IV recognizes, however, injury need not take the form of physical damage to the land: requiring the landowner to bear the artist's message can be harmful.²²⁴ The court's award of damages to the landowner for injury arising from attribution functions as a liability rule—the judgment approximates the bargain the artist and landowner would have struck had such an exchange taken place.²²⁵ Nor, except in rarest instances of overriding social value, should a landowner who disapproves of art on his land, for whatever reason, be denied the right to compel its removal. Although he will not win nominal damages, the modification we propose should not be interpreted to permit the artist to impose a permanent easement on the property of another.

5) One Objection—The Law and Economics Perspective

²²⁰ *Id.*

²²¹ See *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (finding that artist's use of a likeness of Tiger Woods did not violate, among other things, his right to publicity, because the art was transformative and valuable under the First Amendment).

²²² Richard Epstein, *Cybertrespass*, 70 U. Chi. L.Rev. 73 (2003).

²²³ See *Jaque v. Steenberg Homes, Inc.* 563 N.W.2d 153 (Wis. 1997) (permitting punitive damages on the basis of nominal damages, absent evidence of any injury warranting compensatory damages).

²²⁴ See *Wooley v. Maynard*, 430 U.S. 705 (1977); Randall Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983 (2003).

²²⁵ Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091 (1997) (describing a liability rule as one in which the "owner of the thing receives some right to compensation for the thing that has been taken away from him against his will"). For a discussion of the distinction between property and liability rules, see *infra* section E.

We have argued that the right to exclude can, and in narrow cases should, bend to accommodate so-called “trespassory art.” The proposal is potentially objectionable on a variety of grounds. One might criticize the constitutional legitimacy of our proposal. We answer that objection in Part IV. Advocates of strong property rights, and commentators from the law and economics school, will naturally contend that the modification muddles the formerly clear system of property entitlements on which efficient bargaining is based. This section identifies those objections, and explores why we believe they do not threaten our proposal.

American law has generally followed Blackstone’s conception of property as an absolute right, subject to limited intrusion by government.²²⁶ Legal rules protective of property rights spurred development of the western United States as this country grew in the 19th century. Today, like Blackstone, many legal theorists, particularly those associated with the law and economics school, support a system of strong property entitlements. Strong property rules are necessary to permit us to “barter and trade what we want instead of fighting.”²²⁷ Unambiguous property entitlements, in other words, are efficient.²²⁸ Clear rules eliminate uncertainty, and permit parties to bargain to reach an efficient allocation of resources. This, in turn, avoids the tragedy of commons that afflicts societies with shared resources or weak protections for private property.²²⁹

Clear rules and robust protection for property owners are particularly appropriate, it is argued, when it comes to the right to exclude.²³⁰ The right to exclude should be as absolute as possible. And, as trespass claims will frequently involve two landowners, and will take the form of the one-time invasion of the land by a neighbor who lays a fence over the property line, or the lazy pedestrian who insists on taking a shortcut over private land,²³¹ the benefits of a straightforward rule—one that affords the landowner automatic damages absent proof of harm, and the possibility of an injunction, and that spurns consideration of the defendant’s proposed use for the land—are clear. Such a rule reduces transaction costs. The would-be trespasser knows he

²²⁶ In this it was influenced by John Locke. Just as his writings on civil government influenced the Founders at the time of the framing of the Constitution, his views of property as an *a priori* private right worthy of robust protection were similarly influential. See Mryl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 786 (2002) (“The bundle metaphor’s bias in favor of absolutist property rights perpetuates the classic liberal definition of property historically associated with John Locke.”); Duncan, *Public Conversation*, *supra* note 222, at 1096 (“The Lockean system was dominant at the time when the Constitution was adopted.”) (citing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 16 (1985)).

²²⁷ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988).

²²⁸ Cf. Richard Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L. J. 803, 819 (2001) (“In general, I think that private voluntary arrangements will outperform forced interactions in the long run.”).

²²⁹ See Michael Carrier, *Cabining Intellectual Property through a Property Paradigm*, 54 DUKE L. J. 1, 25 (2004).

²³⁰ See Richard Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 74 (2003) (celebrating the right to exclude and noting that “[e]fficient contracting can take place only if A, as owner, is entitled to decide who enters his property and who keeps off.”).

²³¹ See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 153 (Wis. 1997, for one example).

will be liable, just as the landowner knows that the court will take his side. Neither party need wait for the court to perform a nuisance-like balancing analysis to determine his or her legal rights. The common-law remedies for trespass constitute what Calabresi and Melamed, in their famous article, would call a “property rule.”²³² An entitlement is protected by a property rule in cases where “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”²³³ When transaction costs are low, the parties are in a position to bargain their way to an efficient outcome.²³⁴

Indeed, trespass is the prototypical property rule.²³⁵ The homeowner who wishes to build over his property line will have an incentive to bargain for the right to do so, knowing that he will otherwise be forced by court injunction to remove the structure. In that case, the market, rather than the government, establishes the value of the entitlement—that is, the amount that the landowner whose right to exclusive possession of his land is violated will accept to permit the encroachment. This result is in line with the insights of Ronald Coase, who theorized that “voluntary rearrangements of property rights will maximize the aggregate welfare of all market participants.”²³⁶

Where transaction costs are high, the “property rule” gives way to the “liability rule.” A liability rule “means that the other party may destroy the entitlement if he is willing to compensate the entitlement-holder for it at some value set by the state or the courts.”²³⁷ Where a violation or disturbance—such as air pollution from an aluminum reduction plant—affects a wide swath of landowners, transaction costs increase and the type of bargaining possible in the two-player scenario becomes nearly impossible. Not surprisingly, nuisance is the prototypical

²³² Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²³³ *Id.* at 1092.

²³⁴ Thomas Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 21 (1985).

²³⁵ See Stewart E. Sterk, *Property Rules, Liability Rules and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1296 (2008) (describing trespass as a property rule insofar as it “puts my neighbor on notice that she must deal with me if she wants to use “my” land.”); Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1510 (2007). Hylton writes:

Trespass law is a property rule in the sense that it permits the landowner to enjoin the trespasser and to seek damages. The power to enjoin forces the would-be trespasser to bargain for access to the landowner's property. The injunction power protects the subjective valuation of the landowner, because if the trespasser could invade the landowner's property and be required to do no more than pay compensatory damages, the subjective portion of the landowner's valuation would not be protected by the law.

Id. at 1511

²³⁶ Merrill, *supra* note 234, at 21.

²³⁷ *Id.* at 25 (citing Calabresi & Melamed, at 1092).

example of a liability rule.²³⁸ The court imposes damages on the producer of the nuisance, compensating the affected landowners and forcing the producer to internalize the cost of the interference with the landowners' use and enjoyment of their land.²³⁹ Thomas Merrill, for example, suggests that the law favors "mechanical" rules, i.e., "rules that determine entitlements at a low cost—such as the strict liability rule of trespass," when costs of transacting are low, and the cost-benefit balancing type approach when they are high (e.g., nuisance).²⁴⁰

These market-based considerations do not, seemingly, bode well for our proposed modification. They counsel that because transactions costs are apt to be low in the trespass scenario, the mechanical property entitlement of trespass maximizes social welfare better than the balancing approach of nuisance.²⁴¹ The examples of trespassory art we have laid out above generally contemplate the two player collision of interests: the artist wishing to invade and appropriate private property to express his or her own message, and the landowner wishing to prevent the same. One response would be to force the artist—like the neighbor who wants to (or mistakenly does) build his deck over the property line—to bargain for the privilege.²⁴² The large body of economics-influenced legal thought arguably supports such an outcome.

We argue, however, that the efficiency calculus that suggests a mechanical rule in the case of the encroaching neighbor, or the pedestrian who wishes to take a shortcut home, does not dictate a similar outcome in our examples. We can think of two reasons for this result. First, assuming that trespassory art produces two-party interactions,²⁴³ transaction costs can be high even in these situations.²⁴⁴ The type of bargaining normally possible in the case of the trespasser is frequently unrealistic for the trespassory artist. The trespassory artist is, effectively, an invader who aims to proceed in secrecy and in stealth to accomplish his artistic end without detection.

²³⁸ See Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. & TECH. L. REV. 265, 330 (2006) (noting that "the law of nuisance is aptly representative of a liability rule (in allowing for a court enforced sale of the right)").

²³⁹ See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (N.Y. 1970).

²⁴⁰ Merrill, *supra* note 234, at 13–14.

²⁴¹ The argument goes, in other words, voluntary (contract-based) arrangements maximize general utility far better than does a court when it assigns rights and duties.

²⁴² See, e.g., *Hirschfield v. Schwartz*, 110 Cal. Rptr.2d 861, 867 (Cal. App. 2001) (noting that when one neighbor encroaches on another's land, the court balances the equities to determine "whether to grant an injunction prohibiting the trespass, or whether to award damages instead.").

²⁴³ Of course, we can imagine that trespassory art affects more than one landowner at a time. The urban practitioner of parkour, for example, no doubt crosses the property lines of scores of owners in one session. Attempting to bargain with fifteen landowners for the right to use their property, as compared with just one, increases transactions costs. Under Merrill's analysis, this suggests a liability rule rather than a property rule.

²⁴⁴ RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 50 (2007). Posner suggests that in two party transactions, there may be no choice but to bargain with the other party, driving up the costs of bargaining. Accordingly, even was the artist to bargain with the landowner, whose property the artist wishes to use for a site-specific installation, the transaction costs might be prohibitively high. This realization pushes us towards a liability rule and away from a property rule.

The goal is to avoid bargaining. While acknowledging exceptions, Judge Richard Posner recognizes that the cost of transacting in these cases is “normally prohibitive.”²⁴⁵ Addressing the economic implications of laws regarding the permissibility of spring guns to ward off burglars and other trespassers, Posner suggests that “[i]t is not feasible for the landowner to contract with the potential trespasser or the potential trespasser with the landowner.”²⁴⁶ One immediately thinks also of private necessity as a defense to trespass. Precisely in cases where bargaining is impossible or, given the presence of an emergency of sufficient severity to invoke the excuse in the first place, unrealistic, the law provides a rule of non-liability from trespass.²⁴⁷

Posner’s insight certainly applies in the cases of groups such as the Billboard Liberation Front. They fear detection and operate in secrecy, generally at night. The same generally applies to shopdroppers and droplifters. It is less clear whether the traceurs—practitioners of parkour and free running—are similarly constrained. Their art will generally bring them into contact with landowners and create the opportunity to bargain. Sebastian Foucan’s experience in Jump London certainly suggests that free-running can operate on this basis. Those who wish to perform parkour can, as Foucan did, negotiate with landowners and obtain permission to perform. Tunick too usually secures permission before proceeding with a photoshoot.²⁴⁸

The parkour example, however, raises a second, related argument why the market efficiency teachings of the law and economics school should not preclude courts from analyzing trespassory art under nuisance principles. The trespassory art form rejects such bargaining as accommodationism. That rejection is itself expressive.²⁴⁹ That Foucan performed on the various London landmarks with the permission of the city undeniably changed the nature and quality of the expression. This fact, perhaps, meshes with what enthusiasts understand to be free running’s emphasis on acrobatics, to the exclusion of parkour’s rigorous focus on the physical expression of an absence of boundaries, and its transcendence of the same.

Our point is better illustrated by Billboard LiberationFront, the droplifters/shopdroppers, and ImprovEverywhere. Their art exists in order to perpetrate the trespass, to reverse existing limitations, to effect a culture jam. The shopdropper’s purpose is to surprise, to recode expectations and beliefs. Bargaining with the store owner or corporation to redecorate a can of

²⁴⁵ Richard Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201, 224 (1973).

²⁴⁶ *Id.*

²⁴⁷ Epstein explains why, from an economics perspective, private necessity excuses a trespass, noting that “the rigorous right to exclude costs everybody a lot more than it is worth.” Epstein, *Old Boundaries*, *supra* note 228, at 816.

²⁴⁸ Though, given the logistical difficulties and requirements that accompany arranging to photograph thousands of nudes on a city street, it is difficult to imagine how he could proceed otherwise.

²⁴⁹ See Eduardo Moises Penalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1184 (2007) (describing the expressive characteristics of various acts of civil disobedience, and notes that “when someone violates the very law to which she is opposed, she conveys both her intensity and seriousness, and, in addition, provides a visible example of the alternative state of affairs she homes to bring about.”).

peas, and then to surreptitiously place it in the store, is entirely inconsistent with the art.²⁵⁰ It would defeat the purpose. Similarly, the aesthetic message of ImprovEverywhere's mission in Grand Central Station would change had it sought and obtained the NY Transit Authority's permission to perform. Although the two parties might have successfully kept the mission under wraps and managed to stun the audience of passersby, what made the mission special was how it surprised everyone—including station employees.²⁵¹ Sonia Katyal, who explores the practitioners of "semiotic disobedience," comments on these modern-day monkeywrenchers:

[They] create an alternative system of meaning that both appropriates and interrupts the protected associations within the market places of ideas . . . [and] create[] a new, converging marketplace of speech that is largely designed to interrupt and interfere with the "codes" of the previous one. The result is a world in which the powerful purchase properties—billboards, domain names, and the like—only to have their messages exposed, occupied, and thus interrupted by their disenfranchised counterparts.²⁵²

Economic analysis holds powerful lessons for how legal rules can and should channel behavior. We submit that the rigid, mechanical orthodox rules of entitlement—what Calabresi and Melamed would term a property rule—cannot perform their typical role as applied to most trespassory art. Developing a legal rule to implement Coasian precepts will prove ineffectual where, as here, the point of the art is to upend, jam, and reinterpret social structures and to accomplish through mislabeling or other behavior what the law may prohibit the owner from agreeing to do.²⁵³

6) Trespassory Art in the Courts

The modification of trespass that we propose necessarily involves judging the quality of art. Although Justice Holmes long ago counseled his judicial colleagues against that very task, judges are frequently asked to evaluate the aesthetic or artistic merits of artwork.²⁵⁴ For example,

²⁵⁰ For example, Katyal suggests that "part of the richness of semiotic disobedience inheres in its transgression of the operative boundaries that govern both property and intellectual property. In other words, its illegal character can also be part and parcel of its message." Katyal, *Semiotic Disobedience*, *supra* note 2, at 552. Moreover, in the case of shopdropping, the store owner would be prohibited by federal law from agreeing to cover required labels on merchandise.

²⁵¹ One naturally thinks of the maintenance worker in the cart who appeared incredulous, confused and perhaps amused at the scene unfolding before him.

²⁵² Katyal, *supra* note 2, at 514.

²⁵³ *Id.* at 511–12. For example, with Parkour, tort liability or injury; with billboard liberation, libel, invasion of privacy; with Tunic or graffiti, public nudity or obscenity prosecution could fall upon an agreeing landowner.

²⁵⁴ See *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251–52 (1903); See Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) (discussing the various ways in which

the Visual Artists Rights Act (VARA) invites courts to determine whether a work of art is of “recognized stature,” while the fair use doctrine asks judges to evaluate the aesthetic and transformative value of a parody.²⁵⁵ Courts have also waded into the debate over site specificity.²⁵⁶ At the same time, juries resolve artistic and aesthetic issues the law deems “questions of fact.” In obscenity prosecutions, for example, courts ask juries to evaluate alleged obscene speech by reference to prevailing community standards.²⁵⁷

Where an angry landowner brings suit to win damages from a trespassory artist, the jury will be in the room anyway to determine the predicate question—has there been a trespass?²⁵⁸ Accordingly, the authors are comfortable affording the jury a role in determining whether trespassory art qualifies as such under our standards. Jurors are uniformly savvy enough to determine, in light of common sense and experience, whether the art in question is: (i) trespassory, (ii) expressive, and (iii) asserts a connection with the site. The jury must also decide whether the landowner has suffered harm. If the art qualifies, and the plaintiff cannot show harm warranting an award of compensatory damages or his entitlement to an injunction, the judge should dismiss the case.²⁵⁹

For an illustration of the jury’s reliability, we need only look to the prosecution of J.S. Boggs, the controversial “currency artist” in the United Kingdom. Boggs recreates what at first glance appear to be bills of currency, but which on closer examination turn out to be something different entirely. He has faced prosecution in the United Kingdom, Australia and the United States. At his trial for counterfeiting in the United Kingdom, the jury heard from art critics who explained the creativity and value of Boggs’ work and, of course, from the government, which made its case for why Boggs’ *tromp-l’oeil* reproductions of currency constituted criminal counterfeiting. Although the judge all but ordered the jury to convict Boggs, whose acts easily qualified as counterfeiting under British law, the jury acquitted Boggs of all charges after ten minutes of deliberation.²⁶⁰ Sometimes art may be safer in the hands of juries than those of judges.²⁶¹

Whether the trespassory art criteria we identify ultimately come before judge or jury, this Article proposes that judges act first to modify the common law. The landowner’s entitlement to

judges evaluate art).

²⁵⁵ 17 U.S.C. § 106A (2006). *See* text accompanying *supra* notes 211–12 for discussion of transformation as element of fair use analysis.

²⁵⁶ *See* *Serra v. General Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988); *see* *Phillips v. Pembroke Real Estate, Inc.*, 288 F.Supp. 2d 89 (D. Mass. 2003) (addressing site specificity in context of a claim that removal of a sculpture from a park would constitute alteration of the work).

²⁵⁷ *Miller v. California*, 413 U.S. 15 (1973). Although the question is less artistic, juries resolve consumer confusion questions in trademark lawsuits.

²⁵⁸ *Meixsell v. Feezor*, 43 Ill. App. 180 (Ill. App. 1891) (“The questions of possession and the commission of a trespass were for the jury . . .”).

²⁵⁹ To reiterate, we contend that in the context of “trespassory art,” injury to the plaintiff’s right to exclusive use and possession of the land does not warrant an award of nominal damages or, except in special cases, injunctive relief.

²⁶⁰ BEZANSON, *supra* note 55.

²⁶¹ *Id.*

nominal damages for a violation of his or her right of exclusive possession is not an empty remedy. But, as Benjamin Franklin's maxim suggests, it is one that can and should give way when the necessities of society require it.²⁶² Trespassory art is a species of a wider brand of appropriation art; art that hijacks, recodes and reinterprets cultural signals and infuses them with new meaning. In its current configuration, the law of real property and tort stifles this form of expression unduly. This Article addresses a narrow subset of appropriation art, art that asserts a connection with land and uses it as an expressive vehicle. Whether it be a piece of groundbreaking land art, the expressive, athletic pursuit of parkour, or the culture jamming that makes up ImprovEverywhere, this type of art offers expressive value to society. It strains under the rules of real property and the tort remedy of trespass. Because trespassory art asserts a connection with the land, its claim to legal recognition is particularly strong. And this Article has proposed elimination of but one remedy—damages without proof of harm—whose connection to trespass' medieval past is stronger than to the demands of land use in the twenty-first century. The narrowness of the category is one of its primary virtues. So is the range of expression it offers, which this Article argues will expand once trespassory art is brought into the legal fold.

IV. Constitutional Dimensions of the Trespass Question

It is important to emphasize again that we do not propose that private property be considered public property when occupied by art. Arguments that private property should be deemed public property for constitutional purposes have met with modest success in a very small number of states;²⁶³ they have been grounded in state rather than federal free speech concepts;²⁶⁴ their application has been highly selective and limited only to large and open private property, like shopping malls and private universities,²⁶⁵ and in any event the constitutional theories are overbroad and, frankly, unnecessary to achieve the more modest locational privileges for the limited forms of public art with which we are concerned.²⁶⁶ More to the point, we do not suggest abandoning an owner's private property rights or dispensing with the law of trespass, but instead limiting its remedies through a narrow and conditional common law privilege for trespass by art

²⁶² See *supra* note 137.

²⁶³ E.g., *New Jersey v. Schmid*, 423 A.2d 615 (1980) (campus of Princeton University); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Company*, 65 A.2d 757 (N.J. 1994) (State free speech guarantee does not require state action); *In re Lane*, 457 P.2d 561 (Cal. 1969) (right to distribute pamphlets, etc., on privately-owned streets). See Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 U.C.L.A. L. Rev. 1537 (1998) for a thorough listing and discussion of the state cases and of the larger problems presented by extending the First Amendment (or its State equivalent) to private property.

²⁶⁴ E.g., *Schmid*, 423 A.2d at 615; *J.M.B. Realty*, 65 A. 2d at 757; *Lane*, 457 P.2d at 561.

²⁶⁵ E.g., *Schmid*, 423 A.2d at 615 (campus of Princeton University; Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (private shopping center open to public speech under California Constitution).

²⁶⁶ See Eule & Varat, *supra* note 263, at 1537.

that does no harm. Our proposal, therefore, is that the *common law* of trespass, both civil and criminal, be qualified, as with nuisance law, with a requirement of harm to the owner of the land: a harmless trespass by art, in short, should not be actionable.

Having said this, however, there are a number of constitutional considerations that bear on, and indeed compliment, our proposal. We outline them below, beginning with the underlying issue of whether a private trespass action qualifies as state action triggering first amendment scrutiny, and proceeding to the question of the forms of constitutionally required harm in the trespass action. We then turn to the issues of government-compelled speech deriving from possible attribution of the art and its message to the private owner, and then turn briefly to attribution in the setting of government property. Our purpose is to show how the constitutional right of free expression through art supports and clarifies the rules of criminal and common law trespass that we propose for art. In the process of making these points, however, we also fashion the skeletal outlines of an argument that much of what we propose may be constitutionally required.

A) State Action

For the Constitution to apply to restrictions on trespassory art there must be involvement of the government, or state action, in the challenged process.²⁶⁷ The government, of course, has established by law the very idea of private property and the rights of ownership that attend it. The ownership of private property is explicitly acknowledged and protected against government takings in the Constitution itself.²⁶⁸ The meaning of private property and the rights of ownership and control by the property owner are the creatures of the common law and legislation, largely at the state level.²⁶⁹ The remedies for violation of the property owners' rights are also creatures of the common law and of civil and criminal statutes.²⁷⁰

We do not argue that property and its ownership, of itself, involves state action. While property is the product of government, its ownership is essentially a private right against others, whether private individuals or organizations or government. In its well established meaning state action is not implicated in these essentially private rights, any more than owning a car constitutes state action bringing the Constitution to bear on one's use of the car. Like the law of libel that rests on one's "property-like" interest in reputation among others, reputation and its enjoyment (or not) is not governed by the Constitution.²⁷¹

²⁶⁷ The textual source of the state action requirement is the 14th Amendment and also, for our purposes, the First Amendment, whose prohibition applies to Congress, and which was extended (incorporated) to action of the States by the Fourteenth Amendment. U.S. Const. Amend. I, XIV.

²⁶⁸ U.S. Const. Amend. V.

²⁶⁹ See REST. 2D PROPERTY, § 559, cmt. e; See Ugo Mattei, Basic Principles of Property Law: A Comparative Legal and Economic Introduction, 1-13 (2000); PROSSER & KEETON, *supra* note 90, §13, pp. 67-69.

²⁷⁰ *Id.*

²⁷¹ New York Times Co. v. Sullivan, 376 U.S. 254, 265-68 (1964); Gertz v. Welch, 418 U.S. 323, 341 (1974); see RODNEY SMOLLA, THE LAW OF DEFAMATION (2d ed. 2008); PROSSER &

Yet if a person's reputation is damaged by another and that person seeks the assistance of government in vindicating her reputation, or being compensated for its loss, state action is quite directly involved in the judicial process through which the cause of action for libel is adjudicated by a court enforcing the law of reputation.²⁷² And at that point constitutional limitations, structured as constitutional privileges under the First Amendment, fully apply. In the setting of defamation actions these constitutional privileges take the form of elements that must be proved (like negligence, malice, and the falsity of the challenged statement),²⁷³ burdens and standards of proof,²⁷⁴ limitations on the type and degree of harm that can qualify for recovery,²⁷⁵ and limitations on the types of remedies that can be constitutionally granted (such as actual and not presumed damages).²⁷⁶

Like the tort of defamation for wrongful injury to reputation – or its criminal defamation counterparts – trespass actions, civil and criminal, invoke the power of government and its courts to adjudicate the otherwise private property dispute and to impose remedies with the force of law. And like defamation by speech, which implicates protected speech,²⁷⁷ trespass by art likewise implicates protected expression when its enforcement and vindication rest upon the active hand of government.

Application of the First Amendment to a trespass action based on trespass by art, however, doesn't flow quite this simply from the defamation cases, though the analogy is indeed a close one. The Supreme Court's state action doctrine, as it is inaptly called, is widely described as incoherent and riddled with anomalies.²⁷⁸ For example, trespass on the premises of another for the purpose of political protest or speech is generally not sufficient to invoke first amendment limitations when enforced through civil or criminal actions,²⁷⁹ though there are exceptions.²⁸⁰ The reasons for this result are varied. In some cases the First Amendment is simply judged to be inapplicable because the trespass dispute is purely private and enforcing it through a court is not

KEETON, *supra* note 90, § 111, at 771–85 (1984); REST. 2D TORTS, § 559, cmt e..

²⁷² *Sullivan*, 376 U.S. at 265–68.

²⁷³ *Id.* at 279–80 (actual malice for public figures); *Gertz*, 418 U.S. at 346–47 (negligence for private persons); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775–76 (1986) (under *Sullivan* and *Gertz* the plaintiff bears the burden of proving falsity, as well as actual malice and negligence, by clear and convincing evidence).

²⁷⁴ *Hepps*, 475 U.S. at 775–76 (under *Sullivan* and *Gertz* the plaintiff bears the burden of proving falsity, as well as actual malice and negligence, by clear and convincing evidence).

²⁷⁵ *Gertz*, 418 U.S. at 349–50 (actual damages must be proved and recovery is limited to actual damage).

²⁷⁶ *Id.*

²⁷⁷ *Sullivan*, 376 U.S. at 265–68.

²⁷⁸ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 490 et seq. (2002) (a very insightful and comprehensive overview of the state action doctrine); William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW U. L. REV. 558 (1985); Eule & Varat, *supra* note 263.

²⁷⁹ CHERMERINSKY, *supra* note 278, at 497–505.

²⁸⁰ For example, *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982).

deemed sufficient to disturb the enforcement of established law as between the private parties.²⁸¹

In other cases the First Amendment is considered, but is determined to have no effect because the harm from a trespass is the trespass itself and the owner's interest in complete dominion satisfies any constitutional requirement of a substantial and narrowly tailored overriding interest.²⁸²

Yet even in the speech setting, there are notable exceptions to this rule. In *Shelley v. Kramer*²⁸³ the Supreme Court denied a property owner's interest in dominion over land by negating a racially restrictive covenant. And in the speech setting, the Court in *NAACP v. Claiborne Hardware Co.*²⁸⁴ reversed the convictions of participants in an illegal (by state law) boycott against private merchants. Finally, in *Burton v. Wilmington Parking Authority*²⁸⁵ the Supreme Court denied recognition of a private restaurant's racially restrictive policies, judging that the government's leasing of the space to the private restaurant was sufficient to bring state action into play. The ultimate effect, of course, was to deny the private owner full dominion over his property.²⁸⁶ These cases, however, are exceptions – and often analytically distinct exceptions – to the general rule of ownership and dominion disputes not triggering the state action doctrine.

But notwithstanding this, the involvement of the state and the satisfaction of any state action requirement should not present a state action problem in an artistic trespass case, in which the first amendment claim challenges the constitutionality of the state law of property and the forms of relief ordered by the state's courts. This is especially true when the challenged actions are the remedies formulated and enforced by the state. As the Supreme Court put it in *New York Times v. Sullivan*, "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only. [The] test [of state action] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised...."²⁸⁷

B) Harms from Trespass

A second and critically important constitutional issue is the types and gravity of harm that are caused by trespassory art. With the types of art we have earlier described, the resulting harms

²⁸¹ CHEMERINSKY, *supra* note 278, at 490–93; *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

²⁸² *See Bell v. Maryland*, 378 U.S. 226 (1964) and Justice Black's dissent, at 378 U.S. at 330, 332.

²⁸³ *Shelley v. Kramer*, 334 U.S. 1 (1948).

²⁸⁴ 458 U.S. 886 (1982).

²⁸⁵ 365 U.S. 715 (1961).

²⁸⁶ *See also Bell*, 378 U.S. at 226.

²⁸⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). The same rule of state action applies to the privacy and other communicative torts. See notes and accompanying text.

are greatly varied, both in type and duration.²⁸⁸ Parkour, for example, may involve trespass on land and structures, but the trespass is generally short lived and need not do physical damage to either land or buildings.²⁸⁹ The harm from graffiti and similar forms of writing or painting may be aesthetic, may involve costs of removal, and may threaten forced attribution of the art to the owner (a subject that we take up separately in the next section).²⁹⁰ Shop-dropping, as with soup cans re-wrapped in artistic covering, may cause financial harm to the merchant and confusion to the customer.²⁹¹ Theatre or performance art, such as the freezing in place in Grand Central Station, may cause some congestion or confusion, depending on the place and time of day, but is short lived.²⁹²

Before getting to a more refined analysis of types or degrees of harm, however, the more general and generally recognized harm to exclusive control and dominion, with real property especially,²⁹³ must be addressed. Here, as earlier, the defamation analogy is a useful, but by no means determinative, one. Like trespass's interest in control and dominion, the interest in reputation under libel law was, prior to the Supreme Court's 1964 decision in *New York Times v. Sullivan*,²⁹⁴ broad and fixed and served as an adequate justification for recovery in and of itself.²⁹⁵ That is, the common law libel tort protected a person's reputation whether or not the reputation was true or justified – whether or not, that is, the defamatory statement was true or not.²⁹⁶ Truth was usually a defense for the defamer, but it was practically ineffective because truth is often impossible to prove, and failure to succeed in proving it was further punished by treating the failure as yet another defamation.²⁹⁷ The defamed person's reputation was easy to prove and indeed was practically presumed, as were, more importantly, damages.²⁹⁸ The law of defamation employed the remedial device of presumed damage from the disparagement of reputation itself, and the jury was free to render its own judgment, unencumbered by the need for any specific proof of actual harm, on the question of the amount of damages to be awarded.²⁹⁹ “How much would you demand if someone accused you of infidelity?” was the way the plaintiff's lawyer would put the damage question. And while other actual and economic forms of damage were also recoverable, with but rare exceptions such forms of damage need not be proven as a precondition to recovering general damages.³⁰⁰ For all practical and legal purposes, therefore, the interest in one's reputation served, for defamation, just like the interest in dominion and

²⁸⁸ See section *supra*.

²⁸⁹ See text accompanying notes *supra*.

²⁹⁰ See text accompanying notes *supra*.

²⁹¹ See text accompanying notes *supra*.

²⁹² See text accompanying notes *supra*.

²⁹³ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 970–74 (2000); text accompanying notes *supra*.

²⁹⁴ *Sullivan*, 376 U.S. at 254.

²⁹⁵ PROSSER & KEETON, *supra* note 90, § 111, pp. 771–85.

²⁹⁶ *Id.* §. 116, pp. 839–42.

²⁹⁷ *Id.*

²⁹⁸ *Id.* § 116K, pp. 842–43.

²⁹⁹ *Id.*

³⁰⁰ *Id.* §116A, pp. 842–43.

control for the property owner suing for trespass.

When the Supreme Court concluded that a libel action constituted state action and brought the Constitution to bear as a limit on a plaintiff's recovery, a set of privileges required by the First Amendment were imported into the libel tort. These include requirements that reputation be proved,³⁰¹ that harm from the reputational loss – not the reputational loss itself – be proved,³⁰² and that the falsity of the challenged statement be proved by clear and convincing evidence.³⁰³ Thus actual proven damage became the foundation of the tort. Presumed damages were declared violative of the first amendment interest in robust and uninhibited speech.³⁰⁴ Speech should not be inhibited by the prospect of liability from intruding on another's reputation unless the libel is proved by the plaintiff to be a knowing or reckless, or in private libel cases negligent, false and damaging statement.³⁰⁵

Importing the First Amendment into trespass actions in a similar way would yield results broadly similar to those we propose. Not only would the trespass have to be proved in its particulars by the plaintiff, but the actual damage flowing from the trespass would also have to be specified and proved by clear and convincing evidence.³⁰⁶ Presumed or general damages, now available in trespass actions,³⁰⁷ would be unavailable because of their inhibiting effect on artistic expression. And the owner would have to prove that the artist-trespassers were aware that the property was private and that others were not invited, that damage would result, and that they intentionally or negligently trespassed nonetheless.³⁰⁸ Trespass actions, in other words, would require the kinds of harms and proofs that we propose in the form of a modest change in the common law of trespass.

A similar system of first amendment privileges and proofs has been imposed by the Supreme Court in another analogous setting: the right to privacy that protects against public disclosures of intimate personal facts.³⁰⁹ There newsworthiness stands as a constitutional privilege against liability in a privacy action, the first amendment premise being that personally identifiable information is part of our cultural vocabulary – part of the habits and conventions of expression in our culture³¹⁰ – and that while everything need not be made public, the price of

³⁰¹ *Sullivan*, 376 U.S. at 270–84.

³⁰² *Id.* at 283–84; *Gertz v. Welch*, 418 U.S. 323, 347–51 (1974). See Smolla at .

³⁰³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–84 (1964); *Gertz v. Welch*, 418 U.S. 323, 347–51 (1974). See SMOLLA, *supra* note 271.

³⁰⁴ *Gertz*, 418 U.S. at 439–50 (“It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.”).

³⁰⁵ *Sullivan*, 376 U.S. at 270–84; *Gertz*, 418 U.S. at 347–51.

³⁰⁶ *Sullivan*, 376 U.S. at 283–84; *Gertz*, 418 U.S. at 347–51.

³⁰⁷ See notes *supra*.

³⁰⁸ This, at least, would seem to be the equivalent standard to the actual malice test in the libel setting: knowing falsity or reckless disregard for the truth. *Sullivan*, 376 U.S. at 279–80; *St. Amant v. Thompson*, 390 U.S. 727, 731–32 (1968) (failure to investigate before publication is not actual malice unless the publisher harbored serious doubts about the truth of the defamatory statement).

³⁰⁹ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

³¹⁰ *Id.* at 489–96.

easily obtained damages for proven losses is the inhibition of valuable and non-invasive expression for fear of liability.³¹¹

The privacy cases are relevant to our trespass analysis in two ways. First, they rest on a judgment by the Supreme Court that speech about the private affairs of others is valuable under the First Amendment.³¹² Similarly, with respect to art whose trespassory nature is inherent, the artistic expression itself is of undoubted value and its inhibition by the tight constraints of property law would discourage it. Second, and more importantly, an interest often expressed in justification of complete rights of dominion over property is the right to privacy and repose. To the homeowner who wishes to escape the noise and bustle of everyday life this is surely a substantial interest, but it may be much less so to the grocer or the owner of Grand Central Station or the urban dweller. Our point is not to judge those interests categorically, but rather to suggest that, as with privacy, a closer and more specific examination of the privacy-like interests of a property owner and the fact of their actual harm is not too much to ask when artistic expression protected by the First Amendment is also at stake.

The types of provable and specific harms that would often flow from artistic trespass, other than the undifferentiated loss of dominion, have been discussed earlier in connection with our proposed modification of the common law of trespass by borrowing, remedially, from the law of nuisance. They include loss of market value of the property; physical damage to the property; displacement of or interference with intended or actual productive use; loss of peace and solitude; disruption and threat to security.³¹³ Their existence and magnitude in any instance would depend on the duration and nature of the artistic use; the social value of that use; and the use's proportionality and connection to the artistic purposes being sought.³¹⁴

These kinds of factors operate much like the fair use defense operates in copyright law where, like trespass, the "property" right is fixed, and the justifications for intruding upon it take the form of defenses, or privileges, going to liability and remedy only.³¹⁵ In copyright law the use of another's copyrighted material is an infringement, just as an artist's use of another's private property is a trespass.³¹⁶ Indeed, many copyright decisions and much scholarly commentary treat the copyright interest much like private property – even real property.³¹⁷ But as with our suggestion about a nuisance-like harm requirement, the fair use defense (or privilege) denies recovery for an infringement whose use of material is socially useful, limited to its social

³¹¹ *Id.*

³¹² *Id.*; see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 332-334 (1983).

³¹³ See text accompanying notes *supra*.

³¹⁴ See text accompanying notes *supra*.

³¹⁵ 17 U.S.C. sec. 107 (1976); see Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

³¹⁶ 17 U.S.C. & 102 *et seq.*

³¹⁷ *E.g.*, Lloyd Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990); Leval; Epstein; Nimmer; Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Neil Netanel, *COPYRIGHT'S PARADOX* (2008); many others.

purpose, and not substantially harmful.³¹⁸ This, of course, is the essence of what we suggest be accomplished for real property through a common law privilege for art that trespasses.

C) Attribution

1) Attribution to Private Property Owners

There is one harm that warrants special attention, however, for it is of constitutional importance to the property owner. This is the harm of attribution, or more specifically of wrongful association of the property owner with the message or taste or style of the allegedly offending art. A politically controversial work of graffiti art on the side of a building may lead a viewer to believe that it meets with the owner's or occupier's approval, and thus to attribute the sentiment to the owner or occupier. Were the owner's objections not considered when judging constitutional privilege for the art, the owner would effectively be forced by the state to express a view with which she disagrees. Such a result would violate the owner's first amendment right of free speech.³¹⁹

The Supreme Court's forced speech jurisprudence began with the case of *Wooley v. Maynard*,³²⁰ in which a New Hampshire couple objected to the State's motto, "Live Free or Die," on their license plate and accordingly covered it over. The Supreme Court held that the act of covering the motto was protected by the First Amendment because requiring its display would force the Maynards to express a government message with which they disagreed – a message, the Court implied, that would be attributed to the Maynards, who disagreed with it.³²¹

Since *Maynard*, compelled speech cases have arisen in a wide variety of settings. For our purposes, the relevant cases involve, at their core, the question of attribution: what or whom does the audience or onlooker consider the source of the speech, or the speaker, to be? With trespassory art the question is whether the observer or hearer concludes that the artistic expression is endorsed by the property owner. On this question the *Maynard* case is rather extreme, as it is intuitively doubtful that another driver seeing the license plate and State motto would conclude that the Maynards, personally, endorsed the message.³²²

In the context of attribution to a private speaker, the Court has adopted a less extreme but nevertheless generous attribution rule to the organizers of a parade to whom an endorsement of homosexuality would be attributed by the parade audience by virtue of the inclusion of a gay

³¹⁸ For an interesting and broad-based article, see Anne Barron, *Copyright Law and the Claims of Art*, 4 I.P.Q. 368 (2002).

³¹⁹ *Wooley v. Maynard*, 430 U.S. 705 (1977); see generally R. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983 (2003).

³²⁰ 430 U.S. 705 (1977).

³²¹ *Id.* at 714–16.

³²² Equally extreme is *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), which involved an unaccompanied Latin cross standing near the steps of the Ohio State Capitol. A divided Court presumed attribution of the message to the government, at least in the absence of a clear disclaimer.

rights group in the parade.³²³ And in the arts setting, private artists supported by National Endowment for the Arts grants were unsuccessful in claiming that their artistic expression was solely their own; it was, the Court said, instead shaped by the programmatic patronage of the government.³²⁴ In other cases, however, attribution has not been found. The views expressed by a religious student newspaper subsidized by the University of Virginia were attributed to the student organization publishing the paper, and not the University, on the ground, apparently, that the student activity system was an open forum and that reasonable observers would not conclude that the University endorsed the speech. Similarly, in another case private beef producers who were required to fund government-sponsored pro-beef advertisements were unsuccessful in claiming that the advertisement messages would be attributed to them.³²⁵

The attribution cases are complex and far from coherent,³²⁶ but we need not plumb them in great depth here. The fairly straightforward question of whether art placed on private property – or on government property, discussed later – would be understood to have the endorsement of the property owner is a fairly straightforward one. And it is, for private property, a dominantly circumstantial one, dependent on the observer's ordinary perceptions.³²⁷ Many such cases can be resolved by common sense and intuition; others may require specific testimony or other forms of evidence. In the former category would be many forms of graffiti, parkour, and the silent, frozen, performance in Grand Central Station, where cultural conventions lead to general perceptions about authorship, or, with Grand Central, where the dissonance between the traffic function of the place and bodies frozen amidst the flow of people strongly suggest that the owners would not sponsor or endorse the performance art. On the other hand, graffiti in the form of a painted mural on a train car,³²⁸ or a mural on the side of a building, or shop-dropped artistic soup cans on the shelf, may involve more complex perceptual questions.³²⁹

Yet the ultimate question, as a matter of constitutional law, is whether the State by enforcing a trespass regime that permits trespassory art can be held legally accountable for the attribution of art to the owner and the resulting compelled speech. The constitutional question has only infrequently arisen in the context of such a largely private dispute, but the instances in

³²³ Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

³²⁴ N.E.A. v. Finley, 524 U.S. 569 (1998).

³²⁵ Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

³²⁶ See Bezanson & Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Carolina Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) for an insightful and comprehensive review of the full range of cases and their theoretical and practical underpinnings.

³²⁷ The question is more complex with government property, where questions of public forum arise, both as a matter of first amendment law and of reasonableness of audience understanding, and where the Court has suggested that the standard is one of a reasonable observer who is cognizant of the history and background of the speech and the government policy governing the place. E.g., Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260 (1988); Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995); Santa Fe Indep. Sch. Dist. V. Doe, 530 U.S. 290 (2000).

³²⁸ See text accompanying notes *supra*.

³²⁹ See text accompanying notes *supra*; Bezanson, *Speaking Through Others' Voices*, *supra* note 319.

which it has arisen suggest that the Constitution would limit the State's action, even though it is indirect. In the *Hurley*³³⁰ case, involving a private parade and a dispute about whether the parade organizer or the parade participant was the true speaker for purposes of the First Amendment, the government's role in enacting a law prohibiting discrimination based on sexual orientation was sufficient to bring the attribution question to bear on the State's enforcement power. Likewise, in the *Dale* case the Court's conclusion that the expressive significance of a gay scoutmaster would be seen as a message of endorsement by the Boy Scouts organization led to the conclusion that enforcement of the applicable anti-discrimination law would deny the Boy Scouts of their freedom not to be compelled to speak by the government.³³¹

In light of these cases, it seems clear that the government's role as lawmaker is sufficient to trigger first amendment scrutiny in a private dispute, even where the government's role is indirect. Indeed, in the trespass setting, the government's role in creating the law of trespass and property, coupled with the government's direct involvement in adjudicating the private dispute between artist-trespasser and property owner, is even more obvious than in the *Hurley* and *Dale* cases. This, of course, is the same conclusion reached earlier under the explicit heading of state action.

Attribution, therefore, is an inescapable issue in the artistic trespass setting if the relevant common law or constitutional rule is that recovery by the property owner is limited by proof of actual damage rather than simply trespass on the owner's absolute right of dominion. And if such a rule of actual damage is, as discussed earlier, constitutionally required, the question of attribution is inherent in any trespassory art case,³³² whatever the underlying state law of trespass is. Therefore, unwanted attribution of trespassory art to the property owner should, and indeed must, qualify as harm for purposes of our proposal.

2) Government as Property Owner and Attribution

Our attention so far has been largely limited to trespassory art on privately owned property. Government, too, owns property and possesses the attributes of ownership that private parties possess. But government is also directly limited in its property claims by the First Amendment. The relevant rules of limitation are found in the public forum doctrines and the accompanying standards of scrutiny that apply to the government's actions as a property owner.³³³ For government property that is classified as a public forum or a limited public forum,

³³⁰ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); see Randall P. Bezanson & Michele Choe, *Speaking Out of Thin Air: A Comment on Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 25 HASTINGS COMM. ENT. L.J. 149 (2002); BEZANSON, *supra* note 55.

³³¹ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); see Randall P. Bezanson, *Artifactual Speech*, 3 U. PA. JOURN. OF CONST. LAW 819 (2001).

³³² And, indeed, attribution and first amendment rules would apply in any expressive trespass setting. It is not our intention, however, to address the larger free speech implications of our analysis here.

³³³ See CHEMERINSKY, *supra* note 278, at 1082–1103, for a masterful, clearer and succinct

the rules are well established and directly limit the government' restrictions of expression, whether trespassory or not.³³⁴ These rules directly apply to artistic expression and yield much more protective results than our suggested modification of common law remedies in the trespass setting because of the background presumption of access to public property for purposes of expression.³³⁵

But for government property that is neither a public forum nor a limited forum for expression, the government has a relatively free hand to manage and control access to and activities on its property. The main exception is that the government cannot prohibit expression simply because of its message or content, though it may limit all expression or even all expression of general types.³³⁶ Our proposal, therefore, would have potentially meaningful application to this form of government property, as it would limit the government's ability to prohibit all art.

As a general matter, the common law and constitutional analysis outlined in the previous pages would apply equally to government as property owner and to private property owners.³³⁷ The nature of claimed harms, and the relevant circumstances in which trespass occurred, would be different, but they would be evaluated within the same analytical framework applied to private property. The government should be barred, for example, from resting its authority on a universal right of dominion and control, without more. The attribution question, however, may be a bit more complicated. It will involve, first, the question of the observers' awareness that the property is the government's, and the effect that such knowledge would have on reasonable judgments about authorship and endorsement. And it will likely involve, as the Supreme Court's opinions suggest, the related assumption that the observer's judgment should assume an awareness of the ownership, perhaps, and of the laws, policies, and uses that underlie the government's claimed right of control over access.³³⁸ A nuclear test site, or a secret government facility, for example, might justify a flat prohibition on access even in the face of ignorance by the artistic trespassor. These are not insurmountable obstacles or problems, in our judgment, but they require some differences in the form or elements of first amendment analysis.

V. Conclusion

overview of the public forum concept, the types of forums, and the types of scrutiny applied in each.

³³⁴ *Id.* at 1086–95 (public forums, strict scrutiny); 1095–97 (limited public forums, content neutrality and reasonableness); and 1097–1103 (nonpublic forums, reasonableness in relation to function of property).

³³⁵ *E.g.*, *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

³³⁶ CHEMERINSKY, *supra* note 278, at 1097–1103.

³³⁷ For our purposes this is a conceptually useful way to look at the government as non-forum property owner, but of course the government possesses many specific powers as owner that are provided in at the Constitutional or statutory level and have nothing to do with free speech. *See* U.S. CONST. ART. I, sec. 8; art IV sec. 3.

³³⁸ *See Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

It is not our view that the Constitution requires that trespass remedies be limited when the trespass takes the form of art. But we do think that the impact of blunt-edged property justifications and remedies untied to real harm do present constitutional issues when applied to art, and that a common law reform of remedies limited to proven harm and privileges that recognize the value of art and artistic expression even against private property would be fully consistent with the constitutional rules applied in other property-type settings.

A) A New Rule of Trespass that Accommodates Trespassory Art

We propose that state courts recognize a common law privilege for locationally appropriate art that trespasses on the property of another. The privilege draws on the remedial law of nuisance. It would attach in a civil trespass action³³⁹ in which damages are sought. The privilege would be invoked by the defendant-trespassor upon a showing that the trespass was locationally justified for artistic purposes. The effect of the privilege would be to require the plaintiff-property owner³⁴⁰ to prove that the trespass caused actual damage to the property owner in the form of economic harm or reputational harm, which we call attribution harm, that is not justified by the nature and value of the intruding art. In the absence of proof of actual damage, the trespass would be privileged and the damage action dismissed.

We do not, however, propose that the privilege extinguish the trespass. Thus, a property owner would still be entitled to insist on the removal of the trespassing art and enforce that right legally through equitable means, such as injunction. But in an action to force the art's removal the defendant-artist would be afforded a limited privilege to continue the trespass if, as in nuisance law, the clear social benefit of the artistic trespass outweighs the owner's private interests and thus prevents, delays, or alters the owner's enforcement of the trespass claim. Whether, for how long, and under what conditions the trespass is allowed to continue in such a case is to be determined by a court in the exercise of its equitable discretion.

Art is a form of expression protected by the First Amendment, and it can therefore be argued that the privilege we propose is required in some form by the Constitution, and indeed it can be argued that such a privilege should also be recognized for certain types of trespassory, non-artistic, speech. We believe, however, that artistic expression, while protected, is in many ways distinct from purely cognitive speech, and thus that its protection may take different forms and face different limits. For example, artistic expression is highly sensual and evokes idiosyncratic meaning in the minds of the individual viewer or listener. Trespassory art uses property as an element of the process of sensual re-representation, or the creation of new meaning. Strictly cognitive speech does not. Art therefore has a different claim to use of space or place, and arguably a more forceful claim than that of a speaker seeking an audience for *a* message. Attribution and reputational harm will often look very different with art than with

³³⁹ The privilege could easily and naturally be applied to other forms of action grounded in a trespass or property invasion by art, including personal property and intellectual property invasions, and also to a criminal trespass action, given the constitutional grounds upon which it can be justified. But we restrict our focus here to the classic trespass on real property.

³⁴⁰ Owner would include, for instance, a lessee or assignee.

speech, where a single cognitive message to an audience is intended and reasonably expected. Indeed, the same difficulty may exist with financial harm, for example harm to business, for the audience may find the trespassing art enjoyable and merely incidental and therefore not make shopping or other decisions based on its presence.

For these and other related reasons we conclude that a common law privilege coupled with equitable discretion in a court responds to the characteristics of artistic expression with flexibility and attention to the circumstances in which the art appears, whether it consist of freezing in place in Grand Central Station or Best Buy, Parkour in an urban or rural setting, or the more permanent form of artistic graffiti. The known fact of First Amendment concerns should inform a common law court's treatment of a case, but those concerns need not yield an inflexible set of constitutional rules that might (as with the libel tort) convert a flexible and equitable judgment into a technically complex and rigid constitutional and legal framework.

B) The Value of Trespassory Art

Art "evoke[s] imaginary worlds, and not representation in the strict and narrow sense."³⁴¹ Its value, in other words, lies not so much in the creativity of the artist, but in the creativity of the audience – the viewer, listener, reader, participant. This is especially so with *public* art, which inserts into the empirical reality of daily life an instance of sensual reflection, of imagination, of disrupted cognition, of serious aesthetic contemplation. As Dewey put it, "[t]he *product* of art – temple, painting, statue, poem, is not the *work* of art. The work takes place when a human being cooperates with the product so that the outcome is an experience that is enjoyed because of its liberating and ordered properties."³⁴² Dewey called the "idea of art as a conscious idea [] the greatest intellectual achievement in the history of humanity."³⁴³

In a society as devoted to private property as ours is, where public property is even viewed as the equivalent of private property in the hands of government, it is difficult for *public* art truly to flourish. And the limitations we place on the experience and role of art in our lives affect the culture in which we live and the opportunities for creative expression and creative comprehension in the public mind. Art in America is largely confined to public and private museums, galleries, performance halls, and buildings, where it is usually placed in service of the function of the space or the tastes of the patrons. Music may be the exception to this rule, as noise is largely unregulated in our culture and laws. Music is nuisance, not trespass, in American law. Visual art may appear in the public spaces of a building, but not on railroad cars, a decidedly functional venue. Art may appear on a building at the behest of the owner, but a laser image cast on the building at night is a trespass even if the building is not in use. A grocery store shelf is a determinedly functional space; replacing labels with art is disruptive of the commercial function. Theatre is allowed . . . well, in a theatre, or in another dedicated space, not in Grand Central Station or Best Buy or on thoroughfares or sidewalks. Billboards assault our consciousness on streets and highways, but not art. Are we afraid of art when it does not harm

³⁴¹ KAROL BERGER, *A THEORY OF ART* viii (2000).

³⁴² JOHN DEWEY, *ART AS EXPERIENCE* 222–23 (1934).

³⁴³ *Id.* at 26.

because it loses feeling and emotion and idiosyncratic meaning? Or are we afraid of speech – messages about politics or smut or hate – and of our inability to distinguish speech from art? Art may well have been the first form of communication, preceding language, drawn on the walls of caves and enjoyed by dance and ritual.³⁴⁴ Art speaks, but it does so by evoking imagination and memory and failure and greatness. We might call it full-bodied expression. Even more than speech, it is universal.

For the individual who experiences it, art fosters creativity and individuality. It is, like the allied practice of religion, self-defining in its effect, socially constructive in its application. It spurs critical reflection and thought, and is thus deeply cognitive as well as sensual and aesthetic. It requires acts of imagination, of relationship between events and places and people and things, and ultimately of contemplation of the cognitively unknowable.

Much art is also locationally dependent. That is, its sensual and creative force relies on place and time and manner. Photographing large numbers of nude bodies is, for Tunick, a means of re-representation – of a bridge in Australia, a vast public space in Rome, a thoroughfare like Fifth Avenue in New York, a glacier in the North. What are the meanings of these photographic performances? What is being said, and why? Can it be said in a property-law domesticated venue? Will it be truly public there? Will freezing in place have the same aesthetic and sensory affect in a gymnasium rather than in Grand Central Station? Can it produce the same kinds of acts of public imagination? We think not. And we think our culture and our lives would be enriched by truly public art.

There is, of course, a major problem. How do we know whether something claimed as art will produce the advantages that we have outlined? Must we know what art is? In whose hands should we place the authority to decide? These are difficult problems, but perhaps not entirely unsurmountable ones. We propose opening a space for art when it produces no actual harm; a place where unintended harm is compensated if it actually occurs. A place where artistic value to the public can be shown, and where justification for the trespass must be tied to the nature of the art. A place where what is done is clearly an act of art and cannot be confused with the ideas or tastes of the owner of the property, whether a private owner or government. A place where judgments are made in the realm of the specific by the common law and the public jury.

Our proposal, then, is a modest one of limited range. It is not a broad constitutional rule. Even so the results may at times be messy and controversial, but with limited damages based in nuisance law the costs may be well outweighed even by the public controversy and discussion sparked by the claim of art and location. If art opens minds and experiences and imagination to new ways of understanding and seeing and critical thinking, the price will be well worth paying.

³⁴⁴ For discussion of the research that exists on this question, *see* Jean Aitchison, *THE SEEDS OF SPEECH: LANGUAGE ORIGIN AND EVOLUTION* (Cambridge: Cambridge University Press 1996); Thomas Wyn, *Did Homo Erectus Speak?*, 8 *CAMBRIDGE ARCHAEOLOGICAL JOURNAL* 78–81 (1998).