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ARTICLES

THE PROJECTED LIGHT MESSAGE CASES: A STUDY IN THE GENERAL EROSION OF FREE SPEECH THEORY

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INTRODUCTION

Any new practice involving communication can pose a challenge to established free speech law. A few such practices are of exceptional value in promoting a clearer understanding of free speech law and, crucially, of the increasingly important deficiencies of even our best free speech theories. The practice of projecting light messages onto targeted property is just such a practice.

This Article takes note of the phenomenon of projecting messages, through ordinary light, onto backdrops of various kinds, without the consent of any party otherwise associated with the backdrop in question. The message in question can be of any type. The backdrop can be any natural or artificial object, including buildings, homes, or conceivably even one or more human persons.

The Article introduces the practice of projected light messaging by reference to litigated, actual but un-litigated, and hypothetical such cases,[1] and then seeks guiding principles by which such cases, and the basic free speech issues they pose, can be properly adjudicated. These light messaging cases are herein first treated, at the broadest level, as posing issues of the scope and limits of property rights, including a property right to project or else to prohibit the message in question. In such cases, property and tort law bring to bear theories such as nuisance or trespass. The Article considers broad and middle-range theories of the scope and justification of property rights,[2] including theories emphasizing contract, natural right, or natural law;[3] utility or wealth enhancement, or some overall social benefit;[4] and autonomy, freedom, and self-realization.[5] As it turns out, neither our broad nor our middle-range theories of property rights can even approach offering any reasonably determinate general resolution of the projected

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1. *See infra* Part II.
2. *See infra* Part II.
3. *See infra* Part II., beginning with note 54 and accompanying text.
4. *See infra* Part II., beginning with note 55 and accompanying text.
5. *See infra* Part II., beginning with note 56 and accompanying text.

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message cases.

Shifting the focus then to free speech theory itself, the Article seeks guiding principles for the projected message cases drawn from the basic purposes underlying our special constitutional regard for freedom of speech,[6] including the optimal collective pursuit of truth;[7] the promotion of democratic self-government;[8] and the possible implications of the value of autonomy and the disvalue of coercion.[9] But as it happens, mainstream accounts of the basic purposes and values underlying free speech law are also of little use in resolving our light messaging cases.

Thus, neither our best broad or middle-range property rights theories, nor our best free speech theories, alone or in combination, provide us with any reasonably determinate, useful guidance in addressing the free speech issues posed by the various light message projection cases.

This overall result strikingly illustrates the crucial broader phenomenon of the gradual erosion of free speech theory, at the level of principle, as meaningfully guiding the adjudication of free speech cases. In the absence of principled guidance, we are instead left with much more specific, narrow, more or less ad hoc or arbitrary doctrinal categories; particularized contexts; individualized circumstances; and our various associated intuitions in adjudicating the range of projected message cases.[10] In a phrase, free speech adjudication, in general, becomes less a matter of any guiding principles, and more a matter of narrowly contextualized and still contestable, if not ultimately arbitrary, intuitions.

II. THE PHENOMENON OF PROJECTED LIGHT MESSAGING

The projection of light for communicative purposes has given rise to various legal issues, often of constitutional dimension. There are thus cases involving, for example, powerful searchlights used as an attention-attracting device,[11] along with cases involving "flashing, blinking, fluctuating, [or] animated"[12] outdoor commercial advertising signs.[13]

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6. *See infra* Part III.
7. *See infra* Part III.A.
8. *See infra* Part III.B.
9. *See infra* Part III.C.
10. *See infra* Parts IV., V.
11. *See*, *e.g.*, Robert L. Rieke Bldg. Co. v. City of Overland Park, 657 P.2d 1121, 1127 (Kan. 1983).
12. *Id.* at 1128 (citing Art Neon Co. v. City & Cty. of Denver, 488 F.2d 118 (10th Cir. 1973)).
13. *See* the authorities cited *supra* note 2; Rent-A-Sign v. City of Rockford, 406 N.E.2d 943 (Ill. App. Ct. 1980); Gen. Outdoor Advert. Co. v. Dep't Pub. Works, 193 N.E. 799 (Mass. 1935); Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980). In non-communicative contexts, legal disputes can focus on either less, or more, than a typical measure of light. *See*, *e.g.*, *Recent Case, Property–Ancient Lights–Right to an Extraordinary Amount of Light*, 15 HARV. L. REV. 488, 495 (1902) (validating an easement of exceptional light access for business purposes); Luke Burbank, *L.A.'s Disney Hall Shines – A Bit Too Brightly*, NPR (Mar. 18, 2005, 12:00 AM),

The best entryway into our broader concerns is the recent unpublished Nevada appellate case of *International Union of Painters v. Great Wash Park, LLC*.[14] *Great Wash Park* involved a labor union-management dispute, carried out partly in more directly public interest-focused terms. Union members allegedly committed the tort of trespass in non-consensually projecting several times, from a public sidewalk, a message onto the façade of a company restaurant.[15]

The appellate court in this case quickly rejected the claim of trespass, on the theory that the projected light generating the visible message did not amount to a "physical, tangible object,"[16] and that the light did not cause any physical damage to the targeted building.[17] The main opinion in *Great Wash Park* did not address alternative theories of injunction or recovery, any broader and more fundamental issues of property rights and their limits, or free speech issues of any sort.[18]

More elaborate, and more provocative, was the concurring opinion of Judge Tao.[19] Judge Tao began by noting that message projection via light onto property owned by another can occur in a variety of circumstances,[20] and that most of the typical lighting cases – whether regarding excessive or insufficient light – do not involve intentional message projection onto the property of another.[21] Judge Tao then noted the arguably largely abandoned free speech issue, crucial for our purposes herein, "that by projecting a text-based light image onto the Respondents' wall, the Union interfered with the Respondents' property-based right to instead put their own message on that wall, or have no message there at all."[22]

Intriguingly, Judge Tao observed that if the issue is formulated merely in terms of the respondent-building owner's right to display his or her own message

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https://www.npr.org/templates/story/story.php?storyId=4541963 [https://perma.cc/8BKG-TWM6] (reflected glare and heat from a Frank Gehry designed concert hall affecting local drivers and condominium residents; issues addressed via a gray covering tarp and then a metal sanding process to reduce the glare).

14. No. 67453, 2016 WL 4499940 (Nev. Ct. App. Aug. 18, 2016) (unpublished opinion).

15. *See id.* at *1. In this case, the message was not purely labor-dispute focused, or narrowly commercial, or for that matter, broadly political or ideological. The message instead noted alleged health code violations on the property in question, thereby implicating at least a local public interest and concern. *Id.* Below, we treat most sorts of messages as within the scope of our concern, beyond the libelous, the obscene, the substantively fraudulent, or other categories of speech subject to regulation on grounds independent of our concerns herein.

16. *Id.* at *5 (quoting Babb v. Lee Cty. Landfill SC, LLC, 747 S.E.2d 468, 477 (S.C. 2013)).

17. In this case, a restaurant. *See id.* at *2.

18. *See id.* at *1-3.

19. *See id.* at *3-9 (Tao, J., concurring).

20. *See id.* at *3.

21. *See id.*

22. *Id.* A third important possibility would involve the wall owner's option to control, in various respects, access to the wall by would-be message projectors, perhaps denying access in some cases, while allowing access in other cases, on specified terms.

in the space in question, that right could be impaired not only by the union's projecting its own message thereon, but by the union's projecting any light, whether itself conveying a message or not, that prevented the respondent's own preferred message from being effectively displayed.[23]

Pursuant to what he took to be the state of the record, however,[24] Judge Tao did not pursue this or any other considerations from a free speech perspective. Instead, Judge Tao focused on the respective possible tort remedies of trespass and nuisance, and their potential applicability in the circumstances at bar.[25]

Judge Tao began the property-tort analysis by noting that the tort of trespass has historically required a physical invasion of some sort,[26] a conception into which the projection of light, without any resulting physical damage, fits awkwardly.[27] Expanding the tort of trespass to encompass at least some forms of light invasion would inevitably tend to blur the distinction between trespass and nuisance.[28]

Following what he took to be the current majority approach,[29] Judge Tao adopted the view that "light invasions – at least of the kind at issue here – are better suited to be addressed by the law of nuisance than the law of trespass."[30] On Judge Tao's understanding, "the tort of nuisance involves a balancing of competing interests with an eye toward ascertaining the reasonableness of the intrusion, while the tort of trespass is absolute and involves no such balancing."[31] A typical landowner may thus not have an absolute right against all light, directed or ambient, impinging upon his property.[32] But this hardly precludes an action for nuisance in the case of, say, prolonged, high-intensity, excessive, unreasonable, otherwise purposeless light projection intended solely to burden or annoy the property owner.[33]

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23. *See id.* at *4.

24. *See id.* at *3-4.

25. *See id.* at *4-9.

26. *See id.* at *6-7.

27. *See id.*

28. *See id.* at *7.

29. *See id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §13, at 67, 71-72 (5th ed. 1984)).

30. *Id.*

31. *Id.* at *8. This suggests a typically greater compatibility between nuisance law and free speech law than between trespass law and free speech law, at least where free speech law, like nuisance law, involves one sort of interest balancing test or another. For background, see, e.g., Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016).

32. *See Great Wash Park*, No. 67453, 2016 WL 4499940 at *9.

33. *See id.* Evidence relevant to any such interest balancing was not before the court, precluding any possible resolution on such grounds. *See id.* For a very loose analogue to the extreme hypothetical case referred to above, consider the official use of specifically targeted music amplified via loudspeaker in an attempt to induce Panamanian General Manuel Noriega to surrender. For an account thereof, along with broader reflections, see Alex Ross, *When Music Is Violence*, NEW YORKER (July 2, 2016), https://www.newyorker.com/magazine/2016/07/04/when-

The opinions in *Great Wash Park* thus resolve an interesting case of directed, non-consensual message projection via light, but without addressing any underlying issues of the proper scope of anyone's property rights, let alone any free speech issues, given any relevant state action. Across the judicial landscape, we find minimal useful guidance with respect to any variety of the nationally[34] and internationally[35] increasingly popular phenomenon of non-consensually[36]

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music-is-violence [https://perma.cc/9QZ4-TBU5].

34. *See*, *e.g.*, Dashiell Bennett, *How Did They Project That Occupy Wall Street Message on the Verizon Building?*, ATLANTIC (Nov. 18, 2011), https://www.theatlantic.com/national/archive/2011/11/how-did-they-project-occupy-wall-street-message-verizon-building/335321/ [https://perma.cc/5GVD-47NN] (referring to a "bat signal" analogy, although the message was projected onto the wall of a building); Philippe Martin Chatelain, *Daily What?! The Illuminator Beams Protest Messages onto Iconic NYC Buildings*, UNTAPPED CITIES (Apr. 4, 2014), https://untappedcities.com/2014/04/04/daily-what-the-illuminator-beams-protest-messages-onto-iconic-nyc-buildings/ [https://perma.cc/2LKL-NEZL]; Samantha Corbin & Mark Read, *Guerrilla Projection*, BEAUTIFUL TROUBLE, http://beautifultrouble.org/tactic/guerrilla-projection [https://perma.cc/4MY4-GH43] (last visited Oct. 10, 2016) (referring also to the British aircraft carrier Ark Royal, onto which the Greenpeace Organization had projected the message "We [H]ave [N]uclear [W]eapons [O]n [B]oard"); THE ILLUMINATOR, http://theilluminator.org/ [https://perma.cc/68A4-A9M6] (last visited May 22, 2018); *Light Blaster: Revolutionary Strobe-Based Projector*, SPIFF-Y, www.light-blaster.com [https://perma.cc/U2XU-BLFL] (last visited Oct. 10, 2016) (discussing technical features and capabilities of various items); *Projection Bombing*, INSTRUCTABLES, http://www.instructables.com/id/PROJECTION-BOMBING/ [https://perma.cc/C73D-WZSZ] (last visited Oct. 10, 2016) ("Outdoor digital projection in urban environments is a great method for getting your content up big before the eyes and in the minds of your fellow city inhabitants."); SA Rogers, *Your Text Here: Messages of Light Displayed on Buildings*, WEB URBANIST, https://weburbanist.com/2013/01/07/your-text-here-installation-broadcasts-urban-voices-on-buildings/ [https://perma.cc/XJJ8-NCQQ] (last visited Oct. 10, 2016). See also the aesthetic emphasis in *Specialisms: Street Projections*, URBAN PROJECTIONS, https://www.urbanprojections.com/street-projection [https://perma.cc/K3GG-ECTC] (last visited Oct. 10, 2016).

35. *See* Corbin & Read, *supra* note 34; Darren Boyle, *Pro-Union guerrillas 'projection bomb' Scottish landmarks with 50ft No logo on eve of historic decision*, DAILYMAIL.COM (Sept. 17, 2014, 8:20 PM), www.dailymail.co.uk/news/article-2760177 [https://perma.cc/3M4C-TGB2] (the message in this case was projected onto public buildings, including Edinburgh Castle); Feargus O'Sullivan, *Stop Projecting Trashy Ads on Historic Buildings, Warns the U.K. Parliament*, CITYLAB (Mar. 16, 2016), https://www.citylab.com/design/2016/03/stop-projecting-trashy-ads-onto-our-parliament-warns-the-uk-parliament/474051/ [https://perma.cc/KGA2-4XTW] ("Recent [commercial] ads displayed on Big Ben have included images of monkeys and weight loss photos.") (noting as well the phenomenon of authorized or official projections in connection with civic events and causes).

36. Some commercial advertising displays on building walls could be entirely consensual, or self-initiated. *See* Stephanie Hoops, *Firm lights a path for advertising by projecting images onto buildings*, VENTURA CTY. STAR (June 8, 2008), http://archive.vcstar.com/business/firm-lights-a-path-for-advertising-by-projecting-images-onto-buildings-ep-373619702-352548391.html/

directed projection of any sort of message via otherwise harmless[37] light.

This lack of judicial guidance is of increasing importance, particularly because the message projection phenomenon[38] plainly raises issues far beyond the distinction between trespass and nuisance,[39] and far beyond the labor-management dispute context.[40] There are few limits to the range of such cases.

[https://perma.cc/HNV3-6Q98]; O'Sullivan, *supra* note 35. But several of the prominent examples noted in Feargus O'Sullivan are clearly instances of non-consensual commercial advertising against the facades of buildings and other structures unrelated to the product advertiser. *Id.*

37. If the decision is made to physically remove familiar forms of graffiti, the costs of the removal will typically be borne at least in part by the relevant government or by the private building owner. 'Graffiti' is sometimes even legally defined so as to require an intent to damage the property in question. *See*, *e.g.*, People v. Vinolas, 667 N.Y.S.2d 198, 200 (1997). For some free speech-based limitations on broad forms of anti-graffiti legislation, see Vincenty v. Bloomberg, 476 F.3d 74, 89 (2d Cir. 2007). We of course set aside herein any cases of the projection of light as a physically destructive weapon. *See* Kelsey D. Atherton, *What's Next For The F-35B Lasers?*, POPULAR SCI. (Aug. 30, 2016), https://www.popsci.com/whats-next-for-f-35b-lasers [https://perma.cc/F8FU-EL4U].

38. The phenomenon is also known, by proponents and critics alike, as 'projection bombing,' 'wall jacking,' or as 'illuminating.' *See* the sources cited *supra* notes 34-36.

39. For discussion of the modern status of the evolving distinction between trespass and nuisance, see Stevenson v. E.I. DuPont De Nemours, 327 F.3d 400, 405-06 (5th Cir. 2003) (physical entry on land by "some thing" for purposes of trespass as thought to include airborne particulates); Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 220 (Mich. Ct. App. 1999) (citing Martin v. Reynolds Metals Co., 342 P.2d 790, 797 (Or. 1959) (for the possibility of trespass via "a ray of light," perhaps with a certain degree of force and energy, whether the light is considered tangible or not); Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 465-68 (1959); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13 (1985) (trespass as typically a matter of strict liability for even *de minimus* harms, whereas nuisance typically requires a showing of substantial harm and some sort of cost-benefit calculus of the activities in question); G. Nelson Smith, III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 40 (1995) ("the nuisance and trespass remedies remain both nebulous and confusing"); Eugene Volokh, *Is projecting a message onto the wall of a building a trespass? A nuisance?*, WASH. POST. (Aug. 17, 2016), www.washingtonpost.com/new/volokh-conspiracy/wp/2016/08/17 [https://perma.cc/R3GQ-VLDJ] (discussing the *Great Wash Park* case); *Recent Case, Nuisance -- What Constitutes -- Interference With Outdoor Motion Pictures by Race-Track Floodlights Held Not Actionable as Trespass or Nuisance*, 62 HARV. L. REV. 689, 704-05 (1949) (trespass as normally requiring a physical invasion, but perhaps including vibrations from blasting or from escaping gas) (citing the Nobel Prize-winning physicist Louis de Broglie on the wave-particle dualistic nature of light).

40. For a vaguely similar East Coast analogue to the *Great Wash Park* case, see the discussion in Kevin Horridge, *Union Barred from Beaming Messages to Walls of Carl Icahn Casinos*, CASINO.ORG (Aug. 28, 2015), www.casino.org/news/union-barred [https://perma.cc/V4SL-EH2N] (union messages including "Boycott Taj" projected onto casino walls at night); *see* Constr. & Gen. Laborers' Union No. 330 v. Grand Chute, 834 F.3d 745, 751 (7th Cir. 2016)

Potentially, message projection, presumably by governments or by large corporate commercial advertisers, could even reach the moon.[41]

In the meantime, the content of the projected light messages can be purely commercial;[42] mixed commercial and political;[43] political, ideological, cultural, artistic, or religious;[44] hostile or overt hate speech;[45] or personal speech unrelated to matters of public interest and concern.[46] All such messages can be projected

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(Posner, J., concurring and dissenting) ("the large inflated rubber rats widely used by labor unions to dramatize their struggles with employers are forms of expression protected by the First Amendment") (citing Tucker v. City of Fairfield, 398 F.3d 457, 462 (6th Cir. 2005)); Waremart Foods v. NLRB, 354 F.3d 870, 876 (D.C. Cir. 2004) ("We hold that the union organizers had no right under California law to engage in handbilling on the privately-owned parking lot of WinCo's grocery store.") (but consider *Ralph's Grocery*, immediately *infra*); Ralph's Grocery Co. v. United Food & Commercial Workers Union Local 8, 290 P.3d 1116, 1127 (Cal. 2012) (state statute allowing labor picketing on private property outside shopping mall supermarket entrance as justified by the goal of resolving labor disputes through collective bargaining). For discussion, see Giant Eagle Mkts. Co. v. United Food & Commercial Workers Union No. 23, 652 A.2d 1286, 1292 (Pa. 1995) ("Labor picketing, as long as it is not coercive, intimidating, or violent, is recognized as a protected form of assembly and free speech . . . ."); Vikram David Amar, *Do Special Legislative Protections For Labor Picketing Violate the First Amendment?*, VERDICT JUSTIA (Jan. 18, 2013), https://verdict.justia.com/2013/01/18/do-special-legislative-protections-for-labor-picketing-violate-the-first-amendment [https://perma.cc/8C9D-7HWT] (protections for expressive labor picketing as incidental to a broader essentially economic regulatory scheme); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 19-20 (2011) (discussing the scope of coercion and intimidation in the labor picketing context). On the scope of free speech principles in the broader labor context, see *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969) as well as the discussion of unfair labor practices in the National Labor Relations Act, Pub. L. No. 74-198, 49 STAT. 449 (codified at 29 U.S.C. § 158(c) (2016)).

41. Projecting visible messages on the moon as a backdrop, however technically ambitious, is less challenging than the even more audacious aspiration to permanently carve or otherwise alter the visible surface of the moon so as to leave some universally visible corporate logo or other message. The first aspiration is occasionally known as 'moonvertising.' *See* Malcolm Tatum, *What Is Moonvertising?*, WISEGEEK, http://www.wisegeek.org/what-is-moonvertising.htm [https://perma.cc/TPE8-6944] (last visited Jan. 02, 2018). For a sense of the daunting energy requirements and technical obstacles involved, see Steven Kurutz*, Moonvertising*, N.Y. TIMES (Dec. 12, 2008), http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-C-t-009.html [https://perma.cc/N9RJ-YGP7].

42. *See*, *e.g.*, O'Sullivan, *supra* note 35.

43. *See* generally International Union of Painters v. Great Wash Park, LLC, No. 67453, 2016 WL 4499940 (Nev. Ct. App. Aug. 18, 2016) (unpublished opinion).

44. Message projection could be an obvious publicity or proselytization technique.

45. The assumedly non-consensual nature of our message projection techniques opens the door to expressions of hostility or contempt.

46. For discussion of this basic distinction, see generally R. George Wright, *Speech On Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987).

without consent onto major corporate headquarters, small business buildings, health care facilities, social service agencies, houses of worship, union headquarters, government buildings,[47] water towers, monuments, statues, existing billboards, memorials, grave markers, natural environmental features such as Giant Redwoods or the Grand Canyon, clouds, private homes and apartments, specifically targeted or passing vehicles, groups of persons, and even the bodies of individual persons in any publicly accessible place.[48]

Given the remarkable breadth of the kinds of messages and of the physical targets or backdrops of all such messages, some sort of principled or otherwise meaningful guidance for adjudicating the inevitable judicial cases seems obviously desirable. Focusing on the initial distinction between the tort remedies of trespass and nuisance[49] plainly will not suffice in providing such judicial guidance.

The law of trespass and nuisance may involve subtle, or even subconscious, prejudging of how to allocate specific property rights by casually assigning the broad statuses of unique "owner" and "alleged intruder" to the parties involved.[50] But even if the allocation of specific property rights in a given trespass or nuisance case is flawless at a non-constitutional level, there is no guarantee that such an allocation of property rights will still seem appropriate once we consider any free speech constitutional rights claims and constitutional values that may be implicated in the case.[51] Even if we choose to think of all relevant free speech

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47. With a specific focus on District of Columbia working federal buildings and adjacent publicly accessible spaces, see *United States v. Grace*, 461 U.S. 171, 179 (1983) (Supreme Court sidewalks as functionally indistinguishable from other District of Columbia public sidewalks); Hodge v. Talkin, 799 F.3d 1145, 1158 (D.C. Cir. 2015) ("We find the Supreme Court plaza to be a nonpublic forum."); Mahoney v. Dist. of Columbia, 662 F. Supp. 2d 74 (D.C. 2009) (upholding the prohibition of a "chalk art" demonstration physically altering the surface of the sidewalk immediately in front of the White House). A political or commercial message temporarily projected against the White House by ordinary light would not physically alter the backdrop surface, although in a sense temporarily—perhaps for less than a second, while being recorded—altering that appearance.

48. There are a wide range of possible backdrops--including the moon, by the way--for projected light messages.

49. *See generally Great Wash Park*, No. 67453, 2016 WL 4499940; *see also* authorities cited *supra* note 40.

50. *See* the discussion *infra* Part II. Many of us lack the agnosticism as to allocating specific property rights famously exhibited in Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

51. At the federal level, though not necessarily at a state-law level, a free speech claim will typically require some sufficient state action, involvement, or responsibility. *See generally* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U.L. REV. 685 (1989). State action may take the form of pre-existing legal rights and recognized nuisance and trespass remedies dependent thereon. Whether such pre-existing rules, as limits on speech, should count as content-neutral or content-based, may be partly context-sensitive. For the Court's most recent pronouncement on this distinction, see generally

rights as specific property rights, we can hardly hope to properly assign such property rights unless we appropriately consider any distinct and relevant free speech interests and values, and the interests inevitably conflicting therewith.

Seeking a principled or otherwise adjudicatively helpful approach to various[52] sorts of projected message cases thus requires that we exhaust the resources provided by our best broad and middle-range theories of property rights. We must then somehow account specifically for the basic values underlying free speech and any important countervailing considerations. It is thus to our best available theories of property rights, and their implications, however limited, for our message projection cases that we first turn.

III. PROPERTY RIGHT THEORY AND ITS LIMITED VALUE FOR THE PROJECTED MESSAGE CASES

Ideally, our best and most relevant general and middle-range normative theories of property rights, and of private property rights in particular, would help to advance our understanding of the various sorts of light projected message cases. It would be unreasonable to expect the normatively best resolution of our cases to fall neatly out of a general property theory in any logically rigorous way. Whether any sort of even minimally determinate guidance can be drawn from broadly acceptable general or middle-range property theory is the more crucial question.

There are a number of historical[53] and contemporary[54] broad and somewhat

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

52. See the range of cases represented in text, *supra* notes 40-49.

53. Chronologically, see ARISTOTLE, POLITICS BOOK II, § 5 at 47 (Ernest Barker trans., 2009 ed.) (350 BCE) ("When everyone has his own separate sphere of interest, there will not be the same ground for quarrels; and they will make more effort . . . ."); ST. JOHN CHRYSOSTOM, ON WEALTH AND POVERTY 49 (Catharine P. Ross trans., 1984) (~389) ("this also is theft, not to share one's possessions"); ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA II-II, qu. 66 art. 7 *respondio* (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (manifest and urgent need of property held in superabundance by another negates the crime of theft, by operation of the higher natural law); DUNS SCOTUS, ON THE WILL & MORALITY 222 (William A. Frank ed., Allan B. Wolter trans., 1997 ed. 1986) (~1300) (distribution of private property rights as a matter of positive human law, rather than divine or natural law); William of Ockham, *The Work of Ninety Days*, *in* A LETTER TO THE FRIARS MINOR AND OTHER WRITINGS (Arthur Stephen McGrade ed., John Kilcullen ed., trans., 1995) (1334); THOMAS MORE, UTOPIA 67 (Paul Turner trans., 1965) (1516) ("In the absence of a profit motive, everyone would become lazy, and rely on everyone else to do the work for him.") (speaking in the literary character of More); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 87 (James Tulley ed., Michael Silverthorne trans., 1991) (1673) ("[I]t often happens that others acquire a right (on the basis of contract or otherwise) of deriving a certain benefit from our property, or even of preventing us from using it as we might wish without restriction. These rights are normally called servitudes."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. V. §§ 25-51, at 327-44 (Peter Laslett ed., rev. ed. 1963) (~1679) (the focus of Locke's most influential property treatment); DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS § 3,

pt. 2, at 195 (L.A. Selby-Bigge ed., 2d ed. 1972) (1777) (property rights are recognized "to give encouragement to . . . *useful* habits and accomplishments" for the sake of "the convenience and necessities of mankind") (emphasis in original) [hereinafter HUME, ENQUIRIES]; *id.* at 196 ("all questions of property are subordinate to the authority of civil laws, which extend, restrain, modify, and alter the rules of natural justice, according to the particular *convenience* of each community") (emphasis in original); Thomas Jefferson, *Letter to James Madison*, *in* WRITINGS 841-42 (Merrill D. Peterson ed., 1984) (1785) ("Whenever there are in any country uncultivated lands and unemployed poor, . . . the laws of property have been so far extended as to violate natural right"); Condorcet, *On the Influence of the American Revolution on Europe*, *in* SELECTED WRITINGS 71, 73 (Keith Michael Baker ed., trans., 1976) (1786) ("The rights of man [include] . . . [s]ecurity and free enjoyment of property."); DAVID HUME, A TREATISE OF HUMAN NATURE book III pt. II §§ II-III at 490-91 (L.A. Selby-Bigge ed., 1968 ed. 1888) (1789) (property rights as arising not from contract or promise, but from conventions reflecting the common interest, utility, stability, and pragmatic social necessity) [hereinafter HUME, TREATISE]; J.G. FICHTE, FOUNDATIONS OF NATURAL RIGHT pt. II section II § 18 at 185 (Michael Baur trans., 2000) (1796) ("[A]ll property rights are grounded on a contract of all with all, which states: 'We are all entitled to keep this, on the condition that we let you have what is yours.'"); IMMANUEL KANT, THE METAPHYSICS OF MORALS 49 (Mary Gregor ed., trans., 1996) (1797) ("By the term 'property right' . . . should be understood not only a right to a thing . . . but also the *sum* of all the laws having to do with things being mine or yours.") (emphasis in the original); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 55 (John Ladd trans., 1965) (1797) ("A thing is externally mine if it is something outside me which is such that any interference with my using it as I please would constitute an injury to me (a violation of my freedom, a freedom that can coexist with the freedom of everyone in accordance with a universal law."); Benjamin Constant, *Principles of Politics Applicable to All Representative Governments*, *in* POLITICAL WRITINGS 171, 262 (Biancamaria Fontana ed., trans., 1988) (1815) (referring to the property law aim of seeking "to maintain everyone in the part that he found himself occupying"); *id.* at 263 ("[w]ithout property, mankind would not progress"); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 41, at 73 (addition H) (H.B. Nisbet trans., 1991) (1821) ("The rational aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality. Not until he has property does the person exist as reason."); James Madison, *Speech in the Virginia Constitutional Convention*, in WRITINGS 824 (Jack W. Rakove ed., 1999) (1829) (personal and property rights as inseparable; "[t]he personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right"). *See* JAMES MADISON, THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES (William T. Hutchinson et al., eds., 1962-77) (While also endorsing, as of 1792, "the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort."); PIERRE-JOSEPH PROUDHON, SELECTED WRITING 124 (Stewart Edwards ed., Elizabeth Fraser trans., 1969) (1840) ("to the question 'What is property?' . . . I . . . reply 'theft'") (while also distinguishing between property and possession, in the sense of a right to make just and proper use of an object, see *id.* at 125-31); T.H. GREEN, THE POLITICAL THEORY OF T.H. GREEN 146 (John R. Rodman ed., 1964) (1881) ("The freedom to do as they like on the part of one set of men may involve the ultimate disqualification of many others . . . for the exercise of rights."); L.T. Hobhouse, *The Historical Evolution of Property*, *in Fact and in Idea*, *in* LIBERALISM AND OTHER WRITINGS 178-79 (James Meadowcroft ed., 1994) (1913) ("[t]he control over a thing may be

complete or partial . . . ."); *id.* at 185 (on a largely Aristotelian approach, "property is among the external good things which are necessary to the full [development and] expression of personality . . . ."); R.H. TAWNEY, THE ACQUISITIVE SOCIETY 72 (1948) (1920) ("As far as the mass of mankind are concerned, the need which private property other than personal possessions does still often satisfy, though imperfectly and precariously, is the need for security.").

The relevant commentary on the above figures is of course extensive. For a sampling of highlights, see, following the above chronology, John Kilcullen, *The Political Writings*, *in* THE CAMBRIDGE COMPANION TO OCKHAM 302, 308-99 (Paul Vincent Spade ed., 1999); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 169-73 (1998 ed.) (1979) (on Locke's theory, and its relationship to those of some predecessors and successors); JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 114-22 (1982) (1980); J.P. Day, *Locke on Property*, *in* LIFE, LIBERTY, PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 107 (Gordon J. Schochet ed., 1971); ELIE HALEVY, THE GROWTH OF PHILOSOPHIC RADICALISM 42-45 (Mary Morris trans., 1972) (1904); David C. Snyder, *Locke on Natural Law and Property Rights*, 16 CAN. J. PHIL. 723 (1986); James R. Otteson, *Adam Smith and the Great Mind Fallacy*, *in* THE RIGHT TO PRIVATE PROPERTY 276, 304 (Ellen Frankel Paul et al. eds., 2010) (property rights as demarcated by localized judgments based on localized facts, as distinct from broad rules); J.L. MACKIE, HUME'S MORAL THEORY 93-94 (1980); STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME (1991); Mary Gregor, *Kant's Theory of Property*, 41 REV. METAPHYSICS 757 (1988); Susan Meld Shell, *Kant's Theory of Property*, 6 POL. THEORY 75, 88 (1978) ("The justification of property for Kant lies not in its utility, but in its logical necessity, as a condition of rational thought and action."); Kenneth R. Westphal, *Do Kant's Principles Justify Property or Usufruct?*, 5 JAHRBUCH FUR RECHT UND ETHIK 141, 141 (1997) (Kant's "justification of ownership is based on the . . . right to freedom."); Howard Williams, *Kant's Concept of Property*, 27 PHIL. Q. 32 (1977); CHARLES TAYLOR, HEGEL 428 (1975) ("[Appropriation] is something infinitely worthy of respect . . . . An attack on . . . property is thus . . . an attack against the very purpose underlying reality as a whole, including my own existence.").

54. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 27 (1977) (ownership as "that bundle of rights which contains a range of entitlements more numerous or more valuable that the bundle held by any other person with respect to the thing in question"); GREGORY S. ALEXANDER & EDUARDO M. PENALVER, AN INTRODUCTION TO PROPERTY THEORY 135 (2012) ("utilitarian's can favor a robust right to exclude in some situations while recommending extensive rights of access in others"); *id.* at 138-39 (applying the distinction between rule-utilitarianism and act-utilitarianism, with the latter requiring utility calculations even in individualized contexts); S. I. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 181 (1959) ("The rights involved in 'ownership' will obviously vary widely according to the . . . thing owned . . . . The limitations vary not merely according to the nature of the object, but with place and time."); JAMES M. BUCHANAN, THE LIMITS OF LIBERTY 9 (1975) ("[f]ew, if any, rights are absolute in either a positive or negative sense"); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 140 (1960) ("private . . . property is . . . an essential condition for the prevention of coercion"); C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 133-38, (1973) (validating "property as an individual right not to be excluded from the use or benefit of the accumulated productive resources of the whole society"); STEPHEN R. MUNZER, A THEORY OF PROPERTY 3-5 (1990) (endorsing principles of utility and efficiency; of justice and equality; and of labor-based desert); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 177 (1974) (among the considerations favoring private property are that of "increasing

more specific justifications for property rights that might bear upon the legitimate uses of objects such as buildings and private parties, including individuals or corporate entities, in contexts of interest herein. Private property justifications take many forms, may commonly overlap, and may in particular take distinctively pluralistic forms. We focus on those property theories emphasizing some sort of theoretical contract, natural law, or natural rights claims;[55] those theories emphasizing the idea of wealth enhancement, utility, or overall social benefit;[56] and those theories focusing on autonomy, freedom, self-realization, or

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the social product," encouraging experimentation, protecting the interests of future persons, and providing employment opportunities for politically disfavored groups); ALAN RYAN, PROPERTY 77 (1987) ("that acquisition and ownership [of property] limit[s] the freedom of non-owners"); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 55 (1988) (referring to "the 'fragmentation' or 'splitting' of ownership within a given society"); *id.* at 4 (modern Hegelians as linking "private property and . . . individual self-assertion, mutual recognition, the stability of the will, and . . . a proper sense of prudence and responsibility"); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 294 (1983) (referring to purported justifications of property rights emphasizing "the risk taking that ownership requires" and "entrepreneurial . . . inventiveness"); Lawrence C. Becker, *The Moral Basis of Property Rights*, *in* 22 NOMOS: PROPERTY 187, 193 (J. Roland Pennock & John W. Chapman eds., 1980) (citing private property justifications focusing on exertion-based productivity not harming others; labor-desert-reward theory; utility, economic efficiency, broad stability; and political liberty); *id.* at 194 (discussing the need to coordinate general justifications of private property as a broad institution with justifications of more particularized allocations of more specific property rights); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 357 (1967) ("The reduction in negotiating cost that accompanies the private right to exclude others allows most externalities to be internalized at rather low cost."); Gerald F. Gaus & Loren Lomasky, *Are Property Rights Problematic?*, 73 MONIST 483 (1990) (as with Alan Ryan, *supra*, and Allan Gibbard, *infra*, property rights as restricting some liberty rights); Gerald F. Gaus, *Property, Rights, and Freedom*, *in* PROPERTY RIGHTS 209, 209 (Ellen Frankel Paul et al. eds., 1994) (on instrumentalist views, private property is justified by protecting other rights, by dispersing power, and by promoting independent character); Thomas C. Grey, *The Disintegration of Property*, *in* 22 NOMOS: PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) ("a thing can be owned by more than one person, in which case it becomes necessary to focus on the particular limited rights each of the co-owners has with respect to the thing"); *id.* at 71-72 (contrasting allocative efficiency and the security and independence justifications of property rights); Allan Gibbard, *Natural Property Rights*, 10 NOUS 77, 77 (1976) ("If a person owns a thing, his ownership enhances his liberty, but it does so at the expense of the liberty of others."); Virginia Held, *Property Rights and Interests*, 46 SOC. RES. 550, 552 (1979) (purported justification of property as promoting freedom as against tyranny and concentrations of power); A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed. 1961) (listing typical incidents of ownership); Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200, 203 (1972) ("It is quite possible for there to be societies where rights over objects, or certain objects at least, are not exclusive.").

55. *See*, *e.g.*, LOCKE, *supra* note 54, §§ 25-51.

56. *See*, *e.g.*, HUME, TREATISE, *supra* note 54, at 490-91.

perfectionism.[57] Merely for the sake of convenience, we may refer to these three families of property right theory as respectively the natural law, utility, and autonomy approaches.

Each of these three approaches to property rights has long retained a substantial following, which itself suggests that any property law or free speech theory that relies on any particular approach, alone or even in some distinct combination, will inevitably have its detractors. Any legal rule or adjudication that even implicitly relies on any distinctive single approach to property rights will thus be perpetually subject to reasonable critique.

It is certainly not our aim herein to catalog the basic critiques of each of the major normative theories of private property rights. At some level, each of the critiques is sensible. As against natural law theories, for example, there is Justice Iredell's classic observation[58] that even if there is some relevant natural law, the actual content of such a law in interesting cases is typically quite reasonably contested.[59] Utility theories, on the other hand, face basic problems of meaningful specification,[60] and can conflict with our clear sense of distributive justice and fairness.[61] Autonomy theories, finally, can link more directly to some familiar justifications for especially protecting freedom of speech.[62] But as it turns out, autonomy-focused theories of private property in particular ultimately provide

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57. See the perfectionism or self-realization approach of T.H. GREEN, *supra* note 54, at 156; RYAN, *supra* note 55, at 53 ("on the autonomy" value, but in the context of promoting utility); *id.* at 72 (property ownership and "self-expression"); *see also* John Kekes, *The Right to Private Property: A Justification*, *in* OWNERSHIP AND JUSTICE 1, 5 (Ellen Frankel Paul et al. eds., 2010) (private property as a condition of the ability to control or direct one's life uncoercedly); Stephen Kershner, *Private Property Rights and Autonomy*, 16 PUB. AFF. Q. 231, 231 (2002) (private property as contributing to "a self-shaped life"); N.E. Simmonds, *Property, Autonomy, and Welfare*, 67 ARCHIVES FOR PHIL. L. & SOC. PHIL. 61, 66 (1981) ("[a]utonomy is not just man's capacity for choice, but man's capacity to pursue forms of human perfection").

58. Calder v. Bull, 3 U.S. 386, 398, 399 (1798) ("ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject"). A similar point was acknowledged by early natural law theorists. *See*, *e.g.*, WILLIAM OF OCKHAM, A LETTER TO THE FRIARS MINOR AND OTHER WRITINGS, A Dialogue part III, tract II, ch. 15, 272-74 (John Kilcullen trans., 2001 ed. 1995) (~1340) (discussing "natural law about which it is possible for even the learned to err or doubt").

59. *See Calder*, 3 U.S. at 399.

60. *See*, *e.g.*, DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965); David Lyons, *The Moral Opacity of Utilitarianism* (Bos. Univ. Sch. Law, Working Paper No. 99-7, 1999) *available at* http://papers.ssrn/sol3/papers.cfm?/abstract_id=212288 [https://perma.cc/5LUG-6GW7].

61. *See*, *e.g.*, JOHN RAWLS, A THEORY OF JUSTICE § 30 (rev. ed. 1999); David Lyons, *Rawls Versus Utilitarianism*, 69 J. PHIL. 535 (1972); Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM: FOR & AGAINST 77 (1st ed. 1973).

62. *See*, *e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); *see generally* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.–C.L. L. REV. 443 (1998).

little determinate guidance with respect to the various sorts of projected message cases.

The idea of autonomy in particular takes various forms.[63] For our purposes, anything like the idea that "[a]n agent is . . . said to be autonomous in virtue of his capacity to choose what *to do*, whether he will do X or [not]"[64] will suffice. Autonomy thus suggests an independence of one's actions and choices from constraints imposed by other persons and by social institutions.[65] Autonomy, in general, is arguable of crucial moral importance,[66] and on some views, autonomy is important specifically to the design and allocation of private property rights.[67]

The most important problem for our purposes, however, is that autonomy in the property rights context does not seem to point, reasonably determinately, in any particular direction. Autonomy as a personal capacity and as a normative value can be ascribed to any actor capable of rational choice.[68] Plainly, the autonomy of one claimant of a particular property right can come into conflict, generally and as well in our projected message cases, with the autonomy of other claimants.[69] The message projector's autonomy can obviously conflict with the autonomy of the targeted party. In all such cases, we do not even have a consensus whether it is possible to somehow "maximize" autonomy. Even if it is possible to maximize autonomy, it is hardly clear that the legal system should do so if the costs in terms of any particular actor's autonomy seem disproportionately severe.

Consider the range of scenarios in which non-consensual message projection via light can occur. Merely, for example, consider a political message projected

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63. See the various conceptions of autonomy described in GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); ANDREW SNEDDON, AUTONOMY (2013); Joel Feinberg, *Autonomy*, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 27 (John Christman ed., 2014) (1989).

64. R.S. Downie & Elizabeth Telfer, *Autonomy*, 46 PHIL. 293, 293 (1971) (emphasis in original). Interestingly, Joel Feinberg characterizes autonomy partly in terms of a compelled speech metaphor. *See* Feinberg, *supra* note 64, at 32 ("[t]o the degree to which a person is autonomous he is not merely the mouthpiece of other persons or forces[,]" as distinct from displaying authenticity); Marina Oshana, *How Much Should We Value Autonomy in Anatomy?*, 20 SOC. PHIL. & POL'Y 99, 100 (2003) ("autonomy as the condition of being self-directed, of having authority over one's choices and actions whenever these are significant in the direction of one's life"); *see also* MUNZER, *supra* note 55, at 39 (autonomy as "the psychological capacity to be self-governing, which is part of the foundation for a moral right to be treated as self-governing").

65. *See* the sources cited *supra* notes 62-65.

66. *See* notably the argument of IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor & Jens Timmerman trans., 2d ed. 2012) (1785).

67. *See* the authorities cited *supra* note 58.

68. *See* the authorities cited *supra* notes 62-65.

69. *See*, *e.g.*, T.H. GREEN, *supra* note 54, at 146; RYAN, *supra* note 55, at 77 (property rights as inevitably limiting the freedom of other persons in some respects); Gaus & Lomasky, *supra* note 55 (to similar effect); Gibbard, *supra* note 55, at 77 (property rights as enhancing the liberty of the owner, while thereby restricting the liberty of other persons).

onto either a natural object; a government monument or other building; or onto the façade of a non-profit, a small business, or a large corporate headquarters. In some such cases, it is not clear that the party we would think of as the more general or residual owner of the property in question even has any relevant autonomy interests. Do governments, as the owners of, say Mount Rushmore, or a wall of the Grand Canyon, have genuine and relevant autonomy interests?[70] Do large corporations owned by thousands of institutional and remote investors have genuine and relevant autonomy interests?[71] Or is it appropriate in such cases to look for relevant autonomy interests held by, respectively, government officials or members of the political community, by key corporate employees, or by corporate investors whose identification with the corporation may quite be limited?

More crucially, though, in typical cases there will be some sort of autonomy interests at stake for all of the various directly relevant parties.[72] Even if we simply assume that non-consensual political message projectors do not have a particular property right, perhaps a "free speech easement,"[73] to do so, such message projectors have an autonomy interest, of whatever weight or value, at stake. Even commercial message projectors may be exercising their autonomy. An environmental activist clearly has a meaningful autonomy interest in conspicuously identifying a purportedly irresponsible corporate actor, whatever the ultimate legal status or weight of that autonomy interest.[74] And this will hold true for virtually any other politically or artistically motivated message projector.

The most extreme cases of conflicting autonomy interests with respect to targeted backdrops would presumably involve non-consensual message projection onto the walls of neighborhood personal residences,[75] parked or moving personal vehicles,[76] and even, if not especially, onto the physical bodies

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70. This is not to deny that governments can own property, or that governments can constitutionally speak on their own behalf. *See generally* Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015) (Texas specialty license plate messages as supposedly government speech).

71. Again, the question of whether such corporate entities can have genuine autonomy interests is distinct from whether such entities can properly hold free speech rights on any grounds. For controversial discussion of the latter issue, see generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

72. *See* sources cited *supra* note 70 (discussing matter in the context of freedom of action and choice).

73. Consider, whether literally or by reasonable analogy, the standard conception of an easement. *See, e.g.*, *Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose").

74. Consider a variation of the Greenpeace message projection referred to *supra* note 34, with corporate environmental responsibility issues as the primary focus.

75. Consider, again by extrapolation and variation, the residential neighborhood focused picketing case of *Frisby v. Schultz*, 487 U.S. 474 (1988).

76. This scenario could involve an element of the compulsory automobile license plate motto

of groups and individual persons in public places. However, we resolve questions of government or corporate autonomy, home residents and individuals in public places will have autonomy interests in conflict with the autonomy interests of other persons seeking to non-consensually convey their messages.[77] Even a brief such projection may impair autonomy and dignity interests, especially if the projected image is recorded and widely disseminated.

For all such cases, we lack anything like a coherent broad or middle-range theory of property rights which addresses the conflicting autonomy interests at stake. We can certainly debate the legal and moral weight of the freedom and autonomy losses of a would-be message projector who is enjoined from targeting some particular object. But any such would-be message projector is obviously left with a legally restricted choice set, from which a preferred option has been legally denied or withdrawn.[78]

There is a natural temptation to say that someone who asserts a right to project a message onto a building or other object that person does not (otherwise) own is seeking to disturb a rightly settled status quo, or is seeking to re-distribute settled property rights in their favor, at the expense of the established and justified property rights of the presumed owner of the property in question. The problem, though, is that any such analysis simply assumes an answer to what we are herein seeking to discover and explore: whether the various property rights held by the "target" of such speech should include a right to prevent, or to at least receive compensation for, the message projection.

It should be clear that the persons we ordinarily think of as the owners of objects do not, in practice, hold every valuable property right with respect to access to and use of those objects. To own an object, typically, is not to own that object in an exhaustive, absolute, universal sense, unlimited by the moral or legal property rights of others. This division, non-absoluteness, or non-exclusivity of property rights in any given object takes several forms.[79]

Thus classical writers including St. John Chrysostom,[80] Thomas Aquinas,[81] and even Thomas Jefferson[82] have held that one's bundle of property rights cannot rightly exclude a limiting genuine property right held by persons who would otherwise be destitute, or at risk of starvation.[83] Of course, our would-be message projectors are not seeking physical subsistence. But as numerous

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case of *Wooley v. Maynard*, 430 U.S. 705 (1977), but with the non-consensual message being that of any projector, public or private, rather than the distinctly official government message in *Wooley*.

77. Home residents, and especially persons in public, will also, more fundamentally, have dignity interests in not having their homes or physical bodies involuntarily converted into billboards of any sort. *See generally* R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995).

78. *See* the conceptions of autonomy cited *supra* notes 61-63.

79. *See e.g*. PUFENDORF, *supra* note 54, at 87.

80. *See* CHRYSOSTOM, *supra* note 54, at 49.

81. *See* AQUINAS, *supra* note 54, qu. 66, art. 7 *respondio.*

82. *See* Jefferson, *supra* note 54, at 841-42.

83. *See* sources cited *supra* notes 82-84.

classical and contemporary writers across an ideological range have recognized, the typically limited, non-universal, divided, and shared character of property ownership extends well beyond cases of directly remedying material destitution. Thus writers such as Samuel Pufendorf,[84] David Hume,[85] Adam Smith,[86] L.T. Hobhouse,[87] and more contemporary writers such as Bruce Ackerman,[88] Gregory Alexander & Eduardo Penalver,[89] Stanley Benn & Richard Peters,[90] James Buchanan,[91] Jeremy Waldron,[92] Thomas Grey,[93] and Frank Snare[94] have all recognized the broader range of non-contractual or non-consensual respects in which property rights in a given object can be sub-divided and parceled out to various public and private actors.

It is thus clear that ownership in the law has classically been subjected, consensually or non-consensually, to what amounts to a process of subdivision of the broad overall set of property rights at issue.[95] In particular, there has long been a range of servitudes[96] with respect to land or real property,[97] including various sorts of easements[98] and licenses,[99] as well as rights over property known

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84. *See* PUFENDORF, *supra* note 54, at 87 (recognizing some non-contractual such restrictions).

85. *See* HUME, ENQUIRIES, *supra* note 54, at 196 (property rights as constrained by the range of civil laws).

86. *See* Otteson, *supra* note 54, at 304 (Smith on property rights as subject to localized, contextual judgments).

87. *See* Hobhouse, *supra* note 54, at 178 (on "partial" control over property).

88. *See* ACKERMAN, *supra* note 55, at 27 ("ownership" as referring to the greatest or most valuable set of rights with respect to any given object).

89. *See* ALEXANDER & PENALVER, *supra* note 55, at 135 (utilitarianism as open to recognizing broad or narrow sets of property rights in context).

90. *See* BENN & PETERS, *supra* note 55, at 181 (the rights encompassed within ownership as widely variable).

91. *See* BUCHANAN, *supra* note 55, at 9 (most property rights as neither negatively nor positively absolute).

92. *See* WALDRON, *supra* note 55, at 55 (on the "fragmentation" and "splitting" of ownership rights).

93. *See* Grey, *supra* note 55, at 69 (on the limited property rights of co-owners).

94. *See* Snare, *supra* note 55, at 203 (on the possible non-exclusivity of property rights to an object).

95. *See, e.g.*, PUFENDORF, *supra* note 54, at 87; *see generally* L.F.E. Goldie, *Title and Use (and Usufruct): An Ancient Distinction Too Oft Forgot*, 79 AM. J. INT'L L. 689 (1985).

96. *See, e.g.*, PUFENDORF, *supra* note 54, at 87; *Servitudes*, BLACK'S LAW DICTIONARY (10th ed. 2014).

97. *See* sources cited *supra* note 96.

98. *See Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, our reference to possible speech-easements.

99. *See License*, BLACK'S LAW DICTIONARY (10th ed. 2014). (Licenses are typically, but not always, revocable, and need not be consensual).

classically as usufruct.[100]

Now, an asserted right to project light messages onto an object one does not otherwise own has not been either specifically rejected, or accepted with whatever limitations, as a matter of historical jurisprudence. But consider the explicit descriptions of some of the arguably relevant property categories and concepts. An easement, for example, has been defined as "[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose."[101] Walking across a plot of land, as the most convenient means of achieving some goal, could certainly fall under such a definition.[102] But then, so, conceivably, could projecting a message, perhaps briefly, at an object on land, and then perhaps even widely disseminating the image through social media.

Some such property right categories, as in cases of usufruct,[103] involve prerequisites and limitations. Thus usufruct is said to involve a right "for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it."[104] But most would-be light projectors do not seek such a right in perpetuity,[105] nor do they normally pose any risk of physical damage to the property.[106] Their message projection finally need not transfer any of the remaining estate to any third party.[107]

None of these relatively specific considerations, however, even begin to morally or legally resolve any conflicts between would-be message projectors and their targets. All that general and middle range property law, rules, and concepts establish, in our message projection cases, is the existence of undeniable and quite reasonable conflicts at the level of more specific claimed property rights.

There may, finally, be cases in which multiple speaker-coordination problems arise. When multiple persons or groups wish to project messages onto the same space, or even the same neighborhood, some mechanism may be needed to prioritize among speakers whose messages could be considered cumulatively excessive or mutually conflicting unless somehow coordinated. In such cases, the residual owner of most of the other valued rights involving the property in question may sometimes be the person best placed to fairly coordinate among

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100. *See Usufruct*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see generally* Goldie, *supra* note 96.

101. *See Easement*, *supra* note 99. (Such a right is then known as the dominant estate). Thus, again, the idea of what we might call a limited 'speech easement.'

102. *See id.*

103. *See Usufruct*, *supra* note 101.

104. *Id*. Whether the conspicuousness of a façade, say, could count as a "fruit" of the property may depend upon the context and circumstances at issue.

105. *See id*.

106. *Id.*

107. *Id.* We hold open the possibility, however, that sustained message projection by one or more speakers, whether such messages are coordinated, uncoordinated, or conflicting, could affect, presumably adversely, the value of the burdened or servient estate and any associated business interests. *See* Grey, *supra* note 55, at 69 (on the limited property rights of co-owners).

multiple speakers. But considerations of efficiency and possible bias may also suggest that such coordination among multiple would-be speakers should, in some circumstances, be left to some public or private third person, with or without the consent of any party. This will be especially true if the property or properties in question have multiple residual owners. This sort of speech coordination problem will thus require specifically contextualized resolutions.

Perhaps we should not be surprised by the inability of general and middle-range property law, even in combination with the law of tort or nuisance dependent thereon, to provide any reasonably determinate guidance for the message projection cases. Perhaps how we justify our general rules and policies may have little or nothing to do with, and may not be translatable into, how we justify our more specific judgments in particular contexts and cases. The best resolutions of our message projection cases may not even be related to our broad or middle-range theories of property rights and violations thereof.[108] We may well want to adopt entirely different justifications of property rights at relatively broad and at more specific levels.[109] Someone who is strongly egalitarian[110] with regard to property rights generally, for example, clearly is not thereby committed to deciding individualized property disputes among particular claimants by reference to substantive inequality among those claimants. Someone can favor a progressive income or wealth tax, as egalitarian in its effects, without also wishing to decide thousands of property disputes on the basis of promoting overall distributive equality. Macro-redistributivism thus need not require micro-redistributivism. Similarly, someone might hold utility maximization to be the goal of the legal system in general, without also holding that judges should seek to maximize utility in every particular case.

Something like an independence of, or disparity between, the justification of private property rights in general and in specific cases has been widely recognized elsewhere.[111] In discussing the scope and limits of utilitarian justification in the criminal law, for example, John Rawls sought "to show the importance of the distinction between justifying a practice and justifying a particular action falling under it."[112] Some versions of utilitarianism as a general moral theory are, again, especially open to significantly different kinds of justifications at different levels of specificity.[113]

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108. See the broad justifications of private property rights in general, *supra* notes 54-55.

109. *See generally* Jeremy Waldron, *Property and Ownership*, STANFORD ENCYC. OF PHILOSOPHY (Sept. 6, 2004), http://plato.stanford.edu/entries/property [https://perma.cc/M3Y6-N66N] (citing WALDRON, *supra* note 55, at 330); *See* Becker, *supra* note 55, at 195 (noting the need for coordinating the justifications at different levels).

110. For background, see generally R. George Wright, *Equal Protection and the Idea of Equality*, 34 LAW & INEQ. 1 (2016).

111. See generally the classic paper by John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

112. *Id.* at 3. Rawls cites HUME, TREATISE, *supra* note 54, book III, pt. II, §§ 2-4, among other sources.

113. *See*, *e.g.*, ALEXANDER & PENALVER, *supra* note 55, at 138-39 (noting the possibility of

Consider, more elaborately, the family of property rights theories that emphasizes utility, wealth maximization, or overall social benefit.[114] Whether such approaches require supplementation or not,[115] we can at least take seriously a utility-maximizing approach to whether property should be held by the state, held in common, or left in private hands subject to either extensive or limited regulation.[116] A theorist who endorses a utilitarian approach at this broad level of generality, however, again certainly need not also require judges to try to maximize utility, overall, in adjudicating specific property disputes over land boundaries, chains of title, inheritances, or adverse possession cases, in which one particular party opposes another. Thus, an easement by adverse possession is achieved not when a utility or wealth-maximizing calculus may so suggest, but when a number of distinct, specific elements concur over a twenty-year span.[117]

If the best approach, then, to more specific issues of property rights need not reflect the best approach to justifying property rights as a general institution, we should not be surprised to find that our best, or most popular, general and middle-range theories of property rights, singly or in combination, do not offer any sort of determinate guidance with respect to our light message projection cases. If there is to be any useful general guidance in resolving our various sorts of projected messaging cases, such guidance will then have to come from some aspect of free speech theory itself, or from some combination of property theory and free speech theory. As it turns out, however, any such hope is also illusory.

III. THE BASIC FREE SPEECH VALUES AND THEIR LIMITED USEFULNESS FOR THE PROJECTED MESSAGE CASES

If property rights theories cannot provide reasonably determinate guidance for our message projection cases, we seem to be left with the possibility of drawing useful guidance from the most significant values or purposes commonly thought to justify special protection for speech in general. These crucial free speech values[118] include the largely collective search for truth,[119] promoting

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authorizing the calculation of utility at some levels of specificity, but not at others); *see generally* LYONS, *supra* note 61. On rule- versus act-utilitarianism and their respective scope and merits, see the essays in MORALITY, RULES AND CONSEQUENCES: A CRITICAL READER (Brad Hooker et al. eds., 2000).

114. *See supra* note 55.

115. As by what we have referred to as natural law theories, *supra* note 54, and by others that emphasize some form of autonomy, *supra* note 55.

116. *See*, *e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 179-82 (1981).

117. *See*, *e.g.*, Illinois Dist. of Am. Turners v. Rieger, 770 N.E.2d 232, 240 (Ill. App. Ct. 2002) (citing Joiner v. Janssen, 421 N.E.2d 170, 173-74 (Ill. 1981)) (requiring twenty uninterrupted years of continuous; hostile; actual; open, notorious, and exclusive possession; under a claim of title inconsistent with that of the presumptive or historical owner).

118. *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

119. *See generally* Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free*

democratic self-government,[120] and, most intriguingly for our purposes, some form of the idea of autonomy or self-realization,[121] which we have already considered in the context of theories of property rights.[122]

A. The Collective Pursuit of Truth

Consider, then, the possibility of deciding our message projection free speech cases at least partly with a view toward promoting the collective search for truth, in general or in one field or another.[123] We would then ask whether this aim of free speech law determinately points toward resolving the message projection cases in favor of either the message projector or their legal opponent.

The first complication involves the broad range of the kinds of messages to be considered. Not every message projector will be attempting to speak truth to power. Many, perhaps even most, such speakers may have a largely commercial advertising message to convey.[124] Whether a typical such largely commercial message aims at any relevant sort of truth, or otherwise seeks to contribute even indirectly to the pursuit thereof, may well be disputed.[125] But of course, many purely commercial advertising claims are in some sense clearly true.

Of the remaining messages, some will be essentially artistic in nature, and others for entertainment. The speakers in some such cases may candidly disclaim any interest in somehow contributing to a search for truth.[126] Even in such cases, though, it will be possible that any truth-related artistic message projected will tend to negate some aesthetic lesson, implication, or message already embodied in or expressed by the natural geographic features, monuments, statues, or architectural designs against which the message is to be projected.

This leaves us with the residual category of projected messages intended to pursue or convey some sort of broadly political or doctrinal truth, at least

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Expression, 60 S. CALIF. L. REV. 649 (1987).

120. *See generally* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy As the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

121. *See generally* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1988); Murchison, *Speech and the Self-Realization Value*, *supra* note 63.

122. *See supra* notes 55, 61-77 and accompanying text.

123. Although it is of course possible to critique the idea of searching for truth, we hereby set aside all such objections. *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

124. *See*, *e.g.*, the instances referred to *supra* notes 35-36.

125. For broad background, see generally R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE (1989).

126. This is not to suggest that any line between entertainment speech and political speech can invariably be easily drawn. See the majority's discussion of access by minors to violent video games statutorily lacking serious value for such minors in *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (discussed in R. George Wright, *Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341 (2012)).

indirectly. In these cases, we should abstain from dismissing any such projected messages as false, partial, one-sided, or misleading.[127] We may thus assume that all[128] projected messages of this class somehow contribute, to some degree, to the free speech value of the collective search for truth.

Of course, even in such cases, there is again the possibility that the projected message may have a serious cost in free speech value, insofar as it may tend to physically cancel or obscure any truth-related lesson, inspired inference, or message otherwise conveyed by means of the property. But the far more important concern in the broadly political speech cases actually lies elsewhere.

In particular, preventing someone from speaking through projecting a message onto some property not otherwise owned by that speaker will not mean that most or all of the truth-seeking value of the speech in question must be lost. Any would-be message projector has alternative venues, or alternative communicative channels, in and through which to speak.[129] The real cost in free speech value terms, then, is not simply the entire overall free speech value of the prohibited light message projection onto the property in question. Rather, it is the difference in overall free speech value between that afforded by targeting the property through light message projection, and that afforded by the would-be speaker's best realistically available alternative venue or channel in which to speak.[130] The difference in overall free speech value between these two options, even from the standpoint of the speaker, may be modest, or even negative[131] in magnitude.[132] And even here, we must somehow factor in any losses or gains in

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127. As classically argued in JOHN STUART MILL, ON LIBERTY ch. 2 (Dover 2002) (1859).

128. Here we again set aside the complication of clearly political messages subject to regulation on other grounds, such as defamation, obscenity, materially interfering with the voting process itself, etc.

129. The Supreme Court has sometimes attached constitutional significance to the availability of alternative channels in which to convey one's message, as distinct from a narrow tailoring analysis. *See*, *e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 690 (2010); McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), in turn quoting Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984)). These cases typically involve what the Court thought, at least at the time of the decision, to be a content-neutral restriction on speech. The Court has since narrowed the scope of what counts as a content-neutral restriction on speech. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

130. For elaboration, see generally R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

131. It hardly need be irrational for a speaker to prefer, overall, a speech channel with a lesser degree of personal free speech value if that channel provides greater value to the speaker in any terms other than those underlying freedom of speech. Consider, e.g., a commercial speaker who can obtain a tax advantage by using one speech channel but not the other, or a non-commercial speaker who sees some unrelated career advantage in utilizing a particular speech channel.

132. Of course, a similar comparison in the overall free speech value associated with alternative speech channels would also apply if the party that otherwise owns the targeted property seeks to use that property to convey a message that is physically obstructed by the other party's projected light message.

any free speech values from the perspective of the targeted party.

B. Promoting Democratic Self-Government

Ultimately, the idea of freedom of speech as promoting the search for truth thus does not provide any even general guidance in resolving our message projection cases. A similarly indeterminate result, and a similar lack of meaningful guidance, is associated as well with the free speech value of promoting democratic self-government.[133]

This perhaps unfortunate result should not be surprising, in that promoting democratic self-government, even if applicable to some cases in which the search for truth is irrelevant, still tends to cover only a narrow subset of all free speech cases in which light message projection might be utilized. Consider again the prominence of commercial advertising, marketing, or publicity. There will be messages in which commercial and democratic self-governance-related themes are arguably both present, to one degree or another, perhaps in some intertwined fashion.[134] But the most typical understanding of democratic self-government in this context would not encompass the projection of, say, commercial videos or corporate logos, whether on the moon,[135] the Washington Monument, a corporate façade, or elsewhere.

It will again be unclear whether the democratic self-government rationale should encompass at least some message projections where the projected image is intended primarily, if not solely, as an artistic contribution, or as art for art's sake.[136] Some artists, of course, may take all art to be in a broad sense political,[137] if not specifically a contribution to democratic self-government.

More importantly, the value of promoting democratic self-government itself does not much help with the crucial task of determining how much such value would be lost if some or all would-be message projectors were required to utilize instead some available alternative means of publicizing the intended message.[138] How much, in particular, would the cause of democratic self-government suffer if either party in a message projection case were legally required to adopt some alternative course, perhaps at a minimal or even negative[139] cost in terms of free

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133. *See supra* note 119 and accompanying text; *see generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

134. *See generally* Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (involving Nike's corporate response to allegations of worker mistreatment at international production facilities).

135. *See supra* note 41.

136. For general background, see generally Daniel A. Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383 (1997).

137. *See*, *e.g.*, Dickon Stone, *Art for your sake: We don't have to debate whether art should be political – it always is*, EUROPEAN (May 29, 2014), www.theeuropean-magazine.com/dickon-stone/8519 [https://perma.cc/PG79-UF8Y].

138. For background, see the sources cited *supra* notes 35-36. *See also* WRIGHT, *supra* note 126.

139. For one example among many, see *supra* note 127.

speech values?[140] A focus on the free speech value of promoting democratic self-government offers no meaningful guidance, overall, in adjudicating our projected message questions.

C. Promoting Autonomy and Reducing Coercion

Even our most elaborate treatments of the free speech values of promoting the search for truth and democratic self-government[141] thus offer little reasonably determinate guidance in resolving the range of our projected message cases. But perhaps, we might suppose, matters will turn out differently with regard to the free speech value of autonomy[142] or self-realization. After all, the idea of autonomy, in one consistent sense or another, seems uniquely linked to both the possible broad justification of property rights in the first place[143] and to the basic reasons for constitutionally protecting speech.[144]

As it turns out, though, essentially nothing of significance for our purposes can be derived from any linkage between property right theory and autonomy and between autonomy and the basic logic of protecting, or not protecting, freedom of speech.

We need not rehearse here our concerns for how various forms of commercial speech may or may not link, in general or in particular cases, to any version of autonomy. There is certainly some sentiment that commercial advertising is either largely irrelevant to, or even antithetical to, the development of genuine autonomy and self-fulfillment.[145] Whether commercial enterprises, or perhaps even persons or groups in the course of directing them, are even capable of autonomy in a relevant sense, insofar as the persons or groups are acting purely in corporate leadership capacities, is at best too murky to serve as anything like a consensual basis for resolving controversial free speech cases.[146]

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140. The broader problem is that that neither party may be considering problems of a loss of faith in democracy, electoral legitimacy and authority, political institutional health, deteriorating social trust and confidence, and the dilemmas confronting those who might otherwise be inclined to exercise self-restraint and the public virtues. *See* Nathaniel Persily & Jon Cohen, *Americans are losing faith in democracy – and in each other*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.c3306e0ae604 [https://perma.cc/V9AD-Y7K7].

141. *See supra* Part III.A. and the sources cited *supra* notes 54, 55, and 129-30.

142. *See* POSNER, *supra* note 117, at 179-82; *see* Baker, *supra* note 122.

143. *See* LOCKE, *supra* note 54, at 61-77.

144. *See* POSNER, *supra* note 117, at 179-82.

145. *See generally* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (40th anniv. ed., 1998) (1958); HERBERT MARCUSE, ONE DIMENSIONAL MAN (2d ed., 1991) (1968); THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1994) (1899) (on "conspicuous consumption"); *but see generally* TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE (2000).

146. This is not to deny that for-profit and not-for-profit corporate leaders often address matters of political and broad cultural interest, with whatever effect, favorable or unfavorable, on the corporate bottom line. Such matters quickly take on remarkable complexity.

Similarly, there is no need to rehearse here the point that resolving our message projection cases either way may have little effect on the speech-relevant autonomy of the opposing parties, individually or collectively, and even on any viewers of the speech in question. Each party's best remaining alternative venue or channel for speaking may involve, at worst, only minimal loss in anyone's autonomy.[147] Many such effects may be realistically unpredictable by any court.

Perhaps, though, some sort of reasonably definitive guidance for our projected message cases can be extracted from the idea of autonomy when it is conjoined with the related idea of coercion.[148] Perhaps one particular judicial resolution of a typical message projection case would involve autonomy-related coercion, where another possible resolution would not, or would, involve clearly less coercion, overall, than any alternative case resolution.

This possibility may seem to accord with common sense. But it, too, turns out to be clearly unavailing. Crucially, neither the courts nor the theorists have ever been able to settle on even a loose consensus as to the basic nature, meaning, and implications of the idea of coercion.[149] In default of anything remotely like a relevant consensus on what coercion involves, the concept is of no help in our message projection cases.

But even if we could settle upon some basic general meaning for a relevant idea of coercion, and on its moral status, we would still likely be without meaningful guidance in resolving our various message projection cases. This is because the judicial resolution of any dispute over property rights, over the scope of trespass and nuisance claims pursuant thereto, and over the scope of permissible speech will itself unavoidably involve the application of official legal

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147. Again, not all message projectors are seeking to maximize their own or anyone else's autonomy, as distinct from either some other free speech value, or some other unrelated personal or corporate value, such as sheer wealth, community esteem, corporate prestige, or corporate image.

148. *See, e.g.*, Fallon, Jr., *supra* note 63, at 877 ("descriptive autonomy requires freedom from coercion"); *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1992) ("some speech practices are or can be coercive"); WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 95 (2014) (referring to "speech which constitutes a nuisance in itself").

149. *See generally* R. George Wright, *Why a Coercion Test Is of No Value in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2011). For a mere sampling of continuing divisions as to the descriptive or the normative character of coercion, whether coercion requires success, the possibility of coercive offers, and so on, see CHRISTIAN BAY, THE STRUCTURE OF FREEDOM 92 (1958) (coercion as "the supreme political evil"); Several Essays *in* NOMOS XIV: COERCION (J. Roland Pennock & John W. Chapman eds., 2007) (1972); ALAN WERTHEIMER, COERCION (1988); Scott Anderson, *Coercion*, *in* STAN. ENCYC. OF PHIL. (rev. ed., Oct. 27, 2011); Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser et al. eds., 1969); Peter Westen, *"Freedom" and "Coercion" -- Virtue Words and Vice Words*, 1985 DUKE L.J. 541 (1985); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981). For an attempt at a theory of non-coercive speech exchanges, see Jurgen Habermas, *Discourse Ethics: Notes on a Philosophical Justification*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 116 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) (1983).

coercion[150] against one party or the other, or some measure of legal coercion of both parties, quite apart from any coercion otherwise exercised by any of the parties themselves.

It will of course always be possible to claim that the minimum necessary legal coercion of one party would be worse than the minimum necessary legal coercion of the other party,[151] perhaps depending on our underlying sentiments toward the message projector, or toward whoever is otherwise typically the custodian of the property in question. The degree to which either the message projector or the opposing party would otherwise coerce one another is also no subject to consensual resolution. In the absence of any widely embraced theory as to the gravity or degree of coercion in contexts in which alternative speech channels are readily available,[152] we should again expect minimal guidance from our theories of coercion and autonomy.

We may thus conclude, overall, that our best candidates for providing meaningful guidance for resolving our message projection cases are simply not up to the task. What we are left with, then, is only a very loose, indirect, basically indeterminate initial recourse to these principles and values, where the bulk of the work of adjudication takes on a narrowly categorical, and crucially detailed, circumstantial, and contextualized, character. This general judicial outcome is illustrated below.

IV. THE PROJECTED MESSAGE CASES AS DEPENDENT UPON SPECIFIC CATEGORY, CIRCUMSTANCE, AND CONTEXT

At this point, we are left with the interim conclusion that if the law is to provide any meaningful guidance for the broad variety of our projected light message cases, such guidance must come only at some distinctly specific level of narrow category, circumstance, and context. We of course cannot exhaustively sort, classify, and catalogue here the full range and variety of possible projected message cases. Two distinct contexts or categories, however, can at least be pointed to for purposes of illustration.

We have already seen that the particularized free speech law of labor-management relations is crucially distinctive.[153] A pervasive theme seems to be that of the goal of legally adjusting the perceived balance of power between management on the one hand and incumbent unions or union organizers and rank

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150. Unless we all choose to stipulate, oddly, that the threat or application of government enforcement, including civil or criminal penalties, cannot be coercive.

151. Whether we believe that corporations, of whatever sort, can be subject to coercion, it seems clear enough that individual corporate officials can be coerced, as through personal liability for civil or criminal fines, contempt orders, etc.

152. *See* POSNER, *supra* note 117, at 179-82. In the absence of any number of specific items of information, it is similarly impossible to tell how severely someone is being coerced, if at all, in being denied an apple pie for dessert, where that party still has access to a cherry pie for similar purposes. We might in some such cases think of the coercion as affecting basic dignity and as important, or else as largely symbolic and of limited moral significance.

153. *See* sources cited *supra* note 40.

and file workers on the other.[154]

In particular, the classic labor unionization case of *NLRB v. Gissel Packing Co*.[155] refers to quite distinctive limitations on employer speech focusing upon "promise of benefit,"[156] careful phrasing[157] on the "basis of objective fact,"[158] judicial parsing of any employer control of consequences and verbal implications related thereto,[159] and a concern for coercive speech in the context of unionization or bargaining.[160]

These criteria would in general often not be legitimate or relevant, let alone decisive, in some other free speech contexts.[161] Together, they suggest that in any case of light message projection by, say, an insurgent or striking union targeting an employer facility, a crucial concern will be how the adjudicators take the messaging, or its prohibition, to either promote or disturb what the adjudicators consider to be an appropriate balance of power between the parties, conducive to an otherwise contested broader public interest.[162] The problem with this narrowly categorical and contextualized approach is that it draws only modestly on familiar rule of law principles,[163] as distinct from judicial predispositions.

Beyond the labor context, light messages can also be projected, for whatever reason, onto private homes in residential neighborhoods. Such cases thus comprise a further adjudicative context. We can thus easily imagine a projected light message case analogous to the targeted residential picketing case of *Frisby v. Schultz*.[164] A person or group could thus project, nonconsensually, a hostile message onto the wall or roof of a particular home, under the claim of free speech easement or other right. In some such cases, though, whether we find a technical privacy invasion[165] or not, there will be some understandable sympathy for the targeted party.[166]

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154. *Id.*; *see infra* notes 156-61.

155. 395 U.S. 575 (1969).

156. *Id*. at 618.

157. *Id.*

158. *Id*.

159. *Id*.

160. *Id*. For applications of *Gissel*, see Enterprise Leasing Co. v. NLRB, 831 F.3d 534, 543 (D.C. Cir. 2016). *See generally* Care One at Madison Ave., LLC v. NLRB, 832 F.3d 351 (D.C. Cir. 2016).

161. Contrast, for example, the law of defamation of public officials and public figures, as initiated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

162. *See* sources cited *supra* note 40.

163. *See generally* R. George Wright, *The Magna Carta and the Contemporary Rule of Law Problem*, 54 U. LOUISVILLE L. REV. 243 (2016); R. George Wright, *The Rule of Law: A Currently Incoherent Idea That Can Be Redeemed Through Virtue*, 43 HOFSTRA L. REV. 1125 (2015).

164. 487 U.S. 474 (1988).

165. *Id*. at 484; *see generally* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010) (focusing in part on unwarranted intrusions); William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

166. The Court in *Frisby* concluded that "[t]he First Amendment permits the government to

The problem with drawing upon cases such as *Frisby* for judicial guidance in residential home contexts is that message projection need not be something of which the targeted resident is even aware. The projected message need not be visible from inside the house, or involve any immediate subjective privacy element. Perhaps the message is projected only briefly, and then disseminated, to one degree or another, on social media. Or perhaps the message is projected only in the absence of the residents. In such cases, the central issue might not be that of speech versus immediate physical privacy, but speech versus a difficult to define form of dignity. Thus even the residence message projection cases break down into various further sub-categories.

The personal dignity interest in such a case might be translated, perhaps awkwardly, into a kind of speech claim on behalf of the targeted resident. The idea of one's home, let alone one's own person, becoming an involuntary billboard, especially for disfavored messages, suggests the indignities of compelled speech, whether that compelled speech reflects the views of the government or of private actors. The law of compelled speech must in this regard again be subtly contextualized[167] in multiplying fashion.

When one private party holds most of the residual property rights, but another private party targets not a home but a non-residential property for messaging purposes, the legal system may favor or disfavor the rights of the message disseminator, perhaps depending upon state law.[168] In some cases, whether

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prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." 487 U.S. at 487. The Court added that "[b]ecause the picketing . . . is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it." *Id*. at 488. To the extent that the Court in *Frisby* applied only mid-level scrutiny, such an approach may now be superseded by the Court's broadened view of what constitutes a content-based regulation of speech requiring strict judicial scrutiny. *See generally* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). *See also* CF & I Steel v. United Steel Workers, 23 P.3d 1197, 1203 (Colo. 2001) (en banc) (assuming, controversially after Reed, that the targeted picketing regulation should be treated as content-neutral in character). For limitations on the scope of *Frisby*, see Snyder v. Phelps, 562 U.S. 443, 459-60 (2011) (finding no "captive audience" in view of the remote distance of the protestors from the funeral service in question); *See also* Dean v. Byerley, 354 F.3d 540, 551 (6th Cir. 2004) (declining to apply the logic of Frisby in the absence of any specific regulation of the focused picketing in question).

167. *See, e.g.*, Rumsfeld v. FAIR, 547 U.S. 47, 63-65 (2006) (limiting compelled speech relief to instances in which the objecting speaker's own message is adversely "affected by the speech it was forced to accommodate"); Hurley v. Irish-American Gay, Lesbian and Bisexual Grp., 515 U.S. 557, 573 (1995) ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'") (quoting Pacific Gas & Elec. Co. v. P.U.C., 475 U.S. 1, 16 (1986) (plurality opinion)); Wooley v. Maynard, 430 U.S. 705, 713 (1977) (addressing a state-selected and state-imposed message, presumably unlike our more typical message projection cases, but in a context in which the "target" may well not have wanted to expressly convey any specific inconsistent message).

168. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 86-88 (1980); *see also* Glovsky v. Roche Bros. Supermarkets, Inc., 17 N.E.3d 1026, 1032-33 (Mass. 2014) (political candidate's right

involving traditional or contemporary messaging techniques, the residual property rights owner still has the option, however effective or ineffective, to "expressly disavow any connection with the message" by posting disclaimer signs.[169]

Being "forced," in some sense, to post a disclaimer can involve its own costs in terms of speech freedom and dignity. A disclaimer asserting one's neutrality on some controversial issue can itself also lead to strained relationships. Some disclaimers may not be universally or entirely credible.[170] The intended tone of the disclaimer may be unclear or largely lost. A disclaimer posted on or near one's own residence also raises issues of aesthetic suitability. Disclaimers will be of special importance in those many cases in which reasonable persons could falsely believe that the message is that of, or is approved by, the residual property owner.[171]

Taken together, the specialized contexts of the labor-management and the personal residence message projection cases, with all their variations, suggest a truth of much broader applicability. The best answers to the message projection controversies simply cannot be drawn, with any determinacy, from our broader or middle-range theories of property rights, including the law of nuisance and trespass dependent thereon, from the basic values and aims underlying the constitutional protection of speech, or from any reasonably straightforward application of free speech rules even at the level of familiar categories. Instead, our message projection cases must typically be resolved, however controversially, at a level of remarkably detailed and continually sub-dividing circumstance and contextualization.[172] It is thus fair to say that we have at this point no classic principles to meaningfully guide the resolution of our various light message projection cases. At the ultimately crucial level of narrowly particularized contexts and circumstances, individual and collective judicial intuitions, however arrived at, will instead inevitably loom large.[173]

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to solicit campaign signatures on (otherwise) private property near entrance to prominent grocery store).

169. *Pruneyard*, 447 U.S. at 87. For some unavoidable complications of disclaimer law in a number of contexts, see generally R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2008).

170. *See generally* Wright, *supra* note 170.

171. For a parallel problem in public school speech cases, see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

172. For much broader discussion of the role of particularized circumstances and contexts in ethical judgment, see generally JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004); CHALLENGING MORAL PARTICULARISM (Mark Norris Lance et al. eds., 2008); MORAL PARTICULARISM (Brad Hooker & Margaret Olivia Little eds., 2003); SEAN MCKEEVER & MICHAEL RIDGE, PRINCIPLED ETHICS: GENERALISM AS A REGULATIVE IDEAL (2006); MARK TIMMONS, MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM (1998).

173. For broader discussion of the importance of particularized intuitions in adjudication, see generally R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381 (2006). For broader treatments of several much more ambitious varieties of intuitionism in ethics, see generally ROBERT AUDI, THE NEW INTUITIONISM (Jill Graper Hernandez ed. 2011);

CONCLUSION

The emerging light message projection cases illustrate the crucial broader erosion of free speech theory. This result becomes especially clear once we realize that neither broad nor middle range property law theories can guide the legal resolution of the message projection cases in any meaningfully determinate, non-question-begging way. As it then turns out, our best theories of freedom of speech, whether alone or in any conjunction with property theory, are of similarly little use. In the end, judges are left, crucially, to a largely intuitive judgment as to remarkably narrow legal categories, increasingly particularized contexts, and individual circumstances.

This general outcome holds, interestingly, even for judges who think of themselves as principled adherents of some broad school of free speech adjudication. Any purported free speech absolutist,[174] for example, must inevitably confront the question of whose speech is to be absolute, or at least prioritized, when the purported speech rights of more than one potential speaker come into conflict. And those who think of themselves, in contrast, as free speech proportionalists[175] must recognize that the results of free speech balancing tests crucially depend on more or less intuitive, and often quite reasonably contestable, assessments of narrow context and circumstance.

We can imagine an alternative universe in which constitutional rules provide more determinate guidance for the projected messaging cases. A society might, for example, allocate all the relevant speech-related rights to whoever already holds one or more other specified rights with respect to the property in question. Or a society might decide all such cases so as to advance some well-specified version of egalitarianism.[176] But neither of those approaches resembles our own legal culture. Whether that truth, and the diminishing significance of mainstream free speech theory more generally, should be celebrated or regretted is left to the reader.

MICHAEL HUEMER, ETHICAL INTUITIONISM (2002); DAVID KASPAR, INTUITIONISM (2012); ETHICAL INTUITIONISM: RE-EVALUATIONS (Philip Stratton-Lake ed. 2003).

174. *See*, classically, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

175. *See generally* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016).

176. *See generally* Wright, *supra* note 111.