Projecting and Puppeteering

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Maureen E. Brady, *Property and Projection*, 133 **Harv. L. Rev.** __ (forthcoming 2020), available at SSRN.

Suppose an unfriendly neighbor, professional rival, disgruntled employee, or random malcontent decides to send a message—from you. Said enemy projects words or images onto your real estate—the facade of your home or office building, say—turning your private property into an "unwitting billboard" showcasing an unwanted message.[1] The affront is palpable, but a viable cause of action has proved as hard to nail down as the light beams themselves. Claims based on these fact patterns have so far foundered: courts find these projected intrusions too incorporeal to count as trespass,[2] yet too fleeting and harmless to count as nuisance.

In *Property and Projection*, Maureen Brady surveys this interesting terrain and convincingly argues that such targeted acts of "communicative appropriation" should be actionable. This result seems so well supported that it initially seems surprising that courts have yet to reach it. In fact, projected speech of the sort Brady examines turns out to be an intriguing entry point into the nature and evolution of property entitlements, as well as a fascinating legal puzzle in its own right. There's a great deal to unpack and enjoy in the piece, including the detailed history of old-fashioned light-related cases that Brady provides. I will focus in this short jot on what I found most compelling about Brady's argument: the idea that these projections conscript property into the role of an unwilling speaker whose messages may be attributed in error to the owner.

Brady identifies the nub of the wrong caused by projected messages as a form of commandeering—one that is unusually destructive of the owner's dignity, autonomy, and control. Because onlookers are likely to associate the property with its owner, the speech will seem to come from that owner rather than from the third party speaker. Property, in short, is turned into a puppet. As Brady notes, similar risks of misattribution animate other legal protections, including the right of publicity. Commandeering a person's property for expressive ends, just like appropriating her identity, causes her to lose control over her self-presentation.

The First Amendment adds a wrinkle here, as it does for the right of publicity, but Brady rightly resists the notion that it immunizes projective commandeering. Although there are some settings in which free speech rights require private property interests to yield, including public fora, these contexts are rather limited; none involves an appropriation of property that generates the misimpression that the owner herself is speaking. And, as Brady emphasizes, being forced to speak is as much an imposition on free speech as is forced silence. To be sure, a private party and not the government is ventriloquizing the owner's real estate. But normative concerns surrounding forced speech undermine any claim that the law must enable that compulsion.

Notice, for instance, that *A*'s right to free speech does not include the right to hold a gun to *B*'s head and force *B* to recite *A*'s preferred philosophical positions, nor the right to plaster bumper stickers touting *A*'s favorite political candidates all over *B*'s car. These are prime examples of the way in which many liberties that we take for granted, such as not being forced by another private actor to say things we do not believe, are not expressly delineated but rather broadly "shielded" by nonspecific rights to bodily integrity and security in property.[3] This lack of specification is central to the appeal of property's exclusion-based architecture.[4] You need not possess a specific right to keep an interloper from scrawling limericks on your dining room wall, for instance, because you can keep uninvited people off your property altogether, whatever their aims may be. But exclusion is only a proxy for harm prevention, and one that engages poorly with projection.

In considering how to formulate protection against projection, Brady wisely recognizes the need to distinguish between purposeful projections of light displays and incidental projections of light, such as a dog owner accidentally casting light on her neighbor's home as she searches for her pet (a scenario that I can attest is far from hypothetical). Trespass law would be unable to distinguish the cases, Brady explains, because it employs a "strict binary"—either the light beam is an intruder or it is not.

Brady suggests instead that tweaks to nuisance law could offer a better path to liability, one that could distinguish the incidental from the purposeful, and the harmful from the harmless—especially once the indignity of misattribution and commandeering is recognized. One way of threading the needle would be to ask whether the owner's beamed-upon property is instrumentalto the objectives of the light-beamer, rather than merely incidentally impacted as the beamer pursues unrelated goals. Scholars have suggested asking analogous questions in takings and tort contexts.[5] The intuition in these analyses is that making affirmative use of someone else's property to achieve one's own ends is qualitatively different from harming someone's property as a byproduct of one's other pursuits. In place of a conflict between two legitimate goals—where weighing, balancing, and the availability of self-help all seem relevant—there is just the question of whether one party should be able to turn something belonging to someone else into a tool for achieving her own ends.

There are many other questions and considerations that the projection cases implicate, and Brady's piece does a splendid job of addressing them. It is notable, for example, that most of the cases litigated so far involve labor disputes. In that context and others, distributive questions interact with realities of property distribution and with questions about how best to ensure that the relevant stakeholders have effective opportunities to speak. The issues are difficult and intricate, but for anyone wishing to navigate them, Brady's analysis lights the way.

1. Brady, *Property and Projection* at 7.
2. Or at least not the kind of trespass that warrants categorical protection. *See id*. at 16-19 (discussing cases that that treat intangible intrusions as trespass but apply a nuisance-like standard).
3. *See* Matthew H. Kramer, *Rights Without Trimmings*, in "A Debate Over Rights: Philosophical Enquiries" 7, 11-13 (Matthew H. Kramer et al. eds., 1998).
4. *See, e.g.,* Henry E. Smith, *Property as the Law of Things,* 125 **Harv. L. Rev.** 1691, 1709-10 (2012).
5. *See* Brian Angelo Lee, *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*, 97 **Tex. L. Rev.** 935, 973-74 (2019); Oren Bar-Gill and Ariel Porat, *Harm-Benefit Interactions*, 16 **Am. L. & Econ. Rev.** 86, 86-88 (2014); Jed Rubenfeld, *Usings*, 102 **Yale L.J.** 1077, 1114-18 (1993).

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