ANALOG ANALOGIES: INTEL V. HAMIDI AND THE FUTURE OF TRESPASS TO CHATTELS

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A symposium on great torts cases of the twenty-first century must include Intel Corp. v. Hamidi, the canonical case about whether unwanted e-mail spam sent to a company’s server could give rise to a trespass to chattels claim. While much has been written about Intel, in this Essay, we argue that Intel is as much of a classic for what it reveals about the old-fashioned tort as it is for its more closely examined ruling on “cybertrespass.”

The dueling personal property analogies chosen by the majority and dissenting opinions in Intel reveal basic and fundamental disagreements about what sorts of conduct the traditional tort prohibits: specifically, when a plaintiff may obtain nominal damages or an injunction against a defendant’s contact with personal property when that contact does not have lasting physical effects. As we point out, this question arose in cases long before Intel and generated some discussion during the drafting of the First and Second Restatements of Torts. Now, the same question arises in Fourth Amendment law and the law of Article III standing, areas in which recent Supreme Court decisions have elevated trespass-to-chattels analyses to renewed significance. Our Essay indicates the need for further development on open questions in the law of trespass to chattels, suggesting some ways that central tort-law notions like intentionality and custom might provide firmer bases for recognizing the harm in unwanted contact with things.
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Introduction ................................................................. 2

I. The Development of Trespass to Chattels ................................. 4
   A. Development Before the First Restatement ..................... 4
   B. The Restatement’s Influence ..................................... 9

II. From Tangible to Intangible: Analogies in Intel .................... 13

III. Persistent Puzzles in Trespass to Chattels ......................... 19

Conclusion ............................................................................. 26

INTRODUCTION

From the time it came down, and even before it was decided, Intel Corp. v. Hamidi had all the makings of a classic: a star-studded cast of amici, detailed separate opinions, and the enduring allure of dusty common-law applied to new technology.¹ The facts of Intel are simple. A former employee, Kourosh Kenneth Hamidi, sent emails criticizing Intel’s employment practices to current Intel employees on six occasions over two years. Hamidi removed any recipient who requested that the emails stop. Further, while sent to thousands of recipients, the emails did not impair or affect the functionality of Intel’s email servers, the physical computers that received and distributed the communications. Confronted with Intel’s claim that these unwanted communications constituted trespass to chattels—which provides a remedy for unwanted interferences with another’s personal property—the California Supreme Court held that the tort “does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning.”² The decision

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² Id. at 300.
spurred a flurry of law review articles and student notes criticizing or celebrating the case and its promises of an unencumbered internet. Like earlier classics, it came to rest in the pages of casebooks, where students—all of whom grew up with email spam—still examine this case in their study of property, torts, or internet law.

In this Essay, we suggest that Intel is as much of a classic for what it reveals about the old-fashioned tort of trespass to chattels as it is for its more closely examined ruling on “cybertrespass.” The dueling personal property analogies chosen by the majority and dissenting opinions in Intel reveal basic and fundamental disagreements about what sorts of conduct the traditional tort prohibits: specifically, when a plaintiff may obtain nominal damages or an injunction against a defendant’s contact with personal property when it does not have lasting physical effects. As we point out, these questions long predated Intel and were superficially settled by the First and Second Restatements of Torts. These sources proclaimed that in the absence of dispossession, one “who intentionally intermeddles with another’s chattel is subject to liability only if his intermeddling is harmful to the possessor’s materially valuable interest in the physical condition, quality, or value of the chattel.”

Interestingly, the opinions in Intel—and the development of the tort both before and since—reflect anxiety about that rule taken to its extreme. Because the regulation of cybertrespass is now largely accomplished through relatively specialized statutory schemes, rather than the common law of torts, the unresolved debates about trespass to chattels have now migrated into other contexts: to Fourth Amendment law and the law of Article III standing, areas in which recent Supreme Court decisions have elevated trespass-to-chattels analyses to some significance. Our explanation indicates the need for further development of open questions in the law of trespass to chattels, although we recognize that personal property law has often been

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5 RESTATEMENT (SECOND) OF TORTS § 218 cmt. h (1965).

6 But see In re Apple Device Performance Litigation, 347 F. Supp. 3d 434 (N.D. Cal. 2018) (denying motion to dismiss trespass-to-chattels claim when Apple software updates substantially slowed down devices).
neglected as a subject of deep scholarly interest. Nevertheless, the basic problem—how to define what counts as an “interference” when there is no physical harm—of course crops up across tort law in general, including in the closely adjacent context of nuisance.

I. THE DEVELOPMENT OF TRESPASS TO CHATTELS

A. Development Before the First Restatement

The muddy, twisted development of the personal property torts is well rehearsed elsewhere—including in a barn-burning two-part Harvard Law Review series by the former Dean of Harvard Law School, J.B. Ames. Here, it suffices to give a much briefer overview. Apart from actions sounding in criminal law, trespass de bonis asportatis was originally an action for wrongful takings of personal property—for goods taken away. Over the course of several centuries, the tort splintered, as small technicalities led to new causes of action for plaintiffs depending on whether the defendant claimed the thing as their own, detained it, or found a thing that was lost. The last of these, the tort of trover—derived from the French for “to find”—had a variety of “procedural advantages” that led to its replacing other, older forms of action (trespass, replevin, and detinue). Eventually, trover’s association with finding evaporated. The tort required only that (1) the

7 Maureen E. Brady, The Lost Effects of the Fourth Amendment: Giving Personal Property Due Protection, 125 YALE L. J. 946, 952 & n.14 (2016). Even historically, although more work on personal property was produced a century or more ago, one nineteenth-century lawyer referred to real property law as the “pride of the early English lawyer; for chattel learning he cherished little else than a profound contempt.” JAMES SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY 29 (1873). Tellingly, no one is even really sure what the etymology of “chattel” is. Id.

8 See, e.g., Maureen E. Brady, Property and Projection, 133 HARV. L. REV. 1143 (2020) (exploring whether projections of light onto real property can count as “interferences” sufficient for nuisance in the absence of physical damage or communication-related torts).


10 Ames, History of Trespass (Part I), supra note 9, at 286–87.

11 Ames, History of Trover (Part II), supra note 9, at 374. This subsequent development led one early-twentieth century commentator to call the law of personal property torts “a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs . . . .” John W. Salmond, Observations on Trespass and Conversion, 21 L. Q. REV. 43, 43 (1905).


13 It was not long before courts treated as a fiction, then dropped, the requirements of allegations of “losing” and “finding.” Id. at 169–70.
plaintiff had the right to possess the chattel and (2) the defendant had converted it to their own use, linking trover permanently with the notion of “conversion.” English judges treated trover/conversion as requiring the party wrongfully in possession to assert dominion over the thing. Thus, trespass—once the only personal property tort—somewhat ironically came to cover lesser interferences with personal property, short of the new possessor asserting dominion. As renowned tort scholar William Prosser famously put it, trespass to chattels became a “little brother” of conversion.

Despite many centuries of decisions about whether the taking of a chattel fit within trespass or detinue or trover, a basic question had gone unresolved: when, if ever, should a party be able to bring an action against another for misuse or unwanted use of a thing, falling short of a taking? None of these torts clearly covered situations where a “possessor misused the goods,” reducing their value, but without disrupting the plaintiff’s possession. In those cases, historically, “[t]he owner’s only remedy . . . was a special action on the case.” And these actions did not produce much written law; one English case in 1841 only mused in dicta about whether something like “the mere touching and taking [of horses] . . . by the bridle” could ever be an actionable property tort.

The basic problem with interferences short of full-on takings has always been separating trivial interferences from substantial ones. From the earliest extension of the writ of trespass to cover personal property, “there was danger that the royal courts would be encumbered with a mess of petty litigation,” and the Crown passed statutes specifying that the action would lie only for takings of goods worth a minimum price. Prosser credited “a young man of thirty-five named Abraham Lincoln” with arguing a foundational American case in 1843, Johnson v. Weedman, that pointed toward the now-canonical common-law rule: for trespass to chattels to be actionable, there must be substantial damage to the chattel. In Johnson, a horse was ridden beyond the mileage for which it had been hired and died shortly thereafter, but a jury apparently found that the horse had not died as a result of the extra riding and thus that the defendant was not liable for conversion for the misuse.

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14 Id.
15 Prosser, supra note 12, at 171.
17 Ames, History of Trover (Part II), supra note 9, at 383.
18 Id.
20 Ames, History of Trover (Part I), supra note 9, at 283.
21 Prosser, supra note 12, at 172.
22 Johnson v. Weedman, 5 Ill. (4 Scam.) 495, 496–97 (Ill. 1843).
determining that there was no error in the way the jury had been instructed on conversion, the Illinois Supreme Court noted that not every deviation from the strict terms of a bailment is automatically a conversion.23

Here, as elsewhere, there is reason to be skeptical of Prosser’s historical claims on the development of tort law.24 Johnson was not a trespass-to-chattels case, nor was it the first in a large number of nineteenth- and early-twentieth-century cases about property injuries suffered by a bailor when the property was in the custody of a bailee. Many of these cases involved horses that were ridden farther than the lending stable had agreed.25 In most, there was no question about substantial injury to the property: usually, physical harm or death. This left courts and commentators reciting the rule that “if the thing is used for a different purpose from that which was intended by the parties,” the hirer was liable for damages or loss, with the misuse being “deemed a conversion of the property.”26 That rule was refined when the resulting cases came to present a classic causation problem: in many instances, the owner could not decisively link the out-of-line conduct to the resulting damage or loss.27 As a later judge interpreted Johnson, the key problem in that case was the inability to connect the claimed injury to the defendant’s conduct,28 not anything relating to a damage threshold necessary to maintain a trespass action.

Very few cases seem to have involved this application of trespass to chattels: parties meddling with or misusing chattels without damaging them physically or affecting their usefulness to their owners. In the pithy 1808 case of Marentille v. Oliver, a plaintiff claimed assault and battery for the

23 Id.
24 See, e.g., John Goldberg, On Being a Nuisance, at 2 n.9 (unpublished manuscript) (on file with authors) (noting the problems with cases that Prosser cited as evidence of nuisance’s incoherence).
25 E.g., Ledbetter v. Thomas, 30 So. 342 (Ala. 1901); Line v. Mills, 39 N.E. 870 (Ind. 1895); Perham v. Coney, 117 Mass. 102 (1875); see generally 3 ANNOTATED CASES AMERICAN AND ENGLISH 470, 471–72 (William M. McKinney et al. eds., 1906). There were also multiple cases involving chattel slavery. E.g., Spencer v. Pilcher, 35 Leigh 565 (Va. Ct. App. 1837); Harvey v. Epes, 53 Va. (12 Gratt.) 153 (1855).
26 JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 413, at 272–73 (1832); see, e.g., Woodman v. Hubbard, 25 N.H. (5 Fost.) 67, 72–74 (1852).
27 Story’s treatise was edited substantially between its first and third editions to refine this general rule. See JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS §§ 413–413d, at 406–12 (3d ed. 1843).
28 Charles Towne & Co. v. Wiley, 23 Vt. 355, 357 (1851). Johnson does not appear to have been considered particularly noteworthy by commentators before Prosser. It is mentioned only as a “compare” cite in 3 ANNOTATED CASES AMERICAN AND ENGLISH, supra note 25, at 471. It seems plausible that Prosser was more charmed by the case’s connection to Lincoln than its doctrinal significance.
defendant’s striking his horse with a large stick. 29 Because the case chiefly involved strange procedural issues, one judge reversing for other reasons asked in dicta whether the plaintiff had sufficiently demonstrated trespass to property in the absence of specific allegations about injuries to the horse: “Suppose a man, seeing a stranger’s horse in the street, was to strike him with a whip, or a large stick, if you please, and no injury was to ensue, could the owner of the horse maintain an action for this act? I apprehend not.” 30 The case was not, however, a trespass action.

Two Vermont decisions also touched on the puzzle. In Paul v. Slason, a plaintiff brought multiple claims after a sheriff seized his property pursuant to a writ of attachment, including that the sheriff had impermissibly used his pitchfork to remove some of the property being attached. 31 The pitchfork had been left in place after use, but the plaintiff sought nominal damages. The deciding judge cited the maxim “de minimis non curat lex,” finding no right of action absent “actual damage” or an “unlawful intent.” Similarly, in Graves v. Severens, a bailor sued a bailee for improperly using a mare, alleging a miscarriage. 32 Because a jury found that the mare had not been with foal, the claim on appeal was that an action should still lie for nominal damages. 33 Again, the deciding judge contrasted interferences with chattels with entries on real property, noting that interferences with chattels ordinarily required “actual damage.” But he also stated that where “any one wantonly invades another’s rights for the purpose of injury, an action will lie, though no actual damage be done.” 34 In other words, both these cases suggested that interferences accompanied by “unlawful intent”—or “wanton invasions”—might be actionable in the absence of actual damage.

An intervening New Jersey decision likewise indicated that a trespass-to-chattels claim might be made out in the absence of actual damage, albeit under distinguishable circumstances. In the 1867 decision of Bruch v. Carter, a person driving a horse-drawn carriage to church for a funeral untied another horse in order to hitch to a nearby post. 35 The pleading deserves accolades for its combination of exaggeration and honesty: the funeral-goer supposedly “took the horse a great distance, to wit, the distance of ten yards.” 36 After that point, however, the horse apparently died, with the pleading alleging multiple alternative possible causes of its passing. Although the ultimate consequences

29 Marentille v. Oliver, 2 N.J.L. 379, 379 (1808).
30 Id.
31 22 Vt. 231, 232 (1850).
32 40 Vt. 636 (1868).
33 Id. at 638.
34 Id. at 640.
35 32 N.J.L. 554, 555 (1867).
36 Id.

Electronic copy available at: https://ssrn.com/abstract=4545189
to the “chattel” here were severe, the authoring judge considered the “technical trespass” complete as soon as the horse was untied “from the hitching post[] to which his owner had fastened him.”\textsuperscript{37} Even “if nothing more” had occurred, this technical trespass gave the plaintiff the right “to recover nominal damages.”\textsuperscript{38}

These few cases were all that existed on the subject by 1900.\textsuperscript{39} And prominent turn-of-the-century tort theorists diverged in their perceptions of what the law \textit{ought} to be.\textsuperscript{40} In his influential torts treatise, Frederick Pollock wrote that “[a]uthority, so far as known to the present writer, does not clearly show whether it is in strictness a trespass merely to lay hands on another’s chattel without either dispossession or actual damage.”\textsuperscript{41} For him, “treating a mere unauthorized touching as a trespass might be salutary and necessary, as where valuable objects are exhibited in places either public or open to a large class of persons.”\textsuperscript{42} In 1907, John Salmond’s treatise on the English law of torts endorsed this position, suggesting that, although it had “never been decided,” the rule for trespass to chattels should be similar to the rules for land and persons: no unauthorized touching.\textsuperscript{43} In contrast, in his treatise on legal liability in 1906, Thomas Atkins Street asserted it “important in connection with trespasses upon personal property that no cause of action arises unless the trespass is followed by actual damage,” suggesting that a person who committed a forceful, intentional interference only \textit{risked} liability, rather than automatically incurring it.\textsuperscript{44} He called Pollock’s position about liability without actual damage “untenable.”\textsuperscript{45}

Initial signs in England suggested Pollock’s view might win out. In the House of Lords matter \textit{Leitch & Co. v. Leydon}, arising out of Scotland,
makers of soda water asserted continued ownership over the bottles in which they sold the soda, and the purchaser would owe a fine if the bottles were not returned.46 Naturally, customers were keeping the bottles for the minimal fine and refilling them with other (probably less expensive) water.47 The soda maker sued one of its competitors for refilling its bottles. The Lords dismissed the appeal, finding no duty in the contract between soda maker and purchaser that could be extended to cover the third-party competitor. In a concurrence, Lord Blanesburgh wrote separately, contending that, while this case was properly resolved on the grounds that the customers were lawfully in possession of the bottles when they instructed the competitor to fill them, the law of wrongs to personal property needed clarification.48 He suggested that a trespass action might lie in similar circumstances depending on the knowledge of the wrongdoer, citing Pollock to observe that “trespass is constituted whether or not actual damage has resulted [from a trespass] either to the chattel or to themselves.”49 Although there is “little modern authority,”50 even now, British law does not seem to require actual damage in trespass-to-chattels cases.51

B. The Restatement’s Influence

In the first Restatement of Torts, published in 1934, American lawyers took the law in a different direction. Section 218 declared that a person intermeddling with a chattel is liable only if “the chattel is impaired as to its condition, quality or value” or if the owner is deprived of its use “for a substantial time.”52

The individual most clearly associated with the drafting of these sections was then-thirty-seven-year-old Fowler Harper, future Yale Law professor,

46 [1931] AC 90 (H.L.).
47 Id. (Lord Blanesburgh) (“[These questions about trespass to chattels] call for an answer and until that is forthcoming my mind remains open.”).
48 There is an interesting little back-and-forth about how far English personal property law applies in Scotland, though we do not discuss it here. Id.
49 Id. Later editions of Salmond’s torts treatise cite the case as authority for its no-damage-required rule. JOHN W. SALMOND, THE LAW OF TORTS 353 (8th ed. 1934).
50 White v. Withers, [2009] EWCA (Civ) 1122, [44] (Eng.).
52 RESTATEMENT (FIRST) OF TORTS § 218 cmt. i (1934). A person is also liable if the intermeddリング causes bodily harm to the possessor or “some person or thing in which the possessor has a legally protected interest.” Id. § 218(c).
who presented the material at the American Law Institute’s Annual Meeting.\(^5\(^3\) Although precise transcripts of earlier stages in the drafting process are unavailable, it seems that the issue of a damage requirement had been somewhat contentious among the project’s advisers and other American Law Institute members. Harper pointed out specifically to the membership that an actor would not be “liable for a merely harmless intermeddling with another man’s chattel.”\(^5\(^4\) But he also acknowledged that cases about this issue were both rare and conflicting:

This is a question upon which, surprising as it may seem, there is a paucity of authority. There are four or five cases which touch upon it in this country. Two or three of them take the position as here stated. One or two of the others take another position and the balance of the authority is more or less non-committal, merely dicta bearing on the question. . . . I don’t think it is very important. If anyone objects to the statement here that there must be some harm to the chattel—I suppose that this fellow’s proprietary rights to the chattel have been invaded if another persists in meddling with it without his consent, but whether he should be allowed to recover even nominal damages, seemed to the Advisers very problematical.\(^5\(^5\)

A Chicago lawyer, Lessing Rosenthal, asked why nominal damages should not be available for the detention of his watch for a half hour. Harper responded that “the common law has never surrounded the use of chattels with that sanctity it has in the case of land,” observing that “we do not feel quite as strongly when a man meddles around with our chattel a little as we do when he persists in walking across our land without consent.”\(^5\(^6\) With no further discussion, the section was shortly thereafter incorporated for final publication.\(^5\(^7\)

Although this portion did not engender any debate, the 1934 Restatement also introduced a second justification for its actual damage requirement, beyond the less-strong feelings associated with violations of chattels: the availability of self-help. Comment (f) justified the disparate treatment of trespasses against land and chattels—harmless intermeddling cognizable in the former context, but not the latter—by observing that “[s]ufficient legal protection of the possessor’s interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.”\(^5\(^8\) Unlike in the case of land, the damage

\(^{53}\) 11 AM. L. INST. PROCEEDINGS 517 (1934).
\(^{54}\) Id. at 520.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id. at 542.
\(^{58}\) RESTATEMENT (FIRST) OF TORTS § 218 cmt. f (1934).
rule for trespasses to chattels articulated in the First Restatement makes self-help a total substitute for a legal remedy, instead of an option the owner might elect to exercise.\(^{59}\) To be sure, the owner of a chattel may have a broader range of self-help options available than the owner of land does: although in both cases the owner can erect barriers or other obstacles to inhibit another’s access, in the case of chattels, a person might also be able to evade the wrongdoer by relocating their thing.

Despite the apparent breadth of the requirement of actual damage, there were some possible exceptions and qualifications built into it. Most significantly, Comment (i) reminded readers that while the trespass-to-chattels tort required “intermeddling” affecting “physical condition, quality, or value,” value might in some circumstances be affected without physical harm, as where “the use of some personal toilet or medicinal appliance by someone else may lead a person of ordinary sensibilities to regard the article as utterly incapable of further use,” or where “the wearing of an intimate article of clothing may render it valueless in the eyes of even a normally constituted possessor.”\(^{60}\) Prosser, the Reporter of the Second Restatement, made minimal substantive change in the trespass to chattels provisions,\(^{61}\) but he did replace the exemplar “personal toilet or medicinal appliance” with “a toothbrush.”\(^{62}\)

Putting this together with the prior history, it becomes clear that, although in scattered places, lawyers and judges across the nineteenth and early twentieth centuries were cyclically grappling with a fundamental puzzle about trespass to chattels: when, if ever, should an intermeddling be actionable without physical damage? When the person interferes wantonly and intentionally, over another’s objections? Or perhaps when the item meddled with is sufficiently intimate or connected to individual dignity? Or when the person profits by the use?\(^{63}\)

Even in the late twentieth century, courts had only a few occasions to consider these questions. At least one case, from 1949, hints at interesting possibilities with respect to the recognition of dignitary interests. In Bankston v. Dumont, a saleswoman sued for $5,000 when the owner of the store in

\(^{59}\) Epstein, supra note 1, at 151.

\(^{60}\) Restatement (First) of Torts § 218 cmt. i (1934).

\(^{61}\) Prosser did incorporate the formerly separate sections on “dispossession” into the trespass to chattels section (and made nominal damages available for temporary dispossession). See Am. L. Inst., Council Draft No. 3, Restatement (Second) of Torts 13–14 (Feb. 15, 1958).

\(^{62}\) Restatement (Second) of Torts § 218 cmt. h (1965).

\(^{63}\) Cf. Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946) (treating use of egg-washing machine without the owner’s consent as a conversion, ostensibly because it was moved).
which she worked went through her purse, taking out a ten dollar bill that he returned not long after being accused.\textsuperscript{64} The Supreme Court of Mississippi held that her case should have gone to a jury, because once she declared that the defendant “without her permission, opened her purse and went into it and removed therefrom a ten dollar bill belonging to her and carried it away, without her consent,” she sufficiently pled a trespass action against him.\textsuperscript{65} This emphasis on the violation of the purse recurs in a few spots in the opinion. Further, the ten dollars was immediately returned after Ms. Bankston discovered it was missing and recalled seeing the owner in the cabinet where it was stored, yet she sought $5,000 in actual and punitive damages. This suggests that something more than the brief taking of ten dollars was at issue—that perhaps the invasion of the purse itself, and the accompanying distress that the plaintiff experienced, was bound up in the cause of action.

\textit{Bankston} aside, the weight of cases followed the Restatement’s lead in emphasizing actual and often physical damage. Two cases concerned attempts by defendants to defend against personal injury actions by claiming that a plaintiff bitten by a dog had been “trespassing” by patting the dog or pulling on it, and in both, courts found that the injured parties inflicted insufficient damage on the animal.\textsuperscript{66} In 1966, the Georgia Court of Appeals cursorily stated that it was not a trespass when a defendant “rummage[d] through plaintiff’s books, papers and records, making voluminous notes” because the plaintiff’s property was not “injured in any way.”\textsuperscript{67} Relatedly, in the 1978 case of \textit{Birnbaum v. United States}, individuals sued the United States under the Federal Tort Claims Act for opening and photocopying their letters to the Soviet Union.\textsuperscript{68} In finding that the plaintiffs would have an action under state tort law for an invasion of their privacy, the Second Circuit put in a footnote that a trespass to chattels action would not be “fruitful” because “surreptitious opening and reproduction of the letters without appropriating or physically damaging them does not fit easily under the rubric of trespass to chattels.”\textsuperscript{69} In 1988, the Arizona Court of Appeals decided \textit{Koepnick v. Sears Roebuck & Co.}, after a jury awarded the plaintiff $100 in

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\textsuperscript{64} Bankston v. Dumont, 38 So. 2d 721, 722 (Miss. 1949). He also removed a slip she planned to purchase from the store on credit, but that issue was not involved on appeal—and it seems she had not yet paid for it. \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{68} 588 F.2d 319 (2d Cir. 1978).
\textsuperscript{69} \textit{Id.} at 326 n.14. Having apparently been pointed to the canonical Fourth Amendment case of \textit{Entick v. Carrington} for the notion that the reviewing of correspondence is a trespass, the court identified that precedent as a case about intrusions on privacy. \textit{Id.}
\end{flushright}
nominal damages when a company’s security guard searched the plaintiff’s truck (along with police) in a misguided shoplifting investigation.70 Because the search took only two minutes and no damage occurred, the Arizona court overturned the jury’s verdict.71

Despite these few cases on the subject and only minor changes to the Restatement, the famous treatise Prosser and Keeton on the Law of Torts pronounced it settled by 1984 that authority, though “scanty,” nonetheless supported a conclusion that “the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense” than the availability of self-help.72 So things stood when plaintiffs in the 1990s brought a flurry of trespass-to-chattels cases for a variety of intangible interferences made possible by technology.

II. FROM TANGIBLE TO INTANGIBLE: ANALOGIES IN INTEL

Intel v. Hamidi was not the first case of its kind, and the history that preceded it was extensively examined even before Intel was decided in 2003.73 A California appellate court and numerous federal district courts determined that a variety of intangible interferences constituted trespasses: using a computer to generate access codes that enabled free long-distance calling,74 voluminous and unwanted junk email,75 the use of “spiders” to “crawl” websites to collect data for indexing or other purposes.76 Most of these cases involved enough meddling to disrupt or slow down the affected network or system, and thus, at various stages of litigation courts allowed

71 Id. at 618–19. Another case raising a similar issue is Terrell v. Rowsey, in which a supervisor opened the plaintiff’s car door six inches and grabbed an empty beer bottle out of the back. Following the Restatement, the Indiana Court of Appeals rejected the trespass to chattels claim. 647 N.E.2d 662, 666–67 (Ind. Ct. App. 1995).
72 PROSSER AND KEETON ON THE LAW OF TORTS, supra note 16, at § 14, at 87. Prosser’s certainty on this point evidently grew over time. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 14, at 93 (1941).
trespass-to-chattels claims to proceed.\textsuperscript{77} \textit{Intel} was somewhat different than the prior cases in that Hamidi’s messages caused no appreciable slowdown. Further, unlike most of the defendants in these intangible trespass cases, Hamidi was not a competitor trying to gain advantage through the interference.

Early scholarship on the opinions before \textit{Intel} criticized the ways that the authoring judges used analogies to books or personal property or plots of land, criticizing them for “glibly interming[ing] trespass to chattels with doctrines related to real property”\textsuperscript{78} or “building analogy on top of analogy” in ways that created “new law [bearing] little resemblance to prior causes of action.”\textsuperscript{79} Yet as we discussed in Part I, the law of trespass to chattels was itself mostly unsettled and unclear at the time the cybertrespass cases were decided. Indeed, before \textit{Intel}, the opinions in cybertrespass cases were humble about the certitude of underlying tort law.\textsuperscript{80} Commentators, however, relied near-exclusively on select portions of Prosser’s Second Restatement or \textit{Prosser and Keeton on the Law of Torts} to pronounce conclusively the status of tort law, especially highlighting the Restatement’s dismissal of the analogy between personal property and land.\textsuperscript{81}

The majority opinion in \textit{Intel} followed the path laid out by these commentators rather than the trend in earlier trespass-to-chattels decisions.\textsuperscript{82} And in so doing, neither the majority nor the dissenting opinions shied away from analogy. By our count, the majority opinion by Justice Werdegar and the dissent by Judge Brown each cite or use upwards of ten analogies to real or personal property in the physical world.\textsuperscript{83} By leaving those related to real property aside,\textsuperscript{84} focusing only on the analogies to personal property, it

\textsuperscript{77} The most tenuous connection to a slowdown happened in either \textit{eBay Register.com}, in which the court found in the absence of specific evidence about the consequences of the defendant’s conduct that the risk of many intermeddlers interfering in the same way counseled in favor of finding a trespass. \textit{eBay}, 100 F. Supp. 2d. at 1071–72; \textit{Register.com}, 126 F. Supp. 2d at 250–51. In \textit{Ticketmaster}, however, the court found the harm to be “very small” and the likelihood of similar wrongdoers affecting the plaintiff’s business low. \textit{Ticketmaster Corp.}, 2000 WL 1887522, at *4.

\textsuperscript{78} Burk, \textit{supra} note 73, at 28.

\textsuperscript{79} O’Rourke, \textit{supra} note 73, at 567.

\textsuperscript{80} \textit{E.g.}, Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566 (1996) (noting that before decision, trespass to chattels was “seldom employed as a tort theory in California (indeed, there is nary a mention of the tort in Witkin’s Summary of California Law)”)

\textsuperscript{81} See O’Rourke, \textit{supra} note 73, at 594–96 (citing no authority other than the Second Restatement for law of trespass to chattels).

\textsuperscript{82} \textit{Intel Corp. v. Hamidi}, 71 P.3d 296 (Cal. 2003).

\textsuperscript{83} The majority ironically accused the dissent of “overreliance on metaphor and analogy.” \textit{Intel}, 71 P.3d at 309 n.7.

\textsuperscript{84} This sadly means that this Essay does not engage with the most evocative analogy
becomes clear that the disagreement between these opinions is as much about traditional physical trespass to physical goods as it is about its intangible cousin.

For one thing, there is the illuminating disagreement about whether someone sitting in another person’s car would give rise to a trespass-to-chattels claim. Quoting a sentence in Prosser and Keeton on the Law of Torts, the majority considered an intrusion on personal property without accompanying damage obviously unable to support an action, like “merely lay[ing] hands upon the plaintiff’s horse, or sit[ting] in his car.”85 Justice Brown countered in dissent: “An intruder is not entitled to sleep in his neighbor’s car, even if he does not chip the paint.”86

The disagreement here turns on two important distinctions. First, not all chattels are the same. Some chattels (like cars) have spatial properties that distinguish them from others (like a pen). A car can be opened, examined, and intruded upon in ways that make the resulting interference more closely resemble a trespass to real property than the mere touching of other inanimate objects.87 Intriguingly, this sort of differentiation among chattels has been recognized in another context: the Fourth Amendment law of search-and-seizure, where the “container doctrine” protects objects that contain others as warranting the same protection as “one who locks the doors of his home against intruders.”88 And in at least one case on trespass to chattels before the Intel decision—Bankston v. Dumont—the court found sufficient proof of trespass to chattels in part because a container was violated: a purse.89

Second, interferences that cause no physical damage may be differentiated by their nature and extent. A person momentarily getting into the wrong car thinking it is her Uber seems qualitatively different from someone “sleeping” in it, in that the latter is an interference that is for a longer duration and accompanied by a different sort of intent. These distinctions are related to one of the primary points made in Justice Brown’s dissent: that

from the majority, used to characterize Intel’s argument: that emails are like “tiny messengers” running through Intel’s hallways. Id. at 309.

85 Intel, 71 P.3d at 303 (quoting PROSSER AND KEETON ON THE LAW OF TORTS, supra note 16, at 87). Later, evidently in response to the dissent, the majority again mentions a car, noting that finding a person liable for sleeping in it would not implicate free speech values the way that Hamidi’s form of interference—communication—obviously does. Id. at 309 n.7.

86 Id. at 321 (Brown, J., dissenting).


88 United States v. Chadwick, 433 U.S. 1, 11 (1977); see Brady, supra note 7, at 960–62.

89 See supra notes 64–65 and accompanying text.
there is harm when a person persists in “intermeddling” once asked to stop, even if there is no physical consequence resulting from the person’s action. Here, the different analogies point to typical referents: notions of implied permission and customary norms. There are circumstances where there is no plausible claim through custom or implied permission to use someone’s chattel, as when someone enters another’s car to take an afternoon nap. There are other situations where—even if there was some degree of custom or implied permission at the outset—it vanishes once the owner has made clear their objection and given the person an opportunity to desist. Erroneously getting into the wrong car might turn into a trespass if the passenger demands to be taken to their destination once the driver says “get out.”

Relatedly, the majority and dissent see the relationship between the chattel and the asserted harm differently. The majority sees Intel’s claimed harm—loss of “employee productivity”—as deriving from the content of the message that reached Intel’s server, rather than the message’s relationship to the server itself. This is why the majority analogizes the interference caused by Hamidi’s spam to the “injury to [a] recipient’s mailbox” caused by “reading an unpleasant letter” or the “injury to [a] recipient’s telephone equipment” caused by “an intrusive telephone call.”90 Hence the majority’s point that arguments about the content of speech are better addressed by other torts: defamation, or intentional infliction of emotional distress, or tortious interference with business relations, perhaps.91

Justice Brown, however, selected a different analogy: the case where “[Party] A spray paints . . . a water soluble message . . . on [Party] B’s bumpers.”92 In this example, Justice Brown considered the time it would take to remove the paint or treat the bumper to prevent further messaging the sort of harm that trespass to chattels could reach.93 The change in the chattel’s “condition” was reversible and minimal—but nevertheless, for Justice Brown, the car owner should be able to enjoin the writers from further messages using a trespass theory. This is a different vision of the nature of the harm than the one advanced by the majority: the harm is done, at least for injunctive purposes, once the plaintiff must take action to return the chattel to its state before the interference.94 The content of the communication is not

90 Intel, 71 P.3d at 300.
91 Id.
92 Id. at 313 (Brown, J., dissenting).
93 Id. Justice Brown’s example envisioned the car belonging to a political candidate and the messaging endorsing the candidate’s opponent, so in the opinion itself, content was involved—but for this purpose, it need not have been.
94 This idea—that there is injury where the plaintiff must spend time returning the chattel to its previous status, even if no physical harm resulted—is repeated later in the opinion, when Justice Brown envisions the trespass to chattels case that would result if a party
significant.

Justice Brown’s dissent may have envisioned an even more capacious definition of harm. Justice Brown likened the sending of an email to “chasing an owner’s animal,” long considered a tort. Although Justice Brown interpreted the consequences of chasing animals to be minor interferences with an owner’s use, the fact is that for centuries, “worrying sheep” or “worrying cattle” was not merely interfering with the owner’s control over the flock or herd by causing them to move. Animals being pursued may suffer extreme stress that can result in injury to them, danger to their young, or damage to land, fences, and boundaries, making it harder to decouple mere chasing from actual damage. Cattle aside, Justice Brown’s dissent also picks up the Second Restatement’s example about the trespass committed by one who uses another’s toothbrush—which the Restatement used to illustrate the point that an item’s value to its owner might be affected even if the physical condition of the chattel was not. In Justice Brown’s view, if an owner subjectively values a chattel less because of the interference, that might be actionable. The toothbrush example, however, proves complicated. Along with the other example in the same comment of the Restatement—about an “intimate article of clothing”—both forms of unwanted use do carry an “ick” factor that uses of computer servers simply do not, as well as the prospect of some sort of very tiny, biological invasion through viruses or germs.

A slightly different way of understanding the toothbrush example is not to focus on the subjective value of the owner, or the technicality of some kind of virus-sized intrusion, but rather to return to notions of implied permission, wanton disregard, and customary norms. The subjective value of a toothbrush may not be much higher than its market value, but there are precious few situations in which a person other than its primary user would have a colorable argument that contact is expected or customary. Contrast that with the many situations in which norms dictate that a chattel will likely be touched: when one puts luggage in an airplane’s overhead bin or leaves laundry for too long in the building washing machine.

unplugged all of Intel’s computers and moved them to a high shelf. Id. at 323.

Intel, 71 P.3d at 323 (Brown, J. dissenting).

Wood v. LaRue, 9 Mich. 158 (1861); Schmidt v. Adams, 18 Mo. App. 432 (1885).


RESTATEMENT (SECOND) OF TORTS § 218 cmt. h (1965).

Intel, 71 P.3d at 323 (Brown, J., dissenting) (observing that unwanted use would “impair[] the brush’s subjective value to the owner rather than its objective market value” and that “there can be a trespass even though the chattel is used as intended—to brush teeth—if it is used by an unwanted party”).
The sources cited by the dissent—both British torts treatises—either indirectly or directly make this point. The cited edition of *Winfield and Jolowicz on Tort* considered it doubtful whether claims about intentional (rather than negligent) trespasses should require actual damage, noting that “the mere touching of objects like wet paint, waxworks or exhibits in a picture gallery or museum” must be actionable or else their owners would be without remedy.\(^{100}\) *Clerk and Lindsell on Torts* recites that cases requiring actual damage go too far, and that a contrary rule would allow “objects such as pictures or other exhibits in a museum or art collection [to] be fingered or handled with impunity.”\(^{101}\) That work suggests intentional meddling is actionable unless the touching falls within “acceptable standards of conduct.”\(^{102}\) The treatise goes on to use one unusual example here, though it perhaps blurs the intentional with the accidental: in listing forms of acceptable contact, *Clerk and Lindsell* describes “a theatregoer who moves someone else’s coat in the cloakroom,” but also a “pedestrian [who] brushes past a car parked in a crowded street, perhaps breaking off an ornamental mascot in the process.”\(^{103}\)

Each of these disagreements relates back to the development of the traditional trespass-to-chattels tort. The scattered cases both before and after the Restatements hinted at the possibility that even absent actual damage, trespasses to chattels might be actionable if the intermeddler intentionally or wantonly contacted the thing, knowing they had no permission to do so. Characteristics of the thing itself might indicate the absence of permission, perhaps where the chattel has spatial components, where the thing is of a sort or type not typically touched by parties other than the owner, or where the contact is more than fleeting. The majority and dissent’s analogies sail past one another, reflecting the fact that these basic issues in traditional trespass to chattels law do not yet have clear answers.

Despite initial fears that other states might not follow the lead of the California courts in *Intel*,\(^ {104}\) legislators took up the invitation from multiple judges to regulate spam and other putative cybertrespasses instead of leaving that development to state common law. Congress swiftly passed federal legislation to regulate spam the same year that *Intel* was decided.\(^ {105}\) Further,

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\(^{100}\) *Winfield and Jolowicz on Tort* 403 (W. V. H. Rogers ed., 10th ed. 1975).

\(^{101}\) *Clerk & Lindsell on Torts* 13–159, at 703 (Margaret R. Brazier ed., 17th ed. 1995).

\(^{102}\) *Id.* at 704.

\(^{103}\) *Id.*


the Computer Fraud and Abuse Act and its state analogs set boundaries around other sorts of interferences with computers and their networks, though there are thorny questions of application where physical and common-law analogies have proven helpful.106 Litigants continue to bring trespass-to-chattels cases for a variety of intangible interferences, and the courts deciding them most often begin and end with Intel,107 rather than reaching backward into personal property analogies from the physical world.

III. PERSISTENT PUZZLES IN TRESPASS TO CHATTELS

Despite the breadth of the Restatement rule taken to its extreme, the authors of these twentieth-century projects, as well as subsequent tort theorists, have agreed that at least some intermeddling that does not cause physical harm should be actionable. But they disagree sharply about where that line should be drawn. Where the damage requirement is stated most strongly—in the first and second Restatements—the authors would still find the unwanted handling of a toothbrush or one’s underwear actionable, regardless of additional damage. Although the Restatement itself justifies this requirement by asserting that the owner has still lost some kind of subjective “value,”108 we have suggested that these harms could be understood as actionable instead because of some kind of microscopic invasion or because touching is so outside the realm of customary contact that no license to touch might be implied.

Cathy Sharkey has persuasively contended that the remedy of self-help—which we briefly discussed, of course, due to its appearance in the first Restatement—provides some assistance in understanding when a trespass to personal property should be actionable. Sharkey argues that, rather than being

107 See, e.g., hiQ Labs, Inc. v. LinkedIn Corp., No. 17-CV-03301-EMC, 2021 WL 1531172, at *9 (N.D. Cal. Apr. 19, 2021) (concerning company’s “scraping” of website for data in way that slowed down LinkedIn’s systems); Best Carpet Values, Inc. v. Google LLC, No. 5:20-CV-04700-EJD, 2021 WL 4355337, at *6 (N.D. Cal. Sept. 24, 2021) (allowing trespass claim to go forward where Google’s ads slowed down company’s website); WhatsApp Inc. v. NSO Grp. Techs. Ltd., 472 F. Supp. 3d 649, 684 (N.D. Cal. 2020), aff’d on other grounds, 17 F.4th 930 (9th Cir. 2021) (finding that small-scale deployment of malicious code was insufficient for trespass to chattels claim because there was no harm to server or slowdown of system); Grace v. Apple, Inc., 328 F.R.D. 320, 336 (N.D. Cal. 2018) (finding sufficient allegations of trespass to chattels when Apple software disabled FaceTime on some iPhones and reduced their market value).
108 See supra notes 95–99 and accompanying text.
a mere option for an aggrieved owner to choose in lieu of litigation, a chattel owner could be required to avail themselves of self-help before being able to bring a trespass-to-chattels claim. The chief benefits of such an approach include the fact that taking affirmative steps to protect the item or recover it imposes a sort of “sincerity” test on the plaintiff, limiting frivolous filings over trivial invasions. Further, self-help puts others on clear notice of the owner’s claim, thus acting as a sort of “boundary marker.”

Sharkey’s approach has significant appeal in the cybertrespass context, where boundaries are indeed unclear and where possibly-insincere but deep-pocketed litigants abound. But requiring self-help seems to offer fewer benefits and more risks in the real world. The “boundaries” of personal property in physical space are certainly much clearer (in most circumstances) than in cyberspace, so that justification for requiring self-help is less apt offline. And although self-help ordinarily entails the right to use “reasonable force” to protect one’s chattel, the owner must stop short of “violence or a breach of the peace,” consequences that are also more likely in disputes over physical things than in disputes about Internet communication. It is true, of course, that creditors are frequently able to peacefully repossess a debtor’s chattel, the form of self-help that acts as a remedy in soured secured transactions. But it is one thing for a party in a pre-existing relationship to seize a person’s asset pursuant to a failure of the agreement between them; it is quite another to imagine a stranger’s use of self-help to stop unwanted touching or temporary occupation by another stranger. Certainly, if a chattel is sitting unmolested and idle on the side of a road, self-help might be adequate to right the wrong the owner has suffered. But where an unwanted user is sitting in a car, or rummaging through a purse, or photocopying correspondence, safe uses of self-help would seem fewer and farther between.

Elsewhere in the law of torts—in the context of slander, libel, and nuisance, for instance—doctrine evolved to recognize certain “per se” wrongs, permitting a plaintiff to obtain some form of recovery absent a showing of actual or special damage. There is no comparable category in

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109 This is largely the way that self-help works in the context of trespasses to land, and Richard Epstein has argued for the extension of this framework to trespass to chattels. Epstein, supra note 1, at 151.

110 Sharkey, supra note 40, at 697. Sharkey also points out different ways that self-help could come into a torts case, for instance, as an affirmative defense (plaintiff failed to engage in available self-help) rather than as a threshold burden for the plaintiff to meet. Id. at 684–89.

111 Id. at 698–99.

112 Id. at 682.

113 Id.

114 There is, of course, deep disagreement over whether these categories should still exist and the boundaries if they do (and in the context of slander and libel, the looming First
the trespass-to-chattels tort. Nevertheless, American cases have long suggested that unwanted handlings of personal property should be actionable where the touching was accompanied by unlawful intent or wanton disregard.\(^{115}\) A 2009 case from across the Atlantic, *White v. Withers*, is instructive.\(^ {116}\) The question was whether there is an underlying trespass or conversion where the wife in a divorcing couple (and her lawyers) intercepted and copied the husband’s confidential letters. Lord Justice Ward’s opinion says that, particularly in family law matters, the handling of items “acceptable in the ordinary conduct of everyday life” should not give rise to a tort claim, and any person bringing such a trivial claim for nominal damages might be liable for abuse of process.\(^{117}\) Later, however, Lord Justice Ward remarks that the wife’s and lawyers’ “interception and retention” of a deeply personal letter from the husband’s daughter left him with “such an uncomfortable feeling” that it would not be abuse of process to proceed based on that interference.\(^{118}\) In a separate opinion, Lord Justice Sedley contended that a trespass or conversion action lies where the item is “obviously off limits.”\(^ {119}\) Although “obviously off limits” is the stuff of property-professor-hypothetical dreams, these opinions are further reflections of a widely shared sentiment: one ordinarily should not meddle with someone else’s things.

Stateside, the puzzles about intentionality and damage in traditional trespass-to-chattels law now manifest more frequently in other contexts, even outside cybertrespass. One is in defining what counts as a Fourth Amendment “search.” In 2012, in *United States v. Jones*, the Supreme Court held that when police attached a GPS device to a defendant’s car, it constituted a “trespass,” and thus qualified as a “search” subject to the Fourth Amendment’s strictures.\(^ {120}\) A concurring opinion, authored by Justice Alito, accused the majority of applying “18th-century tort law,” pointing out that an element of the modern tort of trespass to chattels is damage to the chattel.\(^ {121}\)

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116 2009 EWCA (Civ) 1122 (Eng.).
117 Id. at [59], [61].
118 Id. at [67]. The opinion blurs its discussion of conversion and trespass somewhat, so it is hard to tell whether the retention is significant to Lord Justice Ward, or if a similar result would obtain if the wife had returned the document after copying. Id. at [59].
119 Id. at [72].
120 565 U.S. 400 (2012).
121 Id. at 418 (Alito, J., concurring). In a footnote, Alito quoted a canonical torts treatise, contending that although once the tort had covered “‘dignitary interest[s] in the inviolability
The mere placement of a GPS device, in Justice Alito’s view, would qualify as the sort of “trivial” harm that tort law does not recognize.\textsuperscript{122} In addition to posing some questions about the precise relationship between the defendant and the car (which belonged to his wife), Justice Alito also worried that “the Court’s reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked”—drawing direct parallels to cases similar to \textit{Intel}.\textsuperscript{123} Would electronic trespasses qualify as Fourth Amendment searches? And if the key question is what historically would have counted as a tortious act at the time of the Founding, “do these recent decisions represent a change in the law or simply the application of the old tort to new situations?”\textsuperscript{124}

Again, leaving to the side technological issues, courts interpreting the Fourth Amendment (and analogous state laws) are indeed eschewing the kind of limitation endorsed in \textit{Intel}. Following \textit{Jones}, the Sixth Circuit held that chalking a vehicle’s tires was a “search” because it involved “intended physical contact with a chattel.”\textsuperscript{125} And in \textit{State v. Dorff}, decided by the Idaho Supreme Court in 2023, the court took up the question whether a defendant suffered an unlawful Fourth Amendment search when a police dog repeatedly made physical contact with his vehicle by jumping with front paws onto the sides.\textsuperscript{126} In the latter case, the court marched through a lengthy discussion of the development of trespass to chattels, beginning with Blackstone and moving through modern torts treatises. At the end, the Idaho Supreme Court found the answer to whether the dog trespassed on the vehicle “plain”: “At common law, a “trespass” to a chattel occurs when an actor violates “the dignitary interest in the inviolability of chattels,” . . . i.e., those “interests” that comprise the “bundle of sticks” (e.g., the right to use, possess,

\begin{quotation}
of chattels,’ . . . today there must be ‘some actual damage to the chattel before the action can be maintained.’”\textsuperscript{127} \textit{Id.} at 418 n.2 (quoting \textsc{Prosser and Keeton on the Law of Torts, supra} note 16, at 87. This appears to be a misreading of the treatise, which makes no such historical claim.
\end{quotation}

\textsuperscript{122} \textit{Id.} at 425.
\textsuperscript{123} \textit{Id.} at 426–27.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Taylor v. City of Saginaw, 922 F.3d 328, 333 (6th Cir. 2019) (citing \textsc{Restatement (Second) of Torts § 217 cmt. e (1965)} (internal quotation marks omitted)). \textit{See also} Verdun v. City of San Diego, 51 F.4th 1033, 1037 (9th Cir. 2022) (assuming arguendo challenged tire chalking is a Fourth Amendment search but concluding it was not reasonable); \textit{id.}, at 1050 (Bumatay, J., dissenting)(tire chalking is a “physical intrusion” of an individual’s effects, and “rather than simply assume that chalking is a Fourth Amendment search and sow confusion over the law, I would hold that it is unequivocally one.”).
\textsuperscript{126} No. 48119, 2023 WL 2563783, at *1 (Idaho Mar. 20, 2023).
Relying on the state’s own cases about the entry of drug dogs into vehicles, the Court interpreted the language from the Second Restatement of Torts about “intermeddling” to encompass the kind of contact that the dog made with the vehicle. It viewed as immaterial the distinction between trespasses to real and personal property:

By analogy to real property, it is also a trespass to, without privilege or consent, enter into a chattel, and breach what amounts to its “close” no different than it is a trespass to, without privilege or consent, breach the “close” that surrounds private parcels of land.

This is a departure from the way that the Intel majority understood the tort, and it even conflicts with a few state-law cases on whether intrusions by private parties into vehicles were actionable in the absence of substantial duration or physical damage.

Outside the Fourth Amendment context, recent decisions on statutory standing also illustrate continued uncertainty about the scope of the tort. The inquiry to determine whether a party has Article III standing to bring federal claims for violations of a federal statute has now long required that a plaintiff suffer a “concrete and particularized” injury. The Supreme Court elaborated on the “concreteness” requirement in 2016 in *Spokeo v. Robins*, noting with particular reference to “intangible harms” that courts should examine both “the judgment of Congress” and “historical practice” to determine if an intangible harm constitutes an injury in fact, including whether a claim “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” The Court reaffirmed this holding in 2021, in *TransUnion LLC v. Ramirez*.

This discussion in *Spokeo* has caused lower courts to pay renewed attention to trespass to chattels. Many of the relevant cases involve plaintiffs who received unwanted text messages and are seeking to bring class action suits for violations of the Telephone Consumer Protection Act (TCPA). As soon as *Spokeo* was decided, district courts began reaching conflicting results in response to claims that the intrusion caused by an unwanted text message

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127 Id. at *7.
128 Id.
129 Id. One of the dissenting judges viewed as significant the distinction between intrusions into the car interior and incidental contact with the exterior. Id. at *10 (Moeller, J., dissenting).
130 See supra notes 70–71.
133 141 S. Ct. 2190 (2021).
is analogous to the sort of harm caused in trespass to chattels cases (and thus sufficient to confer federal standing). For just a flavor of this sort of disagreement, consider that a district court in West Virginia found the analogy to trespass to chattels persuasive in part because it relied on the pre-
*Intel* cases to understand what is harmful about an intangible text message,\(^{134}\) whereas another in the Southern District of California found insufficient connection, relying on the “harmless” nature of the unwanted communication in *Intel* itself.\(^{135}\)

In 2017, the Third and Ninth Circuits found a sufficient nexus between the harm caused by unwanted text messages and other torts—nuisance, intrusion upon seclusion, and invasion of privacy\(^ {136}\)—and on April 30, 2019, the Second Circuit joined them.\(^ {137}\) Then, in August of that same year, the Eleventh Circuit rejected all of these tort law analogies in finding in *Salcedo v. Hanna* that a plaintiff who suffered a single unwanted text message lacked standing to challenge the TCPA.\(^ {138}\) The Eleventh Circuit specifically rejected any similarities between the injury the plaintiff alleged and the tort of trespass to chattels, quoting the classic Second Restatement formulation requiring some change in physical condition or quality. Although noting that the plaintiff’s purported injury “bear[s] a passing resemblance to this kind of historical harm,” the Eleventh Circuit ultimately rejected any parallel and found the unwanted message “precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing.”\(^ {139}\)

The Fifth Circuit has now explicitly criticized this portion of the Eleventh Circuit’s holding. In *Cranor v. Five Star Nutrition, LLC*, a unanimous panel found the *Salcedo* court’s view of trespass to chattels “substantially narrower than the scope of that action at common law.”\(^ {140}\) Citing the Fourth

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\(^{136}\) Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017); Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017).

\(^{137}\) Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir. 2019).

\(^{138}\) 936 F.3d 1162 (11th Cir. 2019).

\(^{139}\) Id. at 1172.

\(^{140}\) 98 F.3d 686 (5th Cir. 2021). Justice Barrett, then a Seventh Circuit judge, wrote the opinion declining to follow *Salcedo* for the Seventh Circuit, but it did not discuss trespass to chattels or particulars of tort law. Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020). A more recent Seventh Circuit decision, albeit involving the relationship of *Spokeo* to contract-law injuries, cuts in a different direction, suggesting that the Article III concrete injury requirement is not met when a particular legal injury historically gave rise only to nominal damages. Dinerstein v. Google, LLC, No. 20-3134, 73 F.4th 502 (7th Cir. 2023) (slip op. at 30); see also William Baude, *Standing in the Shadow of Congress*, 2016
Amendment case *United States v. Jones*, John Salmond’s 1907 treatise on the English law of torts, and an 1838 case by future-Justice Story that involved mills, the Fifth Circuit declared that the tort of trespass to chattels historically required no actual damage and accused the Eleventh Circuit of “mistak[ing] the twentieth-century Restatement for the eighteenth-century common law.”

Even though multiple federal courts have noted that to have Article III standing, a plaintiff needs to show an injury similar to one that would be cognizable at common law—not that it would prevail in a tort action—the split in the circuits is still indicative of the problems that have plagued trespass to chattels for centuries. Does intentional, wanton contact give rise to liability in the absence of damage? How can intent be inferred by the nature of a chattel or the circumstances in which a putative trespasser encounters it? The influential trespass-to-chattels provisions in the First and Second Restatements are currently being supplemented by the tort provisions in the current draft of the Fourth Restatement of Property, provisions that are doing double duty as the Third Restatement of Torts.

The draft section on trespass to “personal property”—in lieu of the archaic “chattels”—takes steps to provide guidance on some of the issues that have plagued trespass-to-chattels both before and after *Intel*. Although the current draft retains clear emphasis on the distinction between trespasses to real and personal property from earlier Restatements, a new comment on the “harm requirement” also emphasizes that “intermeddlings and uses of personal property need not involve physical harm to constitute trespasses.”

Evoking some of the examples once used in the British tort treatises cited in the *Intel* dissent, the draft Fourth Restatement states that a trespass action may be possible when “someone who is interacting with an item egregiously violates a norm,” as when “someone touches a museum exhibit . . . or sits in another’s car over the objection of the owner . . . or herds another’s animals

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141 *Cranor*, 98 F.3d. at 693. District courts within the First and Eighth Circuits have now also joined the Second, Third, Fifth, Seventh, and Ninth in finding that receipt of a single text message is sufficient to satisfy the *Spokeo* standard, albeit without discussing trespass to chattels at all. Cross v. State Farm Mutual Automobile Insurance Company, Case No. 1:20-cv-01047, 2022 WL 193016 (W.D. Ark. Jan. 20, 2022); Sagar v. Kelly Automotive Group, Civil Action No. 21-cv-10540-PBS, 2021 WL 5567408 (Nov. 29, 2021); see also *Seale v. Peacock*, 32 F.4th 1011 (10th Cir. 2022) (briefly considering trespass to chattels analogy in case under other federal statute before finding sufficient nexus to invasion of privacy).


143 *See supra* notes 100–101 and accompanying text.
in such a way as to . . . stir up his field.”144 A separate comment on “cybertrespass” largely endorses the rule from Intel, suggesting the utility of norms in the context of computers and networks, too.145 Time will tell if this more explicit acknowledgement of the role of custom, permission, and norms will take off the way that the First and Second Restatements did, either in the tangible or intangible worlds.

CONCLUSION

The position taken by the majority in Intel has supporters and detractors, and more of the former than the latter, particularly on those issues closest to the question of unwanted bulk targeted email resolved in that case. It is, indubitably, one of the more visible private law decisions of the last quarter century in the United States, notable for its influence, its thoroughness, and perhaps as well for the uneasiness that at some level its holding must provoke for even its most ardent defenders.

In everyday life, we all understand that we are ordinarily not supposed to touch other people’s things without their permission, just as we are not supposed to touch other people themselves, enter their land, or, for that matter, read their correspondence, electronic or otherwise, even if exposed to the world. And while defaults may flip in different contexts from presumptive prohibition to presumptive permission, we also know that when permission is expressly denied, some activities that were once acceptable may cease to be so—presumed consent does not mean there is no underlying interest to be protected. We similarly understand that in a world where perfect enforcement is perfectly costly, not every wrong has an effective social remedy, much less a legal one, but this, too, does not deny the underlying wrong.

Intel has become canonical not simply for its seminal holding on cybertrespass; in its discussions of interferences with physical chattels, both the majority and dissenting opinions uncover underlying tensions and unresolved questions in plain old physical trespass-to-chattels law. While nearly all judges and commentators agree that not every unwanted contact with another’s physical personal property can be actionable, they have struggled to decide when, if ever, an interference that does not cause physical damage is meaningfully injurious or constitutes a legal wrong. Those debates are now recurring in other contexts where judges have imported trespass-to-

145 Id. cmt. d. The comment on cybertrespass still makes use of real-world analogy—this time, the expectation a person “who hangs her coat on a restaurant coat rack” might have when others “touch or even move and then properly rehang her coat.” This example also appears in British treatises. See supra notes 100–101 and accompanying text.
chattels law into higher-stakes disputes than the ordinary conflict over a jacket on a coat rack, calling for a stronger conceptual footing from tort theorists than the case law has demanded to date.