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Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications

Alex Geisinger



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I. INTRODUCTION

Would you buy property near a contaminated site? The phenomenon known as stigma occurs when potential purchasers devalue the cost of property associated with environmental contamination due to their fear of contamination. Even when a particular piece of property has not been, and could never be, adversely impacted by nearby contamination, its value frequently will decrease in the eyes of potential purchasers as a result of their fear.¹

The following question of course arises: absent any potential for actual harm, should the polluter be responsible for the damage resulting from this fear? While the number of claims for such devaluation asserted by owners of stigmatized property is rising dramatically,² the judicial answer to this question has been anything but clear. This Article identifies the source of the current inadequate judicial treatment

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1. Stigma claims can be separated into two factually distinct groups based on their treatment. The first type of stigma damage claim is based on a property's proximity to a source of contamination, even though the property has not and will not be impacted by the contamination. This type of stigma claim is of special importance due in part to the number of people who may bring such a claim against a source of contamination. Frequently, the number of proximate property owners is substantial, and class actions for such damages have been certified. Damages awarded in this type of case frequently amount to tens of millions of dollars. These types of stigma damage claims will be referred to throughout this Article as "proximity stigma" claims.

The second type of stigma claim deals with contaminated property that has been remediated. This type of stigma will be referred to as "postremediation stigma" throughout this Article.

2. Numerous factors have resulted in the increased assertion of such stigma damage claims. The continued erosion of the doctrine of caveat emptor and the increase in legislative or judicial rules requiring disclosure of property conditions to prospective buyers increases the number of cases in which property cannot be sold at market price due to disclosure of prior or nearby contamination. Also, experts in the field of real estate appraisal have begun to develop a significant understanding of the effects of contamination on real property values and, perhaps more important to the litigation context, have begun to develop methods to quantify the diminution in value that results from these effects. Finally, as the number of stigma damage claims continues to rise, judicial decisions allowing recovery of such damages have themselves created an incentive to better understand and prove the effects of stigma. All of these factors will continue to create an incentive to seek recovery of stigma damages. For a detailed analysis of this changing legal trend and its effect on stigma damage claims see, Timothy J. Muldowney & Kendall W. Harrison, *Stigma Damages: Property Damage and the Fear of Risk*, 62 DEF. COUNS. J. 525 (1995). For examples of the approaches to stigma appraisal, see James A. Chalmers & Scott A. Roehr, *Issues in the Valuation of Contaminated Property*, 61 APPRAISAL J. 28 (1993); Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques and Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55 (1994); Bill Mundy, *Stigma and Value*, 60 APPRAISAL J. 7 (1991); Peter J. Patchin, *Contaminated Properties—Stigma Revisited*, 59 APPRAISAL J. 167 (1991); Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7 (1988); Albert Wilson, *A Valuation Model for Environmental Risk*, FOCUS, Jan. 15, 1990, at 17-20.

of stigma. It argues that courts and practitioners misunderstand the process that causes stigma harm and, as a result, have fashioned a jurisprudence that is unresponsive to the problem. It then identifies a proper model of stigma harm and builds a new stigma jurisprudence based on this psycho-social model of the stigma phenomenon.

The most fundamental problem underlying the inadequate judicial treatment of stigma claims is that courts and lawyers simply misunderstand the phenomenon that causes stigma.³ While courts and commentators treat stigma harm in terms of the potential for contamination to reoccur or the potential for residual contamination to impact health or property, this Article argues that stigma is the result of a cognitive "marking" process, completely independent of the potential for future actual harm. According to the cognitive model, the harm results from a mark that, when noticed, "changes in a negative and discrediting way the way the observer sees the victim, whose identity is now spoiled."⁴ In short, the harm from stigma is to reputation and not to property. This redefinition of stigma also is supported by research on heuristics, or cognitive shortcuts, which explain the variations in perception that result in stigmas having different magnitude and duration depending on surrounding circumstances.

The lack of understanding of the stigma phenomenon has led courts to fashion rules of liability and damages that advance few, if any, valid policy concerns. For example, to the extent a majority rule of stigma jurisprudence can be established, it would mirror other current theories of recovery for "subjective" damages, with claims allowed only if the diminution in property value accompanies some actual harm.⁵ This liability rule, however, runs contrary to the concept of the marking process as independent of the means by which contamination causes actual property damage. Simply put, this actual damage standard bears no relationship to whether a party has been harmed by stigma.

Moreover, the reasons generally asserted by courts for requiring an actual damage standard are inapplicable to stigma harm. Generally,

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3. Commentators attribute stigma to such causes as the fear of health impacts associated with environmental contamination, and the fear that one may have to pay for remediation of contamination in the future. See, e.g., Andrew N. Davis & Santo Longo, *Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions*, 25 *Env'tl. L. Rep.* 10345 (July 1995). Others also point to the uncertainty that accompanies the fear as playing a significant role in the creation of stigma. See, e.g., Mundy, *supra*, note 2, at 9. A more detailed analysis of the basis for stigma will be undertaken after a review of existing stigma jurisprudence. See *infra* Part III.
 4. See MICHAEL R. EDELSTEIN, *CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE* (1988).
 5. In the case of postremediation stigma, in which properties have been actually impacted by contamination, courts analyze whether the stigma is permanent such that nuisance recovery would be allowed.

such liability standards are premised on the problems associated with proving "subjective" harm. Usually, the only way to present evidence on the subjective response to contamination would be to put the injured person on the witness stand and ask for a description of his feelings. Yet, stigma is the product of market forces. It can be proved through means other than the subjective feelings of the plaintiff and objectively verified through appraisal evidence. Stigma liability rules need not provide for the same high level of protection required in many "subjective" cases. At the same time, an analysis of heuristics suggests that many stigmas are not permanent, and thus judicial analysis of damages rules also must be reconsidered. In light of this new understanding of stigma, this Article concludes that the best approach to stigma damages would be to turn the current majority jurisprudence upside down—applying a stricter standard for proving damages than for liability.

This Article is separated into three major parts. Part II sets forth the current state of stigma jurisprudence through an analysis of existing stigma case law. Part III then describes the cognitive model of stigma. It focuses on the marking process that causes stigma and uses heuristics to describe why certain stigmas are perceived as larger than others. Finally, Part IV considers the implications of this new understanding for current stigma jurisprudence, suggesting a proper legal basis for consideration of stigma claims.

II. CURRENT STIGMA JURISPRUDENCE

Current environmental stigma jurisprudence, with decisions being made on an ad hoc basis, is best characterized as confused. Some of the confusion in stigma jurisprudence can be traced to the variety of legal claims asserted as a basis for stigma recovery and the disparate judicial treatment these claims receive. Claims to recover stigma damages have been based in such common law theories as nuisance and negligence,⁶ and have also been asserted under statutory authority such as CERCLA.⁷ Another source of confusion has been the development of competing precedent in both the postremediation and proximity nuisance context. As more courts have begun to accept stigma damage claims, this split in authority has become more significant. Thus, while the number of stigma claims continues to increase,

6. See, e.g., *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992)(applying nuisance theory as the basis of a stigma claim); *Adams v. Star Enter.*, 851 F. Supp. 770 (E.D. Va. 1994)(analyzing a stigma claim based in negligence), *aff'd*, 51 F.3d 417 (4th Cir. 1995).

7. Comprehensive Environment Response Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1995)[hereinafter CERCLA]. See, e.g., *Berry v. Armstrong Rubber Co.*, 989 F.2d 822 (5th Cir. 1993)(analyzing a stigma claim founded in nuisance as well as in CERCLA).

the manner in which they are judicially construed becomes more uncertain.

A significant portion of the confusion in current stigma jurisprudence can be traced to the different nuisance law requirements and the varied interpretations of these requirements in different states. The vast majority of stigma claims are premised on a theory of nuisance. Since its initial acceptance, the common law nuisance claim has developed differently in different states. Moreover, courts in states that do apply similar nuisance requirements may interpret these requirements differently. As a result, state nuisance law is not at all universal.

The confusion created by the application of differing nuisance requirements is exacerbated because stigma damages themselves are hard to characterize. Of particular importance to judicial decision-making is the characterization of the source or basis of the stigma associated with a particular piece of property. Some courts have suggested stigma has a basis in personal discomfort or injury to the neighborhood.⁸ Others suggest stigma is the result of unfounded news stories and rumors.⁹ Commentators generally characterize stigma as fear or possibility of future harm.¹⁰ The varying legal standards and interpretation of nuisance law combined with the difficulty many courts encounter in attempting to define stigma has created substantial confusion in environmental stigma jurisprudence.

Such a varied jurisprudence defies ready description, and thus any attempt at description must be subject to the caveat that not every case will be neatly categorized. Moreover, the organizing characteristics chosen by the Author certainly are not the only shared characteristics of the various stigma cases. This being said, some trends in decisionmaking do seem more significant than others. This Part considers some of the more important stigma cases in an attempt to distill from them these important general themes.

This Part treats the factually distinct proximity and postremediation cases separately. Because the vast majority of stigma cases are premised on nuisance claims, this Part focuses on the application of nuisance law in both the proximity and postremediation stigma contexts. After examining relevant nuisance law issues, this Part turns

8. See *Acadian Heritage Realty, Inc. v. City of Lafayette*, 394 So. 2d 855 (La. Ct. App. 1981); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 728 (Mich. 1992)(Levin, J., dissenting).

9. *Berry v. Armstrong Rubber Co.*, 989 F.2d 822 (5th Cir. 1993); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 719 (Mich. 1992)(Boyle, J., dissenting).

10. See Anthony Z. Roisman & Gary E. Mason, *Nuisance and the Recovery of "Stigma" Damages: Eliminating the Confusion*, 26 *Envtl. L. Rep.* 10070, 10071 (Feb. 1996).

to the other legal theories upon which proximity and postremediation claims have been premised.

A. Proximity Stigma Jurisprudence

The number of cases in which individuals seek recovery for damages due to their property's proximity to a contaminated environmental site continues to rise. It is extremely unlikely that this trend will moderate any time in the near future as courts continue to embrace new precedent allowing recovery in such instances.¹¹ Even in light of this new case law, however, the majority of courts still disallow recovery in these cases.

1. *Denial of Nuisance-Based Proximity Stigma Claims: Interpreting Substantial Interference to Require Actual Impact*

Judicial analysis of proximity stigma nuisance claims focuses on the element of nuisance law¹² that requires the nuisance to result in a

11. See *MHE Assocs. v. United Musical Instruments, USA, Inc.*, No. 93CV1883, 1995 U.S. Dist. LEXIS 5808 (N.D. Ohio Mar. 24, 1995); *DeSario v. Indus. Excess Land-fill, Inc.*, 587 N.E.2d 454 (Ohio Ct. App. 1991).

12. Prosser and Keeton define the elements of a nuisance as follows:

- (1) The defendant acted with the intent of interfering with the use and enjoyment of land by those entitled to that use;
- (2) There was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended;
- (3) The interference that resulted and the physical harm, if any, from that interference proved to be substantial. It is this requirement and that next that is most important in distinguishing between trespassory-type invasions from those that are actionable on a nuisance theory. Any intentional and unprivileged entry on land is a trespass without a showing of damage, since those who own land have an exclusive right to its use; but an act that interferes with use but is not in itself a use is not actionable without damage. The substantial interference requirement is to satisfy the need for showing that the land is reduced in value because of the defendant's conduct;
- (4) The interference that came about under such circumstances was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87, at 622-23 (5th ed. 1984).

Private nuisance is defined by the Restatement as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." An individual is subject to liability for such an invasion if (a) the plaintiff has "property rights and privileges respect to the use enjoyment with" which has been interfered; (b) the invasion is either (1) "intentional and unreasonable," or (2) "unintentional and otherwise actionable under the rules governing liability" for negligent, reckless, or ultrahazardous conduct. RESTATEMENT (SECOND) OF TORTS §§ 821D-F, 822 (1987).

substantial interference with the use and enjoyment of property.¹³ Some states have interpreted the substantial interference element as requiring proof of some actual physical interference with property.¹⁴ Under such an interpretation, proximity stigma claims premised on a nuisance theory will, by definition, fail. Other courts hold that physical invasion is not required to satisfy the substantial interference requirement. Nevertheless, these courts may still deny proximity stigma claims if they find on the particular facts that the interference is only nominal.

One of the most thorough treatments of the proximity stigma issue and an excellent starting point for an analysis of proximity stigma jurisprudence is the Michigan Supreme Court's decision in *Adkins v. Thomas Solvent Co.*¹⁵ The majority decision and strong dissent illustrate the problematic nature of applying current nuisance law principles to stigma type injuries, as well as the extremely narrow difference between what may or may not amount to substantial interference.

Adkins was an appeal of a Michigan trial court decision that granted summary judgment for the defendant on the nuisance claims for property devaluation brought by twenty-two individuals who lived near the defendant's contaminated site.¹⁶ The twenty-two individuals were part of a larger group of plaintiffs who had sued Thomas Solvent Company for various types of damages and injunctive relief as the result of the company's allegedly improper handling and disposal of toxic waste.¹⁷ As discovery in the case developed, it became apparent that due to a divide that separated groundwater flow in the area, these twenty-two plaintiffs' properties, unlike the properties of the other plaintiffs in the case, would never be physically impacted by the contamination.¹⁸ The defendant sought summary judgment against these plaintiffs based on this information.

The decisions of both the trial and appellate courts turned on the issue of whether a party must plead actual physical impact of contaminants to satisfy the substantial interference requirement.¹⁹ Holding that nuisance law required a showing of actual contamina-

13. While most case law turns on the application of the substantial interference requirement, another issue that confronts plaintiffs in stigma claims based on a nuisance (or trespass) theory is whether the nuisance is temporary or permanent. Diminution in property value will be recoverable only when the nuisance is deemed permanent. Although applicable in the proximity stigma context, this issue is generally the focal point of postremediation stigma claims. Therefore, it will be discussed in detail *infra* section II.B.

14. For a detailed analysis of the purpose of the substantial interference requirement, see *infra* subsection II.A.2.

15. 487 N.W.2d 715 (Mich. 1992).

16. *Id.* at 725.

17. *Id.* at 717.

18. *Id.* at 718.

19. *Id.* at 720.

tion, the trial court granted summary judgment against the plaintiffs. The Michigan Court of Appeals, however, found that Michigan courts did not interpret substantial interference as requiring allegations of actual physical invasion of property and thus reversed the trial court's decision.²⁰ The Michigan Supreme Court granted leave to consider the appellate court's decision.²¹

Upon review, the Michigan Supreme Court expanded its analysis beyond the issue of whether physical harm was required to satisfy the substantial interference requirement. While the supreme court agreed with the appellate court that physical invasion is unnecessary to satisfy the requirement, it held that unfounded allegations of diminution in property value, without more, did not constitute significant interference.

In reaching this conclusion, the court first considered the meaning of and the rationale behind the substantial interference requirement. Starting with the confusing relationship between the law of nuisance and trespass, it noted that "[t]he tort of trespass later developed to remedy [the] situation in which the defendant interfered with the complainant's interest in land. The source of injury was always on the complainant's land. Later, the assize of nuisance arose to redress injury due to an act of the defendant that interfered with the complainant's interest, although the injury did not involve an entry onto the complainant's land."²²

Nuisance claims were thus quite broad and could be brought for any number of activities including "interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his piece of mind, and threat of future injury that is a present menace and interference with enjoyment."²³ To limit the scope of this broad entitlement, courts added the requirement that a litigant show more than just interference. Plaintiffs would have to prove substantial interference with the use and enjoyment of land to prevail on a nuisance claim. Interference that did not amount to a significant interference was not actionable.²⁴

The court went on to determine whether the interference alleged by plaintiffs was substantial. It found that

[t]he crux of the plaintiffs' complaint is that publicity concerning the contamination of ground water in the area (although concededly not their ground water) caused diminution in the value of the plaintiffs' property. This theory cannot form the basis for recovery because negative publicity resulting in un-

20. *Id.* at 721.

21. *Id.* at 719.

22. *Id.* at 722 (footnotes omitted).

23. *Id.* at 720.

24. *Id.* at 723. See also KEETON ET AL., *supra* note 12 (explaining that to state an actionable nuisance claim, one must allege not just an injury, but a legally cognizable injury).

founded fear about dangers in the vicinity of the property does not constitute a significant interference with the use and enjoyment of land.²⁵

The court further found that the plaintiffs had not alleged that the contamination caused them any fear or harm.²⁶ Rather, according to the court, all of the property devaluation allegedly resulted only from negative publicity. Without any other basis, the court wrote, the public response is merely "conjectural, transitory and ephemeral." Consequently, the court rejected the plaintiffs' argument.²⁷ Thus, based on a narrow reading of the allegations of the plaintiffs' complaint, the majority found that the type of interference alleged in the case was not substantial.²⁸

At first blush, the *Adkins* decision seems to set a strong precedent against the recovery of proximity stigma damages. Yet, the manner in which the interference was characterized by the majority, together with the majority's response to arguments raised in the dissent, suggest that the *Adkins* majority's reasoning should be read to apply to only a narrow factual situation where no property devaluation can be traced to any cause beyond negative publicity.

A very vigorous dissent took strong issue with the basis for the majority's decision. In particular, it took issue with the majority's finding that "none of the reduction in value was attributable to well-founded concern about contamination by the defendants of soil and water supply in the neighborhood."²⁹ The dissent concluded that

[p]laintiffs should, in our opinion, be allowed to recover damages in nuisance on proofs introduced at a trial tending to show that the defendants actually contaminated soil and ground water in the neighborhood of plaintiffs' homes with toxic chemicals and industrial wastes, that the market perception of the value of plaintiffs' homes was actually adversely affected by the contamination of the neighborhood, and thus that plaintiffs' loss was causally related to defendants' conduct.³⁰

Pursuant to this reasoning, proof of a causal connection between contamination and property devaluation³¹ would be enough to state a claim in nuisance.

The majority in *Adkins* took great pain to distinguish the argument presented by the dissent. Frequently, the majority character-

25. *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 721 (Mich. 1992).

26. *Id.* at 725.

27. *Id.* at 724-25.

28. *Id.* at 723.

29. *Id.* at 728 (Levin, J., dissenting).

30. *Id.*

31. Such proof likely would be supplied by, among others, real estate appraisers with expertise in the assessment of stigma damages. There is substantial literature on real estate appraisal of stigma damages. See generally sources cited *supra* note 2. While this literature primarily is concerned with the proper method of valuation, some authors do attempt to describe the reasons why nearby contamination may cause property devaluation.

ized the plaintiffs' claim as an allegation of diminution in property values based solely on an unfounded fear of injury.³² It also stated that "on the present state of the record, plaintiffs do not contend that the condition created by the defendant causes them fear or anxiety."³³ The majority even went as far as to surmise why counsel chose to leave out allegations of personal discomfort or annoyance. The court clearly indicated that it was reading the allegations of plaintiffs' complaint very narrowly.³⁴

Indeed, the majority explicitly excluded the possibility that its decision would apply to a case such as the one characterized by the dissent.

In a given case, the dangers posed by environmental contamination may not be adequately addressed by statutorily created private actions or by traditional rules adopted prior to the existence of these problems. This case does not present that situation. We do not deal with a situation here in which plaintiffs have alleged that "the character of the neighborhood has changed for the worse."³⁵

Thus, even the majority suggests that claims in which a neighborhood has been impacted by contamination or in which plaintiffs experience personal discomfort or annoyance resulting from such contamination might be actionable.³⁶

A close reading of the *Adkins* case suggests that litigants should not casually rely on the *Adkins* holding as support for denial of proximity stigma claims. On the one hand, the *Adkins* majority and dissent, read together, suggest that such a holding is required only in the narrowest of proximity stigma scenarios. On the other hand, the *Adkins* court's reasoning actually may be seen as a limited endorsement of proximity stigma recoveries in cases in which plaintiffs can prove a nexus between the contamination and their own property's devaluation. At the least the decision suggests that the issue of substantial

32. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 721, 725-27 (Mich. 1992).

33. *Id.* at 725.

34. *Id.* at 726.

35. *Id.* at 726-27 (internal citations omitted).

36. The *Adkins* majority also raises the possibility that courts are not the proper institution for determining the recoverability of stigma damages. Noting that many polluters lack the resources to pay for all damages resulting from their activities, the *Adkins* majority concluded that allowing proximity stigma claims may redirect resources away from those who have suffered actual cognizable harm. The majority suggested that these important considerations should be undertaken by the legislature, not the judiciary. *Id.* at 727. At least one other court has suggested that recoverability of stigma damages is not a question for the judiciary, but would be better suited for legislative determination because of the complexity and potential impact of the issues raised. See *Charles Burton Builders, Inc. v. United States*, 768 F. Supp. 160 (D. Md. 1991). See also Roger C. Cramton & Berry B. Boyer, *Citizen Suits in the Environmental Field: Peril or Promise*, 2 *ECOLOGY L.Q.* 407, 412 (1972).

interference is often an extremely narrow one that must be scrutinized carefully in light of the particular facts of each claim.

Despite the detailed historical analysis of the substantial interference requirement of the *Adkins* court and other jurisdictions,³⁷ many courts have denied proximity stigma cases based on the failure to prove actual physical harm to one's property.³⁸ These courts apply state law precedent holding that nuisance recovery requires proof of physical harm to the plaintiff's property.³⁹ Because the damage in proximity stigma cases is not based on a physical invasion of, or harm to, a plaintiff's property, it is highly unlikely that a proximity stigma claim will succeed in these jurisdictions. Thus, although it seems that these courts may be applying a legal distinction without proper basis in the law,⁴⁰ the existence of such a line of case law in any particular state will likely result in the denial of proximity stigma damage claims premised on a theory of nuisance.

The physical invasion requirement has been applied even more stringently by one federal district court in *Lamb v. Martin Marietta Energy System, Inc.*⁴¹ Pursuant to the reasoning of the United States District Court for the Western District of Kentucky, Kentucky law requires not only actual harm, but also that such harm must create a health risk that rises to the level of substantial interference. The district court in *Lamb* considered a proximity stigma claim brought by

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37. See, e.g., *Adams v. Star Enter.*, 851 F. Supp. 770, 773 n.14 (E.D. Va. 1994), *aff'd*, 51 F.3d 417 (4th Cir. 1995). The *Adams* court observed that courts that require physical interference miss the distinction between trespass and trespass on the case. The former concerns activities that impacted the right to exclusive possession, while the latter deals with activities that impact a breadth of interests beyond just possession, including interference with use and enjoyment.
 38. See, e.g., *Berry v. Armstrong Rubber Co.*, 989 F.2d 822 (5th Cir. 1993); *Miller v. Cudahy*, 567 F. Supp. 892 (D. Kan. 1983), *aff'd in part and rev'd in part on other grounds*, 858 F.2d 1449 (10th Cir. 1988).
 39. Even the application of the general "physical harm" rule is not without variation. Some courts hold that a nuisance claim requires proof of physical touching or invasion. See *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 970 (W.D. Ky. 1993). Others require a showing of some physical harm to property caused by contamination. See *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993). While these two standards initially seem to be quite similar, differences may arise in later interpretations. For example, will courts conclude that physical harm requires more damage than just a mere physical encroachment?
 40. The *Adkins* court suggests that the application of the rule requiring physical touching may be the result of imprecision in defining nuisance historically. *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992). Another source of confusion in the development of this line of case law may be predicated on a misreading of the general rule that when invasion affects the physical condition of the plaintiff's land, substantial interference is presumed. See KEETON ET AL., *supra* note 12. The converse of this rule—that an absence of physical touching does not result in substantial invasion—is not necessarily the case.
 41. 835 F. Supp. 959 (W.D. Ky. 1993).

plaintiffs who owned property two miles northwest of a uranium production plant operated and managed by the defendants.⁴² The plant began operation in 1951. In August 1988, a plume of contaminants extending in a northeast direction from the plant was found. Tests conducted by defendants' consultant showed the plume contained elevated levels of technetium, a radioactive byproduct of nuclear fission, and trichloroethylene, a solvent regularly used by the plant.⁴³

The defendants began remediation of the contamination shortly after its discovery. Because of this remediation and testing, which showed no contamination currently in the plaintiffs' water wells, the court concluded that it was uncertain whether the contaminant plume would ever reach the plaintiffs' property.⁴⁴ Other testing, however, showed traces of technetium, plutonium 239, trichloroethylene, and polychlorinated biphenyls in a creek that ran through the plaintiffs' property and technetium on turnip greens in the plaintiffs' gardens.⁴⁵ Thus, although the contaminant plume might never reach the plaintiffs' drinking water, apparently contamination from the plant had managed to physically impact the property through other means.

The plaintiffs based their claim for property damage on a theory of private nuisance.⁴⁶ The district court granted defendants' motion for summary judgment on the nuisance claim. The court used different legal reasoning to deny plaintiffs' claim regarding the contaminant plume and actual contamination, respectively. First, it found that no claim in nuisance could be made for damage resulting from the contaminant plume because the plume had not touched the plaintiffs' property. The court noted that under Kentucky law, nuisance claims required "physical invasion or a physical 'touching.'"⁴⁷ Finding no evidence to suggest that the contaminant plume had invaded or touched the plaintiffs' property, the court found that a nuisance claim could not be supported by the existence of the plume.⁴⁸

Second, the court held that the actual contamination found on the plaintiffs' property was not actionable because it posed no health threat to the plaintiffs. The court first found that the levels of detected contamination did not create a health risk to the plaintiffs.⁴⁹ It then construed Kentucky law to deny recovery unless the level of ac-

42. *Id.* at 960.

43. *Id.* at 960-61.

44. *Id.* at 961.

45. *Id.*

46. *Id.* at 968.

47. *Id.* at 970 (citing *McGinnis v. Tennessee Gas Pipeline Co.*, No. 91-49, slip op. at 5 (E.D. Ky. July 29, 1992)).

48. *Id.*

49. *Id.* at 969.

tual contamination posed a health risk to the plaintiffs.⁵⁰ Because the contamination posed no health risk to them, the plaintiffs could not recover damages in nuisance.⁵¹ Under the analysis of the District Court of the Western District of Kentucky, stigma damages might⁵² be recoverable only in situations in which a property has been actually contaminated to a level that creates health risks.

In summation, the vast majority of proximity stigma claims have been based in nuisance law. Courts that have denied these claims tend to focus on the element of nuisance that requires an interference with property rights to be substantial. Application of the substantial interference element in the proximity stigma damage context has proven somewhat complicated. Many courts apply a rule that requires physical invasion of a plaintiff's property as a prerequisite to a proximity stigma nuisance recovery. At least one court has extended this issue, disallowing a nuisance-based stigma claim even when physical invasion existed but the amount of chemicals did not create a health risk to the plaintiffs. Other courts do not require physical invasion as a basis for proving substantial interference. Instead, these courts recognize that interference can result from aesthetic impacts or the discomfort that arises from living near a contaminated site. None of these cases, however, would allow for recovery based solely on the bare allegation that contamination has resulted in property devaluation.

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50. The court found this requirement to be consistent with the significant harm requirement.

Section 821F of the Restatement states that "there is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." . . . By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance.

Id. (internal citation omitted). Thus, the *Lamb* court found that only an invasion of property that results in a health risk creates significant interference.

51. *Id.* The court also determined that claims based only on a perception of nuisance likewise should not provide a basis of recovery. The court recognized that some courts allowed recovery for a perception of harm. *Id.* (citing *DeSario v. Indus. Excess Landfill, Inc.*, 587 N.E.2d 454 (Ohio Ct. App. 1991); *Allen v. Uni-First Corp.*, 558 A.2d 961 (Vt. 1988)). Relying cursorily on the reasoning in *Adkins*, however, the court determined that such a claim would not be allowed in Kentucky. *Id.* at 968-69.
52. As mentioned earlier, plaintiffs asserting proximity stigma claims face numerous obstacles. Even after proving liability, plaintiffs still must prove that the damage caused by the nuisance is permanent to recover property devaluation under the general nuisance damages rule. See *infra* note 95.

2. *Successful Proximity Stigma Claims: Substantial Interference and Other Factors*

While the majority of courts continue to deny claims for proximity stigma damages, some courts have allowed such claims.⁵³ Successful proximity stigma claims have been decided on a multitude of grounds and therefore cannot be easily categorized. At least two aspects of successful proximity stigma claims warrant consideration, however. First, and perhaps more important, is the recent development of a line of cases holding that the existence of nearby contamination, which causes property devaluation without an allegation of any further harm, amounts to substantial interference with the use and enjoyment of property. Second is the observation that in many successful proximity stigma claims, property devaluation is tied to a general loss in community quality of life as a result of contamination.⁵⁴

Perhaps the most significant development in recent stigma jurisprudence has been the rise of a line of cases allowing recovery of property devaluation absent a showing of any actual impact to the property. Although few courts directly consider the specific elements of nuisance law in allowing for recovery, those that do suggest that a general connection between the contamination and diminished property values creates substantial interference with the use and enjoyment of property. The recent Ohio decision, *DeSario v. Industrial Excess Landfill, Inc.*,⁵⁵ exemplifies this category.

The plaintiffs in *DeSario* included 1713 individuals who owned property within two miles of the Industrial Excess Landfill, in Uniontown, Ohio.⁵⁶ From 1965 to 1980, large quantities of waste had been deposited in the landfill.⁵⁷ Contaminants found at the site included: acetone, benzene, hexane, naphtha, phenol, xylene, and 1,1,1

53. *DeSario v. Indus. Excess Landfill, Inc.*, No. 89-570 (Ohio Ct. C.P., Stark County Dec. 6, 1994). See also *MHE Assocs. v. United Musical Instruments, USA, Inc.*, No. 93CV1882, 1995 U.S. Dist. LEXIS 5808 (N.D. Ohio Mar. 24, 1995).

54. Generally, the courts in these cases avoid detailed analysis of specific legal causation requirements in allowing recovery of stigma damages. They hold simply that production by a preponderance of evidence that ties property devaluation to contamination is enough for a plaintiff to prevail. See *Allen v. Uni-First Corp.*, 558 A.2d 961 (Vt. 1988).

55. See *DeSario v. Indus. Excess Landfill, Inc.*, No. 89-570 (Ohio Ct. C.P., Stark County Dec. 6, 1994)(lower court opinion).

56. See *Hazardous Waste: Property Owners Awarded \$6.7 Million in 'Stigma Damages' from Waste Landfill*, 25 Env't Rep. (BNA) 1675 (Jan. 6, 1995)[hereinafter *Hazardous Waste*].

57. See *DeSario v. Indus. Excess Landfill, Inc.*, 587 N.E.2d 454, 457 (Ohio Ct. App. 1991)(appellate review of the trial court's order certifying the plaintiff class).

trichloroethane.⁵⁸ In 1980, the landfill was closed pursuant to a consent decree and was later listed on the National Priorities List.⁵⁹

Plaintiffs brought suit against a number of defendants, including the landfill's owner and operator and the generators of the hazardous substances found at the site.⁶⁰ The plaintiffs claimed that although their property was not contaminated, stigma prompted by some 600 newspaper articles had reduced property values by \$28 million.⁶¹ After a full trial, the jury awarded the plaintiffs stigma damages totaling \$6.7 million.⁶²

The only basis that can be found for allowing the jury to consider the plaintiffs' stigma claim is contained in an earlier decision of the trial court regarding certification of the plaintiff class.⁶³ In that decision, the trial court, without further substantiation, agreed with the plaintiffs that "in Ohio, to recover damages under a private nuisance theory, the plaintiffs need not show a physical intrusion onto their land. The court further agree[d] that a class action may be premised on the public's perception of contamination irrespective of actual land contamination."⁶⁴ The *DeSario* court's analysis suggests a two-part rationale for allowing proximity stigma damages. First, the court found that physical invasion is not required to satisfy the substantial interference requirement. It then determined that property devaluation damages resulting from the perception of contamination were recoverable. The court thus would allow recovery based on a general showing of a relationship between the property devaluation and the contamination.

In considering the appeal of the class certification issue, the Ohio appellate court gave, at best, implied consent to the trial court's reasoning. The appellate court found that even though different plaintiffs might receive different amounts of damages based on such issues, as each plaintiff's proximity to the site and amount of time that each owned his property differed, all of the plaintiffs' claims arose from a reduction in property value directly related to the presence of the landfill.⁶⁵ The appeals court thus suggested that a reduction in prop-

58. See *Hazardous Waste*, *supra* note 56, at 1675.

59. The National Priorities List was created as a part of CERCLA. It contains a list of sites for which cleanup may be paid by the money contained in a fund created for those purposes.

60. See *DeSario v. Indus. Excess Landfill, Inc.*, 587 N.E.2d 454, 457 (Ohio Ct. App. 1991).

61. See *Hazardous Waste*, *supra* note 56, at 1675.

62. *Id.*

63. See *DeSario v. Indus. Excess Landfill, Inc.*, 587 N.E.2d 454, 457 (Ohio Ct. App. 1991).

64. *Id.* at 461 (appendix of appellate court decision containing the decision of trial court).

65. *Id.* at 457.

erty value caused by proximity to a landfill was recoverable. The *DeSario* decision has since been buttressed by an Ohio district court decision denying a motion for summary judgment on a proximity stigma claim in *MHE Associates v. United Musical Instruments, USA, Inc.*⁶⁶ The plaintiff in *MHE* owned property adjacent to the defendant's musical instrument production facility. The plaintiff alleged that certain contaminants located on the defendant's property had decreased the value of the plaintiff's property.⁶⁷

The district court, relying in part on the *DeSario* decision, elaborated upon the basis for such a claim. The *MHE* court, like the *DeSario* court, first noted that Ohio nuisance law did not require proof of a physical invasion of property.⁶⁸ The *MHE* court then found that Ohio law allowed recovery for loss of property value due to a public perception that property is contaminated.⁶⁹ The district court thus found that substantial interference with the use and enjoyment of property may be proven simply by showing a public perception that property has been contaminated.

MHE and *DeSario*, in conjunction with the reasoning of the *Adkins* minority, provide support for the development of a new line of successful proximity stigma case law. Together, these cases suggest plaintiffs may be able to prevail on proximity stigma nuisance claims if the reviewing jurisdiction does not require a physical touching of land to support a nuisance claim, and the plaintiff can prove a causal connection between her property devaluation and the contamination. This causal connection may be proven simply by a showing of public perception of contamination. Although still untested in jurisdictions outside of Ohio, this new line of precedent may result in more proximity stigma recovery and, almost certainly, in the continued pursuit of proximity stigma claims based in nuisance law.

The second aspect of successful proximity claims suggests plaintiffs may be more likely to recover for devaluation in property if they can tie such devaluation to a general loss in community quality of life caused by a particular source of contamination. Three decisions exem-

66. See *MHE Assocs. v. United Musical Instruments, USA, Inc.*, No 93CV1882, 1995 U.S. Dist. LEXIS 5808 (N.D. Ohio Mar. 24, 1995).

67. *Id.* at *5.

68. *Id.* at *8.

69. *Id.* at *9-10 (citing *DeSario v. Indus. Excess Landfill, Inc.*, 587 N.E.2d 454 (Ohio Ct. App. 1991)). The court also found further support for this conclusion in *Prosser and Keeton on the Law of Torts*, which states that if a "defendant has knowingly polluted soil, surface, or underground water and this pollution has affected to any measurable extent the rental or market value of the plaintiff's land, there normally would be both substantial and reasonable interference." See *id.* at *11 (quoting *KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 87, at 627 (5th ed. 1984)). The court's reliance on this statement is questionable. The statement in the treatise appears in the context of a discussion concerning proof of nuisance when physical interference with land has occurred.

plify this theory.⁷⁰ For example, *Allen v. Uni-First Corp.*⁷¹ concerned a claim for damages due to widespread contamination to a town because of the disposal of chemicals from the defendant's dry cleaning plant.⁷² The defendant had disposed wastes containing perchloroethylene, a product used in its dry cleaning operation, both on its own property as well as in the town landfill.⁷³ Moreover, a leak in the defendant's wastewater discharge system had resulted in a leak of perchloroethylene into the groundwater.⁷⁴ These various sources of perchloroethylene contaminated the town well and several private wells. Perchloroethylene also was contaminating the air surrounding the school located next to the defendant's facility. Finally, evidence from the plaintiffs' expert suggested that the contamination had infiltrated the bedrock and deep aquifers below the town.⁷⁵

The plaintiffs, residents of the town in which the defendant's plant operated, brought suit in negligence against the defendant. The plaintiffs contended that the defendant's operations had resulted in widespread contamination, which in turn had resulted in a diminution in their property values.⁷⁶ The plaintiffs further argued that the problem was exacerbated by media reports of the contamination.

After trial, the jury instructions effectively limited the jury's consideration of the plaintiffs' nuisance claim to the property that was actually impacted by the perchloroethylene contamination—namely the school next to the facility and the town wells.⁷⁷ Having been duly instructed, the jury determined that although contamination of the properties existed, such contamination was remediable and did not

70. See *Allen v. Uni-First Corp.*, 558 A.2d 961 (Vt. 1988). See also *Arcadian Heritage Realty, Inc. v. City of Lafayette*, 394 So. 2d 855 (La. Ct. App. 1981); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 728 (Mich. 1992)(Levin, J., dissenting).

71. 558 A.2d 961 (Vt. 1988).

72. *Id.* at 962. See also *Arcadian Heritage Realty, Inc. v. City of Lafayette*, 394 So. 2d 855 (La. Ct. App. 1981)(stating that the siting of landfill in a neighborhood creates a nuisance "because among other things, the works create unknown environmental effects upon the area; and the works will disrupt the country atmosphere and aesthetic value of the area"); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 728 (Mich. 1992)(Levin, J., dissenting)(stating that recovery should be allowed if the plaintiffs prove that the "defendants actually contaminated soil and groundwater in the neighborhood . . . [and if] the market perception of the value of plaintiffs' homes was actually adversely affected by the contamination of the neighborhood").

73. *Allen v. Uni-First Corp.*, 558 A.2d 961, 962 (Vt. 1988).

74. *Id.*

75. *Id.* Because the extent and migration of the contamination were unknown, it may be arguable that this case is distinguishable from those cases in which it is clear that contamination will never reach the plaintiffs' properties. Such a distinction, however, would fail to consider the burden of proof that would still require plaintiffs, in cases in which the source and extent of contamination are unknown, to prove the contamination would impact their property.

76. *Id.*

77. *Id.* at 963.

constitute a continuing nuisance. Because repair cost, not diminution in value, is the proper measure of damages for temporary nuisances,⁷⁸ judgment was entered for the defendant.

On appeal, the plaintiffs argued that by limiting the jury's analysis only to the properties actually impacted, the trial court erred in not allowing the jury to consider the overall contamination problem. The Vermont Supreme Court agreed. Noting that the "plaintiffs' private nuisance theory was largely dependent upon their ability to establish a public perception of widespread contamination" and that a causal connection between such contamination and property value was established at trial,⁷⁹ the court held that the trial court erred in limiting the jury's consideration of the contamination issue to property actually contaminated.⁸⁰ Thus, the Vermont Supreme Court explicitly acknowledged that claims for property devaluation, absent a showing of actual physical harm to any particular property, could be supported by showing that contamination had a widespread impact on the neighborhood.

In conclusion, successful nuisance claims can be loosely grouped into two categories. The first category of cases have dealt somewhat more explicitly with the legal basis for prevailing on a nuisance-based stigma claim. These cases suggest that substantial interference can be established without showing actual impact of contamination on property. The second category of cases focuses on the connection between contamination and harm to the community in allowing recovery.

3. *Other Legal Theories: Negligence and Paoli*

At least one plaintiff has attempted to base a proximity stigma claim on a theory of negligence. The claims in *Adams v. Star Enterprise*⁸¹ stemmed from the spill of more than 100,000 gallons of petroleum products at the defendant's tank farm.⁸² The spilled petroleum leached into the groundwater and formed a plume that extended under the plaintiffs' property.⁸³ Importantly, although the plume extended under the property, the "[p]laintiffs [did] not complain of actual oil odors, ground water contamination, or other material interference

78. See *infra* note 95.

79. *Allen v. Uni-First Corp.*, 558 A.2d 961, 963-64 (Vt. 1988).

80. *Id.* at 965.

81. See *Adams v. Star Enter.*, 851 F. Supp. 770, 774 (E.D. Va. 1994), *aff'd*, 51 F.3d 417 (4th Cir. 1995).

82. *Id.* at 771.

83. *Id.* at 772.

with their properties.”⁸⁴ This led the court to conclude that “as to plaintiffs’ properties at this time there is no contamination.”⁸⁵

In light of this conclusion, the court held that the plaintiffs failed to state a cause of action in negligence because the contamination was not the proximate cause of their injuries. The court stated that “[t]he harm complained of, that is the diminution in property values, is a result of third-party fears about the contamination, not the contamination itself.”⁸⁶ Thus, in situations in which the only source of property devaluation pleaded is unfounded third-party fear of contamination,⁸⁷ the courts have not allowed recovery under a negligence theory.⁸⁸

Perhaps the better alternate support for proximity stigma damage claims can be found in *In re Paoli Railroad Yard PCB Litigation*,⁸⁹ a decision by the Third Circuit Court of Appeals that allowed a claim for postremediation stigma recovery. In so holding, the Third Circuit found that a plaintiff could base a claim of permanent nuisance⁹⁰ on the stigma that resulted from the prior existence of polychlorinated biphenyls on a plaintiff’s property. The importance of this postremediation case for proximity stigma plaintiffs is the court’s conclusion that fear of harm, unaccompanied by any actual risk of harm, is recoverable in the tort arena.

The *Paoli* court specifically was interested in whether the damage to the plaintiffs’ properties was permanent so as to allow for recovery of property diminution. The Third Circuit found a number of different ways to conclude that the damage was permanent. Of special importance to the proximity stigma context was the court’s conclusion that the “stigma associated with the prior presence of PCBs on . . . land

84. *Id.* at 773.

85. *Id.* Any further basis for this conclusion is not apparent from the decision. Perhaps this conclusion is better analogized to the decision of the *Adkins* court, which held that the plaintiff failed to *allege* any injury from the contamination. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 728 (Mich. 1992).

86. *Adams v. Star Enter.*, 851 F. Supp. 770, 774 (E.D. Va. 1994), *aff’d*, 51 F.3d 417 (4th Cir. 1995).

87. To prevail on a negligence claim, the plaintiffs will have to prove causation in fact as well as proximate causation. Because proximity stigma contamination by its nature does not arise from a physical touching of property, such proof is made more difficult. It will be necessary for plaintiffs to show not just that the contamination has caused them annoyance or discomfort, but also that it is exactly this annoyance or discomfort that has led third parties to value the property less than if no contamination existed.

88. Such a result is also likely with any legal theories requiring a showing of proximate cause, such as strict liability for the creation of an ultrahazardous activity.

89. 35 F.3d 717 (3d Cir. 1994).

90. Postremediation cases usually turn on the issue of whether damages are permanent. See *infra* section II.B.

constitutes permanent, irremediable damage to property under Pennsylvania case law."⁹¹

To reach this conclusion, the Third Circuit made two findings. First, it agreed with the plaintiffs' proposition that the diminution in property value resulting from a fear of physical danger is recoverable in the tort context.⁹² It then determined that the fear itself was enough and need not be accompanied by an actual risk of harm to provide the basis for tort recovery.⁹³ Thus, the means by which the *Paoli* court construed relevant takings case law provides substantial support for a claim that property depreciation resulting from unfounded fears of harm is recoverable in the tort context.⁹⁴

91. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994). The court also found damage to be permanent because some increased risk of harm from the PCBs on the plaintiffs' properties remained and because repair costs alone did not fully compensate the plaintiffs. For a discussion of these two rationales, see *infra* section II.B.

92. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994). The plaintiffs had argued that a series of takings cases were analogous to the claim at bar. These cases concerned the valuation of easements taken for the erection of electric power lines. The issue was whether the property devaluation resulting from the fear of electromagnetic radiation should be included in the takings valuation. Courts have responded differently to this issue. Nevertheless, a vast majority of courts have allowed the stigma associated with electromagnetic radiation to be included in the valuation in different circumstances.

For an exceptionally informative review of the case law on the issue, see Willsey v. Kansas City Power & Light Co., 631 P.2d 268 (Kan. Ct. App. 1981).

93. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994) (citing Appeal of Giesler, 622 A.2d 408, 411-12 (Pa. Commw. Ct. 1993)). The *Paoli* court relied on a particular Pennsylvania electromagnetic takings case, *Appeal of Giesler*, 622 A.2d 408 (Pa. Commw. Ct. 1993), in reaching this conclusion. The appeals court analogized *Giesler* to the issue in *Paoli* as follows: "The *Giesler* court assumed that the electric lines caused no actual physical risk of any sort to plaintiffs' land. This means that the only ongoing damage to the property in *Giesler* was the diminution in value caused by the stigma of living near electric lines." *Id.* Thus, the *Paoli* court determined that diminution in property value resulting from stigma unaccompanied by physical risk was actionable under Pennsylvania law. Interestingly, the court did not consider those tort cases concerning damages for electromagnetic radiation, which almost universally have been decided against plaintiffs. See, e.g., *In re TMI Litig. Consol. Proceedings*, 927 F. Supp. 834 (M.D. Penn. 1996).

94. Although recognizing that it was not constrained by its reasoning to do so, the *Paoli* court held that plaintiffs must show some actual harm to the property to recover damages.

[W]e think that at least where (1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land, plaintiffs can make out a claim for diminution of value of their property without showing permanent physical damage to the land.

35 F.3d 717, 796 (3d Cir. 1994). The usefulness of the *Paoli* court's reasoning must also be subjected to another caveat. In one footnote, the court relied on the physical touching requirement elaborated in its test to deal with an amicus' con-

B. Postremediation Stigma Claims

Claims for postremediation stigma generally have been more successful than those for proximity stigma damages. This is primarily because in postremediation cases, the property has been actually physically impacted by contamination, thus opening the door to the assertion of legal claims such as trespass, as well as making it much easier to succeed on other claims, such as negligence and nuisance.

Although it is much easier for plaintiffs in postremediation cases to prove liability, plaintiffs still must overcome one legal obstacle to recover damages. Generally, repair costs and special damages, such as lost rent, are the only damages recoverable for harm to property that can be repaired.⁹⁵ Diminution in property value, on the other hand, is usually recoverable only when damages are permanent and the property cannot be repaired.⁹⁶ Thus, it is arguable that if property can be properly remediated, in essence repaired, diminution in property value should not be recoverable.

In the postremediation context, courts seem much more willing to avoid damage rules that would foreclose stigma recovery. Thus, pos-

cern that the court's ruling would allow recovery for diminution in value should an AIDS patient or group home be located near one's property.

We think that these concerns are overstated. The rule we have articulated only allows recovery when there has been some initial physical damage to plaintiff's land. This rules out recovery in cases such as the establishment of a group home for the disabled; moreover, recovery in such cases might well be barred as against public policy.

Id. at 798 n.64 (citation omitted). This reasoning seriously undercuts the court's construction of *Giesler* and other electromagnetic radiation cases.

95. Prosser and Keeton set forth the relevant damage rule as follows:

Once a nuisance is established under substantive law, damages are similar to those in many trespass cases. . . . If the nuisance, whatever it is, whether in the form of noxious gases, or noise, or water pollutants, is permanent, the same measure of damages as in cases of permanent damages by trespass is normally used—that is, the depreciation in the market value of the realty by reason of the nuisance. As a rule this will mean a nuisance that is, in the physical nature of things, unlikely to abate or to be avoided by any reasonable expenditure of money, though some states may define permanent nuisances more narrowly. . . .

Where the nuisance, or the injury arising from it, is not permanent and has been or can be abated, damages are usually measured differently. The plaintiff usually recovers the depreciation in the rental or use value of his property during the period in which the nuisance exists, plus any special damages. . . . Damages for temporary nuisances are not necessarily limited to depreciated rental values or use values, however. Where the nuisance is the kind that does more or less tangible harm to the premises, the cost of repair or restoration may be the appropriate measure of damages, just as it is the appropriate measure where similar harm is done in trespass cases.

KEETON ET AL., *supra* note 12, § 89, at 637-39 (quoting DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 332-35 (1973)).

96. *See id.*

tremediation stigma claims are characterized primarily by the way courts avoid this problem. Courts have found stigma damages to be permanent in at least two ways. First, courts may find that some permanent damage continues to exist on property even though it has been remediated. Second, courts turn to precedent suggesting that when damages for the cost of repair do not make a plaintiff whole, damages should be supplemented by additional damages for diminution in property value. In essence, the court read the term "permanent damage" broadly to encompass all damages beyond cost of repair.⁹⁷

Both of these theories are embodied in the Third Circuit's decision in *In re Paoli Railroad Yard PCB Litigation*.⁹⁸ The *Paoli* case centered on what had been described as the highest level of Polychlorinated Biphenyl (PCB)⁹⁹ contamination ever found in an inspection by the National Institute for Occupational Safety and Health.¹⁰⁰ PCBs had been used at the yard as a fire-resistant insulating fluid in railroad car transformers. Over the course of many years, the PCBs had accumulated in the yard, leached into groundwater, and contaminated the soil of nearby residences.¹⁰¹ In 1986, the United States brought a CERCLA suit against a number of defendants to compel the cleanup of the yard. After the entry of numerous consent decrees, a final plan for cleanup of the railroad yard was adopted in July 1992.¹⁰²

Thirty-eight individuals who lived near the yard also sued a variety of defendants for damages resulting from the contamination.¹⁰³ Of these thirty-eight individuals, nine sued for diminution in property value caused by the proximity of the yard to the plaintiffs' property and the presence of PCBs on their land.¹⁰⁴ The district court granted defendants' motion for summary judgment on the diminution claim. It found that uncontroverted evidence indicated the railroad yard was to be adequately remediated, and thus no permanent physical damage to plaintiffs' properties would result.¹⁰⁵ Applying Pennsylvania law,

97. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994); *Bixby Ranch Co. v. Spectrol Elecs.*, 8 Toxics L. Rep. (BNA) 955 (Cal. Super. Ct. 1993); *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995).

98. 35 F.3d 717, 796 (3d Cir. 1994). As set forth *supra* subsection II.A.3, the *Paoli* court also found the stigma created by the PCB contamination itself to be a permanent source of damages.

99. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 735 (3d Cir. 1994). Later inspection also uncovered contamination consisting of dibenzo furans and polychlorinated dibenzo-p-dioxins.

100. *Id.* at 734-35.

101. *Id.*

102. *Id.* at 735.

103. *Id.*

104. *Id.* at 795.

105. *Id.*

the district court held that repair cost, not diminution in value, was the proper measure of damages when the harm was "temporary and remediable."¹⁰⁶

The Third Circuit reversed the district court's decision. The appeals court found that diminution in property value should be recoverable for many reasons. First, it found (1) that the cleanup would not remove enough of the PCBs from plaintiffs' properties to meet standard EPA cleanup levels, and (2) that the increased health risk from remaining PCBs created a genuine issue of material fact as to whether the damages were permanent. The court found that under the approved remediation plan, the EPA itself estimated that the cleanup would lower cancer risk only to one in 100,000 people, a standard that is ten times higher than its normal remedial goal of lowering risk to one in 1,000,000.¹⁰⁷ This fact alone, the court held, created a genuine issue of material fact as to whether a cancer risk of one in 100,000 constitutes actual, permanent damage.¹⁰⁸

The appeals court, however, did not end its analysis at this point. Instead, it further held that the stigma associated with prior PCB contamination on one's land was a "permanent injury" as that term was defined under Pennsylvania law.¹⁰⁹ The court pointed to Pennsylvania law suggesting that the concept of permanent damages was intended to apply to all situations in which "repair costs" would, for some reason, be an inappropriate measure of damages.¹¹⁰ The court continued that generally the appropriate measure of damages is defined "as what is necessary to compensate fully the plaintiff."¹¹¹ Because the plaintiffs would not be made whole without recovering for property devaluation, the court concluded that diminution in property

106. *Id.*

107. *Id.*

108. *Id.* at 796. It seems unlikely that the court's reasoning should apply only to situations in which the cleanup creates a health risk greater than the risk that normally accompanies a cleanup to a certain level of contamination. That is, any time a property that has been contaminated is remediated to a level below that of background levels, an excess risk remains. Pursuant to the reasoning of the *Paoli* court, this excess risk should be a permanent source of damage.

109. *Id.* at 796-97.

110. *Id.* at 797 (citing *Wade v. S.J. Groves & Sons*, 424 A.2d 902, 912 (Pa. Super. Ct. 1981)).

111. *Id.* (citing *Wade v. S.J. Groves & Sons*, 424 A.2d 902, 911-12 (Pa. Super Ct. 1981)).

value should be recoverable.¹¹² Thus, many theories support finding that postremediation stigma damages are permanent.¹¹³

III. A PSYCHO-SOCIAL MODEL OF STIGMA

The definition of stigma has been the subject of substantial recent debate.¹¹⁴ The lack of a proper understanding of the phenomenon of stigma hampers the judicial decisionmaking process and makes it virtually impossible to develop an understanding of the impact of a legal standard on the policy concerns associated with stigma claims. Thus, a more complete sense of why contamination events cause property devaluation is necessary. The purpose of this Part is to discuss the basis for property devaluation so as to better inform decisionmakers of the problem. To accomplish this task, this Part inquires into two separate issues. First, it considers what constitutes stigma. Second, it considers what factors may influence the size and substance of stigma. In the process, it notes that current conceptualizations of stigma do not fully account for stigma as a psycho-social phenomenon resulting in harm to reputation. Throughout, this Part suggests that legal discussion of the concept of stigma has itself been based on an incomplete understanding of the phenomenon.¹¹⁵

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112. *Id.* at 797-98. One author has analogized postremediation cases to a developing trend in case law allowing hybrid recovery of both repair costs and diminution in value when the repair is incomplete. See Muldowney & Harrison, *supra* note 2, at 526, and cases cited therein. This analogy may be applicable to the first basis for recovery in *Paoli*, i.e., that remediation is incomplete. The court's second rationale, however, is slightly different. The second rationale was based on a theory of market failure.

[W]hen physical damage is temporary, only repair costs are recoverable, because in a perfectly functioning market, fully repaired property will return to its former value. Thus, an award of repair costs will be fully compensatory. . . . Hence, normally, it is only when property cannot be repaired that courts must award damages for diminution in value in order to fully compensate plaintiffs. However, the market sometimes fails and repair costs are not fully compensatory. In such cases, . . . plaintiffs should be compensated for their remaining loss. Absent such an approach, plaintiffs are permanently deprived of significant value without any compensation.

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 797-98 (3d Cir. 1994). Pursuant to this reasoning, even if repairs are complete, recovery should be allowed to correct for market failure.

113. This reasoning has already played a substantial precedential role in one Indiana court decision. See *Terra Prod., Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 93 (Ind. Ct. App. 1995)(citing *Paoli* in holding that postremediation stigma recovery is allowed when the plaintiff can show that the market value after remediation is lower than the market value before the contamination was found).
114. See Davis & Longo, *supra* note 3, at 10345, and citations contained therein.
115. Different judicial decisions have emphasized different aspects of stigma in analyzing stigma claims. The way in which judicial decisionmaking reflects these various aspects of stigma will be considered in the margin of this Part, where appropriate.

A. The Marking Process

Social psychologists have developed substantial literature on the phenomenon of stigma. Pursuant to the social-psychological characterization, stigma is defined as a label marking someone (or something) as deviant.

It is the dramatic essence of the stigmatizing process that a label marking the deviant status is applied, and this marking process typically has devastating consequences for emotions, thought, and behavior. Many words have been applied to the resulting status of the deviant person. He or she is flawed, blemished, discredited, spoiled, or stigmatized. . . .

The mark may or may not be physical: It may be embedded in behavior . . . or group membership. It may also be possible to conceal it. The mark is potentially discrediting and commonly becomes so when it is linked through attributional processes to causal dispositions, and these dispositions are seen as deviant.¹¹⁶

This characterization of stigma suggests that stigma arises as a result of being "marked."¹¹⁷ This mark, in turn, is discrediting to the "marked" party through its link to causal dispositions, such as increased health risk and aesthetic impacts.

It is unnecessary that any of the results attributed to the "mark" actually occur.¹¹⁸ Rather, it is the mark itself that, when noticed, "changes in a negative and discrediting way how the observer sees the victim, whose identity is now spoiled," which creates the damage.¹¹⁹ In other words, the damage caused by stigma is to reputation,¹²⁰ or social standing, and thus arises as soon as the mark attaches. Further, "because we tend to assume that people deserve what happens to them, stigma readily invites a tendency to blame the victim."¹²¹ Therefore, when property has been marked by contamination, the psycho-social phenomenon of stigma will result in harm to the property's reputation regardless of the potential for harm actually posed by the underlying contamination.

B. Attributional Harm Versus Actual Harm

It is important to distinguish stigma damage from damage resulting from the actual impact of contamination. When a contamination event occurs, it can result in actual harm to various groups. For ex-

116. EDWARD E. JONES ET AL., *SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS* 4-7 (1984).

117. In the context of environmental damage, the mark is one of "contamination." See EDELSTEIN, *supra* note 4, at 14 (stating that stigma is a result of being "contaminated").

118. In any case, once a property is contaminated by any hazardous material above background level, the actual health risk does increase. See *supra* notes 94-95.

119. See EDELSTEIN, *supra* note 4, at 14.

120. *Id.* at 180.

121. *Id.* at 14. For a comprehensive exegesis of this phenomenon, see WILLIAM RYAN, *BLAMING THE VICTIM* (1976).

ample, a person who may be exposed to a high level of contamination may be subject to unreasonable health risks or actual health impacts, as well as aesthetic impacts, such as odors. Further, contamination may impact groundwater, rendering it undrinkable, or otherwise impact an individual's ability to use her property. In all of these cases, the damage is the result of the actual, or the potential for actual, impact of contamination.

Actual damages differ from stigma damages, which are equated with anticipated outcomes. In both proximity and postremediation stigma cases, the devaluation in property is tied to perceived outcomes, not actual ones.¹²² More specifically, stigma is characterized as based on the fear¹²³ that is associated with the mark of "contamination." This fear concerns the same types of harms that are generally associated with contamination: future cleanup costs that may result if the government changes its remediation standard; risk to the health of those on or near the contamination; inconvenience to those who own or live near the property; aesthetic impacts on those who own or live near the property; or any number of other impacts contamination may have. The fear results from attribution of the mark of contamination to its anticipated outcomes, and the fear arises regardless of whether these anticipated outcomes will actually be realized. Thus, the potential for actual harm is completely irrelevant to the occurrence of stigma.

C. Courtesy Stigma

A property need not be actually contaminated to be marked as "contaminated." Rather, properties near actually contaminated property may become marked indirectly by virtue of a "courtesy stigma," whereby the community also becomes stigmatized because of its direct association with the hazard.¹²⁴ Individuals normally considered without stigma can, by association with the degraded, acquire some of the socially degrading characteristics of a marked person.¹²⁵ Examples of

122. Many commentators seemingly have confused the attributional harm of stigma damages with potential actual harm. *See, e.g.,* Davis & Longo, *supra* note 3, at 10345 ("In other instances stigma is used to refer to a decrease in, or loss of, property value caused by fear that a property owner may face future cleanup liability—for example, as a result of a government enforcement action or a third-party claim."). *See also* Muldowney & Harrison, *supra* note 2, at 525 ("An environmental stigma results from perception of uncertainty and risk.").

123. *See* EDELSTEIN, *supra* note 4, at 14 (stating that stigma is associated with the phenomenon of anticipatory fear); JONES ET AL., *supra* note 116, at 65 (stating that the essence of stigma is fear).

124. EDELSTEIN, *supra* note 4, at 180. The concept of courtesy stigma is generally attributed to the noted sociologist Erving Goffman. *See* ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 30-31 (1963).

125. JONES ET AL., *supra* note 116, at 71. The reasons for such a phenomenon are difficult to understand and have not been fully explored. Jones and his col-

courtesy stigma include the relative of the ex-convict or the friend of a handicapped individual. These individuals are obliged to share some of the discredit of the stigmatized person with whom they are associated.¹²⁶ Further, the relationship need not be of an enduring nature for courtesy stigma to occur.¹²⁷ Thus, property located near a stigmatized property will share in the stigmatization by virtue of its association with the stigmatized property.

Indeed, courtesy stigma may have extremely significant impacts in communities that highly value their particular community image.

Courtesy stigma is inherently tied to image, since image is what is harmed by stigma. Therefore, a logical inference is that the degree to which stigma is feared will relate to the extent to which the hazardous facility contradicts the community image projected. An area seeking to attract tourists because of its setting, an agricultural area known for its wholesome products, a family residential area—all are vulnerable to the devaluing of image.¹²⁸

Courtesy stigma may thus have substantial impacts on property values in communities with reputations tarnished by the contamination.¹²⁹

D. Heuristic Factors that Impact the Degree of Stigma Perception

Having discussed the way in which stigma develops and affects the reputation or social perception of property, it is now important to consider a number of variables that impact the substance or size of a particular stigma. Such factors include the uncertainty surrounding a contamination event, as well as contextual and cognitive factors that impact the way individuals perceive both the mark of stigma and the risks associated with the mark. Consideration of these factors begins to shed light on the variability of stigma claims and indicates that no single rule can provide a basis for evaluating stigma harm.

leagues, however, have considered a few potential reasons for the phenomenon. They suggest, for example, that someone who accompanies a stigmatized person may be suspected of hiding a similar problem. See GOFFMAN, *supra* note 124, at 30-31.

126. GOFFMAN, *supra* note 124, at 30-31. Professor Goffman has noted that the tendency for stigma to spread from the stigmatized person to his close connections provides a reason why such relations tend either to be avoided or to be terminated. Obviously, the relationship caused by owning property in the same neighborhood as the stigma could be terminated only through the sale of the property.

127. The relationship need not be of an enduring nature for courtesy stigma to occur. JONES ET AL., *supra* note 116, at 71.

128. See EDELSTEIN, *supra* note 4, at 180.

129. Such a concern played a large role in the Vermont Supreme Court's decision in *Acadian Heritage Realty, Inc. v. City of Lafayette*, 394 So. 2d 855 (La. Ct. App. 1981). For a discussion of both the majority and dissenting opinion, see *supra* note 8 and accompanying text.

A number of factors that may directly affect the perception of stigma have been identified by researchers.¹³⁰ These factors include the following:

1. Concealability. Is the condition hidden or obvious? To what extent is its visibility controllable?
2. Course. What pattern of change over time is usually shown by the condition? What is its ultimate outcome?
3. Disruptiveness. Does it block or hamper interaction and communication?
4. Aesthetic qualities. To what extent does the mark make the possessor repellent, ugly, or upsetting?
5. Origin. Under what circumstances did the condition originate? Was anyone responsible for it and what was he or she trying to do?
6. Peril. What kind of danger is posed by the mark and how imminent and serious is it?¹³¹

Together, these factors help indicate some of the reasons why the amount of stigma varies with different environmental contamination events. A few examples will illustrate this point.

Obviously, the ability to conceal a stigma will significantly affect its size. Factors that may influence concealability include signs identifying a site as subject to ongoing cleanup, as well as noxious odors and noises that may be created by the contamination or its remediation. As noted by one author, a leaking underground storage tank cannot be seen, smelled, or felt.¹³² In contrast, a landfill subject to a superfund cleanup is much more readily apparent. In the case of environmental contamination, concealability of a stigma may also depend upon the amount of media coverage given to a contamination event.¹³³ Thus, media coverage for an event such as Love Canal¹³⁴ will likely play a large role in increased stigma impacts on nearby property, while the limited coverage received by a small industrial oil or solvent spill will likely play a smaller role in the creation of stigma.

130. See generally JONES ET AL., *supra* note 116, at 24-79 (examining factors that cognitive researchers believe may directly affect the perception of stigma).

131. *Id.* at 24.

132. See Mundy, *supra* note 2, at 9.

133. Media coverage may also have other impacts. For example, media coverage is likely to increase perception of an event as catastrophic or serious and thus impact the anchoring heuristic. See generally *infra* note 147 and accompanying text. Because many of these examples impact other factors that affect stigma perception, it is important to consider each example as if all other factors remain constant.

134. The story of Love Canal (named after William T. Love) began in 1942, on the eastern boundary of the city of Niagara Falls, New York, when Hooker Chemicals and Plastics Corporation started using the canal as a disposal site for manufactured waste. In 1953, the Niagara Board of Education purchased the closed canal, where an elementary school, and later single-family homes, were constructed. By 1980, 1000 families lived within 1800 feet of the canal. Chemicals were found in the backyards of the single-family homes in the late 1970s, and this led to both the EPA and New York State declaring a health emergency in the area in 1978. The area was subsequently secured from public access.

Another factor that impacts stigma size is the degree of peril posed by the contamination. Peril has two dimensions: it considers both the type of danger posed by an activity and its relative significance. Either of these factors will likely impact perceptions of stigma. If the peril posed by a source of contamination impacts the visibility of the air, but does not impact human health, the stigma associated with the activity may be minimal. Similarly, if a leaking underground storage tank is seen as causing an immediate threat to a water supply, it will result in greater stigma than a leak that does not impact groundwater.

A number of other context-dependent variables that impact perception of the underlying risks associated with stigma have also been identified.¹³⁵ Some of the more significant of these include the following factors: (1) the public's lack of control over an activity;¹³⁶ (2) the potential of the activity to have catastrophic results; and (3) the inequitable distribution of risks and benefits.¹³⁷ Together, these factors exert a significant influence over the perception of the risks underlying the mark of contamination.

For example, the activity frequently identified as incorporating a large number of these factors to create significant perceived fear is nuclear power. While more than 150,000 people die from cigarette smoking each year, no deaths have resulted from nuclear power.¹³⁸ Yet until recently, vast resources were spent on controlling nuclear power and very little on controlling smoking.¹³⁹ This disparity can be explained through the extremely high-dread risk associated with nuclear power. Nuclear risks are "seen as involuntary, delayed, unknown, uncontrollable, unfamiliar, catastrophic, dreaded and fatal."¹⁴⁰ Thus, although allegedly causing minimal, if any, health effects, nuclear power is perceived as high-risk due to the confluence of numerous contextual factors.

135. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 57 (1995).

136. This factor frequently is cast in terms of whether a risk is voluntarily or involuntarily assumed.

137. These and other salient factors are identified in Paul Slovic, *Perception of Risk*, 236 SCIENCE 280, 283 (1987). These factors together provide a significant basis upon which human perception of risk will vary from expert determination of life and health impacts of a particular activity. Together, these factors provide the basis of what Slovic describes as "dread risk."

138. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 6-7 (1993).

139. Pildes & Sunstein, *supra* note 135, at 57-58.

140. CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH RISK TECHNOLOGIES* 325 (1984)(quoting Paul Slovic et al., *Perceived Risk: Psychological Factors and Social Implications*, A376 PROCEEDINGS OF THE ROYAL SOCIETY OF LONDON 17, 25 (1981)).

The confluence of a number of these factors may significantly affect the perception of risks posed by a contamination event. For example, sources of contamination that are controllable due to the ability to define and clean the plume of contamination will likely be less stigmatized than those sources in which such activity cannot be undertaken. Similarly, if one is threatened by a leaking landfill used only for local waste, the threat will likely be smaller than if the waste was completely imported because the benefits in the first case are received locally, while, in the latter case, benefits are received primarily outside of the community that is impacted.

Cognitive factors also may cause people to either underestimate or overestimate risks associated with contamination. Recent work in cognitive psychology suggests that humans do not perceive risk simply "by identifying what matters to them, comparing probabilities, and making consistent decisions over time that maximize their overall utilities."¹⁴¹ Rather, cognitive psychologists have identified a number of heuristic¹⁴² processes that impact laypeople's perception of risk. Such heuristics tend to result in overestimating or underestimating the actual risks involved in any activity.¹⁴³

Professor Donald Hornstein has undertaken a survey of heuristic impacts on risk perception.¹⁴⁴ Two examples from that survey will serve to illustrate the impact of heuristics on perception. The "availa-

141. See Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992).

142. Cognitive error theorists trace mental distortions of risk to a variety of heuristics (rules of thumb) and mental "biases" that people tend to use in lieu of expected-utility-type calculations in approaching risks. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristic and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES 3-20 (Daniel Kahneman et al. eds., 1982). Tversky and Kahneman have explained that "[b]ecause of imperfections of human perception and decision . . . changes of perspective, often reverse the relative apparent size of objects and the relative desirability of options." Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981). For example,

if while traveling in a mountain range you notice that the apparent relative height of mountain peaks varies with your vantage point, you will conclude that some impression of relative height must be erroneous, even when you have no access to the correct answer. Similarly, one may discover that the relative attractiveness of options varies when the same problem is framed in different ways The susceptibility to perspective effects is of special concern in the domain of decision-making because of the absence of objective standards such as the true height of the mountains.

Id. at 457. For another description of heuristics, see generally Marina Groner et al., *Approaches to Heuristics: A Historical Review*, in METHOD OF HEURISTICS 13-14 (Rudolf Groner et al. eds., 1983).

143. For an analysis of these theories in the legal context, see Hornstein, *supra* note 141.

144. See *id.*

bility heuristic" describes the tendency of people to weigh the probability of an event by the ease with which some relevant information comes to mind; other information, although relevant, is ignored simply because it does not come to mind so quickly.¹⁴⁵ Such a heuristic may result in either overestimation or underestimation of risk based on context. For example, the public may overestimate risk because of the occurrence of sensational, but statistically unlikely mishaps, such as Three Mile Island and Chernobyl. Similarly, the public may underestimate the risk of high fat diets because the impacts are diffuse and less sensational.¹⁴⁶

Another heuristic that may impact perception is the "anchoring heuristic." The anchoring heuristic tends to exacerbate the effects of other heuristic devices. Anchoring is a process whereby a person, after learning that he has based his probability estimates on improper information, continues to be influenced by these assessments.¹⁴⁷ For example, a homeowner who learns that his neighbor's property is contaminated may continue to believe that his property is also contaminated even though testing has revealed the opposite.¹⁴⁸ These types of heuristic devices will result in a property owner and potential buyer's overestimation or underestimation of the risks posed by contamination and thus the size of the stigma associated with a contamination event.

In summation, stigma is the result of being marked either physically or through a process called courtesy stigma. The result of being marked is a loss in social standing and injury to reputation. Once a property has been marked, the size of a stigma may differ based on a number of different factors. In particular, a number of context-based factors tend to influence the size of the "mark," and other factors impact perception of the risks posed by the contamination event. This suggests that, if aligned properly, these factors can actually result in perceived risks that are much higher or smaller than the amount of risk determined by experts to accompany any contamination event.¹⁴⁹

145. *Id.* at 606 (citing Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Logical Rules*, 38 UCLA L. REV. 391, 394 (1990); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristic and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES 3, 11 (Daniel Kahneman et al. eds., 1982)).

146. See Hornstein, *supra* note 141, at 608 (citing MARGARET MAXEY, MANAGING ENVIRONMENTAL RISKS: WHAT DIFFERENCE DOES ETHICS MAKE 7-8 (1990)).

147. See Hornstein, *supra* note 141, at 609 (citing Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1092 (1990)).

148. See Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1092 (1990).

149. The inquiry into the causes of property devaluation does not, however, end with a consideration of stigma. Indeed, many other factors influence property values once a source of contamination is known. For example, the discovery of contamination may impact an individual's sense of control over his community or create a

IV. ANALYSIS: IMPLICATIONS OF THE PSYCHO-SOCIAL MODEL FOR STIGMA JURISPRUDENCE

To this point, this Article has provided an understanding of the dynamic that causes stigma damage and the way in which courts have acted upon that dynamic when confronted with claims based almost exclusively in nuisance law. This Part analyzes the adequacy of the current jurisprudential treatment of stigma damages in light of this understanding. It argues that current nuisance-based jurisprudence generally is not well-suited to the disposition of stigma claims. First, this Part argues that judicial focus on the substantial interference test is seriously misplaced. Put simply, the purpose of the substantial interference test is to ensure that nontrespassory invasions cause harm of a type that would be suffered by a normal person in the community. Because stigma devaluation is the type of harm that would be suffered by a normal community member,¹⁵⁰ the substantial interference test will always be satisfied. Second, this Part notes that the majority interpretation of substantial interference, which requires proof of some actual impact to property before allowing stigma damage recovery, creates a basis for the award of stigma damages that advances no valid policy concern. Instead of focusing on substantial interference, this Part argues that when confronted with a nuisance claim, courts should, when possible, focus their attention on the element of nuisance that requires an invasion to be unreasonable. While this change in focus does not solve all problems associated with stigma claims, as a standard it is much more suitable to achieving proper results.

Although virtually all claims for stigma damages have been premised on a theory of nuisance,¹⁵¹ this section further argues that once

loss of trust for those experts and officials entrusted with community well-being. These factors generally have been identified by Professor Michael Edelstein as providing a psycho-social basis for the NIMBY ("Not in My Backyard") response to potentially hazardous activity in a community. See EDELSTEIN, *supra* note 4, at 180-81. Edelstein suggests these factors influence individuals to take vigilant action to oppose locating a hazardous activity within their neighborhood. He does not suggest that they may also provide a basis for property devaluation once a contamination event has occurred. It is unlikely that any of these factors play a significant role in the devaluation of property attributable to third-party perception of value, and thus they will not be discussed further in this Article.

150. Indeed, as is argued later, one of the major distinctions between stigma damages and other types of nonphysical damage is that stigma can be proven through an objective analysis of property values without regard to the subjectiveness of the property owner. See *infra* note 189.

151. The reasons for this phenomenon are not entirely clear. For proximity stigma claims, nuisance may have been perceived as a better basis for recovery because it generally does not require a physical invasion of property. Lawyers also may have turned to nuisance because of their fear of the treatment their claims would be given under negligence law. In particular, a number of jurisdictions considering related claims of fear of disease have found such claims to be recoverable only with proof of a number of particular factors not generally provable by stigma

the mechanism by which stigma is created can be understood, negligence becomes a better vehicle for the assertion and consideration of stigma claims. This Part shows how the problems associated with a nuisance standard do not arise with the application of negligence law, and how negligence will force those who deal with stigma to confront head on its causes and potential impacts. Finally, this Part discusses the importance of proving damages in the stigma context. This Part refers to the earlier discussion of the causes of stigma and suggests that the majority of stigma harm is likely to be temporary. A focused analysis of the stigma and its sources will serve to ensure that only those plaintiffs who prove that they have been permanently harmed by a stigma will be allowed to recover.

A. Problems with the Substantial Interference Standard: The Difference Between Actual and Psychological Harm and Why Roses Are Not a Nuisance

There is strong legal support for the argument that property devaluation resulting from a contamination event results in substantial interference with the use and enjoyment of properties. But, tying recovery to whether property has been actually impacted by contamination creates a completely arbitrary standard. Moreover, the arguments advanced by courts for allowing recovery only in cases of actual impact are misplaced. In particular, the concern that finding property devaluation alone creates substantial interference will open the door to nuisance claims against bare uses such as group homes is unfounded. In most situations, reliance on the element of nuisance law that requires a showing of tortious conduct or unreasonable interference will work to satisfy these judicial concerns. Courts should consider relying on the substantial interference standard only in states with laws that do not require a showing of tortious conduct or unreasonable interference and thus raise the possibility that a bare use such as a group home may be held to create a nuisance.

In most cases, stigma damages satisfy the substantial interference test. The purpose of the substantial interference test is not to test the means by which an invasion occurs, but to ensure that a nontrespassory invasion of land that fails to cause harm will not result in a nuisance recovery. Yet, once an invasion of property creates harm, it generally will be considered substantial. Prosser and Keeton have described this requirement based on its relationship to trespass:

Any intentional and unprivileged entry on land is a trespass without a showing of damage, since those who own land have an exclusive right to its use; but an act that interferes with use but is not in itself a use is not actionable with-

plaintiffs. As will be discussed, it is questionable whether the concerns underlying these negligence standards will require application of such standards in the stigma damage context. *See infra* note 183.

out damage. The substantial interference requirement is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct.¹⁵²

Simply put, an activity that results in a physical invasion of land without harm is actionable. An activity that objectively interferes with the use of land, including interfering with the ability to dispose of land, is actionable, however, only if it causes harm. For example, the odors from a neighbor's rose garden may interfere with one's use and enjoyment of land (if the property owner does not enjoy the smell of roses), but if the smell of roses does not reduce the value of the property, the rose garden will not be found to create a nuisance.¹⁵³ Stigma-based devaluation satisfies these concerns. Stigma-based devaluation is an interference with the use and enjoyment of property¹⁵⁴ that results in damage to the property. In other words, the devaluation to the property is a direct result of the defendant's conduct.¹⁵⁵

Second, the current majority rule in nuisance jurisprudence provides an artificial, if not totally arbitrary, basis for the award of stigma damages. The vast majority of nuisance cases turn on whether there has been a substantial interference with the use and enjoyment of the plaintiff's property.¹⁵⁶ Further, substantial interference generally is interpreted to require proof of either some physical invasion of property¹⁵⁷ or some actual impact, such as aesthetic impact, on the use and enjoyment of land.¹⁵⁸ Together these standards will be referred to as "actual impact" standards. The actual impact standards, however, advance no valid policy concern. Indeed, at best these standards can be seen as creating artificial distinctions upon which to award damages for stigma-based harms.

152. KEETON ET AL., *supra* note 12, § 87, at 623.

153. See also RESTATEMENT (SECOND) OF TORTS § 821F (1987). "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Id.*

154. Use and enjoyment is defined very broadly to include all interests in use and enjoyment of property, including the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land. Further, "freedom from discomfort and annoyance while using land is often as important to a person as . . . freedom from detrimental change in the physical condition of land itself." *Id.* § 821D cmt. b. The right to freedom from discomfort includes "the right to be free from physical pain, annoyance, stress, . . . and the right to dispose of land." Roisman & Mason, *supra* note 10, at 10071 (citing *Long v. City of Charlotte*, 293 S.E.2d 101, 110 (N.C. 1982); *Hanna v. Brady*, 327 S.E.2d 22, 25 (N.C. Ct. App. 1985)).

155. For an exposition of the argument that stigma devaluation satisfies the substantial interference test, see Roisman & Mason, *supra* note 10.

156. See *supra* section II.B. It is assumed that in the case of postremediation nuisance claims, liability is proven and damages become the court's focus because actual impact has occurred. See *supra* note 95.

157. See *supra* section II.B.

158. See, e.g., *supra* note 154.

The actual impact standards bear no relationship to whether a party has actually been harmed by virtue of stigma. Stigma devaluation is the result of anticipatory fears attributed to a particular mark.¹⁵⁹ The mark can be caused by actual contamination or through association resulting in marking by courtesy.¹⁶⁰ The harm caused by this process bears little relation to a harm based on the actual impacts of contamination—one is a harm based on attributional fear, while the other is a harm based on the potential that certain activities may occur in the future.¹⁶¹

The lack of correlation can be best explained through an example. Assume that a plaintiff's property has been permanently devalued by ten percent of its actual market price due to a contamination event. Assume further either that the property has been impacted by the contamination at low levels or that those living on the property have been impacted aesthetically or by odors relating to the event. The actual harm that is the cost associated with the potential (1) that the contamination will result in money being expended for cleanup,¹⁶² (2) that contamination will impact health, or (3) that contamination will aesthetically or otherwise impact use of property, will be extremely limited. The majority of the harm, regardless of the actual impact, will still flow from attributional fear.

An appraiser has related a story of one contamination event, which helps to put this understanding in perspective.

For example, in the 1990 sale of an industrial property formerly owned by a Fortune 500 company, serious soil contamination had been discovered in 1983. The large corporate owner signed a consent order and the cleanup was begun. Seven years later, the local environmental protection agency considered the cleanup complete. It is important to note that if any future cleanup were deemed necessary the corporate owner would be held responsible for such costs. Another Fortune 500 company was an intermediate holder of title in this property and stood second in line to pay for cleanup costs if the first owner failed to pay for any reason. Consequently, liability for present and future cleanup costs simply was not an issue in the sale of this property. Any discount from its unimpaired value would thus be attributable strictly to the stigma factor. Several local appraisers and the assessor agreed that the unimpaired value of the property was about \$2,000,000. After an 8-month sales effort, the property was sold for \$95,000 cash. The indicated discount, caused solely by the effect of stigma, was over 95%.¹⁶³

159. See Hornstein, *supra* note 141.

160. *Id.*

161. For a complete analysis of the difference between these two types of harm, see *supra* section III.B.

162. For example, future cleanup costs may be associated with the possibility that in the future, individuals become newly aware of the potential dangers of a particular substance or of a lower threshold exposure. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789 (1995).

163. See Patchin, *Contaminated Properties—Stigma Revisited*, *supra* note 2, at 167-68.

The true arbitrariness of the actual harm standard becomes even more apparent when comparing the plaintiff whose property has been actually impacted and can recover stigma damages with the party whose property has not been actually impacted. Even though a significant portion of their harm is caused by the same source and event, one party will be allowed to recover while the other party will not. In short, correlating actual impact with stigma damage creates irrational results.

Take, for example, the case of *Allen v. Uni-First Corp.*¹⁶⁴ In this case it was shown that the disposal of perchloroethylene from the defendant's dry cleaning plant had resulted in widespread contamination to an entire community.¹⁶⁵ Although the court did not explicitly address this factor, it is reasonable to assume that a large number of individual properties were not actually impacted by the contamination. Although the devaluation to these properties is likely to be as severe as the devaluation on actually impacted properties, only those parties whose properties have been actually impacted by the contamination would be allowed to recover their stigma damages in most cases.

B. Misplaced Need for Actual Impact

Courts have raised two reasons for relying on an actual impact standard. Neither reason provides a satisfactory basis for such reliance in all circumstances. Some courts base their decision to use an actual impact standard on the assertion that without any potential for actual impact to property, the fears associated with a contamination event are unfounded.¹⁶⁶ This argument does not, however, provide a basis for drawing the line at actual impact.¹⁶⁷ As just explained, the vast majority of situations in which property values decrease, even with actual impact, are still attributable to the same psycho-social forces that result in devaluation of property that could not be actually impacted.¹⁶⁸ Indeed, when the actual impact is aesthetic in nature, it

164. 558 A.2d 961 (Vt. 1988).

165. *Id.*

166. See *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 969 (W.D. Ky. 1993).

167. A separate and more basic question concerns whether attributional harm should be recoverable at all. In other words, because stigma is a harm based on fears of results that cannot occur, one may question allowing stigma damages in any particular situation at all. Responses to this concern are numerous. First, it may be argued that stigma damages are the result of the way in which reasonable people think. Moreover, if these damages are not the result of the way in which reasonable people think, as one court has stated, they are caused by market failure and should be recoverable in any case. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 795 (3d Cir. 1994).

168. See *supra* note 149 and accompanying text.

is possible that virtually the entire amount of devaluation is attributable to attributional fear. Nevertheless, courts do not limit an award of damages to that portion of property devaluation associated with the factual impacts of contamination and not the portion associated with such a psycho-social response.¹⁶⁹ Rather, the actual impact standard allows recovery of a substantial portion of the devaluation solely attributable to these "nonrational" responses. The actual impact standard does not, therefore, prevent the concerns expressed by the courts regarding unfounded harm.

A second concern advanced by courts that have opted for the actual impact standard is that tying nuisance recovery to actual invasion creates a standard that would not allow recovery of stigma damages simply because a neighboring use, say to a group home, incites anticipatory fear that results in property devaluation.¹⁷⁰ Courts generally have indicated an unwillingness to attach stigma damage to this type of property use.¹⁷¹

This problem arises, however, only to the extent that nuisance allows recovery for a use of property without fault. Broadly speaking, nuisance may be applied to another's use of property that causes problems with the use and enjoyment of one's own property.¹⁷² Beyond this basic concept, state definitions of nuisance differ substantially¹⁷³ and, perhaps based on historical treatment of nuisance,¹⁷⁴

169. For example, one could determine the likelihood that more stringent standards will be created and multiply this by the cost such a standard would require from the party that is actually responsible. This number, of course, will have to be discounted by the possibility that one may be able to recover these costs from the party that is actually responsible.

170. See *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 969 (W.D. Ky. 1993).

171. One exception to this rule is the doctrine of absolute nuisance. For a general analysis of the relationship between nuisance and strict liability theories, see Jon G. Anderson, Comment, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ ST. L.J. 99, 106-08.

172. See *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985)(explaining that the historical role of private nuisance law is a means of resolving conflict between neighboring, contemporaneous uses).

173. Indeed, probably no other cause of action is treated as differently by the states as nuisance.

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach in a baked pie. There is general agreement that it is incapable of any exact or comprehensive definition.

KEETON ET AL., *supra* note 12, § 86, at 616.

174. While early cases of private nuisance seem to have assumed that a defendant was strictly liable and thus made no inquiry as to the nature of his conduct, the trend has been to require a level of tortious conduct by the defendant for nuisance recovery. *Id.* § 87, at 624.

many courts have treated nuisance as based on a standard of strict liability.

Not surprisingly, different jurisdictions have developed varied, and often contradictory, rules of pleading, proof, and permissible defenses under the general heading of nuisance. In the environmental tort context, this situation can result in similar conduct—or similar industrial activity—being treated under radically different rules of law at different times and in different jurisdictions. Thus, for example, . . . the Texas Court of Civil Appeals ruled that liability in private nuisance for oil seepage from an underground pipeline may be established only by proving that the pipeline operators acted negligently.¹⁷⁵ In contrast, in 1983, a New Jersey Superior Court ruled . . . that owners of a gasoline storage facility should be held strictly liable to adjoining property owners for damage caused by a crude oil leak.¹⁷⁶

Even under the Restatement definition, there is substantial variation in the fault standards applicable to nuisance. The type of conduct that may be actionable as a nuisance is codified in the Restatement.

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.¹⁷⁷

Thus, in many jurisdictions nuisance will be recoverable for conduct that is intentional, negligent, reckless, or that creates an abnormally dangerous condition. In any of these situations, it would seem impossible to attach nuisance liability to the use of a group home simply because the use resulted in property devaluation.

Nonetheless, construction of the intent requirement of nuisance has, as a practical matter, created a quasi-strict liability standard. The Restatement defines intent broadly. "An invasion of another's interest in the use and enjoyment of land . . . is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct."¹⁷⁸

As a practical matter this construction of intent permits nuisance actions to be grounded in conduct that is neither negligent nor specifically directed toward the creation of a nuisance. Where an industrial facility has been operated non-negligently, a court may infer the requisite element of intent if the defendant continues to operate with knowledge that damage to neighboring property owners is occurring.¹⁷⁹

175. *Humble Pipe Line Co. v. Anderson*, 339 S.W.2d 259, 264-65 (Tex. Civ. App. 1960).

176. 3 SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION* § 17.01[2][b], at 17-19 to 17-20 (1994).

177. *RESTATEMENT (SECOND) OF TORTS* § 822 (1987).

178. *Id.* § 825.

179. 3 COOKE, *supra* note 176, at 17-21. *See also* *RESTATEMENT (SECOND) OF TORTS* § 825 cmt. d (1987)(stating that "when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional").

Under this interpretation, virtually all nuisance laws leave open the possibility that a "group home," without more, may be considered the source of a nuisance. Simply put, if the condition causing the invasion is a "group home," then a standard that does not require proof of actual impact may result in liability for the use without a need to show more, and the only way to stop the impact once knowledge is received would be to stop the use. Courts do not want to open the door to such a result.

This judicial concern, however, misses the important fact that under the Restatement, intentional conduct alone does not satisfy most states' nuisance requirements. Rather, the definition requires a plaintiff to prove that such interference is intentional and unreasonable.¹⁸⁰ The unreasonableness requirement will serve to ensure that the feared result does not occur. The Restatement sets forth the following test for unreasonable interference:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

- (a) the gravity of the harm outweighs the utility of the actor's conduct, or
- (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.¹⁸¹

This balancing test serves to draw the line desired by courts.

180. See RESTATEMENT (SECOND) OF TORTS § 822 (1987). The Restatement requires proof of substantial and unreasonable or otherwise tortious interference.

181. *Id.* § 826. Further definitions of gravity of harm and utility of conduct are provided by the Restatement in sections 827 and 828.

Section 827 sets forth criteria to be considered in determining the gravity of harm.

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- a) the extent of the harm involved;
- b) the character of the harm involved;
- c) the social value that the law attaches to the type of use and enjoyment invaded;
- d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- e) the burden on the person harmed of avoiding the harm.

Id. § 827.

Section 828 sets the criteria to be used in determining the utility of an activity.

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- a) the social value that the law attaches to the primary purpose of the conduct;
- b) the suitability of the conduct to the character of the locality; and
- c) the impracticability of preventing or avoiding the invasion.

Id. § 828.

Without methodically analyzing each element of the test, it is possible to argue generally that a facility that handles hazardous substances is less suited to a residential neighborhood (the neighborhood in which stigma will most significantly harm reputation) than a group home, and that the harm from a contamination event may be practically prevented short of shutting down the facility, which would be the likely result with a group home.¹⁸² Thus, by focusing on these equitable concepts, courts, in general, may be able to ensure that only those activities that can be controlled and are not from uses that are not well suited to a particular location will be liable for stigma damages. While the standard may not award damages based purely on whether the contamination event has created a stigma,¹⁸³ it achieves the goal set forth by courts in a manner better adapted to analysis of stigma harm.

This Article has explained how current majority nuisance liability standards do not relate to the mechanisms by which stigma occurs, and thus, these standards create arbitrary results. In addition, this Article has set forth how arguments for adopting such actual impact standards are frequently misplaced. Only in situations in which state nuisance law prescribes recovery based on strict liability, without an unreasonable interference requirement, should courts consider an actual impact standard. In most cases, however, a finding that stigma devaluation creates substantial interference will not engender the feared results. Moreover, the requirement that an interference be unreasonable, or based on otherwise tortious conduct, will be generally better suited to analysis of stigma claims.

C. Applying a Negligence Standard: The Difference Between Emotional Harm and Stigma

As this discussion of nuisance law suggests, a standard that deals with claims for stigma devaluation should consider both the act that creates the stigma as well as the means by which the act causes stigma harm. Based on these concerns, a negligence standard is better suited to an analysis of stigma harm than nuisance. Negligence jurisprudence does not create artificial distinctions based on fears of engendering unwanted results. This makes it a more realistic choice

182. See *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 969 (W.D. Ky. 1993).

183. This standard still does not require parties to confront head on those aspects of stigma damages that create harm. Thus, it is unlikely that the standard will be a preferable means of analyzing stigma harm as negligence. See Chalmers & Roehr, *supra* note 2; Mundy, *supra* note 2; Patchin, *Contaminated Properties—Stigma Revisited*, *supra* note 2; Patchin, *Valuation of Contaminated Properties*, *supra* note 2. See also Davis & Longo, *supra* note 3; Roisman & Mason, *supra* note 10.

for analysis of stigma claims. Perhaps more important, negligence, with its direct analysis of causation, serves to focus the inquiry onto the actual dynamic by which stigma damages occur.

The greatest obstacle to assertion of a negligence-based stigma claim is the unsympathetic analysis given by courts to claims brought by individuals exposed to contamination for emotional harm resulting from the fear of disease. Courts traditionally have set high standards for recovery of this type of emotional harm. The majority of courts require actual impact or injury for the recovery of emotional harm, unless the activity causing the harm was undertaken intentionally.¹⁸⁴ Courts also require that the fear of illness be reasonable before allowing recovery.¹⁸⁵

Courts do not base these high standards on the belief that serious emotional harm cannot result from a defendant's activity. Rather, the reasons for such strict standards generally are based on the highly subjective nature of emotional distress and the difficulty in determining its genuineness.¹⁸⁶ Courts fear that the intangible nature of damages and potential for an unrestricted class of plaintiffs would overburden the judicial process, and that courts would face negligent defendants with a plethora of unrealistic claims.¹⁸⁷

None of the factors of concern in emotional harm cases are present in the case of stigma damages. Stigma damages are not based on the fears of plaintiffs. Rather, stigma damages are based on the fears of third-party purchasers who do not stand to benefit in any way from the claims against the defendant.¹⁸⁸ Moreover, stigma harm is embodied in a decrease in property value, which is measurable through empirical appraisal techniques.¹⁸⁹ In short, while courts have not

184. See, e.g., *Nesom v. TriHawk Int'l*, 985 F.2d 208 (5th Cir. 1993); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364 (E.D. Va. 1979).

185. See, e.g., *In re Moorenovich*, 634 F. Supp. 634 (D. Me. 1986).

186. See KEETON ET AL., *supra* note 12, § 54, at 361, 363.

187. The various concerns were reviewed by the California Supreme Court in *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993), which considered the following factors: (1) the tremendous societal cost of allowing emotional distress compensation to a potentially unrestricted plaintiff class; (2) the unduly detrimental impact that unrestricted fear of liability would have on the health care field; (3) allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual injury and those who ultimately develop cancer as a result of the toxic exposure; (4) establishing a definite and predictable threshold of recovery to permit consistent application from case to case; and (5) restricting liability of negligent tortfeasors for emotional loss in consideration of the intangible nature of the loss, the inadequacy of monetary damages to make whole the loss, the difficulty of measuring the damage, and the societal cost of attempting to compensate the plaintiff. *Id.*

188. Purchaser incentives will be further explored later in this section's discussion of damages rules.

189. For an analysis of the appraisal techniques available to access stigma damages, see Chalmers & Roehr, *supra* note 2; Mundy, *supra* note 2; Patchin, *Contami-*

doubted the validity of many cases of emotional harm, the need to restrict claims for such harm was based on the impact the subjective nature of the harm would have on the litigation process. These concerns are not implicated in the case of objectively measurable stigma harm.

The use of a negligence standard would provide a much better means by which to consider stigma claims. First, negligence requires parties to focus directly on the specific act that allegedly causes property devaluation. It does this through the simple process of requiring proof that a party has acted unreasonably toward another. This process stands in direct contrast to nuisance law, which may allow action against those who maintain a condition that causes the nuisance.¹⁹⁰ Take, for purposes of comparison, the group home example previously considered in this Article. While a nuisance standard based on strict liability will allow damages for any broadly defined "use" of the property, negligence will allow recovery only if the home is operated unreasonably. The simple existence of a group home in the neighborhood will not provide a basis for stigma recovery.

The proximate causation requirement will further ensure that only the stigma resulting from an improperly run activity will be recoverable. In proving causation, plaintiffs will have to show that the specific contamination event—that is, the negligent act—and not the use of property in general, was the source of a decrease in property values. Such proof would have many levels. First, plaintiffs would have to consider using expert testimony to offer proof of the dynamic by which stigma is caused.¹⁹¹ Evidence of permanent stigma harm would be introduced through the testimony of an appraiser.¹⁹² Appraisal evidence could then be supplemented by evidence that the various factors impacting the creation and size of stigma have been implicated. For example, testimony may show the event received wide news coverage. Similarly, evidence could be presented on the controllability of an activity and the possibility that the activity may cause catastrophic results.¹⁹³

Thus, a negligence standard solves the major problems of the current nuisance liability scheme. A negligence standard does not create

nated Properties—Stigma Revisited, *supra* note 2; Patchin, *Valuation of Contaminated Properties*, *supra* note 2. See also Davis & Longo, *supra* note 3; Roisman & Mason, *supra* note 10 (suggesting the use of objective analysis).

190. See *supra* note 174.

191. Expert testimony is frequently used to prove causation. KEETON ET AL., *supra* note 12, § 41, at 269. In this case, it may be necessary to provide evidence on the cause of stigma through the testimony of either a psychologist or sociologist.

192. For an overview of general appraisal techniques, see texts cited *supra* note 189.

193. See *supra* note 189 and accompanying text generally for these factors. These factors will also play a role in analyzing the permanence of a stigma. See *infra* note 199.

an artificial distinction for stigma damage awards. Further, a negligence standard will ensure that activities that are properly run and constructed will not become a source of stigma damages.¹⁹⁴ Similarly, the use of a negligence standard will ensure that only the devaluation resulting from the actual malfeasance is recovered.

The negligence damage standard also satisfies major policy concerns.¹⁹⁵ Two major concerns impact the award of stigma damages. First, an analysis of many of the factors that impact the potential and size of stigma suggests that stigma damage will decrease over time and that many stigmas may be only temporary. For example, one heuristic device described earlier, the anchoring heuristic,¹⁹⁶ explains that individuals will not immediately change their beliefs upon acquiring new information. Understanding will change in time after new information is learned. This has led commentators to suggest that regulators of an activity should "strike while the iron is cold" to ensure that standards reflect all information.¹⁹⁷ Similarly, appraisers have noted that stigma frequently decreases substantially after information on the nature and extent of contamination is developed.¹⁹⁸

The most important factors to consider in determining whether a stigma will be permanent are the factors that play a role in the marking of property. In particular, over time the mark may become inconspicuous. Consequently, this information should play an important role in the determination of whether a stigma will be permanent. Over time a contamination event will likely be remediated, news stories of the event no longer will be published, and other discernable indicia will also dissipate. Thus, although it is possible that a contamination event may endure much longer at a community level than at a state or national level, it is also very likely that the stigma associated with any event may be temporary, and proof of this may itself be the most difficult obstacle to prevailing on a stigma damage claim.¹⁹⁹

194. In this manner, negligence also serves the goals of equity more often than nuisance. Usually, the parties to a stigma case will be defendants who have caused contamination and who have directly benefitted from the activity in question, and plaintiffs who likely have not been responsible for the contamination event and who will have, at most, benefitted only indirectly from the activity. Obviously, these bare concerns may be supplemented by numerous other factors. For example, did the owner/operator remediate the contamination immediately? Was the contamination event the result of "midnight dumping" on the owner's property?

195. The applicable negligence standard requires that damages be actually incurred to be recoverable. KEETON ET AL., *supra* note 12, § 30, at 165.

196. See Hornstein, *supra* note 141, at 609 (citing Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1092 (1990)).

197. *Id.*

198. See Mundy, *supra* note 2, at 7.

199. Indeed, a strong argument could be made that this factor will serve to restrain the majority of potential stigma damage claims. Because it is likely that many stigmas will, over time, disappear or become extremely small, the number of indi-

Any standard applied to stigma claims must ensure that only permanent stigma devaluation is recoverable. This obviously is the case with nuisance law, which allows recovery of devaluation only when the harm is permanent.²⁰⁰ Yet, as previously stated, when courts find actual impact, they tend to ignore the issue of permanent harm.²⁰¹ The actual impact on property fails to provide a basis for ignoring this factor. Negligence, too, will allow for recovery of only permanent harm.

The second factor with which the application of a legal standard must deal is remuneration to individuals who sell their property before a stigma has dissipated and thus have incurred stigma-related damage regardless of the permanence of devaluation. Any damage rule should not create an incentive to sell property so as to incur such extra damages. At the same time, however, a damage rule should avoid awarding a windfall to either the buyer or seller of the property. Only negligence accomplishes this goal.

Negligence allows recovery for actual damages incurred in the sale of a stigmatized property and will not create an incentive to sell property to collect stigma damages. This is because, at most, a homeowner will be able to recover only those stigma damages that she actually has incurred. If the homeowner manages to sell the home for a better price, stigma damages will not be recoverable. For example, assume a house was worth \$100,000 before the contamination event, and then the home was sold one year after the event for \$90,000. Assume further that the trier of fact, considering evidence of an appraisal and other testimony, found that eight percent of the decrease in property value was attributable to stigma.²⁰² The home seller in this case would be entitled to only \$8000. If the home had sold for \$98,000, the seller would collect nothing because no damage would have been actually incurred. Thus, any rule allowing recovery for actually incurred damages will not create an incentive to sell property just to recover stigma damages.

While nuisance law allows recovery only for actually incurred damages, the requirement that harm be permanent serves to create a windfall in those cases in which a party sells a home shortly after a contamination event has occurred even though no permanent harm resulted. In such a case, a home seller whose house was worth \$100,000 before the event, but is devalued by ten percent due to a

viduals seeking permanent damages may be limited. Further, the substantial costs of litigation, including the costs of hiring experts, will serve as a deterrent to most stigma claims except the most egregious and those in which individuals are seeking damages for other harms. The fear of a flood of new litigation must be considered in light of these factors.

200. See *supra* note 199.

201. *Id.*

202. The other 2% decrease is the result of different market factors.

stigma, will lose \$10,000, while the purchasers of the house ultimately will realize a gain of a similar amount once the stigma dissipates. While this potential outcome may influence price negotiations, it is unlikely that the homeowner will recover the complete difference.²⁰³

V. CONCLUSION

Award of damages for property devaluation due to the stigma that accompanies environmental contamination is becoming an extremely significant issue in environmental law. As more plaintiffs continue to seek stigma damages, courts will be called on to develop a legal standard that properly disposes of these claims. Current stigma jurisprudence, the majority rule of which allows recovery only when properties have been actually impacted, fails to analyze or address stigma claims satisfactorily. This jurisprudence, which is based in nuisance law and on an incomplete understanding of stigma and its causes, must be reconsidered in this nascent stage of stigma litigation. This Article has considered some of the problems associated with these claims and has suggested a potential solution to the problems. It also has suggested a different and considerably better means for the assertion and analysis of stigma claims. While stigma claims have many of the hallmarks of emotional harm claims, they do not suffer from the same inadequacies of subjective types of damage. Courts and attorneys will do well to explicitly confront these and the other legal and policy concerns presented by claims for stigma damages so as to develop a standard that promotes a reasoned analysis of the issues.

203. This will occur for many reasons. First, the seller will be in a position of unequal bargaining power caused by the need to sell at a time when stigma impact is still high. Also, it is likely that there will still be incomplete information and uncertainty about the contamination event at the time of sale. Due to the unequal bargaining position, it is likely that the seller, not the buyer, will be subject to the risks associated with the impact of the stigma harm on the property's value.