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Public Nuisance, the Restatement (Second) of Torts, and Environmental Law

John E. Bryson*
Angus Macbeth**

The law of public nuisance as a tort is increasingly being used in environmental litigation. In this Article the authors review the position of the American Law Institute with respect to the tort of public nuisance as it is represented in the Tentative Drafts leading to the Restatement (Second) of Torts.

The development of the American Law Institute's position is analyzed by considering the various elements of public nuisance actions. The case law is evaluated to identify the trends that the Restatement (Second) emphasizes and to expose some weaknesses in the conclusions reached by the drafters.

Finally, the use of public nuisance theories in various types of environmental litigation such as water, air and noise pollution is scrutinized and those areas identified where public nuisance law may most appropriately be used.

In the last three years the American Law Institute (ALI), in its Restatement (Second) of Torts, has, for the first time, addressed itself to the tort of public nuisance.¹ Public nuisance has long been a quagmire

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¹ RESTATEMENT (SECOND) OF TORTS ch. 40, at 2 (Tent. Draft No. 16, 1970) [hereinafter cited as Tent. Draft No. 16]. The first Restatement failed to deal
in the law, and the drafting of sections for the Restatement (Second) which both accurately reflect the background of the law and take account of its present movement has been difficult. In 1970 the ALI published Tentative Draft No. 16 covering public nuisance; after comments by the members of the Institute it was revised and a second version, Tentative Draft No. 17, was issued in 1971. Tentative Draft No. 17 has now received the approval of the ALI and, with minor changes proposed in Tentative Draft No. 18 this year, probably will become part of the Restatement (Second) of Torts.

There are important changes between the first two ALI drafts which take account of the forward movement of the law in this area. One principal purpose of the changes was to reflect developments in environmental law. This Article analyzes the ALI position and discusses the direction in which the law of public nuisance should move. The discussion falls naturally into three sections: the definition of the tort of public nuisance; the question of who has the right to recover for, or standing to sue in, public nuisance; and the circumstances governing the imposition of liability and the award of relief against those committing public nuisances. In conclusion, the Article discusses the significance for environmental lawyers of a liberalized law of public nuisance.

I

THE DEFINITION OF PUBLIC NUISANCE

A. Tentative Draft No. 16

Tentative Draft No. 16 took an historical approach to the definition of public nuisance, proposing a simple and clear definition: "A public nuisance is a criminal interference with a right common to all members of the public." Members of the ALI Council were not entirely satisfied with the definition and the focal point of the dissatisfaction with public nuisance because of confusion in the areas of the law to be covered by the various groups developing the Restatement. "Nuisance" was assigned to the property drafting group which included only one expert on torts. Not surprisingly, the drafters concentrated on private nuisance which involves the invasion of rights in land. When the chapter on nuisance was transferred to the Restatement of Torts, public nuisance, involving the invasion of rights which one possesses as a member of the public, was omitted.

5. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 18, 1972) [hereinafter cited as Tent. Draft No. 18].
7. Tent. Draft No. 16, supra note 1, § 821B.
tion was the use of the word "criminal." If a public nuisance tort must in fact be a criminal act, the evolution of the tort will be seriously confined by the criminal statutes of individual states and it will be isolated from the rest of tort law, which is not governed by the stricter requirements of criminal procedure and proof. Tentative Draft No. 16 stated the definition as it had been expressed in the broad statements of the treatises and cases. The question remained whether the holdings of the cases supported the oft-repeated definition and whether the case law was itself changing and leaving the old pronouncements behind.

The Reporter of Tentative Draft No. 16 consulted eight treatise writers for support of his definition. There are reasons, however, for not putting great weight on the opinions they expressed. First, three were writing on the criminal law and, because they were not primarily concerned with torts, it is neither surprising that they included criminality in the definition of public nuisance nor unexpected that they did not carefully think through the consequences of their statements for the field of torts. Second, many of the writers were addressing themselves to the common law of England rather than of the United States. English commentary may, of course, be illuminating but there are sufficient divergences between the laws of the two countries such that a work on modern English tort law cannot be taken as authority on modern American tort law.

The only authority to deal at length with the tort of public nuisance was Horace Wood, a nineteenth century American writer. His definition included a criminal element but set it in the fundamental context of tort:

Every person owes certain duties to the public, and the failure to discharge them, whereby the public is injured, is regarded at common law as a quasi crime. Among these duties is that of so using his own property as not to injure the public, being only an enlarged application of the maxim *Sic utere tuo ut alienum non laedas,* and only differing in its violation in this respect in the fact that it is treated as a public offense, and is punishable by fine or imprisonment.
Thus, according to Wood, public nuisance is essentially a part of tort law whose violation is criminally punishable. This approach is considerably different from viewing public nuisance as itself an integral part of the criminal law. Giving due weight to Wood's discussion, the treatises are not a rich mine from which to extract a definition which is American, well-analyzed and modern.

The cases consulted by the Reporter are of little more value than the treatises. The criminal cases cited that deal with public nuisance do not focus on the tort of public nuisance. They simply demonstrate what everyone knew—that there is a crime of common or public nuisance. Not being concerned with cases in tort, they have virtually no light to shed on the relation of the tort to the crime. These cases are therefore not very useful in answering the basic question of whether a criminal element must or should be included in the definition of the tort of public nuisance.

_Tentative Draft No. 16_ cited a number of tort cases in which the court's dicta clearly include the criminal element in the definition of public nuisance. The problem is that these statements are dicta. The accepted rule was that the commission of a public nuisance was criminal, and the judges repeated the precept without coming to grips with the consequences of its application. In only one case cited as support in _Tentative Draft No. 16_ was the definition put to the acid

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*Restatement* and was fully aware that this was a self-serving citation. _Tent. Draft No. 16, supra_ note 1, § 821B, note to Institute. Neither of the latter two treatises, moreover, provides a searching analysis of public nuisance.


14. Tent. Draft No. 16, _supra_ note 1, § 821B. The cases are C. Rice Packing Co. v. Ballinger, 311 Ky. 38, 223 S.W.2d 356 (1949) (action to enjoin defendant from operating packing house as public nuisance; reference to criminal-tort distinction only in passing); Evans v. Bullock, 260 Ky. 214, 84 S.W.2d 26 (1935) (suit to enjoin defendant from maintaining obstruction on country passway found not to be public and so no public nuisance present); State _ex rel._ Dickey v. Alverson, 225 N.C. 29, 33 S.E.2d 135 (1945) (civil action by State on relation of Dickey for violation of statute); State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944) (same issue as Hazen _infra_ which is relied upon as authority and cited extensively); Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1918) (suit for damages and to enjoin defendant from raising and lowering level of a lake); Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 12 S.E. 1085 (1891) (suit to enjoin use of noisy furniture factory; court concerned with propriety of equitable rather than legal remedy; definition of common nuisance is pure dictum); Schiro v. Oriental Realty, 272 Wis. 537, 76 N.W.2d 355 (1956) (action for damages; case has nothing to do with distinction between crime and tort aspects of public nuisance).

15. There are a couple of unclear cases in which the criminal element in the definitions seems to be less than holding but more than sheer dictum. _State ex rel._ Maples v. Quinn, 217 Miss. 567, 64 So. 2d 711 (1953); Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904).
test: whether the element of criminality in the definition of public nuisance was the deciding factor in whether or not a tort action would lie. This is the case of *Kernan v. Gulf Oil Corp.*

*Kernan* was a suit for damages for wrongful death involving a fire on a tug which killed two crew members. The plaintiff maintained that the defendant had committed a public nuisance in permitting the escape of gas into the river. Although the theory was initially barred because it was not raised at the trial, the court went further, saying that a public nuisance is a crime and citing 66 C.J.S., *Nuisances* § 2. It pointed out that crimes have an element of intent, citing 22 C.J.S. *Criminal Law* § 30. The court found that in the case at bar the escape of gas was accidental and involuntary. Having no element of intent, the act complained of was not a crime, and therefore not a tortious public nuisance. No recovery could be allowed.

By relying on the requirement of a criminal element in public nuisance, the court in *Kernan* did destructive violence to the tort law of public nuisance. Cases have long held that liability for nuisance may be based on negligence as well as intent, and in a number of cases there is strict liability. *Tentative Draft No 16* itself makes clear that the definition of public nuisance has not been read to require that all the elements of criminal liability be present before a defendant is liable in tort.

In light of the unanalytic quality of statements supporting the inclusion of a criminal element in the definition of public nuisance, what reason is there to yoke the tort of public nuisance to criminal activity? What effect does such a fusion have on public nuisance tort law? The classic justification for binding the tort of public or common nuisance to a criminal offense is found in Blackstone:

> [C]ommon nuisances are such inconvenient offenses as annoy the whole community in general, and not merely some particular person and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects.

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17. 231 F. Supp. at 345.
18. *Id.*
20. Tent. Draft No. 16, supra note 1, § 821B, comment e.
21. 4 W. Blackstone, Commentaries * 167.
This language is repeatedly used in the cases.\textsuperscript{22}

The requirements for standing to sue and the mechanism of class actions provide two devices by which courts may discourage an unreasonable multiplicity of suits.\textsuperscript{23} There is no longer any need to add a notion of criminality to what is essentially a tort action in order to produce a rational judicial procedure. The major historical explanation for including the criminal element in the definition of the tort of public nuisance is no longer relevant or compelling.

Furthermore, the broad dicta of the cases and the treatises hide other historical developments which have gradually moved tortious public nuisance out of the realm of the criminal law. The growing reliance on the use of injunctions in public nuisances cases\textsuperscript{24} is an obvious example of the increasing separation between the crime and the tort of public nuisance.

Equity's power to restrain a public nuisance has been consistently upheld.\textsuperscript{25} The standard of proof in the tort causes has been a preponderance of the evidence rather than beyond a reasonable doubt.\textsuperscript{26} In tort actions and even in some criminal actions for public nuisance it has not always been necessary to show criminal intent.\textsuperscript{27} All of these characteristics distinguish public nuisance torts from criminal acts.

Two other historical developments also deserve attention. The first has been the increase in the number and types of crimes explicitly defined by state statutes. Most states now have specific statutes covering causes which 150 years ago might have been swept under the heading of criminal public nuisances.\textsuperscript{28} One result of this specific-

\begin{footnotesize}
\begin{enumerate}
  \item See, e.g., State v. Everhardt, 203 N.C. 610, 617, 166 S.E. 738, 742 (1932); State v. Turner, 198 S.C. 487, 496, 18 S.E.2d 372, 375 (1942). In White v. Town of Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939) the court uses Blackstone's language but not exactly as quoted in the text here.
  \item See part II infra.
  \item A quick and inconclusive demonstration of this broad development can be made by comparing the relative space devoted to equitable and criminal remedies in 37 AMERICAN DIGEST 1658-1896 (Century ed. West 1903) and 24 SEVENTH DECENNIAL DIGEST 1956-1966 (West 1968). In the early volume slightly more space was devoted to criminal than to equitable remedies; in the later volume criminal remedies are given approximately one-eleventh of the space occupied by equitable remedies.
  \item Try-Me Bottling Co. v. State, 235 Ala. 207, 178 So. 231 (1938); State ex rel. Williams v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945); Weis v. Superior Court, 30 Cal. App. 730, 159 P. 464 (2d Dist. 1916); Commonwealth v. McGovern, 116 Ky. 212, 75 S.W. 261 (1903); State ex rel. Atty Gen. v. Canty, 207 Mo. 439, 105 S.W. 1078 (1907).
  \item Lawson v. State, 226 Ark. 170, 228 S.W.2d 585 (1956).
  \item "The necessity of intent in public prosecutions for nuisance depends on the nature of the case." 66 C.J.S. Nuisances § 10 (1950); see also cases and materials cited note 19 supra.
  \item E.g., CAL. PENAL CODE, § 311.6 (public obscenity), §§ 314-318.6 (indecent exposure and disorderly houses), §§ 330-337s (gaming), § 374e (littering bodies of wa-
\end{enumerate}
\end{footnotesize}
cation of criminal statutes is that the legal concept of public nuisance has lost some of its adaptability as a criminal charge. Its flexibility as a tort concept has remained and so there has been a slowly growing division between the criminal and tort aspects of public nuisance. The result has been to leave damages and injunctions as the primary remedies for what are now termed public nuisances, while the grounds for many criminal prosecutions have been set out in categories separate from public nuisance.  

Second, the criminal actions for public nuisance that remain are themselves changing and losing much of their criminal character. This development is discussed in the Practice Commentary to the criminal nuisance section in New York's Penal Code:

Subdivision 1 of the revised section deals with the . . . category formerly covered by a provision penalizing one who "annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons" (§ 1530[1]). One difficulty with this offense has been that, frequently entailing fine questions concerning the relative rights of plant operators or business people on the one hand and residents of the vicinity on the other, prosecutions therefore have been boiled down to issues having a distinctly civil flavor.

This is undoubtedly an accurate commentary.

From this history it can be argued that public nuisance is an action which never developed many typically criminal characteristics and is now growing away from its broad criminal sources toward, on the one hand, increasingly specific definition as a criminal offense and, on the other, toward a broad cause of action in tort which has fewer criminal aspects. This is not an unusual evolutionary development in tort law. Products liability is an obvious parallel example. The archetypal area in products liability is the sale of food and drink, an area originally covered by criminal statutes but one in which tort remedies have come to be overwhelmingly predominant. The development of the products liability doctrine is significant for that of tortious public

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29. Borough of Verona v. Shalit, 92 N.J. Super. 65, 222 A.2d 145 (1966), aff'd on other grounds, 96 N.J. Super. 9, 232 A.2d 431 (1969); see City of Milwaukee v. Milbrew, Inc., 240 Wis. 527, 3 N.W.2d 386 (1942). This may serve as an effective goad to the State's Attorney to move on the civil side rather than on the criminal side.


31. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer) 69 Yale L.J. 1099, 1103 (1960).
nuisance, both because of the similarity of their historical roots and be-
cause of the general closeness of the two fields.\textsuperscript{32} Protection of human
life, health and safety have always been central to both fields.\textsuperscript{33} More-
over, the risk-spreading argument which has been employed as a jus-
tification for some of the changes in product liability\textsuperscript{34} is relevant to
public nuisance. In both actions the defendants as a group are in a
better position than the plaintiffs to absorb losses which they can then
pass on through their prices to the community.

B. Tentative Draft No. 17

Neither history nor logic provides a compelling or persuasive rea-
son for including the criminal element in the definition of public nui-
sance. Well-worn dicta are recited by the courts with the ease and
thoughtlessness of hornbook learning, but the substance of the law has
meanwhile grown beyond the concepts invoked in the opinions.

In these circumstances it was important that the Restatement (Sec-
ond) eliminate the words and deal with the substantive changes. The re-
drafted definition of public nuisance in large part does so. Tentative
Draft No. 17 provides an expanded and far more accurate and helpful
definition of public nuisance:

(1) A public nuisance is an unreasonable interference with a right
common to the general public.

(2) Factors conducing toward a determination that an interference
with a public right is unreasonable, include the following:

(a) The circumstance that the conduct involves the kind of
interference with the public health, the public safety, the
public peace, the public comfort or the public conven-
ience which sufficed to constitute the common law crime
of public nuisance,

(b) The circumstance that the conduct is proscribed by a
statute, ordinance or administrative regulation, or

(c) The circumstance that the conduct is of a continuing
nature or has produced a permanent or long-lasting ef-
fect, that its detrimental effect upon the public right is

\textsuperscript{32} P. Winfield, TORT 391 (7th ed. 1963). If it is felt that the sale of defective
products, despite the demise of privity, does not have the crucial element of affecting
the citizen in his rights as a member of the public, attention is drawn to the cases en-
joining loan sharking as a public nuisance. State \textit{ex rel.} Embry v. Bynum, 243 Ala.
138, 9 So. 2d 134 (1942); State \textit{ex rel.} Beck v. Basham, 146 Kan. 181, 70 P.2d 24
(1937); State \textit{ex rel.} Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).

Winfield actually includes the selling of food unfit for human consumption as
an example of a common law nuisance.

\textsuperscript{33} Prosser, \textit{supra} note 31, at 1122.

\textsuperscript{34} \textit{Id.} at 1120, \textit{citing} Escola \textit{v.} Coca Cola Bottling Co., 24 Cal. 2d 453, 462,
150 P.2d 436, 441 (1944) (Traynor, J., concurring).
This new definition is a large and very significant step forward. Subsection (2)(a) picks up the dicta of the cases and the treatises as well as the early history of public nuisance. Subsection (2)(b) recognizes the increasing specificity of criminal law and procedure. The historical development of the tort is thus appropriately recognized in subsections (2)(a) and (2)(b), but the definition does not stop there. Both the general wording of subsection (1) and the phrasing of subsection (2)(c) point toward future development of the tort. The Reporter's comments on the section make it clear that subsection (2) is not exhaustive:

Subsection (2) has listed three sets of circumstances as factors. They are called "factors" because they are not conclusive tests controlling the determination of whether an interference with a public right is unreasonable. They are listed in the disjunctive; any one may warrant a holding of unreasonableness. They also do not purport to be exclusive. Some courts have shown a tendency, for example, to treat substantial interference with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance. The language of Subsection (2) is not intended to set restrictions against such developments.36

The Restatement (Second) of Torts thus breathes fresh vitality into the concept of tortious public nuisance. The final definition as accepted by the ALI provides the tort considerable space in which to develop and adapt to the needs of the time. There have been indications that the courts are moving in this direction.37 However, the Restate-

35. Tent. Draft No. 17, supra note 4, § 821B.
36. Id. comment e at 8. Earlier in the same comment the controlling word "unreasonable" in subsection (1) was defined in accordance with the general rules of tort: "the defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct for abnormally dangerous activities."
37. Two recent environmental cases discarded the old hornbook definition of nuisance ignoring the criminal element, but neither was powerfully reasoned or showed any appreciation of the tortured history of the definition. The first is City of Miami v. Coral Gables, 233 So. 2d 7, 1 ERC 1184 (Fla. Ct. App. 1970). Here the appellants, plaintiffs below, were the City of Coral Gables and 20 individual residents who sought to enjoin the City of Miami from operating a municipal incinerator. The chancellor below issued an injunction finding both a public and a private nuisance and the Florida District Court of Appeals affirmed that judgment. In reaching its decision the court turned to what it took to be the bases of the law:

The underlying principle supporting the law of nuisance has been succinctly stated in the case of Jones v. Trawicks, Fla. 1953, 75 So. 2d 785, 50 A.L.R.2d 1319, wherein the court stated:

"This court recognizes that the law of private nuisance is bottomed on the fundamental rule that every person should use his own property as not to injure that of another * * *"
ment (Second) clarifies what the cases have failed to state explicitly:
the tort of public nuisance may be employed to protect from invasion
those rights which we hold in common as members of the public and
is, despite its tortured history, clearly distinguished from criminal law
concepts.

II

STANDING IN PUBLIC NUISANCE ACTIONS

The traditional rule is that public nuisance actions may be brought
by private citizens only when they have suffered "particular dam-
age." The particular damage required is an injury different in
kind from that suffered by other affected members of the public. Where an entire community is injured in the same manner by the nui-
sance, public officials have been held to be the only proper parties to seek redress.

"Anything which annoys or disturbs one in the free use, possession, or enjoy-
ment of his property, or which renders its ordinary use or occupation physi-
cally uncomfortable, is a 'nuisance' and may be restrained." [Citations omitted].

No doubt the instant litigation is representative of an entire assault by
the people of this nation in response to the "crimes against the environment" which have been perpetrated by the users of our amassed technologies. Recognition of the public's right to pure air, soil, and water has been forthcoming from a vast segment of the governmental agencies entrusted to protect these interests for our country's people.

The second case is Department of Health and Mental Hygiene v. Galaxy Chemical Co., Inc., Civil No. 243-4 (Md. Cir. Ct., decided Sept. 17, 1970) 1 ERC 1660. Here plaintiff, the Air Quality Control Division of the Department of Health, sought to en-
join defendant from emitting gas, vapors and odors beyond its property lines. In modi-
fied form, the injunction was granted. This is a classic public nuisance action. The
court dealt with the notion of nuisance in the following manner:

The legal definition of a nuisance is anything that unlawfully annoys or
does damage to another, and it includes everything that endangers life or
health, gives offense to the senses, violates the laws of decency, or obstructs
the reasonable and comfortable use of property. Traditionally, it is a thing or
condition on the premises or adjacent thereto, offensive or harmful to those
who are off the premises.

I ERC at 1668.

38. This notion has been alternately expressed in the definition of the tort or as a
special rule of standing for the tort. Although Prosser has expressed it in the defini-
tion, i.e., a certain action is a tort as to an individual only when it imposes particular
damage on that individual [W. Prosser, supra note 2, § 88], the rule appears to derive
from traditional standing considerations such as multiplicity of suits and lack of suffi-
cient damage to impart concrete adversity. Moreover, expressing the limitation in
the definition of the tort has the awkward consequence of making a certain activity
a public nuisance if a public official files against it but not a public nuisance if a citizen
sues. The more straight-forward conceptual approach is to view the particular damage
rule as a standing limitation. This is the approach taken by Tent. Draft No. 17, supra
note 4, § 821C.

39. "Particular damage" is often referred to in the cases as "special damage." The concepts are the same.

40. Harper & James, supra note 12, § 1.23; W. Prosser, supra note 2, § 88.
While the course of the law generally has been away from the vesting of exclusive authority to sue in public officials and from other restrictive rules of standing, the tort of public nuisance has, until recently, been untouched by these trends. This relative neglect may be understood, in part, as a consequence of a general lack of concern for rights which the public holds in common. In the last ten years, however, the principal reason for the neglect is that plaintiffs have been deterred by the restrictive standing rule. Few public nuisance suits have been brought by private citizens and, as a consequence, the particular damage rule has had little opportunity for re-examination in the courts.

There are, however, signs of change. A few recent decisions have departed from the old rule, and in the most recent revision of the Restatement (Second) of Torts, the ALI has moved toward bringing standing for public nuisance injunction proceedings into conformity with the general law of standing.

A. The Particular Damage Rule of Tentative Draft No. 16

At its worst, the particular damage rule has been interpreted to deny standing to private plaintiffs whenever a nuisance affected a whole community on the theory that since many persons were affected, none had suffered unique injury. In addition, the requisite injury was traditionally found only in cases of monetary or physical damage. Even where clear economic injury exists, courts have sometimes found the injury not to be different in kind from that suffered by the public in general. Thus, in Kuehn v. City of Milwaukee, a professional fisherman sued to enjoin the dumping of garbage into Lake Michigan. The court, however, denied standing on the ground that the plaintiff was asserting a public right with respect to which he was not uniquely injured—anyone could fish in the lake.

Section 821C of Tentative Draft No. 16, did little to discredit these rulings and set out the particular damage rule in its harshest form:

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42. Tent. Draft No. 17 supra note 4, § 821C; see text accompanying note 75 infra.
43. Willard v. City of Cambridge, 3 Allen (85 Mass.) 574 (1862) (closing of a drawbridge affects commerce of area); Swanson v. Mississippi & Rum River Boom Co., 42 Minn. 532, 44 N.W. 986 (1890) (the blocking of a river forces town to import its coal and supplies by a more expensive route); Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (1917) (a navigable stream's being made less pleasant for water sports not an injury peculiar to riparian owner).
44. Prosser, supra note 19, at 1011-16.
45. 83 Wis. 583, 53 N.W. 912 (1892).
For a public nuisance there is liability in tort only to those who have suffered harm of a kind different from that suffered by other members of the public exercising the public right. 47

Relying largely on late nineteenth and early twentieth century cases, the section rejected the position of some commentators 48 that an injury of greater severity, albeit of the same kind, was sufficient to secure standing. The comments, however, did note that physical and monetary damage would generally be seen as "different in kind." 49 Unfortunately, no guidance was provided as to when such damage is different in kind and when not. 50

Although ameliorating some of the worst consequences of the particular damage rule, section 821, thus formulated, remained a barrier to justice. Persons who are injured or threatened with substantial injury should be able to seek redress in the courts. Experience has shown that public officials, because of inertia, lack of resources, political pressures, or vested interests in the nuisance, cannot always be relied on to seek redress for a community. 51 An injured person should not be denied access to court simply because others in the community are injured in the same way he is.

Moreover, although actual, physical injury would normally ground standing, 52 the courts should be open to persons before they incur serious physical harm. The law should afford a means to challenge threatened harm. Take a community where, due to extreme air pollution, the incidence of low-level respiratory difficulties is widespread among the citizens. Illustration 12 of the Restatement (Second) comments suggested, by analogy, that a person with a persistent cough and frequent lung congestions could not sue the polluter for abatement of the public nuisance. 53 The only recourse would evidently be to wait for ac-

47. Tent. Draft No. 16, supra note 1, § 821C.
49. Tent. Draft No. 16, supra note 1, comments d at 34 and h at 38.
50. These comments regrettably were not changed in the revised draft. Tent. Draft No. 17, supra note 4, comments d at 15 and h at 17.
51. The value of citizen suits to supplement efforts of public officials has been explicitly recognized by the President's Council on Environmental Quality. "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs." Council on Environmental Quality, Resolution of Legal Advisory Committee, reprinted at 1 ENV. RPRTR.-CURR. DEV. 746 (1971).
52. Tent. Draft No. 16, supra note 1, § 821C, comment d at 29.
53. In that illustration a bridge is destroyed causing economic loss to an entire community. Even a person who suffers four times as much economic damage as the others in the community is said to be barred from suit by section 821C. Cf. Applebaum v. St. Louis County, 451 S.W.2d 107, 1 ERC 1125 (Mo. 1970) (nuisance suit charging that incinerator will produce dirt, smoke, noise, odors denied injunction). "[M]ere apprehension of future damage or injury cannot be the basis for issuance of
tion by local officials or for the contraction of severe illness by someone in the community.

The justifications presented for the particular damage rule are, first, that where all are affected the injury to any one person is likely to be trivial and, second, that if any affected person is allowed to sue, the defendant will be faced with an unduly burdensome multiplicity of actions. In an era of less sophisticated technology it may have been that the harm from public nuisances was trivial so far as the individual was concerned. That is no longer true. Mercury pollution threatens extreme genetic, nervous system, and brain disorders. Badly polluted air may cause emphysema and other respiratory diseases. Chronic shrill noise threatens health and sanity, and oil spills ruin beaches, which may be an urban population's principal recreation area. The technological by-products of the 1970's can threaten serious harm to each individual in affected communities.

In any event, the possibility that the injury to any one individual may be slight is no justification for a restrictive standing rule. According to the substantive law of public nuisance the invasion must be substantial to be actionable. If an injury is trivial, a court will find it so on the merits and deny relief. Thus, the particular damage rule has the effect not of eliminating trivial actions, for they would be denied relief anyway, but of barring substantial claims.

Neither is the fear of a multiplicity of suits sufficient reason to deny standing in public nuisance actions to persons who suffer injury. The near-revolution of the last few years in the general law of standing has not resulted in a deluge of cases which could not previously the writ. Id. at 114, 1 ERC at 1130, citing Fenestra, Inc. v. Gulf American Land Corp., 377 Mich. 565, 141 N.W.2d 36, 52 (1966).

54. Tent. Draft No. 16, supra note 1, § 821C, comment a at 27.


56. New Mexico ex rel. Norvell v. Arizona Public Service Co., Civil No. 17994 (San Juan Cty. Dist. Ct., N.M., decided Jan. 5, 1972), 3 ERC 1617 (public nuisance suit by New Mexico and the Sierra Club to enjoin air pollution from Four Corners Power Plant); Wisconsin v. Dairyland Power, 52 Wis. 2d 45, 187 N.W.2d 878, 2 ERC 1763 (1971) (public nuisance suit to abate generating plant's air pollution not preempted by existence of state agency with comprehensive air pollution powers). United States v. United States Steel Corp., Civil No. 71-1041 (N.D. Ala. 1971) (at EPA's request, the Justice Department, in December, 1971, obtained a temporary restraining order requiring twenty-three local industries to halt their emissions of air pollutants).


58. Tent. Draft No. 16, supra note 1, § 821C, comment a at 27.

have been brought. As the Court of Appeals for the District of Columbia has recently observed:

The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the hue and cry went up when the states relaxed the criteria for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied.60

Nor have the laws which abolish standing requirements altogether and allow "any person" to challenge "unreasonable" pollution or environmental destruction61 resulted in a spate of litigation.62

The fact is that nuisance lawsuits are so costly and difficult to bring that it is extremely unlikely that defendants and the courts would be burdened with numbers of harassing or unjustified suits should the standing requirement be brought into conformity with the more relaxed standards prevailing elsewhere in the law.63 And the courts have means, including summary dismissal, bond requirements, and the imposition of costs to deal with meritless lawsuits should they be brought.64

Moreover, the class action as developed in many jurisdictions in recent years should prevent a multiplicity of suits against the same de-


62. A reporter examining the consequences of the Michigan law six months after it became effective found that at most ten suits had been filed under it. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 643 n.403 (1970). Nine months after the effective date of the law, thirteen suits had been filed pursuant to it, six by the State of Michigan. 1 ELR 10079-83 (1971).

63. As the Court of Appeals for the Second Circuit has stated: "Our experience with public actions confirms that the expense and vexation of legal proceedings is not lightly undertaken." Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965).

fendant. Class litigation would often be the appropriate procedural device for citizen action against a public nuisance since, by definition, the tort affects a class and, by pooling its resources, the class might better be able to finance the suit. Even if plaintiffs do not bring a class action, defendants may ask to have the suit so designated.\textsuperscript{65} Class actions provide for an examination of whether the plaintiff is a proper and adequate representative of the class,\textsuperscript{66} and in most jurisdictions, a class action may not be settled without court approval.\textsuperscript{67} Both these provisions safeguard against strike suits where the interest is a lucrative settlement for the nuisance value of the suit. Finally, the resolution of a class suit is binding on the entire community; no member of the class may thereafter bring a separate action.\textsuperscript{68}

In the recent \textit{Sierra Club v. Morton} decision,\textsuperscript{69} the Supreme Court discussed the "representative of the public" cases and stated that plaintiffs who act as private attorneys general must themselves have been injured.\textsuperscript{70} Although this raises some question as to the vitality of certain environmental standing decisions, it presents no problems for public nuisance where the citizen-plaintiff will have been injured by the nuisance. In fact, the decision affirms that parties adversely affected may properly represent the public.

In one respect denying citizens the right to sue the perpetrator of a public nuisance might generate duplicative litigation. The only legal resort to the denied citizen would be a citizen mandamus action\textsuperscript{71} against a public official to force the official to sue for relief from the nuisance. It is this sort of wasteful circumvention that modern procedural reforms have sought to eliminate from the old common law forms of action.

\textbf{B. Tentative Draft No. 17}

In 1971, the Reporter proposed and the Institute adopted a revision of the public nuisance standing rule which, though aspects of it may be criticized, is a substantial step toward liberalization. Although the old rule is retained for damage actions, section 821C(2) now provides:

In order to maintain a proceeding to enjoin or abate a public nuisance, one must

\textsuperscript{66} \textit{See}, e.g., \textit{Fed. R. Civ. P.} 23(a)(4).
\textsuperscript{67} \textit{See}, e.g., \textit{id.} 23(e).
\textsuperscript{68} \textit{See}, e.g., \textit{id.} 23(c)(3).
\textsuperscript{69} 405 U.S. 727, 3 ERC 2039 (1972).
\textsuperscript{70} \textit{id.} at 738, 3 ERC at 2043.
(C) Have standing to sue as a representative of the general public, or as a citizen in a citizen’s action, or as a member of a class in a
class action. 72 Comments accompanying the section provide some background on the revision. The former rule immunizing from private suit defendants
who managed to injure alike all in the community was regarded as too restrictive and the revision was intended to “afford opportunity for de-
velopment in the area of environmental protection.” 73 In addition, the Institute was influenced by developments in related fields of the
law: “[s]tatutes allowing citizens’ actions or authorizing an individ-
ual to represent the public and extensive general developments regard-
ing class actions and standing to sue are all pertinent.” 74 More precise
guidelines as to the meaning of the new section, however, are not pro-
vided for the reasons that standing is a procedural matter not fully ap-
propriate to a restatement of the substantive law of torts, and, with the
law of standing in flux, the ALI does not wish to impose a categoric
rule which would restrict developments.

The single most important aspect of this change is that standing
for public nuisance is linked with the general law of standing. This is
a persuasive position—no sound reason exists for treating public nui-
sance standing as distinct from standing elsewhere in the law. In fact,
it appears that when private actions for public nuisance were first al-
lowed in the sixteenth century, the court simply adopted the then-
prevailing rules regarding standing. 75 But while standing evolved else-
where in the law, the courts, in the few private actions for public nui-
sance brought before them, adopted without analysis the old formula.
Now, the ALI has put its authority behind bringing the law of public
nuisance, at least as to injunctive actions, into harmony with the general
body of procedural law.

The three specific situations in which the Restatement (Second) indi-
cates that standing for injunctions may be appropriate are also significant.

1. Representatives of the General Public

Although the courts do not seem yet to have gone this far, 76 it is
persuasive that private citizens in public nuisance actions should be
able to sue as representatives of the general public. Increasingly,

72. Tent. Draft No. 17, supra note 4, § 821C(2).
73. Id. § 821C, note to the Institute.
74. Id. comment j at 18.
75. Y.B. 27 Hen. VIII, Mich. pl. 10 (1536).
76. But see New Mexico ex rel. Norvell v. Arizona Public Service Co., Civil No.
  17994 (San Juan Cty. Dist. Ct., N.M., decided Jan. 5, 1972), 3 ERC 1617, where
the lead plaintiff in the suit against the Four Corners Power Plant appears to be the
Sierra Club.
courts and legislatures are recognizing the utility of the plaintiff who acts as "private attorney general." 77 The Legal Advisory Committee to the President’s Council on Environmental Quality has praised the private environmental suit as an important adjunct to public enforcement of environmental legislation. 78 A number of states have provided that “any person” may sue to enjoin unreasonable harm to the environment, 79 and Congress in the Clean Air Amendments of 1970 80 provides that any citizen may sue to enforce duties or standards imposed under the Clean Air Act.

In determining whether persons adversely affected may bring public nuisance actions as representatives of the public, courts may be guided by the principles enunciated, in an FCC license renewal challenge case, by Chief Justice (then Judge) Burger:

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of these assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide. 81

Since pollution in some form is the typical contemporary public nuisance, the many recent cases in which courts have granted conservation organizations standing to challenge environmental degradation are particularly relevant to the interpretation of sections 821C(2). The concept that the environmental groups will act as representatives of the public interest is at the heart of these decisions. The landmark

77. Compare Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir., 1943) with Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972) where the Supreme Court discusses the “representative of the public” or “private attorney general” concept of standing and states that the plaintiff who represents the public must himself have suffered some injury economic or otherwise. Id. at 736-38, 3 ERC at 2042-43.
78. Letter from CEQ Chairman Russell E. Train to IRS Commissioner Randolph Thrower, Sept. 30, 1970, reprinted at 1 ENV. RPTTR.—CURR. DEV. 745 (1971); see note 51 supra.
81. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003-04 (D.C. Cir. 1966). In Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970), the court of appeals stated that “we think it time that such doubts [as to standing] were resolved in favor of hearing cases in which the public interest demands a hearing on the merits.”
case was *Scenic Hudson Preservation Conference v. F.P.C.*, 82 where the court found that conservation organizations had standing to contest the construction of a power plant at a scenic and historic site on the Hudson River:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b) [of the Federal Power Act]. 83

Similarly, in *Citizens Committee for the Hudson Valley v. Volpe*, 84 the court granted standing to environmental organizations and municipalities who sought to challenge the granting of a permit to fill for an expressway along the Hudson River:

We hold, therefore, that the public interest in environmental resources . . . is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest. 85

Since the theory of public nuisance is the protection of public rights, the private attorney general concept of standing seems especially appropriate for such actions. 86 It is a logical extension of the traditional notion that public nuisance actions should be brought by a public official on behalf of his constituents. Courts in recent years have taken the practical viewpoint that the public interest will be best guarded if private citizens are given access to courts on matters of public concern which specially affect them. 87

2. Citizen's Actions

The second ALI category for standing to abate public nuisances, "a citizen in a citizens' action," is less well-defined in the law. It may be largely synonymous with the "representative of the public" notion, but the comments suggest that it refers to "[s]tatutes allowing citi-

82. 354 F.2d 608 (2d Cir. 1965).
83. Id. at 616.
84. 425 F.2d 97 (2d Cir. 1970).
85. Id. at 105. Accord, e.g., EDF v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (environmental organizations have standing to seek proscription of DDT in interstate commerce both as "injured" parties and as representatives of the "consumers' interest in environmental protection.")
zens' actions." A number of states have statutes permitting private citizens to sue on behalf of the public to enjoin public nuisances. The ALI provision may be intended simply to describe the fact that citizens suing under such statutes do not need to meet the particular damage test.

3. Class Actions

The third category in section 821C(2) is "a member of a class action." As discussed above, there is considerable justification for the ALI's categorization of class actions among those situations where the standing rules should be liberalized. Defendants will contend that the plaintiff representing the class must meet the traditional particular damage standard, but such a rule would mean that class actions could never be appropriate for citizen public nuisance suits. By definition there could be no class of persons too innumerable to name individually (a basic requirement for class actions) who suffered particular damage.

Class action procedures could make a significant contribution to public nuisance actions. Public nuisances always affect a group or class of persons. Government officials may sue to redress that wrong to the public. However, under the particular damage rule, if a private citizen sues for public nuisance, the principal focus of the action is the special injury to the individual. Class actions, however, provide a means by which citizens can represent the rights of all affected members of the community. Such a presentation would aid the courts in considering the full range of interests at stake.

In addition, the class suit provides a means within the traditional doctrine for a liberalization of standing. The major objection to the particular damage rule is that if a defendant succeeds in injuring the whole community he is immune from private suit. Class action procedures, however, allow the entire injured group, whose position is different in kind from the class of persons not affected by the nuisance, to present their grievances in a single proceeding.

89. See text accompanying note 71 supra.
90. See Tent. Draft No. 17, supra note 4, comment a, which logically must be intended only as a comment on section 821C(1) but is, unfortunately, not so labeled.
91. FED. R. CIV. P. 23(a)(1).
92. Professor Jaffe has recently suggested a variant of this approach. Broadened standing might be accomplished within the terms of traditional public nuisance law by holding "that everyone within a certain radius of such a nuisance [air pollution] is particularly affected." Jaffe, Standing to Sue in Conservation Suits, in LAW AND THE ENVIRONMENT 123, 130 (M. Baldwin & J. Page eds. 1970).
The revised section 821C of the *Restatement (Second)*, then, offers substantial opportunity for citizens to employ public nuisance actions to seek redress for wrongs to the public. Since a multiplicity of suits is not a problem in injunction proceedings, limiting the relaxation of standing requirements to injunction cases has some logic in the dubious rationale of the particular damage rule. In any event, the great majority of public nuisance cases ask for injunctive relief. Damages are often difficult to recover in such actions because it is hard to measure the injury and because courts may require plaintiffs to prove the extent of injury caused by a particular defendant among many polluters. In addition, there is some fear that the possibility of damage awards may encourage frivolous suits.

The retention of the particular damage rule for suits to recover damages may nevertheless be criticized. The concept that parties might have standing to sue for an injunction but not for damages is unknown to the common law or to any of the recent cases, Supreme Court or otherwise, dealing with the law of standing. Nor is there any sound reason for denying compensation to persons injured by the activity of another simply because others are similarly injured. Likewise, there is no good reason for exempting polluters whose operations, because of their social significance, will not be enjoined from having to pay for the external costs of their activities. Rather than accepting the Restatement distinction between injunction and damage actions, courts would do better to look to the general law of standing and make their decisions as to the appropriateness of damage awards on a case-by-case basis.

**C. The Case Law**

While the *Restatement (Second)* leaves room for development in the case law, the courts in the few private actions for public nuisance brought in the last several years have likewise moved in the direction of liberalization. In *Karpisek v. Cather & Sons Construction, Inc.*, the court, in a nuisance action against emissions from an asphalt plant, rejected the argument that the action could not be maintained because of the number of parties affected. The court relied on the proximity of plain-
tiffs to the asphalt plant to distinguish their injury from others, observing that: "If the holding urged were the rule, any nuisance affecting more than a small part of a community would have to be borne without injunctive remedy on behalf of those materially injured unless the public authorities act." 88 Likewise, Wade v. Campbell 99 indicates that proximity alone to the source of the nuisance may constitute sufficient damage on which to base standing. 100

In a separate development, a New York court has upheld standing where the plaintiff had not actually proved special injury but was particularly threatened by the nuisance challenged. The plaintiff in Stock v. Ronan, 101 a man with a diseased lung, was allowed to maintain a public nuisance suit against the exhaust from idling motors in a bus terminal.

The greater willingness of the courts to hear claims of unreasonable interference with the rights of others may also be seen in private nuisance actions. Deterred by the several snares of public nuisance law, plaintiffs whenever possible have sought to fit their actions within the rubric of private nuisance. Private nuisances are nuisances which unreasonably harm persons in the use and enjoyment of their property. While at one time courts were inclined to count the number of parties affected by a nuisance, and, where a considerable number were affected, to deny the action on the grounds that the nuisance was public, 102 there is now a much greater receptivity to private nuisance actions brought by a whole group of plaintiffs.

Thus, in Ozark Poultry v. Gorman, 103 nine homeowners in the vicinity of a rendering plant sought injunctive relief contending that the odors from the plant were so offensive that the plaintiffs and others in the area were often unable to sleep or eat without nausea. The chancellor found the plant to be a public nuisance and ordered it closed unless the conditions were corrected within a reasonable fixed time. 104 On appeal, the defendant argued that plaintiffs had not been specially damaged and therefore lacked standing. The Supreme Court of Arkansas affirmed, finding that the plant was, in addition, a private nuisance, which plaintiffs as affected property owners could properly challenge.

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88. Id. at 241, 117 N.W.2d at 326-27.
100. See also Strickland v. Lambert, 268 Ala. 580, 109 So. 2d 664 (1959) (flies and odors from poultry plant).
103. 472 S.W.2d 714, 3 ERC 1545 (Ark. 1971).
104. Id. at 716, 3 ERC at 1546.
Similarly, in *Urie v. Franconia Paper Corporation*, a number of real estate owners in the Pemigewasset River Valley, only some of whom were riparian owners, sued for an injunction against pollution of the river by a paper mill. They contended that offensive odors from the pollution affected them all and that sludge and organic matter made the river unsightly and left foul deposits on the riparian owners' lands. The defendants contended that the pollution was, if anything, a public nuisance which should be left to public officials to deal with. The river was in fact subject to a ten-year abatement plan set by the legislature. The court, however, upheld the right of all the plaintiffs to maintain the private nuisance action.

Plaintiffs and courts have found that private nuisance doctrine more readily allows the litigation of nuisance harm to numbers of people. This derives from the common law concern for property rights and the fiction in the common law that each piece of land is unique. When the central problems posed by substantial pollution are the health, sanity, comfort, or beauty of an entire community, however, it does not serve the stature of the law well for access to courts to depend on the existence of an affected realty interest willing to sue. Nor should the focus of the cases be the type and extent of injury to a landowner's enjoyment of his property rather than the injury to all members of the public. It seems likely that increasingly courts will share the view expressed in *Stock v. Ronan:* "it would appear to the court to be an invidious distinction to confine the right to a cause of

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106. Id. at 135, 218 A.2d at 363.

The desire of the courts to get around the particular damage rule may also be seen in a case in which one of the authors represented a conservation organization. The Hudson River Fishermen's Association sought to intervene in a nuisance action brought by the Attorney General of New York for damages and an injunction against fish kills caused by a Consolidated Edison nuclear plant on the Hudson River. Although the court denied intervention, for the traditional reasons, it allowed full participation as an amicus. *Hudson River Fishermen's Ass'n v. Consolidated Edison Co. of N.Y.,* New York Law Journal, June 7, 1971, at 2, col. 2.

Another means of avoiding the snares of public nuisance law is an action in inverse condemnation. Thus, owners of 581 parcels of residential property have recently been granted in an inverse condemnation action the right to receive damages for a reduction in property value due to noise from aircraft at the Los Angeles International Airport. *Aaron v. City of Los Angeles*, Civil No. 837,799 (Los Angeles Cty. Super. Ct., decided Dec. 15, 1971) 3 ERC 1798.

action in nuisance only to those who have property rights affected thereby."

D. Conclusion

The prospect for citizen public nuisance actions is, then, that standing will increasingly be determined according to the general principles of standing applicable elsewhere in the law. This desirable result has been given a substantial boost by the Restatement (Second) of Torts. The proper question is likely to be whether the plaintiff has sufficient stake in the litigation to insure the concrete adverseness on which courts depend for the adequate presentation of issues. 109 This

109. As the Supreme Court put it most recently:
Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

Likewise, in Plast v. Cohen, 392 U.S. 83, 99 (1968), the Court, citing Baker v. Carr, 369 U.S. 186, 204 (1964), stated:

[T]he "gist of the question of standing" is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends.

The first part of a two-part test set out by the Court in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), was "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." Id. at 152. Under this "personal stake" or "injury in fact" test a taxpayer in Flast was held to have standing to challenge a projected government subsidy of church-related activities; in Baker v. Carr, a voter was permitted to challenge the boundaries of his election districts; in Data Processing, vendors of data processing services had standing to challenge a ruling that national banks could properly provide data processing for their customers; and in Barlow v. Collins, 397 U.S. 159 (1970), decided with Data Processing, tenant farmers were allowed to test a ruling which would permit them to assign their cotton subsidies to their landlords. In none of these cases does the personal stake of the plaintiff seem greater or more adverse than does that of the citizen subjected to the threat of mercury poisoning, respiratory ailments, or fouled beaches.

The second part of the test enunciated by the Supreme Court in Data Processing and Barlow is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. As the law of standing develops, this prong of the test may well be dropped. Justices Brennan and White rejected the second prong of the test—for them the only question was injury in fact. See concurring and dissenting opinion in Barlow v. Collins, 397 U.S. at 167. Likewise, Professor Davis in a recent article urges that "injury in fact" be the sole test, pointing out that lower courts have increasingly looked to injury. Davis, supra note 59, at 450. In any event, the tort of public nuisance clearly includes among its purposes the protection of persons subjected to the nuisance. Thus, by the Supreme Court test, standing should be granted to all persons injured by a public nuisance.

Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972), indicates that it is not sufficient for an organization to simply allege a general interest in con-
stake may derive from personal or economic injury or from damage to a more intangible interest which the plaintiff has demonstrated is of great importance to him. Those who have demonstrated a special interest in, say, freedom from harsh noise, moreover, are likely to be excellent representatives of the public to challenge noise pollution. The particular damage rule has unjustifiably thwarted the development of public nuisance law and forced plaintiffs to employ less appropriate causes of action. In the words of Professor Davis:

Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. One whose legitimate interest is in fact injured by legal action should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.

III

LIABILITY AND REMEDIES

Once it is clear that a plaintiff has been harmed by the activity which comes within the definition of public nuisance and that he has standing to sue under the applicable rules, his course is not yet run. Cases dealing with liability and remedies in both public and private nuisances have long contained a requirement that before relief is awarded the court must be persuaded that a substantial invasion has taken place and, if so, the court must balance the utility of the defendant's conduct against the harm caused the plaintiff.

This scheme is carried over into the Restatement (Second) and is embodied in interlocking definitions in five principal sections. Section 821F requires that the invasion be substantial for it to be actionable. Section 822 states that liability will be imposed when the invasion of another's interest is "intentional and unreasonable" or "unintentional and otherwise actionable under the principles controlling liability for..."
negligent or reckless conduct, or for abnormally dangerous conditions or activities.\footnote{114} Since most continuing nuisances are "intentional," the crucial word in this passage is "unreasonable." Unreasonableness is discussed in section 826 which states that an intentional invasion of another's interest is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct."\footnote{115} Sections 827 and 828 lay out the factors which are considered important in determining whether or not a defendant's activity has utility and a plaintiff has been caused harm.\footnote{116} In addition sections 829 through 831 contain illustrations of how the rules should operate.\footnote{117}

These sections cover the multiple aspects of public nuisance, but do very little to clarify the maze of confused problems which have plagued the courts in dealing with the basis on which liability will be imposed for the tort of public nuisance. The clearest indication of this failure to develop a satisfying theory for liability is the frequent assertion by the courts that every case must be decided on its own peculiar facts.\footnote{118} "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all circumstances."\footnote{119} This is little more than an admission that there are few recognized principles which govern the courts in nuisance cases. The final draft of the Restatement (Second) accepts the failure to develop a satisfying theory by stating: "Fundamentally, the unreasonableness of intentional invasions is a

\footnote{114} Id. § 822; Tent. Draft No. 18, supra note 5, § 822. This section and the others that deal with the utility/harm balancing process are written in terms of private nuisance and constantly make reference to the invasion of interests in land which is pertinent to private but not to public nuisance. The comments to these sections, however, make it clear that the principles and rules stated apply to both private and public nuisance. See, e.g., Tent. Draft No. 17, supra note 4, § 822, comment a; Tent. Draft No. 16, supra note 1, § 826, comment a & note to Institute. The cases also do not recognize a distinction in dealing with the remedies for the two types of nuisance. Therefore the distinction between private and public nuisance will be ignored throughout the text in this section and cases dealing with causes in private nuisance will be assumed to be equally applicable to public nuisance.

\footnote{115} Tent. Draft No. 17, supra note 4, § 826.

\footnote{116} Id. §§ 827, 828.

\footnote{117} Id. §§ 829-831; Tent. Draft No. 18, supra note 5, § 829A.

\footnote{118} Cities Service Oil Co. v. Roberts, 62 F.2d 579, 581 (10th Cir. 1933) ("Since every case depends largely on its own facts, it is difficult to say categorically what the law in Oklahoma is."); Sarraillon v. Stevenson, 153 Neb. 182, 187, 43 N.W.2d 509, 512 (1950) ("There is no fixed or arbitrary rule governing cases of this class. Each case must be determined by the facts and circumstances developed therein.").

problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case."\textsuperscript{120}

There have been suggestions for bringing clarity and rationality into the principles governing liability and remedies in nuisance law. Tentative Drafts Nos. 17 and 18 briefly discuss the differing proposals put forward by Professor Fleming James and Professor Robert E. Keeton\textsuperscript{121} and a compromise embodying some of Professor Keeton's points is included in Tentative Draft No. 18.\textsuperscript{122} In an attempt to bring order to this situation we have thought it most useful to explore some of the confusions in nuisance law which are reflected in the cases and in the Restatement (Second) and offer a few suggestions for clarification.

\textbf{A. Determining Liability}

\textit{1. Homogeneous Community and Equitable Cost-Spreading}

In determining liability the threshold question is whether the alleged invasion is sufficiently substantial to amount, in the eye of the law, to an actionable invasion. An example of a complaint which falls below the threshold of harm is \textit{Grubbs v. Wooten},\textsuperscript{123} in which the plaintiff sought to enjoin the use of a lot in a residential district for a graveyard monument business. The court was unimpressed by the claim of injury. "The possibility of injurious effect, from operating such a business, upon the mind of an adult or child is theoretical, fanciful, and too remote to constitute ground for condemning the business as a nuisance to be enjoined by the courts."\textsuperscript{124} The injunction was not issued. In keeping with rulings of this sort, the Restatement (Second) retains the requirement that an invasion be substantial in order to be actionable.\textsuperscript{125}

The point that there is a threshold of alleged harm below which a court will find no damage is obvious and is little more than an example of the old maxim, \textit{de minimis non curat lex}. It is important to establish the point in order to distinguish the true \textit{de minimis} cases from another group with which they are easily confused and which we will call the homogenous community cases. Historically, the typical fact pattern of the latter cases involves a largely homogenous area in which the nuisance of, \textit{e.g.}, noise or smoke is created by many different homes or enterprises and in which the plaintiff also emits noise or

\begin{verbatim}
120. Tent. Draft No. 17, supra note 4, § 826, comment b at 34.
121. Id. at 31. The notes in the drafts on the James-Keeton proposals are too brief to allow a fair and thorough critique of their suggestion.
122. Tent. Draft No. 18, supra note 5, § 829A.
123. 189 Ga. 390, 5 S.E.2d 874 (1939).
124. Id. at 396, 5 S.E.2d at 878.
125. Tent. Draft No. 17, supra note 4, § 821F.
\end{verbatim}
smoke, or at least receives the advantage of lower prices for the goods produced by the nuisance-causing enterprise. The courts frequently refuse to impose liability on defendants in these circumstances. A dictum in Krockel v. Westmoreland Planing Mill Co. expresses this line of rulings: "People in cities must, of course, submit to many annoyances and it is only when industries are unjustifiably such as to seriously interfere with people of ordinary sensitiveness that they will be restrained."

The opinions in these cases rarely analyze the basis for the holdings and dicta which they recite. There are two or three theories on which the results might be justified. First, they can be viewed as de minimis cases, but the statements of the courts conceding real annoyance and injury to the plaintiff make that a strained interpretation. Moreover, the growing number of studies showing injurious effects from the low levels of pollution make this approach less than satisfying.

Second, there is what may be called the notion of equitable cost-spreading which is rarely if ever discussed in the cases but which seems to make sense of many of the holdings. Simply put, this explanation of the case law contends that everyone has a right to clean air or quiet, but that in a relatively homogeneous community the benefit of damages collected for each invasion of that right by polluters or noise-makers would be lost in the higher prices which it would be necessary to pay for goods and services, or in the damages which could be collected from the plaintiff for similar actions. Allowing the enforcement of the right to clean air or quiet in these circumstances would require the cost, time and effort of both lawyers and litigants with no advantage to the plaintiff in the long run. Thus, the refusal of the courts to entertain these claims results in a net saving to the affected parties and to the community as a whole. This practical interpretation of the position which the courts historically have taken infers rationality in the decisions, but it is not explicitly supported by the language of the cases.

The number of situations today in which it is appropriate to refuse to award damages or an injunction on the basis of equitable cost-

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126. See, e.g., Kennedy v. Frechette, 45 R.I. 399, 405, 123 A. 146, 148 (1924) ("Anyone living in a city must put up with the usual and ordinary noises of city life."); Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919).
128. Id. at 146, 117 A. at 670.
129. See, e.g., Hodgson, Short-Term Effects of Air Pollution on Mortality in New York City, 4 ENVIRONMENTAL SCIENCE & TECHNOLOGY 589, 597 (1971).
spreading is strictly limited. While the truly homogeneous community was relatively common in the nineteenth and early twentieth centuries, now with giant manufacturing units and national distribution chains, the production benefits of a nuisance are rarely limited to the community affected by the nuisance conduct. Regrettably, the courts continue to be influenced by the early cases where denial of relief was, for cost-spreading reasons, justified.

Today in most of the cases which come before the courts the activity of either the plaintiff or the defendant varies sufficiently from the community norm so that the defense of equitable cost spreading cannot be reasonably applied. Such cases are typical nuisance actions and no special rules should govern in assigning liability. But the factual circumstances of the cases are often close to the paradigm of the homogeneous community and the courts frequently do not distinguish between them. There are two typical situations where there is repeated confusion. An example of the first variation is the plaintiff who has built his home in a district with an industrial character and seeks damages or an injunction against a defendant whose industrial wastes or emissions have invaded the quiet enjoyment of plaintiff's land. The second variation typically involves a defendant who engages in a common and accepted enterprise in a manner which places an unusual burden on his neighbors—for instance, a laundry burning a type of coal which produces more pollutants than one's neighbors,131 or running a factory that makes much greater noise than others in the neighborhood.132 Neither of these situations comes within the rationale of the equitable cost spreading notion and that rationale should be carefully distinguished from the fact pattern in these cases.

The distinction is also muddied by a third theory, the defense of "coming to the nuisance" which is frequently raised by a defendant who has an established manufacturing plant against the newcomer plaintiff who builds a house nearby and is annoyed or injured by the operation of the plant.133 The courts and the treatises are divided on whether the defense should be allowed. Harper and James dismiss the defense as a discredited one: "it is no defense to an action for nuisance that the plaintiff 'came to the nuisance' by knowingly acquiring property in the vicinity of defendant's premises."134 But it is not difficult to

133. This defense is little more than a specialized version of the principle of voluntary assumption of risk. See W. PROSSER, supra note 2, § 68 for a discussion of assumption of risk. Assumption of risk has not been favored as a defense in nuisance cases and the arguments against "coming to the nuisance" apply to assumption of risk as well. HARPER & JAMES, supra note 12, at § 1.28.
134. HARPER & JAMES, supra note 12, at § 1.28. See also Note, Private Remedies for Water Pollution, 70 COLUM. L. REV. 734, 744 (1970).
find cases holding the other way.\footnote{135}

The argument against allowing the defense appears strong. Essentially it permits the defendant to expropriate the interests of other land owners and the public for his own use without leave or compensation. The courts which admit the defense sanction this private taking on the basis of when the victim chooses to exercise his rights or assert his interest. This seems an unpersuasive rationale.\footnote{136} Nevertheless, even when the holding of the opinions does not support the defense of "coming to the nuisance," the language of the courts is frequently tainted by the idea. Time and again emphasis is put on the fact that certain districts of a town or regions of a countryside are devoted to certain kinds of use and plaintiff's deviation from that use, while insufficient in itself to establish a complete defense, is an important factor to consider.\footnote{137} This point of view is retained in the Restatement (Second).\footnote{138} Again the explanation may be that judges continue to be swayed by the old homogeneous community cases in which the costs to the newcomer plaintiff were likely to be offset by substantially equal benefits.\footnote{139}

\footnote{135. E.g., East St. John's Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952); Grzelka v. Chevrolet Motors, 286 Mich. 141, 281 N.W. 568 (1938).}

\footnote{136. It can be argued that frequently the plaintiff has already been compensated for the invasion by buying the property at a price which reflects the presence of a neighboring nuisance. But this rationale begs the question. The owner of the invaded property at the time the nuisance was commenced would still be entitled to damages for his loss of property value. Moreover, if "coming to the nuisance" were not a bar to recovery, the buyer's price would not reflect the presence of the nuisance. This is bootstrapping—the existence of the defense justifies its perpetuation.}

\footnote{137. E.g., Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 A. 627 (1934).}

\footnote{138. Tent. Draft No. 17, supra note 4, § 827(d).}

\footnote{139. The notion of equitable cost-spreading may also taint the cases where it is the defendant who deviates from the community norm. In these cases the courts have generally imposed liability, but there is frequently a tortured quality to the reasoning in the opinions which may come from an inability to articulate clearly the idea of equitable cost-spreading. For instance, in a suit seeking an injunction against the burning of soft coal, the court was driven to elaborate rationalization to support its decision:}

Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all artificial impurities. If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. Hence, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and nature of the community. The use of fuel in the home, the place of business, and the manufacturing establishment is necessary. In proportion as the population thickens, the impurities thrown into the air are increased. The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society is not actionable; but the right (and such it must be conceded) must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily.

\textbf{Holman v. Athens Empire Laundry Co., 149 Ga. 345, 350, 100 S.E. 207, 210 (1919) (citations omitted).}
Since the principle of equitable cost spreading has not been clearly articulated in the opinions, courts have difficulty recognizing when there are departures from the homogeneous community paradigm and fail to realize that the considerations of a situation in which the costs and benefits are equitably spread no longer fully apply. It is important that the courts come to recognize these distinctions because once they are taken into account the way is clear to engage rationally in the balancing process required in nuisance actions.

2. The Utility-Harm Balance

The balancing of utility against harm contains two separate issues: first, to whom is the utility in the balance to run and, second, at the end of the balancing, what distinctions should be made between issuing injunctions and awarding damages. This section will examine the first of these issues. Tentative Draft No. 17 of the Restatement (Second) states in the Comments that "regard must be had not only for the interests of the person harmed but also for the interests of the actor and for the interests of the community as a whole." Accepting this rule would throw into the balance on the utility side both the utility to the defendant and the utility to the community or the public generally. These are two distinct considerations. They have often been talked of in the cases as if they were virtually interchangeable, especially where the defendant is an important taxpayer or employer in a small town. Thus, in Madison v. Duckworth Sulphur, Copper & Iron Co., plaintiffs sought an injunction against the operation of a smelting plant whose fumes and pollutants had injured plaintiff's land and crops. The court considered the effect of an injunction regarding the interests of both the defendants and the town as substantially synonymous, "we are asked to destroy . . . property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to the owners, but to the state. . .".

It is, however, important to differentiate the interests of the defendant and the public. The benefits to a private defendant are obtained at the expense of other land owners or members of the public. These should not be weighed in the utility-harm balance. Although some courts have said that consideration of the advantages to private parties should be considered in the balancing process, there seems to be a growing recognition that this is not always the case.

140. Tent. Draft No. 17, supra note 4, § 826, comment c at 31.
141. E.g., Mountain Copper Co. v. U.S., 142 F. 625 (9th Cir. 1906); De Blois v. Bowers, 44 F.2d 621 (D. Mass. 1930).
142. 113 Tenn. 331, 83 S.W. 658 (1904).
143. Id. at 366, 83 S.W. at 665-66.
144. E.g., Mountain Copper v. U.S., 142 F. 625 (9th Cir. 1906); De Blois v. Bowers, 44 F.2d 621 (D. Mass. 1930); Hansen v. School District, 61 Ida. 109, 98
very little justice in this. It flies in the face of the old tort maxim that no man can use his property so as to cause injury to another. In the words of an Indiana court: "[T]he magnitude of their investment and their freedom from malice furnish no reason why they should escape the consequences of their own folly."

Moreover, weighing the utility to the defendant does not have a persuasive economic justification. The price of goods and services should represent the real cost of their production and not be lowered by an externalizing of costs which is achieved at the expense of others. If goods whose costs are internalized are not bought on the open market, the situation is simply one in which buyers do not think the goods are worth the cost of their production. There is no reason for the law to aid such goods in remaining on the market. The Restatement (Second) has failed to take a clear and persuasive position on this issue.

P.2d 959 (1940). But note that the defendants in two of the cases were arms of the Government which might claim a closer relationship between personal and public benefit than might private defendants.

145. See text accompanying note 12 supra.
146. Weston Paper Co. v. Pope, 155 Ind. 394, 402, 57 N.E. 719, 721 (1900).
147. For a longer discussion of this problem see d'Arge & Hunt, Environmental Pollution, Externalities, and Conventional Economic Wisdom: A Critique, 1 ENVIRONMENTAL AFFAIRS 266 (1971).
148. The issue of internalizing costs, particularly where internalization would make it impracticable for the defendant to carry on an activity which had a recognized net utility to the community, is at the heart of one of the most confusing passages in the Restatement (Second). Professors Keeton and James, and Mr. Eldredge, all advisors to the Reporter, took the position in the 1971 proceedings of the ALI that costs generally should be internalized. Professor Keeton suggested a revision to the black letter of section 826 to incorporate this notion:

An interference with either interest in the use and enjoyment of land is unreasonable if, but only if:
(a) The gravity of harm including the risks of harm outweighs the utility of the actor's conduct, or
(b) Even though utility in the actor's conduct outweighs harms and risks it causes, the resulting interference is greater than it is reasonable to require the other to bear under the circumstances without compensation, in which case the actor is subject to liability for damages but not to an injunction.

48 ALI PROCEEDINGS 83 (1971).

Mr. Eldredge summarized the position of the three advisors on the case where awarding damages against a defendant engaged in utilitarian conduct might force him to cease his activity:

[It is our thought that where you have that sort of a situation, it is not fair to ask the injured claimant to really subsidize this socially valuable activity.

[It would be utterly wrong to have say 25 plaintiffs who have suffered substantial damage have to subsidize this operation at their expense.

Id. at 84.

At the same time Mr. Eldredge said that he would support "a little different form of language" which the Reporter would propose.

The Reporter took the general position that this issue should be dealt with in comments rather than in the black letter of Restatement (Second), but nevertheless of-
A different situation is presented when the defendant claims that the community or the public as a whole benefits from his activity. It is inevitable that certain ultimately beneficial activities are, because of their mode of operation, nuisances. Cement manufacturing and copper smelting must take place somewhere and the neighboring landowners and the public are bound to suffer from the manufacturing accepted another formulation of section 826 which he preferred to Professor Keeton's language:

In an action for damages, an invasion of another's interest in the use of land is unreasonable despite the utility of the actor's conduct, if:
(a) The harm resulting from the invasion is greater than it is reasonable to require the other to bear without compensation, or
(b) The financial burden of compensating for this and other harms created by the conduct does not make continuation of the conduct impracticable.

Id. at 85.

Mr. Eldredge and Professor James immediately moved to include the Reporter's language in the black letter, apparently believing that it incorporated their position. It is difficult to see how the language supports the Keeton-James-Eldredge position since it appears to say that an invasion is not unreasonable if compensating for the damage caused by it will make it impracticable to continue the invading conduct. In other words, an invasion of another's interest in land is compensable only up to the point at which the amount of damages would force the invader to halt his conduct altogether.

Whatever the parties thought the language meant, the ALI was not in favor of it. The motion to include it in the Restatement (Second) failed, 76 to 64. Id. at 92.

This would be an academic point if language substantially similar to that rejected by the ALI did not appear in Tentative Draft No. 18:

Unreasonableness of Invasion.

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the rule stated in § 822, if:
(a) The gravity of the harm outweighs the utility of the actor's conduct, or
(b) The harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct.

Tent. Draft No. 18, supra note 5, § 826.

This section appears to bring back the substance of the language which the ALI rejected. It certainly introduces the notion that an intentional invasion of another's interest is compensable only up to the point at which the award of damages would lead to the cessation of the conduct. This does not seem to be a very sound principle but it may be based on the theory that damage actions should not be allowed to become injunctive actions in disguise. If that is so, it is disrupting the more fundamental principal that costs should be internalized and consumers should make their choices of goods and services on the basis of the true cost of the items they are buying.

The final oddity of section 826 in Tentative Draft No. 18 is that it no longer appears in connection with the Keeton-James proposals which the Reporter now intends to handle by adding section 829A:

Gravity vs. Utility—Serious Harm.

Under the rules stated in §§ 826-828, an intentional invasion of another's interest in the use and enjoyment of land is unreasonable and the actor is subject to liability if the harm resulting from the invasion is substantial and greater than the other should be required to bear without compensation.

We frankly feel that this whole tangled skein of compromises and reformulations is making confusion more confounded. It has become virtually impossible to state with surety what principles the Restatement (Second) embodies.
tivity. We are faced here with the situation which moved one early court to rule: "Le utility del chose excusera le noisomeness del stink." But, as Professor James has pointed out, it is still possible to preserve the general principle of internalizing costs while insuring that socially useful activities can be pursued. This depends on the appropriate use of injunctions and damages in the granting of remedies.

B. Remedies

In dealing with an activity which has a recognized utility to the local or national community greater than the harm it causes plaintiffs, a permanent injunction is a severe and inappropriate remedy since by definition the community would lose a net benefit. In some circumstances, a form of abatement which satisfies fairly the interests of both parties may be possible. For instance, it may be adequate to enjoin a heavy duty truck terminal from operating at night when it affects the sleep of surrounding residents, or to restrain low flights out of an airport which cause noise and annoyance to local landholders. Where possible, such a solution is obviously to be preferred, but it is not always available.

When the best practicable manner of conducting an activity whose utility outweighs its harm still necessarily creates a nuisance, the social balance points to awarding damages but refusing to issue an injunction. This seems to be the direction in which the courts are now moving. For instance, in the New York case of Boomer v. Atlantic Cement, Inc., plaintiffs sought an injunction and damages for injury to their property from the dirt, smoke, and vibration caused by the cement plant. The court denied the injunction, finding that the plant was of net social benefit to the public, but awarded damages. Similar rulings have been handed down in a number of jurisdictions.

151. E.g., Bartlett v. Moats, 120 Fla. 61, 162 So. 477 (1935); Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919); Smith v. Ann Arbor, 303 Mich. 476, 6 N.W.2d 752 (1942); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919).
155. Regrettably, the court's opinion contained some confusion in distinguishing the benefits of the plant to the community and the public from the benefit to the defendant. See also Northern Indiana Public Service Co. v. Vesey, 210 Ind. 338, 200 N.E. 620 (1936), cited in Boomer, where the court likewise denied an injunction but awarded damages.
156. E.g., Mountain Copper v. U.S., 142 F. 625 (9th Cir. 1906); Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942); De Blois v. Bowers, 44 F.2d
These cases are persuasive. Optimal allocation of resources requires that the market price of goods should reflect their true costs.\textsuperscript{157} Any product which is not required to internalize its costs will be artificially underpriced and therefore overproduced. Thus the award of damages is necessary to assure proper resource allocation as well as to compensate the injured plaintiff. The courts should not shrink from awarding damages in these cases, even where the award would make it impracticable for the activity to continue. The market place is a test of utility. Moreover, public subsidies may be available if consumers are not willing to meet the true cost of goods and services in the market place. The \textit{Restatement (Second)} has gone a long way toward adopting the principle of internalizing costs, but it has done so in a confused way marked by unsurety and it has failed to take the final step of accepting that businesses of some social value may be properly forced out of operation if damages are awarded against them.\textsuperscript{158}

At every turn, this analysis of the law of liability and remedy in nuisance has had to admit the existence of conflicting sources of authority, confusion in the language and reasoning of the cases, and often poor articulation of reasons which might be produced to justify or explain the decisions. Much of this tangle is reflected in the final draft of the \textit{Restatement (Second)}. For instance, section 828 sets out the factors which are important in evaluating the utility of conduct that is alleged to be a nuisance:

(a) the social value which the law attaches to the primary purpose of the conduct;
(b) the suitability of the conduct to the character of the locality;
(c) whether it is impracticable to prevent or avoid the invasion, if the activity is maintained;
(d) whether it is impracticable to maintain the activity if it is required to bear the cost of compensating for the invasion.\textsuperscript{159}

The list covers most of the points discussed in this review, but it does little to clarify the theories and justifications that lie behind each item. The comments to the section add some illumination, but not as much as one might reasonably expect from the \textit{Restatement (Second)}. The ALI will not have properly distilled the law until the competing ration-


\textsuperscript{158} For a discussion of the ALI position on this issue see note 148 supra.

\textsuperscript{159} Tent. Draft No. 17, \textit{supra} note 4, § 828.
ales are laid out and the instinctive judgments of the courts made conscious. The threshold question of substantial harm; the notion of equitable cost-spreading; the proper elements of the utility-harm balance; and the distinctions in the use of injunctions and damages should be explored and developed more than they are.

In this analysis we have attempted a brief review of these issues which has necessarily passed over many of the subtleties and difficulties of nuisance law. Nevertheless, these suggestions may act as a starting point—a first probe into what Prosser has so aptly called the "impenetrable jungle" of nuisance law. 160

IV
PUBLIC NUISANCE AND ENVIRONMENTAL LAW

The principal focus of this article has been an analysis of the law of public nuisance, with special emphasis on the recent revision of the public nuisance sections of the Restatement (Second) of Torts. This concluding section compares public nuisance with other environmentally significant common law and statutory causes of action and suggests in what areas public nuisance actions may be most useful to environmental lawyers.

A. Common Law Causes of Action

With the flowering in the last few years of environmental litigation, numerous commentators have searched the common law for a cause of action appropriate to assert the public's interest in a decent environment. The great virtue of the common law, particularly in injunction proceedings, has been its ability to respond and adapt itself to evolving concepts of legal procedure and social equity. With this in mind, Professor Sax has imaginatively revived the doctrine of public trust from the ancient canons of Anglo-Saxon and Roman law. 161 Other commentators have turned to the law of private nuisance. 162 But, because of the anachronisms in public nuisance law, which have made it only slightly easier to plead than disseisin or trover, little attention has been given to the tort of public nuisance.

According to public trust doctrine, the government in holding and distributing public goods is a fiduciary for its citizens. As such the government is not as free as a private owner to sell or otherwise allow the exploitation of its property. Regrettably, however, the historical

160. W. PROSSER, supra note 2, § 86.
162. See authorities cited at note 107 supra.
scope of public trust law was quite narrow and the judiciary remains largely unfamiliar with the concept.\textsuperscript{163}

Public trust and public nuisance complement each other. Public trust ensures that the government, in actions affecting public lands and public rights, does not permit unreasonable harm to the community, whereas public nuisance protects the members of the public against pollution and environmental degradation. Public trust runs against the government as fiduciary owner of public assets; public nuisance runs against the polluter whether public or private.

Private nuisance actions do not face the historical encumbrances of public trust or public nuisance, but they are concerned with private rather than public rights. As discussed above,\textsuperscript{164} modern courts should not permit the right to challenge pollution to depend on property ownership, nor should they, in dealing with substantial pollution questions, focus only on the effect on a plaintiff's enjoyment of his land. Although courts have shown a tendency to hear private nuisance actions on the part of a number of persons with property near the source of the nuisance,\textsuperscript{165} a liberalization of public nuisance law would obviate the necessity for plaintiffs and courts to fit their challenges and remedies within the property-protection standards of private nuisance doctrine. If any injured party may bring a nuisance action, public or private, then private nuisance actions may be reserved for situations in which the principal problem is invasion of property interests, and environmental threats to the health, comfort, and beauty of the community will be treated—as they logically should—as public nuisances.

Public nuisance, then, is the only common law cause of action for challenging environmental degradation as an invasion of rights common to the public. Private nuisance focuses on interference with private property rights; public trust is unfamiliar to courts and focuses on the fiduciary rights of government rather than rights vis-à-vis a polluter.

\textbf{B. Statutory Causes of Action}

The principal vehicle of environmental lawsuits to date has been section 102(2)(C) of the National Environmental Policy Act (NEPA).\textsuperscript{166} NEPA offers great advantages for environmental plaintiffs, but it is not without flaws. The advantages are that private citizens

\textsuperscript{163} Sax, \textit{supra} note 161, at 556.
\textsuperscript{164} See text accompanying note 108 \textit{supra}.
\textsuperscript{165} See text accompanying note 106 \textit{supra}.
and organizations may challenge major federal actions under NEPA\textsuperscript{167} and that the burden is on the Government to prepare an adequate statement of the environmental impact of and alternatives to the project in question.\textsuperscript{168} Where the impact statement is patently inadequate, as has often been the case, the plaintiff may secure a relatively easy initial victory, which results in a preliminary injunction against the project.\textsuperscript{169} The victory, however, is often likely to be only a temporary one.\textsuperscript{170} Government agencies, when challenged, will prepare a comprehensive statement\textsuperscript{171} which is likely eventually to be found to satisfy section 102(2)(C).\textsuperscript{172} And it may be anticipated that agencies will, over time, become more adept at preparing invulnerable statements. Even when, as many environmentalists may conclude, the statement does little more than rationalize a proposed action, NEPA, at least as the courts have interpreted it to date,\textsuperscript{173} seems unlikely to offer a means to go beyond the procedural requirements of the impact statement to challenge the merits of the contested actions.

Public nuisance, in contrast, focuses on the merits. Does the activity in question unreasonably violate the rights of the affected com-

\textsuperscript{167} Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972), which holds that conservation organizations must allege something more than a general interest in a proposed activity for standing to challenge the activity, did not involve a NEPA claim. Although the question has not yet been treated by the Court, it may be that all conservation organizations will be found to have a stake in the full disclosure procedure of NEPA.

\textsuperscript{168} See cases cited at note 166 supra.


\textsuperscript{170} Although environmentalists are genuinely concerned that agencies follow NEPA procedures and prepare adequate impact statements [see, e.g., Scientists' Institute for Public Information v. AEC, 1 E.L.R. 10079 (D.D.C., filed May 25, 1971) (suit asking, without a request for injunctive relief, for an environmental impact statement on the AEC's liquid metal fast breeder reactor program)], it is nevertheless normally true that their principal interest in section 102(2)(C) lawsuits is stopping the project in question.


We conclude, then, that section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.
community? In addition, there are a growing number of statutes which allow citizens to challenge the merits of environmental threats. And, unlike NEPA, both public nuisance and the statutory causes of action are directed at the polluter himself rather than at the government which licenses, leases, sells to, or otherwise enables the environmental degradation.

It is within this matrix of federal procedural requirements and statutory citizen suits that public nuisance must find its best uses. Where there is no major federal action in any way involved, as in the case of most relatively localized instances of pollution or environmental degradation, NEPA does not apply. Moreover, plaintiffs with time, money, and desire to challenge a threatened action on the merits may increasingly turn away from NEPA.

With regard to statutory citizen suits, their availability depends on the jurisdiction and the type of environmental damage threatened. The Clean Air Amendments of 1970 provide that any person may seek an injunction to enforce a duty created under the act.\textsuperscript{174} Emissions standards have been set under the act and more specific implementation plans to meet those standards are being promulgated.\textsuperscript{175} Public nuisance actions could be used in the interim against air pollution.\textsuperscript{176} In the longer run, such suits may be useful in combating pollutants not included under the act. In addition, in regions where the standards are too weak, public nuisance might be used to seek stricter control. While there is case support for such efforts,\textsuperscript{177} it seems unlikely that courts using the balancing process of nuisance law will find against defendants meeting air quality standards, unless the standards can be shown to be blatantly inadequate.\textsuperscript{178} Public nuisance will remain


\textsuperscript{175} \textit{See} Trumbull, \textit{supra} note 174, at 296-300.

\textsuperscript{176} Thus, the Sierra Club and the State of New Mexico are challenging the largest single stationary source of air pollution in the country, the Four Corners Power Plant, in a public nuisance action. New Mexico \textit{ex rel.} Norvell v. Arizona Public Service Co., Civil No. 17994 (San Juan Cty. Dist. Ct., N.M., decided Jan. 5, 1972), 3 ERC 1617. At EPA's request, the Justice Department, in December 1971, obtained a temporary restraining order requiring twenty-three local industries to halt their emissions of air pollutants. United States v. United States Steel Corp., Civil No. 71-1041 (N.D. Ala. 1971).

\textsuperscript{177} In Urie v. Franconia Paper Corporation, 107 N.H. 131, 218 A.2d 360 (1966), the court enjoined river pollution on nuisance grounds even though the paper mill in question was under a legislative abatement plan.

\textit{See also} Wisconsin v. Dairyland Power, 187 N.W.2d 878, 2 ERC 1763 (Wis. 1971) (public nuisance suit to abate generating plant's air pollution not preempted by existence of state agency with comprehensive air pollution powers).

\textsuperscript{178} In addition, the standards themselves may be challenged directly under the citizen suit provision of the Amendments.
the only means for recovering damages attributable to air pollution, but due to the difficulties\textsuperscript{179} of pollution damage actions, abatement proceedings will be the most significant means of litigating air pollution. So public nuisance actions will be useful in filling in the cracks in the statutory framework, but are unlikely to play the central role in efforts to control air pollution.

Public nuisance suits may be more useful in the area of water pollution. Although public officials can challenge discharges into waterways under the 1899 Refuse Act,\textsuperscript{180} courts have consistently held that citizens have no standing to bring such suits.\textsuperscript{181} Similarly, the existing Federal Water Quality Act provides water quality standards but does not provide for citizen enforcement.\textsuperscript{182} Nuisance actions appear to be an appropriate means for private enforcement of the standards.\textsuperscript{183}

Although it is possible that Congress will soon pass a broad citizen suit provision with amendments to the Federal Water Quality Act\textsuperscript{184} the prospect now, given the great differences between Senate and House Bills, is that no new law will be passed this year. So nuisance actions, public and private, may for some time play a major role in citizen efforts to control water pollution.

With the exception of the six states in which recently passed statutes allow citizens to challenge in court any action which threatens unreasonable harm to the environment,\textsuperscript{185} public nuisance may be the cause of action best suited to challenge all other sorts of environmental damage. Noise, particularly in urban areas, threatens health, sanity, privacy, and comfort.\textsuperscript{186} Yet there are no detailed federal or state plans to protect against it.\textsuperscript{186a} Noise problems have tradi-

\textsuperscript{179} See text accompanying note 158 supra.
\textsuperscript{181} \textit{E.g.}, Bass Anglers Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412, 2 ERC 1204 (N.D. Ala. 1970), aff'd sub nom., 447 F.2d 1304, 3 ERC 1065 (5th Cir. 1971).
\textsuperscript{184} See S. 2770, 92d Cong., 1st Sess. § 505 (1971).
\textsuperscript{185} \textit{CONN. GEN. STAT. ANN.} §§ 22a-16 (Supp. 1972); \textit{FLA. STAT. ANN.} § 403.412 (Supp. 1972); \textit{IND. ANN. STAT.} § 3-3501 (Supp. 1972); \textit{MASS. GEN. LAWS ANN.} ch. 214, § 10A (Supp. 1972); \textit{MICH. COMP. LAWS ANN.} § 691.1201-07 (Supp. 1972); \textit{MINN. STAT. ANN.} § 116 B.10 (Supp. 1972). \textit{But see} Roberts v. Michigan, 2 ERC 1612 (Mich. Cir. Ct. 1971) which holds that the Michigan act is unconstitutional as an unlawful delegation of legislative power at least with respect to vehicular emissions.
\textsuperscript{186} See Hildebrand, supra note 57.
tionally been dealt with under nuisance law and a liberalized tort of public nuisance would offer the best means to combat it in the future. Similarly, strong and offensive odors are not controlled by legislation and have traditionally been dealt with as nuisances. Disturbing vibrations may also be challenged as public nuisances.

A significant area in which public nuisance may prove to be the only remedy is the protection of aesthetic values. Since it is impossible to legislate precise aesthetic standards, it is likely that the reasonableness rule of nuisance actions and case-by-case analysis by the courts will remain for some time the best means for dealing with threats to natural beauty. An excellent recent law review note discusses fully the authority for and value of aesthetic nuisance actions. As the author indicates, nuisance law is the only means of challenging, for example, a junkyard along a historic and scenic river, the location of a sanitary landfill, or the siting of a nuclear power plant near a seacoast community.

Finally, the Supreme Court recently has rendered an opinion which suggests that all forms of interstate pollution may be challenged in federal courts as public nuisances. The decision seems likely to add greatly to the significance of public nuisance law for environmental litigation.

In *Illinois v. City of Milwaukee,* Illinois sought to sue, under the original jurisdiction of the Supreme Court, four Wisconsin cities for pollution of Lake Michigan. Although the Court declined to entertain original jurisdiction, it ruled that the suit might properly be brought in federal rather than state court and that federal common law rather than choice of law and state substantive law principles would govern. Writing for the Court, Justice Douglas stated: "When we deal with air or water in their ambient or interstate aspects, there is a federal common law." The Tenth Circuit had earlier reached a similar conclusion in *Texas v. Pankey,* a suit by Texas against New Mexico ranchers who polluted the Canadian River with pesticide runoff. The more precise contours of federal public nuisance law must await further decisions. One significant question will be whether citizens may bring such actions. There is nothing in the jurisdictional statute, 28

189. Transcontinental Gas Pipeline Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952).
192. *Id.* at 103, 4 ERC at 1005.
193. 441 F.2d 236, 2 ERC 1200 (10th Cir. 1971). The case is discussed at 1 ELR 10018-22.
U.S.C. 1331(a), on which the Supreme Court based its opinion in *Illinois*, to suggest that suits by citizens should be treated differently from suits by states. It would be unfortunate if the new federal common law, as yet unencumbered with the traditional particular damage rule, should adopt it to bar citizen suits. In any event, the potential impact of *Illinois v. City of Milwaukee* seems great.\textsuperscript{194}

**CONCLUSION**

In sum, a liberalized law of public nuisance, which the *Restatement (Second)* of Torts and a few recent cases portend, would provide in most jurisdictions, the principal or only means for challenging aesthetic blights, noise pollution, and offensive continuing odors. Public nuisance could also be the principal means for citizen challenges to water pollution and, along with private nuisances, will be the basis for damage actions for both water and air pollution. Finally, in *Illinois v. City of Milwaukee* the Supreme Court has opened the federal courts to public nuisance actions against all forms of interstate pollution or pollution of the navigable waters. In all of these instances, and others yet unforeseen, public nuisance provides a unique doctrine for the presentation of the public interest in freedom from, or compensation for, injury done to the natural resources which the public holds in common.

\textsuperscript{194} The extent of federal public nuisance law could be significantly limited if courts find a sweeping preemption of the common law by federal legislation. However, *Illinois v. City of Milwaukee*, indicates that, barring real inconsistency, preemption should not be found. "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of suits alleging creation of public nuisance by water pollution." 406 U.S. at 107, 4 ERC at 1006.