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## Liability for Unintentional Nuisances: How the Restatement of Torts Almost Negligently Killed the Right to Exclude in Property Law

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**LIABILITY FOR UNINTENTIONAL NUISANCES: HOW THE  
RESTATEMENT OF TORTS ALMOST NEGLIGENTLY KILLED  
THE RIGHT TO EXCLUDE IN PROPERTY LAW**

Jill M. Fraley\*

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## I. INTRODUCTION

In 1979 the Second Restatement of Torts aligned private nuisance law<sup>1</sup> squarely with the law of torts by altering the elements of liability to require 1) intent, 2) negligent or reckless conduct, or 3) abnormally dangerous conditions or activities.<sup>2</sup> The Second Restatement argued that what distinguishes nuisance from negligence is only the type of interest invaded (land rather than person) rather than some difference in terms of the unwanted conduct. In a nutshell, the Second Restatement's position was that where there is neither intent nor an abnormally dangerous activity, nuisance is essentially land negligence. Having determined that nuisance law is nothing special in the world of torts, the Second Restatement then concluded that private nuisance law had failed to notice that tort liability had moved away from strict liability. The Second Restatement then concluded: "an actor is no longer liable for accidental interferences with the use and enjoyment of land."<sup>3</sup>

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<sup>1</sup> This article focuses on private nuisance law, which is quite distinct from public nuisance liability. Indeed, some courts maintain that the connection between public and private nuisance is nothing more than an "accident of historical development," for they are "two separate fields." *Brown v. Cty. Comm'rs*, 622 N.E.2d 1153, 1158 (Ohio Ct. App. 1993). The separation is all the more important when one's focus is on the implications of nuisance law for property rights, because public nuisance does not necessarily have anything to do with property. *See In re Starlink Com Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 844 n.12 (N.D. Ill. 2002) (noting that "unlike a private nuisance, a public nuisance does not necessarily involve interference with use or enjoyment of land"); *see also Ugrin v. Town of Cheshire*, 54 A.3d 532, 539 (Conn. 2012) ("[P]ublic and private nuisance law have 'almost nothing in common.'"); *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368, 379 n.3 (Ind. Ct. App. 2002) ("Although private nuisance and public nuisance are both generally described as nuisance actions, . . . 'the two have almost nothing to do with one another, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names.'"); *Martins v. Interstate Power Co.*, No. 1-517 / 00-0791, 2002 Iowa App. LEXIS 586, at \*4 (Iowa Ct. App. Apr. 10, 2002) ("Confusion exists in statements of the legal basis of liability as applied to the law of nuisance because the term 'nuisance' is used indiscriminately to designate harmful results. American courts show a deplorable tendency to call everything a nuisance and let it go at that."). *See generally City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at \*60 (Mass. Super. Ct. 2000) ("Thus, in its broadest statement, the concept of a public nuisance 'seems unconnected to place or property.'").

For the purposes of simplicity within the text, the author has chosen to hereafter refer simply to nuisance when speaking of private nuisance. Unless explicitly otherwise specified, all such references to nuisance are to private nuisance law rather than public nuisance law.

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW. INST. 1979).

<sup>3</sup> *Id.* § 822 cmt. B.

Nearly 40 years later, textbooks and treatises tend to teach the Second Restatement approach,<sup>4</sup> but few courts have adopted this switch in the intent requirement for nuisance. Indeed, the Second Restatement's approach cannot be described fairly as a restatement of the law in the majority of jurisdictions. Rather, only a minority of jurisdictions have adopted the Second Restatement's position.<sup>5</sup> Little to nothing has been said about this development,<sup>6</sup> although nuisance law continues to be a subject of immense scholarly interest.<sup>7</sup> In general, while a great deal has been written about nuisance in terms of its theory<sup>8</sup> and

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<sup>4</sup> Powell's treatise on property law describes this approach to nuisance as though it is the majority position. The treatise focuses on conduct, finding that "four varieties of defendant conduct can result in a private nuisance." RICHARD R. POWELL, *POWELL ON REAL PROPERTY* (Michael A. Wolf ed., 2017).

<sup>5</sup> See *infra* Section II.C.

<sup>6</sup> As for scholars, many repeat the Second Restatement's position explicitly. See Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 546 (1997) (paraphrasing the Second Restatement rule). Others do not rely explicitly on the Second Restatement, but do suggest that only intentional or negligent conduct will produce nuisance liability. See Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 10 (2006) (noting that nuisance liability generally requires negligence or intent); Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851, 864 (2010) (emphasizing the intent requirement essentially to the exclusion of other options). Alternatively, some scholars note, but only in passing, the fact that nuisance can spring from liability beyond that of intentional, negligence, or abnormally dangerous activities.

<sup>7</sup> See Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J.L. & LIBERTY 1, 15 (2009) (discussing the modern uses of nuisance in environmental law and the connections with property law); Joseph H. Guth, *Law for the Ecological Age*, 9 VT. J. ENVTL. L. 431, 435 (2007–08) (finding that nuisance law "is the core environmental tort" and "the common law's primary vehicle for addressing virtually all environmental issues, including land uses as well as air, water, land and groundwater pollution"); Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 739 (2011) (endeavoring to "develop clear lines and a comprehensive, neutral framework for analyzing how the tort system can and should respond to environmental injuries"); Albert C. Lin, *Community Levers for Benefit Sharing*, 21 LEWIS & CLARK L. REV. 357 (2017) (discussing the potential for nuisance liability for fracking); David S. Wilgus, Comment, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 103 (2001) (examining "how the doctrine of nuisance can be a tool to protect environmental values while respecting the sanctity of private property rights").

<sup>8</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (establishing the trend of using nuisance law to write about the division between property and tort law). Other scholars have followed this trend. See, e.g., Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001) (using pollution as the primary example of harm to a neighboring property); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010) (focusing on land-use torts, including nuisance); Christopher Essert, *Nuisance and the Normative Boundaries of Ownership*, 52 TULSA L. REV. 85 (2016) (discussing the multiple theoretical

importance to a variety of areas of modern law,<sup>9</sup> especially environmental law,<sup>10</sup> relatively little has been written about the evolution of the doctrine of nuisance law across the states.<sup>11</sup>

On the other hand, a larger number of states by far maintain the traditional position, which extends liability for nuisance beyond acts that are intentional or negligent to interferences more generally, regardless of the conduct of the defendant. As a result, this means that in a number of states, accidental interferences remain actionable under nuisance law—logically because there is no set mind-state required for nuisance. Yet, despite the resistance to the new rule, the Restatement (Third) project does not plan to make any revisions to the rule proposed in the Restatement (Second).<sup>12</sup>

The old approach to nuisance law is not dying away quietly.<sup>13</sup> In fact, in the new millennium courts have often gone to some trouble to explain and

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approaches to nuisance law and their implications for our understanding of the nature of real property); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996) (using industrial pollution and nuisance cases as examples).

<sup>9</sup> I have previously discussed how nuisance law has evolving implications for a wide spectrum of cases. See Jill Fraley, *The Uncompensated Takings of Nuisance Law*, 62 VILL. L. REV. 651 (2017).

<sup>10</sup> See, e.g., Stephen Harland Butler, *Headwinds to a Clean Energy Future: Nuisance Suits against Wind Energy Projects in the United States*, 97 CALIF. L. REV. 1337 (2009) (renewable energy); David A. Dana, *The Mismatch Between Public Nuisance Law and Global Warming*, 18 SUP. CT. ECON. REV. 9 (2010) (global warming); Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403 (1997) (siting of polluters); Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49 (2012) (climate change); Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955 (2010) (toxins regulation); Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 MICH. L. REV. 257 (2010) (climate change litigation); Endre Szalay, Comment, *Breathing Life into the Dead Zone: Can the Federal Common Law of Nuisance Be Used to Control Nonpoint Source Water Pollution?*, 85 TUL. L. REV. 215 (2010) (water pollution); see also Joseph F. Falcone III & Daniel Utain, Comment, *You Can Tech an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59 (2000) (discussing generally the applicability of common law nuisance claims to modern environmental issues).

<sup>11</sup> I have previously discussed this lack of literature on the doctrine of nuisance law as opposed to its theoretical position. See *supra* note 9.

<sup>12</sup> See Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1355 n.1 (2009) (explaining that no changes are anticipated for the private nuisance rules). The Author here would add that a member working on the next Property Restatement indicated that changes may be in the works in that realm, but stated that if a draft were shared, it could not be cited. The Author declined to read such drafts or to change her positions here based on any documents she was not free to cite.

<sup>13</sup> Notably, this is not the only point on which the Second Restatement and courts have had an ongoing debate. The Restatement defines nuisance as a “nontrespassory invasion” of one’s

emphasize their resistance to the Second Restatement's proposed rule—and for good reason. Nuisance law reaches to the right to exclude. Courts, including the United States Supreme Court, have long maintained that the “right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>14</sup> Thomas Merrill has taken this position further, arguing that the right to exclude is the very defining thing of property rights: “Deny someone the exclusion right and they do not have property.”<sup>15</sup>

This article defends the positions of those courts and argues that the Second Restatement got it wrong. While the Second Restatement was correct that there had been “confusion” in the case law, the confusion was not about the conduct versus the interest invaded, but rather the muddling of the law of negligence with the law of nuisance.

This article argues that nuisance was historically unique in tort law because of its special role in protecting property rights.<sup>16</sup> In other words, nuisance historically had distinct features addressed to the special situation of land. Most importantly, nuisance protected the right to exclude in a way that no other cause of action did. The Second Restatement's change then diminished our rights to private property to the extent that it has been adopted. The majority of courts retain the more logical and defensible position—that property rights are special and nuisance encompasses something more than the idea of negligence.

First, Part II of this article will begin by providing the traditional approach to nuisance law, as generally followed by the courts prior to the Second Restatement. This Part will then introduce the Second Restatement's proposed changes and evidence of the limited acceptance of that position by courts. Before continuing to examine the Second Restatement's focus on negligence in Part IV,

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property rights. RESTATEMENT (SECOND) OF TORTS § 821D (AM. LAW INST. 1979). Some jurisdictions have accepted this definition, but many do not use the term “nontrespassory.” This is unsurprising given how common it is for plaintiffs to simultaneously pursue actions for trespass and nuisance. Indeed, scholars have considered the potential advantages of pursuing both causes of action together. See Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 21 *FORDHAM ENVTL. L. REV.* 157, 158 (2010) (exploring the “alternative remedy” that is nuisance “accompanied by trespass”). With that said, the Restatement (Second) does acknowledge that there “may, however, be some overlapping of the causes of action for trespass and private nuisance.” RESTATEMENT (SECOND) OF TORTS § 821D cmt. e (AM. LAW INST. 1979). From the perspective of a teacher, the “nontrespassory” language is unfortunate, because it suggests to students that one must maintain either a trespass action or a nuisance action, and not both. Whether or not this is what the textbook actually teaches, this appears to be what students commonly conclude from the language.

<sup>14</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>15</sup> Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEB. L. REV.* 730, 730 (1998).

<sup>16</sup> Notably, historically courts have often changed the scope of property rights through redefining the scope of nuisance law. See Lynda L. Butler, *The Resilience of Property*, 55 *ARIZ. L. REV.* 847, 896 (2013) (arguing that nuisance law, and thus the boundaries of property rights, changed with the development from more rural to more urban communities); Joseph H. Guth, *Law for the Ecological Age*, 9 *VT. J. ENVTL. L.* 431, 435 (2008) (finding that nuisance law “established general principles of property law that remain widely applicable today”).

Part III considers whether or not nuisance law had already moved to accepting a more tort-oriented perspective through employing the tort concept of foreseeability. Part III focuses on the Second Restatement's adoption of the negligence approach and the significant resistance of courts to this position. Part IV considers the responses of others scholars to the distinction between property and tort approaches and the importance of a shift between the two. Part V argues that the Second Restatement should not have adopted the tort orientation to nuisance and that courts have been correct in refusing the Second Restatement's position. This Part argues that adopting the Second Restatement's position would significantly weaken property rights.

## II. THE SECOND RESTATEMENT POSITION: INTENT, NEGLIGENCE OR ABNORMALLY DANGEROUS ACTIVITIES

This Part provides the relevant history necessary to understanding the important choice between aligning nuisance with negligence. This Part begins by reviewing the traditional standard of nuisance law. This Part then continues, introducing the Second Restatement's proposed change to a more tort-based approach to nuisance that aligns with negligence law. Finally, this Part considers the limited number of court decisions that have supported the restatement position. All of this Part serves as a background for considering more generally the problem of adopting a negligence approach to nuisance and sets the stage for the author's argument that a negligence approach significantly weakens property rights and should rightly be rejected by courts.

### A. *The Historical Position that the Second Restatement Sought to Change*

Historically, nuisance is defined as an interference with the use and enjoyment of land. More broadly,

[a] "nuisance" includes anything that annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable, and this extends to 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.<sup>17</sup>

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<sup>17</sup> 58 AM. JUR. 2D *Nuisances* § 1 (Supp. 2018).

The idea of nuisance law is to provide property rights protections.<sup>18</sup> In pursuance of this goal, courts tend to “broadly construe an occupant’s right to the use and enjoyment of land.”<sup>19</sup>

Nuisance law is also a limitation on property rights. Nuisance law places limits on the land uses that a neighbor can choose without becoming liable for nuisance. Thus, “nuisance rules . . . diminish a landowner’s use privileges.”<sup>20</sup> Such limits represent the fullness of the neighbor’s property rights and prevent interference with those rights. “This is the province of nuisance law: Property owners must not use their property unreasonably in ways that substantially interfere with their neighbors’ use and enjoyment of their property.”<sup>21</sup>

Historically, nuisance law did not require a tort-like finding of fault.<sup>22</sup> Initially, courts applied the doctrine as a relatively strict liability style enterprise, imposing “absolute liability for interference with the enjoyment of property.”<sup>23</sup> Instead, nuisance law began as more of a strict liability enterprise.<sup>24</sup> Under this rule, “[a] judgment for damages in this class of cases is a matter of absolute right, where injury is shown.”<sup>25</sup> Traditionally, as the Second Restatement acknowledged, private nuisance liability existed “irrespective of the type of conduct involved.”<sup>26</sup>

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<sup>18</sup> Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1552 (1999) (noting that nuisance law functions to provide “property rights protections”).

<sup>19</sup> 58 AM. JUR. 2D *Nuisances* § 1 (Supp. 2018).

<sup>20</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1363 (1993).

<sup>21</sup> Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 642 (1988). Such limitations, while longstanding, also create a bit of an “eternal thicket” because the limitations imposed by nuisance law tend to clash with the “intuitive image of absoluteness” that we have of private property. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 360 (1998).

<sup>22</sup> This paragraph describes the more general trend of nuisance, which became less and less consistent through time. My previous work describes some of the varied evolutions of nuisance law in the course of arguing for the implications of some of those trends for property law. See Fraley, *supra* note 9. Robert Bone has considered the divergence of nuisance law in the last half of the nineteenth century, an era that he describes as “a period in which jurists prized determinate and uniform systems of law.” Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101, 1105 (1986).

<sup>23</sup> Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 622 (1976).

<sup>24</sup> Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 779 n.24 (1986).

<sup>25</sup> *Louisville & N. Terminal Co. v. Lelleyett*, 85 S.W. 881, 888 (Tenn. 1904).

<sup>26</sup> See RESTATEMENT (SECOND) OF TORTS § 822 cmt. b (AM. LAW INST. 1979).



B. *The Second Restatement Change: Pairing Unreasonableness with Negligence*

In 1979, the Second Restatement of Torts changed the traditional approach to the law of nuisance. The new “general rule” provided:

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

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.<sup>27</sup>

The new rule made important changes to the traditional rule for nuisance law.<sup>28</sup> The Second Restatement paired unreasonableness with intentionality, removing the possibility of proving a nuisance through simply substantial and unreasonableness of the interference without any reference to the mental state of the defendant.<sup>29</sup> The remainder of the rule then required that the defendant’s conduct be taken into account. The interference had to either be through negligent or reckless conduct or, alternatively, be a product of abnormally dangerous activities. This meant, the Second Restatement concluded, “[I]ability for an invasion of interests in the use and enjoyment of land now depends upon the presence of some type of tortious conduct.”<sup>30</sup> No longer would nuisance be measured simply by the idea of whether or not there was an unreasonable interference.

The Second Restatement justified this change from the previous volumes by arguing that the treatise was fixing a confusion in the existing law. The Second Restatement explained, “[f]ailure to recognize that private nuisance has reference

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<sup>27</sup> *Id.* § 822.

<sup>28</sup> For further discussion of the multiple changes introduced by this section of the Second Restatement, see Hon. Robert E. Keeton, *Restating Strict Liability and Nuisance*, 48 VAND. L. REV. 595 (1995).

<sup>29</sup> As explained in the Second Restatement:

An invasion of a person’s interest in the private use and enjoyment of land by any type of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional. A person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case, and he is subject to liability for an unintentional invasion when his conduct is negligent, reckless or abnormally dangerous. RESTATEMENT (SECOND) OF TORTS § 822 cmt. c (AM. LAW INST. 1979).

<sup>30</sup> *Id.*

to the interest invaded and not to the type of conduct that subjects the actor to liability has led to confusion.”<sup>31</sup> In other words, the Second Restatement authors believed that the differentiating factor for nuisance law was the context of land—rather than any different requirement of conduct from the unusual requirements of tort law generally. The authors continued, “[t]hus, in respect to an interference with the use and enjoyment of land, attempts are made to distinguish between private nuisance and negligence, overlooking the fact that private nuisance has reference to the interest invaded and negligence to the conduct that subjects the actor to liability for the invasion.”<sup>32</sup>

At the time, a few courts followed the practice that the Restatement was describing—but only a few. The Second Restatement took the position that relying on negligence was the better and more logical approach to nuisance law. The authors justified this position by arguing that nuisance law was traditionally a matter of strict liability and that it should change to accommodate the general trend of tort liability. The authors explained:

[t]his confusion is mainly due to a failure to notice in respect to private nuisance the change that has occurred in the basis of tort liability. In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability.<sup>33</sup>

The Second Restatement maintained that

[t]his change came later in the law of private nuisance than in other fields. Private nuisance was remediable by an action on the case irrespective of the type of conduct involved. Thus the form of action did not call attention to the change from strict liability to liability based on conduct.<sup>34</sup>

The authors went on to argue, “the change has occurred, and an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct.”<sup>35</sup>

As will be discussed in further detail below, these assertions about the state of the law and the transformation of law were not quite accurate. As explained below, the law had changed in only a couple of jurisdictions as of the

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<sup>31</sup> *Id.* § 822 cmt. b.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

time of publication, and 40 years later, it remains the minority rule and one that is highly opposed by the majority of jurisdictions.

### C. Courts Adopting the Second Restatement's Position

Some courts follow the Second Restatement's position explicitly.<sup>36</sup> These jurisdictions adopted definitions of nuisance that match the Restatement's three categories of intent. For example, in South Dakota

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<sup>36</sup> Ohio, for instance, has adopted the Second Restatement's language requiring intent or negligence. *Hurier v. Gumm*, No. CA99-01-005, 1999 Ohio App. LEXIS 5122, at \*11 (Ohio Ct. App. Nov. 1, 1999). New Jersey, similarly, follows the Second Restatement's position. *Birchwood Lakes Colony Club v. Medford Lakes*, 449 A.2d 472, 477 (N.J. 1982). Mirroring this approach, Texas finds that "a defendant can be liable for causing a nuisance if the defendant intentionally causes it, negligently causes it, or—in limited circumstances—causes it by engaging in abnormally dangerous or ultra-hazardous activities." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 588 (Tex. 2016). New York adopts the Second Restatement's approach, making unreasonableness work only in the context of intentional acts. *Nalley v. Gen. Elec. Co.*, 630 N.Y.S.2d 452, 455 (N.Y. Sup. Ct. 1995); *Anderson v. Elliott*, 24 A.D.3d 400, 400 (N.Y. App. Div. 2005). Pennsylvania also links intent with unreasonableness. *Karpiak v. Russo*, 676 A.2d 270, 272 (Pa. Super. Ct. 1996). Mississippi follows the same approach. *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995). Wisconsin also requires a tortious act to create liability. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 669 ("If the conduct of the defendant is not of a kind that subjects him to liability the nuisance exists, but he is not liable for it.") (alterations omitted).

A few courts specifically take adopting the Second Restatement's position to require the merger of negligence and nuisance. See *Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 973 (S.D. Ohio 2015) ("[Courts] have held that at the summary judgment stage, nuisance and negligence 'merge, as the nuisance claims rely upon a finding of negligence.'"); *N.N. Int'l (USA) Corp. v. Gladden Props., L.L.C.*, No. 103909/09, 2016 N.Y. Misc. LEXIS 2546, at \*20 (N.Y. Sup. Ct. May 31, 2016) (noting that "nuisance, either public or private, based on negligence and whether characterized as either negligence or nuisance, is but a single wrong") (citations omitted); *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 403–04 (N.Y. App. Div. 1997) ("In the absence of negligence or intent, a cause of action to recover damages arising from a private nuisance cannot be maintained."). A few jurisdictions had reached this position before the Second Restatement. See *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 972 (N.Y. 1977) ("A nuisance, either public or private, based on negligence and whether characterized as either negligence or nuisance, is but a single wrong, and 'whenever a nuisance has its origin in negligence,' negligence must be proven, and a plaintiff 'may not avert the consequences of his or her own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance.'") (citations omitted); *Culwell v. Abbott Constr. Co.*, 506 P.2d 1191, 1196 (Kan. 1973) ("[A] nuisance may result from conduct which is intentional or negligent or conduct which falls within the principle of strict liability without fault. The point is that nuisance is a result and negligence is a cause and they cannot be distinguished otherwise.").

Other courts refuse to equate nuisance and negligence, even while adopting the Second Restatement's general approach to liability. See *Physicians Plus Ins. v. Midwest Mut. Ins.*, 646 N.W.2d 777, 792 n.22 (Wis. 2002) (adopting a standard of negligent, intentional or abnormally dangerous, but also maintain that "negligence and nuisance are distinct torts, and that negligence is just one way (as opposed to intentional) that a nuisance can be maintained").

one is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either: (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.<sup>37</sup>

In these courts, provided that there is no intent or abnormally dangerous activity, where the court finds that there is no negligence, then the nuisance claim is automatically "resolved" by the determination of the negligence action.<sup>38</sup>

Other courts have arrived at the Second Restatement's position through a more roundabout method. In Connecticut, for example, foreseeability is not directly a part of establishing the elements of an action for nuisance. Instead, the court specifically requires that the "condition have a natural tendency to create danger and inflict injury upon person or property" and this is, thereafter, linked with it being "reasonably foreseeable that the kind of injury complained of could result from the condition alleged to be a nuisance."<sup>39</sup> Additionally, other courts have resisted adopting the Second Restatement's approach to the absolute exclusion of other approaches. For example, Kansas follows the Second Restatement's approach, but also acknowledges that there may be "very rare exceptions" to the Second Restatement's three-prong path to liability.<sup>40</sup> Louisiana, which explicitly rejects the common law of nuisance,<sup>41</sup> does not adopt

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<sup>37</sup> *Atkinson v. City of Pierre*, 706 N.W.2d 791, 796 (S.D. 2005). Notably, however, it is not clear that South Dakota does not permit a finding of nuisance in a larger spectrum of cases. This is because in South Dakota, it is possible to bring a cause of action for nuisance under either a common law approach or under the statutory scheme for nuisance. *Id.* at 795. The statutory definition reads quite differently from the common law rules quoted above. The statutory definition includes an act that "[i]n any way renders other persons insecure in life, or in the use of property." S.D. CODIFIED LAWS § 21-10-1 (2017). Case law suggests that the statutory approach to nuisance in South Dakota is more similar to the traditional focus on reasonableness. *See Prairie Hills Water & Dev. Co. v. Gross*, 653 N.W.2d 745, 752 (S.D. 2002) ("[T]he existence of a nuisance is subject to a rule of reason. It involves the maintenance of a balance between the right to use property and the right to enjoy property unaffected by others' uses.' The ultimate question in each cause is whether the challenged use is reasonable in view of all of the surrounding circumstances.") (citation omitted). In contrast, when applying the common law approach to nuisance, South Dakota courts tend to think more in terms of negligence, or at least conduct of the actor, requiring landowners to exercise a duty of "ordinary care." *Collins v. Barker*, 668 N.W.2d 548, 553 (S.D. 2003).

<sup>38</sup> *Follett v. Mulberry Mobilehome Park Assocs.*, No. B244102, 2014 Cal. App. Unpub. LEXIS 1910, at \*2 (Cal. Ct. App. Mar. 18, 2014).

<sup>39</sup> *Cty. of Westchester v. Town of Greenwich*, 870 F. Supp. 496, 501 (S.D.N.Y. 1994).

<sup>40</sup> *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239, 246 (Kan. Ct. App. 1981).

<sup>41</sup> *Rodrigue v. Copeland*, 475 So. 2d 1071, 1077 (La. 1985) ("[T]he common law of nuisance has no binding, precedential value in the courts of this state.").

the Second Restatement's approach specifically, but by statute, does focus on "the exercise of reasonable care," applying a "should have known" standard.<sup>42</sup>

It's important to clarify the somewhat ambiguous term "intentional" in the context of a nuisance action. Some jurisdictions that adopt the Second Restatement's language, appear to interpret intent simply by contrasting it with negligence.<sup>43</sup> In 1996, the Supreme Court of South Dakota addressed this ambiguity in the case law. The court first explained that "[i]ntent' in its most commonly used sense, means (1) a state of mind; (2) about consequences of a given act, not about the act itself; and (3) having in mind a desire to cause certain consequences knowing these consequences are substantially certain to result."<sup>44</sup> The court then went on to explain how this worked in the nuisance context: "Furthermore, an intentional intrusion in the nuisance context is an invasion that the actor knowingly causes, [such as] natural stray voltage, in the pursuit of a laudable enterprise, [such as] provision of electrical power, without any desire to cause harm."<sup>45</sup>

At this point, the court's meaning is not entirely clear, but the court goes on to explain very clearly that, "[i]t is not enough to make an invasion intentional that the actor realizes or should realize that this conduct involves a serious risk or likelihood of causing the invasion."<sup>46</sup> The court seeks a higher standard: "The actor must either act for the purpose of causing it or know that it is resulting or is substantially certain to result."<sup>47</sup> Applying this to the case before the court in that instance, the court explained that

[t]he knowledge element on which the definition of "intentional invasion" turns exists not when the electric power company knows it is providing electricity with a natural by-product being stray voltage and ground current, but when the company knows these phenomena are occurring at unreasonable levels, causing harm and continues to act to cause the harm.<sup>48</sup>

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<sup>42</sup> LA. CIV. CODE ANN. art. 667 (2017).

<sup>43</sup> Thus, a court can find that

it has been said that in many, if not in most, instances the existence of a nuisance presupposes negligence. Unless a nuisance is based on action that is intentional and unreasonable, if an act or condition can become a nuisance only by reason of the negligent manner in which it is performed or permitted, a right of recovery cannot be shown independently of the existence of negligence.

*Sandifer Motors, Inc.*, 628 P.2d at 245.

<sup>44</sup> *Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 762 (S.D. 1996).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (alterations omitted).

<sup>48</sup> *Id.*

The court focuses not on the risk or likelihood, but on the creation of actual harm.

More commonly, however, jurisdictions adopt the Second Restatement language but do not focus on the intent to harm. Instead, these jurisdictions focus on simple knowledge. This is the approach that the Second Restatement itself follows.<sup>49</sup> “Occasionally, a nuisance proceeds from a malicious desire to do harm, but usually a nuisance is intentional in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiffs’ interest is substantially bound to follow therefrom.”<sup>50</sup> Similarly, in Georgia, the Court of Appeals explained that

[o]ccasionally, the defendant may act from a malicious desire to so harm for its own sake, but more often the situation involving a private nuisance is one where the invasion is intentional merely in the sense that the defendant has created or continued the interference with full knowledge that the harm to the plaintiff’s interests are occurring or are substantially certain to follow.<sup>51</sup>

In this approach, the nuisance is intentional if either “the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.”<sup>52</sup> A number of jurisdictions follow this approach, requiring either the purpose to harm or knowledge.<sup>53</sup>

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<sup>49</sup> RESTATEMENT (SECOND) OF TORTS § 825 (AM. LAW INST. 1979).

<sup>50</sup> *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 320 (W.D. Tenn. 1986).

<sup>51</sup> *Fielder v. Rice Constr. Co.*, 522 S.E.2d 13, 16 (Ga. Ct. App. 1999).

<sup>52</sup> *Vogel v. Grant-Lafayette Elec. Coop.*, 548 N.W.2d 829, 835 (Wis. 1996).

<sup>53</sup> *See, e.g., Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (adopting essentially identical language to *Vogel*); *Keeney v. Town of Old Saybrook*, No. CV 91 0396716S, 1996 Conn. Super. LEXIS 2748, at \*1 (Conn. Super. Ct. Oct. 23, 1996) (same); *United Proteins, Inc. v. Farmland Indus., Inc.*, 915 P.2d 80, 85 (Kan. 1996) (same); *Keiswetter v. Petoskey*, 335 N.W.2d 94, 97 (Mich. Ct. App. 1983) (same); *Morgan v. Quailbrook Condo. Co.*, 704 P.2d 573, 575 (Utah 1985) (same). *But see Traver Lakes Cmty. Maint. Ass’n v. Douglas Co.*, 568 N.W.2d 847, 852 (Mich. Ct. App. 1997) (“Unlike a claim of negligence, the defendant’s intent in causing a trespass or a nuisance is generally irrelevant.”).

Additionally, some jurisdictions that do not follow the Restatement’s approach, but also designate some nuisances as intentional, use similar language restricting intent to either purpose or knowledge. *See Accashian v. City of Danbury*, No. XO1CV 970147228S, 1999 Conn. Super. LEXIS 36, at \*25 (Conn. Super. Ct. Jan. 5, 1999) (finding that the invasion is intentional where the actor acted “for the purpose of causing it or know that it is resulting or is substantially certain to result”).

### III. ANOTHER METHOD OF INCORPORATING NEGLIGENCE DOCTRINES INTO NUISANCE: DOES NUISANCE DOCTRINE INCORPORATE THE KEY TORT CONCEPT OF FORESEEABILITY?

Before turning to the topic of the resistance maintained by the majority of jurisdictions to the Second Restatement's position, it is appropriate to pause to consider another way that nuisance law can be shifted in the direction of tort concepts—particularly as a result of influence of negligence concepts on the law of nuisance. Specifically, it is worth considering how courts have included the concept of foreseeability, a traditional negligence concept, in the law of nuisance. The simple question is whether nuisance doctrine incorporates the key tort concept of foreseeability.

The complexity of American nuisance law should prevent a simple answer to this question, even in any one jurisdiction. Nuisance liability emerges from three to four separate bases and courts approach foreseeability differently in each of these circumstances. Therefore, theoretically, it would be necessary to ask the question much more specifically to be assured of an accurate answer. In jurisdictions that follow the Second Restatement's position, liability emerges from intent, negligence, or strict liability. Where damages result from negligence, there is a split in jurisdictions regarding whether or not foreseeability limits damages.<sup>54</sup> In jurisdictions that do not adopt the Second Restatement's limitation of nuisance to intent, negligence, and strict liability, there is an additional basis for liability: unreasonable interferences, whatever the mental state of the defendant. While logically the multiple methods of establishing nuisance liability should lead to different takes on how the doctrine of foreseeability works in the context of nuisance law, the trend has been more toward overarching statements that either allow foreseeability considerations or refuse them.

Some courts have made broad general statements against including any ideas of foreseeability in an analysis of nuisance.<sup>55</sup> For example, some courts

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<sup>54</sup> See Peter B. Kutner, *The End of Rylands v. Fletcher?* Cambridge Water Co. v. Eastern Counties Leather Plc, 31 TORT & INS. L.J. 73, 74 (1995).

<sup>55</sup> Many such general statements relate to the relationship between public nuisance law and foreseeability. While this article focuses specifically on private nuisance and therefore does not address this in any depth, it is worth pausing to note that courts adopt multiple viewpoints on the relationship.

Where the cause of action for public nuisance lies against a public entity or local government, some jurisdictions use foreseeability to limit the duty of care. *Housing Auth. v. Superior Court*, no. A032085, 18 Cal. Rptr. 2d 218, 245 (Cal. Ct. App. Mar. 30, 1993). Some jurisdictions, while not explicitly using the concept of foreseeability, do employ the language of "knows or has reason to know" in defining public nuisance liability. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 625 (S.D.N.Y. 2001). The Second Restatement of Torts adopted this position, noting that circumstances indicating an unreasonable interference include whether "the actor knows or has reason to know" that her conduct "has a significant effect upon the public right."

state specifically that foreseeability is not a concern in private nuisance cases: “In determining whether a defendant’s conduct is ‘unreasonable’ in a nuisance case, the test is not unreasonable risk or foreseeability as these terms are used in negligence cases.”<sup>56</sup> Other courts have extended this doctrine to the context of public nuisances as well, refusing to require foreseeability for public nuisances. The Pennsylvania Supreme Court held that “[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance.”<sup>57</sup>

On the other hand, in some jurisdictions courts have made broad declarations that accept the concept of foreseeability. The Supreme Court of Indiana, for example, has said that the very “essence of a nuisance claim is the foreseeable harm unreasonably created by the defendants’ conduct.”<sup>58</sup> More commonly, however, when a court openly endorses foreseeability, the context is for public nuisance claims rather than private nuisance claims.<sup>59</sup>

Additionally, a jurisdiction may require that a nuisance be proved through proximate cause.<sup>60</sup> For example, Connecticut defines a nuisance as: “(1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the

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RESTATEMENT (SECOND) OF TORTS § 821B(2)(c) (AM. LAW INST. 1979). On the other hand, in some jurisdictions “[q]uestions of pinpointed duty, foreseeability, remoteness, intent, or the ‘wrongfulness’ of defendant’s conduct are not at issue in public nuisance *abatement* actions brought by the State.” *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 113 (N.Y. App. Div. 2003) (emphasis in original).

<sup>56</sup> *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992) (citation omitted).

<sup>57</sup> *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 883 (Pa. 1974). The Texas Court of Appeals has, similarly, found that “[w]hile foreseeability is required before a duty will be found in the negligence context, it is not a requirement of a nuisance claim.” *Dodson v. Javelina Co.*, No. 13-95-481-CV, 1997 Tex. App. LEXIS 1708, at \*5 (Tex. App. Apr. 3, 1997).

<sup>58</sup> *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003); *KB Home Ind., Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 306 (Ind. Ct. App. 2010).

<sup>59</sup> *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1127 (Ill. 2004) ((citing *Lee v. Chicago Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992)) (“The proper inquiry regarding legal cause involves an assessment of foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct.”)); *McGhee v. Norfolk & S. Ry.*, 60 S.E. 912, 913 (N.C. 1908) (finding that when the plaintiff sues for special damages by reason of a public nuisance, he must show as an essential element in his cause of action that such nuisance was the proximate cause of his injury); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 451 (R.I. 2008) (quoting and agreeing with *City of Chicago* on this point).

<sup>60</sup> For a discussion of how proximate cause can serve as a defense to nuisance, see Justin Pidot, Note, *The Applicability of Nuisance Law to Invasive Plants: Can Common Law Liability Inspire Government Action?*, 24 VA. ENVTL. L.J. 183, 203–06 (2005). As one might expect, the idea of foreseeability is particularly important in the context of environmental law, where often injuries result from actions that were taken long ago or with less knowledge than we currently possess about a toxic substance.



nuisance was the proximate cause of the plaintiffs' injuries and damages."<sup>61</sup> In such circumstances, foreseeability of the damages becomes a requirement to recover due to the general definition of a proximate cause.<sup>62</sup> "Proximate cause is a more exacting standard than simple 'but for' causation."<sup>63</sup>

While general causation has long been a part of the nuisance analysis, requiring proximate cause is a minority position. Many jurisdictions refuse to require proximate causation.<sup>64</sup> The difference is substantial, because proximate causation imposes that more exacting standard on the plaintiffs, increasing the proof necessary to establish a claim for nuisance. Such a change makes a not

<sup>61</sup> *Bentley v. City of New Haven*, No. CV970403487S, 2001 Conn. Super. LEXIS 2505, at \*7 (Conn. Super. Ct. Sept. 4, 2001). In Connecticut, foreseeability can also be relevant in determining reasonableness. *See Peterson v. Oxford*, 459 A.2d 100, 103 (Conn. 1983).

The issue of reasonableness is a question of fact to be determined on a case by case basis, considering all the relevant circumstances, including such factors as the amount of harm caused, its foreseeability, the purpose or motive with which the act was done, and the consideration of whether the utility of the use of the land outweighed the gravity of the harm resulting.

*Id.*

A few other jurisdictions, similarly, include proximate cause as a basic element of a private nuisance claim. *George v. Hercules Real Estate Servs., Inc.*, 795 S.E.2d 81, 87 (Ga. Ct. App. 2016) ("Proximate cause is also an essential element in a nuisance claim."); *Hall v. Phillips*, 436 N.W.2d 139, 145 (Neb. 1989) ("One may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities."); *Home Sales, Inc. v. City of N. Myrtle Beach*, 382 S.E.2d 463, 469 (S.C. Ct. App. 1989) (requiring proximate causation for the injury); *DeYoung v. Cenex Ltd.*, 1 P.3d 587, 590 (Wash. Ct. App. 2000) (recognizing that proximate cause is an element of a nuisance claim).

<sup>62</sup> For example, Texas applies this definition: "[A]n act or omission is a proximate cause of the plaintiff's injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable consequence of the act or omission." *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 967 (E.D. Tex. 1997). *But see Lever Bros. Co. v. Langdoc*, 655 N.E.2d 577, 584 (Ind. Ct. App. 1995) ("The fundamental element of proximate cause is that the injury or consequence of the wrongful act be of a class reasonably foreseeable at the time of the act."); *Dodson*, 1997 Tex. App. LEXIS 1708, at \*5 (stating that foreseeability is not required for a nuisance claim).

<sup>63</sup> *Lead Indus. Ass'n*, 951 A.2d at 451.

<sup>64</sup> *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 264 (D.N.J. 2000) (finding that public nuisance "does not require a showing of proximate cause"). Recently, the Federal District Court for the District of New York considered the history of nuisance and proximate causation in state court decisions. The court found that "[t]he label 'proximate cause' is occasionally employed in public nuisance actions," but that such "cases often involve more than one cause of action or are otherwise ambiguous." *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 496 (E.D.N.Y. 2003) As a result, the court concluded that, "[t]he rule employed with respect to limitations on liability, whatever label is used, in public nuisance actions must be less restrictive than in individual tort actions." *Id.*

insignificant movement in the jurisprudence towards limiting nuisance law as a remedy for property damage by neighbors.

#### IV. EXPLICIT RESISTANCE TO THE SECOND RESTATEMENT'S POSITION AND THE MOVEMENT OF NEGLIGENCE DOCTRINES INTO NUISANCE

A number of jurisdictions continue to resist the Second Restatement's alignment of nuisance with negligence. American Jurisprudence summarizes the position of these jurisdictions: "The terms 'negligence' and 'nuisance' are not synonymous. They describe completely distinct concepts, which constitute distinct torts, different in their nature and in their consequences."<sup>65</sup> Therefore, "[a] claim of nuisance is more than a claim of negligence, and negligent acts do not, in themselves, constitute a nuisance; rather, negligence is merely one type of conduct upon which liability for nuisance may be based, and thus, negligence is not a necessary ingredient of a nuisance."<sup>66</sup>

Jurisdictions that resist the negligence approach to nuisance tend to reason that nuisance is about the nature of the land.<sup>67</sup> Indeed, such courts often note that, "the crux of a nuisance case is unreasonable land use."<sup>68</sup> In other words, the only potential duty at issue in a nuisance action is "the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property."<sup>69</sup> As a result, some courts would maintain that "a nuisance is a property action."<sup>70</sup>

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<sup>65</sup> 58 AM. JUR. 2D *Nuisances* § 6 (2018).

<sup>66</sup> *Id.*

<sup>67</sup> A number of jurisdictions that resist the Restatement's approach also maintain the traditional definition of nuisance as simply something that interferes with the use and enjoyment of property. *See, e.g.,* *Payne v. Skaar*, 900 P.2d 1352, 1353 (Idaho 1995) (noting the statutory definition of a nuisance as "[a]nything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway is a nuisance"); *State ex rel. Fallis v. Mike Kelly Constr. Co.*, 638 P.2d 455, 456 n.4 (Okla. 1981) ("A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: (1) "Annoys, injures or endangers the comfort, repose, health, or safety of others;" or (2) "Offends decency;" or (3) "Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway;" or (4) "In any way renders other persons insecure in life, or in the use of property."); *Palazzolo v. State*, No. WM 88-0297, 2005 R.I. Super. LEXIS 108, at \*18 (R.I. Super. Ct. July 5, 2005) ("A private nuisance involves an interference with the use and enjoyment of land. It involves a material interference with the ordinary physical comfort or the reasonable use of one's property.").

<sup>68</sup> *Booker v. Foose*, 613 S.E.2d 94, 97 (W. Va. 2005).

<sup>69</sup> *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992).

<sup>70</sup> *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 321 (W.D. Tenn. 1986).

There is a certain logical alignment in thinking that the focus should be about land use: traditionally, rights in land are necessary to bring a suit for nuisance.<sup>71</sup> And recovery is based on “a significant harm to their property rights or privileges caused by the interference.”<sup>72</sup> To maintain a cause of action for nuisance, a plaintiff must either have ownership or control of the land.<sup>73</sup> Standing is broad enough to encompass those who have an “interest in the use and enjoyment of easements and profits.”<sup>74</sup> Simply put, “[t]he concept of a private nuisance does not exist apart from the interest of a landowner.”<sup>75</sup>

Additionally, courts continue to recognize the centrality of property to the concept of a nuisance claim. As the Supreme Court of Michigan explained, “[t]he essence of private nuisance is the protection of a property owner’s or occupier’s reasonable comfort in occupation of the land in question.”<sup>76</sup> A nuisance is an action that is “based on a disturbance of rights in land.”<sup>77</sup> Without the focus on the use and enjoyment of land,<sup>78</sup> “the fact of personal injury, or of interference with some purely personal right, is not enough” to establish a claim for nuisance; such claims fall in tort more generally, but not in the law of

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<sup>71</sup> See *Murphy v. Hillside Vill. Condo. Ass’n*, No. CV 960254486S, 1997 Conn. Super. LEXIS 1999, at \*4 (Conn. Super. Ct. July 22, 1997) (“[A] private nuisance exists only where one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land. Accordingly, a claim for private nuisance may be brought by one who enjoys ownership of an interest in land.”). The requirement in modern law does not focus on ownership, and indeed ignores the “quality of the tenure.” *Id.* at \*7. A variety of property rights can support a claim for nuisance. *Id.* (“[F]or private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including (a) possessors of land, (b) owners of easements and profits in the land, and (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment . . . . [P]ossessors of land encompass ‘not only owners of possessory estates in fee simple absolute, but also owners of any possessory estate.’”).

<sup>72</sup> *Hendricks v. Stalnaker*, 380 S.E.2d 198, 201 (W. Va. 1989) (citing RESTATEMENT (SECOND) OF TORTS §§ 821E–F (AM. LAW INST. 1979)).

<sup>73</sup> *Fielder v. Rice Constr. Co.*, 522 S.E.2d 13, 16 (Ga. Ct. App. 1999).

<sup>74</sup> *Id.*

<sup>75</sup> *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239, 242 (Kan. Ct. App. 1981).

<sup>76</sup> *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992).

<sup>77</sup> *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368, 379 n.3 (Ind. Ct. App. 2002).

<sup>78</sup> While the focus of a nuisance claim is land, where a land use is substantial and unreasonable and causes personal injury to the neighbors, some jurisdictions allow recovery for those injuries. See *Koll-Irvine Ctr. Prop. Owners Ass’n v. Cty. of Orange*, 29 Cal. Rptr. 2d 664, 668 (Cal. Ct. App. 1994) (“But these are elements of damage which must be caused by an interference with a property right . . . . [D]amages for private nuisance may include recovery for diminution in value and for annoyance, inconvenience, or discomfort.”); *Bowers v. Westvaco Corp.*, 419 S.E.2d 661, 667 n.7 (Va. 1992) (“A litigant in a private nuisance action is entitled to recover, as an element of damages, compensation for physical or emotional injuries resulting from a nuisance which has endangered ‘life or health.’”).

nuisance, which is restricted to land.<sup>79</sup> This restriction is appropriate because it is the very nature of nuisance law to “provide[] a mechanism for resolving conflicts between competing, simultaneous uses of nearby property by different landowners.”<sup>80</sup> Indeed, scholars continue to believe that nuisance law performs a key function in land use control,<sup>81</sup> as well as in environmental law.<sup>82</sup>

Courts refusing to adopt the Second Restatement’s position tend to stick to the traditional definition of nuisance as “a substantial and unreasonable interference with the private use and enjoyment of another’s land.”<sup>83</sup> Such

<sup>79</sup> Turnbaugh v. Anderson, 793 P.2d 939, 943 (Utah Ct. App. 1990).

<sup>80</sup> Lilly Indus. v. Health-Chem Corp., 974 F. Supp. 702, 706 (S.D. Ind. 1997); see also Sowers v. Forest Hills Subdivision, 294 P.3d 427, 431 (Nev. 2013) (“When deciding whether one’s use of his or her property is a nuisance to his neighbors, it is necessary to balance the competing interests of the landowners, using a commonsense approach.”) (quoting 66 C.J.S. *Nuisances* § 13 (2012)); Palazzolo v. State, No. WM 88-0297, 2005 R.I. Super. LEXIS 108, at \*22 (R.I. Super. Ct. July 5, 2005) (“Historically the law of private nuisance has been applied to conflicts between neighboring, contemporaneous land uses.”) (quoting *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 957 (R.I. 1994)).

<sup>81</sup> Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729 (1973) (describing how communities control land use through community norms, including through the use of nuisance law).

<sup>82</sup> For a discussion of the many uses of nuisances across a variety of different types of cases, see Epstein, *supra* note 7. Nuisance law also fails to effectively protect the environment in many contexts. See Butler, *supra* note 16, at 857–58 (2013) (arguing that nuisance can address water and air pollution, but not the destruction of habitat or ecosystem services).

<sup>83</sup> Browning v. Halle, 632 S.E.2d 29, 32 (W. Va. 2005) (quoting Syl. Pt. 1, *Hendricks v. Stalnaker*, 380 S.E.2d 198 (W. Va. 1989); see also *Yslava v. Hughes Aircraft Co.*, No. CIV-91-525-TUC-ROS, 1998 U.S. Dist. LEXIS 17228, at \*40 (D. Ariz. June 26, 1998) (noting that the standard of substantial and unreasonable interference applies to private nuisance); *Miller v. Jasinski*, 705 S.W.2d 442, 443 (Ark. Ct. App. 1986) (“A nuisance is defined as conduct by one landowner which unreasonably or unlawfully interferes with the use and enjoyment of the lands of another and includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property.”); *Allison v. Smith*, 695 P.2d 791, 794 (Colo. App. 1984) (“To demonstrate its existence a plaintiff must show that the defendant unreasonably and substantially interfered with the use and enjoyment of his property.”); *Saadeh v. Stanton Rowing Found., Inc.*, 912 So. 2d 28, 32 (Fla. Dist. Ct. App. 2005) (“A court examining a claim of nuisance must focus not only upon legality, but also upon reasonableness of the use, ‘as such use affects the public and private rights of others’ and ‘must of necessity be determined from the facts and circumstances of particular cases as they arise.’”) (citation omitted); *Sumitomo Corp. of Am. v. Deal*, 569 S.E.2d 608, 612 (Ga. Ct. App. 2002) (finding that liability must exist, “however socially desirable the conduct,” provided that “the interference that is the consequence of the activity is substantial and considered to be unreasonable”); *Wash. Suburban Sanitary Comm’n v. CAE-Link Corp.*, 622 A.2d 745, 750 (Md. 1993) (“Virtually any disturbance of the enjoyment of the property may amount to a nuisance so long as the interference is substantial and unreasonable and such as would be offensive or inconvenient to the normal person.”); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at \*61 n.60 (Mass. Super. Ct. July 13, 2000) (defining nuisance in terms of a substantial and unreasonable interference); *Dunlop v. Daigle*, 444 A.2d 519, 520 (N.H. 1982) (defining nuisance in terms of substantial and unreasonable interferences); Sowers

approaches may also explicitly note that the doctrine includes unintentional acts. The Maine Supreme Court, for example, noted that nuisance requires that “[t]here was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended.”<sup>84</sup> At its heart, the test is simply a question of property as a social mechanism—nuisance is a balancing “between the rights of adjoining property owners.”<sup>85</sup> Although often described as a tort, the law of nuisance focuses on property rights, “recogniz[ing] the inherent conflict between the rights of neighboring property owners.”<sup>86</sup> This is precisely why the traditional test, and the test maintained by a good number of jurisdictions, focuses on reasonableness: “[t]he unreasonable use element seeks to balance those [competing] rights.”<sup>87</sup>

Additionally, courts may adopt a broader list of potential ways of establishing nuisance liability. Michigan notes “countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant

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v. Forest Hills Subdivision, 294 P.3d 427, 432 (Nev. 2013) (“To sustain a claim for private nuisance, an interference with one’s use and enjoyment of land must be both substantial and unreasonable.”); Lunda v. Matthews, 613 P.2d 63, 66 (Or. Ct. App. 1980) (defining private nuisance in terms of substantial and unreasonable interference); O’Cain v. O’Cain, 473 S.E.2d 460, 466 (S.C. Ct. App. 1996) (applying the unreasonable interference standard); Post & Beam Equitie Grp., L.L.C. v. Sunne Vill. Dev. Prop. Owners Ass’n, 124 A.3d 454, 465 (Vt. 2015) (“To prove a nuisance, plaintiffs must demonstrate an interference with the use and enjoyment of another’s property that is both unreasonable and substantial.”); Arnoldt v. Ashland Oil, 412 S.E.2d 795, 800 (W. Va. 1991) (applying Kentucky law and finding that “nuisance must be ascertained on the basis of two broad factors, neither of which may in any case be the sole test to the exclusion of the other: (1) the reasonableness of the defendant’s use of his property, and (2) the gravity of harm to the complainant.”) (quoting Louisville Ref. Co. v. Mudd, 339 S.W.2d 181, 186 (Ky. 1960)).

Other courts continue to define nuisance in terms of the *sic utero* principle. See Radcliff Homes, Inc. v. Jackson, 766 S.W.2d 63, 66 (Ky. Ct. App. 1989) (“It is a general principle of law that every person may make such use as he will of his own property, provided he uses it in such a manner as not to injure others.”) (quoting Commonwealth *ex rel.* Dep’t of Fish & Wildlife Res. v. Mayer, 357 S.W.2d 879, 881 (Ky. 1962)) (emphasis omitted); O’Cain, 473 S.E.2d at 465 (defining nuisance in terms of not only unreasonable interference, but also “the right of one generally to make such lawful use of his property as he may desire and the right of the other to be protected in the reasonable enjoyment of his property”); Shore v. Maple Lane Farms, L.L.C., 411 S.W.3d 405, 409 (Tenn. 2013) (citation omitted) (“The legal maxim—*sic utere tuo ut alienum non laedas*—directs landowners not to use their property in a way that injures the lawful rights of others. Thus . . . ‘every individual, indeed, has a right to make the most profitable use of that which is his or her own, so that he or she does not injure others in the enjoyment of what is theirs.’ This longstanding principle is the cornerstone of a common-law nuisance claim.”) (citation omitted).

<sup>84</sup> Charlton v. Town of Oxford, 774 A.2d 366, 377 (Me. 2001).

<sup>85</sup> Fletcher v. Independence, 708 S.W.2d 158, 166 (Mo. Ct. App. 1986).

<sup>86</sup> Peters v. ContiGroup, 292 S.W.3d 380, 385 (Mo. Ct. App. 2009).

<sup>87</sup> *Id.* See generally Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1 (2012).

including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment.”<sup>88</sup> Virginia defines a nuisance as “everything that endangers life or health, or obstructs the reasonable and comfortable use of property.”<sup>89</sup> Washington follows an even broader rule established by statute, where

[n]uisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.<sup>90</sup>

Courts that refuse the Second Restatement’s position, emphasize the distinction between condition or land use and conduct. In other words, “nuisance is a condition and does not depend on the degree of care used; it depends on the degree of danger existing with the best of care.”<sup>91</sup> Oregon’s Court of Appeals

<sup>88</sup> *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992).

<sup>89</sup> *Bowers v. Westvaco Corp.*, 419 S.E.2d 661, 665 (Va. 1992) (quoting *Barnes v. Graham Va. Quarries, Inc.*, 132 S.E.2d 395, 397 (Va. 1963)). Tennessee follows much the same standard, finding that a nuisance is “anything which annoys or disturbs the free use of one’s property, or which renders its ordinary use or physical occupation uncomfortable and extends to 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.” *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364 (Tenn. 2002) (quoting *Pate v. City of Martin*, 614 S.W.2d 46, 47 (Tenn. 1981)). Hawaii, which draws its standard from the common law generally, also approaches nuisance with a similar definition. *See Marsland v. Pang*, 701 P.2d 175, 187 (Haw. Ct. App. 1985).

A nuisance has been variously defined to mean “that which unlawfully annoys or does damage to another, anything that works hurt, inconvenience, or damage, anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or physical occupation uncomfortable, and anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.”

*Id.*

<sup>90</sup> *Miotke v. Spokane*, 678 P.2d 803, 816 (Wash. 1984).

<sup>91</sup> *Frank v. Envtl. Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 880 (Mo. 1985). The emphasis on outcomes over duties is an old one and traditional to the common law of nuisance. *See, e.g., Stanley v. Macon*, 97 S.E.2d 330, 332 (Ga. Ct. App. 1957) (“The wrongfulness must have been in the acts themselves, rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction, under the facts of this case, between ‘nuisance’ and ‘negligence.’”); *Foley v. H. F. Farnham Co.*, 188 A. 708, 710 (Me. 1936) (“Nuisance is a violation of an absolute duty; negligence, a failure to use the requisite degree of care in the particular circumstances.”); *Benson v. Loehler*, 178 A.2d 909, 911 (Md. 1962) (quoting *Sherwood Bros., Inc. v. Eckard*, 105 A.2d 207, 211 (Md. 1954) (citation omitted) (“A nuisance exists because of a violation of an absolute duty so that it does not rest on the degree of care used but rather on the degree of danger existing with

finds that nuisance “refers to the interest invaded and not to any type of culpable conduct.”<sup>92</sup> Iowa, similarly,

long recognize[s] a distinction between the claim of nuisance and the claim of negligence. . . . Negligence is a type of liability forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. It [is] called a type of harm.<sup>93</sup>

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the best of care.”); *Hinds v. City of Hannibal*, 212 S.W.2d 401, 403 (Mo. 1948) (“[C]reating or maintaining a nuisance is the violation of ‘the absolute duty of refraining from the participating acts, not merely the relative duty of exercising reasonable care, foresight, and prudence in their performance.’”); *Pearson v. Kan. City*, 55 S.W.2d 485, 489 (Mo. 1932) (“A nuisance does not rest on the degree of care used, but on the degree of danger existing with the best of care.”); *Herman v. City of Buffalo*, 108 N.E. 451, 453 (N.Y. 1915) (“[T]he distinction . . . between nuisance and negligence [is as follows: Nuisance] is a violation of an absolute duty, the other a failure to use the degree of care required in the particular circumstances—a violation of a relative duty.”); *Harris v. Findlay*, 18 N.E.2d 413, 415 (Ohio Ct. App. 1938) (“In the creation or maintenance of a nuisance the wrongfulness must be in the acts themselves, rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction between ‘nuisance’ and ‘negligence.’”); *Weakley Cty. v. Carney*, 14 Tenn. App. 688, 693–94 (Tenn. Ct. App. 1932) (“The distinction lies in the fact that the creation or maintenance of a nuisance is the violation of an absolute duty, the doing of an act which is wrongful in itself, whereas negligence is the violation of a relative duty, the failure to use the degree of care required under the particular circumstances in connection with an act or omission which is not of itself wrongful.”); *Flanagan v. Gregory & Poole, Inc.*, 67 S.E.2d 865, 871 (W. Va. 1951) (“An act done with the best of care may result in a nuisance. The creation of a nuisance is the violation of an absolute duty. Negligence is the violation of a relative duty”) (citations omitted)).

<sup>92</sup> *Lunda v. Matthews*, 613 P.2d 63, 66 (Or. Ct. App. 1980). See also *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 669 (Wis. 2005).

[A] cause of action in nuisance is predicated upon a particular type of injurious consequence, not the wrongful behavior causing the harm. While it is necessary to prove the underlying tortious conduct before liability may attach for a nuisance, it is incorrect to speak of nuisance “as itself a type of liability-forming conduct.” As such, the first step in a nuisance analysis is proof of the particular harm that defines a nuisance—the interference with a private interest in the use and enjoyment of land or with a public right.

*Id.* (citation omitted).

<sup>93</sup> *Martins v. Interstate Power Co.*, No. 1-517 / 00-0791, 2002 Iowa App. LEXIS 586, at \*5 (Iowa Ct. App. Apr. 10, 2002). Virginia, additionally, maintains that “[n]egligence and nuisance are distinct legal concepts,” thus, “[w]hile negligent acts may give rise to the dangerous condition, the acts themselves do not constitute a nuisance.” *Chapman v. City of Va. Beach*, 475 S.E.2d 798, 802 (Va. 1996). Delaware adopted the same approach, distinguishing nuisance and negligence. See *Artesian Water Co. v. Gov’t of New Castle Cty.*, No. 5106, 1983 Del. Ch. LEXIS 496, at \*44 (Del. Ch. Aug. 4, 1983) (“1) [N]egligence is not a necessary element of nuisance (though it may be an element in a finding of nuisance per accidents); 2) a defendant may not impair the reasonable use of another’s property or rights, though the reasonableness of another’s use is determined by weighing the conflicting interests of the parties involved; 3) a nuisance need not be, though it is

Thus, when applying a reasonableness standard, courts are not looking at the defendant's conduct. Indeed, "[t]o award damages, the defendant's conduct, in and of itself, need not be unreasonable."<sup>94</sup> Instead, the proper focus is on the unreasonableness of the interference—the resulting harm.<sup>95</sup>

The second edition of *American Jurisprudence* describes this trend, explaining that "[a]ccording to some courts, the term 'nuisance' does not refer to conduct but rather refers to the interests invaded, as well as to the consequences of conduct—that is, the inconvenience to others, or the damage or harm inflicted, rather than the type of conduct involved."<sup>96</sup> The treatise then finds that in such jurisdictions "[t]here can be a nuisance claim without an underlying actionable conduct, such as negligence, being proved, and such a claim can be established without a showing of intentional conduct."<sup>97</sup> The explanation continues that, "[i]n other words, a cause of action in nuisance is predicated upon a particular type of injurious consequence, not the wrongful behavior causing the harm."<sup>98</sup>

Confusingly, however, a number of jurisdictions that follow the Second Restatement's position of requiring negligence to make a defendant liable for unreasonable conduct also use similar language. In such jurisdictions, courts apply the language of focusing on harm to explain how they differentiate between negligence and nuisance. Thus, Wisconsin, for example, can say that "[n]uisance arises when a particular type of harm is suffered, i.e., nuisance refers to the particular interest that is invaded."<sup>99</sup> In other words, nuisance in such jurisdictions is negligence that happens to cause harm to land.

Nuisance, then, for most jurisdictions, is not about conduct of the defendant, but rather about the harms done to the plaintiff's land.<sup>100</sup> In this way, "[n]uisance describes an effect, not a cause of tort liability, so that conduct antecedent to the interference may not be relevant to remedy."<sup>101</sup> Therefore, "[i]t

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not precluded from being, the result of an intentional violation of the plaintiff's interests."). Courts also may take the same approach to public nuisance. *See* *Dep't of Env'tl. Res. v. PBS Coals*, 534 A.2d 1130, 1136 (Pa. Commw. Ct. 1987) quoting *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 883 (Pa. 1974)) ("The absence of facts supporting concepts of negligence . . . is not in the least fatal to a finding of the existence of a common law public nuisance.").

<sup>94</sup> *Mayes v. Tabor*, 334 S.E.2d 489, 490 (N.C. Ct. App. 1985).

<sup>95</sup> *Id.*

<sup>96</sup> 58 AM. JUR. 2D *Nuisances* § 2 (Supp. 2018).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Butler v. Advanced Drainage Sys.*, 717 N.W.2d 760, 770 (Wis. 2006).

<sup>100</sup> *Fentress Families Tr. v. Va. Elec. & Power Co.*, 81 Va. Cir. 67, 72 (Va. Cir. Ct. 2010) ("In order for there to be an actionable nuisance, it is not necessary that there be a finding of negligence or intentional wrongdoing.") (quoting CHARLES E. FRIEND, *PERSONAL INJURY LAW IN VIRGINIA* 451–52 (3d ed. 2003)).

<sup>101</sup> *Fletcher v. Independence*, 708 S.W.2d 158, 166 (Mo. Ct. App. 1986). Alternatively, negligence might not be entirely irrelevant. In Massachusetts, for example, the courts may use



may be said that negligence is some act or omission in violation of a duty, while a nuisance is a dangerous, unsafe, or offensive condition resulting from some act or omission."<sup>102</sup> Connecticut focuses on the condition directly, listing as the elements of a cause of action for nuisance

(1) the condition complained of has a natural tendency to create danger and inflict injury upon person and property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; and (4) the existence of the nuisance was the proximate cause of the plaintiff's injuries and damages.<sup>103</sup>

Similarly, Minnesota defines nuisance by statute, "in terms of the resultant harm rather than in terms of the kind of conduct by a defendant which causes the harm."<sup>104</sup> In Maryland, "a nuisance claim [does] not depend upon proof of negligence of an offending landowner: nuisance focuses not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff's use and enjoyment of his or her own property."<sup>105</sup>

Although taking a slightly different route, the courts of North Dakota reach a similar result in terms of separating nuisance and negligence, but defining the duty of care in nuisance as an absolute duty that one has as a landowner or neighbor. The North Dakota Supreme Court explained that "[t]he creation or maintenance of a nuisance is a violation of an absolute duty, the doing of an act that is wrongful in itself."<sup>106</sup> The Court contrasted nuisance with negligence, which the Court found "is a violation of a relative duty, the failure to use the degree of care required under particular circumstances in connection with an act or omission that is not of itself wrongful."<sup>107</sup> This means, then, that "[n]uisance is a condition and not an act or failure to act, so that if a wrongful condition

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negligence as a part of the determination of "reasonableness of use of land," but the courts still maintain that negligence "is not determinative of the existence of a private nuisance." *DeSanctis v. Lynn Water & Sewer Comm'n*, 666 N.E.2d 1292, 1296 (Mass. 1996).

<sup>102</sup> *Martins v. Interstate Power Co.*, No. 1-517 / 00-0791, 2002 Iowa App. LEXIS 586, at \*6 (Iowa Ct. App. Apr. 10, 2002).

<sup>103</sup> *Accashian v. City of Danbury*, No. XO1CV 970147228S, 1999 Conn. Super. LEXIS 36, at \*24 (Conn. Super. Ct. Jan. 5, 1999).

<sup>104</sup> *Highview N. Apartments v. Cty. of Ramsey*, 323 N.W.2d 65, 70 (Minn. 1982).

<sup>105</sup> *Wietzke v. Chesapeake Conference Ass'n*, 26 A.3d 931, 948 (Md. 2011).

<sup>106</sup> *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992) (quoting *Knoff v. Am. Crystal Sugar Co.*, 380 N.W.2d 313 (N.D. 1986)).

<sup>107</sup> *Id.*

exists, the person responsible for its existence is liable for resulting damage to others.”<sup>108</sup>

In this approach to nuisance, “[a] defendant’s negligence, intention, design or motive are immaterial to his liability for nuisance.”<sup>109</sup> Not only is negligence “not needed to prove a nuisance,” negligence is not necessarily evidence of a nuisance.<sup>110</sup> Instead, “negligence will only support a finding of nuisance when it constitutes an unreasonable use of land.”<sup>111</sup> Maryland chooses to focus “not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff’s use and enjoyment of his or her property,” which must “cause actual physical discomfort and annoyance.”<sup>112</sup> North Carolina pursues the same approach, finding that “while the same act or omission may constitute negligence as well as give rise to a cause of action for private nuisance per accidens, a nuisance does not require negligence.”<sup>113</sup> Iowa, similarly, explains that, “negligence is not necessarily one of the material elements of nuisance. Negligence is not vital to the establishment of an action based on nuisance.”<sup>114</sup> More specifically, if the focus is on the land use and its appropriateness to the context, then the behavior of the defendant is irrelevant; this means: “liability for nuisance, unlike liability for negligence, exists regardless of the degree of care exercised to avoid injury.”<sup>115</sup> As the Virginia courts have repeatedly explained, “[a] nuisance, however careful it is

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<sup>108</sup> *Id.* A number of courts use similar language, distinguishing nuisance from negligence by pointing to the fact that a nuisance is about a “condition rather than an act or failure to act.” 58 AM. JUR. 2D *Nuisances* § 3 (Supp. 2018).

<sup>109</sup> *Frank v. Envtl. Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 880 n.3 (Mo. 1985).

<sup>110</sup> *Id.* at 882. *See also* *Hilliard v. Huntsville*, 585 So. 2d 889, 892 (Ala. 1991) (“As a general rule, liability for damages caused by a nuisance does not depend upon proof of negligence and may exist even though there has been no negligence.”).

<sup>111</sup> 687 S.W.2d at 882.

<sup>112</sup> *Washington Suburban Sanitary Comm’n v. CAE-Link Corp.*, 622 A.2d 745, 750 (Md. 1993). The Maryland Supreme Court explains the relationship between negligence and nuisance further: “Negligence is not involved in an action with respect to nuisance. The existence of a nuisance is not affected by the intent of its creator not to injure anyone.” *Id.* at 758 (citations omitted). The Court concludes, “Negligence and nuisance are distinct concepts and the defendant’s negligence or failure to act reasonably is not an essential element in a nuisance action. Nuisance is a condition and does not depend on the degree of care used.” *Id.*

<sup>113</sup> *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 368 (M.D. N.C. 1997). However, the Court goes on in the same opinion to note that liability comes from negligence, recklessness or ultra-hazardous conditions, which may suggest that a non-negligent or fully accidental act is not covered. *Id.*

<sup>114</sup> *Martins v. Interstate Power Co.*, No. 1-517, 2002 Iowa App. LEXIS 586, at \*7 (Iowa Ct. App. Apr. 10, 2002).

<sup>115</sup> *Padilla v. Lawrence*, 685 P.2d 964, 968 (N.M. Ct. App. 1984).

conducted is unlawful, and where a nuisance exists, it is immaterial whether the nuisance was created by, or operated with negligence or reasonable care.”<sup>116</sup>

Instead, rather than focusing on the conduct of the actor, the court focuses on the land use itself.<sup>117</sup> The court looks at the land use and asks the consequences to the neighbor, asking whether those are *reasonable* in the social context. The Missouri Court of Appeals explains the approach this way: “It may facilitate a pleader to articulate the nuisance effect—the unreasonable use— by averments in terms of breach of duty of care, intentional conduct, or other theory of action, but it is the unreasonable use determined upon a balance of interests, and not a formal category of action, which determines a nuisance.”<sup>118</sup> The Court concludes, “[t]hus, unreasonable use—and hence private nuisance—may be proven *per se*: a use unreasonable as a matter of law from the very circumstances.”<sup>119</sup> Under such an approach, “[s]o long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.”<sup>120</sup>

Reasonableness, then, allows courts to focus on the appropriateness of land uses rather than on the conduct of the defendant or her mental state. West Virginia, for example, has found that “private nuisance includes conduct that is intentional and unreasonable, negligence or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place.”<sup>121</sup> The Arizona Supreme Court has emphasized this focus of nuisance law: “[i]t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance.”<sup>122</sup> To make the concept concrete, the Court gave this example: “[a] business which is not *per se* a public nuisance may become such by being carried on at a place where the health,

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<sup>116</sup> *Fentress Families Tr. v. Va. Elec. & Power Co.*, 81 Va. Cir. 67, 72–73 (Va. Cir. Ct. 2010) (quoting Charles E. Friend, *Personal Injury Law in Virginia*, 451–52 (3d ed. 2003)).

<sup>117</sup> North Carolina has precisely such a focus on land use. The rule is that, while the same act or omission may constitute negligence as well as give rise to a cause of action for private nuisance *per accidens*, a nuisance does not require negligence. Rather, a nuisance is the improper use of one’s own property in a way which injures the land or other right of one’s neighbor.

982 F. Supp. at 368.

<sup>118</sup> *Fletcher v. Indep.*, 708 S.W.2d 158, 166 (Mo. Ct. App. 1986).

<sup>119</sup> *Id.*

<sup>120</sup> *Oliver v. AT&T Wireless Servs.*, 90 Cal. Rptr. 2d 491, 493 (Cal. Ct. App. 1999).

<sup>121</sup> *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va. 1989) (emphasis added). Utah also follows this approach, finding liability for “activities in an inappropriate place.” *Turnbaugh v. Anderson*, 793 P.2d 939, 942 (Utah Ct. App. 1990).

<sup>122</sup> *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972) (quoting *MacDonald v. Perry*, 90 P.2d 994 (Ariz. 1939)).

comfort, or convenience of a populous neighborhood is affected.”<sup>123</sup> Liability then depends on the circumstances of the land use: “[w]hat might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable.”<sup>124</sup>

Courts generally take this approach to nuisance law, emphasizing the context of the land use. Kansas, for example, adds to the list of ways that something can be a nuisance—the possibility that an activity that is “abnormal and out of place in its surroundings.”<sup>125</sup> This approach is consistent with nuisance law historically. It has long been the rule that a nuisance is determined by the context. As the Supreme Court of Tennessee explained, “an activity or use of property that constitutes a nuisance in one context may not constitute a nuisance in another context.”<sup>126</sup> The Court instead found, “[w]hether an activity or use of property amounts to an unreasonable invasion of another’s legally protected interests ‘depends on the circumstances of each case, such as the character of the surroundings.’”<sup>127</sup>

## V. DOES NEGLIGENCE DOCTRINE BELONG IN NUISANCE?

Having discussed the Second Restatement’s position, and the minority of courts that adopt this position, and the majority that resists, Section V.A turns to the larger philosophical inquiry at hand: which position is a better approach for courts to take to nuisance law? The remainder of this Section discusses the odd situation of nuisance law and the boundary between tort and property law. To emphasize how much a change in intent requirements matters for property law, Section V.B discusses how scholars and jurists have reacted to a similar change in British law.

These discussions provide a background for the later portions of this article, which ultimately argue (1) that the quintessential nature of nuisance sounds in property rather than in tort, and (2) that for the sake of robust protection of our private property rights, and particularly the right to exclude, the better approach to nuisance is the majority position that rejects the Second Restatement conduct requirement.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Rogers v. Allen Utils., Inc.*, No. 59,102, 1986 Kan. App. LEXIS 1526, at \*4 (Kan. Ct. App. Nov. 20, 1986). Wyoming, similarly, assigns liability for nuisance where the land use is “abnormal and out-of place in its surroundings.” *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 977 (D. Wyo. 1998).

<sup>126</sup> *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 415 (Tenn. 2013).

<sup>127</sup> *Id.* at 415–16.

A. *Does the Unique Situation of Land Matter, or is Nuisance a Property Claim or a Tort Claim?*

At the outset of discussing the importance of the property context of a nuisance claim, it is appropriate to consider more generally how nuisance sits at the boundary between tort and property law. Tort and property form two of the most expansive and central fields of law, and yet we remain unable to define with precision the outlines and foundations of either concept.<sup>128</sup> While property theory has developed at a rapid pace within the last decade, we seem better able to say what we want property to do than to clarify precisely what property is.<sup>129</sup> Tort fares no better, and indeed, we may be “incapable of understanding tort law.”<sup>130</sup> We struggle all the more when we try to articulate the boundary between them.

Some years ago, Professors Calabresi and Melamed proposed distinguishing the two fields via property and liability rules, and while this contributed an important foundation, the boundary remains blurred.<sup>131</sup> Calabresi and Melamed’s article has remained a central point of discussion since publication.<sup>132</sup> Yet, scholars have never been comfortable accepting that the property versus liability rules framework fully and accurately articulates the property-tort divide.<sup>133</sup> This past year, Calabresi again highlighted the lack of consensus on this issue by tackling the problem of the “resurgence of torts viewed as a purely private legal arrangement,” and arguing for a “public meaning” of torts via liability rules that are collectively set.<sup>134</sup>

<sup>128</sup> See generally Calabresi & Melamed, *supra* note 8 (illuminating first the intertwined problems of defining property and tort). Calabresi and Melamed note that prior to their article, property and torts were very rarely approached from any unified perspective. *Id.*

<sup>129</sup> Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 959 (2009) (finding that “[m]ost of us have a sense that property is doing something important, but it does it in a somewhat mysterious way”).

<sup>130</sup> Nicholas McBride, *Rights and the Basis of Tort Law*, in RIGHTS AND PRIVATE LAW 331, 332 (Donal Nolan & Andrew Robertson eds., 2011).

<sup>131</sup> E.g. Calabresi & Melamed, *supra* note 8.

<sup>132</sup> See generally Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995).

<sup>133</sup> Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092 (1997); Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1400 (2007).

<sup>134</sup> Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS. 1, 1 & 4 (2014). For a taxonomy of the private or individual rights views of property, see Butler, *supra* note 15, at 856–63 (2013).

Approaching the question from the torts perspective, Nicholas McBride finds that the “vast amount of academic writing on the nature and basis of tort law . . . produced in the last few decades” is “a sign of sickness,” indicating that we are “incapable of understanding tort law.”<sup>135</sup> Indeed, McBride concludes that, by the early 1990s, the “community of tort academics was stuck firmly in the wilderness.”<sup>136</sup> If we were lost theoretically by the mid-90s, recent real-world encounters with practical problems such as climate change have only revealed how much we struggle with central concepts such as harm, causation, and responsibility in tort.<sup>137</sup> Having failed to define either property or tort to our satisfaction, we struggle all the more when we try to articulate their boundary.

In probing the edges of the property-tort divide scholars have repeatedly utilized nuisance as a primary case study, following Calabresi and Melamed’s assertion that nuisance is awkwardly poised on the boundary of the two fields.<sup>138</sup> Nuisance, they explained, is “one of the most interesting areas where the question of who will be given an entitlement, and how it will be protected, is in frequent issue.”<sup>139</sup> Key cases such as *Boomer v. Atlantic Cement Co.*<sup>140</sup> and *Spur Industries, Inc. v. Del E. Webb Development Co.*<sup>141</sup> encouraged this focus by shifting rules in ways seen as moving nuisance law away from property rules and more toward liability rules.<sup>142</sup> Other scholars have followed Calabresi’s lead and used nuisance as the primary case study for exploring the property-tort boundary.<sup>143</sup>

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<sup>135</sup> Nicholas McBride, *Rights and the Basis of Tort Law*, in RIGHTS AND PRIVATE LAW 331, 332 (Donal Nolan & Andrew Robertson eds., 2011).

<sup>136</sup> *Id.* at 332.

<sup>137</sup> Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 1 (2011).

<sup>138</sup> See Calabresi & Melamed, *supra* note 8, at 1092. Nuisance as the primary case study is logical because, as Lee Anne Fennell explains, property rights tend to be “retained in their entirety until someone raises an issue regarding an actual or potential incompatible land use.” Lee Anne Fennell, *Property and Precaution*, 4 J. TORT L. 1, 1 (2011).

<sup>139</sup> Calabresi & Melamed, *supra* note 8, at 1115.

<sup>140</sup> 257 N.E.2d 870, 875 (N.Y. 1970).

<sup>141</sup> 494 P.2d 700, 708 (Ariz. 1972).

<sup>142</sup> Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeal, 1850-1915*, 54 ALB. L. REV. 301, 301 (1990).

<sup>143</sup> See, e.g., Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001) (using pollution as the primary example of harm to a neighboring property); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1409 (2010) (focusing on land-use torts, of which nuisance cases form a substantial part); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 754 (1996) (using industrial pollution and nuisance cases as examples).

Calabresi and Melamed proposed demarcating this boundary by distinguishing between property and liability rules.<sup>144</sup> Their seminal article on the subject focused on how entitlements change hands, explaining how the level of protection received by the entitlement depends on whether property or liability rules are applied. Calabresi and Melamed's scheme focused on the remedies, or "the manner in which entitlements are protected," as a primary point of distinction between property rules and tort rules.<sup>145</sup> Property remedies (i.e., injunctions and supra-compensatory remedies) made taking the entitlement effectively impossible or set the remedy so high that taking would be economically illogical.<sup>146</sup> Such remedies emphasized the quintessential property characteristic of the owner's right to exclude.

On the other hand, liability rules allowed for violation of the owner's right to exclude. Remedies did not punish so much as set compensation at a collectively determined price. As a result, liability rules provided some relief against the "hold out" problem of a single owner refusing to sell and preventing a project more highly valued socially from proceeding.<sup>147</sup> The two rules then align with property rules' focus on protecting entitlements and allowing takings only in the narrowest of circumstances, and tort rules' focus on compensating when a taking has occurred accidentally or must occur to facilitate a higher social good.

Calabresi and Melamed focused on entitlements and remedies to distinguish property rules from liability rules. When property rules apply, the owner is the exclusive gatekeeper—the property can only be taken or infringed upon if the owner willingly sells.<sup>148</sup> On the other hand, if liability rules apply, then the owner's exclusive gatekeeping function yields—someone may take or invade the property, so long as they pay an objectively set value.<sup>149</sup>

Prior to Calabresi and Melamed's work, Frank Michelman illustrated three potential rule choices within the nuisance context.<sup>150</sup> This breadth of rules resulted from the possible permutations of property and liability rules that might protect either the entitlement to quiet enjoyment of the land or the entitlement to pollute. In elucidating Michelman's rule choices by applying them in a hypothetical context, Calabresi and Melamed introduced two imaginary

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<sup>144</sup> Calabresi & Melamed, *supra* note 8, at 1092.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1106–08.

<sup>147</sup> *Id.* at 1107–09.

<sup>148</sup> *Id.* at 1105.

<sup>149</sup> *Id.* at 1105–06. More recently, Calabresi has clarified that the value for the property set by the liability rule is more than objective. It is a collectively set value, which emphasizes the public function of liability rules. Calabresi, *supra* note 134, at 4.

<sup>150</sup> Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 676 (1971).

characters: Taney as a polluter and Marshall as a neighboring landowner.<sup>151</sup> Subsequently, they developed a further example to introduce a fourth type of rule.<sup>152</sup>

Calabresi and Melamed's scheme of rule choices focused on the remedies, or "the manner in which entitlements are protected," as a primary point of distinction between property rules and tort rules.<sup>153</sup> For our purposes, the important points from Calabresi and Melamed's work are the division between property and tort rules and the types of protections that are afforded in the two distinct realms. Property law has historically provided the stronger protections when compared to tort law. For this reason, it matters that courts are struggling against adopting a negligence standard and maintaining that the quintessential nature of nuisance sounds in property rather than in tort.

*B. Reactions to the British Shift to Negligence-based Liability for Hazardous Escapes from Property*

One way to approach the question of the significance of the shift to negligence-based liability is to consider a similar development in British law that caused quite a stir. In British law, courts traditionally protected property rights and attributed liability under a doctrine called "the rule in *Rylands v. Fletcher*."<sup>154</sup> The rule might be otherwise titled, "the rule against lion tamers," for the rule is one of unnatural capture or containment and subsequent escape. In *Fletcher v. Rylands*,<sup>155</sup> Justice Blackburn wrote that the "rule of law is, that the person who for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril."<sup>156</sup> While lion tamers are unusual, *Rylands v. Fletcher*<sup>157</sup> addressed a much more common occurrence for land owners: the containment and release of water.<sup>158</sup> For well over a century, the rule in *Rylands v. Fletcher* prevailed, allocating liability based on the containment, escape, and subsequent damage to the plaintiff rather than considering any questions of the foreseeability of those particular damages.<sup>159</sup>

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<sup>151</sup> Calabresi & Melamed, *supra* note 8, at 1115.

<sup>152</sup> *Id.* at 1116.

<sup>153</sup> *Id.* at 1092.

<sup>154</sup> Kutner, *supra* note 54, at 74.

<sup>155</sup> (1866) 1 LRE 265 (HL) 279 (Eng.).

<sup>156</sup> *Id.*

<sup>157</sup> (1868) 3 LRE 330 (HL) (appeal taken from Eng.), *aff'g* *Fletcher v. Rylands* (1866) 1 LRE 265.

<sup>158</sup> *Id.*

<sup>159</sup> Kutner, *supra* note 54, at 74.



The longstanding rule changed with the House of Lords' decision in *Cambridge Water Co. v. Eastern Counties Leather Plc.*<sup>160</sup> In the *Cambridge Water Co.* case, the House of Lords shifted the rule in *Rylands v. Fletcher* to align with other tort rules. The primary change was that the damages now had to be foreseeable. This change then meant that the damages from escape and entry onto a neighbor's property were treated more like a negligence inquiry and less like a trespass to property.

Scholars and theorists of property and tort responded immediately to this development. In the words of Peter Kutner, the development "[could] be described without exaggeration as 'bombshell.'"<sup>161</sup> British law of nuisance does not equate nuisance with negligence. Instead, there is no particular fault required on the part of the defendant; liability is akin to strict liability.<sup>162</sup> Courts balance that strict approach by limiting damages in nuisance claims damages by way of applying the concept of foreseeability.<sup>163</sup> In adopting the new position limiting *Rylands* liability to foreseeable damages, the House of Lords justified the decision by pointing to how this aligned the *Rylands* rule with the British law of nuisance.<sup>164</sup>

For the purposes of British property law, the change was significant. The primary question is whether the concern facing the court is about the mental state of the defendant or about the harm that is done to property. As Maria Hook put it, "[i]f reasonable foreseeability of harm is an element of nuisance, the function of the tort is to impose liability for wrongful conduct as opposed to wrongful damage."<sup>165</sup> The very heart of the concept of foreseeability is to limit the duty of the actor—"even harmful action cannot meaningfully be viewed as 'wrong' if the actor could not possibly have contemplated that the action might produce the harm."<sup>166</sup>

In the next Part, this article argues that British scholars were correct to emphasize the importance of the shift. This article argues that in terms of

<sup>160</sup> [1994] 2 AC 264 (HL) (Eng.).

<sup>161</sup> Kutner, *supra* note 54.

<sup>162</sup> *Id.* at 92 n.132.

<sup>163</sup> *Id.* at 97 n.156.

<sup>164</sup> *Id.* at 86–87. In the American context, foreseeability occupies a prominent role within the field of torts; notably, however, the Restatement (Third) argued that foreseeability as a nuisance concept should be marginalized. See David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1277–78 (2009). Owen believes that the concept occupies the appropriate place in American tort law currently and, therefore, disagrees with the Restatement (Third)'s position. *Id.*

<sup>165</sup> Maria Hook, *Reasonable Foreseeability of Harm as an Element of Nuisance*, 47 VICT. U. WELLINGTON L. REV. 267, 267 (2016). Hook's article addresses British common law developments.

<sup>166</sup> Owen, *supra* note 164, at 1277–78. Owen notes that foreseeability is one of tort's "most vital moral tethers" because it provides torts with "principle and boundaries" and thereby "defines the nature and scope of responsibility in tort." *Id.* at 1277.

American property law, there is indeed a significant change in moving nuisance law to align with negligence and that such a change is not beneficial. Such a change would improperly reduce property rights and unreasonably expose property owners to damages from neighbors that are unlikely to be compensated.

## VI. THE HISTORICAL DOCTRINE OF NUISANCE AND THE CENTRALITY OF PROPERTY

At the heart of the debate about nuisance law is nothing less than the very core of what the cause of action means and what it protects in the general scheme of private law. If nuisance law is able to dictate the boundaries of property rights, then there is nothing logical about aligning nuisance law to the remainder of tort law. This Part argues that nuisance is quintessentially about property, not about tort. The primary function of nuisance law is to limit the normally rather unlimited freedom that a property owner has to use her land as she likes. If nuisance law is, as the history books would tell us, about the idea of not using your property to injure another (*sic utere tuo ut alienum non laedas*),<sup>167</sup> then the heart of the concept is less about the general idea of wrongful conduct and more about the relational nature of property.

Section VI.A, below, discusses the property origins of nuisance law, drawing on historical sources. Section VI.B discusses the importance of broad nuisance protections for the sake of the right to exclude in property law. Section C turns to the primary objection to broad nuisance protections: the idea that it is too akin to strict liability.

### A. *The Property Origins of Nuisance Law*

The original assize from which nuisance emerged was described as the Assize of Novel Disseisin.<sup>168</sup> The purposes of this cause of action related directly to the rights in land.<sup>169</sup> In particular, the assize assigned liability for interference with easements or natural rights in land.<sup>170</sup> This is the cause of action that eventually became our traditional cause for interference with the use and enjoyment of land.<sup>171</sup> The assize originated for the purposes of “protect[ing] the

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<sup>167</sup> Within nuisance law, this Roman principle famously came into the British common law when Sir Edward Coke applied it within *Aldred's Case* to explain the boundaries of nuisance law. *Aldred's Case*, (1610) 77 Eng. Rep. 816.

<sup>168</sup> JOHN BEAMES, A TRANSLATION OF GLANVILLE 270–77 (1900).

<sup>169</sup> *Id.* at 270–71.

<sup>170</sup> See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 193 (1990) (discussing the origins of the assize of nuisance).

<sup>171</sup> *Id.*

possession of freeholders.”<sup>172</sup> In short, nuisance “protected the rights of landowners to use and enjoy their property free from interference by others.”<sup>173</sup> One of the ideals of nuisance law is to compensate landowners where the nuisance would “diminish the comfort, enjoyment, or value of the property which is affected.”<sup>174</sup>

Historically, nuisance law not only provided an opportunity for an individual landowner to obtain damages and/or an injunction, but also provided a mechanism for land use planning before the advent of comprehensive zoning laws.<sup>175</sup> What was “disagreeable and uncomfortable” for the purposes of nuisance law, depended on the neighborhood and its qualities before the alleged nuisance.<sup>176</sup> As a result, where the air quality was already bad, the addition of another, marginal interference would be negligible.<sup>177</sup> This meant that the potential for nuisance liability encouraged de facto zoning—a “like with like” grouping of land uses that collected more disruptive uses, such as industrial ones, away from quieter ones, such as residential uses.<sup>178</sup> Nuisance law did not determine whether a type of conduct was unreasonable, but rather “where an activity can or cannot take place.”<sup>179</sup> To determine whether conduct was reasonable, the court looked to the location as well as priority of occupation.<sup>180</sup> As a result, “[w]hat may be a nuisance in one locality may not in another.”<sup>181</sup>

Property rights were central to the concept of nuisance law. Courts justified the initial severity of nuisance doctrines in terms of the affirmation of the strength of property rights: “No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value.”<sup>182</sup> This court ultimately concluded: “The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to the

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<sup>172</sup> Julian Morris, *Climbing out of the Hole: Sunsets, Subjective Value, the Environment, and the English Common Law*, 14 *FORDHAM ENVTL. L. REV.* 343, 347–48 (2003).

<sup>173</sup> *Id.* at 348.

<sup>174</sup> *St. Helen’s Smelting Co. v. Tipping*, [1865] 11 HL 642 (Eng.).

<sup>175</sup> J.H. Beuscher & Jerry W. Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 *WIS. L. REV.* 440, 443 (1955).

<sup>176</sup> *R. v. Neville*, (1791) 170 Eng. Rep. 102.

<sup>177</sup> *Id.*

<sup>178</sup> See *Hendricks v. Stalnaker*, 380 S.E.2d 198, 201 (W. Va. 1989) (focusing on the “use of property in relation to the particular locality”).

<sup>179</sup> See Morris, *supra* note 172, at 352.

<sup>180</sup> *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82, 84 (Ala. 1929).

<sup>181</sup> *Hall v. N. Montgomery Materials, LLC*, 39 So.3d 159, 173 (Ala. Civ. App. 2008) (citation omitted).

<sup>182</sup> *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 902 (Md. 1890).

protection of the law, let the consequences be what they may.”<sup>183</sup> This strict rule was necessary, according to the traditional rule because “to hold otherwise would be to compel the citizen to abandon his property at the demand of the public convenience.”<sup>184</sup>

A number of historical points also support the argument that nuisance emerged as a distinct cause of action from negligence because of the need for a cause of action that (1) addressed liability for indirect consequences of the defendant’s actions rather than the direct consequences covered by trespass, (2) addressed the context of land uses specifically, and (3) securely protected the private property owner’s right to maintain possession and exclude others.

### B. *Why Limiting Nuisance Law Matters?: The Right to Exclude*

The right to exclude is a key concept, if not the defining concept, of private property. According to Thomas Merrill, “[d]eny someone the exclusion right and they do not have property.”<sup>185</sup> Calabresi and Melamed linked the right to exclude with property rules, as opposed to liability rules.<sup>186</sup> This strong statement makes sense given that “the right to exclude is best understood as a gatekeeper right—the owner’s right to determine the use of the thing.”<sup>187</sup> The common law protected the right to exclude not only through the law of trespass, but also through the law of nuisance.<sup>188</sup> Notably, those protections are strong. The common law regularly punished violations of the right to exclude with “injunctions and supracompensatory damages.”<sup>189</sup>

If nuisance law protects the right to exclude, then any reduction in the rights to sue under nuisance indicates an equal reduction in the rights that exist in private property across those jurisdictions. Where the courts have adopted the Second Restatement’s approach, nuisance aligns with concepts of negligence and foreseeability of damages, and in those jurisdictions, nuisance is simply “a tort about wrongful conduct.”<sup>190</sup> Nuisance loses its focus on property law and loses the very reason that the liability historically was very strong—because nuisance law protected an owner from invasions and interference that prevented her from the use and enjoyment of her land.

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<sup>183</sup> *Id.* at 902.

<sup>184</sup> *Seacord v. People*, 13 N.E. 194, 201 (Ill. 1887).

<sup>185</sup> Merrill, *supra* note 15, at 730.

<sup>186</sup> Calabresi & Melamed, *supra* note 8, at 1092.

<sup>187</sup> Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 972 (2004).

<sup>188</sup> *Id.* at 972–73.

<sup>189</sup> *Id.* at 973.

<sup>190</sup> Hook, *supra* note 165, at 276.

Aligning nuisance law with other tort concepts such as negligence and foreseeability may also prompt other changes in the law that also impact property rights. One important implication of aligning nuisance with negligence liability is the likelihood that other negligence concepts will continue to erode liability (and therefore property rights as well). For example, a number of courts that apply a negligence-based approach to nuisance also allow contributory negligence as a defense to the nuisance action.<sup>191</sup>

*C. Answers to the Strict Liability Objection to Broad Nuisance Protection*

The Second Restatement's approach contained, in part, a criticism of traditional nuisance law: a suggestion that strict liability was too much.<sup>192</sup> The Second Restatement then suggested that nuisance law needed to modernize to an approach that was not strict liability, in fitting with the overall trend of tort law moving away from strict liability.<sup>193</sup> There are a number of problems with this position. First, as noted above, if nuisance law quintessentially protects property rights, and the right to exclude, then there is no particular reason that nuisance should be doctrinally aligned with other types of tort law. Indeed, the uniqueness of those circumstances argue against such an alignment, suggesting instead that nuisance would logically deviate so as to adapt itself to our expectations for property rights.

Second, the Second Restatement's argument presumes that nuisance liability under the traditional rule was, in fact, strict liability. This article argues that this statement is not particularly accurate for two reasons: (1) traditional nuisance doctrine contained elements that already contextualized the inquiry, allowed for discretion, and softened liability; and (2) the overall trend of modern nuisance law has been to introduce even more contextualization, softening, and discretion through the advent of balancing tests within the *prima facie* case.

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<sup>191</sup> *Sandifer Motors, Inc. v. Roeland Park*, 628 P.2d 239, 246–47 (Kan. Ct. App. 1981). This is, of course, limited to those cases in which the alleged ground of liability for nuisance is based on negligence rather than, for example, strict liability for an abnormally dangerous activity. *See id.*; *Vogel v. Grant-Lafayette Elec. Coop.*, 548 N.W.2d 829, 835 (Wis. 1996) (citations omitted) (“[W]hen the harm is intentional or the result of recklessness, contributory negligence is not a defense.”). The Second Restatement also addresses the potential uses of contributory negligence as a defense in nuisance actions. *See* RESTATEMENT (SECOND) OF TORTS § 840B (AM. LAW INST. 1979).

<sup>192</sup> RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979).

<sup>193</sup> *Id.*

## 1. The Assumption of Strict Liability in the Historical Doctrine of Nuisance

The Second Restatement's discussion of the proposed change to nuisance law presumes that, traditionally, nuisance was associated with a strict liability approach. Depending on your perspective, this statement is both accurate and inaccurate. The statement is accurate if one relies on a definition of strict liability that does not mean that liability is without limitation, but only that it is liability without proving fault or negligence.<sup>194</sup> Under this definition, traditional nuisance law was aligned with strict liability in that the elements of the cause of action did not require proving fault or negligence.

Notably, courts in nuisance cases have long stated that there is not a relative duty in nuisance cases, but rather an absolute duty. Courts today continue to repeat this language, stating that nuisance is an "absolute duty" and one that does not "rest on the degree of care used."<sup>195</sup> With that said, courts in these

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<sup>194</sup> This is a common approach to defining strict liability according to some theorists. *See, e.g.*, Hook, *supra* note 165, at 276.

<sup>195</sup> *See* Cudworth v. Midcontinent Commc'ns, 380 F.3d 375, 383 (8th Cir. 2004) ("The duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property."); *Cae-Link Corp. v. Wash. Suburban Sanitary Comm'n.*, 602 A.2d 239, 240 (Md. Ct. Spec. App. 1992) (citations omitted) ("[A] nuisance exists because of a violation of an absolute duty so that it does not rest on the degree of care used."); *Little v. Union Tr. Co.*, 412 A.2d 1251, 1255 (Md. Ct. Spec. App. 1980) (citations omitted) ("[A] nuisance exists because of a violation of an absolute duty so that it does not rest on the degree of care used."); *McKay ex rel. McKay v. Boyd Constr. Co.*, 571 So.2d 916, 921 (Miss. 1990)

The creation or maintenance of a nuisance is a violation of an absolute duty, the doing of an act which is wrongful in itself, whereas negligence is a violation of a relative duty, the failure to use the degree of care required under particular circumstances in connection with an act or omission which is not of itself wrongful.

*Id.*

*Hale v. Ward Cty.*, 818 N.W.2d 697, 703 (N.D. 2012) (citations omitted) ("The duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property."); *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992) (citations omitted); *West v. Nat'l Mines Corp.*, 336 S.E.2d 190, 196 (W. Va. 1985) (citations omitted) ("The creation of a nuisance is the violation of an absolute duty. Negligence is the violation of a relative duty."); *see also* *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 792 n.21 (Wis. 2002) (citations omitted)

Nuisance and negligence are different kinds of torts. A nuisance does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care. . . . To constitute a nuisance, the wrongfulness must have been in the acts themselves rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction . . . between nuisance and negligence. The one is a violation of an absolute duty; the other a failure to use the degree of care required in the particular circumstances—a violation of a relative duty.

instances do not seem to be pointing to the fact that there is nothing to soften strict liability in nuisance law, but rather courts are simply trying to make clear the fact that there is a distinction between negligence and nuisance.

On the other hand, the concept of strict liability in whole references the idea of liability that is without limitations that would allow a defendant to both acknowledge the damage and escape from liability. In this type of approach, it is not accurate to say that nuisance law aligned with strict liability, at least not once the concept of reasonableness had been included within the elements.

Certainly, courts from time to time discussed nuisance liability as strict,<sup>196</sup> probably because they meant in comparison to the behavior-oriented position of negligence law. With that said, nuisance liability was never completely strict. Subsets of nuisance law were strict—liability for abnormally dangerous activities or for the escape of something unnatural and contained that later damages a neighbor. Outside of those subsets, however, nuisance law was not unlimited. Rather, two doctrines limited nuisance liability: (1) the conduct had to be unreasonable, and (2) the injury had to be substantial.

Reasonableness introduced two important limitations to liability. First, reasonableness allowed discretion for the court. Second, reasonableness turned the inquiry into one that was cultural and contextualized: “As to what is a reasonable use of one’s own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case.”<sup>197</sup> General rules are not helpful because “[a] use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance.”<sup>198</sup> No general rule would suffice; reasonableness had to be fitted to the circumstances to make a determination on whether or not a land use constituted a nuisance: “There can be no fixed standard as to what noise constitutes a nuisance, and the circumstances of the case must necessarily influence the decision . . . . The location and surroundings must be considered.”<sup>199</sup>

Reasonableness is a matter of the context of an action. Thinking in these terms, it makes sense that courts would not be particularly looking to the degree of care used in operation of some particular land use, but rather the choice of that land use for its circumstances. Thus, it historically made sense to say: “In the creation or maintenance of a nuisance the wrongfulness must be in the acts

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*Id.*

<sup>196</sup> See Kurtz, *supra* note 23; Lewin, *supra* note 24, at 779.

<sup>197</sup> Campbell v. Seaman, 63 N.Y. 568, 577 (N.Y. 1876).

<sup>198</sup> *Id.*

<sup>199</sup> Hatch v. W.S. Hatch Co., 283 P.2d 217, 218–19 (Utah 1955) (quoting 39 AM. JUR. Nuisances § 47, at 331).

themselves, rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction between ‘nuisance’ and ‘negligence.’”<sup>200</sup>

Reasonableness, in particular, formed a significant limit on the law of nuisance. Instead, in early cases reasonableness is more a question of what rights a party has to use his own property before he is impinging on the property of his neighbor. Reasonableness formed an overall limit on the concept of a land use being a nuisance.<sup>201</sup> Doctrine required that a court determine “whether or not the use of the property in the manner complained of is reasonable and in accordance with the relative rights of the parties.”<sup>202</sup>

As a result of the inclusion of reasonableness in the *prima facie* case of nuisance, courts did not follow precisely the idea of strict liability. Instead, liability was based on the appropriateness of a land use for the cultural context. This significantly softened the doctrine from an idea of strict liability. Additionally, as I have argued elsewhere, from the mid-twentieth century on, courts introduced the concept of a balancing of rights into the doctrine of nuisance law, thereby making another important change that reduced the likelihood of nuisance liability and, thereby, reduced the scope of property rights.<sup>203</sup>

## 2. More Ways Courts Have Softened Strict Liability: The Implications of Balancing in Nuisance Actions

In previous work, I detailed the history of the concept of balancing within nuisance actions.<sup>204</sup> In particular, I argued that the concept of balancing has sneakily made its way from the remedies portion of the deliberations into the core elements of the cause of action.<sup>205</sup> While I have criticized this change<sup>206</sup>—and noted its unfortunate implications for private property rights<sup>207</sup>—I have also acknowledged that a number of modern courts follow this approach and includes a balancing of social utility against the gravity of harm within the core elements of nuisance.<sup>208</sup>

If a court includes balancing within the elements of nuisance, then the court is already acknowledging the many limitations on nuisance liability—

<sup>200</sup> Harris v. Findlay, 18 N.E.2d 413, 415 (Ohio Ct. App. 1938).

<sup>201</sup> Glucose Refining Co. v. Chicago, 138 F. 209, 213 (N.D. Ill. 1905).

<sup>202</sup> Blanc v. Murray, 36 La. Ann. 162, 167 (1884).

<sup>203</sup> Fraley, *supra* note 9, at 653–54.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 654.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 678–79.

<sup>208</sup> *Id.* at 676.



including the costs to others in the community who are not parties to the action. Specifically, rather than focusing solely on conduct within the elements of establishing the nuisance action, the court is already using its discretion to think about cultural issues that may make the alleged nuisance more or less tolerable, including the many advantages of land uses that may be problematic for their immediate neighbors but beneficial for the population more generally. All of this means that nuisance law is not looking particularly like strict liability in these circumstances. As Henry Smith noted, “[u]nder the balancing approach, nuisance starts looking like core areas of tort law, particularly the law of negligence.”<sup>209</sup>

Notably, the balancing inquiries of this type underscore the earlier point that nuisance is quintessentially about property rights. The circumstance-specific inquiries that courts make are about property and land use rather than about conduct and its wrongfulness.

## VII. CONCLUSION

The Second Restatement argued that what distinguishes nuisance from negligence is only the type of interest invaded (land rather than person) rather than some difference in terms of the unwanted conduct. It is the property context that distinguishes nuisance from other tort concepts. This does not mean, however, that courts should adopt tort principles for the law of nuisance. Indeed, it indicates quite the opposite: that nuisance law is differently situated from other areas of tort law. Nuisance law functions to protect rights in private property—another area of law that rarely follows tort approaches.

The Second Restatement sticks to this rule, not revising it, even while, after nearly forty years, only a minority of jurisdictions have adopted the Restatement approach. The majority of jurisdictions decline to accept the rule and, indeed, are careful to distinguish nuisance from negligence or other tort claims.

There are excellent reasons why the Second Restatement approach remains a minority view. In particular, nuisance law protects the right to exclude, a quintessential if not defining feature of private property. Traditional nuisance law—and the law followed by the majority of jurisdictions—provides more robust protections when compared with negligence specifically because of the necessity of protecting the right to exclude and, thereby, the integrity of property rights. In short, the Second Restatement got it wrong, and those states following the Second Restatement position should reconsider.

The primary argument that the Second Restatement made in favor of its position was that the remainder of tort law had moved away from strict liability approaches, and that to be consistent, nuisance law should do the same. There is little to support this argument. If nuisance law quintessentially protects property rights and the right to exclude, then there is no particular reason that nuisance

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<sup>209</sup> Smith, *supra* note 187, at 967.

should be doctrinally aligned with other types of tort law. Indeed, the uniqueness of those circumstances argue against such an alignment, suggesting instead that nuisance would logically deviate so as to adapt itself to our expectations for property rights. Additionally, the Second Restatement's argument makes unwarranted presumptions about the strictness of nuisance doctrine. In fact, traditional nuisance doctrine was far less than strict liability; it contained elements that already contextualized the inquiry, allowed for discretion, and softened liability. Finally, the overall trend of modern nuisance law has been to introduce even more contextualization, softening and discretion through the advent of balancing tests within the *prima facie* case. In sum, there is little to support the Second Restatement's approach and a great deal to be lost—in terms of property rights and particularly the right to exclude—in adopting the Second Restatement's position.