Chapter 5

LIMITS ON THE USE OF LAND RESULTING FROM PROPERTY INTERESTS OF ANOTHER

Section 1. INTRODUCTION

PHILBRICK, CHANGING CONCEPTIONS OF PROPERTY IN LAW

86 U.PA.L.REV. 691, 723–24 (1938)

[p*852] That this country, as compared with the countries of western Europe, was, during the first century of its existence, distinctly one in which property received extreme protection under the law cannot be questioned. Our urban concentration was slight. Free lands and loose economic conditions generally made independence easy. An interest in reforms of any kind is, under such conditions, impossible; but we were conscious of no social problems. Cheap land had as one of its consequences that of stimulating and universalizing acquisitive instincts and respect for property rights. Simultaneously, however, with the aggrandizement of political and economic individualism by the modes of thought above referred to, and by the continuance of the frontier mode of life, there arose in the last century an economic society whose problems inevitably demanded restrictions upon individual ownership. It became very evident that inviolability of private property would not work.[1] The close integration of modern society, particularly its urban portion, made it impossible to leave unchecked land's individual use. Hence, the great modern development of the law of nuisances, public and private; and the enormous expansion, almost wholly a creation of the period since the Civil War, of the police power, by virtue of which the use of property is regulated, or the property may even be destroyed, for the furtherance of public order, safety, health, morality, and well-being generally.[2] The details in which user is thus controlled are very great in number and of extraordinary variety. [p*853]

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[1] "The principle of the inviolability of property means the delivery of society into the hands of ignorance, obstinacy, and spite." JHERING, [LAW AS A MEANS TO AN END (Husik's trans.1913)] 389. And *cf. id.* at 396–97. "There is no absolute property—property, that is, independent of consideration of the interests of the community; and history has taken care to engrave this truth upon the minds of all peoples." I JHERING, GEIST [DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG (3d ed. 1877)] 7.

[2] E. FREUND, THE POLICE POWER (1904).

Note on Legal Instruments Of Land-Use Control—An Historical Overview

As the preceding excerpt observes urbanization and greater population densities have simply made more evident the fundamental impossibility of "absolute" property rights.[1] Conceding one

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[1] *See also* the article by Professor Cross suggestively entitled *The Diminishing Fee*, 20 LAW & CONTEMP.PROB. 517, 518 (1955).

owner total discretion in the use of certain land, without restraint or liability for harm caused, simply cannot be reconciled with comparable rights of any value in his neighbors. Professor Cohen puts the point well:

> . . . To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of the owners, enforced by the state as much as the right to exclude others . . . .

Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927), in M. COHEN, LAW AND THE SOCIAL ORDER 41, 57 (1933).

As *Donahue* notes, DKM3, p. 115, the area of land use is on in which the western tendency to "agglomerate" property rights in a single individual runs into an inherent tension. My property rights in my land cannot begin to be absolute if your right (or privilege) to use your land is not in some way constrained. But if your privilege to use your land is constrained, how can it be absolute?

Yet it is not by chance that the two powerful statements of this proposition quoted above come from the 1930's, for it was in this period in American legal thought that there was a profound reaction to what was perceived as the exaggeration of absolute notions of property in the preceding generation. The *Philbrick* extract, then, seeks to justify limiting property rights on the ground that the world had changed—our society had become more crowded and more urbanized. This justification, in turn, can lead to the impression that there was a time, before crowding and urbanization, when property rights were absolute. Such, however, does not seem to be the case.

You will recall the discussion of the development of the real property forms of action in Chapter 1, p. S68 *supra*. One of the earliest of these actions was the Assize of Nuisance. This action lay for disturbance of the complainant's possession by "things erected, made or done" on the defendant's land. *See* Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 1978 CAMBRIDGE L.J. 144. By the beginning of the seventeenth century it had become established that an action on the case lay wherever the assize was appropriate. Being more convenient, it superseded the earlier form. *See* J. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 478–94 (3d ed.1990). For grosser harms, more directly caused, trespass itself was available. Equity soon added the more potent weapon of injunction to a complaining owner's arsenal. *See* de Funiak, *Equitable Relief Against Nuisances*, 38 KY.L.J. 223 (1950); Walsh, *Equitable Relief Against Nuisance*, 7 N.Y.U.L.REV. 352 (1929). The resulting composite of judicially imposed limits on land use is explored in Section 2 of this chapter. Its bolder features have already been sketched in the Note on the Real Actions—Twentieth Century Style, *supra* p. S123, and its relationship to environmental law is discussed in DKM3, p. 294. [p*854]

Nuisance law has recently been the focus of considerable theoretical debate. The article by Ronald Coase, extracted *infra*, pp. S389396, was the catalyst for the "law and economics" approach to dealing with legal problems. The effect of such ideas may be seen some of the materials that we will consider in the next section, particularly in the *Boomer* case, p. S382 *infra*. But while many adherents of the "law and economics" school would argue for a relaxation of nuisance law (fewer injunctions, greater freedom for landowners to work out their own solutions), many environmentalists would argue for a stricter nuisance law. That, in turn, has led to a reexamination of the history. Some historians have argued that the history, even in the 19th century, shows the courts continually striving to remove incompatible land uses. This effort, however, so the argument runs, failed in the 19th century because the forces of industrialization were so powerful. *See* McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons From Social History*, 3 OXFORD J.LEGAL STUD. 155 (1983); *see also* McBride, *Critical Legal History and Private Actions Against Public Nuisances, 1800–1865*, 22 COLUM.J.L. &

SOC.PROBS. 307 (1989); Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S.CAL.L.REV. 1101 (1986); Coquillette, *Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L.REV. 761 (1979).

The same developments which have thrown nuisance law into greater prominence furnish strong incentive for neighbors to create land-use limits by agreement (and for land developers to prepackage such bargains). Section 3 examines the legal framework within which these adjustments to the fee can be accomplished. Here again the history is complicated, and it has been profoundly affected by the "agglomerative tendency." While the history here is less well explored, it would seem that the beginning of the 19th century brought into English law from Continental sources a restrictive idea of easements (one of the principal devices for private land-use control). *See* pp. S408–409. Since the conceptual category of easements was closed, new devices, which came to be called "equitable servitudes," were developed. *See* pp. S434–437 *infra*. Similarly restrictive rules about another category, "real covenants," also led private parties and, to some extent the courts, to seek refuge in the category of "equitable servitudes." Then, in the latter part of the 19th century the category of "equitable servitudes" was itself confined. *See id*.

The result today can only be described as confused. We have a number of categories of private land-use restrictions—easements, profits, covenants, equitable servitudes and licenses—not to mention other categories that may be used to create land-use restrictions—notably defeasible fees and leases. The confusion has led to an almost universal call for simplification, and the debates over the proposed *Restatement (Third) of Property—Servitudes* have produced an extensive literature that promises to affect the course of the law in the next generation.

The closely related subject matter of Chapter 6 is what one author terms "affirmative state control,"[2] restrictions imposed by the community without the prod of an aggrieved party or the support of a private bargain. This is the law of [p*855] zoning, planning and eminent domain. While public land-use regulation has been with us for a long time, it was not until the twentieth century that it became pervasive enough that it was possible to speak of a general body of public land-use law, as opposed to large collection of specific regulations varying almost randomly from area to area. Public land-use law has been strongly affected by the debates in the first half of this century over the legitimacy of direct state intervention into what were seen as private land-use decisions. Currently, after many years of playing little role in the field, the United States Supreme Court has once more entered the fray, with consequences that are certain to be far-reaching but the precise import of which is yet to be discerned. *See* Ch. 6, § 5 *infra*.

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[2] Hunt, *Federal and State Control of Land: A Synopsis*, in M. MCDOUGAL & D. HABER, PROPERTY, WEALTH, LAND 70, 84 (1948).

Section 2. INHERENT LIMITS OF THE FEE SIMPLE ABSOLUTE—*SIC UTERE TUO UT ALIENUM NON LAEDAS*

In Chapter 3 and the prior subsection we have for the most part used the word "nuisance" without qualification when speaking of the private civil action of that name. Such actions remain our subject here. Confusingly, the same term, "nuisance," has for centuries been applied as a catch-all defining a variety of minor criminal offenses which involve some interference with the

health, safety, comfort or convenience of the general public. *See generally* W. PROSSER & W. KEETON, TORTS §§ 86–91 (5th ed.1984). These are "public" or "common" as distinguished from "private" nuisances. A number of writers have lamented that the same word should have been applied to such different notions (*e.g.*, *id*. § 86, at 618), and the not infrequent failure to draw this distinction may explain some, but not all, of the confusion which abounds in the law of nuisance. *Cf.* pp. S126–128 *supra*. But the mistake, if such it was, is an ancient one and by now irremediable. Further, whether because of confusion or for more fundamental reasons, many similarities have developed in the law of private and public nuisance, leading the authors of one article dealing with the application of nuisance doctrine to competing land uses to conclude that in such cases "the public-private nuisance dichotomy [has] little significance." Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS.L.REV. 440.

Since the core notion of public nuisance is of a publicly initiated remedy against a public wrong, the topic is taken up later, in Chapter 8. But it should be noted here that the public/private dichotomy is not a clean one. Obviously the same conduct by a landowner can at once interfere unreasonably with the rights of the public and with a neighbor's enjoyment of his land. Since many of the more hotly contested private nuisance suits involve large numbers of plaintiffs—50, 90, 185—the area of overlap is significant. *See, e.g.*, Spur Indus., Inc., v. Del E. Webb Dev. Co., 108 Ariz. 178, 183–84, 494 P.2d 700, 705–06 (1972). Moreover, whether or not a private nuisance is established, if a plaintiff can prove particular or unique damage caused by a public nuisance, he has a private cause of action. *Compare* Stop & Shop Co. v. Fisher, 387 Mass. 889, 444 N.E.2d 368 (1983) (stores may recover for loss of business due to defendant's negligent destruction of a bridge) *with* Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp. 345 N.W.2d 124 (Iowa 1984) (businesses may not recover for economic loss due to faulty construction of a public bridge). *See generally* RESTATEMENT (SECOND) OF TORTS § 821C (1979). For these reasons, public nuisance actions (today, normally brought as civil actions for an injunction rather than as criminal prosecutions) can find [p*856] themselves with large numbers of private intervenors. *E.g.*, Ellen v. City of Bryan, 410 S.W.2d 463 (Tex.Civ.App.1966). Finally, in a number of states there is explicit statutory authority for a private party's suit to enjoin a public nuisance without any requirement of special damage. *E.g.*, WYO.STAT.ANN. § 6–12–102 (1977) ("Whenever a nuisance . . . exists as defined in this act, . . . the county attorney or any citizen of the county may maintain an action in equity in the name of the State of Wyoming . . . to perpetually enjoin said nuisance . . . .") *But cf.* Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 237 A.2d 342 (1968) (S.P.C.A. lacks interest necessary to sue to enjoin bullfight, a public nuisance, despite statutory grant of certain enforcement powers to the organization).

While the prime focus in this section is on nuisance, there are other tort doctrines, as you should by now be well aware, that set limits on an owner's use of his fee. An example is the law concerning discharge of surface waters touched on in Chapter 3. There are others. If the use in question causes a direct physical invasion of other property, the law of trespass may be brought to bear on the resulting controversy. If the conduct can be characterized as ultrahazardous or abnormal, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), and its progeny may be invoked. *See, e.g.*, Wood v. Picillo, 443 A.2d 1244 (R.I.1982) (chemical company strictly liable for percolation of hazardous waste on nearby residents' property); *cf.* Frank v. Envtl. Sanitation Management, Inc. 687 S.W.2d 876 (Mo.1985) (recovery for landfill leaching into stream must be based on unreasonableness of defendant's action, but neither intent nor negligence need be shown); *see generally* Comment, *A Private Nuisance Approach to Hazardous Waste Disposal Sites*, 7 OHIO N.U.L.REV. 86 (1980).

There can easily be situations where nuisance and one or more of these other doctrines are, at least arguably, alternatives. Deciding which theory to apply may or may not be important; in some cases the analysis is the same whether or not the issue is treated as one of nuisance law. *See*,

e.g., Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692 (1986) (recovery for damage when adjoining landowners' development of property caused periodic flooding of plaintiff's parking lot same whether nuisance or water-law concepts used); Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529 (1966) (employing water-law concepts with seemingly the same result as nuisance); *but see* Henderson v. Wade Sand & Gravel Co., 388 So.2d 900 (Ala.1980) (plaintiff may recover under nuisance law for loss of support because of underground water removed by defendant, even though the removal was a non-actionable "reasonable use" as a matter of water law). When the competing theory is trespass, however, the difference in treatment is, at least according to traditional doctrine, substantial.

At this point, you ought to read, if you have not before, the Note on the Real Actions—Twentieth Century Style, *supra*, p. S123. Several distinctions noted there, to the extent they are retained in a given jurisdiction, make trespass a distinctly preferable theory for the plaintiff who can qualify:

(a) In trespass but not nuisance a defendant is liable whether or not he causes substantial harm; indeed, in nuisance a defendant may not be liable even if his conduct causes substantial harm provided it is adjudged "reasonable." *See* W. PROSSER & W. KEETON, TORTS § 13, at 69–70 (5th ed.1984); RESTATEMENT (SECOND) OF TORTS §§ 158, 163 (1965). What may be a minor point so long as one is talking about recovering nominal or relatively trivial damages (although note that they can be major and still the plaintiff may not recover in nuisance) becomes major when an injunction is the contemplated relief. On this aspect of nuisance law, see DKM3, pp. 866–71. [p*857]

(b) In trespass, but not nuisance, conduct sure to cause an invasion of the plaintiff's land can produce liability for all resulting harm whether or not it or any harm was foreseeable. *E.g.*, Van Alstyne v. Rochester Tel. Corp., 163 Misc. 258, 296 N.Y.S. 726 (Rochester City Ct.1937), in which the defendant was held liable in trespass for the death of plaintiff's dogs, which were poisoned by lead casually dropped on plaintiff's land by telephone company employees. Compare the treatment of this matter in nuisance law, DKM3, pp. 874–75.

(c) In trespass the plaintiff seeking an injunction may be less troubled by a balancing of the equities. *See* pp. S128–128 *supra* and pp. S385–387 *infra*.

Is there some connection between these differences and how the line between the two actions, trespass and nuisance, should be drawn?

The following decisions apply nuisance law. As you read them, consider whether trespass or some other alternative theory of liability would not have been equally appropriate.

A. THE CONSEQUENCES OF BEING A NUISANCE

It may at first glance seem "hindmost first," but before proceeding to a detailed investigation of the question "What is a private nuisance?", it makes sense to pause to consider what consequences attach to the answer. It has already been noted that both a damage action "on the case" and equitable relief may be available against the party whose conduct is deemed a nuisance. Since damages can, typically, be sought in the same action, most modern nuisance actions are brought "in equity." A careful survey of American nuisance actions from 1936 to 1955 concludes that:

> . . . [A]ctions [solely for damages] are pretty much confined to cases against governmental units, public utilities, charities and the like, where counsel has, as a matter of strategy, decided that chances of an injunction, on "balancing of equities" are slight.

Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS.L.REV. 440, 442. (The significance of the phrase, "balancing of equities," will be explored shortly.)

In the typical nuisance suit, then, there are at a minimum two possible outcomes: (a) total denial of relief based upon a conclusion that no nuisance exists (a conclusion which, let us note, is possible even though the defendant's land use is causing the plaintiff appreciable harm); or (b) issuance of an injunction ordering the defendant to cease his objectionable activity coupled with a damage award to compensate the plaintiff for injury suffered prior to its effective date. Are there any intermediate options? The following case addresses that question.

BOOMER v. ATLANTIC CEMENT CO.

Court of Appeals of New York
26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312, 40 A.L.R.3d 590 (1970)

BERGAN, J. . . . The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate. . . . [p*858]

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. . . .

The cement making operations of defendant have been found by the court at Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court . . . accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. [Citations omitted.] The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance. . . .

. . . The rule laid down in [Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913)] is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency [citations omitted]. . . .

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. . . .

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at

once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.[1]

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit [p*859] defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period—*e.g.*, 18 months—the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry Nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable [sic] effective spur to research for improved techniques to minimize nuisance.

The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. [Citations omitted.]

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S., Nuisances, § 140, p. 947). . . .

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[1] Respondent's investment in the plant is in excess of $45,000,000. There are over 300 people employed there. [The trial court had found that the sixteen individual plaintiffs from eight separate households had suffered $535 total loss of "usable value per month" up to the time of trial, and that "permanent loss" to them, calculated in terms of the reduction in market values of their properties, totaled $185,000, in sums ranging from $11,000 to $70,000. Boomer v. Atlantic Cement Co., 55 Misc.2d 1023, 1024–25, 287 N.Y.S.2d 112, 113–15 (1967). Ed.]

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court. [p*860]

JASEN, J. (dissenting). I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. [Citations omitted.] To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act (Public Health Law, §§ 1264–1299–m) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution (Public Health Law, § 1265).

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma. The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. . . . It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation [citation omitted] may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. [Citations omitted.] The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit. [p*861]

Nor is it constitutionally permissible to impose [a] servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. [Citations omitted.] This is made clear by the State Constitution (art. I, § 7, subd. [a])

which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Notes and Questions

1. What did the court of appeals do in *Boomer* that the lower courts had not already done? To put the question another way, why was the result in the lower courts reversed rather than affirmed? Does it help in answering this question to know that New York authority since *Boomer* is more notable for cases in which *Boomer* is held not to apply than for those in which in which it is applied? *See*, *e.g.*, Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 363 N.E.2d 1163, 395 N.Y.S.2d 428 (1977) (*Boomer* not applicable to situation in which the nuisance-producing operation was also in violation of a zoning ordinance); Flacke v. Bio-Tech Mills, Inc., 95 A.D.2d 916, 463 N.Y.S.2d 899 (1983) (*Boomer* not applicable to situation in which defendant was discharging effluents in violation of state Enviromental Conservation Law). *Boomer* has, however, influenced courts in other jurisdicitons. *See*, *e.g.*, Padilla v. Lawrence, 101 N.M. 556, 685 P.2d 964 (1984).

2. While there may be a few exceptions, today most courts called upon to enjoin a nuisance will engage in some sort of balancing of the interests of the plaintiff, defendant, and general public. Annot., 40 A.L.R.3d 601, 612 (1971). The question is not whether to balance "equities," or "hardship," or "convenience" but what exactly to weigh and how. In most states, as in New York, this [p*862] represents a shift from an earlier less flexible approach. For an attempt to explain the shift, see Kurtz, *Nineteenth Century Anti-entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L.REV. 621 (1976). Establishing a shift or lining up jurisdictions is tricky business because as one student comment observes: "The dividing line [between those courts which reject the comparative injury doctrine and those which accept it] is blurred, sometimes beyond recognition, by the exceptions that many of the courts which purport to reject the doctrine make to their no-balancing rule." 49 N.C.L.REV. 402, 405 (1971). Seeming exceptions run the other way, too. Courts generally inclined to balance may justify issuance of a

particular injunction by saying that balancing is inappropriate in that type of case instead of explaining the outcome as the result of an especially heavy factor in the balance. *See generally* Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN.L.REV. 627 (1988).

3. Judge Jasen's constitutional argument figures prominently in one of the classic anti-balancing opinions. Ironically, it, too, involved a cement plant. Hulbert v. California Portland Cement Co., 161 Cal. 239, 244, 118 P. 928, 930 (1911):

> We are not insensible to the fact that petitioner's business is a very important enterprise; that its location is peculiarly adapted for the manufacture of cement; and that great loss may result to the corporation by enforcement of the injunction. . . . [W]e cannot, under plain principles of equity, compel these plaintiffs to have recourse to their action at law only and take from them the benefit of the injunctive relief accorded them by the chancellor below. To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law.

Federal and state constitutional restrictions of the power of eminent domain to "public use" are far less inhibiting today than they seemed in 1911. *See generally* Ch. 6, § 6. But assuming that the concept still has some vitality, has it any pertinence to denial of an injunction in this sort of case? The majority in *Boomer* are far from alone in their failure to address the issue. One of the few decisions that does is Arnold v. Melani, 75 Wash.2d 143, 151, 449 P.2d 800, 805 (1969):

> To suggest that property rights of an individual (other than protection against the sovereign in regard to eminent domain) are created and protected by Const. art. 1, § 16 (amendment 9) ["Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches. . . ."] misconstrues its sole purpose. To suggest that such a provision somehow divests a court of equity of the power to refuse a mandatory injunction would necessarily by logical extension likewise prohibit the legislative body from establishing rules of limitation (adverse possession) and further, would bar the passing of title by other equitable doctrines based upon negative conduct, such as estoppel, waiver, or laches.

Is this an adequate response? *See* Bartman v. Shobe, 353 S.W.2d 550, 554 (Ky.1962); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA.L.REV. 1299, 1333–34 (1977). *But see* Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7–25 (P. Hay & M. Hoeflich eds. 1988); Roberts, *The Right to a Decent Environment; E=MCý: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L.REV. 674, at 681 (1970); Schoenbrod, [p*863] *supra* note 2. *See generally* D. LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991).

4. Would plaintiffs have been more likely to receive the injunction they sought if they had been proceeding on a theory of trespass? Injunctions are routinely available to prevent recurrent trespass to real property. *See* Annot., 60 A.L.R.2d 310 (1958). Yet there is nothing in the language of the *Boomer* decision to suggest that the principles it invokes do not apply to equitable actions generally, not merely those based on nuisance. *See* RESTATEMENT (SECOND) OF TORTS) §§ 933–51 (1979).

Indeed, in some jurisdictions the balancing of equities in innocent encroachment cases was well established at a time when nuisances were enjoined without such an inquiry. *See generally* Annot., 28 A.L.R.2d 679, 699 (1953). Yet many of the trespass cases do give the distinct impression that the test being applied is a much stiffer one than would be used in a comparable nuisance suit. *See* Sheppard Envelope Co. v. Arcade Malleable Iron Co., 335 Mass. 180, 188, 138

N.E.2d 777, 783 (1956) ("'A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass.'"); Peters v. Archambault, 361 Mass. 91, 278 N.E. 729 (1972), *supra*, p. S118.

5. It is common in encroachment cases to distinguish between willful and innocent trespass, applying balancing only to the latter category. *See* RESTATEMENT (SECOND) OF TORTS §§ 941(b), 941(d) (1979); Annot., 28 A.L.R.2d 679, 705 (1953). If this distinction were applied to a case like *Boomer* would it preclude balancing? Professors Keeton and Morris suggest:

> Though encroachment may be unintended, the creation of a nuisance seldom is unanticipated. . . . Most enterprisers who establish large factories know their business, and can foresee the kind and amount of noxious waste products which will be dispersed when the plant is put in operation.

Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX.L.REV. 412, 417 (1940).

Keeton and Morris do not, however, argue against balancing in nuisance cases:

> When an action for damages arising out of a nuisance is brought, the central question raised is, in simple terms, should the defendant be permitted to inflict injuries on the plaintiff without compensating the plaintiff for the injuries done? But the equity court applied to for an injunction cannot justify an injunction on the ground that the defendant should bear the cost of the burden he is casting on the plaintiff—that would be rather a reason for remitting the plaintiff to his action for damages. To justify an injunction, the equity court must find that even though the defendant is willing to compensate the plaintiff, he should, nevertheless, desist from injuring him—that he may not injure and pay; he must not injure. In some situations the defendant's conduct is not improper (and is in fact desirable) if he will compensate his neighbors for the injuries perpetrated on them.

Id., at 418 n.16.

6. Assuming that injunctions are not to be granted in all cases where damages are to be awarded for nuisance, what factors should govern their availability? As one writer comments: "Many polluters have blatantly adopted the callous attitude that it is cheaper to pay claims than to control pollution." Schmitz, *Pollution, Law, Science, and Damage Awards*, 18 CLEV.ST.L.REV. 456, 458 (1969). Distaste for such an attitude is not uncommon; yet is it clear to you [p*864] under what circumstances "polluters" should be prohibited from proceeding in this fashion?

Consider the following elements present in *Boomer*. As to each would you say it alone argues strongly (or weakly) for, argues strongly (or weakly) against, or has no bearing on, the issuance of an injunction.

(a) Defendant's investment was forty-five million dollars; plaintiffs' permanent damages were but $185,000.

(b) The plaintiffs were residents, not simply other commercial or industrial enterprises.

(c) There were, no doubt, other residents of the area harmed by the defendant's plant who were not parties to this suit.

(d) Plaintiffs did not and very likely could not show any measurable threat to public health from defendant's continued operation.[2]

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[2] 35 ALB.L.REV. 148, 154 n.52 (1970). Judge Jasen's supposition to the contrary seems to rest upon the following syllogism. Suspended particulate matter is "the type of air pollution which produces the greatest hazard to human health." Defendant's pollution is of this type. "We have thus a nuisance which . . . is decidedly harmful to the general public."

(e) Although unzoned when Atlantic Cement started to build in May 1961, the area was three months later designated "heavy industrial" by the Town Board. 35 ALB.L.REV. 148, 149 & n.7 (1970). New York then had an air pollution statute enforced by a state agency.[3] The company complied with its requirements. The plans for the new plant were approved by state authorities prior to construction. 35 ALB.L.REV. 148, 154 (1970).

(f) Defendant could not have predicted with great confidence whether its operations would be deemed a nuisance. (Or could it? You'll have to defer final judgment on this point until you've completed the next series of cases.) Defendant surely knew, nonetheless, that its operations would harm those like the plaintiffs. See the discussion of willfulness, *supra*, note 5.

For an extensive list of the factors which courts have said to be relevant to the appropriateness of injunctive relief against nuisance, see RESTATEMENT (SECOND) OF TORTS) §§ 936–43 (1979).

7. Injunctions awarded private parties never provide complete assurance that a polluter won't continue to "pay claims" rather than "control pollution." If controlling pollution is impossible or at least very expensive, it is quite likely (more likely the fewer plaintiffs are involved—present and potential) that the defendant will negotiate a settlement. Where that occurs the injunction simply shifts the mode of compensation from a judicial damage award based on harm to a negotiated payment. (Is the latter likely to be larger or smaller?) Should an injunction ever be granted where such a negotiated settlement is likely? If it is what the plaintiffs have had in mind from the start? [p*865]

8. Assuming that equities may be balanced, the typical nuisance suit complaining of an existing condition[4] presents the court[5] with three major options; it can:

(a) conclude that no nuisance exists, which leaves the plaintiff bearing the full cost, if any, of the incompatibility of uses;

(b) find that defendant's activity is a nuisance for which damages must be paid but hold that an injunction is not appropriate; or

(c) grant an injunction coupled with a damage award to compensate the plaintiff for injury suffered prior to its effective date.

These are not, however, the limit of its choices; for both (b) and (c) involve suboptions.

Damages can be awarded either for losses suffered to date (effect on rental or use value of plaintiff's property or specific losses of crops or value of personal discomfort or injury etc.) leaving the plaintiff to sue later for subsequent installments if the nuisance continues, or the court

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[3] Air Pollution Control Act of 1953, *as amended*, 1957 N.Y. Laws, ch.931 (N.Y.PUB.HEALTH LAW §§ 1264–98 (McKinney 1971)). The draftsmen clearly did not wish to preclude the private nuisance suit. Section 1294 of the act then provided (as it still does, *recodified as* N.Y.ENVTL.CONSERV.LAW § 19–0703 (McKinney 1984)):

It is the purpose of this article to provide additional and cumulative remedies to prevent and abate air pollution and air contamination. Nothing in this article contained shall abridge or alter rights of action or remedies now or hereafter existing . . . .

[4] The suit to enjoin future activity which, it is argued, will be a nuisance involves special problems discussed in DKM3, p. 870, note 4.

[5] This discussion is limited to forms of individually sought judicial relief; for the landowner aggrieved by a nuisance there is, at least theoretically, an alternative to going into court. He is privileged under the common law to employ reasonable self-help measures to abate the nuisance. *See* Wactor, *Self-Help: A Viable Remedy for Nuisance?*, 24 ARIZ.L.REV. 83 (1982); W. PROSSER & W. KEETON, TORTS § 89, at 641–43 (5th ed.1984). *See also* p. S121 *supra*. There is also the possibility of securing public action of some sort. *See generally* Ch. 6 *infra*.

may determine that the nuisance is permanent and calculate the award on that basis. *See* Hiley, *Involuntary Sale Damages in Permanent Nuisance Cases: A Bigger Bang from* Boomer, 14 B.C.ENVTL.AFF.L.REV. 61 (1986) (criticizing the method the court used to calculate the permanent damages). Did the Court of Appeals make the right choice between these two in *Boomer*? What factors are relevant in making such a judgment?) In extreme cases punitive damages can be assessed. *See* Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA.L.REV. 1299, 1335 (1977); Annot., 31 A.L.R.3d 1346 (1970).

Injunctions, too, can be of different sorts. A court may direct the defendant to take specific steps to reduce the harm caused by his enterprise without compelling it, at least directly, to shut down. (If the court's prescription is too costly it may, of course, have that ultimate effect.) A court may instead set a performance standard, either vague ("stop being a nuisance") or specific ("no more than 65 decibels"), forcing the defendant to come up with the techniques necessary for compliance. If a court is convinced that operational changes, improvements in equipment and so forth cannot sufficiently alleviate the incompatibility, it may simply order the defendant to close down. Nor does this exhaust the possibilities. Using the order to close as an ultimate threat, the court can grant defendant a period of grace to come up with a solution or liquidate the operation. In addition, the court may even grant a "compensated injunction," where the plaintiff pays the defendant for ceasing to create the nuisance. *See* Spur Indus., Inc., v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972); Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L.REV. 775 (1986).

Factors that fail to persuade a court to withhold injunctive relief may cause it to choose a limited injunction that allows a degree of actionable nuisance to continue. *See* RESTATEMENT (SECOND) OF TORTS) § 941 comment c (1979) ("Sometimes [p*866] the best solution is to grant an injunction that reduces the harm but leaves an actionable nuisance for which supplementary damages may be awarded.").

A final possibility that you should not ignore is that the list above is too restricted. One author suggests that the proper relief in certain nuisance situations is fractional recovery by the plaintiff (fifty percent, say) which would result in both parties sharing the cost of their incompatibility. In other cases, he argues the proper remedy is an injunction conditioned upon the plaintiff's paying defendant's cost of relocation. *See* Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN.L.REV. 293, 301–11 (1969).[6] Is the range of equitable discretion sufficiently broad to permit a court to employ such innovations? *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972), discussed *supra*.

8. Like the court in *Boomer*, we have throughout this discussion of the case assumed the soundness of the trial court's conclusion that defendant's activity was a nuisance. That is a finding you ought to reexamine after you have been through the next two cases. [p*882]

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[6] *See also* Rabin, *supra* note 3. Rabin suggests there are two separate questions: "who should pay?" and "what remedy will minimize the harm?" For another view, see Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN.L.REV. 1075 (1980).

B. SOME ECONOMIC ANALYSIS

COASE, THE PROBLEM OF SOCIAL COST

3 J. LAW & ECON. 1 (1960)

. . .

This paper is concerned with those actions of business firms which have harmful effects on others. The standard example is that of a factory the smoke from which has harmful effects on

those occupying neighbouring properties. The economic analysis of such a situation has usually proceeded in terms of a divergence between the private and social product of the factory, in which economists have largely followed the treatment of Pigou in *The Economics of Welfare*. The conclusions to which this kind of analysis seems to have led most economists is that it would be desirable to make the owner of the factory liable for the damage caused to those injured by the smoke, or alternatively, to place a tax on the factory owner varying with the amount of smoke produced and equivalent in money terms to the damage it would cause, or finally, to exclude the factory from residential districts (and presumably from other areas in which the emission of smoke would have harmful effects on others). It is my contention that the suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable. . . .

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. . . .

The harmful effects of the activities of a business can assume a wide variety of forms. An early English case concerned a building which, by obstructing currents of air, hindered the operation of a windmill.[1] A recent case in Florida concerned a building which cast a shadow on the cabana, swimming pool and sunbathing areas of a neighbouring hotel.[2] . . . To clarify the nature of my argument and to demonstrate its general applicability, I propose to illustrate it . . . by reference to [several] actual cases.

Let us first [consider] the case of *Sturges v. Bridgman*[3] . . . . In this case, a confectioner (in Wigmore Street) used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room. "In particular . . . the noise [p*883] prevented him from examining his patients by auscultation[4] for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention." The doctor therefore brought a legal action to force the confectioner to stop using his machinery. The courts had little difficulty in granting the doctor the injunction he sought. "Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes."

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. The doctor would have been willing to waive his right and allow the machinery to continue in operation if the

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[1] *See* Gale on Easements 237–39 (13th ed. M. Bowles 1959).

[2] *See* Fontaineble[a]u Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla.App.1959).

[3] 11 Ch.D. 852 (1879).

[4] Auscultation is the act of listening by ear or stethoscope in order to judge by sound the condition of the body.

confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionary business to some other location. The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.[5] But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery. If the doctor's income would have fallen more through continuance of the use of this machinery than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery. That is to say, the circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner's using his machinery) would be those in which it would be in the interest of the doctor to make a payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right to operate the machinery). . . . With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. It was of course the view of the judges that they were affecting the working of the economic system—and in a desirable direction. . . . The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. . . . [p*884]

Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. . . . The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place. . . . If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties. . . .

The reasoning employed by the courts in determining legal rights will often seem strange to an economist because many of the factors on which the decision turns are, to an economist, irrelevant. Because of this, situations which are, from an economic point of view, identical will be treated quite differently by the courts. The economic problem in all cases of harmful effects is how to maximise the value of production. . . . But it has to be remembered that the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production. . . .

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[5] Note that what is taken into account is the change in income after allowing for alterations in methods of production, location, character of product, etc.

The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

In earlier sections, when dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this would lead to an increase in the value of production. But this assumed costless market transactions. Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved. . . . [p*885]

. . . In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out. . . .

The discussion in this section has, up to this point, been concerned with court decisions arising out of the common law relating to nuisance. Delimitation of rights in this area also comes about because of statutory enactments. Most economists would appear to assume that the aim of governmental action in this field is to extend the scope of the law of nuisance by designating as nuisances activities which would not be recognized as such by the common law. And there can be no doubt that some statutes, for example, the Public Health Acts, have had this effect. But not all Government enactments are of this kind. The effect of much of the legislation in this area is to protect businesses from the claims of those they have harmed by their actions. . . .

The legal position in the United States would seem to be essentially the same as in England, except that the power of the legislatures to authorize what would otherwise be nuisances under the common law, at least without giving compensation to the person harmed, is somewhat more limited, as it is subject to constitutional restrictions. Nonetheless, the power is there and cases more or less identical with the English cases can be found. . . .

There can be little doubt that the Welfare State is likely to bring an extension of that immunity from liability for damage, which economists have been in the habit of condemning (although they have tended to assume that this immunity was a sign of too little Government intervention in the economic system). . . .

Notes and Questions

1. Professor Coase's ultimate conclusion that, assuming zero transaction costs, liability rules have no effect on resource allocation has received both serious criticism (*e.g.*, Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427 (1972)) and staunch defense (*e.g.* Demsetz, *When Does the Rule of Liability Matter?*, 1 J.LEGAL STUD. 13 (1972)). *See also* Hoffman & Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73 (1982).

Consider the following commentary on Coase:

> The mechanism [Coase presupposes] for achieving efficiency in the absence of competitive markets is bargaining. For example, Calabresi formulated the Coase Theorem as follows: "If one assumes rationality, no transaction costs, and no legal impediments to bargaining, *all* misallocation of resources would be fully cured in the market by bargains." This formulation apparently presupposes a general proposition about bargaining, namely, "Bargaining games with zero transaction costs reach efficient solutions."
>
> In order to evaluate this interpretation of Coase, we must explain the place of bargaining in game theory. A zero-sum game is a game in which total winnings minus total losses equals zero. Poker is an example. A zero-sum game is a game of pure redistribution, because nothing is created or destroyed. By contrast, a coordination game is a game in which the players have the same goal. For example, if a phone conversation is cut off, then [p*886] the callers face a coordination problem. The connection cannot be restored unless someone dials, but the call will not go through if both dial at once. The players win or lose as a team, and winning is productive, so coordination games are games of pure production.
>
> A bargaining game involves distribution and production. Typically, there is something to be divided called the *stakes*. For example, one person may have a car to sell and the other may have money to spend. The stakes are the money and the car. If the players can agree upon a price for the car, then both of them will benefit. The *surplus* is the joint benefits from cooperation, for example, consumer's surplus plus seller's surplus in our example of the car. If the players cannot agree upon how to divide the stakes, then the surplus will be lost. In brief, bargaining games are games in which production is contingent upon agreement about distribution.
>
> The bargaining version of the Coase Theorem takes an optimistic attitude toward the ability of people to solve this problem of distribution. The obstacles to cooperation are portrayed as the cost of communicating, the time spent negotiating, the cost of enforcing agreements, etc. These obstacles can all be described as transaction costs of bargaining. Obviously, we can conceive of a bargaining game in which these costs are nil.
>
> A pessimistic approach assumes that people cannot solve the distribution problem even if there are no costs to bargaining. According to this view, there is no reason why rationally self-interested players should agree about how to divide the stakes. The distribution problem is unsolvable by rational players. To eliminate the possibility of noncooperation, we would have to eliminate the problem of distribution, that is, to convert the bargaining game into a coordination game. But it makes no sense to speak about a bargaining game without a problem of distribution.
>
> Our example of selling a car illustrates the collision of these two viewpoints. The costs of communicating, writing a contract, and enforcing its terms are the transaction costs of buying or selling a car. These costs sometimes constitute an obstacle to exchange. However, there is another obstacle of an entirely different kind, namely the absence of a competitive price. The parties must haggle over the price until they can agree upon how to distribute the gains from trade. There is no guarantee that the rational pursuit of self-interest will permit agreement. If

we interpret zero transaction costs to mean that there is no dispute over price, then we have dissolved the bargaining game.

The polar opposite of the optimistic bargaining theorem can be stated as follows: "Bargaining games have noncooperative outcomes even when the bargaining process is costless." This line of thought suggest the polar opposite of the Coase Theorem: "Private bargaining to redistribute external costs will not achieve efficiency unless there is an institutional mechanism to dictate the terms of the contract." We have already discussed one institutional mechanism to achieve efficiency, namely a competitive market, which eliminates the power of parties to threaten each other. Another such institution is compulsary arbitration.

The conception of law which is the polar opposite to Coase is articulated in Hobbes and is probably much older. It is based upon the belief that people will exercise their worst threats against each other unless there is a third party to coerce both of them. The third party for Hobbes is the prince or leviathan—we would say dictatorial government—who has unlimited power relative to bargainers. Without his coercive threats, life would be "nasty, brutish, and short." We shall refer to the polar opposite of the Coase theorem as the Hobbes Theorem. . . . [p*887]

The Coase Theorem and the Hobbes Theorem have contradictory implications for the size of government. We can see this point most clearly by considering the policy implications in the ideal world of zero transaction costs. According to the Coase Theorem, there is no continuing need for government under these conditions. Like the deist god, the government retires from the scene after creating some rights over externalities, and efficiency is achieved regardless of what rights were created. According to the Hobbes Theorem, the coercive threats of government or some similar institution are needed to achieve efficiency when externalities create bargaining situations, even though bargaining is costless. Like the theist god, the government continuously monitors private bargaining to insure its success.

The Coase Theorem represents extreme optimism about private cooperation and the Hobbes Theorem represents extreme pessimism. Perhaps the Coase Theorem is more accurate than the Hobbes Theorem in the sense that gains from trade in bargaining situations are more often realized than not, or perhaps the Hobbes Theorem is more accurate from the perspective of lawyers who must pick up the pieces when cooperation fails. We shall not attempt an allocation of truth. The strategic considerations are not normally insurmountable, as suggested by Hobbes, or inconsequential, as suggested by Coase. An informed policy choice must balance the Coase Theorem against the Hobbes Theorem in light of the ability of the parties to cooperate. . . .

Cooter, *The Cost of Coase*, 11 J.LEGAL STUD. 1, 16–20 (1982).

2. Does Coase's analysis give you any help in dealing with the points of nuisance law detail discussed in the preceding pages? Quite a number of legal writers have found it a useful starting point on the kind of questions surveyed in this section. With real nuisance cases this, obviously, involves assimilating somehow the reality of significant, sometimes overwhelming, transaction costs. One recent author, for example, finds that there may be a justification for the traditional rule (*supra*, p. S381) that imposes liability and awards injunctions almost automatically in trespass cases but not in nuisance cases because trespass cases are ones in which the transactions cost of a bargained solution are likely to be low and hence the legal result is more likely to be overturned by negotiation than in nuisance cases which are more likely to involve high transactions costs of bargaining and must therefore be subject to more complicated (and costly) entitlement-determining rules. Merill, *Trespass, Nuisance and the Costs of Determining Property Rights*, 14 J.LEGAL STUD. 13 (1985).

3. Coase deals with harmful effects. The physical interdependence of private landholdings can also produce an uncompensated flow of benefits to which similar economic analysis can be supplied. *See* Cho, *Externalities and Land Economics*, 47 LAND ECON. 65 (1971). Professor Cho's hypothetical example is a denuded hilly parcel owned by *A* immediately adjacent to a farm owned by *B*. Were *A* to plant trees (requiring an investment of $10,000) it would improve the fertility of *B*'s farm (present value of the benefit $2,000). However, without some inducement *A* will not plant those trees, for the present value of their future worth as timber is only $9,000. *Id*. at 68. Does *B*, should *B*, have an action in nuisance for damages or an injunction based on *A*'s refusal to plant trees? How does one distinguish harm from a benefit denied? Which is involved in the case of a building which blocks a neighbor's solar collector? How does the existence of external benefits affect one's judgment about proper treatment for an alleged nuisance? *Cf.* Michelman, *Book Review*, 80 YALE L.J. 647, 681–83 (1971). *See generally* Honabach, *Windfalls, Wipeouts, and Nuisance* [p*888] *Law: Strict Liability With or Without Restricted Damages*, 19 URB.L.ANN. 3 (1980).

4. Does any of this cast new light on the problem posed by the *Boomer* case—namely, when a defendant held to have committed an actionable nuisance and therefore liable for damages, should be allowed to continue unhindered by injunction? Many authors in the "law and economics" tradition argue for a preference, in some cases a strong preference, for damage remedies, at least in most situations. *See, e.g.*, Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA.L.REV. 1299, 1309–48 (1977); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U.CHI.L.REV. 681, 738–48 (1973); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV.L.REV. 1089, 1115–24 (1972); G. CALABRESI, THE COSTS OF ACCIDENTS, 68–197 (1970). Can you see why? The wisdom of this preference was challenged in Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN.L.REV. 1075 (1980), in which the author argues that the desirable solution may depend on the extent to which redistribution rather than compensation is a desired goal of the process and also on the extent to which the court can accurately assess the costs to the parties of the alternatives. Polinsky's conclusions are questioned but not upset in Burrows, *Efficiency Levels, Efficiency Gains and Alternative Nuisance Remedies*, 5 INT'L REV.L. & ECON. 59 (1985).

5. Assuming that damages are going to be awarded, does it make sense that they be calculated, as they generally are now, on the basis of what the plaintiff has actually lost, as opposed to what it cost him to prevent the damage? For an argument that defendants in nuisance actions should have to pay for potential plaintiffs' prevention costs but then should be liable only for those losses that plaintiffs suffer having taken (or having been assumed to have taken) reasonable prevention measures, see Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J.LEGAL STUD. 25 (1989).

6. A student note, *An Economic Analysis of Land Use Conflicts*, 21 STAN.L.REV. 293 (1969), reaches some interesting conclusions about how certain nuisance controversies ought to be handled. Limiting itself to "either or" cases, that is, those in which accommodation is not feasible, so that the solution must lie in either the plaintiff's relocating or the defendant's ceasing operation, the note proposes different solutions for two types of cases: (a) those in which the incompatible uses developed concurrently; and (b) those in which one or the other party was established first. In the first type of case, it would have a court determine which of the parties can eliminate the conflict for the least monetary cost to society and then force that resolution. If it is the defendant, this is done by granting an injunction; if the plaintiff, by denying an injunction. In either event the "winning" party would be required to share the "loser's" costs. This last feature is, the author contends, based upon a point made by Coase:

> Because both the uses caused the conflict, both should share its costs. This notion is not based on a "fault" theory; . . . no discussion of "fault" is appropriate to concurrent cases. Rather, the notion is based on general principles of resource allocation . . . . An activity must be forced to "internalize" its external costs if we are to ensure that it makes its pricing decisions in a manner that will maximize the total value of goods and services in society.

Id. at 302. [p*889]

The rule proposed for "sequential" cases is that the second user be permitted to stay only on condition that he pay the full costs of relocating the first. *Id*. at 303–08.

Does the note's proposal seem a sound one? If you agree with it, how would you draw the line between the two types of cases? *See id*. at 308–09. How would you deal with external costs and benefits falling upon neighboring owners who are not parties to the suit? *See id*. at 301. *See also* Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance"*, 9 J.LEGAL STUD. 557 (1980).

7. In addition to the literature cited above, *see generally* Manson, *A Reexamination of Nuisance Law*, 8 HARV.J.L. & PUB.POL'Y 185 (1985); White, *Economics and Nuisance Law: Comment on Manson*, *id*. 213; Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J.LEGAL STUD. 49 (1979); Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT.RESOURCES J. 89 (1973); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A.L.REV. 429 (1971).

Section 3. PRIVATE ADJUSTMENTS OF THE USE RIGHTS ASSOCIATED WITH THE FEE

The land-use relationship between neighboring owners (*A* and *B*) produced by the common law tort doctrines discussed in the preceding section allows each owner a considerable range of land-based activity which can be enjoyed without threat of injunction or damages. Beyond that range lie uses which *A* and *B* can undertake without the consent of the other but only upon payment of damages. Finally, one comes to uses over which the neighbor has an effective veto, backed if need be by an injunction.

One point made quite forcefully in the *Coase* article, *supra*, p. S389, is that, however judges and juries draw the lines demarking these ranges, there will be situations in which *A* and *B* will see mutual advantage in modifying one or more of them. Since the precise location of those boundaries may be hard to plot in advance, there will also be occasions when *A* and *B* are prompted to seek an agreement simply to remove the uncertainty. In either case the agreement may be reached by *A* and *B* themselves or by a prior owner *O*. The latter occurs when an *O* believes his land will be more attractive to, and hence command a better price from, buyers like *A* and *B* if it is covered by different or more particularized land-use limits than those furnished by common law liability principles. In such a case, *A* and *B* are in the position of purchasing a ready-made land-use agreement.

This can be true with respect to any or all of the boundary lines described above. For example, *A* and *B* may agree or have it agreed for them that *A* will not engage in certain conduct under penalty of damage liability or an injunction (even though it is not a nuisance or at least arguably