Fordham Environmental Law Review

Volume 14, *Number* 1 2002 *Article* 2

Public Bads and Public Nuisance- Common Law Remedies for Environmental Decline

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PUBLIC BADS AND PUBLIC NUISANCE: COMMON LAW REMEDIES FOR ENVIRONMENTAL DECLINE

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I. INTRODUCTION

The symbiotic relationship between evolved common law and the market process has been noted for centuries.[2] Having developed from controversies that emerge in the conduct of day-to-day business of ordinary human beings, the common law facilitated the enforcement of contracts and the definition and enforcement of property rights. Indeed, the complimentary relationship between the common law and market efficiency has led some to suggest that the common law is efficient in the allocation of resources.[3] In contrast to statutory law, which is formed more on the basis of political expediency

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1. The authors are respectively, Assistant Dean, George Mason University School of Law and Professor Emeritus of Economics, Clemson University, and Senior Associate at PERC. Appreciation is expressed for helpful comments provided by Elizabeth Brubaker, Jonathan Adler, and Roger Meiners.

2. The Law Merchant, which for centuries provided commercial dispute settlement across England and all of Europe, became embodied in common law in the 17th century. For a discussion of the 17thcentury views of Sir Edward Coke on this topic, *see* Bruce Yandle, *Organic Constitutions and the Common Law*, 2 CONST. POL. ECON. 225, 234 n.7 (1991). *See also* Harold J. Berman, LAW AND REVOLUTION 333-345 (1983) (providing a history of the Law Merchant).

3. *See* Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977). *Cf.* Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEG. STUD. 205 (1982) (revising the original opinion). *See also* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEG. STUD. 501 (2001).

than on legal norms and principles, common law, where it has evolved, was—and is—the law common to the people.[4]

In recent years, the relative merits of common law protection of environmental property rights have become a topic of investigation and debate within free market environmentalism circles.[5] This, in spite of the fact that federal statutes, having provided the foundation for environmental regulation for more than 30 years, are seen generally as the most logical basis for protecting environmental rights. Long before there were statutes that claimed to protect air and water quality and other features of nature, the common law of nuisance and trespass enabled holders of environmental rights, whether the state or private citizens, to bring either a criminal or civil action when another party invaded and damaged those rights without permission. On the other hand, when a party wished to engage in actions that might harm the environmental rights of another, the common law allowed the two parties to engage in trade. By contracting around common law rules, for example, downstream holders of common law rights could transfer those rights to upstream holders or to other parties and then accept the costs associated with the rights' transfer. Decades before even the most creative economist thought of cap-and-trade programs for managing environmental quality, the common law provided a framework for trading the right to pollute.

Yet while much has been accomplished describing how the common law worked to protect private rights to the environment, and how the common law might work effectively again, little has been done to show how the common law framework was used to maintain and protect a community's environment.[6] There is only sparse discussion of public goods and bads. Put in terms of the law, most of the discussion thus far has focused on private nuisance tort law. By comparison, not much attention has been devoted to the tort or crime of public nuisance. A better understanding of the law of public nuisance will contribute to a more fruitful debate about alternative institutions for providing environmental protection now emerging among economists and legal scholars.

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4. *See* F.A. Hayek, 1 LAW, LEGISLATION, AND LIBERTY 124-127 (1973).

5. *See* Elizabeth Brubaker, *The Common Law and the Environment*, *in* WHO OWNS THE ENVIRONMENT (Roger Meiners & Andrew Morriss eds., 1998).

6. *See id.*

In this article, we do three things. We first describe the economic framework and vocabulary for analyzing public environmental harms. This, of necessity, requires that we touch on the framework for considering private harms. We also provide the vocabulary for the common law of nuisance that parallels the economic framework. This discussion contains the notions and theory of public bads and their common law counterpart, public nuisance. The next part of the article relates the discussion of nuisance law to a property rights scheme that begins with common rights and ends with well-specified rights. We follow this discussion with a series of case law vignettes to illustrate how public nuisance law can work to deal with public bads. The article concludes with brief final thoughts about ways to strengthen the common law of public nuisance so that it can be used more effectively to protect environmental rights.

II. THE WORLD OF BADS

According to Kenneth Boulding, "We produce 'bads' because 'bads' are jointly produced with goods. We want goodies, so we get baddies."[7] Bads are actions or commodities that, at the margin, increase cost or reduce utility for the recipient. Goods, of course, yield benefits and positive marginal utility. Boulding was referring to the classic 'Pigouvian' joint production problem where a factory, in the course of producing steel products, spews soot and ashes on clothes that are being dried in the sunshine by the laundry next door.[8] Pigou's problem here was between two private parties – the owner of the mill and the owner of the laundry. There were no other economic agents involved. If, in this case, the soot is a bad, it is a private bad that imposes an uncompensated cost on a well-defined private party.

The mention of mills, soot, laundry and Pigou brings to mind the taxation solution Pigou offered[9] but later recanted. He proposed placing a tax on the bads, so that the mill would take into account the

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7. Bruce Yandle, *Mixed Goods and Bads*, 19 PUBLIC CHOICE 95 (1974).

8. Bruce Yandle, *Coase, Pigou, and Environmental Rights*, *in* WHO OWNS THE ENVIRONMENT, 121-133 (Peter J. Hill & Roger E. Meiners eds., 1998).

9. A.C. PIGOU, THE ECONOMICS OF WELFARE (1932).

cost being imposed on the laundry. Properly devised and implemented, the 'Pigouvian tax' will "internalize the externality."[10] Pigou was talking about external costs. Later, Pigou determined that his solution was not a solution at all; this was before Coase[11] and then Buchanan and Stubblebine[12] theoretically leveled the Pigouvian castle.[13] Instead of focusing on one-sided costs and benefits as observed at the steel plant, the issue became simply how to reconcile competition for scarce property rights when both potential users would generate costs and benefits. And, as recognized by Coase's extensive reference to case law, this formulation of the problem put the matter squarely in the realm of the common law of nuisance and, in some instances, trespass.

In a world of private bads, external costs that affect, and are confined to, easily defined economic agents are seen as a private matter by the common law. Economic theory sees the problem as a matter that may be resolved by bargaining. Common law rules both specify the party who holds the right to pollute or not be polluted, and provides a cause of action against the party imposing the cost. The cause of action is more often than not based on the tort of nuisance. At times, the law of trespass may also be used. Dating back almost to time *in memoriam*, nuisance law is based on a 13th-century maxim of law that developed in England: "Use your own property so as not

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10. *See generally id.*

11. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

12. James M. Buchanan & William Craig Stubblebine, *Externalities*, 29 ECONOMICA 371 (1962).

13. The debate between Pigou and Coase, with others such as Buchanan and Stubblebine joining the fray, was about how to deal with problems like pollution, sparks from chimneys and other unpleasant aspects of life. In a deeper sense, the debate was about how to obtain and maintain social order. The exchange that took place between the two powerful intellectuals was important because it led to clearer thinking and analysis about a broad category of social problems. Although Pigou ultimately abandoned his position, which called for command-and-control top-down regulation, he is still remembered for having taken that position. Coase, on the other hand, called for a decentralized approach, namely more effective enforcement of property rights and contracts.

to harm another's."[14] According to legal scholar Elizabeth Brubaker, the maxim entered the body of common law precedents in 1611 when it was stated in the now famous *Aldred's Case*, one of the first cases at common law involving environmental pollution.[15] Finally, in 1885, an English judge summarized the meaning of both the maxim and private nuisance in the following way:

> *Prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbor's land, or by putting poisonous matter on his land and allowing it to escape on his neighbour's land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial. If a man chooses to put filth on his own land he must take care not to let it escape on his neighbour's land.[16]

Over time, common law judges developed the concept of private nuisance, which involves a wrongful interference with the use or enjoyment of land. This doctrine was designed to prevent polluters from harming "downstream" parties. Along with the definitions of the law and the right holders came the notion of contracting around the rule. At common law, market forces could deliver gains from the trading of rights between downstream and upstream parties. Economic theory explains how bargaining between parties can generate a mutually beneficial way of contracting around the common law rule and how the enforcement of property rights enables an ordinary market to emerge. Private bads pose no particular problem in common law and economics.

A. *Public Bads*

Public bads are another matter. They are said to emerge when a large number of parties are affected negatively and simultaneously, at the margin, by an action undertaken by an individual or group. The nature of the phenomenon is such that there is no low-cost way to insulate and partition the affected individuals in the group from

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14. Brubaker, *supra* note 5, at 89.

15. 9 Coke Report. fol. 59a (1611).

16. Brubaker, *supra* note 5 at 89 (*quoting* Lord Lindley's decision in *Ballard v. Tomlinson*, 20 Ch.D. 115, 126 (1885)).

the negative effect.[17] What one group member receives, all receive. To tighten the focus and at the same time illustrate the concept, a pure public bad is said to exist if, for example, all homeowners in a mining village receive equal amounts of corrosive emissions from the local copper smelter. In this case, if the polluter responds and the air is cleaned for one, it is cleaned for all. If one homeowner took it upon herself to bring legal action against the smelter, hoping to attract support to her cause from all the other homeowners, it is likely that the lack of support would disappoint her. Benefits accrue to one and all when the emissions fall, whether one pays or not.[18]

Public bads can also be thought of in property rights terms; although it is not entirely accurate to do so in economic theory, since the theory relates to characteristics of the good, not the good's owner. When public property, such as a navigable stream or state-provided highway, is adversely affected by the action of an economic agent, that action can be termed a public bad.

The economic analysis of public bads calls for a different theoretical approach than that required for private bads. Indeed, the economic theory of public goods and bads inevitably includes such things as collective decision-making, free-rider problems, government coercion, and strategic behavior. Because of the level of decision-making costs, the world of public bads is not as neat as the world of private bads. In the private world, the small numbers of agents and clearly defined property rights enable bargaining to emerge as a low-cost way to eliminate relevant private bads. The problem is more costly to resolve in the world of public goods and bads. As suggested in the discussion of the smelter and actions to deal with it, one individual landowner along a publicly owned river who is damaged by pollution that forms silt in the river may bring a private suit against the discharger. However, it is costly for the same individual to organize a large number of similarly situated silt recipi-

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17. JAMES BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS 49 (1967).

18. A public bad is *impure* when the dose received varies across individuals or can be modified by some but not all individuals. Buchanan, *supra* note 17, at 49-75. For example, those individuals dwelling closer to the smelter may be more adversely affected than more distant parties. The number of individuals affected, their cost in organizing a suit, and the ability to contain the effect are the obvious differences between the private bad and the public bad.

ents and then bring suit. The cost of organizing and the tendency for individuals to free ride works against the individual's success. The decision to bring suit obviously involves a benefit and cost calculus on the part of an aggrieved party. When the benefits of a suit are widely dispersed and the cost of bringing private action is concentrated, actions to protect public property logically call for a public sector response. The sovereign has an obligation to protect the general welfare, and the power to tax can deal with the free-rider problem.

B. *Public Nuisance*

At common law, a public nuisance is defined as an unreasonable interference with rights held by the public in general, not merely with the rights or interests of a few individuals.[19] An example would be interference with the public's right to maintain the navigability of a river. A public nuisance involves the harmful use of common and public property.[20] To make matters a bit more complex but useful to us in later discussion, in cases that do involve interference with the use and enjoyment of land, a private nuisance *may co-exist* along with a public nuisance. This may happen when an individual has a claim for damages that are different in kind from those suffered by the general public as a result of the nuisance.

Under English law, the ancient public nuisance action was originally a common-law crime that involved the infringement of the rights of the crown or the general public.[21] Today, a public nuisance suit may be brought either by the state through its attorney general or through another public official or public agency representing the state or one of its political subdivisions, or by *private plaintiffs*. When the case is brought by the state, the sovereign is essentially

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19. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

20. Unlike a private nuisance, a public nuisance does not necessarily involve interference with the use and enjoyment of land. In Commonwealth v. S. Covington & Cincinnati St. Ry. Co., 205 S.W. 581, 583 (Ky. 1918), the court said: "A common or public nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public."

21. W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86 (5th ed. 1984).

exercising its police power to protect the health, safety and/or morals of its citizens. The appropriate remedy in this case is abatement via injunction to either improve operations or to terminate operations.[22]

Private plaintiffs may bring a case seeking damages for harm suffered as a result of a public nuisance if their injury differs in kind – not simply in degree – from that of the general public.[23] They may also seek injunctive relief. In public nuisance cases involving a private plaintiff, the action is in tort. These cases are conceptually different from a public nuisance brought by the sovereign, which is more analogous to an exertion of the police power of the state, as noted above, rather than tort. Legal remedies available in public nuisance cases include: an award of money damages; injunctive relief to abate the nuisance; or a criminal proceeding if the case is brought under a criminal nuisance statute. The plaintiff in a public nuisance suit must prove that the defendant's conduct unreasonably interfered with a public right. In suits brought by the sovereign,

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22. Injunctive relief for nuisance was not available until the early 18th century, first awarded in English cases and later in the century in American cases. Injunctions were authorized in cases of continuing or recurring nuisance where damages were determined to be inadequate. *See* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 109 n. 101 (1998).

23. RESTATEMENT (SECOND) OF TORTS § 821 C (1) (1979); *see also* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973); *and* Koll-Irvine Ctr Prop. Owners Ass'n. v. County, 29 Cal. Rep.2d 664 (1994); Hanlin Group v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925 (D. Me.1990) (holding under Maine law purchaser did not have standing to maintain public nuisance action against vendor that had allegedly contaminated land by releasing hazardous chemicals, absent any indication that purchaser suffered special injury.) In some states, the requirement for the plaintiff to demonstrate a special injury will not apply in cases seeking injunctive relief only, and not monetary damages. As noted in RESTATEMENT (SECOND) OF TORTS § 821C, cmt. on subsection 2 (1979): "[s]tatutes allowing citizens' actions or authorizing an individual to represent the public, and extensive general developments regarding class actions [suggest that the requirement of an injury "different in nature" may be less pertinent in actions seeking abatement or injunction]." A small number of states do not allow private citizens to bring public nuisance cases against the state or against a municipality.

liability for public nuisance is strict, however in private action on public nuisances cases the liability is based upon the defendant's negligence.[24]

Common law actions for public nuisance will not be precluded even though a polluter holds a government issued permit that allows discharge,[25] though in some cases state and federal environmental statutes are interpreted to preclude public nuisance suits.[26] However, an indication that a defendant is complying with permit requirements will be considered, by most courts, as evidence of reasonable conduct, a presumption that may be overcome. If a defendant is in violation of permit requirements, this will typically be considered evidence of unreasonable conduct.

Rather than disappearing as vast state and federal regulatory regimes were created to manage environmental quality in the 1970s, public nuisance actions have continued to play an important role in the area of environmental protection. Indeed, as one source has noted, the action has, "if anything, [] gained in popularity in recent decades, with heightened public concern over environmental issues."[27] The rejuvenation of the old public nuisance action was further promoted by passage of federal Superfund legislation, which allowed for common law actions in conjunction with statutory claims, and by the 1992 Supreme Court case of *Lucas v. South Caro-*

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24. Halper, *supra* note 22, at 100. However, the liability issue in public nuisance is confused: *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (Suggesting the defendant will be liable for public nuisance if his action was intentional, unintentional but actionable under principles controlling liability for negligence or reckless conduct, or was abnormally dangerous.)

25. City of Odessa v. Bell, 787 S.W.2d 525 (Tex. App. 1990).

26. *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (Precluding *federal* common law nuisance actions, though not state common law actions); *see also U.S. v. Price*, 523 F. Supp. 1055 (D.NJ. 1981) *aff'd*, 688 F.2d 204 (3d Cir. 1982) (holding federal common law preempted by the Resource Conservation and Recovery Act (RCRA) and by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)).

27. P. WEINBERG & K.A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW § 3.01 (1998).

lina Coastal Council,[28] in which the court stated that if a landowner lost all the value of his property to uncompensated regulation, and if the action prohibited by the regulation was not a nuisance under common law, then the landowner should be considered the victim of a regulatory takings.

To illustrate the relative amount of court activity involving common law public nuisance actions, we conducted a Lexis search of reported actions using the following terms: "public nuisance and pollut! or environment! or health." We then examined each case in the search results and deleted those that involved non-environmental issues such as attacks on abortion clinics, gangs, gun manufacturers, weed clearance, insurance claims, and lead paint. In short, we sought to identify cases that related to what might generally considered environmental harms. The resulting count, by decade, is as follows:

	State Court	Federal Court	Total
1960s	50	7	57
1970s	107	43	150
1980s	136	116	252
1990s	184	178	362

As indicated, public nuisance actions expanded with the rise of environmentalism and federal legislation. This is especially noticed in federal court activity where common law pleadings often accompanied statute-based pleadings. Far from being a discredited body of law for protecting environmental rights, public nuisance continues apace.

Why might this be the case, given the extensive reach provided by environmental statutes? Part of the answer to this question relates to what public nuisance offers a plaintiff that cannot be provided by statute-based remedies. While many statutes and even other tort actions have relatively short statutes of limitations, the equitable common law action of public nuisance has no statute of limitations. Also, if a group of individuals is convinced that it has been damaged by a polluter, a complaint to regulatory authorities may bring penalties and other enforcement actions against the polluter. However, there will be no payment of damages to the harmed individuals. Statutes do not provide for damage payments. Violators of statutes

28. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

are seen as having imposed cost on the sovereign, not on individuals. We note that it is possible that a regulatory agency will declare an emergency and provide emergency assistance to damaged private parties. What about other remedies? Public nuisance actions can bring court-enforced injunctions against polluters. They can be shut down. Injunctions, which may be gained at common law, cannot be obtained by citizens filing complaints under federal statutes. Only the federal government itself can seek injunctive relief.[29] As result of this richness of common law remedies, actions involving Superfund sites often include common law pleadings along with those that are statute based.[30]

C. *Summary*

The common law of public nuisance has evolved for dealing with public bads. When an agent imposes a cost, similar in amount and kind, on a group of individuals, then the harmed group can call upon a public defender to bring a public nuisance action against the agent. If a copper smelter discharges corrosive fumes that fall systematically on homeowners in the mining village, then any one of the homeowners can call on the attorney general or prosecutor to bring suit against the smelter. Alternately, if the emissions affect particular homeowners in demonstrably different ways, then those homeowners may have a cause of action for either private or public nuisance, or perhaps both, against the offending business. Just as economic theory ushers in collective decision-making and government action when dealing with public bads, common law taps the shoulder of the public attorney, who is paid with tax money. In both cases,

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29. *See, e.g.*, New York v. Shore Realty, 759 F.2d 1032, 1049 (2d Cir. 1985).

30. Indeed, it is in connection with CERCLA (Superfund) where common law has resurged. Commenting on this, one author has noted: "This shift [away from common law implied by the statute], from the elegant and contextual common law approach to CERCLA's ponderous and arguably arbitrary liability and cleanup rules, may have encouraged state court judges to find the common law applicable to hazardous waste cases in ways they previously had not." Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 219 (1996).

the free-rider problem is solved by the coercive tool of taxation. We call attention here to the matter of incentives facing the prosecutor or attorney general, especially when the defendant is the state, and the degree to which the response is in fact a politically determined event. We will address this concern later.

D. *The Property Rights Framework*

The economic theory of private and public bads and common law treatment of private and public nuisance can be related to the notion of property rights stations that describe different property definitions. Figure 1 shows a property rights classification scheme that begins with a commons and ends with private property rights.

Figure One: Property Rights Stations

THE COMMONS: There are no enforceable private, common or public property rights. Economic analysis predicts dissipation of all rents. Property rights analysis predicts a "tragedy of the commons."

COMMON PROPERTY: There are indivisible, nontransferable, exclusive rights held in common by members of a family, tribe or community. Economic analysis predicts efficient use, given the cost of defining and enforcing private rights. Common law provides for contract enforcement and for action against parties that impose cost on the holders of common property rights. In Canada and the U.S., public nuisance is sometimes called common nuisance.

PUBLIC PROPERTY: There are indivisible, nontransferable, exclusive rights held and managed by a political unit on behalf of citizens. Some public goods, such as air and water quality may be considered to be public property. Economic analysis calls for collective decision making. When public property rights are invaded, common law calls for public nuisance action.

REGULATORY PROPERTY: There are limited, nontransferable, indivisible exclusive rights assigned to individuals by regulatory bodies. Economics applies theories of regulation, bureaucracy and rent-seeking behavior to explain the allocation process. Regulatory property lies outside the common law domain.

PRIVATE PROPERTY: There are transferable, divisible, exclusive rights held by individuals. Economics applies the standard theory of consumer and firm behavior in predicting the use of the rights. The common law of private nuisance is applied when an outside party invades the rights or causes the rights to deteriorate.

A brief description of applicable economic reasoning and common law treatment is provided for each of the stations. Common law remedies are available for property rights protection in all but two cases. The first is where no property rights are defined; hence there can be no legal protection provided. The second is where property rights are defined by statute law, as in the case of interstate matters related to U.S. water quality, and common law rights are replaced by regulatory property rights.[31]

III. PUBLIC BADS AND PUBLIC NUISANCE APPLIED

Now we will illustrate how the law has worked by discussing a series of cases that involve claims of public nuisance. In each of these cases the public nuisance claim is used as a mechanism for addressing an environmental harm: pollution to the land, water, or air. The cases highlight the ways in which public nuisance has been, and still is, used to protect environmental rights. Additionally , the cases illustrate how public nuisance has adapted to rising concerns for increased environmental protection.

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31. For the relevant Court decisions that ended the period of federal common law protection of interstate waters, *see* Illinois v. Milwaukee, 406 U.S. 91 (1972); *and* Milwaukee v. Illinois, 451 U.S. 304 (1981). For related discussion, *see* Roger E. Meiners, Stacie Thomas & Bruce Yandle, *Burning Rivers, Common Law, and Institutional Choice for Water Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT (2000).

A. *The People of the State of California v. Gold Run Ditch and Mining Co.*[32]

This 19th-century case granted a perpetual injunction against a California mining company after it was found that the company's operations caused serious harm to the Sacramento and American Rivers in California and to adjacent property. In terms of our property rights taxonomy, the case illustrates protection of public property—a navigable river, as opposed to a more highly stylized public bads case. The case was brought on appeal from a judgment perpetually restraining the discharge of mining debris into the American River and compelling the discontinuance of those acts found to be wrongful and injurious to the public's rights. Brought as a traditional public nuisance claim for equitable relief by means of injunction, the case did not involve a claim for damages.

The facts are as follows: Beginning in 1870, Gold Run, a California corporation, operated a hydraulic mine on 500 acres along the north fork of the American River.[33] The hydraulic mining process involved piping large quantities of water onto a property and using the force of gravity to propel the water over potentially gold-laden dirt. The piped water would shoot with tremendous force from the nozzle of a hydraulic monitor – a device much like a water cannon. Monitors in the 1870s and 80s could be sixteen to eighteen feet long and could blast water four hundred to five hundred feet. The monitors would be used to break down the sides of riverbanks and mountains. The rocks, dirt, and other debris that the water cannon broke apart would then travel through gold-separating sluices. Gold would settle behind riffle boards in these sluices but in the process, much of the bank or mountainside that was being worked would be washed into a stream or river. In this case, the resulting debris, or tailings, flowed down a several hundred-foot drop into the non-navigable American River, which joined the navigable Sacramento River,

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32. The People of the State of California v. Gold Run Ditch and Mining Co., 4 P. 1152 (Cal. 1884). *See also* Woodruff v. North Bloomfield Gravel Min. Co., 45 F. 129 (C.C.N.D. Cal. 1891) (issuing a federal injunction that had the practical effect of virtually ending hydraulic mining in the state of California).

33. People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1153 (1884).

where it "commingled with the tailings from other hydraulic mines."[34]

The trial court estimated that during its five-month long season of operations, the company discharged between four and five thousand cubic yards of material per day into the American River. This discharge equaled a yearly discharge of "at least six hundred thousand cubic yards."[35] The court noted that the bed of the American River had been raised between 10 and 12 feet as a result of the dumping, and the bed of the Sacramento River was raised between 6 and 12 feet. The rising riverbeds destroyed habitat and contributed to extensive flooding. During the flooding, mining refuse was deposited on land adjoining the rivers, which the court believed could destroy the land's economic value.

The Supreme Court of California implicitly recognized that this case pitted two very powerful interests against each other: the mining industry versus farmers. Yet the Court depicted the case as one involving a rather simple question: did Gold Run – as the owner of hydraulic mines located on the riverbank – have the right to dump hydraulic debris into the waters of a non-navigable stream that emptied into a navigable stream? If it did not have this right, then the Court could determine whether or not Gold Run's actions constituted a public nuisance. In other words, was the river protected by public property rights?

The Court began its inquiry by noting that the Sacramento River – into which the American River flowed – was a navigable river, and that until 1862 deep-draught steam ships could travel anytime upriver to the city of Sacramento. As of 1884 this was no longer the case; farmers who lived upstream could no longer use river transport to get their goods to market. The river was "a great public highway, in which the people of the State have paramount and controlling rights."[36] Because it was navigable in fact and in law and therefore, was public property, the court could hold any unauthorized intrusion upon it to be a nuisance. And because Gold Run's actions affected not just the American River, but also the navigable Sacramento, the issue of impeding a navigable waterway was an important one.

In its defense, Gold Run argued that it should not be held liable for harms to which other mining companies contributed. The Court re-

34. *Id.* at 1154.
35. *Id.*
36. *Id.* at 1155.

jected this claim, noting that it was a valid defense in a case at law for damages (where defendants would only be severally, not jointly, liable), but was inapplicable in an equitable claim for injunction.[37]

Gold Run further argued that it had acquired the right to discharge its tailings from custom, by prescription, and by operation of the statute of limitations. The Court likewise rejected these three claims. While it was true, the Court said, that mining was customary in California, this did not give Gold Run a legal right to interfere with a valuable public resource. The Court's reasoning was as follows:

> [A] legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner.[38]

Citing an English authority, the Court said "The *jus privatum* . . . must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use."[39]

The Court also rejected the remaining argument concerning prescriptive rights and statute of limitations by saying that "a right to continue a public nuisance cannot be acquired by prescription . . . Nor can it be legalized by lapse of time."[40] Finding that all people of the State had the right to use navigable rivers within the state, and finding further that the state attorney general could maintain an equitable action in the name of the people, the Court upheld the judgment for a perpetual injunction of Gold Run's activities.

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37. *Id.* at 1157 (*quoting* Keyes v. Little York Gold Washing and Water Co., 53 Cal. 724 (1874), "[t]his case clearly recognized the equitable principle that, in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally. It is the nuisance itself, which, if destructive, of public or private rights of property, may be enjoined").

38. *Id.* at 1158-59.

39. People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1153 (1884) at 1159 (*citing* Lord Chief Justice Hale, DE JURE MARIS, 22 (1670)).

40. *Id.* at 1159.

While the rhetoric of Gold Run suggests that it represents a battle between public rights and rights of the mining industry, in fact it is more accurate to read it as a battle of special-interest groups: miners versus farmers. By 1884, after thirty-five years of intensive mining in California, the miners were encountering serious opposition in the battle for scarce resources. Protecting land rights – agricultural land and otherwise – was clearly important to the Court and it did not hesitate to impose significant costs on Gold Run, which was seen as harming property and navigation rights. It is interesting that the California Supreme Court did not engage in an overt balancing of equities in this case. Rather, the Court relied upon a bright-line, common law nuisance rule that prohibited unauthorized intrusions on water highways that were public property.

When placed in a modern setting, the logic of the Gold Run decision indicates that common law courts could provide meaningful protection for rivers, lakes, and other bodies of water that might receive costly discharge from private and public sources. Most significant bodies of water in the various states are defined as public property. At common law, deterioration of these waters could be a cause of action undertaken by an attorney general or prosecutor.

Having stated this point, we now turn to face a serious difficulty. Today in the United States, publicly owned treatment works, military establishments, and federal energy facilities constitute the most serious sources of pollution.[41] After 30 years of intense regulation and litigation, the uncontrolled discharge from industrial sources has been more successfully eliminated. The pertinent question is this: will state attorneys general and prosecutors be diligent in bringing suit against their employers – cities, counties, and state governments? And what if the defendant is the federal government? The same problem applies. Given the incentives at play, we suggest they may not be diligent.[42] Given a risk of disinterest in citizen complaints against government entities, it is important that alternate

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41. BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT 76-77 (1997).

42. There is some evidence to support our suspicion. Kuhnle indicates that in Superfund-related common law cases, where the common law seems to offer distinct advantages over the statute for obtaining remedies, "none of the nuisance cases brought in California... have been brought by a public official." Kuhnle, *supra* note 30, at 226.

forms of action be made available. We will return to this issue in the paper's last section and suggest ways that common law may be strengthened to provide a partial path through this thicket.

B. *Anderson et al. v. American Smelting & Refining Co.*[43]

In our earlier discussion, we identified what might be called the Achilles Heel of public nuisance. When a public nuisance is eliminated or reduced, each member of a large group – the public – gains simultaneously. No one, by definition, can be excluded from the improvements. A potential free-rider problem emerges when any single member of the group hopes that some other member or group will assume the costs of pursuing the improvements, allowing the free-rider to gain without paying at all or by paying a minimal amount. The free-rider problem suggests the difficulties associated with private actions on public nuisance. We shall now see how private action dealt with a public nuisance problem.

Anderson involved two smelters and 61 holders of private property rights that lived downwind from the plants that were located near Salt Lake City, Utah. This 1919 air pollution case involves Mr. Anderson and 60 other farmers who brought a common law suit against American Smelting & Refining Company and United States Smelting & Refining Company. The two smelters, with indistinguishable emissions, were located within three miles of each other. The 61 farmers claimed their crops and livestock were damaged by emissions of sulphur dioxide that became converted to sulphuric acid, as well as by arsenic and other emissions.[44] Mr. Anderson and his neighbors went to a local court and sought an injunction to stop the smelters from polluting. The plaintiffs argued that "the fumes...are offensive to the senses, and ...are injurious to the health of the [complainants] and their families. That said fumes, gases, and dust, either directly or by poisoning the grasses upon which they feed, have caused and are causing many domestic animals ...to sicken or die."[45] The smelter firms first responded by admitting the emissions were present and practically unavoidable, but argued there was no injury. They also argued there was simply no technical solution for the problem and pointed out the relative magnitudes of the

43. 265 F. 928 (D. Utah 1919).
44. *Id.* at 930.
45. *Id.*

smelter operations as compared to the farmers. Technical evidence presented at trial persuaded the judge to accept enough of the plaintiffs' claim of harm to sustain their position. The court focused on common law rights and found for the farmers, but also noted the importance of the industry. The court stated: "[T]here can be no solution [to the] smelter smoke problem...unless SO2 is removed entirely from the smoke stream ...or so diffused...the concentration...will be reduced to a point imperceptible to the senses."[46] On the other hand, the court pointed out that no "industry, however important, can justly claim the right to live or operate which creates a nuisance in operation or trespasses upon the property or the inherent personal rights of others."[47]

The court was caught on the horns of a dilemma. The common law rule gave the farmers environmental rights, but there was no known technical solution for this particular pollution problem. Would the court close the smelter, or would the court find a compromise? Recognizing how costly it would be to close the smelter, the court ordered the company to come forward with a solution or at least an approach that would lead systematically to a solution. Failing that, the court promised to order the injunction remedy that Anderson requested.

C. *Board of Commissioners of Ohio County v. Elm Grove Mining Co.*[48]

Twenty years later, a West Virginia court faced a similar dilemma. The case involved a private company creating a public bad in the form of air pollution. In the late 1930s, in the small West Virginia town of Triadelphia, West Grove Mining Company operated a bituminous coal plant. The plant began operations in 1915, many decades after the town was founded.[49] Over time, the plant became the major employer in town and thus many depended upon it for their livelihoods.

In a 1940 case before the Supreme Court of Appeals of West Virginia, a public authority (the Board of Commissioners) brought suit

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46. *Id.* at 943.

47. *Id.*

48. Bd. of Comm'rs of Ohio County v. Elm Mining Co., 9 S.E.2d. 813 (W. Va. 1940).

49. *Id.* at 814.

to enjoin the company from maintaining a public nuisance. The defendant mining company had lost its plea at equity and was appealing that decision.

The facts of the case were as follows: as a part of the process of mining bituminous coal, the defendant produced refuse that it disposed of on its property. Elm Grove had produced this refuse from the beginning of its operations. The result of this on-site trash disposal was a "gob pile" approximately 200 feet wide and 1000 feet long and from 30 to 60 feet high. In 1930, the pile caught fire and burned and smoldered continuously up to the time of the suit. Elm Grove attempted to extinguish the fire but was unsuccessful. From 1930 until 1933 – when a preliminary injunction was issued – the company continued to dump combustible refuse on the burning pile.

Fumes from the continuously burning gob pile filled the air with the smell of burning sulphur. Local residents complained of burning eyes, throats, noses, respiratory-tract problems, headaches, coughing, loss of appetite, and sleeplessness. Several physicians testified to the ill effects the fumes had on the local community. Chemical engineers determined that sulphur dioxide was the pollutant being emitted into the air from the pile, although there was conflicting testimony as to the concentration of the chemical in the air around Triadelphia.[50]

Reviewing the record produced by the trial chancellor, the appeals court found that dumping refuse outside a mine was a necessary part of the mining process. However, they also found that the situation "clearly warranted . . . [a] finding that the fumes from the gob pile constitute a nuisance affecting public health, within the meaning of the [applicable] statute . . . on which this suit is grounded."[51] In short, there was a public bad. The appeals court then had to consider the injunction that had been issued against the coal company by the lower court. The court noted that the West Virginia Coal Association had filed an *amicus* brief, which stated: "To affirm the decree in this instance is to decree from existence the mining of coal in this State."[52]

And so the battle lines were drawn: The claim of environmental rights of a small community of some 300 people against a polluter that was part of one of the major industries in the state. A public

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50. *Id.* at 815-16.
51. *Id.* at 817.
52. *Id.*

good, air quality, stood on one side of the court. Air pollution, a public bad associated with the production of a private good, stood on the other side.

To reach a decision, the court considered the balancing or comparative injury aspects of the case. The decision making process was not as simple as determining who held the property rights. Given the small number of people affected and the significance of Elm Grove for Triadelphia, and the coal mining industry at large for the state of West Virginia, one might expect that the scales tipped heavily in favor of Elm Grove. Such expectations would be disappointed by this decision.

The court stated that "[t]he 'comparative injury' doctrine should be applied with great caution in nuisance cases, *even those not involving public health* . . . With all the more reason there is extremely narrow basis undertaking to balance convenience where people's health is involved."[53] The court stated further: "But public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby."[54] The court was not convinced that enjoining Elm Grove's activity would prove as disastrous as the coal mining trade association argued and noted further that Elm Grove could dump its refuse in another location away from the offending gob pile.

We note that in this case, as in the *Gold Run* case, the free-rider problem was avoided, as the state used its police powers to protect the health and safety of its citizens. No one citizen was forced to bear the costs associated with addressing this public bad. Rather, the public sector responded using the common law tool of public nuisance.

D. *Commonwealth v. Barnes & Tucker Co.* [55]

There are occasions where the common law serves to buttress statute law in providing protection from environmental harms. Even though a polluter may hold a state-issued permit for engaging in en-

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53. *Id.* (emphasis added).

54. Bd. of Comm'rs of Ohio County v. Elm Mining Co., 9 S.E.2d. 813 at 817 (W. Va. 1940).

55. Commonwealth v. Barnes & Tucker Co., 303 A.2d 544 (Pa. 1973).

vironmentally risky activity, if the polluter damages public property or produces a public bad, common law remedies can still be applied. We see an early example of this in a 1973 Pennsylvania water pollution case.

In 1915, a bituminous deep coalmine (Mine No. 15) was opened for operations near the headwaters of the west branch of the Susquehanna River in Pennsylvania. The mine was operated by a series of owners until 1939, when the defendant, Barnes & Tucker Co., took control from a subsidiary, Barnes Coal Company. Barnes & Tucker operated the mine until 1969, when it was closed and sealed. During the 30 years when Mine No. 15 was open, Barnes & Tucker received four discharge permits from the Pennsylvania Sanitary Water Board. Permits were issued pursuant to the Clean Streams Law, which was first enacted in 1937 and subsequently amended.[56]

In 1970, after Mine No. 15 was closed, it began to "inundate," and in June and July of the same year, "substantial discharges of acid mine drainage were discovered at two different locations."[57] The Pennsylvania Department of Environmental Resources filed a complaint in equity seeking a preliminary and permanent mandatory injunction mandating that Barnes & Tucker treat the discharge. The

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56. 35 Pa. Const. Ann. §691.1 *et. seq.* (2002).

57. Commonwealth v. Barnes & Tucker Co., 319 A.2d 871, 873 (Pa. 1974). Mine No. 15 operated in an area with a number of other mines. There were "cut throughs" between some of these mines. Barriers—designed to prevent workers from sudden inundation of water, but not designed to prevent any water seepage—were placed at the connecting points of some of the mines; however, these barriers had been breached and substantial amounts of water was flowing from other mines into Mine No. 15. *See* Commonwealth v. Barnes & Tucker Co., 353 A.2d 471, 476-77 (Pa. 1976) (hereinafter Barnes I). On remand, the Commonwealth Court noted: "To maintain a static level of water in Mine No. 15 thereby avoiding a breakout or pressure or other discharge, it is necessary to pump from the mine approximately 7.2 million gallons per day. Of this pumping figure, approximately 1.2 million gallons per day are attributable to water generated in Mine No. 5, while approximately 6 million gallons per day are attributable to fugitive mine water generated in other mines in the complex and findings its way into Mine No. 15." Commonwealth v. Barnes & Tucker Co., 353 A.2d 471, 508 (hereinafter Barnes II).

Department subsequently amended its original complaint, basing its claims on three counts of violations of the Clean Streams Law, and one count of common law nuisance.[58] A preliminary injunction was issued, requiring Barnes & Tucker to undertake treatment efforts until a final determination was reached in the case. The trial court found that a permanent injunction should not be issued because none of the Commonwealth's theories for finding liability were valid.[59] The Commonwealth appealed the decision.

On appeal, the Supreme Court of Pennsylvania noted that the case presented important questions about the power of Department of Environmental Resources to enjoin acid mine drainage from abandoned mines. The Court proceeded to analyze both the legal and factual background of the case in conjunction with the history of the Pennsylvania Clean Streams Law. This analysis led the Court to dismiss the charges related to the Clean Streams Law. However, unlike the trial court, the Court *did* find that the Commonwealth's claims based on statutory and common law nuisance were applicable and that injunctive relief could be granted based on these theories.[60]

The Court held that Section 3 of the 1970 Clean Streams Law made the discharge of sewage or industrial waste into Commonwealth waters a public nuisance. This statutory provision was simply a declaration of the common law at all times as it applied to Commonwealth waters. Addressing the common law public nuisance issue, the Court attempted to clarify public nuisance principles in Pennsylvania as they pertained to coal mines. The Court quoted a 1924 decision that it found pertinent:

> '[T]he controversy . . . is controlled by one fact and a single equitable principle – the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance if the public uses the water.' We find this an accurate *precis* of public nuisance law and apposite to the present case.[61]

The Court continued by stating: "We recognize that when the Commonwealth brings an equity action to abate a public nuisance its right to relief *is not restricted by any balancing of equities, nor by*

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58. Barnes I, 319 A. 2d at 873.

59. *Id.*

60. *Id.* at 880.

61. *Id.* at 882 (*citing* Pennsylvania R.R. v. Sagamore Coal Co., 126 A. 386, 387 (Pa. 1924)).

any rule of demnum [sic] absque injuria."[62] Recognizing that any relief granted must, nonetheless, be reasonable, and recognizing further that the Court did not have sufficient information to render an appropriate decree, the Court remanded the case to the lower court to make additional findings of fact.

On remand, the Commonwealth Court considered whether or not the abatement methods presented to them in the record, in fact constituted "an exercise of police power equivalent or amounting to a taking of property without just compensation," and whether or not the available abatement options were reasonable.[63]

The court suggested that the answer to these two questions could not be readily determined from precedents in the state. In some cases, the court noted, Commonwealth courts had allowed property to be "taken" through use of police power even though this led to the "entire suppression" of a business or imposed substantial costs on the defendant. In other cases, courts had resorted to a rule of reasonableness. The court announced a rule that "a proper exercise of the police power by legislative enactment does not, in itself, constitute a taking of property for public use."[64] But, if such legislation exists, and if it does not completely outlaw a particular action, then the police power must be applied in a reasonable manner balancing public and private needs and taking economic impact into consideration.

In this case, however, the court said it had no way to balance such concerns because the defendant had failed to introduce evidence concerning the economic impact that alternate abatement methods would impose.[65] The court refused, without additional evidence, to find the abatement method being used to be either unreasonable or unconstitutional. Thus, the court concluded that the discharge of acid mine water from the Mine No. 15 constituted a public nuisance which the defendant was responsible for abating. The company was required to pump from Mine No. 15 enough water to avoid any future breakout, and to maintain an appropriate water treatment program to achieve water quality standards defined by law. Finally, the court awarded money damages to the Commonwealth to cover costs

62. Barnes I, 319 at 886 (emphasis added).
63. Barnes II, 353 A.2d. 471, 478 (Pa. 1976).
64. *Id.* at 479.
65. *Id.* at 480.

associated with operating and maintaining a dam used to hold back mine water.[66]

This case clearly demonstrates the vigor and the usefulness of common law public nuisance as it relates to environmental harms. In *Barnes & Tucker* we can see the limitations of statutes designed to prevent and also to remedy environmental harms. The Clean Stream Law of Pennsylvania, despite repeated and substantial modification and amendment, did not provide protection against harms imposed by actors working under a legally created permit regime. At the same time, the statute did not limit the reach of common law remedies. *Barnes & Tucker* suggests possibilities for augmenting federal environmental statutory claims with common law public nuisance claims so that courts may provide additional protection from public and private bads. This case may also suggest that statutorily created bars to the use of common law actions found in some federal environment statutes should be removed.

E. *Village of Wilsonville, et. al., v. SCA Services, Inc.*[67]

The approach taken by common law courts when considering whether to rule on the basis of some benefit and cost calculus, such as balancing or comparing harm, or whether to simply rule on the basis of property rights, varies across common law jurisdictions as well as time.

All else being equal, communities with higher incomes tend to assign greater value to environmental rights. Because of this income-related preference for greater environmental protection, we can predict that public nuisance cases will increasingly be seen as important vehicles for protecting environmental rights. Incomes vary across states at a point in time and rise through time. A more recent public nuisance case illustrates the point that over time, as incomes tend to rise, citizens and their representatives demand greater environmental protection.

In 1977, SCA Services began operating a chemical-waste landfill in Wilsonville, Illinois. Approximately 90 acres of the company's 130-acre landfill was located within the city limits of Wilsonville,

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66. *Id.* at 481.

67. . Village of Wilsonville, et. al., v. SCA Services, Inc., 425 N.E.2d 824 (Ill. 1981).

and the remaining acres were adjacent to the village.[68] SCA contracted with generators of toxic chemical waste to remove waste, which they hauled away and then dumped in a series of trenches on their property. Most of the waste (95%) was placed in 55-gallon steel drums before being placed in the trenches, 5% was placed in double-wall paper bags. All the material was then covered with clay. Further complicating matters, the landfill and village were both located above an abandoned mine. The land above the mine showed signs of subsiding and acid drainage from the mine was seeping into the ground and into several surface drainage channels on SCA property. The quality of the community's ground water supply was threatened. A polluted aquifer for one family would be a polluted aquifer for all. A public bad was in the offing.

In 1976, SCA received a permit to operate from the Illinois Environmental Protection Agency (IEPA). Between November, 1976 and June, 1977, 185 deliveries of toxic chemicals were made to company property, including shipments of PCBs, asbestos, mercury, pesticides and arsenic. After IEPA issued the permit, evidence accrued that the ground upon which the landfill was built was more permeable than previously thought.

In 1977, the attorney for the City of Wilsonville brought suit, alleging a public nuisance and seeking permanent injunctive relief. At the trial and on appeal, the plaintiff prevailed on the basis that the landfill was both a present and prospective nuisance. On appeal to the Illinois Supreme Court, the defendant argued the decision should be reversed, that the landfill was not a prospective nuisance, that the lower courts applied the wrong legal standard to find a prospective nuisance, that the lower courts should have balanced equities in this case, that the courts should have deferred to, or placed greater reliance on, the decisions of the IEPA, the U.S. EPA and the Illinois State Geological Survey permitting the landfill, that a mandatory injunction should not have been issued, and that the injunction constituted a taking of property without due process.[69]

The Illinois Supreme Court agreed with the lower courts that the landfill was a present and prospective nuisance, located on permeable soil that was likely to subside over time. The court found that at least some of the steel drums were leaking when they arrived at the

68. Wilsonville v. SCA Serv., Inc., 425 N.E. 2d 824, 827 (Ill. 1981).

69. *Id.* at 830-31.

landfill and that some had simply been pushed over the edge of the trenches, rather than placed in by machinery. Given the toxic nature of the chemicals, the court upheld the lower courts' decisions to enjoin further deliveries to the site.

The defendant next offered what might termed an efficiency argument. It argued that the lower courts failed to balance the equities between the defendant's substantial investment in the business and the economic value and utility of the landfill versus the harm to the plaintiff. The supreme court rejected this line of argument, favoring instead a property rights argument. The court cited a portion of the trial opinion that read:

> It is the opinion of the Court that . . . nuisance cannot be justified on ground of necessity, pecuniary interest, convenience or economic advantage. The Court understands . . . that there is a need for disposal of industrial hazardous wastes. However, where disposal of wastes creates a nuisance said disposal site may be closed through legal action . . . *The importance of an industry to the wealth and prosperity of an area does not as a matter of law give to it rights superior to the primary or natural rights of citizens who live nearby.*[70]

The court held that issuing an injunction for a prospective harm was appropriate in the case because "it is highly probable that the instant [chemical waste disposal] site will constitute a public nuisance if, through either an explosive interaction, migration, subsidence, or the 'bathtub effect,' the highly toxic chemical wastes deposited at the site escape and contaminate the air, water, or ground around the site."[71]

The matter of permits issued by regulatory agencies was raised by defendant, as was the question of whether the plaintiff should have petitioned the regulatory agencies for relief before bringing suit. This argument implied that the permits should shield the firm from the courts' action. The court agreed with the lower courts that the plaintiffs were not barred from bringing an action in equity. This case was to enjoin a nuisance, not to review the issuance of the permits, therefore, a court of equity was the proper venue for the ac-

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70. *Id.* at 835 (emphasis added).

71. *Id.* at 837.

tion.[72] The court also noted that IEPA and U.S. EPA issued permits based upon scientific evidence that proved to be inaccurate. Thus, the lower courts were not required to defer to the decisions of IEPA and U.S. EPA in permitting the landfill.[73] The court rejected the argument that the injunction constituted a taking of property without due process. The defendant had argued that the decision of the lower courts enjoining its activities and requiring exhumation and reclamation constituted "sudden changes in State law." The court found this argument without merit.

Finally, the court upheld the lower courts' rulings, issuing a permanent injunction against SCA, ordering SCA to exhume and move the wastes deposited on the site and last, to reclaim the site. The court summed up its position when it stated:

> We are acutely aware that the service provided by the defendant is a valuable and necessary one . . . But a site such as defendant's, if it is to do the job it is intended to do, must be located in a secure place, where it will pose no threat to health or life, now or in the future.[74]

The importance of the *Village of Wilsonville* case is substantial. It shows the vitality of public nuisance theories as applied to environmental harms. Also, it specifically rejects the argument that administrative avenues are more appropriate vehicles for resolving disputes about environmental harms, or related threats to public health. State and federal permits provided no shield from liability for the prospec-

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72. For cases that decide in favor of administrative review by a pollution control board, *see* People v. New Penn Mines, Inc., 212 Cal. App. 2d 667 (1963) (precluding the Attorney General from seeking to abate a public nuisance caused by toxic mine wastes draining into a river because such authority vested with the state's regional water pollution control boards); *see also* Schofield v. Material Transit Inc., 206 A.2d 100 (Del. 1960).

73. The court also rejected the suggestion of the U.S. EPA that was contained in an *amicus* brief filed with the appellate court to the effect that some remedy other than permanent injunction and exhumation of the waste should be crafted. The court noted, "It is ironic that the host of horribles mentioned by the U.S. EPA in support of keeping the site open includes some of the same hazards which the plaintiffs have raised as reasons in favor of closing the site." *SCA Services*, 425 N.E.2d at 839.

74. *Id.* at 838.

tive polluters. Further, the decision shows the robust nature of equitable remedies available through public nuisance claims: permanent injunction, exhumation and removal of the offending chemicals, and reclamation of the property are thorough, and costly, methods of addressing the prospective harms that SCA's activities were likely to create.

F. *State of New York v. Shore Realty Corp.*[75]

The ability of common law to interact with statute law is seen again in a 1984 action brought by the State of New York against Shore Realty Corp. and Donald Leo Grande, office and sole shareholder of Shore, to clean up a hazardous waste site on Long Island. Shore Realty had been incorporated by DeoGrande specifically for the purpose of buying 3.2 acres of land on a small peninsula of land on Long Island, which was surrounded on three sides by Hempstead Harbor and Mott Cove. Mr. DeoGrande intended to develop the land and build condominiums.[76]

At the time he purchased the property, DeoGrande and Shore knew that hazardous waste was stored on the property and that cleanup would be expensive. In its purchase agreement, Shore had the option of voiding the agreement with the seller if, after conducting an environmental study, it decided not to proceed. Mr. DeoGrande and Shore did proceed, despite strong cautions from Shore's environmental consultant – which found the property in great disrepair and found toxic materials leaching into groundwater and surrounding waters of the cove and Hempstead Harbor. After receiving this report, Shore requested a waiver of liability as a landowner for disposal of hazardous waste stored at the site from the State Department of Environmental Conservation.[77] The waiver was denied, but Shore took title anyway in 1983.

Shore, and Mr. DeoGrande, took title to a mess, and the mess only got worse. Sitting in the middle of the 3.2-acre site were five large tanks holding "most of some 700,000 gallons of hazardous chemicals" located on the property. Six smaller tanks, located above and below ground, held additional hazardous materials. These tanks

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75. 759 F.2d 1032 (2d Cir. 1985).

76. New York v. Shore Realty Corp., 759 F.2d 1032, 1038 (2d Cir. 1985).

77. *Id.* at 1039.

were connected by deteriorating pipes to loading and dockage facilities. Also on the property were warehouses holding over 400 corroding and leaking 55-gallon drums of chemicals and contaminated solid materials.[78] From October, 1983 to January, 1984, the property's tenants, Applied Environmental Services, Inc. and Hazardous Waste Disposal, Inc. added another 90,000 gallons of hazardous chemicals to the leaking, corroded, poorly maintained tanks. Nonetheless, Shore "essentially ignored the problem" until June, 1984, when Shore employees asked the State to enter the site, inspect it, and deal with what they claimed was a "life threatening crisis situation."[79] Soon, DeoGrande and Shore found themselves in court being charged with cleanup liability under the federal Superfund statute.

At trial, the federal District Court upheld the State's motion for partial summary judgment finding Shore and DeoGrande liable for the State's response costs under Superfund and issued a permanent injunction requiring the defendants to remove all 700,000 gallons of hazardous material found on the site. This motion was stayed pending appeal. On appeal, the Second Circuit Court of Appeals noted that the case involved "novel" questions about the interplay between the 1980 federal Superfund legislation and New York state public nuisance law.[80]

The court found that Shore and DeoGrande were liable under the federal statute for the state's response costs. The state incurred costs from assessing the extent of environmental damage and supervising the removal of drums of hazardous waste from the property; these costs could be recovered. The court found Shore and DeoGrande to be "covered persons" within the definition of the statute, meaning that they were strictly liable for cleanup costs associated with releases or threatened releases of hazardous material, so long as these costs were consistent with the Superfund-created National Contingency Plan.

Although the Court held Shore and DeoGrande liable for response costs, it held the state did not have a right to injunctive relief under the federal statute, finding that "Congress specifically declined to

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78. *Id* at 1038. The hazardous materials included PCBs, benzene, dichlorobenzene, ethyl benzene, and tetrachloroethylene.

79. *Id.* at 1038 n.3.

80. *Id.* at 1037.

provide states with a right to injunctive relief."[81] But here, the Court recognized that state public nuisance law could be used to grant such relief. Even though Shore and DeoGrande did not dump the hazardous materials, as the owners of property, they could be found liable based on their "exclusive control over the land and the things done upon it and [thus they] should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harms to others."[82]

The court found that Shore was strictly liable for maintaining a public nuisance, noting: "[w]e have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law."[83]

The court held DeoGrande personally liable for costs of clean up and removal by finding that he was an "operator" within the meaning of the statute. Also, under New York law, corporate officers who control the conduct of the corporation and are active participants in that conduct, are liable for the corporation's tortious acts. The court stated that "[t]his general rule is particularly appropriate in the public nuisance context, where 'everyone who . . . participates in the . . . maintenance . . . of a nuisance are liable jointly and severally.'"[84] The court did note that in supervising the injunction, the trial court might need to reconsider DeoGrande's personal liability if abatement expenses became prohibitive and disproportionate.

Shore presents an example of how public nuisance law can be used to "fill the gap" in statutory law. Although Shore and DeoGrande were held liable under Superfund legislation for response costs incurred by the New York Department of Environmental Conservation, the federal statute did not allow the state to seek injunctive relief against the defendants – only U.S. E.P.A. could do that and E.P.A. was not party to the suit. Injunctive relief is, however, an important tool imposing costs on parties who assume liability. In

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81. *Id.* at 1049.

82. New York v. Shore Realty Corp., 759 F.2d 1032 at 1051 (2d Cir. 1985). (*quoting* RESTATEMENT (SECOND) OF TORTS § 839 cmt. d (1979)).

83. *See id.*

84. *Id.* at 1052-53 (*citing* State v. Schenectady Chemicals, Inc., 117 Misc. 2d 960, 966; 456 N.Y.S.2d 971, 976 (Sup. Ct. Rensselaer Co. 1983)).

this case, clean up costs were shifted from the state to Shore, DeoGrande, and to the numerous other parties that Shore and DeoGrande brought into the suit as third-party complainants.[85] The *Shore* case shows how common law protection can interact with statute law in a modern setting to impose costs on producers or owners of risky operations. This, then, suggests possibilities for modifying statute law to further invigorate common law protection of property rights.

IV. FINAL THOUGHTS

Our exploration of common law treatment of public bads has 1) compared underlying legal theory with the economic theory of goods and bads, 2) shown how this theoretical treatment can be viewed in a property-rights context, 3) discussed key elements of public nuisance case law, and 4) shown how common law treatment of public nuisance has worked within the context of statute law. While our discussion has revealed that public nuisance law can be robust in dealing with environmental harms, our comments have also raised a flag of caution.

State attorneys general and public prosecutors play important roles in public nuisance cases by bringing action on behalf of citizens and/or the state. And like all economic agents, these actors will be guided by incentives. These incentives will be heavily influenced by political pressure to protect government as well as politically strong private firms from costly actions. At the same time, public attorneys face resource constraints that limit the number of cases they are able to litigate. Taken together, this may suggest that these attorneys litigate too few public nuisance cases. At the beginning of our research venture, we hoped to find that common-law protection of the public could escape politics' heavy hand. Yet we did not believe this could be entirely possible. As Elizabeth Brubaker has pointed out before us, the definition of private rights is the only obvious way to escape the vagaries of political enforcement of public property rights.[86] We note that this has been the solution for the protection of water quality in the trout streams of the United Kingdom and in parts of Canada,

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85. *See* New York v. Shore Realty Corp., 648 F. Supp. 255 (E.D.N.Y. 1986).

86. *See generally* Brubaker, *supra* note 5.

where angling associations own private rights in the fisheries.[87] In those jurisdictions, the discharge of waste into public streams that contain private property is disciplined by the common law of private nuisance. But defining property rights, particularly rights to common property, is expensive – largely due to technological difficulties. While the socially optimal solution for the effective resolution of public-bads problems may be to carefully define property rights, so that all such problems are converted to private bads thus obviating the need for public nuisance actions altogether, this is unlikely to happen anytime soon. In the meantime, it may be worthwhile considering options to strengthen the existing tort of public nuisance.

We believe there are certain institutional modifications that can be made to invigorate common-law protection of public property and the avoidance of public bads. We now offer two modest, but meaningful, suggestions:

- The special-injury requirement for private action to be taken in the context of a public-nuisance problem may need to be revisited. Recognizing the important role that the special-injury requirement plays, in terms of limiting access to court to those cases where a plaintiff suffers an injury-in-fact,[88] we suggest further this option be considered as one possible way to alleviate the potential incentive problems that public attorneys might face.
- All federal environmental statutes should include language permitting the full range of common law actions, that is statutory barriers to common law actions should be removed and common law actions should be defined as having equal standing to administrative law procedures.

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87. Roger Bate, *Protecting English and Welsh Rivers: The Role of the Anglers' Conservation Association*, *in* THE COMMON LAW AND THE ENVIRONMENT 86 (Roger E. Meiners & Andrew P. Morris eds., 2000).

88. For a thoughtful discussion of potentially serious problems created by an expansion of standing in the case of citizen-suits under the major federal environmental statutes, *see* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001); *and* Maxwell L. Stearns, *From* Lujan *to* Laidlaw: *A Preliminary Model of Enviornmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321 (2001).

We conclude by again underlining our belief that common law protection of property rights, both public and private property rights, can be – and increasingly is – a vital component of market-driven environmental protection. We encourage other scholars to join us in our continued investigation of the common law alternative.