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## PRIVATE ACTIONS FOR PUBLIC NUISANCE: THE STANDING PROBLEM

MARK A. ROTHSTEIN\*

From its original function of providing a remedy for the invasion of land rights, the law of nuisance has expanded to encompass a multitude of interferences with the health, safety, and welfare of the public and individuals. Where a nuisance is injurious to the public, the government has a right to sue for its abatement. An individual, however, has traditionally lacked standing to sue for damages or to enjoin a public nuisance where his injury is not distinct in degree and/or in kind from the injury to the public as a whole.

While judicial inroads into this restrictive standing requirement have always been possible, courts have consistently been reluctant to relax the standing requisites for individuals attempting to sue on the theory of public nuisance. Only recently have some courts given indications that orthodox common law standing restrictions may slowly be giving way to the public's interest in a healthful environment. This article discusses these new cases and the statutory provisions of several states that have modified the common law rules.

### I. DEVELOPMENT OF THE NUISANCE REMEDY

At common law, the action for nuisance was exclusively concerned with the redress of an interference with the use and enjoyment of land. The assize of nuisance was used as early as the twelfth century when a landowner suffered an injury which did not amount to a disseisin. In other words, a nuisance action could be brought where there was only indirect damage to an individual's land or its enjoyment. By the fifteenth century, the assize of nuisance was replaced by an action on the case for nuisance. Unlike the earlier remedy, under which abatement was possible, the action on the case gave rise only to damages. A plaintiff was forced to resort to equity if he wished to secure abatement by judicial process.<sup>1</sup>

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<sup>1</sup>See RESTATEMENT (SECOND) OF TORTS §§ 201-203; Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997-99 (1966).

This early common law notion of a nuisance being inextricably related to an interference with an owner's interest in land is now embodied in the law of private nuisance.<sup>2</sup> Inasmuch as the interference is generally caused by "intangible substances,"<sup>3</sup> recent private nuisance cases are still concerned with the same problems as the older nuisance cases, such as smoke and soot,<sup>4</sup> noise,<sup>5</sup> and dirt and vibration.<sup>6</sup> Private nuisances are evaluated *per accidens*; courts apply a reasonableness standard in determining if there is an unlawful invasion of land rights.<sup>7</sup>

During the development of the common law of nuisance, several illegal acts were legislatively classified as *per se* nuisances. These acts against the public health and welfare, such as maintaining a house of gambling or prostitution, were known as common or public nuisances.<sup>8</sup> A public nuisance, unlike a private nuisance, was not necessarily related to any interest in land and gave rise to a right of action only in the sovereign under its police powers, regardless of whether the act was also in violation of criminal statutes.

Public nuisance law has expanded immensely over the years and now is a catch-all legal label for "everything that endangers life or health, gives offense to sense, violates the laws of decency, or obstructs reasonable and comfortable use of property."<sup>9</sup> As a result of vague judicial and legislative definitions of what consti-

<sup>2</sup>"A 'private nuisance' exists only where one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land." *Croughwell v. Chase Brass & Copper Co.*, 128 Conn. 110, 20 A.2d 619 (1941). A private nuisance "affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public." *Reinhard v. Lawrence Warehouse Co.*, 41 Cal. App. 2d 741, 107 P.2d 501, 504 (1940).

<sup>3</sup>"A 'private nuisance' is actionable invasion of interests in the use and enjoyment of land, and is usually by intangible substances, such as noises or odors, and usually involves the idea of continuance or recurrence over a considerable period of time." *Ryan v. Emmetsburg*, 232 Iowa 600, 4 N.W.2d 435 (1942).

<sup>4</sup>*Pottock v. Continental Can Co.*, 42 Del. Ch. 360, 211 A.2d 622 (1965).

<sup>5</sup>*McAlester v. King*, 317 P.2d 265 (Okla. 1957).

<sup>6</sup>*Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 294 N.Y.S.2d 452, 257 N.E.2d 870 (1970).

<sup>7</sup>RESTATEMENT (SECOND) OF TORTS, *supra* note 1, at 217.

<sup>8</sup>*Id.*

<sup>9</sup>*Hall v. Putney*, 291 Ill. App. 508, 516, 10 N.E.2d 204, 207 (1937). "A 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." *Echave v. Grand Junction*, 118 Col. 165, 193 P.2d 277 (Colo. 1948).

tutes a public nuisance, recent cases have involved such diverse matters as live sex shows,<sup>10</sup> the improper practice of optometry,<sup>11</sup> the public exhibition of snakes,<sup>12</sup> and usurious small loan businesses.<sup>13</sup> In addition to public and private nuisances, there is the hybrid "mixed nuisance," damaging to the public in general and also to the land rights of an individual.<sup>14</sup>

Four remedies are available to individuals who are harmed by nuisances. Self-help, the use of reasonable measures by adversely affected parties, is still recognized today,<sup>15</sup> and equitable remedies are available to abate a nuisance.<sup>16</sup> Past damages,<sup>17</sup> as well as permanent damages,<sup>18</sup> are also proper remedies for nuisance.

As noted above, any proper government agency, under its police powers, can initiate proceedings to enjoin a public nuisance.<sup>19</sup> The problem, however, involves the standing of private individuals to sue for public nuisance.<sup>20</sup> Generally, in the absence of a statute to the contrary, a public nuisance gives rise to no action in law or

<sup>10</sup>People *ex rel.* Hicks v. "Sarong Gals," 27 Cal. App. 3d 46, 103 Cal. Rptr. 414 (1972).

<sup>11</sup>Delaware Optometric Ass'n v. Sherwood, 11 Del. Ch. 507, 122 A.2d 424 (1956).

<sup>12</sup>Hill v. State, 88 So. 2d 880 (Ala. 1956), *cert. denied*, 88 So. 2d 887 (Ala. 1956).

<sup>13</sup>State *ex rel* Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).

<sup>14</sup>Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938); Riggins v. District Ct., 89 Utah 183, 51 P.2d 645 (1935).

<sup>15</sup>Fletcher's Gin., Inc. v. Cribfield, 423 F.2d 1066 (6th Cir. 1970); Cook Indus. v. Carlson, 334 F. Supp. 809 (N.D. Miss. 1971); Corentin v. Columbia, 29 Conn. Supp. 499, 294 A.2d 80 (1972).

<sup>16</sup>National Ass'n of Letter Carriers AFL-CIO v. Independent Postal System of Am., Inc., 336 F. Supp. 804 (W.D. Okla. 1971); United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968). Equity cannot enjoin criminal violations except where a statute also terms them a nuisance. To do so would be a denial of due process because the quantum of proof required in equity proceedings is only the preponderance of the evidence [or clear and convincing evidence] instead of proof beyond a reasonable doubt, and because there is no jury. People v. Goldman, 7 Ill. App. 3d 253, 287 N.E.2d 177 (1972).

<sup>17</sup>Greyhound Leasing & Fin. Corp. v. Joiner City Unit, 444 F.2d 439 (10th Cir. 1971); Reynolds Metals Co. v. Martin, 337 F.2d 780 (9th Cir. 1964).

<sup>18</sup>Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 294 N.Y.S.2d 452, 257 N.E.2d 870 (1970). The Boomer decision has been the subject of considerable controversy. See, e.g., Note, 21 SYRACUSE L. REV. 1243 (1970); Comment, 20 BUFFALO L. REV. 312 (1970); Comment, 22 CASE W. RES. L. REV. 356 (1971); Comment, 39 FORDHAM L. REV. 338 (1970); Comment, 19 KAN. L. REV. 549 (1971); Comment, 49 N.C.L. REV. 402 (1971); Comment, 45 N.Y.U.L. REV. 919 (1970).

<sup>19</sup>See generally Annot., 65 A.L.R. 699 (1930).

<sup>20</sup>See Prosser, *supra* note 1, at 1004-08.

equity by one who suffers an injury which is common to the public.<sup>21</sup>

## II. THE "SPECIAL INJURY" RULE

There are two major exceptions to the rule that denies standing to individuals to sue for public nuisance: (1) Special injury to personal or land rights; and (2) morally offensive nuisances and other statutory standing rights. The most important exception is the "special injury" rule. Simply stated, where an individual plaintiff suffers damages surpassing those of the general public, then the plaintiff has standing to sue. The issue of "special injury" has long troubled both courts and commentators. Essentially, the issue has been whether a plaintiff must show damages of a distinct kind, damages of a greater degree, or both. Although Dean Prosser has suggested that the key is the "distinct kind of damage rather than degree,"<sup>22</sup> the question is still largely unresolved.

The California Court of Appeals, in *Venuto v. Owen-Corning Fiberglass Corp.*,<sup>23</sup> adopted the approach suggested by Dean Prosser, which is the majority rule today. In this case, four plaintiffs who were residents of Santa Clara sued a fiberglass manufacturing plant, alleging that emissions from the plant were seriously polluting the air, thus constituting a public nuisance. The plaintiffs sought an injunction and damages; they claimed that they were particularly harmed because the nuisance aggravated respiratory

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<sup>21</sup>Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971). This well-settled common law rule has been expressly codified in many jurisdictions. "A private person may maintain an action for public nuisance, if it is specifically injurious to himself but not otherwise." CAL. CIV. CODE § 3493 (1973). For similar statutory language, see ALASKA STAT. § 9.45.230 (1973); GA. CODE ANN. § 72-103 (1973); OKLA. STAT. ANN. tit. 50, § 1 (1962); S.D. COMPILED LAWS ANN. § 21-10 (1969); WASH. REV. CODE ANN. 7.48.010 (1961). Compare the less specific language in the Alabama statute: "Nuisances are either public or private. A public nuisance is one which damages all persons which come within the sphere of its operation . . . Generally a public nuisance gives no right of action to an individual." ALA. CODE tit. 7, § 1084 (1960). See also CONN. GEN. STAT. ANN. § 19-310 (1969); DEL. CODE ANN. tit. 10, § 7102 (1953); IDAHO CODE § 52-102 (1957); ILL. ANN. STAT. ch. 100 1/2, §§ 1, 26 (Smith-Hurd 1935); IOWA CODE ANN. 657.1 (1950); LA. REV. STAT. § 13:4711 (1968); MASS. GEN. LAWS ANN. ch. 111, § 122 (1971); MICH. COMP. LAWS ANN. § 600.380 (1968); MINN. STAT. ANN. § 561.01 (1947); MISS. CODE ANN. § 95-3-1 (1973); NEB. REV. STAT. § 28-1016 (1965); N.J. REV. STAT. ANN. § 2a:130-2 (1969); TEX. REV. CIV. STAT. art. 4664 (1952).

<sup>22</sup>Prosser, *supra* note 1, at 1011.

<sup>23</sup>22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971).

disorders and allergies suffered by each of them and because the pollutants obscured each plaintiff's view of the scenic Santa Clara Valley, for which each plaintiff alleged he was paying higher rent.

In affirming the trial court's general demurrer, the court of appeals concluded that the plaintiffs failed to allege injury of a different kind than that suffered by the general public, and therefore, they lacked standing. As to the claim of respiratory injury, the court stated that "where personal discomfort is the basis of the complaint, the test of liability is the effect of the alleged interference on the comfort of normal persons of ordinary sensibilities in the community."<sup>24</sup> The court also rejected the obstruction of view argument, concluding that this was not an interference with a known property right.

The Arizona Supreme Court adopted the "degree" test in *Spur Industries Inc. v. Del E. Webb Development Co.*<sup>25</sup> In this case, a real estate developer of Sun City, a senior citizen community, sought to enjoin an adjacent cattle feeding operation because of flies and odors. In affirming a permanent injunction, the court said that "the difference between a private nuisance and a public nuisance is generally one of degree."<sup>26</sup> The court termed the condition a public nuisance without a detailed consideration of the plaintiff's standing to sue.

In *Clabaugh v. Harris*,<sup>27</sup> an Ohio court adopted the most stringent standing rule, one that requires a plaintiff to show an injury different in both kind and degree. In this case, residents of a farm community sought to enjoin highway construction work during late night and early morning hours due to the noise and vibration of large numbers of trucks. The court, in denying the injunction, stated that an injunction would only issue if four elements were met: (1) The plaintiffs' rights were clear; (2) a nuisance was clearly established; (3) the legal rights of the plaintiffs were substantially affected by the nuisance; and (4) the plaintiffs would suffer irreparable injury. As to the particular damage issue, the court stated

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<sup>24</sup>*Id.* at 126, 99 Cal. Rptr. at 356.

<sup>25</sup>108 Ariz. 178, 494 P.2d 700 (1972); Note, 55 UTAH L. REV. 74 (1973).

<sup>26</sup>108 Ariz. at 183, 494 P.2d at 705.

<sup>27</sup>27 Ohio Misc. 153, 273 N.E.2d 923 (C.P. 1971). West Virginia also has adopted a stringent standing rule. In *International Shoe Co. v. Heatwole*, 126 W. Va. 888, 892, 30 S.E.2d 537, 540 (1944), the West Virginia Supreme Court of Appeals stated that "a private individual can maintain an action for relief against a public nuisance only when he has suffered therefrom an injury different from that inflicted upon the public in general, not only in degree, but in character."

that a plaintiff has no right to the abatement of a public nuisance unless his or her injury is of a different kind *and* degree than that of the general public.

The Florida District Court of Appeals took a major step toward the elimination of the restrictive "special injury" rule in *Save Sand Key, Inc. v. United States Steel Corp.*<sup>28</sup> Although still pending before the Florida Supreme Court, this case established Florida as the first American jurisdiction to repudiate the special injury rule.<sup>29</sup>

In *Save Sand Key*, a non-profit citizens group sought to enjoin United States Steel from interfering with the alleged vested rights of its members to the use of a beach. The citizens group alleged that a purpusture erected by the company blocked the enjoyment of these rights.<sup>30</sup> In reversing the trial court's dismissal of the action, the appellate court began by tracing the historical roots of the special injury rule. The court noted that the rule was enacted to avoid multiplicity of actions, "the theory being that the threat of multipliciousness in such cases is a greater evil than the nuisance."<sup>31</sup> They went on to indicate that relief had to be sought from the appropriate public official or, if need be, from the ballot box.<sup>32</sup>

Judge McNulty, speaking for the court, observed that experience indicated old remedies to be ineffective, depriving an individual of standing to sue if his injury was suffered jointly with the public. "But," said the court, "it is anathema to any true system of justice to proclaim that a right may be enjoyed by all yet none may protect it."<sup>33</sup>

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<sup>28</sup>281 So. 2d 572 (Fla. App. 1973), *cert. granted*, November 21, 1973 (Fla. S. Ct.).

<sup>29</sup>In so doing the court specifically overruled *Askew v. Hold The Bulkhead — Save Our Bays*, 269 So. 2d 696 (Fla. App. 1972). In that case, plaintiffs who sought relief on behalf of the public from the commercial exploitation of a public park were denied standing.

<sup>30</sup>*Cf. Gulf Holding Corp. v. Brazoria County*, 497 S.W.2d 614 (Tex. Ct. Civ. App. 1973) (injunction by state barring company from obstructing use of a public beach affirmed). When the state initiates the action, injunctive relief may be more easily obtained.

<sup>31</sup>281 So. 2d at 573. Quite apart from the policy of judicial restraint adopted by the courts in public nuisance actions is an historical consideration that dates back to early common law England. "The reasons for the requirement of particular damage have been stated many times. The plaintiff did not and could not represent the King, and the vindication of royal rights was properly left to his duly constituted officers." Prosser, *supra* note 1, at 1007.

<sup>32</sup>281 So. 2d at 574.

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

The trend in Florida and the federal courts has been to broaden standing to sue on a number of causes of action. Based upon this apparent trend, the court concluded that standing in nuisance cases should also be broadened, stating that "it is time to say . . . that the 'special injury' concept serves no valid purpose in the present structure of the law and should no longer be a viable expedient to the disposition of these cases."<sup>34</sup> The court rejected the multipliciousness argument, citing the expense of litigation, the precedential value of prior decided cases, and the increasing number of class actions as factors that would reduce multiple suits. As noted above, this case is now pending before the Florida Supreme Court, and it is not clear whether the District Court of Appeals decision will be affirmed. In any event, this case is an indication that the archaic special injury rule may soon be outmoded.<sup>35</sup>

#### A. What Constitutes Special Injury?

Every American jurisdiction, except perhaps Florida, requires an individual plaintiff to show special injury before acquiring standing to sue for public nuisance.<sup>36</sup> Although the practical effect of the special injury rule has been to limit the standing of individuals, it has not eliminated individual standing. Regardless of the type of special injury required by a jurisdiction—distinct kind, different kind, or kind and degree—individual plaintiffs have been able to demonstrate the requisite quantum of personal injury.

There are two types of special injury by which a plaintiff may have standing. The first type, when the nuisance has resulted in personal harm to the plaintiff, is least likely to occur and is difficult to prove, but it is the "true" special injury. In *George v. Houston*,<sup>37</sup> for example, the parents of a deceased child, who drowned in a pond located on land used by the city of Houston for garbage disposal, sued the city on the theory that the garbage

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<sup>34</sup>*Id.* at 575.

<sup>35</sup>The decision in *Save Sand Key* was followed in *Save Our Bay, Inc. v. County Poll. Control Comm'n*, 285 So. 2d 447 (Fla. App. 1973). The court held that a nonprofit corporation whose members used waters for recreation had standing to bring an action against utilities who allegedly polluted the waters.

<sup>36</sup>Florida may be the first jurisdiction to reject this rule. See notes 28-35 *supra* and accompanying text.

<sup>37</sup>465 S.W.2d 387 (Tex. Ct. Civ. App. 1971), *rev'd on other grounds*, 479 S.W.2d 257 (1972).



dump was a public nuisance.<sup>38</sup> The court ruled that the personal injury suffered by the plaintiffs' decedent constituted special injury, and, thus, the plaintiffs had standing.

A somewhat more unusual situation confronted the Oregon Supreme Court in *Wilson v. Parent*<sup>39</sup> when a woman sued for an injunction against her son-in-law, who allegedly was creating a public nuisance by the continual use of obscene words and gestures against the plaintiff in public. The court ruled that the plaintiff did suffer damages of a different kind and degree from the public in general because the obscene words and gestures were directed at her personally.

The second type of special injury recognized by the courts is injury to a plaintiff's land. This concept is identical to what is sometimes termed a mixed nuisance,<sup>40</sup> and is used by courts that have not adopted the terminology of mixed nuisance. At the heart of the standing exception for mixed nuisance and special injury to land is the assumption that a plaintiff could bring an action for private nuisance, notwithstanding the public nature of the nuisance. In *Wade v. Campbell*,<sup>41</sup> several landowners sought damages and an injunction against an adjacent dairy farmer, alleging that the dairy farm caused noxious and nauseating odors, large numbers of flies and mosquitoes, excessive dust, and disturbing animal noises. The court, in affirming an injunction against the dairy farm, used the special injury to land approach: "While the conditions created and maintained by defendants on their property are sufficient to constitute a continuing and public nuisance affecting a considerable number of persons in the community, the plaintiffs, as near residents and property owners were specially injured thereby."<sup>42</sup>

A similar approach was used by the court in *Weinstein v. Lake Pearl Park, Inc.*<sup>43</sup> In this case, landowners bounded by a great pond brought an action against an adjoining owner who had put fill into the pond without a license, causing flooding on the plaintiffs' land.

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<sup>38</sup>The pond was alleged to be an "attractive nuisance." For a discussion of the law of attractive nuisance, see generally W. PROSSER, *THE LAW OF TORTS* 372-85 (3d ed. 1964).

<sup>39</sup>228 Ore. 354, 365 P.2d 72 (1961).

<sup>40</sup>See *Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938).

<sup>41</sup>200 Cal. App. 2d 54, 19 Cal. Rptr. 173 (Cal. Dist. Ct. App. 1962).

<sup>42</sup>19 Cal. Rptr. at 176-77.

<sup>43</sup>347 Mass. 91, 196 N.E.2d 638 (1964).

The court, in holding for the plaintiffs, found that placing fill in a great pond without a license is a public wrong for which a private action will not lie absent "special and peculiar" damage. The court, however, concluded that the wetting of plaintiffs' lands by the nuisance constituted special injury. Identical reasoning has been used to give standing to individual plaintiffs suing for mixed nuisance. In *Bishop Processing Co. v. Davis*,<sup>44</sup> a group of plaintiffs sought to perpetually enjoin the defendant from operating a processing plant. The plant processed about 35,000 tons of animal by-products annually. The plaintiffs' primary objection to the processing plant was the stench that it generated. The plaintiffs introduced evidence that an obnoxious odor permeated the air for more than a mile from the plant, causing headaches, throat irritations, loss of appetite, nausea and other discomforts. The court noted that when a nuisance is both public and private in character, it is termed mixed. It stated that a public nuisance could be enjoined by an individual if the nuisance injured or impaired the value of his property. The court concluded "that whether the conduct of the appellant's business be determined as constituting a public or a private nuisance, the appellees have shown sufficient discomfort to themselves and injury to their properties to entitle them to injunctive relief."<sup>45</sup>

### III. ALTERNATIVE STANDING POSSIBILITIES

#### A. Morally Offensive Nuisances

Under common law, various types of conduct were deemed to be public nuisances *per se*.<sup>46</sup> These noxious or morally offensive nuisances could not only be enjoined by the appropriate public official, but were also subject to suit by an individual. Today, while the list of *per se* nuisances has expanded greatly and varies from jurisdiction to jurisdiction, a majority of states still permit private citizens to seek injunctive relief from an unlawful or morally offensive nuisance. The three main types of nuisances that can be enjoined by a private action are houses of prostitution, gambling halls, and the illegal production and distribution of liquor.<sup>47</sup>

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<sup>44</sup>213 Md. 465, 132 A.2d 445 (1957).

<sup>45</sup>*Id.* at 474, 132 A.2d at 449.

<sup>46</sup>See RESTATEMENT (SECOND) OF TORTS § 201 (1965).

<sup>47</sup>Private actions are maintainable against morally offensive conduct pursuant to: ARK. STAT. ANN. § 34-101, 102 (1962 Replacement Volume) (roadhouses, dance halls, nudist camps); DEL. CODE ANN. tit. 10, § 7102 (1953) (lewdness, assignation,

Most other illegal activities may be enjoined only by a designated public official.

Even if an individual has the right to enjoin a morally offensive nuisance, this right is often limited in one way or another. In some jurisdictions, a *per se* nuisance suit may only be brought by a citizen of the locality where the nuisance exists.<sup>48</sup> In other jurisdictions, the plaintiff must be joined in the action by a minimum number of other complainants.<sup>49</sup> Finally, a security bond may be statutorily mandated or discretionary with the court.<sup>50</sup>

Although suits by individuals on behalf of the state to enjoin morally offensive nuisances have been successful,<sup>51</sup> the mere fact

prostitution); ME. REV. STAT. ANN. tit. 17, § 2741 (1965) (prostitution, gambling, illegal sale of liquor or drugs); MICH. COMP. LAWS ANN. § 27A.3801 (1972 Replacement Volume) (gambling, prostitution, sale of illegal drugs and liquor); MISS. CODE ANN. § 95-3-11 (1973) (gambling); MO. ANN. STAT. § 563.940 (1953) (prostitution); MONT. REV. CODE ANN. § 94-1002 (1969) (opium, prostitution, gambling); N.H. REV. STAT. ANN. § 47-17 (1971) (prostitution, lewdness, illegal manufacture and distribution of liquor); N.M. STAT. ANN. § 40A-8-1 (1972 2d Replacement Volume) (unlawful conduct injurious to public morals, safety, health or welfare); N.C. GEN. STAT. § 19-2 (1965) (prostitution, gambling); N.D. CENT. CODE § 42-1-1 (1968) (any act offending decency); OHIO REV. CODE ANN. § 37.3767.01 (1971 Replacement Volume) (lewdness, assignation, gambling, pornography, prostitution); R.I. GEN. LAWS ANN. § 10-1-1 (1970) (prostitution, gambling, illegal sale of liquors, slaughterhouses, rendering plants); S.C. CODE ANN. § 10-1801 (1962) (prostitution); S.D. COMPILED LAWS ANN. § 21-10-10 (1967) (prostitution); TENN. CODE ANN. § 23-301 (1955) (liquors, gambling, prostitution); UTAH CODE ANN. § 47-1-1 (1970) (brothels); VA. CODE ANN. § 48.7 (1972) (prostitution); W. VA. CODE ANN. § 61-9-1 (1966) (lewdness, prostitution, assignation, gambling); WYO. STAT. ANN. § 7-453 (1959) (lewdness, prostitution, assignation, gambling).

<sup>48</sup>Residency requirements are contained in: ARK. STAT. ANN. § 34-113 (1962) (citizen of county); DEL. CODE ANN. tit. 10 § 7103 (1953) (citizen of county); IDAHO CODE § 52-204 (1957) (citizen of county); LA. REV. STAT. § 13:4711 *et seq.* (1968) (resident of election district for gambling only). ME. REV. STAT. ANN. tit. 17, § 2741 (1965) (voter in county); MICH. COMP. LAWS ANN. § 600.380 *et seq.* (1968) (citizen of county); MONT. REV. CODES ANN. § 94-1004 (1969) (citizen of county); OHIO REV. CODE ANN. § 37.3767 (Baldwin 1971) (citizen of county); TENN. CODE ANN. § 23-301 *et seq.* (1955) (citizens of county); UTAH CODE ANN. § 47-1-2 (1970) (citizens of county).

<sup>49</sup>ARK. STAT. ANN. § 34-102 (1962) (five or more citizens or freeholders); LA. REV. STAT. § 13:4722 (1968) (10 residents for gambling); ME. REV. STAT. ANN. tit. 17, § 2741 (1965) (seven voters); TENN. CODE ANN. § 23-302 (1955) (10 citizens or freeholders); VA. CODE ANN. § 48.1 (1972) (five or more citizens).

<sup>50</sup>Posting of bond: ARK. STAT. ANN. § 34-103 (1962) (required); LA. REV. STAT. § 13:4715 (1968) (showing of good faith); MO. ANN. STAT. § 563.140 (1953) (court's discretion); OHIO REV. CODE ANN. § 37:3767.03 (Baldwin 1971) (required); TENN. CODE ANN. § 23-304 (1955) (required).

<sup>51</sup>*See, e.g., State ex rel. Leahy v. O'Rourke*, 115 Mont. 502, 146 P.2d 168 (1944)

that the state declares an activity to be illegal does not confer standing on an individual to sue for its abatement, absent specific statutory language to the contrary.<sup>52</sup> Similarly, the existence of a public nuisance is not necessarily a basis for civil damages.<sup>53</sup>

### B. Environmental Legislation

In the last five years most states have enacted new environmental protection laws. Although the purpose of this article is not to examine at great length either state or federal environmental protection legislation, these statutes have had a significant effect on the rights of individuals to seek relief from environmental nuisances. Consequently, a brief look at the standing provisions of various statutes is helpful.

There are four major federal anti-pollution or environmental acts.<sup>54</sup> In each act, private citizens have been granted only "secondary" standing rights; that is, standing only to attack the inappropriate action or inaction of a designated federal official. The National Environmental Policy Act<sup>55</sup> gives standing to private citizens to challenge the validity of impact statements issued pursuant to title forty two, section 4332 of the United States Code,<sup>56</sup>

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(gambling nuisance); *Caravella v. State ex rel. Holcomb*, 185 Miss. 1, 186 So. 653 (1939) (liquor sales and gambling).

<sup>52</sup>See, e.g., *Parker v. Lowery*, 446 S.W.2d 593 (Mo. 1969), in which an individual was found to lack standing to sue to enjoin gambling at a carnival, despite a state statute that declared gambling to be a per se nuisance.

<sup>53</sup>See, e.g., *Fitzwater v. Sunset Empire, Inc.*, 502 P.2d 214 (Ore. 1972), in which a plaintiff who had slipped and fallen on ice on a public sidewalk in front of the defendant's restaurant sought damages for his injury. The Astoria, Oregon, city code stated that a violation of the snow removal ordinance, conceded to be violated in this case, constituted a public nuisance. Nevertheless, the court ruled that the city ordinance did not create a cause of action for third parties, but only for the city.

<sup>54</sup>For a complete list of federal statutes and a description of each, see STAFF OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, 93D CONG., 1ST SESS., A COMPILATION OF FEDERAL LAWS RELATING TO CONSERVATION AND DEVELOPMENT OF OUR NATION'S FISH AND WILDLIFE RESOURCES, ENVIRONMENTAL QUALITY AND OCEANOGRAPHY (Comm. Print 1973). See also Morgenstern, *The Relationship Between Federal and State Laws to Control and Prevent Pollution*, 1 ENVIRONMENTAL L. 238 (1971); Note, *The Federal Environmental Pesticide Control Act of 1972*, 40 TENN. L. REV. 538 (1973); Note, *Survey of Environmental Legislation*, 26 U. MIAMI L. REV. 778 (1972).

<sup>55</sup>42 U.S.C. § 4321 (1973).

<sup>56</sup>A great deal of litigation has resulted from this standing provision. See generally Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970);

and the Clean Air Act<sup>57</sup> provides for the standing of individuals to challenge the non-discretionary acts of the Administrator of the Environmental Protection Agency (E.P.A.).<sup>58</sup> Similarly, the Water Pollution Control Act<sup>59</sup> grants private parties secondary standing rights.<sup>60</sup> Finally, while the Rivers and Harbors Act of 1899 (also known as the Refuse Act)<sup>61</sup> contains no specific reference to citizen suits, private suits brought under this Act have been permitted by some courts.<sup>62</sup>

Generally speaking, state environmental legislation has given individual citizens only "secondary" standing rights. In other words, in most jurisdictions the job of abating environmental nuisances has been given to a specific public agency<sup>63</sup> with private

Note, *The National Environmental Policy Act of 1969: Analysis and Judicial Interpretation*, 25 BAYLOR L. REV. 71 (1973); Note, *Environmental Law: Standing to Challenge Federal Agency Action Under National Environmental Protection Act*, 57 MINN. L. REV. 404 (1972).

<sup>57</sup>42 U.S.C. § 1857 (1974).

<sup>58</sup>See 42 U.S.C. §§ 1857h-2, 1857h-5 (Supp. 1974). See generally Juergensmeyer, *Control of Air Pollution through the Assertion of Private Rights*, 1967 DUKE L.J. 1126 (1967); Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153 (1972); Greco, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 1 ENVIRONMENTAL AFFAIRS 384 (1971); Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970); Note, *Rule 23 Class Action Enforcement of the Clean Air Act of 1970*, 7 U. RICHMOND L. REV. 549 (1973); Note, *Environmental Law—Air Pollution Abatement—A Supplemental Damage Remedy Under the Clean Air Act*, 75 W. VA. L. REV. 266 (1973).

<sup>59</sup>33 U.S.C. § 1251 (1974).

<sup>60</sup>See generally Davis, *Theories of Water Pollution Litigation*, 1971 WISC. L. REV. 738 (1971); McThenia, *Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195 (1973); Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970); Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. LEGIS. 565 (1973); Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102 (1969).

<sup>61</sup>33 U.S.C. § 401 *et seq.* (1970).

<sup>62</sup>See generally Lazarus, *Private Relief Under the Refuse Act*, 2 ENVIRONMENTAL AFFAIRS 250 (1972); Note, *Environmental Law—Private Remedies for Pollution of Navigable Waters*, 50 N.C.L. REV. 153 (1971); Note, *Environmental Law—Private Cause of Action Under the Rivers and Harbors Appropriation Act of 1899 for Injury to the Ecology of Navigable Waters*, 50 TEX. L. REV. 1255 (1972).

<sup>63</sup>The limiting clause of the Maryland Air Pollution Control Act is typical. "Persons other than the State shall not acquire actionable rights by virtue of this subtitle. The basis for proceedings or other actions . . . shall inure solely to and shall be for the benefit of the people of the State generally and is not intended to create in any way new or enlarged rights or to enlarge existing rights." MD. ANN. CODE. art. 43, § 699 (1971). For similar language, see ALASKA STAT. § 46.03.870

actions possible only when the duly constituted public agency has failed to act or has expressly approved of the private suit.<sup>64</sup> Under the Florida Environmental Protection Act, for example, private parties have the right to compel state government agencies, by writ of mandamus, to enforce laws "for the protection of the air, water, and natural resources. . . ."<sup>65</sup> Florida citizens also have standing to intervene in administrative licensing proceedings when environmental interests are affected.<sup>66</sup> In New York, individual citizens can maintain actions to preserve mineral resources by enjoining waste. An individual citizen can only obtain standing, however, after a complaint has been filed with the Attorney General and he has failed to bring the action within ten days.<sup>67</sup> In Massachusetts, any private action against air pollution can be maintained, but only with the consent of the Board of Health.<sup>68</sup>

In three other states, administrative agencies bear the primary responsibility for abating environmental nuisances, but the enabling statutes have also given secondary rights to private individuals. Under New Mexico's Air Quality Act, private individuals, or representatives in a class action, may seek a declaratory judgment to determine the validity or applicability of an environmental commission regulation.<sup>69</sup> In Illinois, court relief may be sought after a plaintiff has exhausted his administrative remedies before the state environmental board.<sup>70</sup> Finally, under Indiana law, a private

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(1971); IOWA CODE ANN. § 25.455B (1971); KANS. STAT. ANN. § 65-3019 (1972); MO. ANN. STAT. § 203.170 (Supp. 1974); OKLA. STAT. ANN. tit. 63, § 2001 *et seq.* (1962); TENN. CODE ANN. § 53-3421 (1973). See generally Note, *State Legislation to Grant Standing: Questions, Answers and Alternatives*, 2 ENVIRONMENTAL L. 42 (1971).

<sup>64</sup>Private actions, although limited in one way or another, are provided for under the following statutes: CONN. GEN. STAT. ANN. § 22a-16 (Supp. 1973); FLA. STAT. ANN. § 403.412 (1973); ILL. ANN. STAT. ch. 111 1/2 § 1001 *et seq.* (Smith-Hurd 1972); IND. ANN. STAT. § 3-3501 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 111, § 169 (1954) (water); Ch. 111, § 142(a) (Supp. 1967) (air); MICH. COMP. LAWS ANN. § 691.1201 (1969); MINN. STAT. ANN. § 116B.01 *et seq.* (Supp. 1974); N.M. STAT. ANN. § 12-14-1 *et seq.* (1968); N.Y. ENVIRONMENTAL CONSERVATION LAW § 71-1311 (McKinney 1971).

<sup>65</sup>FLA. STAT. ANN. § 403.412 (1973). (Before writ may issue, private party complainant must notify agency, which has 30 days to take appropriate action). See generally Finell, *Saving Paradise: The Florida Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103 (1973).

<sup>66</sup>FLA. STAT. ANN. § 403.414. Cf. IND. ANN. STAT. § 3-3501 (1973).

<sup>67</sup>N.Y. ENVIRONMENTAL CONSERVATION LAW § 17-1311 (McKinney 1971).

<sup>68</sup>MASS. GEN. LAWS ANN. ch. 111, § 142A (1971).

<sup>69</sup>N.M. STAT. ANN. § 12-14-1 (1968).

<sup>70</sup>ILL. ANN. STAT. ch. 111 1/2, § 1045 (Supp. 1973). See generally Klein,

party has standing to bring an action on behalf of the state for equitable relief, but only after written notice has been filed with the Board of Health and the Department of Natural Resources, and neither agency has taken action within 180 days.<sup>71</sup>

Connecticut, Michigan, and Minnesota are three states that provide an independent right of action for private persons against environmental nuisances.<sup>72</sup> In each state, the legislature has expressly declared that the environment can best be protected by private as well as governmental action. For example, the Minnesota Environmental Rights Act of 1971 provides: "The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land and other natural resources. . . . Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land, and other natural resources located within the state from pollution, impairment, or destruction."<sup>73</sup> In all three states, individuals, associations, and partnerships may seek judicial relief without any major standing limitations. The courts are then empowered to fashion injunctive, declaratory, or other appropriate relief to abate environmental nuisances.<sup>74</sup> In addition, the Michigan Environmental Protection Act provides for court appointment of an environmental expert to study the situation and suggest proper judicial remedies.<sup>75</sup>

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*Pollution Control in Illinois—The Formative Years*, 22 DE PAUL L. REV. 769 (1973); Pöelle, *The Illinois Environmental Protection Act: Constitutional Twilight Zone of Criminal and Civil Law*, 61 ILL. B.J. 584 (1973).

<sup>71</sup>IND. ANN. STAT. § 3-3501 (Supp. 1972).

<sup>72</sup>Connecticut Environmental Protection Act of 1971, CONN. GEN. STAT. ANN. § 22a (Supp. 1973); Michigan Natural Resource Conservation and Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. § 691.1201 (1973); Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116(B).01 (1973).

<sup>73</sup>MINN. STAT. ANN. § 116B.01 (1973). Identical language is found in the Michigan statute, MICH. COMP. LAWS ANN. § 691.1201 (1973). See generally Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972); Note, *The Minnesota Pollution Control Agency—A Study in State Administrative Law*, 56 MINN. L. REV. 997 (1972).

<sup>74</sup>The Connecticut statute provides: "The court may grant temporary and permanent equitable relief, or may impose such conditions on the defendant as are required to protect the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction." CONN. GEN. STAT. ANN. § 22a-18(a) (1973). See MICH. COMP. LAWS ANN. § 691.1201 (1973); MINN. STAT. ANN. § 116B.01 (1973).

<sup>75</sup>See generally Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085 (1970); Sax,

There is little doubt that federal and state environmental legislation holds the greatest potential for preventing or remedying various interferences with the health, safety, and welfare of individuals and the public. In the interim, however, there are two major weaknesses in most state environmental statutes. First, as noted above, very few jurisdictions have granted unconditional standing to private parties. Second, the possible application of the pre-emption doctrine threatens to leave litigants without a proper remedy.

In *Commonwealth v. Glen Alden Corp.*,<sup>76</sup> for example, the Pennsylvania Supreme Court refused to allow the state to enjoin a company's burning of coal refuse that caused air pollution because the state air pollution control act had allegedly pre-empted the field. The court held that an injunction would only lie if pursuing the statutory remedy would cause irreparable injury.<sup>77</sup> It should be readily apparent that the use of pre-emption rationale on private litigants is a distinct possibility because courts have been reluctant historically to grant private citizens standing in public nuisance or environmental actions, regardless of the legal rationale.<sup>78</sup>

At the federal level, despite the vast number of new environmental statutes, the Supreme Court has recently declared that these new acts have not totally pre-empted the federal common law of nuisance.<sup>79</sup> In *Illinois v. Milwaukee*<sup>80</sup> Illinois sought to invoke

*Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 575 (1972).

<sup>76</sup>418 Pa. 57, 210 A.2d 256 (1965).

<sup>77</sup>The Pennsylvania law has been subsequently amended to permit equitable remedies by the state. See *Borough of Brookhaven v. American Rendering, Inc.*, 434 Pa. 290, 256 A.2d 626 (1969).

<sup>78</sup>*But cf.* *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379 (Alas. 1974). In this case, the Supreme Court of Alaska held that the Alaska Department of Environmental Conservation did not have primary jurisdiction over all actions for the abatement of environmental nuisances. Even though the Alaska statute did not confer standing on individuals who would not otherwise have standing to sue, it did not preclude private persons from maintaining common law actions. ALASKA STAT. § 46.03.870(c) (Supp. 1973) provides: "This chapter does not estop the state, persons or political subdivisions of the state in the exercise of their rights to suppress nuisances, to seek damages, or to otherwise abate or recover for the effects of pollution or other environmental degradation." See also *White Lake Improvement Ass'n v. Whitehall*, 22 Mich. App. 262, 177 N.W.2d 473 (1970).

<sup>79</sup>See generally Note, *State Ecological Rights Arising Under Federal Common Law*, 1972 WIS. L. REV. 597 (1972).

<sup>80</sup>406 U.S. 91 (1972).



the original jurisdiction of the United States Supreme Court in a suit against four Wisconsin cities and the sewerage commissions of the city and county of Milwaukee. The suit was for abatement of a public nuisance, based on the defendants' alleged pollution of Lake Michigan. According to the plaintiff, more than 200 million gallons of raw or inadequately treated sewage was being discharged daily into the lake. The Supreme Court, in remitting the parties to the appropriate federal district court, stated that federal question jurisdiction under title twenty-eight, section 1331 of the United States Code "will support claims founded upon federal common law as well as those of statutory origin."<sup>81</sup> In reaching this conclusion, the Court relied on two earlier Supreme Court decisions, *Georgia v. Tennessee Copper Co.*<sup>82</sup> and *North Dakota v. Minnesota*,<sup>83</sup> in addition to a recent Tenth Circuit case, *Texas v. Pankey*.<sup>84</sup> With respect to the pre-emption question, Mr. Justice Douglas wrote for a unanimous Court: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."<sup>85</sup> The significance of this case, however, should not be over-estimated. In all likelihood, this decision will be limited to instances of interstate pollution. Furthermore, the decision does nothing to resolve the threshold standing requirements that effectively bar private litigants.

### C. Joinder of the State as a Party

There are several other standing possibilities that involve joinder of parties. The first of these is an individual's suit on behalf of the state to have a public nuisance abated.<sup>86</sup> Only Florida and Wisconsin permit a citizen to sue on behalf of the state to enjoin a public nuisance. Under Florida law, any citizen within the county

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<sup>81</sup>*Id.* at 100.

<sup>82</sup>206 U.S. 230 (1907).

<sup>83</sup>263 U.S. 365 (1923).

<sup>84</sup>441 F.2d 236 (10th Cir. 1971).

<sup>85</sup>406 U.S. at 107.

<sup>86</sup>This is virtually the same type of suit as an individual's suit for the abatement of a morally offensive, or per se, nuisance. See notes 46-52 *supra* and accompanying text. It should be noted, however, that where an individual plaintiff elects to sue on his own behalf, as would be required in a suit for damages, every jurisdiction (except possibly Florida) requires that a plaintiff demonstrate special injury. See notes 22-45 *supra* and accompanying text.

where a public nuisance exists may seek injunctive relief in the name of the state.<sup>87</sup> Florida defines a public nuisance as that "which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals."<sup>88</sup> In Wisconsin, private citizens may maintain an action to enjoin public nuisances, even if they are not citizens of the county where the nuisance exists, after first obtaining leave from the court. The statute provides that "an action to enjoin a public nuisance may be commenced and prosecuted in the name of the state, either by the attorney general upon his own information . . . or upon the relation of a private individual, the sewerage commission, or a county, having first obtained leave therefor from the court."<sup>89</sup>

In the other forty-eight states, an individual does not have standing to sue on behalf of the state to abate a public nuisance. The majority position is stated in *Garland Grain Co. v. D-C Home Owners Improvement Association*:<sup>90</sup>

Though a nuisance may be public, it furnishes an individual no right of action, unless he has in some way been actually injured or will suffer such an injury by its maintenance. No one can constitute himself a guardian of the public and maintain an action for public nuisance which does not sensibly injure him or his property, although he be a member of the community where such nuisance exists. The rights of the general public are not involved unless the state—the custodian of those rights—is made a party to the suit. Absent such view of the statute, the public policy of our own state on such vital matters could be thwarted, without the state having had an opportunity to have its side of the controversy presented in a court of justice.<sup>91</sup>

Because the government has freer access to the courts in public nuisance suits than do individual plaintiffs, and inasmuch as the state and individual plaintiffs often have a common interest in the abatement of a public nuisance, it is understandable that private citizens would attempt to circumvent the traditional standing obstacles by suing jointly with the state. Nevertheless, as a rule, courts have required that all plaintiffs in a public nuisance

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<sup>87</sup>FLA. STAT. ANN. § 60.05 (Supp. 1972).

<sup>88</sup>*Id.* § 823.01(1).

<sup>89</sup>WIS. STAT. ANN. § 280.02 (Supp. 1973).

<sup>90</sup>393 S.W.2d 635 (Tex. 1965).

<sup>91</sup>*Id.* at 640. The court does suggest, however, that actual injury is not necessary in order to have standing, but only that an individual "will suffer" an injury from the nuisance. See notes 22-45 *supra* and accompanying text.

suit have an independent basis for standing.

In *Metropolitan St. Louis Sewer District v. Zykan*,<sup>92</sup> the sewer district and owners of homes in a subdivision brought a joint action to compel the developer of the subdivision to construct a drainage ditch and for damages arising from the failure to construct the ditch. The sewer district sued on behalf of the citizens of St. Louis County and the State of Missouri, alleging that failure to construct the storm sewers interfered with drainage, caused ponding and pooling of water, and land erosion, all of which created a public nuisance and caused a diminution of land value.

The Missouri Supreme Court, in affirming a judgment for the plaintiffs, rejected the defendant's assertion that there was a misjoinder of parties and actions. The court stated that "the equity relief thus sought by all plaintiffs arises 'out of the same transaction, occurrence or series of transactions or occurrences' and presents questions of law and fact 'common to all.' Joinder is permissible when these conditions exist, and it is not necessary that all plaintiffs 'be interested in obtaining . . . all the relief demanded.'" <sup>93</sup> The misjoinder argument primarily related to the joinder of a suit for an injunction with a suit for damages. The homeowners had at least two bases for having standing: First, the failure to construct the ditch was a breach of contract, and second, they suffered an injury to land, thus acquiring standing under the special injury doctrine.<sup>94</sup>

There do appear to be some minor advantages for private citizens maintaining a joint suit with the state for public nuisance. One advantage is the legal aid and advice that may be forthcoming from the state directly relating to the litigation of the case. Another advantage is the intangible benefit to an individual citizen when the state, in effect, expressly endorses the suit by jointly suing for abatement of the nuisance.

#### D. Class Actions

The final type of private action for public nuisance is the class action.<sup>95</sup> Although several commentators have noted the great po-

<sup>92</sup>495 S.W.2d 643 (Mo. 1973).

<sup>93</sup>*Id.* at 652.

<sup>94</sup>See notes 40-43 *supra* and accompanying text.

<sup>95</sup>Another type of action similar to a class action is a *parens patriae* suit initiated by the state on behalf of its citizens. *Parens patriae* is not discussed at great

tential of the class action in nuisance and environmental cases,<sup>96</sup> as a practical matter, class actions based on a public nuisance theory have been an almost total failure. There are two apparent reasons for the failure of class action nuisance suits. First, the plaintiffs must overcome all of the basic standing obstacles that thwart individual plaintiffs, such as the special injury rule. Second, the plaintiffs must overcome the pitfalls associated with all class actions such as class composition and representation, manageability, injury in fact, and, in the federal courts, jurisdictional amount.<sup>97</sup>

*Diamond v. General Motors Corp.*<sup>98</sup> is an example of an ingenious, but unsuccessful, class action based on the theory of public nuisance. In this case, the plaintiff sued on behalf of himself and all other residents of Los Angeles County (7,119,184 persons) against 293 corporations and municipalities for alleged pollution of the atmosphere.<sup>99</sup> The plaintiff argued that the class combined all of the special damage claims of the individual residents. Among the injuries alleged by the plaintiff were a shortening of life span, increased chances of suffering heart attack, emphysema, lung cancer, damage to and destruction of body tissue, eye irritation, brain damage, exhaustion due to lack of oxygen, and fatigue. The appellate court, in affirming the trial court's dismissal, stated that the class action was not maintainable for three reasons. First, there were significantly disparate interests within the alleged class. Second, the right to recovery and amount of recovery to individual plaintiffs against individual defendants would have to be sepa-

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length here because it is a public, rather than a private action. Although historically *parens patriae* suits have been successful in cases involving interstate pollution, it is well-settled that "[t]he status of *parens patriae* cannot be used to substitute for a class action as to individual claims of the residents of political subdivision." *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398, 401 (C.D. Cal. 1970). For a discussion of what constitutes a valid *parens patriae* suit, see *Hawaii v. Standard Oil*, 301 F. Supp. 982 (D. Hawaii 1969).

<sup>96</sup>See, e.g., Note, *The Viability of Class Actions in Environmental Litigation*, 2 *ECOLOGICAL L.Q.* 533 (1973).

<sup>97</sup>See generally, Comment, *Developments in the Law of Federal Class Action—Catch 22 in Rule 23*, 10 *HOUSTON L. REV.* 337 (1973).

<sup>98</sup>20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971).

<sup>99</sup>*Cf. Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972). A *parens patriae* suit was brought by the city on the basis of the Illinois common law of strict products liability. The Seventh Circuit affirmed the district court's dismissal, stating that the Air Quality Act of 1967 (amended as the "Clean Air Act") resulted in federal preemption of the area of emissions control.

rately litigated. Third, the number of parties, interests, and issues were unmanageable.

Even though the overwhelming majority of class actions have been unsuccessful, there have been a few exceptions. In *Biechele v. Norfolk & Western Railway*,<sup>100</sup> the residents of the Sandusky, Ohio, area sued the railroad seeking damages and an injunction against coal dust pollution. The class action was originally filed in state court, but removed to the district court on diversity grounds. After publication of the suit, 731 plaintiffs sought entry into the case, 532 withdrew, and thousands of others did nothing. The district court ruled that the class action could be properly maintained and that the court had jurisdiction to hear the injunction suit and pendent jurisdiction to hear the suit for damages. The court held that "the right of each member of the class to live in an environment free from excessive coal dust and conversely, the right of defendant to operate its coal loading facility are both in excess of \$10,000."<sup>101</sup>

As to the merits of the case, the plaintiffs introduced evidence that black, greasy dirt accumulated on sidewalks, porches, outdoor furniture and cars. The coal dust also ruined the paint on homes and damaged interior furnishings. The court, in holding for the plaintiffs on all claims, stated:

It is possible that this Court has the burden of deciding whether the plaintiffs must continue to suffer in defendant's filth, or become citizens of a ghost town on an abandoned railway line and a silted-up harbor. If so, the latter seems the lesser of two evils, especially in view of the maxim "sufficient unto the day is the evil thereof."<sup>102</sup>

The vitality of the *Biechele* decision was, unfortunately, completely destroyed by the Supreme Court's recent decision in *Zahn v. International Paper Co.*<sup>103</sup> In *Zahn*, the Court upheld the dismissal of a class action brought by owners of property along the shores of Lake Champlain in Vermont against the International Paper Company for alleged pollution of the lake. The district court had dismissed the action because, although each named plaintiff satisfied the statutory requirement of ten thousand dollars dam-

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<sup>100</sup>309 F. Supp. 354 (N.D. Ohio 1969).

<sup>101</sup>*Id.* at 355.

<sup>102</sup>*Id.* at 358.

<sup>103</sup>414 U.S. 812 (1973).

ages, not all members of the class had suffered damages in excess of the jurisdictional amount.<sup>104</sup> The Second Circuit had affirmed.<sup>105</sup> Mr. Justice White, speaking for a divided Court, and relying primarily on *Snyder v. Harris*,<sup>106</sup> stated that separate and distinct claims cannot be aggregated to meet the ten thousand dollars required for diversity jurisdiction: "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" <sup>107</sup>

Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall, dissented. The dissenters argued that if named plaintiffs satisfied the jurisdictional amount, then the court had ancillary jurisdiction to entertain the claims of other members of a class. Mr. Justice Brennan cited a number of other instances in which federal courts have ancillary jurisdiction over additional parties.<sup>108</sup> The dissent suggested that "[c]lass actions under Rule 23(b)(3) are equally appropriate for such treatment."<sup>109</sup>

The significance of the *Zahn* decision should not be underestimated. It is clearly the most important class action case since *Snyder v. Harris*.<sup>110</sup> Not only has the Supreme Court declared that all plaintiffs in a class action must satisfy the jurisdictional amount in diversity cases, but footnote eleven of the majority opinion plainly suggests that the requirement that all plaintiffs satisfy the jurisdictional amount also applies to class actions based on federal question jurisdiction.<sup>111</sup> Even though the majority cites several areas of federal question jurisdiction specifically exempted from any jurisdictional amount by Congress,<sup>112</sup> the effect of *Zahn*

<sup>104</sup>53 F.R.D. 430 (D. Vt. 1971).

<sup>105</sup>469 F.2d 1033 (2d Cir. 1972).

<sup>106</sup>394 U.S. 332 (1969).

<sup>107</sup>42 U.S.L.W. at 4090, *citing* the Second Circuit's opinion, 469 F.2d at 1035.

<sup>108</sup>*See* 42 U.S.L.W. at 4092. The Court cited the following examples: Compulsory counterclaims under Rule 13(a), *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961), *aff'g* 275 F.2d 148 (1960); intervention as of right under Rule 24(a), *Phelps v. Oaks*, 117 U.S. 236 (1886); cross-claims under Rule 13(g), *R.M. Smythe & Co. v. Chase Nat'l Bank*, 291 F.2d 721 (2d Cir. 1961); impleaded defendants under Rule 14, *Pennsylvania R.R. v. Erie Ave. Warehouse Co.*, 302 F.2d 843 (3d Cir. 1962); defendants interpleaded under Rule 22, *Walmac Co. v. Isaacs*, 220 F.2d 108 (1st Cir. 1955).

<sup>109</sup>42 U.S.L.W. at 4092.

<sup>110</sup>*Snyder v. Harris*, 469 F.2d 1033 (2d Cir. 1972).

<sup>111</sup>42 U.S.L.W. at 4091 n.11.

<sup>112</sup>*See* 28 U.S.C. §§ 1333-34, 1336-40, 1343-45, 1347-58, 1361-62.

is most assuredly to render it exceedingly difficult, if indeed not impossible, for a class action to be maintained in the federal courts on a theory of public nuisance.<sup>113</sup>

In many federal and state court class actions, the plaintiffs have been "environmentalist" groups.<sup>114</sup> Consequently, it is important to consider the circumstances under which an organizational plaintiff is deemed a proper party to sue on behalf of some or all of its members.<sup>115</sup> In *Association of Data Processing v. Camp*,<sup>116</sup> the Supreme Court delineated the two requirements that must be met before an organizational plaintiff has standing to sue under a federal statute: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . . [The second] question [is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute. . . ."<sup>117</sup>

At the state court level, the various courts have adopted similar approaches. In *Save Sand Key, Inc. v. United States Steel Corp.*,<sup>118</sup> the Florida District Court of Appeals stated that "an organizational plaintiff has a sufficient right or has suffered a sufficient injury in this context if all or some of its members have been or will be *directly and personally* aggrieved in some manner relating to, and within the scope of, the interests represented and advanced by the organization."<sup>119</sup>

The standing problems of the organizational plaintiff appear to be the least of the problems encountered by plaintiffs in class action environmental or nuisance suits. Courts now generally rec-

<sup>113</sup>It is most unlikely that a class of plaintiffs satisfying the jurisdictional amount could be assembled that would be large enough to qualify as a valid class action under the well-settled "impracticability of joinder" test. See note 88 *supra*. In other words, a class would be either too small or composed of plaintiffs that must be dismissed. For an overview of federal class actions, see generally Note, *Federal Class Action in Environmental Litigation: Problems and Possibilities*, 51 N.C.L. REV. 1385 (1973).

<sup>114</sup>See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>115</sup>See generally Note, 25 BAYLOR L. REV. 1973 (1973); Note, *Administrative Law: Standing to Represent the Public Interest—The Password is Injury*, 25 U. FLA. L. REV. 233 (1972).

<sup>116</sup>397 U.S. 150 (1970). See also *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>117</sup>397 U.S. at 152-53.

<sup>118</sup>281 So. 2d 572 (Fla. App. 1973).

<sup>119</sup>*Id.* at 576-77.

ognize that bona fide non-profit organizations whose members share a lawful common interest are proper parties to bring environmental suits, assuming that there is a justiciable controversy and the plaintiff organization alleges a personal injury.<sup>120</sup>

#### IV. THE ARGUMENT FOR ABOLITION OF THE SPECIAL INJURY RULE

##### A. The Need for a Forum and a Remedy

Beneath all the rhetoric and technicalities of nuisance and environmental law is the fundamental human desire to live a safe, healthful, and pleasant life. When intervening pollutants or other nuisances unreasonably interfere with an individual's well-being, then the law must endeavor to protect that individual from those interferences. All too often, however, victimized plaintiffs find that they have neither a forum nor a remedy.<sup>121</sup>

An example of this type of case is *Hagedorn v. Union Carbide Corp.*<sup>122</sup> In this case, the plaintiff and his wife sued on behalf of their minor child and approximately 950 persons living in the vicinity of Anmoore, West Virginia. The plaintiffs alleged that the defendant's plant in Anmoore was polluting the air by emitting dirt, graphite, dust, gases, and fumes. The plaintiffs also named as defendants the West Virginia Air Pollution Control Commission, the National Air Pollution Control Administration, and others. Despite the plaintiffs' various claims of jurisdiction the district court dismissed the action for lack of subject matter jurisdiction.<sup>123</sup>

In *Hagedorn*, the plaintiffs alleged six separate bases of jurisdiction. The first contention was that the acts of the defendant deprived the plaintiffs of their rights as guaranteed by the fifth (life, health, and property), ninth (fundamental human right of

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<sup>120</sup>See Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971).

<sup>121</sup>For a discussion of private remedies, see generally SAX, *DEFENDING THE ENVIRONMENT—A HANDBOOK FOR CITIZEN ACTION* (1972); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Cramton, *Citizen Suits in the Environmental Field—Peril or Promise?*, 25 AD. L. REV. 147 (1973); Mannino, *Citizen Suits to Protect the Environment: An Introduction to Some 'New Remedies,'* 44 PA. B.A.Q. 181 (1973); Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 CONN. L. REV. 531 (1973); Trumbull, *Private Environmental Legal Action*, 7 U.S.F.L. REV. 27 (1972).

<sup>122</sup>363 F. Supp. 1061 (N.D.W. Va. 1973).

<sup>123</sup>FED. R. CIV. P. 12(h)(3).



survival), and fourteenth (equal protection) amendments to the United States Constitution. The court rejected this argument and cited *Ely v. Velde*,<sup>124</sup> wherein the Fourth Circuit stated: "While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction . . . ."<sup>125</sup> The court in *Hagedorn* also cited *Tanner v. Armco Steel Corp.*,<sup>126</sup> a case arising from a set of facts similar to *Hagedorn*. The *Tanner* court wrote that "no legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution. As the United States Supreme Court recently observed in rejecting a similarly imaginative constitutional claim, 'the Constitution does not provide judicial remedies for every social and economic ill.'"<sup>127</sup>

The plaintiffs' second allegation of jurisdiction involved the Civil Rights Act of 1871.<sup>128</sup> They asserted that the State Commission's sanctioning of the defendant's "so-called 'Air Pollution Abatement program' amounts to a state license to pollute,"<sup>129</sup> and, therefore, constituted "state action" for the purposes of section 1982 of title forty two of the United States Code. The court rejected this argument, relying on *Johnson v. Capital City Lodge No. 74, FOP*,<sup>130</sup> which stated that state action is only one prerequisite to a section 1983 action; the plaintiff must first have suffered a deprivation of a right secured by the Constitution and laws of the United States. Inasmuch as the court rejected plaintiffs' earlier constitutional argument, it ruled that the plaintiffs could not sue under section 1983.

The third alleged basis of jurisdiction was the Administrative Procedure Act (A.P.A.).<sup>131</sup> The plaintiffs contended that the failure on the part of the National Air Pollution Control Administration to designate Anmoore, West Virginia, an air quality control region had injured the plaintiffs. The court rejected this argument and

<sup>124</sup>451 F.2d 1130 (4th Cir. 1971).

<sup>125</sup>*Id.* at 1139. *Accord*, *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

<sup>126</sup>340 F. Supp. 532 (S.D. Tex. 1972).

<sup>127</sup>*Id.* at 537, *citing* *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>128</sup>42 U.S.C. § 1983 (1974). Jurisdiction is conferred by 28 U.S.C. § 1343 (1973).

<sup>129</sup>363 F. Supp. at 1065.

<sup>130</sup>477 F.2d 601 (4th Cir. 1973).

<sup>131</sup>5 U.S.C. §§ 701-06 (1967).

stated that the A.P.A. alone does not confer jurisdiction on the court.<sup>132</sup> The court further stated that the A.P.A. does not sanction judicial review where a statute precludes it,<sup>133</sup> and the Clean Air Act only provides for judicial review of non-discretionary acts.<sup>134</sup>

The final three alleged grounds for jurisdiction were summarily rejected by the court. The court ruled that the plaintiffs could not invoke jurisdiction under United States Code title twenty-eight, section 1331 because they did not have a "substantial claim founded directly upon federal law."<sup>135</sup> The court rejected the plaintiffs' claim of diversity jurisdiction to hear the state court claims of nuisance and trespass, noting that both the plaintiffs and co-defendant West Virginia Air Pollution Control Administration were West Virginia citizens, thus destroying total diversity as required by *Strawbridge v. Curtiss*.<sup>136</sup> Finally, the court ruled that the Declaratory Judgment Act<sup>137</sup> could not be used to confer jurisdiction where there otherwise was none.

The inability of the plaintiffs in *Hagedorn* to maintain a suit in the district court on a federal cause of action would not be catastrophic if they were able to bring suit in State court. Unfortunately, however, in State court the plaintiffs would have been faced with the same standing problems that have been discussed in the preceding pages. First, there is no provision for private suits under the West Virginia Air Pollution Control Act.<sup>138</sup> Second, suing under a theory of public nuisance, the defendants would not have standing unless they could show special injury.<sup>139</sup> In effect, the plaintiffs had neither a forum nor a remedy.

<sup>132</sup>See *Zimmerman v. United States*, 422 F.2d 326 (3d Cir. 1970), *cert. denied*, 399 U.S. 911, *rehearing denied*, 400 U.S. 855 (1970).

<sup>133</sup>5 U.S.C. § 701(a)(1) (1967); *Caulfield v. Department of Agriculture*, 293 F.2d 217 (5th Cir. 1961), *cert. dismissed*, 369 U.S. 858 (1962).

<sup>134</sup>42 U.S.C. §§ 1857h-2, h-5 (1973). See also note 54 *supra*.

<sup>135</sup>363 F. Supp. at 1068, *citing Gullely v. First Nat'l Bank*, 299 U.S. 109 (1936).

<sup>137</sup>U.S. (3 Cranch) 267 (1806).

<sup>138</sup>28 U.S.C. §§ 2201-02 (1959).

<sup>139</sup>See W. VA. CODE ANN. §§ 16-20 (1972 Replacement Volume).

<sup>140</sup>The plaintiffs claimed that the pollution aggravated a respiratory ailment of their daughter. The test, however, is the plaintiff of "ordinarysensibilities." See *Venuto v. Owen-Corning Fiberglass Corp.*, *supra* notes 23-24 and accompanying text. The plaintiffs also contended that the pollution dirtied their property, but it is questionable whether this would have constituted sufficient injury to their property to give them standing. Ultimately, the plaintiffs chose not to bring an action in State court. Interview with John Boettner, co-counsel for the plaintiffs, Feb. 22, 1974.

## B. The Role of Public Nuisance

Three possible approaches can be used to give individual plaintiffs freer access to the courts in environmental public nuisance cases. The first approach is for the courts to infer a constitutional right to a healthful environment from any number of possible constitutional sources.<sup>140</sup> As noted in *Hagedorn v. Union Carbide Corp.*,<sup>141</sup> however, courts have not given credence to this contention, nor are courts in future cases likely to be eager to interpolate sweeping new constitutional rights from inexplicit constitutional language.<sup>142</sup>

The second possibility for greater standing for private plaintiffs is by legislative enactment. In the last ten years, Congress and state legislatures have enacted a plethora of legislation concerning the environment and with only a few exceptions these new laws have not provided any meaningful rights of action for private plaintiffs. It is unlikely that these laws will be amended in this regard in the near future.

The final possibility is the law of public nuisance. In its present posture, however, nuisance law is archaic and unresponsive to present day environmental needs. As Professor Wright noted: "Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half-century . . ."<sup>143</sup> Even though nuisance cannot possibly deal with many types of problems, such as large-scale pollution, it has the potential of being an excellent cause of action for private plaintiffs in a variety of cases. The law of public nuisance is sufficiently broad to encompass an assortment of incursions into the safety, health, and welfare of individual citizens.<sup>144</sup> It is a relatively straightforward concept that can be litigated easily, efficiently, and promptly. Furthermore, nuisance provides a variety of remedies including past

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<sup>140</sup>See Roberts, *The Right to a Decent Environment: E=MC<sup>2</sup> Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

<sup>141</sup>363 F. Supp. 1061 (N.D.W. Va. 1973).

<sup>142</sup>But cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *NAACP v. Button*, 371 U.S. 415 (1963) (right of association).

<sup>143</sup>Wright, *The Federal Courts and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967).

<sup>144</sup>See, e.g., notes 9-13 *supra* and accompanying text.

damages, permanent damages, and injunctions.<sup>145</sup>

The major problem with public nuisance law in its present state is the issue of standing—or more specifically the special injury rule. By merely abolishing the special injury rule, courts could drastically reduce the number of “remedy-less” interferences with the well-being of individual citizens. At the same time that the law is becoming significantly more responsive, it would neither be difficult to administer, nor likely to result in over-congested dockets.<sup>146</sup>

### C. Conclusion

Public nuisance law encompasses a multitude of interferences with the health and comfort of the public, for which public officials always have standing to sue. Under the special injury rule, however, which is the law in all fifty states, only individuals who have suffered a special injury to their person or land have standing. Federal and state environmental statutes have not appreciably expanded the standing restrictions imposed on private citizens. Similarly, class actions and constitutional claims have been unsuccessful in giving greater standing to individual plaintiffs. By abolishing the special injury rule the courts can revitalize the law of public nuisance and make it a valuable device for private parties.

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<sup>145</sup>See notes 15-18 *supra* and accompanying text.

<sup>146</sup>The Florida District Court of Appeals, in *Save Sand Key v. United States Steel Corp.*, 281 So. 2d 572 (Fla. App. 1973), directly addressed this concern. The court stated:

“[T]he dockets . . . have not increased appreciably as a result of the new cases in which standing would previously have been denied.” *Scanwell Laboratories v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859, 872 (D.C. Cir. 1970). See also, *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966).

Professor Kenneth C. Davis likewise points out that experience of the federal courts themselves shows that floods of litigation do not result when the judicial doors are opened to all. A 1953 case, *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953) held that a ‘consumer’—anyone who eats—has standing to challenge action of the Food and Drug Administration. If consumers have brought many cases, they must all be unreported. See Davis, [*The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970)] . . . at 471.

281 So. 2d 575 n.18.

