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Nuisance as a Modern Mode of Land Use Control

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COMMENTS

NUISANCE AS A MODERN MODE OF LAND USE CONTROL

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INTRODUCTION

Ownership of real property has never been recognized as conferring an absolute right to do whatever one pleases with his property.¹ One of the common law concepts which recognizes and effects such limitations on the rights of property owners is the law of nuisance. Generally, a nuisance can be described as:²

1. See Philbrick, *Changing Conceptions of Property in Law*, 86 PA. L. REV. 691 (1938); Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955).

2. COCHRAN'S LAW LEXICON 219 (4th ed. 1956); see notes 19-32, 224-237 and accompanying text, *infra*; see also BLACK'S LAW DICTIONARY 1214-15 (4th ed. 1951); see generally 39 AM. JUR. NUISANCES (1942); 66 C.J.S. NUISANCES (1950).

Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 at 410 (1942) cautions at 410:

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[a]nything not authorized by law which worketh hurt, inconvenience, or damage. It may be (a) *private*, as where one so uses his property as to damage another's or disturb his quiet enjoyment of it; (b) *public*, or *common*, where the whole community is annoyed or inconvenienced by the offensive acts. . . .

Viewing *nuisance as a mode of land use control*, it can be defined as unreasonable interference caused by unreasonable use of property. In the case of private nuisance, the interference is with the individual's right to use and enjoy his property; while with public nuisance, the interference is with the rights of a considerable number of persons or their properties. Private nuisance developed chiefly as a creature of the common law, but conduct constituting a public nuisance is frequently identified by statutes. Where statutes do not identify conduct as a public nuisance, principles which have been developed by decisional law may furnish a basis for finding a public nuisance, and many of the principles so applied are identical or similar to those applicable to private nuisances.

Another dimension is added to nuisance law by the range of available remedies. These remedies include abatement, injunction, contempt, damages, and declaratory judgments; and in the case of public

"Nuisance," unhappily, has been a sort of legal garbage can. The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie. Coupled with the dubious notion of "attraction," it has been applied even to conditions dangerous to trespassing children. Blackstone defines it as "Anything that worketh hurt, inconvenience or damage, or which is done to the hurt of the lands, tenements or hereditaments of another"—which certainly is broad enough to cover all conceivable torts. There has been a deplorable tendency to use the word as a substitute for any thought about a problem, to call something a nuisance and let it go at that. If "nuisance" is to mean anything at all, it is necessary to disregard much of this as mere aberration.

RESTATEMENT OF TORTS ch. 40 (1939) generally avoided the use of the term "nuisance" and identified its discussion of private nuisance with the title, "Invasions of Interests in the Private Use of Land (Private Nuisance)." The avoidance of reliance on the term "private nuisance" was thought desirable because of the confusion and uncertainty of its meaning. *Id.* at 215. There was no discussion of public nuisance. RESTATEMENT (SECOND) OF TORTS § 821A (Tent. Draft No. 15, 1969) revives the use of the term "nuisance," stating that it is ". . . used to denote either (a) a public nuisance . . . , or (b) a private nuisance" The Tentative Draft's analysis is then grounded upon the concepts of public and private nuisance.

There are some nuisances that may also constitute actionable wrongs under other traditional theories of law; these related theories are beyond the scope of analysis of this comment, but the reader should be alert to the possibility that a court might decide a particular case on the basis of such other theories as are relevant. Perhaps the most pervasive example is found in cases involving riparian rights to water. See generally RESTATEMENT OF TORTS ch. 41 (1939); Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960).

nuisance, criminal sanctions. The conditions under which any one of these remedies is available differ from the conditions under which a different remedy may be given. These differences make it difficult to abstract principles from the cases because it is often difficult or impossible to ascertain whether the court's reasoning was directed to the issue of the existence of a nuisance or of the appropriateness of a particular remedy. In any event, selection of proper remedies is an important element in any nuisance case and should be undertaken with extreme care.

Nuisance law is flexible and its principles are vague and imprecise, making it almost impossible to predict the outcome of most cases. Because of this imprecision, *comprehensive land use controls*, largely legislative and administrative in nature, have grown to occupy almost the full attention of land use planners and lawyers.³ Zoning is by far

3. See A. BETTMAN, *CITY AND REGIONAL PLANNING PAPERS* 171 (A. Comey ed. 1946), where it is argued in favor of zoning on the premise that nuisance law had severe limitations:

[C]ases and enactments, coming before the courts from time to time, have produced such elasticity of definition as to what is or may be declared a nuisance, that the term has ceased to have any definite measure of legislative power. The decisions upon the definition of nuisance have become utterly irreconcilable. . . . A lawyer would often hardly hazard a guess as to whether his client's proposed industry will or will not be declared a nuisance. There is something manifestly unfair in requiring an owner of an industry to select and pay for his site, design his plant, and even build before he can obtain any degree of assurance that he will be permitted to operate. The zone plan, by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use is decidedly more just, intelligent, and reasonable than the system, if system it can be called, of spotty ordinances and uncertain litigations about the definition of a nuisance. [From the author's brief, as amicus curiae, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)].

See N. WILLIAMS, JR., *THE STRUCTURE OF URBAN ZONING* 23 (1966), reviewed in Robbins, Book Review, 14 N.Y.L.F. 219 (1968), where the author states the modern case for zoning:

Zoning is the most comprehensive and effective device available to carry out public control of land use, with far more potentialities for intelligent and flexible regulation than would ever be possible through nuisance or covenant law. For zoning regulations are formulated by the public authorities, and make it possible to indicate in advance the proper use of land over large areas. Moreover, zoning regulations can be related to the land needs of various uses, and are potentially of considerable value in regulating future loads on public facilities.

This conclusion leads Williams to identify nuisance and restrictive covenant actions as "Pre-Zoning Techniques" of land use control. *Id.* at 11-22. The current impatience with nuisance law is suggested by one student writer's conclusion that "in the future there will be a decrease in the uncertainty caused by relating zoning with the confusing concept of nuisance, proportionate to the increase in the scope and self-sufficiency of zoning." Comment, *Zoning and the Law of Nuisance*, 29 *FORD. L. REV.* 749, 756 (1961).

This comment presents an argument against regarding nuisance as a pre-zoning technique of land use control. While restrictive covenants are beyond the scope of the comment, it seems likely that it is also inappropriate to regard them as pre-zoning techniques.

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the most pervasive mode of comprehensive land use control, and for a time appeared to be, in effect, an heir to antiquated nuisance and covenant actions.⁴ For a number of years, however, certain inadequacies of zoning, primarily its rigidity, the mediocrity it has produced in the development of land, and the parochialism it has enabled local governmental entities to effect in land use decision making, have been a matter of growing concern to planners.⁵ Several trends can be observed in zoning law as a result of these concerns. One is a tendency to seek representation of larger areas in the decision making process, through regional or state planning.⁶ Another is the frequent use of traditional mechanisms for attaining flexibility in zoning, for example, rezoning, variances, sinking zones, floating zones, contract zoning, and selective non-enforcement of zoning ordinances.⁷ Perhaps the most widespread recently developed device for attaining flexibility is the planned unit development.⁸

See, e.g., *Reading v. Keller*, 67 Wn. 2d 86, 406 P.2d 634 (1965); *Mt. Baker Park Club v. Colcock*, 45 Wn. 2d 467, 275 P.2d 733 (1954); Comment, *Restrictive Covenants and Zoning Regulations*, 31 TENN. L. REV. 353 (1964); 20 AM. JUR. 2d *Covenants, Conditions, and Restrictions* (1965).

4. See note 3, *supra*, and authorities cited therein.

5. F. BAIR, JR. & E. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE 2* (3d ed. 1966). The authors note that:

Zoning is increasingly under attack as a form of unnecessarily rigid regulation rooted in outmoded tradition and inhibiting desirable change and experimentation. Many of these criticisms are made by planners. The fault, however, does not lie with zoning, which can be a very flexible instrument, but with failure to take advantage of its flexibility.

See Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. URB. L. 1 (1967); Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15 (1965); Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965); Nixon, *Jane Jacobs and the Law—Zoning for Diversity Examined*, 62 NW. U.L. REV. 314 (1967); Comment, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970).

6. See Comment, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970); Comment, *Recent Trends in State Planning Legislation: A Selective Survey*, 16 BUF. L. REV. 801 (1967).

7. See Sullivan, *Flexibility and the Rule of Law in American Zoning Administration*, LAW AND LAND 129 (C. Haar ed. 1964); Bryden, *Zoning: Rigid, Flexible, or Fluid*, 44 J. URB. L. 287 (1967); Comment, *Zoning Change: Flexibility v. Stability*, 26 MD. L. REV. 48 (1966); Note, *Zoning—A Comprehensive Study of Problems and Solutions*, 14 N.Y.L.F. 79, 119-30 (1968); see also Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A.L. REV. 897 (1965); Comment *Zoning and Concomitant Agreements*, 3 GONZ. L. REV. 197 (1968).

8. See D. MANDELKER, *CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS* (1966); *Symposium: Planned Unit Development*, 114 U. PA. L. REV. 2 (1965).

The basic problem underlying comprehensive land use control systems has been described as:⁹

The need is to afford sufficient flexibility and responsiveness to community needs to deal constructively with vicissitudinous situations, yet to assure that zoning restraints are administered pursuant to the rule of law, not unconfined discretion.

The Washington court has indicated an increasing willingness to review actions of zoning officials to assure that those actions are taken pursuant to the rule of law.¹⁰ Such judicial activity will probably result in practical problems in trying to assure flexibility in zoning through the use of some of the traditional methods.¹¹ Zoning officials may also find that federal courts and agencies will take an increasing interest in discouraging tight zoning ordinances which tend to discriminate against certain income or racial groups or reflect parochial interests which are incompatible with sound regional development.¹² These trends would seem to lead to the enactment of zoning ordinances which permit a wider range of uses in each zone in order to assure needed flexibility without running afoul of due process and equal protection requirements.¹³

9. Sullivan, *Flexibility and the Rule of Law in American Zoning Administration* LAW AND LAND 129 (C. Haar ed. 1964). He continues:

The rule of law, as the phrase is here used, is an ellipsis intended to suggest the primary values to which policies promulgated and enforced in a democratic society should adhere: that they be rational, and thus capable of articulation at a level of generality removed from the facts to which they apply, rather than merely intuitive and inexplicable; that such policies be reasonable in the sense that they be logically defensible in terms of the context in which they will operate; and that such policies be fair, in that the costs of the social gains sought to be implemented are distributed equitably. All of these, of course, are values protected against extreme intrusions by the due process and equal protection clauses of the federal and state constitutions.

See Bryden, *Zoning: Rigid, Flexible, or Fluid*, 44 J. URB. L. 287 (1967).

10. See *Smith v. Skagit County*, 75 Wn. 2d 715, 454 P.2d 832 (1969); cf. *State v. Work*, 75 Wn. 2d 204, 449 P.2d 806 (1969); *Pierce v. King County*, 62 Wn. 2d 324, 382 P.2d 628 (1963); *State v. Thomasson*, 61 Wn. 2d 425, 378 P.2d 441 (1963).

11. Close scrutiny of local zoning officials by the courts would make it difficult to rely on actions of such officials to provide required flexibility. Many actions would be contested in court, in view of the substantial chance of showing some procedural irregularity or some improperly considered factor which may have affected the official's decision to modify zoning regulations.

12. See Morris and Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1 (1968); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Comment, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970).

13. A wider range of permitted uses in each zone would seem to decrease the need for amending zone classifications, granting variances, etc. In addition, less rigid regulations applicable to certain zones are probably the only means by which zoning authorities can avoid excluding certain racial and income groups to a degree which is unacceptable.

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Thus, it is highly probable that zoning and perhaps other types of comprehensive land use controls will utilize increasingly flexible restrictions. With this trend, landowners must expect less protection of their individual interests from zoning than they have been able to attain through rigid and highly restrictive ordinances, and without heavy pressure from landowners, zoning officials should be more able to concentrate their attention on public interests rather than those of individual landowners. But this does not imply that the interests of individuals should be ignored in the total system of land use controls. Those interests are as important as the public's interests, even though public law systems may be inappropriate for protecting them. It is at this juncture that *private nuisance* can be introduced as an important modern mode of land use control. Individual landowners who suffer unreasonable interference from a land use which is acceptable to the public may bring actions for private nuisance to secure remedies appropriate to them as individuals.

As for *public nuisance*, the pervasiveness of existing law as a mode of land use control is suggested by the discussion in Part III *infra*. Public nuisance law seems to be particularly appropriate for prohibiting certain conduct that is offensive to the public interest. Beyond this, however, it is perhaps equally important that individuals who suffer special injury from a public nuisance may bring private actions against such nuisances,¹⁴ and public nuisance law thereby provides a mechanism for protecting individuals injured by governmental policy decisions not to enforce the law, which might otherwise leave them with no remedy for their injury.¹⁵

A major advantage offered by both *private and public nuisance* is the flexibility inherent in the remedies which are available. In many land use disputes, damages are appropriate but preventive remedies are not. When individuals appeal from decisions of zoning authorities, they must challenge the authority or appropriateness of such decisions, thus leaving the courts with the choice between authorizing or pro-

14. See notes 304-308 and accompanying text, *infra*.

15. A person might bring an action to contest an administrative decision relating to zoning or pollution control, but the standing requirements and procedural problems would probably be more severe than in nuisance actions. See Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362 (1960); Comment, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967).

hibiting a land use by deciding to uphold or reject the administrative decision. In such cases, no balancing of monetary interests is possible. But with nuisance actions, such a balancing or compensating is possible by awarding damages but not injunctive relief, leaving the decision as to permissible uses to be made by the public authorities on the basis of the dominant public interest.

The *purpose of this comment* is to examine the Washington law of nuisance, to abstract and analyze the principles thereof and the factors which affect judicial decisions in nuisance cases, to suggest reliance on nuisance law as a mode of resolving certain types of land use control problems, and to suggest modification and development of nuisance law which will contribute toward an integrated system of land use control, with nuisance law operating as a part of that system. While the primary focus is on Washington law, general common law principles are noted for comparative purposes.¹⁶

I. PRIVATE NUISANCE

A. *The Concept of Private Nuisance*

1. *Development of the Concept of Private Nuisance*

The earliest actions for private nuisance were recognized in the twelfth or thirteenth century by the assize of nuisance, which provided

16. RESTATEMENT (SECOND) OF TORTS ch. 40 (Tent. Draft No. 15, 1969) is generally cited for comparative purposes. One reason for this is its recent date of preparation, which makes it one of the most current general works on nuisance. A second reason is its extensive notes, comments, and case citations, which make it a valuable research tool.

The following general works on torts probably have the best recent discussions of nuisance law: W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 87-92 (3d ed. 1964) [hereinafter cited as PROSSER]; 1 F. HARPER AND F. JAMES, JR., THE LAW OF TORTS §§ 1.23-1.30 (1956) [hereinafter cited as HARPER & JAMES]. Several English texts are also useful: R. HEUSTON, SALMOND ON THE LAW OF TORTS ch. 5 (14th ed. 1965); J. FLEMING, THE LAW OF TORTS ch. 18 (3d ed. 1965); H. STREET, THE LAW OF TORTS ch. 11 (3d ed. 1963). Three older treatises may also have limited usefulness. They are: J. JOYCE AND H. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES (1906) [hereinafter cited as JOYCE]; E. GARRETT AND H. GARRETT, THE LAW OF NUISANCES (3d ed. 1908) [hereinafter cited as GARRETT]; H. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES (2d ed. 1883) [hereinafter cited as WOOD]. A practical treatment of Washington nuisance law from the perspective of municipalities is found in: E. CAMPBELL, G. SMITH AND H. OLSON, NUISANCES—THEIR CONTROL AND ABATEMENT IN THE STATE OF WASHINGTON (1949). For discussions of nuisance law in states neighboring Washington, see Yerke, *The Law of Nuisance in Oregon*, 1 WILLAM. L.J. 289 (1960); IDAHO CODE ANN. §§ 52-101 to 52-410 (1948).

A review of these authorities indicates that although some aspects of Washington's nuisance statutes and decisional law appear to be unique, in general the basic principles of Washington law are fairly representative of most jurisdictions.

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the remedies of damages and abatement for certain disturbances of freeholds not constituting disseisin.¹⁷ In the fifteenth century, the action on the case for nuisance superseded the assize and limited the legal remedy to damages, thus requiring plaintiffs to seek injunctive relief from the equity courts in order to prevent disturbances.¹⁸

Blackstone defines private nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another."¹⁹ While this definition reflects the basic concept of nuisance held by the common law courts,²⁰ it is overgeneralized to a degree which prevents it from being particularly useful.²¹ Of course, overgeneralization is probably necessary because of the common law courts' extreme sensitivity to the circumstances surrounding each nuisance case they considered. As stated by Thesiger, L.J., in 1879:²²

Whether anything is a nuisance or not, is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances.

This approach to deciding cases led one early American author to conclude:²³

It is not practicable to give other than a general definition of what constitutes a nuisance. A precise, technical definition, applicable at all times to all cases, cannot be given because of the varying circumstances upon which the decisions are based . . . The only approximately accurate method of determining the meaning of the term nuisance is to examine the cases adjudicating what are and are not nuisances.

Notwithstanding the difficulties encountered in attempting to define

17. J. FLEMING, *THE LAW OF TORTS* 365 (3d ed. 1965); *RESTATEMENT (SECOND) OF TORTS* § 821D, comment *a* (Tent. Draft No. 15, 1969).

18. See note 17, *supra*.

19. 3 W. BLACKSTONE, *COMMENTARIES* *216.

20. See L. CAVE, *ADDISON ON THE LAW OF TORTS* 332 (5th ed. 1879). For cases applying this and similar definitions, see JOYCE, *supra* note 16, at 16-17 n.25. Early American cases frequently quoted Blackstone's definition. See 3 W. BLACKSTONE, *COMMENTARIES* 296 (W. Hammond ed. 1890).

21. See WOOD, *supra* note 16, at 17, where the author concludes that:

[The] definition is incomplete, and in some respects misleading, as it is now well settled that neither mere hurt, or [*sic*] mere inconvenience, necessarily makes the use of property producing those results a nuisance

22. *Sturges v. Bridgman*, 11 Ch. D. 852 (1879). A number of English opinions to the same effect are quoted by GARRETT, *supra* note 16, at 6 nn.2,3; 7 nn.2,4; 9 n.2.

23. JOYCE, *supra* note 16, at 1.

private nuisance, many commentators, courts, and legislatures have persisted in the effort, with the result that there are numerous general definitions to be found.²⁴ The necessity of overgeneralization in such definitions is revealed by the *Restatement (Second) of Torts (Tentative Draft)*, which states:²⁵

A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land.

It is useful to note that this definition (1) defines nuisance in terms of the *effect* of conduct, that is, an invasion and (2) limits the invaded rights to interests in land.²⁶

2. *The Washington Concept of Private Nuisance*

In Washington, a statute provides:²⁷

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

A private nuisance is any nuisance other than "one which affects equally the rights of an entire community or neighborhood. . . ."²⁸

The Washington court has held that the statutory definition of

24. JOYCE, *supra* note 16, at ch. 1; WOOD, *supra* note 16, at ch. 1; H. STREET, *THE LAW OF TORTS* 215 (3d ed. 1963).

25. RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 15, 1969); *see also* RESTATEMENT OF TORTS § 822 (1939).

26. RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 15, 1969), comments a, b. R. HEUSTON, *SALMOND ON THE LAW OF TORTS* 84 (14th ed. 1965) states:

Nuisance is really a field of tortious liability rather than a single type of tortious conduct: the feature which gives it unity is the interest invaded—that of the use and enjoyment of land.

See PROSSER § 90; H. STREET, *THE LAW OF TORTS* 212, 215 (3d ed. 1963); RESTATEMENT (SECOND) OF TORTS § 821A, comments b, c (Tent. Draft No. 15, 1969); note 201 and accompanying text, *infra*; *but see* Note, *Nuisance—Personal Annoyance as Sole Injury*, 55 MICH. L. REV. 310 (1956).

27. WASH. REV. CODE § 7.48.120 (1957).

28. WASH. REV. CODE §§ 7.48.130, 7.48.150 (1957).

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nuisance is broader than the common law concept, and has construed this to mean that relief may be granted in some cases where it would not have been granted at common law;²⁹ however, the court has exercised caution in relying on general definitions to decide cases,³⁰ and renders its decisions by placing heavy weight on the circumstances surrounding each case.³¹ This approach results in a judicial balancing of the various interests asserted in each case, as indicated in the following statement:³²

Our basic point of inquiry relates to the general theory of the law of nuisance. This appears primarily to be based upon generally accepted ideas of right, equity, and justice. The thought is inherent that not even a fee simple owner has a totality of rights in and with respect to his real property. In so far as the law of nuisance is concerned, rights as to the usage of land are relative. The general legal principle to be inferred from court action in nuisance cases is that one landowner will not be permitted to use his land so unreasonably as to interfere unreasonably with another landowner's use and enjoyment of his land.

29. *Champa v. Washington Compressed Gas Co.*, 146 Wash. 190, 197, 262 P. 228, 230 (1927), states:

Regardless of the theory of the law in other jurisdictions, . . . because of our statute, we have long held that the common-law definition and consequent remedy for a private nuisance is enlarged.

Ferry v. Seattle, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 664, 203 P. 40, 41 (1921); *Everett v. Paschall*, 61 Wash. 47, 49-50, 111 P. 879, 881 (1910).

30. *Thornton v. Dow*, 60 Wash. 622, 635, 111 P. 899 (1910), *quoting COOLEY ON TORTS* 672 (2d ed. 1888), states:

An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general that it is likely to define nothing.

31. *Crawford v. Central Steam Laundry*, 78 Wash. 355, 357, 139 P. 56, 57 (1914) concludes that:

The precise degree of discomfort that must be produced to constitute a lawful business a nuisance . . . cannot be definitely stated. No fixed rule can be given that will be applicable to all cases. Each case must therefore depend largely upon its own facts. . . . Every person has a right to do with his own property as he sees fit so long as he does not invade the rights of his neighbor unreasonably, judged by the ordinary standards of life, according to the notions and habits of people of ordinary sensibilities and simple tastes.

See Mathewson v. Primeau, 64 Wn. 2d 929, 395 P.2d 183 (1964); *Park v. Stolzheise*, 24 Wn. 2d 781, 167 P.2d 412 (1946); *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 112 P. 255 (1910).

32. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 254, 248 P.2d 380, 382 (1952). *See Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Morin v. Johnson*, 49 Wn. 2d 275, 300 P.2d 569 (1956).

B. Actionable Private Nuisances in Washington

A Washington statute provides that:³³

[W]hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other further relief.

This statutory recognition of a cause of action for essential interference, in context with the court's recognition of unreasonable interferences as causes of action, results in the proposition that for purposes of analysis, *an actionable private nuisance is an unreasonable interference with a property or small number of properties caused by an unreasonable use of other property.*³⁴ Causation and the defenses of

33. WASH. REV. CODE § 7.48.010 (1957).

34. Riblet v. Spokane-Portland Cement Co., 41 Wn. 2d 249, 254, 248 P.2d 380, 382 (1952) suggests the importance and dominance of this concept:

The crux of the matter appears to be reasonableness. Admittedly the term is a flexible one. It has many shades and varieties of meaning. In a nuisance case the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances.

Application of the doctrine of nuisance requires a balancing of rights, interests and convenience.

See notes 26, 28, 31, 32, 33 and accompanying text, *supra*.

RESTATEMENT OF TORTS § 822 (1939) applies the standard of unreasonableness to intentional conduct which results in a nuisance. Subsequent sections then provide an analytic framework for evaluating unreasonableness. Section 826 provides:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable . . . unless the utility of the actor's conduct outweighs the gravity of the harm.

In evaluating the gravity of the harm, § 827 states that the following factors are to be "considered":

- (a) the extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value which the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality;
- (e) the burden on the person harmed of avoiding the harm.

As to the utility of the defendant's conduct, § 828 states that the following factors are "important":

- (a) social value which the law attaches to the primary purpose of the conduct;
- (b) suitability of the conduct to the character of the locality;
- (c) impracticability of preventing or avoiding the invasion.

See also RESTATEMENT OF TORTS §§ 829-831 (1939); RESTATEMENT (SECOND) OF TORTS §§ 826-831 (Tent. Draft No. 15, 1969).

The RESTATEMENT's discussion of unreasonableness is applied only to invasions which are "intentional" and not to invasions which are "negligent or reckless" or "actionable under the rules governing liability for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822 (Tent. Draft No. 15, 1969). For some purposes, analysis of a case requires that these differences in types of cases be considered, e.g., as to whether contributory negligence constitutes a defense; but the courts generally obscure

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adverse possession, contributory negligence and assumption of risk must be considered when nuisance actions are brought;³⁵ however, unreasonable interference and unreasonable use are the basic analytic elements of nuisance law.³⁶

these differences as to types of conduct. Therefore, this comment applies the unreasonableness analysis to all types of conduct, and it is suggested that negligence, recklessness, and abnormally dangerous activity are particular aspects of a basic analysis of the "unreasonableness" test. See RESTATEMENT (SECOND) OF TORTS § 822, comments *h*, *i* (Tent. Draft No. 15, 1969); HARPER & JAMES at 69, 71-72. A rigid application of the RESTATEMENT's formula may result in substantial injustice to injured plaintiffs whose cases do not clearly fall into the RESTATEMENT's categories. See Note, *Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 134 (1967).

Analysis of the principles of nuisance law takes the perspective of the types and degree of interference complained of, and this comment makes no attempt to identify particular land uses which have been adjudicated nuisances. Such listings may be found in 9 WASH. DIG. NUISANCE § 3 (1954); 39 AM. JUR. NUISANCES §§ 47-116 (1942); 66 C.J.S. NUISANCES §§ 27-75 (1950).

35. At least one Washington case suggests that *cause in fact* must be proved by the plaintiff, but not *proximate or legal cause*. See *Forbus v. Knight*, 24 Wn. 2d 297, 311-12, 163 P.2d 822, 829 (1945). RESTATEMENT (SECOND) OF TORTS § 822 (Tent. Draft No. 15, 1969) states that "legal cause" is required. The concept of "legal cause" is a general tort concept of infinite complexity, and will not be discussed herein. See RESTATEMENT (SECOND) OF TORTS §§ 279-280, 430-462 (1965); PROSSER ch. 9. Many of the policy considerations which probably determine whether a court will apply the concept to deny recovery are discussed herein under other headings, and the inability to find cases decided on the rationale of proximate or legal cause suggests that it is more appropriate to discuss these policies under such other headings. In the case of nuisance law, there is probably little reason for the courts to apply proximate cause reasoning because they are free to consider virtually any matter when balancing the unreasonableness of the interference with the plaintiff's property against the reasonableness of the defendant's use of his property. See notes 37-128 and accompanying text, *infra*.

Clearly, "the right to maintain a public nuisance cannot be acquired by prescription." *Elves v. King County*, 49 Wn. 2d 201, 202, 299 P.2d 206 (1956). See *D'Ambrosia v. Acme Packing & Provision Co.*, 179 Wash. 405, 37 P.2d 887 (1934); *Bales v. Tacoma*, 172 Wash. 494, 20 P.2d 860 (1933); WASH. REV. CODE § 7.48.190 (1957). But the court has suggested a contrary rule as to private nuisances. See *Diking Dist. No. 2 v. Calispel Duck Club*, 11 Wn. 2d 131, 118 P.2d 780 (1941). However, it would seem that in most cases, a plaintiff could successfully argue that the defendant had not satisfied the requirements for establishing *adverse possession* or *prescription*. See *Stoebuck, The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

Contributory negligence constitutes a defense in nuisance actions only where the defendant's negligence is the cause of the resulting nuisance. *Albin v. National Bank of Commerce*, 60 Wn. 2d 745, 375 P.2d 487 (1962); *Owens v. Seattle*, 49 Wn. 2d 187, 299 P.2d 460 (1956); see RESTATEMENT (SECOND) OF TORTS § 840B (Tent. Draft No. 15, 1969); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1023-27 (1966); Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952); Comment, *Nuisance: Contributory Negligence or Assumption of Risk as Defense*, 28 TENN. L. REV. 561 (1961).

RESTATEMENT (SECOND) OF TORTS § 840C (Tent. Draft No. 15, 1969) states that *assumption of risk* is a defense to nuisance actions to the same extent as in other tort actions. *Contra*, HARPER & JAMES at 83. No Washington cases on this point have been found, and it seems that the defense has little utility in view of the Washington court's position that "coming to the nuisance" does not necessarily constitute a defense. See notes 114-117 and accompanying text, *infra*.

36. See note 32 and accompanying text, *supra*.

1. Unreasonable Interference

(a) *Types of Interference.* (1) *Depreciation of Property Value.* The Washington court has held that depreciation of property value is not sufficient by itself to constitute a cause of action for private nuisance.³⁷ Even so, diminution of property value should be alleged in any case in which it can be proved,³⁸ since the court tends to place considerable weight on this factor if the accompanying allegations of other types of interference are somewhat tenuous and difficult of proof.³⁹ The importance of reduced property value is also suggested by the numerous opinions which state that there was such a reduction, even though it was not a salient factor in the ratio decidendi of the court,⁴⁰ and the occasional references to the plaintiff's failure to show such a reduction when the court has concluded that there was no cause of action.⁴¹

(2) *Physical Invasion of Property.* Physical invasion of property may constitute a trespass;⁴² however, such an invasion may also result in a nuisance.⁴³ In some factual situations there may be a nuisance without there being an actionable trespass,⁴⁴ and the courts have probably recognized nuisance as a theory by which they can balance the interests in borderline physical invasion cases.⁴⁵ En-

37. *Morin v. Johnson*, 49 Wn. 2d 275, 282, 300 P.2d 569, 573 (1956); *Rea v. Tacoma Mausoleum Ass'n*, 103 Wash. 429, 174 P. 961 (1918). See *Tarr v. Hopewell Community Club*, 153 Wash. 214, 217, 279 P. 594, 595 (1929); *Crawford v. Central Steam Laundry*, 78 Wash. 355, 357, 139 P. 56, 57 (1914); *State ex rel. Warner v. Hayes Investment Co.*, 13 Wn. 2d 306, 314, 125 P.2d 262, 265 (1942) (public nuisance case).

38. Most cases where other types of interference can be proved, *i.e.*, physical invasion, harm or fear of harm to persons, or discomfort or inconvenience, will present a fact pattern in which diminution of the market value of property can also be proved. Physical deterioration, functional obsolescence or economic obsolescence will result in the decrease in value. See Comment, *Valuation of Real Property—Role of the Expert Witness*, 44 WASH. L. REV. 687, 697 (1969) and sources cited therein.

39. See *Drake v. Smith*, 54 Wn. 2d 57, 337 P.2d 1059 (1959); *Turtle v. Fitchett*, 156 Wash. 328, 332, 287 P. 7, 8-9 (1930); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 664, 203 P. 40, 41 (1921); *Goodrich v. Starrett*, 108 Wash. 437, 441, 184 P. 220, 222 (1919).

40. See *Harris v. Skirving*, 41 Wn. 2d 200, 202, 248 P.2d 408, 410 (1952); *Grant v. Rosenburg*, 112 Wash. 361, 364, 192 P. 889, 890 (1920), *rehearing* 112 Wash. 368, 196 P. 626 (1920); *Lavner v. Independent Light & Water Co.*, 74 Wash. 373, 374, 133 P. 592, 593 (1913); *Everett v. Paschall*, 61 Wash. 47, 48-49, 111 P. 879, 880 (1910).

41. See *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 20, 129 P.2d 536, 539 (1942); *Zey v. Town of Long Beach*, 144 Wash. 582, 584, 258 P. 492, 493 (1927).

42. See generally PROSSER § 13; HARPER & JAMES §§ 1.1-1.22; RESTATEMENT (SECOND) OF TORTS chs. 7, 8 (1965).

43. See RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 15, 1969); cases cited in note 46, *infra*.

44. See notes 309-313 and accompanying text, *infra*.

45. *Id.*

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encroachments of artificial structures and natural objects are generally treated as nuisances, whether they are intentional or accidental.⁴⁶ Substances invading property via air or water may also constitute private nuisances,⁴⁷ although the court may carefully weigh other factors before concluding that a particular invasion is actionable.⁴⁸ A potential invasion which is reasonably certain to occur is sufficient to support a cause of action.⁴⁹

(3) *Harm and Fear of Harm to Persons.* The Washington court has construed the Washington statutes to confer a cause of action for reasonable fear of harm to persons.⁵⁰ Most of the cases recognizing such a cause of action are grounded on the plaintiff's fear that the defendant's use of his property will create exposure to diseases that would not otherwise exist,⁵¹ but fears of other harmful events have also been recognized.⁵² In early cases, it was suggested that a reasonable fear did not necessarily mean one supportable by scientific evidence,⁵³ but the application of this principle has been seriously eroded by suggestions that the reasonableness of the fear may be determined by reference to general public beliefs,⁵⁴ probabilities based on the

46. *Peterson v. King County*, 45 Wn. 2d 860, 278 P.2d 774 (1954) (earth slide); *Forbus v. Knight*, 24 Wn. 2d 297, 163 P.2d 822 (1945) (tree roots); *First Methodist Episcopal Church v. Barr*, 123 Wash. 425, 212 P. 546 (1923) (encroachment of wall); *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921) (tree branches); see Note, *Trespass or Nuisance*, 23 Mod. L. Rev. 188 (1960).

47. Air-borne substances: *Riblet v. Spokand-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952); *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 P. 446 (1930); *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270; 230 P. 419 (1924); *Sterrett v. Northport Mining and Smelting Co.*, 30 Wash. 164, 70 P. 266 (1902); see Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. Rev. 107 (1968).

Water-borne substances: *Drake v. Smith*, 54 Wn. 2d 57, 337 P.2d 1059 (1959); *Haveman v. Beulow*, 36 Wn. 2d 185, 217 P.2d 313 (1950); *Bowman v. Helsler*, 143 Wash. 397, 255 P. 146 (1927).

48. See *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924); compare *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952) with *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 129 P.2d 536 (1942).

49. Cf. *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7 (1930).

50. *Everett v. Paschall*, 61 Wash. 47, 53, 111 P. 879, 881 (1910); *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 112 P. 255 (1910).

51. See cases cited in notes 49-50, *supra*; see also *Goodrich v. Starrett*, 108 Wash. 437, 184 P. 220 (1919).

52. *Park v. Stolzeise*, 24 Wn. 2d 781, 167 P.2d 412 (1946); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 203 P. 40 (1921).

53. *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910).

54. See *Clark v. Sunset Hills Memorial Park, Inc.*, 45 Wn. 2d 180, 191-92, 273 P.2d 645, 651 (1954); *Rea v. Tacoma Mausoleum Ass'n*, 103 Wash. 429, 436, 174 P. 961, 963 (1918).

evidence,⁵⁵ the existence of related physical invasions,⁵⁶ or even legislation.⁵⁷ Undoubtedly, these limitations on the rule as originally stated were made necessary by conjectural and imaginary apprehensions alleged in some cases,⁵⁸ and the subjective nature of allegations of such fears and the court's cautious reaction to such allegations make it extremely difficult to predict the outcome of any particular case. Nevertheless, the cases discussing fear of harm suggest that it is a significant factor weighing in favor of the plaintiff.

(4) *Discomfort and Inconvenience.* Some Washington cases have stated that there will be no recovery for nuisance based on discomfort and inconvenience alone,⁵⁹ but the court has also stated that a property owner is entitled to "mental quiet as well as physical comfort."⁶⁰ There is some suggestion that this apparent inconsistency is based on a distinction between severe discomfort and mere unpleasantness, the distinction thus being a matter of degree,⁶¹ but an analysis of the cases suggests the general rule is that no action will lie for discomfort and inconvenience alone.⁶² This conclusion is based on the fact that the opinions upholding a cause of action based partially on discomfort and inconvenience have also been substantially grounded on other types of interference.⁶³ Accordingly, it is probably wise to allege discomfort and inconvenience in any case where they are present, but other types of interference should also be pleaded. This would not seem

55. See *Clark v. Sunset Hills Memorial Park, Inc.*, 45 Wn. 2d 180, 191, 273 P.2d 645, 651 (1954); *Aubol v. Tacoma*, 167 Wash. 442, 445-46, 9 P.2d 780, 781 (1932); *Hite v. Cashmere Cemetery Ass'n*, 158 Wash. 421, 424, 290 P. 1008, 1009 (1930), noted in 6 WASH. L. REV. 89 (1931).

56. See *Rea v. Tacoma Mausoleum Ass'n*, 103 Wash. 429, 437, 174 P. 961, 963 (1918); *Goodrich v. Starrett*, 108 Wash. 437, 442, 184 P. 220, 222 (1919).

57. See *Aubol v. Tacoma*, 167 Wash. 442, 445-46, 9 P.2d 780, 781 (1932).

58. See *Hughes v. McVay*, 113 Wash. 333, 194 P. 565 (1920).

59. *Tarr v. Hopewell Community Club*, 153 Wash. 214, 217, 279 P. 594, 595 (1929); *Zey v. Long Beach*, 144 Wash. 582, 584, 258 P. 492, 493 (1927); *Hughson v. Wingham*, 120 Wash. 327, 330, 207 P. 2, 3 (1922).

60. *Everett v. Paschall*, 61 Wash. 47, 51, 111 P. 879, 880-81 (1910).

61. See *Zey v. Long Beach*, 144 Wash. 582, 258 P. 492 (1927); *Hughson v. Wingham*, 120 Wash. 327, 207 P. 2 (1922).

62. This generalization is subject to at least one limitation. Fear of physical harm will probably be sufficient, by itself, to sustain a nuisance action, and it should therefore be distinguished from discomfort and inconvenience, as the terms are used here. See notes 50-58 and accompanying text, *supra*.

63. See *Drake v. Smith*, 54 Wn. 2d 57, 337 P.2d 1059 (1959); *Riblet v. Spokane-Portland Cement Co.*, 45 Wn. 2d 346, 274 P.2d 574 (1954); *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7 (1930), noted in 5 WASH. L. REV. 132 (1930); *Lavner v. Independent Light & Water Co.*, 74 Wash. 373, 133 P. 592 (1913); *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910).

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to pose a serious difficulty in most cases since appreciable discomfort or inconvenience would almost always be accompanied by other types of interference.⁶⁴

Offensive odors and sounds are recognized as causes of discomfort, and an allegation of their occurrence generally has the same impact as an allegation of discomfort.⁶⁵ The court generally considers the offensiveness of odors without requiring proof of "discomfort";⁶⁶ but the offensiveness of sounds seems to present more difficulty, with the court appearing to pay more attention to the subjective reactions of persons to sounds in deciding whether they create a nuisance.⁶⁷ The Washington court has stated that unsightliness does not constitute a ground for establishing a cause of action for nuisance,⁶⁸ however, some opinions indicate that the court considered offensive visual stimuli in arriving at the conclusion that a nuisance existed.⁶⁹

64. Discomfort and inconvenience are frequently accompanied by fear of physical harm and are quite often caused by a physical invasion of substances onto the plaintiff's property, e.g., air or water pollutants. In almost any case, however, discomfort and inconvenience will result in a depreciation of property value. See note 38, *supra*. See also cases cited in note 63, *supra*.

65. See notes 59-64 and accompanying text, *supra*.

66. See *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Haveman v. Beulow*, 36 Wn. 2d 185, 217 P.2d 313 (1950); *Asia v. Pool*, 47 Wash. 515, 92 P. 351 (1907); *State v. Primeau*, 70 Wn. 2d 109, 422 P.2d 302 (1966) (public nuisance); but see *Grant v. Rosenberg*, 121 Wash. 361, 192 P. 889 (1920) *rehearing* 112 Wash. 368, 196 P. 626 (1920) (odors found to cause nausea and vomiting).

Physiological and psychological aspects of olfaction suggest the need for more liberal treatment of offensive smells than for offensive noises or unsightliness. C. BUTTER, *NEUROPSYCHOLOGY: THE STUDY OF BRAIN AND BEHAVIOR* 86 (1968) states:

Whereas many sights and sounds are motivationally neutral, our first and often primary reaction to tastes and smells [is] evaluative. They are typically judged as either "good," "bad," or "indifferent." These behavioral observations are consistent with the anatomical connections of the olfactory and taste systems . . . the afferent pathways of both these senses project to a part of the forebrain involved in motivational processes and arousal.

67. See *Bruskland v. Oak Theater, Inc.*, 42 Wn. 2d 346, 254 P.2d 1035 (1953); *Payne v. Johnson*, 20 Wn. 2d 24, 145 P.2d 552 (1944); *Haan v. Heath*, 161 Wash. 128, 296 P. 816 (1931); *Grantham v. Gibson*, 41 Wash. 125, 83 P. 14 (1905); cf. *Deaconess Hospital v. Highway Comm'n*, 66 Wn. 2d 378, 407 n.6, 403 P.2d 54, 71 n.5 (1965).

Vibrations of greater magnitude than sounds are probably subject to the same treatment as sounds. See *Ridpath v. Spokane Stamp Works*, 48 Wash. 320, 93 P. 416 (1908).

68. *Mathewson v. Primeau*, 64 Wn. 2d 929, 938, 395 P.2d 183, 189 (1964). This seems to reflect the general rule. See Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54, 55 (1961), where the writer concludes:

[W]hen a mere eyesore restricts the complete use and enjoyment of property and decreases its value, most courts retreat from their normal indignation at nauseous smells and sleep-robbing noises.

69. See *Bruskland v. Oak Theater, Inc.*, 42 Wn. 2d 346, 351, 254 P.2d 1035, 1036 (1953); *Haan v. Heath*, 161 Wash. 128, 130, 296 P. 816, 817 (1931).

The court has also recognized that the offensive nature of a defendant's conduct may depend upon an interrelationship between various sensory experiences, including vision.⁷⁰

It is difficult to rationalize the distinction between visual and other types of sensory stimuli. All sensory systems have the same physiological basis: they function as transducers which transfer energy of various forms, *e.g.*, light, vibration and molecular structure, into nerve impulses which are transmitted to nerve centers such as the brain.⁷¹ The physiological and psychological responses and feelings generated by various types of stimuli may differ somewhat, but they are not distinguishable by any criteria that would suggest that visual stimuli have a less direct effect on human feelings and responses or that visual perception is so much more complex than that resulting from the other senses that it should be treated with more caution in legal analysis.⁷² In short, visual perception is not materially different from other types, and for purposes of legal actions, there is no physiological or psychological basis for distinguishing it from other types.

It appears that the basic reasons for the reluctance of the courts

70. See *State v. Primeau*, 70 Wn. 2d 109, 114, 422 P.2d 302, 305 (1966) (public nuisance case).

71. Humans have sensory receptors of various types, which are sensitive to various types of energy. Of those which are of particular interest here, the olfactory bulb and related structures respond to certain molecular structures. See L. WOODBURNE, *THE NEURAL BASIS OF BEHAVIOR* ch. 15 (1967) [hereinafter cited as WOODBURNE]; J. DEUTSCH AND D. DEUTSCH, *PHYSIOLOGICAL PSYCHOLOGY* ch. 12 (1966) [hereinafter cited as DEUTSCH]. The organ of Corti and related structures respond to certain vibrations in the air. See WOODBURNE ch. 13; DEUTSCH ch. 10. The retina and related structures respond to certain types of light. See WOODBURNE ch. 14; DEUTSCH ch. 11. There are, of course, other sensory receptors, such as those sensitive to pressure, heat, and cold, and they perform the same basic transducer function as smell, hearing, and vision. See WOODBURNE ch. 5; DEUTSCH ch. 8.

The receptor organs transform the energy to which they are sensitive into electrochemical energy to which neurons in the nervous system will respond. See WOODBURNE 66-70; M. GORDON, *ANIMAL FUNCTION: PRINCIPLES AND ADAPTATIONS* ch. 9 (1968). Neurons respond to the electrochemical stimulus and transmit impulses through nerve fibers to various nerve centers, including parts of the brain. The general location and functioning of areas in the brain which integrate and control responses to sensory input are not well understood; however, it is fairly safe to say that of the three types of sensory input discussed herein, olfaction is the least understood. See DEUTSCH 378. Vision is at least as well understood as audition. See C. BUTLER, *NEUROPSYCHOLOGY: THE STUDY OF BRAIN AND BEHAVIOR* 40, 58 (1968); De Valois, *Neural Processing of Visual Information*, in *FRONTIERS IN PHYSIOLOGICAL PSYCHOLOGY* ch. 3 (R. Russell ed. 1966).

72. Probably the most significant distinction between vision and the other two senses of primary interest herein (audition and olfaction) is that human beings are considerably more dependent upon vision than the others. See WOODBURNE 193; C. BUTLER, *NEUROPSYCHOLOGY: THE STUDY OF BRAIN AND BEHAVIOR* 39 (1968).

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to recognize offensive visual stimuli as bases for nuisance actions are: (1) the association of visual stimuli with aesthetics, and the notion that one person does not have a right to impose his aesthetic values on another⁷³ and (2) the fear that the recognition of visual stimuli as an element of a cause of action will lead to petty actions based on different tastes rather than substantial injuries.⁷⁴ As to the first reason, there is no closer connection between vision and aesthetics than that of any other sensory system,⁷⁵ and in cases where other courts have recognized visual stimuli as proper for consideration, the cases actually involved the suppression of "ugliness" rather than the imposition of aesthetic "tastes."⁷⁶ While "ugliness" and "taste" may not reflect a

73. *Mathewson v. Primeau*, 64 Wn. 2d 929, 938, 395 P.2d 183, 189 (1964) cites several cases supporting the proposition: "That a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance. . . ." The court does not elaborate on the reasoning of the cited opinions, but mentions that one of them "holds that the mere fact that a thing is unsightly, and thus offends the aesthetic sense, furnishes no valid ground for a declaration by the legislature that it is a nuisance." *Id.* The Washington court strongly suggests that it would not follow this holding as applied to a statutory declaration of nuisance, but does follow the reasoning as applied to the plaintiff's contention of an "unreasonable interference" with his land. *Id.* at 938-39. A rather curious statement in the opinion follows the discussion summarized above: "As we have made clear, we are not here concerned with the enforcement of a zoning ordinance or with an area that is residential in character. We see no reason for the intervention of equity on this phase of the case." *Id.* at 939. This statement suggests that the unsightliness was merely *insufficient, when weighed against other factors in the case*, to warrant injunctive relief or a conclusion of unreasonable interference caused by an unreasonable use; thus permitting an interpretation of the case concluding that offensive visual stimuli may be a basis for a cause of action in a nuisance case. The reference to injunctive relief suggests that the court may adopt a different rule in damage actions, in view of the more strict requirements for injunctive relief than for damages.

74. This is essentially a restatement of the notion that offensive visual stimuli offend the aesthetic sense. See note 76, *infra*.

75. Any sensory system, but at least olfaction, audition and vision, may be the basis of an aesthetic experience. See Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54, 60 (1961); note 76, *infra*.

76. See Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939); Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54 (1961); Note, *Nuisance Based on Aesthetic Considerations*, 17 MD. L. REV. 345 (1957); Note, *Nuisance—Aesthetic Grounds Held Valid for Injunctive Relief Against Lawful Business*, 59 W. VA. L. REV. 92 (1956).

For discussions of offensive lights as nuisances, see Note, *Light as Constituting Nuisance*, 1 ALA. L. REV. 314 (1949); Note, *Light as a Private Nuisance*, 2 OKLA. L. REV. 259 (1949).

When the term "aesthetic" is used, its inherent ambiguity obscures the issue facing the court. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) reveals this ambiguity quite clearly, as can be seen by observing two of the alternative definitions of "aesthetic." One of these states: "relating to the beautiful as distinguished from the merely pleasing . . . artistic . . . beautiful." The other is: "relating to sensuous cognition: involving pure feeling or sensation . . . in contrast to ratiocination . . . based on or derived from immediate . . . sensuous experience." When the latter sense of the term is meant, any evaluative reaction to stimuli would be appropriately

legal distinction which is of great value, the problem of subjective valuation which concerns the court in the case of visual stimuli is also applicable to other types of stimuli and should not suffice to justify different treatment of vision. The fear that the courts will be forced to entertain petty actions is likewise without merit. The courts are not required to recognize any and all offensive stimuli of any non-visual or visual type as sufficient to constitute a nuisance; and as a practical matter, offensive stimuli alone are virtually never sufficient to sustain a cause of action.⁷⁷

Visual stimuli seem to fall within the language of the Washington nuisance statutes,⁷⁸ and the courts have recognized visual stimuli as appropriate considerations for legislative and administrative land use control decisions.⁷⁹ Such stimuli are also recognized in resolving certain traditional types of judicial problems, such as proof of market value.⁸⁰ With the increasing tendency of courts and legislatures to acknowledge visual stimuli as the basis of certain types of land use controls, it is quite possible that the Washington court will be increasingly responsive to allegations of unsightliness in actions for private nuisance. Such stimuli should be given the same weight as that given any other type of offensive stimuli in nuisance cases.⁸¹

(b) *Degrees of Unreasonableness.* (1) *Substantiality of Interference.* The interference with the plaintiff's property must be unreason-

encompassed by the term. When the former is intended, only "beautiful" or positively valued stimuli are included within the meaning of the term. In nuisance cases, the courts which use the term "aesthetic" apparently intend the concept of beauty or positive values; yet nuisance actions nearly always involve offensive stimuli. In any event, it is clear that either concept of "aesthetic" is equally applicable to sights, sounds, smells, or other types of sensory stimuli. See note 75, *supra*.

77. Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54, 60 (1961) suggests: It has been pointed out that the difficulties of setting an objective standard as to what degree of noise or odor is sufficient to annoy substantially the ordinary person are hardly greater than in the case of an eyesore. These difficulties have not kept courts from declaring offenses to the nose or ears to be nuisances. See notes 50, 53 and accompanying text, *supra*.

78. See notes 27, 33, *supra*, 233-237 and accompanying text, *infra*. A statute which deals specifically with offensive visual stimuli is WASH. REV. CODE § 9.66.060 (1967).

79. See *Markham Advertising Co. v. State*, 73 Wn. 2d 405, 439 P.2d 248 (1968); See also *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964); *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964); *In re Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); Comment, *Aesthetic Control of Land Use; A House Built upon the Sand?*, 59 NW. U.L. REV. 372 (1964).

80. The appearance of property and its surroundings is a basic factor considered in valuing it. See generally Comment, *Valuation of Real Property: Role of the Expert Witness*, 44 WASH. L. REV. 687 (1969).

81. See notes 65-67 and accompanying text, *supra*.

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able in order for it to amount to a nuisance.⁸² For certain types of interference, such as encroachments, virtually any interference may be considered so unreasonable as to constitute a nuisance.⁸³ But for most types, including physical invasions by substances via air or water and offensive stimuli, the interference must be substantial to confer a cause of action,⁸⁴ but it need not be continuous.⁸⁵ Fear of harm to persons must be reasonable to sustain an action; however, the cases generally approach this fact determination from the point of view of the plaintiff, and once he alleges his fear, that allegation will probably fail only upon the trial court's affirmative determination that the fear was unreasonable.⁸⁶

(2) *Sensibilities of the Ordinary Person.* In determining whether an interference is substantial enough to be actionable as a nuisance, the court has applied the standard of the "person of ordinary and normal sensibilities"⁸⁷ in order to avoid extreme claims for "every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or overrefined person."⁸⁸ While this standard is useful in physical invasion nuisance cases involving pollution,⁸⁹ it is undoubtedly necessary in cases where discomfort or fear of harm to persons is alleged.⁹⁰ Where depreciation of the value of property is claimed, the substantiality of such depreciation is determined indi-

82. See note 34 and accompanying text, *supra*. RESTATEMENT (SECOND) OF TORTS § 821F. (Tent. Draft No. 15, 1969) requires "substantial harm" for liability.

83. See *Forbus v. Knight*, 24 Wn. 2d 297, 163 P.2d 822 (1945); *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921).

84. *Morin v. Johnson*, 49 Wn. 2d 275, 300 P.2d 569 (1956); *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924) (invasions of substances by air). For other types of interference, see notes 37-70 and accompanying text, *supra*.

85. *Wilcox v. Henry*, 35 Wash. 591, 77 P. 1055 (1904); *cf.* *Ames Lake Community Club v. State*, 69 Wn. 2d 769, 775, 420 P.2d 363, 367 (1966).

86. See *Park v. Stolzheise*, 24 Wn. 2d 781, 797-801, 167 P.2d 412, 420-22 (1946); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 662-63, 203 P. 40, 41-42 (1921); *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 112 P. 255 (1910); *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910); notes 50-58 and accompanying text, *supra*.

87. *Riblet v. Ideal Cement Co.*, 57 Wn. 2d 619, 622, 358 P.2d 975, 977 (1961); *see* *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910); *see also* RESTATEMENT (SECOND) OF TORTS § 821F (Tent. Draft No. 15, 1969) ("normal" person test).

88. *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 232-33, 112 P. 255, 256 (1910), *quoting* *Ross v. Butler*, 19 N.J. Eq. 294, 97 Am. Dec. 654 (1868).

89. See, *e.g.*, *Riblet v. Ideal Cement Co.*, 57 Wn. 2d 619, 358 P.2d 975 (1961).

90. See *Park v. Stolzheise*, 24 Wn. 2d 781, 797-801, 167 P.2d 412, 420-22 (1946); *Tarr v. Hopewell Community Club*, 153 Wash. 214, 279 P. 594 (1929); *Goodrich v. Starrett*, 108 Wash. 437, 184 P. 220 (1919); notes 87-88, *supra*.

directly by a normative standard through the use of the concept of market value.⁹¹

2. Unreasonable Use

(a) *Principle.* The analysis of nuisance cases is based primarily on the type and unreasonableness of the interference with the plaintiff's property.⁹² In several cases, however, the Washington court seems to have written its opinion from the perspective of the reasonableness of the defendant's conduct.⁹³ These opinions do not reflect the general rule, however, and they probably represent only extreme applications of the balancing principle which is basic to the law of nuisance.⁹⁴ The pervasiveness of this balancing principle is suggested by the following discussion of the court's consideration of the reasonableness of the defendant's conduct in determining whether it results in an actionable nuisance.

(b) *Uses Authorized by Statute.* A Washington statute provides: "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance."⁹⁵ This language leaves some doubt as to what "express authority of a statute" means, and the court has been quite liberal in its interpretation of the phrase, generally with the result that governmental actions taken under a broad statutory authorization are given protection under the statute.⁹⁶ While

91. Cf. Comment, *Valuation of Real Property—Role of the Expert Witness*, 44 WASH. L. REV. 687, 688-90 (1969) (discussion of hypothetical willing buyer and seller concept of market value).

92. See notes 25, 26, 34 and accompanying text, *supra*.

93. See *Payne v. Johnson*, 20 Wn. 2d 24, 29, 145 P.2d 552, 554 (1944); *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 129 P.2d 536 (1942).

94. See notes 32, 34 and accompanying text, *supra*; compare *Riblett v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952) with *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 129 P.2d 536 (1942).

Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418 (1942) states:

In the field of nuisance . . . the courts have recognized the limitation upon liability imposed by the defendant's privilege to make a reasonable use of his own land, or to carry on his own reasonable enterprise. Everyone must put up with some degree of inconvenience in a civilized community, and each defendant is free, within reasonable limits, to carry on his own affairs at the expense of some damage to his neighbors. *It is only when his conduct is unreasonable, in the light of its social utility and the harm which results, that it amounts to a nuisance.* The plaintiff must be expected to endure some danger and some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no undue harm to another. The law of private nuisance is very largely a series of adjustments and compromises to limit the rights and privileges of both parties. (Emphasis added).

95. WASH. REV. CODE § 7.48.160 (1957).

96. See *Deaconson Hospital v. Washington State Highway Commission*, 66 Wn. 2d

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an early opinion suggested that municipal ordinances based on the police power would be given the same effect as statutory authorizations,⁹⁷ the rule seems to be firmly adopted that a municipal ordinance authorizing a particular activity does not affect the court's decision of whether the activity is a private nuisance.⁹⁸ This is especially important in land use control cases where building permits or zoning ordinances purport to authorize the defendant's use of his land.⁹⁹ The legislative authorization statute is an absolute bar to a successful nuisance action; however, the cases suggest that an action brought on some other theory might be recognized, notwithstanding legislative authorization, since the statute applies only to nuisance actions.¹⁰⁰

378, 408, 403 P.2d 54, 72 (1965); *Carlson v. Wenatchee*, 56 Wn. 2d 932, 350 P.2d 457 (1960); *Judd v. Bernard*, 49 Wn. 2d 619, 304 P.2d 1046 (1956); *Mola v. Metropolitan Park Dist.*, 181 Wash. 177, 42 P.2d 435 (1935); *Aubol v. Tacoma*, 167 Wash. 442, 9 P.2d 780 (1932); *Hughes v. McVay*, 113 Wash. 333, 194 P. 565 (1920); see generally Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781 (1952).

In each of these cases, it is highly probable that the legislature did not consider the impact of the statute relied on by the defendant on causes of action for private nuisance. Whether it intended to extinguish such causes of action is therefore a matter of pure speculation, and it would seem to be appropriate for the court to give the phrase "express authority of a statute" a much narrower construction, perhaps limiting its application to statutes which refer to the particular event complained of by the plaintiff and clearly indicate an intention to bar private nuisance actions. This would seem to be especially appropriate in cases where governmental entities are defendants, since the legislature has declared them to be liable for their torts as a general rule and a clear intention to declare an exception to that rule should be required.

The court has suggested that the statute should be strictly construed in *Brusland v. Oak Theater, Inc.*, 42 Wn. 2d 346, 350-51, 254 P.2d 1035, 1037 (1953):

The rule of law deducible from the statute and . . . cases is that, when proper authority authorizes the operation of a lawful business in a certain area, such business does not constitute a nuisance in a legal sense, but it may become such if it is conducted in such an unreasonable manner that it substantially annoys the comfort and repose of others or essentially interferes with the enjoyment of property in violation of RCW 7.48.010 and 7.48.120.

This language probably does not reflect the current law, however, in view of the subsequent cases cited above and the fact that the *Brusland* case involved authorization by a zoning ordinance adopted by a municipality.

97. *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922).

98. *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Steele v. Queen City Broadcasting Co.*, 54 Wn. 2d 402, 341 P.2d 499 (1959); *Brusland v. Oak Theater, Inc.*, 42 Wn. 2d 346, 254 P.2d 1035 (1953); *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952).

99. See cases cited in note 98, *supra*.

100. See *Deaconess Hospital v. Washington State Highway Commission*, 66 Wn. 2d 378, 408, 403 P.2d 54, 72 (1965); *Carlson v. Wenatchee*, 56 Wn. 2d 932, 936, 350 P.2d 457, 460 (1960) (dissent); *Burback v. Bucher*, 56 Wn. 2d 875, 879, 355 P.2d 981, 984 (1960); *Mola v. Metropolitan Park Dist.*, 181 Wash. 177, 181, 42 P.2d 435, 437 (1935).

See notes 309-313 and accompanying text, *infra*, for a discussion of nuisances constituting trespass and notes 314-322 and accompanying text, *infra*, for a discussion of nuisances constituting a constitutional taking or damaging of property.

Private nuisances are found in an infinite number of changing settings involving a wide variety of relationships between individuals, and the common law should be relied upon to maintain the flexibility needed to provide the relief warranted by various circumstances. While it is reasonable to extinguish nuisance actions when the legislature has expressly declared conduct to be authorized, the rights of individuals should be recognized and considered by legislative bodies enacting statutes, and the intent of such enactments with regard to their effect on nuisance actions should be explicit.¹⁰¹ Accordingly, express provisions of enactments should identify conduct which is authorized and thereby not to be deemed a nuisance and limit the types of remedies available to individuals in certain nuisance actions so that such remedies are compatible with the comprehensive planning goals of the public.¹⁰²

101. Statutory enactments which are ambiguous as to their intended effects on nuisance actions can result in a deprivation of effective protection for persons adversely affected by nuisances. This is most likely to occur when statutes create administrative agencies to perform functions relating to pollution control, etc. See *Ellison v. Rayonier, Inc.*, 156 F. Supp. 214 (W.D. Wash. 1957); see also cases and statutes cited in note 312, *infra*; Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362 (1960); Comment, *Water Pollution Control in Washington*, 43 WASH. L. REV. 425 (1967).

102. The availability of injunctive relief could effectively prevent certain developments of land deemed to be in the public interest. It would seem that there is justification for prohibiting injunctions in virtually any such case; however, the prohibition of injunctive relief should not necessarily abolish the plaintiff's right to recover damages. In most cases, strong justification would appear to be needed to extinguish damage actions because the potential defendant in such cases should be expected to carry the burden of the costs or losses incurred by others as a result of his use of his land. Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781, 785-86 (1952) summarizes the argument:

There is a valid reason for holding that legislative authorization confers a privilege against suits to enjoin: the legislature in authorizing an activity determines that it will produce more good than harm. Consequently, an injunction would result in a net loss to society and should not be allowed. But this reasoning is not applicable to damage actions except in the hypothetical situation, which has not been encountered in the cases, where the magnitude of the damages would make the cost of pursuing the activity prohibitive.

If the individuals engaged in the authorized activity are forced to make compensation for injuries resulting from it, they can, by raising the price of their product or service, spread the cost of injuries over a wide number of persons. This, of course, cannot be done by the individuals who are injured. Moreover, in addition to a wider spreading of costs, payment for injuries through raising prices has the advantage of requiring the ones that benefit from the activity, the users of the resulting product or service, to bear the burden of the injuries caused by such activity. Also, to require the creator of the nuisance to make compensation for injuries he causes will tend to encourage the development of better methods. If the defendant is not required to compensate the plaintiff, there may be constitutional objections to the statutory authorization of his conduct. See notes 314-322 and accompanying text, *infra*.

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(c) *Nuisance Per Se*. The Washington court has indicated that a particular use might constitute a nuisance per se, being "an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances."¹⁰³ The court has further suggested that a person who creates or maintains a nuisance per se is liable for its effects without limitation.¹⁰⁴ A search of the Washington cases, however, reveals only one private nuisance action in which the concept of a nuisance per se had any apparent effect on the decision.¹⁰⁵ This is perhaps appropriate, since the application of the concept would be contrary to the basic principle that a nuisance is basically an unreasonable interference, and not an unreasonable use.¹⁰⁶ Cases which conclude that a use is not a nuisance per se indicate that there is a further inquiry which is the essential determination to be made in virtually all cases; namely, the decision as to whether a particular interference constitutes a nuisance in fact.¹⁰⁷ Unreasonable interference caused by unreasonable use is the essence of a nuisance in fact,¹⁰⁸ and the following factors are considered by the court in such cases in evaluating the unreasonableness of the defendant's use of his property.

(d) *Character of Neighborhood*. Recognizing that some interference with residential use of property in cities is inevitable because of industrial development,¹⁰⁹ the court has frequently considered the char-

103. *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 325, 154 P. 450, 451 (1916) quoting 21 AM. & ENG. ENCY. LAW 683 (2d ed. 1896); *State v. Paggett*, 8 Wash. 579, 36 P. 487 (1894). A somewhat different concept of nuisance per se is found in some public nuisance cases. See *State v. Boren* 42 Wn. 2d 155, 253 P.2d 939 (1953); but see *State ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 670, 220 P.2d 305, 308-09 (1950). See generally Note, *Nuisance Per Se*, 38 WASH. L. REV. 385 (1963).

104. *Thornton v. Dow*, 60 Wash. 622, 633, 111 P. 899, 903 (1910).

105. *State v. Paggett*, 8 Wash. 579, 36 P. 487 (1894). The reluctance of the court to apply the doctrine of nuisance per se is suggested by several opinions. See *State ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 670, 220 P.2d 305, 309 (1950) (public nuisance); *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916).

106. See notes 25, 26, 34 and accompanying text, *supra*.

107. See *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *State ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 670-71, 220 P.2d 305, 309 (1950) (public nuisance); *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916); *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 112 P. 255 (1910).

Nuisances other than those per se are called nuisances in fact, *Hardin, supra*, at 325, or nuisances *per accidens*, *Bradford, supra*, at 671.

108. See notes 25, 26, 34 and accompanying text, *supra*.

109. *Crawford v. Central Steam Laundry*, 78 Wash. 355, 357-58, 139 P. 56, 57 (1914) suggests the value judgment underlying the court's consideration of neighborhood characteristics:

Residents of cities must necessarily submit to some inconveniences from the noise,

acter of the surrounding neighborhood in determining whether a particular activity results in a nuisance.¹¹⁰ When the defendant's use of his property fails to conform to the predominant use pattern of the area, the court places considerable weight on this fact in arriving at its conclusion of nuisance in fact.¹¹¹ Some cases suggest that the consideration of this factor may even be extended to an evaluation of the impact of the defendant's use on the future development of the area.¹¹² Conversely, the court frequently refers to the fact that the defendant's activity conforms to the character of the neighborhood, and seems to weigh this fact heavily in concluding that a particular activity does not give rise to a nuisance.¹¹³

(e) *Sequence of Events.* Some Washington cases suggest that if the defendant's use of his property was begun prior to the plaintiff's use or acquisition of his property, that fact will be considered in determining the reasonableness of the defendant's use;¹¹⁴ however, it is clear that his use being first in time is not a bar to concluding that

smoke, and smells of trades and industries carried on therein, and the courts cannot abate every such trade or industry as a nuisance because it is offensive to some of the residents and property owners within its immediate vicinity.

110. See *Morin v. Johnson*, 49 Wn. 2d 275, 281, 300 P.2d 569, 572 (1956); *Grant v. Rosenberg*, 112 Wash. 361, 192 P. 889 (1921), *rehearing* 112 Wash. 368, 196 P. 626 (1920); *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916). In *Beuscher and Morrison, Judicial Zoning Through Recent Nuisance Cases*, 1955 Wis. L. Rev. 440, the authors state at 443:

The courts . . . in deciding nuisance cases have much more than the analysts, weighed heavily facts about the character of the area in which the protested use is occurring. There is nothing new about this, it has been going on for a long time. But recent cases clearly demonstrate a definite increase in judicial sensitivity to the "character of the neighborhood."

See *Levitin, Change of Neighborhood in Nuisance Cases*, 13 CLEV.-MAR. L. REV. 340 (1964.)

111. See *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Snively v. Jabor*, 48 Wn. 2d 815, 296 P.2d 1015 (1956); *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952); *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *State ex rel. Tollefson v. Mitchell*, 25 Wn. 2d 476, 171 P.2d 245 (1946); *Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 61 Wash. 230, 112 P. 255 (1910).

112. See *Snively v. Jabor*, 48 Wn. 2d 815, 296 P.2d 1015 (1956) (injunction for sufficient period to permit residential development of area without interferences complained of); *Park v. Stolzheise*, 24 Wn. 2d 781, 800, 167 P.2d 412, 421 (1946) (area "peculiarly adaptable for improvement with substantial homes and the rearing of children"); *Grant v. Rosenberg*, 112 Wash. 361, 368, 192 P. 889, 891, (1920), *rehearing* 112 Wash. 368, 196 P. 626 (1920), ("district suitable primarily for residential purposes . . . and . . . its growth is being retarded . . .").

113. See *Morin v. Johnson*, 49 Wn. 2d 275, 281, 300 P.2d 569, 572 (1956); *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 21, 129 P.2d 536, 540 (1942); *Woodward v. West Side Mill Co.*, 43 Wash. 308, 313, 86 P. 579, 581 (1906).

114. See *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 129 P.2d 536 (1942); *Hite v. Cashmere Cemetery Ass'n*, 158 Wash. 421, 290 P. 1008 (1930).

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it creates an actionable nuisance.¹¹⁵ Thus, while priority is not conclusive, the court will generally consider it as a factor favoring the prior user.¹¹⁶ Prior notice of the defendant's plans for a use and the length of time the defendant has maintained his use have also been considered.¹¹⁷

(f) *Capacity to Control Objectionable Effects.* If an action is brought when the defendant is proposing his use, the court generally assumes that the use will be carried out with proper management;¹¹⁸ but in some cases, it might be possible to convince the court that the defendant will not be able to eliminate objectionable interference with the plaintiff's property.¹¹⁹ In such cases, and in cases where the defendant is already engaging in an activity alleged to result in a nuisance, there is a possibility that the court will weigh the impossibility of eliminating the objectionable features of the activity in arriving at a conclusion that the activity does not give rise to a nuisance.¹²⁰ However, this possibility appears remote,¹²¹ and the allegation should probably

115. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952). In *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 190, 229 P. 306, 309 (1924), the court stated:

It is said . . . that when appellants bought their property and moved onto it the respondent's mill was in operation in substantially the same manner as now, and that they, having come to the nuisance, may not recover. We cannot support this doctrine, nor is it supported by the authorities.

This position is clearly articulated by RESTATEMENT (SECOND) OF TORTS § 840D (Tent. Draft No. 15, 1969):

The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but is a factor to be considered in determining whether the nuisance is actionable. See note 35, *supra* (prescriptive rights).

116. See *Park v. Stolzeise*, 24 Wn. 2d 781, 801, 167 P.2d 412, 422 (1946); *Powell v. Superior Portland Cement Inc.*, 15 Wn. 2d 14, 129 P.2d 536 (1942); *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270, 230 P. 419 (1924).

117. *Hite v. Cashmere Cemetery Ass'n*, 158 Wash. 421, 425, 290 P. 1008, 1010 (1930) (plaintiff should have anticipated expansion of cemetery); *Park v. Stolzeise*, 24 Wn. 2d 781, 801, 167 P.2d 412, 422 (1946) (distinguishing certain cases involving long established businesses).

118. See *Hughes v. McVay*, 113 Wash. 333, 339, 194 P. 565, 567 (1920).

119. See *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7, 8 (1930).

120. See *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 255-56, 248 P.2d 380, 383 (1952); *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 16-17, 129 P.2d 536, 538 (1942).

The court might also consider the capacity to eliminate objectionable effects as bearing on the defendant's motives, *i.e.*, whether he acted maliciously. See note 137 and accompanying text, *infra*, for a discussion of injunctions against maliciously erected structures.

121. See *State ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 220 P.2d 305 (1950); *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7 (1930); *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 P. 446 (1930); *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 282 P. 848 (1929); *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924).

be avoided because of its potential for convincing the court that the extreme remedy of absolute injunctive prohibition of the defendant's use is appropriate.¹²² In addition to this risk, the defendant's incapacity to control objectionable effects may result in a finding that he is engaging in activity that is necessarily hazardous, with the result that he may be strictly liable for the effects of such conduct under the theory of extra hazardous activity.¹²³

(g) *Public Interest in Use*. A significant public interest is generally found in public nuisance but is not necessarily involved in private nuisance.¹²⁴ When public interest is alleged by a party in a private nuisance case, it will not be determinative of the case;¹²⁵ however, it

122. See notes 145-151 and accompanying text, *infra*.

123. *Zimmer v. Stephenson*, 66 Wn. 2d 477, 483, 403 P.2d 343, 346 (1965), quoting RESTATEMENT OF TORTS § 165 (1939), states that the proper rule now should be:

One who recklessly or negligently, or as a result of an *extra hazardous* activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor thereof or to a thing or a third person in whose security the possessor has a legally protected interest. (Emphasis added).

The court, at 479, noted the classic distinction between actions of trespass on the case (which include nuisance actions) and actions of trespass, and concluded that actions falling within the extra hazardous activity rule of the RESTATEMENT are actions of trespass. RESTATEMENT (SECOND) OF TORTS § 165 (1965) is identical with the original except that the italicized language now reads: "abnormally dangerous." For a thorough discussion of abnormally dangerous activity resulting in an unintentional but actionable trespass, see *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961) (aerial spraying of agricultural chemicals); see generally West, *Nuisance or Rylands v. Fletcher*, 30 CONVEY. 95 (1966).

The RESTATEMENT rule discussed above applies only to trespasses, thus requiring a physical invasion of land which constitutes a trespass. See notes 42-49, *supra*, and notes 309-313 and accompanying text, *infra*, for discussions of physical invasions and trespass. However, a rule of broader application is announced by RESTATEMENT OF TORTS § 519 (1939), which provides:

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

See also RESTATEMENT OF TORTS §§ 520-24 (1939); see generally Freedman, *Nuisance, Ultrahazardous Activities, and the Atomic Reactor*, 30 TEMP. L.Q. 77 (1957).

124. See notes 221-237 and accompanying text, *infra*, for a discussion of basic principles of public nuisance.

125. See *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 282 P. 848 (1929); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 203 P. 40 (1921). *Turtle v. Fitchett*, 156 Wash. 328, 337, 287 P. 7, 10 (1930) summarizes the impact of the public benefit or necessity argument in certain cases:

Many necessary businesses, such as hospitals, sanitariums and undertaking establishments, as well as other lawful businesses . . . may become [nuisances] when the conduct thereof is contemplated within an exclusively residential district. (Emphasis added).

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will probably receive serious consideration by the court.¹²⁶ Allegations of public interest are generally asserted by defendants who are engaged in commercial or industrial activity,¹²⁷ but such an interest may also be a factor weighing on the plaintiff's side.¹²⁸

C. Remedies for Private Nuisance

1. Abatement

If an action is brought and a nuisance is found to exist, the Washington statutes provide that the plaintiff¹²⁹

may . . . , on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance. Such motion shall be allowed, of course, unless it appears on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance. . . .

The procedures for issuing such a warrant are prescribed by statute, and no case law refining the statutory provisions was discovered.¹³⁰ In addition to abatement by warrant, the Washington court has suggested that the person whose property is interfered with by a private nuisance may abate the nuisance without bringing a judicial action.¹³¹ However, this right is undoubtedly subject to the limitation that the

126. See *Steele v. Queen City Broadcasting Co.*, 54 Wn. 2d 402, 412, 341 P.2d 499, 505 (1959); *Powell v. Superior Portland Cement, Inc.*, 15 Wn. 2d 14, 15-16, 129 P.2d 536, 538 (1942).

127. See cases cited in note 126, *supra*.

128. Immorality is frequently the basis for statutory declarations of public nuisance, see notes 253-257 and accompanying text, *infra*; however, it seems probable that the court might react to immoral conduct in deciding private nuisance cases. Several private actions for public nuisance have resulted in opinions suggesting that the court may respond more to the immorality of the defendant's conduct than the language of its opinions generally suggests. See *Hall v. Galloway*, 76 Wash. 42, 135 P. 478 (1913); *Dempsey v. Darling*, 39 Wash. 125, 81 P. 152 (1905). In the latter opinion, at 129, the court states:

[T]he nuisance complained of in this case is of an entirely different character [from objectionable lawful businesses]. It is degrading, immoral, indecent, and always under the ban of the law, and the courts ought not to be too exacting with citizens who are asking relief from such impositions on their rights.

See also *Ingersoll v. Rousseau*, 35 Wash. 92, 76 P. 513 (1904).

129. WASH. REV. CODE § 7.48.020 (1957).

130. WASH. REV. CODE §§ 7.48.030-040 (1957); see Annot., WASH. REV. CODE ANNOT. §§ 7.48.020-040 (West Supp. 1969).

131. See *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921). This case involved an encroachment, and there is a question as to whether the suggested remedy of abatement by self-help would extend to other types of nuisances or to cases where abatement required entering property other than that owned by the property owner suffering the injury.

destruction or removal of the thing which creates the nuisance must be carried out "without committing a breach of the peace, or doing unnecessary injury."¹³² It is clear that the plaintiff's right to abate a private nuisance without judicial action does not impose a duty to the defendant to do so.¹³³

2. *Equitable Remedies*

(a) *Injunctions*.¹³⁴ The Washington nuisance statutes clearly indicate that the defendant's creation or maintenance of a private nuisance may be enjoined by a superior court.¹³⁵ Numerous court opinions have upheld injunctions against wrongful conduct resulting in a nuisance, regardless of the types of interferences involved.¹³⁶ In addition to injunctive relief for nuisances, the statutes expressly authorize injunctions to compel the removal of or prohibit any structure which is maliciously erected and "intended to spite, injure or annoy an adjoining proprietor."¹³⁷

132. See WASH. REV. CODE § 7.48.230 (1957), which subjects the remedy of abatement of a public nuisance by self help to his limitation. See note 285 and accompanying text, *infra*, for discussion of the statute and case law.

133. *Champa v. Washington Compressed Gas Co.*, 146 Wash. 190, 200, 262 P. 228, 231 (1927) (quoting several authorities upholding the principle); *Forbus v. Knight*, 24 Wn. 2d 297, 313, 163 P.2d 822, 829 (1945).

134. For a thorough and recent discussion of injunctions, see *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994 (1965).

135. WASH. REV. CODE § 7.40.010 (1957) provides: "Restraining orders and injunctions may be granted by the superior court, or any judge thereof." WASH. REV. CODE § 7.48.010 (1957) states that a nuisance is "the subject of an action for damages and other and further relief." WASH. REV. CODE § 7.48.020 (1957) provides for abatement, and if it is inadequate, "the plaintiff may have the defendant enjoined."

136. See *Mathewson v. Primeau*, 64 Wn. 2d 929, 395 P.2d 183 (1964); *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *Park v. Stolzheise*, 24 Wn. 2d 781, 167 P.2d 412 (1946); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 203 P. 40 (1920); *Goodrich v. Starrett*, 108 Wash. 437, 184 P. 220 (1919); *Lavner v. Independent Light and Water Co.*, 74 Wash. 373, 133 P. 592 (1913); *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910); *Grantham v. Gibson*, 41 Wash. 125, 83 P. 14 (1905).

137. WASH. REV. CODE § 7.40.030 (1957) provides:

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.

While this statute is technically not a nuisance statute, it is noted here because of its possible utility in relation to nuisance actions which involve animosity between the parties. The proscriptions of the statute could also be found to constitute private nuisances. See *Fridman, Motive in the English Law of Nuisance*, 40 VA. L. REV. 583 (1954); Note, *Spite Fence: A Newly Created Cause of Action*, 9 WYO. L.J. 74 (1954).

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Although law and equity actions are merged in Washington,¹³⁸ a prayer for injunctive relief results in procedural consequences which should be kept in mind. For example it is quite likely that the parties will not be entitled to a jury trial, since one of the main issues of the action will be equitable,¹³⁹ and bonds or security may be required of the plaintiff for the protection of the defendant.¹⁴⁰ It should also be noted that an injunction may be dissolved or modified upon motion after reasonable notice to the adverse party,¹⁴¹ and after dissolution or modification, the injunction may be reinstated.¹⁴² Preliminary injunctions and temporary restraining orders are expressly authorized by statutes and court rules, and may be extremely useful in certain nuisance actions.¹⁴³ In applying for such orders, however, caution is required because of the special requirements and procedures which are applicable thereto.¹⁴⁴

138. WASH. CIV. R. SUPER. CT. 2 states: "There shall be one form of action to be known as 'civil action'."

139. *Maas v. Perkins*, 42 Wn. 2d 38, 41, 253 P.2d 427, 429 (1953) concludes:

The complaint contains a prayer for monetary damages, but also includes a prayer for an injunction to abate a nuisance. Where any one of the main issues in an action is equitable in nature, equity takes jurisdiction for all purposes, and there is no right to trial by jury.

This result should not be reached where only a preliminary injunction is being sought. See WASH. CIV. R. SUPER. CT. 65(a).

140. See WASH. REV. CODE §§ 7.40.070, .080, .090 (1957); WASH. CIV. R. SUPER. CT. 65(c).

141. WASH. REV. CODE § 7.40.180 (1957).

State *ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 674, 220 P.2d 305, 311 (1950) states the judicially developed rule:

It is generally recognized that a court of equity has inherent power to modify or vacate a permanent preventive injunction where a change in circumstances demonstrates that the continuance of the injunction would be unjust or inequitable or no longer necessary.

See *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270, 277, 230 P. 419, 421 (1924).

142. WASH. REV. CODE § 7.40.210 (1957).

143. WASH. REV. CODE § 7.40.020 (1957) provides guidelines for determining when preliminary injunctive relief is appropriate.

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; . . . an injunction may be granted to restrain such act. . . .

144. The notice requirements are quite stringent. WASH. CIV. R. SUPER. CT. 65(a)(1) states: "No preliminary injunction shall be issued without notice to the adverse party." See also WASH. REV. CODE § 7.40.050 (1957). However, pursuant to WASH. CIV. R. SUPER. CT. 65(b), a temporary restraining order may be granted without notice to the adverse party if:

(1) it clearly appears from specific facts shown by affidavit or by the verified com-

Injunctions are issued only to protect the parties from deprivation of a right,¹⁴⁵ in the case of private nuisance from an unreasonable interference with property caused by unreasonable use of other property.¹⁴⁶ In many cases, the type of use the defendant makes of his

plaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

WASH. CIV. R. SUPER. CT. 65(c) provides that:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

Applications for injunctions must designate the kind of evidence to be introduced at the hearing, which may be presented orally (with prior permission of the court) or by affidavits, but this rule does not apply to restraining orders. WASH. CIV. R. SUPER. CT. 43(e); *see also* WASH. REV. CODE § 7.40.060 (1957). WASH. CIV. R. SUPER. CT. 65(d) further states:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

WASH. REV. CODE § 7.40.130 (1957) provides:

When notice of the application for an injunction has been served upon the adverse party, it shall not be necessary to serve the order upon him, but he shall be bound by the injunction as soon as the bond required of the plaintiff is executed and delivered to the proper officer.

Compare WASH. REV. CODE § 7.40.120 (1957), which states: "An order of injunction shall bind every person and officer restrained from the time he is informed thereof." Apparently, notice of the order and its contents is required to bind a defendant in an *ex parte* proceeding; but if the defendant is notified of the proceeding such notice is not required.

145. *McInnes v. Kennell*, 47 Wn. 2d 29, 38, 286 P.2d 713, 718 (1955) states the principle:

Rights of adjoining landowners in the use and enjoyment of their property are relative, but they are also equal. Equity cannot restrict one landowner to confer a benefit on the other. It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of another in the reasonable use and enjoyment of his land that equity will intervene.

146. 5 J. POMEROY AND J. POMEROY, JR., *EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* § 1926 (1919) summarizes the relationship between nuisance law and equitable remedies:

The term "nuisance" has in equity no different signification from that given it in law. Anything which is a nuisance in law is also a nuisance in equity, and, on the other hand, "it is true that equity will only interfere, in a case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance." This is not saying that the jurisdiction of law and that of equity are coextensive; it is simply pointing out that equity in the determination of what constitutes a nuisance follows the law. Whether, assuming a nuisance to exist, equity will take jurisdiction to enjoin it, is another question, a question which is answered in every particular case by determining whether there is a need of equity interposing; whether, in the usual phrase, the legal remedy is adequate.

As to whether equitable relief is appropriate in nuisance cases, *see* the following chapters in standard equity texts: 5 POMEROY, *supra*, ch. 24; W. WALSH, *A TREATISE ON EQUITY* chs. 7, 8 (1930).

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property does not, in and of itself, cause an unreasonable interference with the plaintiff's property, but the manner in which the defendant's use is undertaken results in such interference. In these cases, the court generally addresses an injunction to the objectionable aspects of the defendant's conduct, that is, the manner of conducting his use rather than the type of use to which his property is put.¹⁴⁷ The injunction may require that the defendant meet a precise standard, but more often it will require that the defendant engage in his use in a manner which will not result in the objectionable effects.¹⁴⁸ As indicated by the above discussion of actionable nuisance, the standards for determining what effects are prohibited by nuisance law are extremely imprecise, and if the injunction is directed to the objectionable effects of the defendant's conduct he may find it quite difficult to ascertain an acceptable standard by which to continue the use of his property.¹⁴⁹

Of course, if the court concludes that the defendant cannot engage in a particular use of his property without causing an unreasonable interference with other property, it may enjoin the use itself rather than the objectionable aspects of it.¹⁵⁰ As a practical matter, this is probably required in some cases because of the defendant's circum-

147. See *State ex rel. Tollefson v. Mitchell*, 25 Wn. 2d 476, 480, 171 P.2d 245, 247 (1946); *Payne v. Johnson*, 20 Wn. 2d 24, 145 P.2d 552 (1944); see also *Snively v. Jaber*, 48 Wn. 2d 815, 296 P.2d 1015 (1956); *Haveman v. Beulow*, 36 Wn. 2d 185, 217 P.2d 313 (1950); *Zey v. Long Beach*, 144 Wash. 582, 258 P. 492 (1927); *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270, 230 P. 419 (1924).

148. See cases cited in note 147, *supra*. For attempts by the court to prescribe precise standards, see especially *Payne v. Johnson*, 20 Wn. 2d 24, 145 P.2d 552 (1944); *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270, 230 P. 419 (1924).

149. See notes 34-128 and accompanying text, *supra*, for discussion of what constitutes a private nuisance; cases cited in note 147, *supra*.

An alternative to ordering the defendant, in effect, to conduct his land use in a manner which does not result in a nuisance is to require that he submit a plan for eliminating the objectionable effects of his use to the court for approval. See *Ames Lake Community Club v. State*, 69 Wn. 2d 769, 774, 420 P.2d 363, 366 (1966). This type of remedy might be accompanied by the use of a referee to supervise the implementation of the plan. See notes 168-171 and accompanying text, *infra*, for a discussion of the use of referees.

150. See *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7 (1930); *Grant v. Rosenburg*, 112 Wash. 361, 192 P. 889 (1920), *rehearing* 112 Wash. 368, 196 P. 626 (1920).

State ex rel. Bradford v. Stubblefield, 36 Wn. 2d 664, 672, 220 P.2d 305, 310 (1950) suggests the reluctance of the court to enjoin a use rather than its offensive characteristics:

Had the [trial] court based the . . . orders upon a finding that it would be impossible or impracticable to operate the plant in such manner as to avoid offense, there is little doubt that an unconditional injunction would have been appropriate, in view of the previous opportunity which had been accorded [defendant] to overcome the difficulty. . . . But, where such a finding has not been made, the usual remedy is to restrain the operation until the condition has been corrected, rather than to unconditionally abate the business. . . .

vention of more limited injunctions or his propensity to engage in unsuccessful efforts to prevent the proscribed interference.¹⁵¹ Injunctions and restraining orders may be granted subject to equitable terms or conditions imposed on the plaintiff,¹⁵² and while this increases the adaptability of injunctions as remedies, it may result in a remedy which is of very little practical value to the plaintiff.¹⁵³

Notwithstanding the extensive powers of the courts to protect the defendant when an injunction is granted, there are many cases where a private nuisance is found to exist, but injunctive relief in any form is denied.¹⁵⁴ Denial of an injunction in these cases is based upon the remedy's equitable nature¹⁵⁵ and the court's weighing of the factors involved in a case without emphasizing the unreasonableness of the *interference* complained of to the same extent as it does in deciding whether there is a nuisance.¹⁵⁶ In addition, the court considers a wider range of factors than is considered in determining whether there is a nuisance, and has suggested:¹⁵⁷

The appropriateness of injunction against tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:

- (a) the character of the interest to be protected,
- (b) the relative adequacy to the plaintiff of injunction and of the remedies [available]. . . ,

151. Cf. *State ex rel. Bradford v. Stubblefield*, 36 Wn. 2d 664, 220 P.2d 305 (1950).

152. WASH. REV. CODE § 7.40.070 (1957) provides:

Upon the granting or continuing an injunction, such terms and conditions may be imposed upon the party obtaining it as may be deemed equitable.

See generally Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639 (1962).

153. Cf. *First Methodist Episcopal Church v. Barr*, 123 Wash. 425, 212 P. 546 (1923).

154. *Mathewson v. Primeau*, 64 Wn. 2d 929, 935-36, 395 P.2d 183, 187 (1964) states the principle:

After an interference with comfort and convenience is established, there arise the further questions as to whether the lawful, but interfering, use should be enjoined, or whether the payment of damages is adequate compensation for the interference, or whether it is *damnum absque injuria*.

See *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 P. 579 (1906).

155. See PROSSER at 624-25; note 146, *supra*.

156. See notes 92-94 and accompanying text, *supra*, for a discussion of the balancing of the unreasonableness of the interference and the use; Note, *Injunction—Nuisance—Balancing the Equities*, 5 WASH. L. REV. 76 (1930).

157. *Steele v. Queen City Broadcasting Co.*, 54 Wn. 2d 402, 411, 341 P.2d 499, 504 (1959) quoting RESTATEMENT OF TORTS § 936 (1939); see *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 191, 229 P. 306, 309 (1924).

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- (c) plaintiff's delay in bringing suit,
- (d) plaintiff's misconduct,
- (e) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied,
- (f) the interests of third persons and the public, and
- (g) the practicability of framing and enforcing the order or judgment.

Some of the factors considered by this statement are bases of the traditional equitable defenses of estoppel and waiver.¹⁵⁸ The broad scope of the factors stated to be relevant indicates that consideration will also be given to the imminence of the unreasonable interference alleged¹⁵⁹ and probably all of the factors considered in determining whether the defendant's use is so unreasonable as to result in a nuisance;¹⁶⁰ however, these factors are generally insufficient to preclude

158. For the application of these defenses in nuisance actions, see *Mahoney Land Co. v. Cayuga Investment Co.*, 88 Wash. 529, 153 P. 303 (1915); *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 P. 579 (1906).

Equitable estoppel has been discussed in several Washington opinions. *Finley v. Finley*, 43 Wn. 2d 755, 763-64, 264 P.2d 246, 251 (1953), quoting *Huff v. Northern Pac. Ry.*, 38 Wn. 2d 103, 114, 228 P.2d 121, 128 (1951), states:

Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice.

See *Hesley v. Riblet Tramway Co.*, 68 Wn. 2d 927, 416 P.2d 331 (1966); *Thomas v. Harlan*, 27 Wn. 2d 512, 178 P.2d 965 (1947).

The court has also discussed waiver, identifying it as "the voluntary relinquishment of a known right." *Voelker v. Joseph*, 62 Wn. 2d 429, 435, 383 P.2d 301, 306 (1963), quoting *Dunbar v. Farnum*, 109 Vt. 313, 196 A. 237, 241 (1938). The court continued, at 435-36:

To establish [waiver], there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question. . . . It may be express or implied. But if it is the latter class, caution must be exercised both in proof and application. The facts and circumstances must be unequivocal in character. . . . Silence alone is never a waiver. It is only where there is an obligation to speak that it has that result.

See generally 28 AM. JUR. 2d *Estoppel and Waiver* (1966).

159. *Turner v. Spokane*, 39 Wn. 2d 332, 335, 235 P.2d 300, 301-02 (1951) articulates the principle:

While it is true that a court of equity may enjoin a threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the contemplated act or thing which it is sought to enjoin, yet the court ought not to interfere where the injury is of a character to justify conflicting opinions as to whether it will in fact ever be realized.

160. See notes 92-128 and accompanying text, *supra*, for discussion of the factors considered in evaluating the unreasonableness of the defendant's use.

See especially *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 513, 282 P. 848, 851 (1929) (incapacity to control objectionable effects); *Woodard v. West Side Mill Co.*, 43 Wash. 308, 316-17, 86 P. 579, 582 (1906) (character of neighborhood); *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 191, 229 P. 306, 309 (1924) (public interest); *Steele*

injunctive relief in cases where the plaintiff makes a substantial allegation of fear of harm¹⁶¹ or of an encroachment.¹⁶²

(b) *Contempt*. An exercise of the civil contempt power is the means usually employed to secure enforcement of injunctions.¹⁶³ A Washington statute authorizes the exercise of the power for "[d]isobedience of any lawful judgment, decree, order or process of the court,"¹⁶⁴ and it has been held that for civil contempt, there is no need to find "wilful and deliberate" disobedience.¹⁶⁵ The Washington court has stated that an injunction may bind successive owners of property who had no notice of it,¹⁶⁶ but it seems likely that a more

v. Queen City Broadcasting Co., 54 Wn. 2d 402, 412, 341 P.2d 499, 504-05 (1959) (defendant's substantial hardship from injunction).

161. See cases cited in notes 50-52, *supra*.

162. See cases cited in note 46, *supra*; Note, *Injunction—Removal of encroachments by an Adjoining Owner*, 8 WASH. L. REV. 43 (1934).

163. WASH. REV. CODE § 7.20.020 (1956) grants the courts power to punish contempt and provides for certain limitations on the power.

WASH. REV. CODE § 9.23.010 (1956) provides that criminal contempt, which is a misdemeanor, includes: "Wilful disobedience to the lawful process or mandate of a court." Criminal contempt is thus available for the enforcement of injunctions, but it is rarely used, probably because of the requirement of a jury trial. *State v. Boren*, 42 Wn. 2d 155, 253 P.2d 939 (1953). It is interesting to note that a defendant may apparently be acquitted of the charge of committing a crime, be enjoined from engaging in the same conduct he was accused of in the criminal proceeding, and be convicted of contempt under WASH. REV. CODE § 9.23.010 with the result that he is criminally liable. See *Boren* at 164.

164. WASH. REV. CODE § 7.20.010(5) (1956).

165. *Mathewson v. Primeau*, 64 Wn. 2d 929, 934, 395 P.2d 183, 186 (1964) (based on WASH. REV. CODE § 7.20.010(5) (1956)). But see WASH. REV. CODE § 7.40.150 (1957), which provides as to preliminary injunctions and temporary restraining orders:

Whenever it shall appear to any court granting a restraining order or an order of injunction, or by affidavit, that any person has *wilfully* disobeyed the order after notice thereof, such court shall award an attachment for contempt against the party charged, or an order to show cause why it should not issue. . . . (Emphasis added).

166. *State v. Terry*, 99 Wash. 1, 6, 168 P. 513, 515 (1917), quoting *State v. Porter*, 76 Kan. 411, 91 P. 1073, 1074 (1907), rationalizes the result as follows:

The decree of injunction was against the defendants in that suit, and, in a sense, was *ad rem*—against the property, or rather against a certain illegal use of the property. It cut off perpetually the use of the property for any of the purposes which the prohibitory liquor law of this state denounces as a nuisance. Thereafter, not only the parties to that action, but all persons using the property for any of such unlawful purposes, did so at their peril. The judgment is a limitation upon the use of the property of which all subsequent owners or occupants must take notice.

But the Washington court continues, at 6, finding:

[It is] unnecessary to rest our decision entirely upon the constructive notice imposed by the decree itself. . . . We are satisfied, as was the trial court, that appellant had actual knowledge of the injunction. . . .

Thus, the strength of the holding that the decree operated in rem is weakened. The fact that the case involved a public nuisance which constituted a crime also weakens the probability that an "in rem" injunction would be recognized in private nuisance actions. The weakness of the case as precedent is further compounded by the questionable wisdom of enforcing decrees against persons who have no knowledge of them.

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restrictive requirement of notice reflects the current Washington law, in view of the court's subsequent statement:¹⁶⁷

The rule is, in cases of injunction, that the injunction binds the parties defendant, who are named and upon whom service has been secured, and all other persons who have knowledge of its provisions; in other words, that persons not parties to the injunction proceeding and against whom the decree is not directed by name may be punished for contempt if they violate the terms of the decree, provided that, subsequent to the making of the decree, they have been served with a copy of it or have had notice of it.

Thus, exercise of the civil contempt power would seem to be effectively restricted to persons with knowledge or reason to have knowledge of the decree.

(c) *Referees*. Many injunctions are vague and indefinite in nuisance cases and the subject matter of such injunctions may be extremely complex.¹⁶⁸ In such cases there are serious doubts as to the justification or effectiveness of the contempt proceeding as a means of achieving justice,¹⁶⁹ and the Washington courts may deal with these cases by appointing a referee with power to "execute an order, judgment or decree or to exercise any other power or perform any other duty expressly authorized by law."¹⁷⁰ No Washington cases involving referees in nuisance actions have been found, but it seems that the complex environmental problems which will probably result in numer-

167. State *ex rel.* Lindsley v. Grady, 114 Wash. 692, 693, 195 P. 1049, 1050 (1921); see WASH. REV. CODE § 7.40.120 (1957); WASH. CIV. R. SUPER. CT. 65(d), (e); note 165, *supra*; Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965).

168. See note 149 and accompanying text, *supra*.

169. The use of contempt results in an "all or nothing" enforcement procedure with the defendant being in a position of having to outguess the court's view of required standards in many cases. See note 149 and accompanying text, *supra*. In this setting, he may successfully avoid punishment for contempt, but he may also make good faith efforts to comply with the court's decree only to find that it is unrealistic or so indefinite that it is impracticable to be certain that he has complied with it. A supervised program to eliminate the objectionable characteristics of a particular land use would seem to be a preferable alternative to most defendants who intend in good faith to comply with the decree. For those who do not so intend, supervision by an officer of the court should provide the feedback necessary to permit the court to take further appropriate action.

170. WASH. REV. CODE § 2.24.060 (3) (1956). This section also provides for referees with power

(1) To try an issue of law or of fact in a civil action or proceeding and report thereon.

(2) To ascertain any other fact in a civil action or proceeding when necessary for the information of the court, and report the fact or to take and report the evidence in an action.

ous nuisance actions in the future will warrant an increased use of referees to enforce decrees.¹⁷¹

(d) *Servitudes*. The early Chancery courts refused to grant remedies other than those which operated in personam,¹⁷² but statutes and court rules in most jurisdictions, including Washington, now provide that equity courts may grant certain "in rem" remedies, e.g., to "enter a judgment divesting the title of any party and vesting it in others" if the property is located within the jurisdiction of the court.¹⁷³ The preventive remedy generally sought in nuisance cases is injunctive relief, and the doubtful validity of "in rem" injunctions is discussed above.¹⁷⁴ The reason that "in rem" injunctions should not be recognized is that they are effective against a person without knowledge or notice, and contempt actions may be unjustly brought against such persons by virtue of their activities on land which is subject to the injunction.¹⁷⁵ In addition to injunctions which might be effective "in rem," collateral estoppel may be effective to decide subsequent cases involving a tract of land, and with the application of this concept to subsequent actions, a person who has no detailed knowledge of a previous decree may also be unjustly subjected to it.¹⁷⁶

171. For a discussion of the appointment and use of special judicial officers to enforce decrees, see *United States v. Manning*, 215 F. Supp. 272, 292-94 (W.D. La. 1963). See also 19 AM. JUR. *Equity* §§ 364-83 (1939) (discussion of masters in chancery); Note, *Development in the Law: Injunctions*, 78 HARV. L. REV. 994, 1092-93 (1965) (discussion of receivers).

172. W. WALSH, *TREATISE ON EQUITY* 44 (1930) states:

Chancery's method of enforcing her decrees by compelling the defendant to obey them under penalty of imprisonment was no doubt, originally borrowed from the canon law. . . . We know that Chancery used this method of personal compulsion, *in personam*, exclusively during the earlier periods, without resort to the method at law of giving a judgment adjudicating title to land or for damages enforced by execution through the sheriff.

4 J. POMEROY AND J. POMEROY, JR., *EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* § 1433 (2d ed. 1919).

173. WASH. CIV. R. SUPER. CT. 70; 4 J. POMEROY AND J. POMEROY, JR., *EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* § 1434 (2d ed., 1919). W. WALSH, *TREATISE ON EQUITY* 48-49 (1930) concludes:

It is clear . . . that any limitations upon equity's power to give relief by decree operating *in rem* or enforced *in rem* by execution, prior to modern statutes which have almost completely swept away such limitations, are based partly on historical accident and principally upon the way in which equity developed outside the common law as a competing and corrective system of law, and all reason for continuing alive limitations of this kind have disappeared with the elimination of the struggle between law and equity.

See *id.* § 11.

174. See notes 164-167 and accompanying text, *supra*.

175. See notes 164-167, *supra*; 176 and accompanying text, *infra*.

176. See note 194, *infra*, for a discussion of collateral estoppel.

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In some types of actions, such as quiet title, eminent domain, and divorce, "in rem" remedies are granted and the title to property or an interest therein is divested and/or vested by the court.¹⁷⁷ In many

It is doubtful that persons who hold subsequent interests in the land on which the use is restricted by a previous decree will receive notice of the decree. Title insurance companies take care to list as encumbrances on title reports and policies any judicial proceedings which have an effect upon title. Money judgments which constitute a lien fall into this category. See WASH. REV. CODE §§ 4.56.190 (1969), 4.56.200, .210, .225 (1956); 28 U.S.C. §§ 1962, 1963 (1964). In rem decrees expressly vesting title to real property are also included. See WASH. CIV. R. SUPER CT. 70. However, injunctive decrees are in personam, and are not shown on title reports unless they happen to come to the attention of the title examiner, in which case they may be "noted," but not shown as encumbrances. In the event a *lis pendens* has been filed in the action, they will be shown as encumbrances. See WASH. REV. CODE §§ 4.28.320 (1959), 4.28.325 (1969). The foregoing appears to be the prevalent procedure used by Title Insurance Companies. Telephone conversation with Mr. Bill Edwards, attorney, Transamerica Title Insurance Co., Seattle, Washington, January 6, 1970.

WASH. REV. CODE § 4.28.320 (1959) provides for filing a *lis pendens* with the county auditor:

In an action affecting the title to real property the plaintiff, at the time of filing the complaint, or at any time afterwards . . . or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded . . . shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action Provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. (Emphasis added).

See also WASH. REV. CODE § 4.28.325 (1969) (*lis pendens* in actions in United States District Courts). Actions for injunctive relief do not affect the title to real property, so the statute does not authorize the filing of the *lis pendens* or give it operative effect as constructive notice in such actions. Even the most cautious plaintiffs are therefore unable to assure subsequent holders of interests in the defendant's property of notice of the action. See generally Note, *Civil Procedure—Lis Pendens—May not be Filed in an Action to Enjoin Nuisance*, 26 ALB. L. REV. 315 (1962); Note *Real Property—Lis Pendens—Action to Abate Nuisance No Basis for Lis Pendens*, 36 ST. JOHNS L. REV. 373 (1962).

177. Eminent domain statutes authorize judicial vestings of title by decrees of appropriation. See WASH. REV. CODE §§ 8.04.120 (1956) (actions by state), 8.08.060 (1956) (actions by counties), 8.12.210 (1956) (actions by cities), 8.16.110 (1956) (actions by school districts). The right of corporations and individuals to condemn interests in land for certain purposes has long been recognized, and is accomplished by judicial proceedings which re-vest title to real property or interests therein. WASH. REV. CODE § 8.20.090 (1956) provides that in such actions:

At the time of rendering judgment for damages . . . the court or judge thereof shall also enter a judgment or decree of appropriation of the land, real estate, premises, right-of-way or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such. . . . Whenever said judgment or decree of appropriation shall affect lands, real estate or other premises, a certified copy of such . . . may be filed for record in the office of the auditor of the county where the said land, real estate or other premises are

nuisance cases, similar remedies would also seem to be appropriate in view of the land use basis of most nuisance actions. A court could give a more effective and fair remedy in a nuisance case by imposing a servitude similar to that imposed by an easement restricting the uses of the defendant's land and causing a record of such servitude to be recorded in the county's real property records.¹⁷⁸ The decree would thus operate to notify all subsequent holders of interests in the land of the restrictions on its use, and it would be just to expect subsequent holders to comply with such restrictions. It might also be advisable to impose a servitude on the plaintiff's land when he has been awarded damages in the amount of the decrease in the market value of his

situated, and shall be recorded by said auditor like a deed of real estate and with like effect. . . .

See WASH. REV. CODE § 8.24.030 (1956) (actions for private ways of necessity).

Decrees in quiet title actions are conclusive as to the title, but WASH. REV. CODE § 7.28.260 (1956) provides for a procedure somewhat different from that employed to implement eminent domain decrees:

[T]he judgment . . . shall be conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined, upon all persons claiming by, through, or under the party against whom the judgment is rendered, by title or interest passing after the commencement of the action, if the party in whose favor the judgment is rendered shall have filed a [*lis pendens*]. . . .

Statutory provision for court dispositions of property in divorce cases are found in WASH. REV. CODE § 26.08.110 (1958).

178. The procedure for giving the decree an in rem effect need not be identical to that employed in other types of actions. It would seem that the *lis pendens* procedure would be valuable, at least during the pendency of the action, and that it would be available under existing statutes if an in rem decree was being sought, since the action would then be one "affecting the title to real property." See note 176, *supra*. The decree would best serve its function if a copy thereof was filed with the county auditor of the county in which the property was located, so as to give interested persons detailed knowledge of its contents. See note 77, *supra*.

C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 4 (2d ed. 1947) summarizes easements as involving

rights in rem, good against the world generally. But each specially concerns one or more legal relations with a particular landowner. . . . The individual who has the right, privilege, or power . . . has the benefit; the one who has the duty, no-right, or liability has the burden. When the benefit is to be exercised for a particular parcel of land, it is appurtenant to and passes with such land; when it is personal to a named person, it is said to be in gross. Ordinarily the burden will not be in gross, but will rest upon the owner of the so-called "servient" land.

At 65, Clark points out:

The burden on the servient land passes with such land to all takers thereof. . . . The benefit of an easement appurtenant to some dominant tenement passes freely therewith, even without separate mention.

Servitudes imposed for the benefit of plaintiffs who are landowners would be appurtenant to their lands, thus running with the land. In actions by the public, servitudes would be in gross as the term is sometimes used, and the benefit would not be appurtenant to any land. See CLARK at 83-89. In either case, however, the burden would run with the defendant's land, since it would be the servient tenement.

Judicial creation of servitudes amounting to legal interests in land would probably require statutory authorization. However, the courts could conceivably use their equity

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property caused by the defendant's use of his land.¹⁷⁹ By imposing a servitude in such cases, the court would be acknowledging the defendant's right to create a nuisance as to the plaintiff's land and the fact that the plaintiff has been permanently compensated therefor. Subsequent purchasers of the plaintiff's property would be protected by having notice of the defendant's right to maintain the nuisance without compensating the owner of the property for property losses caused thereby. Imposition of servitudes should also lead the courts to inquire into the total effect of preventive remedies very closely, and to examine each case in detail to determine who are necessary and appropriate parties.¹⁸⁰ In this way, the judicial proceedings in a given

powers to find equitable servitudes, which would be enforced similarly to easements. CLARK at 174-75. Equitable servitudes are based on "the equitable doctrine of notice, that he who takes land with notice of a restriction upon it will not in equity and good conscience be permitted to act in violation of the terms of these restrictions." CLARK at 170. Some courts have applied the concept to conclude that the reasonable expectations of property owners in acquiring subdivision lots resulted in "reciprocal negative easements" in the lots which restricted their use, even though no written restrictions were in existence. See, e.g., *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); see generally 2 AMERICAN LAW OF PROPERTY § 9.33 (1952); 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 679 (recomp. 1968 by P. Rohan). It would seem that property owners' reasonable expectations would justify recognition of such servitudes by the courts in the case of nuisance actions, since the restriction of the servitude would be against tortious conduct. Recording the decree declaring the servitude should constitute sufficient notice to holders of subsequent interests in the defendant's land to bind them without actual notice of the servitude. See CLARK at 183.

179. See note 196 and accompanying text, *infra*, for discussion of the measure of damages in nuisance actions.

In such cases, it is very doubtful that a subsequent purchaser will be permitted to recover for the same injury that his predecessor in title was fully compensated for, because he will be a privy to his grantor and barred by collateral estoppel. Even so, it is likely that a subsequent purchaser would not be aware of the previous recovery by the plaintiff, and would pay an excessive amount for the property because of his lack of knowledge of the previous award or the existence of the nuisance. An in rem decree would give him record notice of the interest for which compensation had been paid, similar to the notice now given in eminent domain actions. See notes 176-178, *supra*.

180. In a case where a number of properties are involved, some holders of interest in some tracts may not join as plaintiffs or be joined as defendants. It would seem that the courts could best render effective relief by considering such cases in light of the totality of related events which might constitute a nuisance, rather than entertaining individual, and probably sporadic, actions at the whim of each potential plaintiff. With the granting of damages or injunctive relief to and against individual parties, the courts are likely to regard such cases as appropriate for permissive, but not necessary, joinder, since WASH. CIV. R. SUPER. CT. 20(a) would appear to be applicable:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. . . .

case may be limited to one action, with adequate protection granted to all parties through the use of joinder or class actions.

A possible problem with in rem decrees on the defendant's land is the provision of the Washington state constitution that private property shall not be taken for a private use, regardless of whether just compensation is paid.¹⁸¹ The imposition of a servitude on the defendant's land in favor of a private party might be found to violate this provision;¹⁸² however, the common law has long recognized that the uses which would be forbidden by such a servitude are unlawful and not included among the rights which are held by an owner of property. It is therefore doubtful that the courts would find the imposition of such servitudes to be barred by the state constitution.¹⁸³

If servitudes are potential remedies in an action involving more than one potential plaintiff or defendant, there are two things that must be identified with respect to each servitude imposed: (1) What land does it encumber? (2) What land does it operate in favor of? If either of these questions is unanswered, the servitude will be of doubtful validity since the very nature of a servitude requires a dominant and servient tenement. See note 178, *supra*. Cases where such remedies are possible would seem to fall within the criteria for necessary joinder. WASH. CIV. R. SUPER. CT. 19(a) provides for necessary joinder of a person

. . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

See also WASH. CIV. R. SUPER. CT. 21 (misjoinder and nonjoinder of parties).

See note 303 and accompanying text, *infra* (class actions).

181. WASH. CONST. art. 1, § 16 provides as follows:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. . . .

182. Cf. *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 P. 385 (1901); *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 671-72, 117 P. 497, 499 (1911); *Tyree v. Gosa*, 11 Wn. 2d 572, 580-81, 119 P.2d 926, 930 (1941); *Mathews v. First Christian Church*, 355 Mo. 627, 197 S.W.2d 617, 621 (1946).

183. The servitude imposed as a remedial device would actually have no substantive effect, since the proscriptions or rights identified therein existed prior to the judicial action and the decree merely identified the common law or statutory rights and duties of the parties with respect to the use of their land and their conduct. Therefore, the imposition of the servitude should not be regarded as a taking of property, because it has not adversely affected recognized property rights. In this regard, it is interesting to note that the benefits of restrictive covenants have generally been recognized as a property right for purposes of eminent domain. Annot., 4 A.L.R. 3d 1137 (1965); 5 RESTATEMENT OF PROPERTY § 566 (1944). The Washington court has held that private property under the state constitution includes non-possessory and intangible property interests. *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 P. 385 (1901). Yet the Washington court has freely refused to recognize restrictions imposed by such covenants when common law or equitable rules in effect nullify such restrictions. See *Ronberg v. Smith*, 132 Wash. 345, 232 P. 283 (1925); cases cited in note 158, *supra*. Easements have long been recognized as being extinguished upon abandonment, with the court merely

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With the use of joinder and class actions and the imposition of servitudes as part of their remedial system, the courts can use nuisance concepts to resolve numerous disputes in a relatively permanent manner; however, this potentiality will probably raise the objection that the settlement of such a dispute with such a permanent remedy is too rigid and precludes adjustments or modifications for future changes in circumstances. There are two facts which should suffice to answer this objection. First, equity courts have a well recognized power to modify their decrees if a change in circumstances warrants.¹⁸⁴ Second, in future equity actions to enforce servitudes, the equity courts will recognize a number of equitable defenses based on changing circumstances in deciding whether to enforce such servitudes. These defenses include equitable estoppel, waiver, and changes in the surrounding neighborhood, which should offer the flexibility needed to accommodate changing circumstances relevant to the future use of land.¹⁸⁵

declaring the rights of the parties at the time of suit, not taking or damaging the original dominant servitude, and this doctrine has been suggested as being applicable to nullification of interests derived under covenants. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 186 (2d ed. 1947); see also Botts, *Removal of Outmoded Restrictions*, 8 U. FLA. L. REV. 428 (1955). Interests in land are also affected by judicial decisions relating to adverse possession and prescription, without the courts running afoul of the constitutional prohibition of taking private property for private use. See generally Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

The examples of accepted law above suggest that the courts can impose servitudes as remedies for nuisance without violating Article 1 § 16 of the Washington Constitution. See notes 314-322 and accompanying text, *infra*, for further discussion of constitutional provisions.

184. See notes 142-145 and accompanying text, *supra*.

185. See notes 158, 183, *supra* (estoppel and waiver in covenant actions).

Injunctive relief may also be denied in covenant actions because of changes in the neighborhood. See *Ronberg v. Smith*, 132 Wash. 345, 352, 232 P. 283, 285 (1925) (quotation and dictum); Botts, *Removal of Outmoded Restrictions*, 8 U. FLA. L. REV. 428 (1955); 5 RESTATEMENT OF PROPERTY § 564 (1944); 20 AM. JUR. 2d *Covenants, Conditions, and Restrictions* § 183 (1965). The Washington court has also consistently held that covenants should be strictly construed in order to preserve to the greatest extent possible the free use of land. See *Burton v. Douglas County*, 65 Wn. 2d 619, 399 P.2d 68 (1965); *Gwinn v. Cleaver*, 56 Wn. 2d 612, 354 P.2d 912 (1960); *Jones v. Williams*, 56 Wash. 588, 106 P. 166 (1910).

Even so, servitudes would probably shift the burden to the party challenging the servitude. See *Granger v. Boulls*, 21 Wn. 2d 597, 601, 152 P.2d 325, 327 (1944); *Beaulaurier v. Washington State Hop Producers*, 8 Wn. 2d 79, 85, 111 P.2d 559, 661 (1941). This results in an advantage for the party seeking to retain the effectiveness of the previous adjudication. See note 194, *infra*, for discussion of cases relating to collateral estoppel.

3. Damages

The plaintiff may be awarded damages proved by him¹⁸⁶ regardless of whether the nuisance is abated¹⁸⁷ or injunctive relief is granted or denied.¹⁸⁸ "[R]ecovery may be had for 'sickness, suffering, mental anguish and bodily infirmities,'"¹⁸⁹ but generally, claims are for property damages, compensating for temporary, continuing or permanent injuries, depending upon the circumstances of the case.¹⁹⁰ Temporary injury may occur in some nuisance cases, especially in cases where the future objectionable conduct of the defendant is enjoined.¹⁹¹ The injuries are continuing when the court refuses to enjoin the conduct which is causing the nuisance and the nuisance continues, but there is a possibility that it will be discontinued in the future.¹⁹² With both temporary and continuing injuries, the court measures damages by the amount of the loss suffered and proved by the plaintiff,¹⁹³ and in the case of a continuing injury, the plaintiff may bring actions periodically for the damages accrued since his last action¹⁹⁴ or the period

186. WASH. REV. CODE § 7.48.010 (1957). See Note, *Damages for Private Nuisance*, 30 WASH. L. REV. 126 (1955); Comment, *Recovery of Damages for Private Nuisance*, 18 WASH. L. REV. 31 (1943).

187. WASH. REV. CODE § 7.48.180 (1957).

188. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952); *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924).

189. *Riblet v. Spokane-Portland Cement Co.*, 45 Wn. 2d 346, 353, 274 P.2d 574, 578 (1954), quoting Annot. 142 A.L.R. 1307, 1322 (1943), states the rule:

The question whether an occupant of real estate (whether owner or not) may recover damages for discomfort, annoyance, etc., personally resulting to him from a nuisance, in addition to, or separate from, any sort of property damages, is most distinctly presented in cases where the claim for the personal damages is accompanied by a claim for depreciation in rental or use value of the premises. In most jurisdictions the rule is that the personal damages are recoverable in addition to, or separate from, damages for diminution in rental or use value. This rule seems clearly to involve the idea that the law will not presume that one responsible for a temporary nuisance will continue it, and will not require the occupant of premises to abandon them to avoid consequences to his person.

This court has recognized that recovery may be had for "sickness, suffering, mental anguish and bodily infirmities" resulting from nuisance, in addition to property damage.

190. Nominal damages may also be awarded. See *Snively v. Jaber*, 48 Wn. 2d 815, 296 P.2d 1015 (1956).

191. See *Forbus v. Knight*, 24 Wn. 2d 297, 163 P.2d 822 (1945); *Ehorn v. Northwest Magnesite Co.*, 131 Wash. 270, 230 P. 419 (1924).

WASH. REV. CODE § 7.48.010 (1957) provides for "damages and other and further relief." The statute thus clearly contemplates damages in addition to injunctive relief.

192. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952); *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 P. 446 (1930).

193. See *Bowman v. Helser*, 143 Wash. 397, 255 P. 146 (1927); cases cited in notes 191, 192, *supra*.

194. In actions subsequent to the initial action, the plaintiff may be able to rely on the doctrine of collateral estoppel to establish the existence of the nuisance. Compare

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barred by the statute of limitations.¹⁹⁵ If there is virtually no possibility that the nuisance will be discontinued in the foreseeable future, the court may award permanent damages, amounting to the reduction in the market value of the plaintiff's property caused by the nuisance.¹⁹⁶ In any case, the amount of damages need not be proved in an exact amount if the court can determine the loss to the plaintiff with reasonable certainty.¹⁹⁷

4. Declaratory Judgment

Washington has adopted the Uniform Declaratory Judgments Act, which provides:¹⁹⁸

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

There would seem to be little advantage in bringing a declaratory judgment action in most nuisance cases since damages or injunctive re-

Riblet v. Ideal Cement Co., 57 Wn. 2d 619, 358 P.2d 975 (1961) with Riblet v. Ideal Cement Co., 54 Wn. 2d 779, 345 P.2d 173 (1950) and Jones v. Rumford, 64 Wn. 2d 559, 564, 392 P.2d 808, 811 (1964).

195. The applicable statute of limitations is two years. WASH. REV. CODE § 4.16.130 (1956). But the cause of action is treated as accruing at the time of the interference with the plaintiff's property, so that with a continuing nuisance, the statute bars only those damages accruing more than two years before the action is brought, rather than barring the action itself. See Riblet v. Spokane-Portland Cement Co., 41 Wn. 2d 249, 258, 248 P.2d 380, 384-85 (1952); Weller v. Snoqualmie Falls Lumber Co., 155 Wash. 526, 285 P. 446 (1930); Bowman v. Helsler, 143 Wash. 397, 255 P. 146 (1927); Sterrett v. Northport Mining and Smelting Co., 30 Wash. 164, 70 P. 266 (1902).

The court consistently refuses to accept arguments that WASH. REV. CODE § 4.16.080(2) (1956) (three year statute of limitations) applies, although a plausible argument can be made for its application to at least some nuisance cases. See Riblet, *supra*; notes 309-314 and accompanying text, *infra*.

196. See Drake v. Smith, 54 Wn. 2d 57, 337 P.2d 1059 (1959); Brusklund v. Oak Theater, Inc., 42 Wn. 2d 346, 254 P.2d 1035 (1953); Haveman v. Beulow, 36 Wn. 2d 185, 217 P.2d 313 (1950); Haan v. Heath, 161 Wash. 128, 296 P. 816 (1931).

See generally Comment, *Valuation of Real Property—Role of the Expert Witness*, 44 WASH. L. REV. 687 (1969).

197. See Bowman v. Helsler, 143 Wash. 397, 255 P. 146 (1927); Asia v. Pool, 47 Wash. 515, 92 P. 351 (1907).

198. WASH. REV. CODE § 7.24.010 (1956); see also WASH. REV. CODE §§ 7.24.020-.050 (1956).

lief are generally sought. In some respects, however, declaratory judgment proceedings may prove to have several advantages over actions for injunctions, such as a possible right to a jury trial, absence of bonding requirements, and non-availability of equitable defenses. The use of the declaratory judgment procedure should also be considered by potential defendants who are uneasy about risking substantial capital investments in developments which may be declared nuisances or who may wish to litigate numerous complex issues in a situation in which their conduct may create a nuisance.¹⁹⁹

5. Parties

An "action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance,"²⁰⁰ although, as a practical matter, only a person with an interest in property may be capable of proving private nuisance, since nuisances which affect non-property owners will generally affect "equally the rights of an entire community or neighborhood," thus being public nuisances.²⁰¹ Class actions for private nuisance would seem to be theoretically possible, but class actions may only be brought if "the class is so numerous that joinder of all members is

199. See, e.g., *Markham Advertising Co. v. State*, 73 Wn. 2d 405, 439 P.2d 248 (1968).

200. WASH. REV. CODE § 7.48.020 (1957).

201. WASH. REV. CODE § 7.48.130 (1957).

It is quite clear that owners [*Riblett v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952)], lessees [*Grantham v. Gibson*, 41 Wash. 125, 83 P. 14 (1905)], and licensees [*McInnes v. Kennell*, 47 Wn. 2d 29, 286 P.2d 713 (1955); *Shew v. Hartnett*, 121 Wash. 1, 208 P. 60 (1922)], may bring private nuisance actions for interferences with real property in their possession. Even so, if a neighborhood is affected by a nuisance, it will probably be a public nuisance. Cf. *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952).

Actions brought by persons other than those who have interests in land are generally based on a right (but not injury, because of the special injury requirement) held in common by the public. Compare *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952) and *Bales v. Tacoma*, 172 Wash. 494, 20 P.2d 860 (1933) with *Kemp v. Putnam*, 47 Wn. 2d 530, 288 P.2d 837 (1955) and *Lampa v. Graham*, 179 Wash. 184, 36 P.2d 543 (1934).

RESTATEMENT (SECOND) OF TORTS § 821E (Tent. Draft No. 15, 1969) provides:

For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of land affected, including

- (a) possessors of the land,
- (b) owners of easements and profits in the land, and
- (c) owners of non-possessory estates in the land which are detrimentally affected by interferences with its use and enjoyment.

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impracticable,²⁰² which would suggest that virtually all class actions would be for public nuisances.

A landowner is, of course, liable for using his land in a manner causing a private nuisance,²⁰³ as are successive owners who neglect to abate a continuing nuisance caused by a former owner.²⁰⁴ Lessees and licensees creating nuisances by their use of property have also been held liable by the Washington court.²⁰⁵ Liability of a landlord for nuisance, as a general rule, depends upon his duty to make repairs²⁰⁶ or his contemplation of an improper use of the property by the lessee.²⁰⁷ Landlord liability cases suggest that great care is required to ascertain the duties and liabilities of the landlord in each case.²⁰⁸ Private nuisance actions have been upheld against cities,²⁰⁹

202. WASH. CIV. R. SUPER. CT. 23(a). Rule 23 also prescribes additional requirements for class actions.

203. See *Jones v. Rumford*, 64 Wn. 2d 559, 392 P.2d 808 (1964); *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952).

204. WASH. REV. CODE § 7.48.170 (1957) provides:

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property caused by a former owner, is liable therefor in the same manner as the one who first created it.

Collateral estoppel may also apply to successive owners. See note 194, *supra*.

205. See *Ridpath v. Spokane Stamp Works*, 48 Wash. 320, 93 P. 416 (1908); *Grantham v. Gibson*, 41 Wash. 125, 83 P. 14 (1905); *State ex rel. Dow v. Nichols*, 83 Wash. 676, 145 P. 986 (1915) (public nuisance) (lessees); *Great Northern Ry. v. Oakley*, 135 Wash. 279, 237 P. 990 (1925) (licensee under contract to cut timber).

As to lessees, see cases cited notes 206-208, *infra*.

206. See *Ward v. Hinkleman*, 37 Wash. 375, 79 P. 956 (1905).

207. See *Maas v. Perkins*, 42 Wn. 2d 38, 43-44, 253 P.2d 427, 430 (1953).

208. See *Flannery v. Nelson*, 59 Wn. 2d 120, 366 P.2d 329 (1961); *Shew v. Hartnett*, 121 Wash. 1, 208 P. 60 (1922).

WASH. REV. CODE § 59.12.030 (1958) provides:

A tenant of real property for a term less than life is guilty of unlawful detainer

....

(5) When he . . . erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service (in manner in RCW 59.12.040 provided) upon him of three days notice to quit . . .

If the landlord has knowledge that the tenant is creating a nuisance, he can thus prevent the nuisance by bringing an unlawful detainer action, and this power would seem to offer the basis for a strong argument that the landlord be liable for such a nuisance if he fails to take such action.

See generally Comment, *Duty of a Landlord to Third Persons Outside the Premises*, 9 WASH. L. REV. 217 (1934).

209. *Southworth v. Seattle*, 145 Wash. 138, 259 P. 26 (1927); *Ferry v. Seattle*, 116 Wash. 648, 200 P. 336 (1921), *rehearing* 116 Wash. 661, 203 P. 40 (1921).

Immunity of cities from certain types of tort actions, not including nuisance actions, raised an issue in several cases as to the real character of the action, *i.e.*, nuisance or negligence. See, *e.g.*, *Macy v. Chelan*, 59 Wn. 2d 610, 369 P.2d 508 (1962). But the immunity of cities from tort liability was seriously eroded in *Kelso v. Tacoma*, 63 Wn.

counties,²¹⁰ and the state,²¹¹ and recent statutes make it clear that any of these governmental entities may be found liable for private nuisance.²¹² The federal government might be found liable for a nuisance, but a careful analysis of decisional law and constitutional and statutory provisions is required before evaluating any given case.²¹³

2d 913, 390 P.2d 2 (1964) and *Hosea v. Seattle*, 64 Wn. 2d 678, 393 P.2d 967 (1964); it was clearly extinguished by WASH. REV. CODE § 4.96.010 (1967), which provides:

All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: Provided, That the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. . . .

See WASH. REV. CODE § 4.96.020 (1967) (filing claims).

210. *Peterson v. King County*, 45 Wn. 2d 860, 278 P.2d 774 (1954). See WASH. REV. CODE §§ 4.96.010, .020 (1967) (discussed in note 209, *supra*).

211. WASH. REV. CODE § 4.92.090 (1969) provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

See *Ames Lake Community Club v. State*, 69 Wn. 2d 769, 420 P.2d 363 (1966); *Deaconess Hospital v. Highway Comm'n*, 66 Wn. 2d 378, 403 P.2d 54 (1965).

212. See notes 209-211, *supra*, for discussion of statutes. These statutes apply expressly to damages, leaving open the question of injunctive relief; but the immunity argument should be ineffective in equity as it is in law, and the express right to bring a legal action should be construed as including the right to bring an action in equity. Cf. WASH. CIV. R. SUPER. CT. 2 (one form of civil action). On the other hand, the public interest in the governmental activity sought to be enjoined may justify a refusal to grant injunctive relief in particular cases; and as a practical matter refusal to enjoin would seem to be appropriate in most cases where a municipality has the power of eminent domain by which it could acquire the right to damage the plaintiff's property. See *Snavely v. Goldendale*, 10 Wn. 2d 453, 117 P.2d 221 (1941); notes 314-322 and accompanying text, *infra*.

213. Certain non-tort actions may be brought against the United States under the Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.). Nuisance actions could conceivably be construed to be covered by the Act if they are based upon constitutional grounds. See notes 314-322 and accompanying text, *infra*. But the federal constitution's requirement of just compensation applies only to the taking of property, not *damaging*, and the courts have accordingly rejected claims of damaging under the constitution and the Act. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), *rehearing denied*, 372 U.S. 925 (1963), *noted in* 16 VAND. L. REV. 430 (1963).

Certain tort actions against the United States have been authorized by the Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842, as amended by the Act of 1947, ch. 446, 61 Stat. 722 (codified in scattered sections of 28 U.S.C.).

Nuisance actions of certain types are probably authorized by this statute; however, the complex history and dynamic judicial development of the Act require careful scrutiny before evaluating any particular case. It would seem that the trend is toward a more liberal application of the Act. The Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) stated: "There is no justification for this court to read exemptions into the Act beyond those provided by Congress." Subsequent to that case, numerous procedural amendments were enacted by Congress. See *Jacoby, The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212 (1967). But extensive research of decisional law is still required to ascertain the actionability of particular

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In many cases involving pollution, the injury to the plaintiff is caused by a number of polluters who individually contribute pollutants which cumulatively cause the injury. In these cases, an individual polluter may be found liable for his contribution to the pollution if the extent of the injury caused by his contribution can be ascertained; however, this causal connection is generally so obscure that it poses a serious and possibly insurmountable proof problem.²¹⁴ Where apportionment to the contributors is not possible, Prosser and the *Restatement (Second) of Torts (Tentative Draft)* suggest that the defendant must prove the extent of his contribution or be liable for the entire injury.²¹⁵ The Restatement Draft cites a Washington case to support this proposition;²¹⁶ however, the cited case was clearly identified by the court as a non-nuisance case,²¹⁷ and the court strongly suggested that it would apply the same rule to nuisance cases that it had applied in the past.²¹⁸ Prior cases held that where a plaintiff was in doubt as to the contributions of a number of independent polluters, the plaintiff had the burden of proving the extent of the injury caused by each, and failure to carry that burden resulted in no liability of any of the polluters, since they were severally, not jointly, liable.²¹⁹ While this probably reflects the current Washington position,

torts. See generally Steffen, *A Federal Tort Claims Act Tort*, 34 TENN. L. REV. 367 (1967); *Symposium on Federal Tort Claims Act*, 26 FED. B.J. 1 (1966); Abend, *Federal Liability for Takings and Torts: An Anomalous Relationship*, 31 FORD. L. REV. 481 (1963).

214. See, e.g., *Maas v. Perkins*, 42 Wn. 2d 38, 253 P.2d 427 (1953).

215. See PROSSER 628-29 (3d. ed. 1964); RESTATEMENT (SECOND) OF TORTS § 840E, comment c (Tent. Draft No. 15, 1969).

216. RESTATEMENT (SECOND) OF TORTS 134 (Tent. Draft No. 15, 1969) citing *Robillard v. Selah-Moxie Irr. Dist.*, 54 Wn. 2d 582, 343 P.2d 565 (1959).

217. *Robillard v. Selah-Moxie Irr. Dist.*, 54 Wn. 2d 582, 583-84, 343 P.2d 565, 566 (1959) states: "We are not concerned with a nuisance in the instant case."

218. *Id.* The court concluded that the rule applicable to nuisances was stated in RESTATEMENT OF TORTS § 881 (1939) as follows:

Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion . . . each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm.

It then distinguished the case as not being a nuisance case, and applied the rule found in RESTATEMENT OF TORTS § 879 (1939):

Except as stated in § 881, each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing harm to another is liable for the entire harm, in the absence of a superseding cause.

219. *Maas v. Perkins*, 42 Wn. 2d 38, 253 P.2d 427 (1953) affirmed dismissal of a nuisance action. The court addressed itself to the question of joint or several liability of the defendants at 43, stating:

In her complaint, appellant alleged that she was in doubt as to the person or

joint liability would appear to be more desirable in cases where some harm is proved as to each defendant because (1) plaintiffs will otherwise be left without recourse in many cases where they cannot hope to prove the extent of injury caused by each polluter and (2) the polluters in such cases are in a better position than is the plaintiff to present evidence as to their contributions to the pollution.²²⁰

persons from whom she was entitled to redress, and for that reason she was joining all of the named defendants. Such procedure is appropriate where, as here, it is alleged that the pollution comes from several independent sources. In such case the liability of those contributing to the injury is several. *Snavely v. Goldendale*, [10 Wn. 2d 453, 117 P.2d 221 (1941)].

This, however, does not relieve a plaintiff from the burden of proving that a particular defendant, whose liability is several rather than joint, caused damage to plaintiff in a specified amount. The difficulty of making such a showing is readily recognized. Unless it is done, however, the trial court has no basis in the evidence for allocating total damage between a number of severally-liable trespassers, tortfeasors, or creators of a nuisance.

The *Snavely* case, on which the court relies, stated its reasons for permitting joinder of a number of polluters of a stream, at 458-59:

The only sound reason for the . . . rule is that the liability of those contributing to the injury is several. Some of the decisions applying the [contrary] rule refer to the liability as being joint and several. To this we cannot agree, for, obviously, it might work great injustice to hold one responsible for the entire injurious effect of the pollution of a stream brought about by himself and others in varying degrees. But the several liability of such *tort-feasors* can be as well determined in one action as in many. Indeed, it seems to us that the extent of responsibility of each of the persons liable may be more accurately and justly determined in an action in which they are all defendants

For a subsequent statement and application of this rule, see *Getzendaner v. Unite Pac. Ins. Co.*, 52 Wn. 2d 61, 322 P.2d 1089 (1958). See also PROSSER at 252; WASH. CIV. R. SUPER, Cr. 20(a) (permissive joinder).

Robillard v. Selah-Moxee Irr. Dist., 54 Wn. 2d 582, 343 P.2d 565 (1959) could be construed as seriously eroding the position taken in *Maas* and *Snavely* because it is negligence action (as was *Getzendaner*) which could have been argued on a nuisance theory. Attempts to use this argument are extremely precarious, however, because the clear distinction between nuisance and non-nuisance actions made by the court. See note 217, *supra*.

220. As to the first proposition see *Maas v. Perkins*, 42 Wn. 2d 38, 253 P.2d 4 (1953).

PROSSER, at 254, comments on the several liability rule:

There has remained . . . enough in the way of real difficulty experienced, and possible injustice feared, to lead several writers to urge that in any case where two or more defendants are shown to have been negligent, and to have caused each some damage, and only the extent as to each is in question, the burden of proof should be shifted to the defendants, and each should be held liable to the extent that he cannot produce evidence to limit his liability. The justification for this rests upon the fact that a choice must be made, as to where the loss due to failure of proof shall fall, between an entirely innocent plaintiff and defendant who are clearly proven to have been at fault, and to have done him harm. See Wigmore, *Joint Tortfeasors and Severance of Damages Making the Innocent Party Suffer without Redress*, 17 ILL. L. REV. 458 (1923); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939).

Plaintiffs might also argue for application of the doctrine of *res ipsa loquitur* in pollution cases which are based on negligence. See Porter, *The Role of Private Nuisance*

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II. PUBLIC NUISANCE

A. *The Concept of Public Nuisance*

1. *Development of the Concept of Public Nuisance*

By the thirteenth century, a number of offenses whose common element was obstruction, inconvenience, or damage to the public were identified as public nuisances.²²¹ Governmental action, in the form of abatement or indictment, was the exclusive remedy for public nuisance until the sixteenth century, when the common law courts recognized damage actions by plaintiffs suffering special injury distinct from the public in general.²²² The requirement of special injury was apparently derived from the belief that the attorney general or a public representative should seek redress for wrongs to the public, rather than every individual who was adversely affected by the wrong.²²³

Blackstone defined public or common nuisances as "such inconvenience or troublesome offenses, as annoy the whole community in general, and not merely some particular person."²²⁴ This broad definition suffers from the same degree of over-generalization as did the definitions of private nuisance discussed above,²²⁵ but the extreme sensitivity of the courts to the circumstances surrounding each case and their resulting refusal to decide such cases on the basis of a system of artic-

Law in the Control of Air Pollution, 10 ARIZ. L. REV. 107, 113 n.27 (1968). If the polluter knows of the dangerous nature of the pollutants, yet allows them to escape, a nuisance action based on negligence and the application of the doctrine of *res ipsa loquitur* has been permitted by some courts. See *Reynolds Metals Co. v. Yturvide*, 258 F.2d 321 (9th Cir. 1958). If these arguments fail, the plaintiff in any event will probably be successful in arguing for a fairly liberal standard of proof where he retains the burden of proving the amount of injury caused by each polluter. See *Bales v. Tacoma*, 172 Wash. 494, 502, 20 P.2d 860, 863 (1933); *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 602, 92 P. 442, 444 (1907).

221. J. FLEMING, *THE LAW OF TORTS* 365-66 (3d ed. 1965); RESTATEMENT (SECOND) OF TORTS § 821B, comment *a* (Tent. Draft No. 15, 1969).

222. J. FLEMING, *THE LAW OF TORTS* 365-66 (3d ed. 1965); RESTATEMENT (SECOND) OF TORTS § 821C, comment *a* (Tent. Draft No. 15, 1969).

223. J. FLEMING, *THE LAW OF TORTS* 367 (3d ed. 1965). For a recent discussion of the "special" or "particular" damage requirement, see Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

224. 4 W. BLACKSTONE, *COMMENTARIES* *167.

For early cases using this definition, see JOYCE, *supra* note 16, at 13-14 n.20. For other "classic" definitions, see RESTATEMENT (SECOND) OF TORTS § 821B, Note 2 to Institute (Tent. Draft No. 15, 1969).

225. See note 21 and accompanying text, *supra*.

ulated rules make such over-generalization necessary.²²⁶ An additional difficulty with attempts to define public nuisance precisely is that it is frequently defined by statute,²²⁷ and, in addition, statutes quite often identify particular types of conduct which constitute public nuisances,²²⁸ thus making attempts to generalize about the elements of public nuisance virtually impossible. Statutory development of public nuisance law is a legitimate outgrowth of the public nature of the offenses represented thereby and the fact that such offenses are frequently, if not always, crimes.²²⁹ The pervasiveness of criminal sanctions against public nuisances is suggested by the *Restatement (Second) of Torts (Tentative Draft)*, which states:²³⁰

A public nuisance is a criminal interference with a right common to all members of the public.

This definition is perhaps justified by the abundant authority cited by the Reporter;²³¹ however, an alternative definition seems to be a more accurate statement of the common law concept as most recently stated by the English courts and the concept provided for by a number of state statutes. This concept was stated in 1957 by Denning, L. J.:²³²

226. See J. FLEMING, *THE LAW OF TORTS* 369 (3d ed. 1965); notes 22, 23 and accompanying text, *supra*.

227. See RESTATEMENT (SECOND) OF TORTS § 821B, comment *c* (Tent. Draft No. 15, 1969); JOYCE, *supra* note 16, at § 7.

228. RESTATEMENT (SECOND) OF TORTS § 821B, comment *c* (Tent. Draft No. 15, 1969).

229. *Id.* § 821B, comments *d*, *e*.

230. *Id.* § 821B.

231. *Id.* § 821B, Note 1 to the Institute.

232. *A. G. v. P.Y.A. Quarries, Ltd.*, 2 Q.B. 169, 191, 1 All E.R. 894 (1957). Romer, L.J., expressed the same general conclusion at 902:

[A]ny nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighborhood". . . .

The opinions in this case appear to reflect the current state of the common law, and they have received considerable attention from the common law writers. See H. STREET, *THE LAW OF TORTS* 238 (3d ed. 1963); *Nuisance: Public or Private: Quarry*, 101 SOL. J. 338 (1957); *Nuisance: What is a Public Nuisance*, 33 N.Z.L.J. 229 (1957); *Nuisance: Public and Private Nuisance Distinguished*, 74 S.A.L.J. 339 (1957); Comment, *Common Law Remedy Effective Alternative to Municipal Legislation*, 43 CAN. B.J. 100, 105-06 (1965).

This concept seems to reflect the basic notion of public nuisance suggested by Cardozo, J., in *People v. Rubinfeld*, 254 NY. 245, 172 N.E. 485, 486 (1930), quoted in *State ex rel. Tollefson v. Mitchell*, 25 Wn. 2d 476, 479, 171 P.2d 245, 246 (1946), which recognizes the criminal provisions relating to the wrong, but also attempts to identify distinctions between the persons affected by the wrong:

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A public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effects that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

2. *The Washington Concept of Public Nuisance*

Under Washington statutes, a public nuisance is any nuisance²³³ "which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."²³⁴ This definition, taken together with other statutory provisions, suggests that the basic difference between private and public nuisance is the number of persons or properties which are affected by a particular interference,²³⁵ and that many of the basic concepts applicable to

By the Penal Law of the State, an act which "annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons" is declared to be "a public nuisance," and punishable as a crime. . . . The definition corresponds to the distinction between public and private nuisances as it stood at common law. . . . To be reckoned as "considerable," the number of persons need not be shown to be "very great". . . . Enough that so many are touched by the offense and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community. Public is the nuisance whereby "a public right or privilege common to every person in the community is interrupted or interfered with," as by the obstruction of a public way. . . . *Public also is the nuisance committed "in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution". . . .* (Emphasis added).

Public nuisances are subject to remedial actions of many types other than imposition of criminal sanctions. See notes 279-306 and accompanying text, *infra*. It seems unnecessary to identify such nuisances as "criminal" interferences, as the Tentative Draft of the RESTATEMENT (SECOND) OF TORTS does. The term "criminal" fails to add any descriptive element to the definition which is of any aid in identifying an interference which constitutes a public nuisance. In addition, the limitation to "criminal" interferences might have the undesirable effect of restricting the development of the concept of public nuisance and the range of remedial systems which could be developed to prevent and control public nuisances. In this regard, there is no need to provide for criminal sanctions for certain types of nuisances, and it might be desirable to abandon criminal sanctions in an effort to develop an enforcement system based largely on civil remedies. In short, the essential characteristic of public nuisance seems to be, and should be, the right and duty of public officials to take remedial action, not their right and duty to bring a criminal prosecution.

233. WASH. REV. CODE § 7.48.120 (1957) defines "nuisance" without distinguishing between private and public nuisances. See text accompanying note 27, *supra*.

234. WASH. REV. CODE § 7.48.130 (1957).

235. In this regard, Washington law seems to be more clear than the law of many other jurisdictions. Most authorities conclude that public nuisances must be interferences with rights common to the public rather than the individual rights of a large number of persons. See RESTATEMENT (SECOND) OF TORTS § 821B (Tent. Draft No. 15, (1969)); PROSSER at 606-07. But comment *g* of the Tentative Draft recognizes statutes such as Washington's creating the contrary rule:

private nuisance also apply to public nuisance.²³⁶ The criminal statutes further develop the concept of public nuisance:²³⁷

A public nuisance is a crime against the order and economy of the state. . . .

Every act unlawfully done and every omission to perform a duty, which act or omission

- (1) Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; or,
- (2) Shall offend public decency; or,
- (3) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a lake, navigable

Except as may be provided by statute, a private nuisance does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be interference with a public right. . . .

It should be noted, however, that in a small number of states, such as New York and Oklahoma, there are statutes defining a public nuisance to include interference with "any considerable number of persons," and under these statutes no public right, as such, need be involved.

A "Note to the Institute" then cites cases in "non-statute" states to the same effect as the statutes. The citations in the note suggest that there is authority for the "considerable number of persons" concept of public nuisance in the District of Columbia, Kansas, Missouri, New Jersey, and South Carolina. In addition to New York [N.Y. PENAL LAW § 240.45 (McKinney 1967)] and Oklahoma [OKLA. STAT. ANNOT. tit. 50, § 2 (1962)], statutes in California [CAL. PENAL CODE § 370 (West 1955)], Idaho [IDAHO CODE § 18-5901 (1948)], and Washington provide for the "considerable number of persons" test, thus making at least ten jurisdictions in the United States which probably do not require injury to a public right for public nuisances. WASH. REV. CODE § 9.66.010 (1957) refers to the rights of a "considerable number of persons" twice in identifying public nuisances, and this, along with WASH. REV. CODE § 7.48.130 (1957), makes the Washington position clear.

236. The court sometimes refers to "nuisance" throughout an opinion, without ever stating whether the case involves a private or public nuisance; and in most cases, the term "nuisance" is frequently used, making it difficult at times to determine whether the rule stated is intended to be applicable to private nuisance, public nuisance, or both. See *Carlson v. Wenatchee*, 56 Wn. 2d 932, 350 P.2d 457 (1960); *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922); *Hughes v. McVay*, 113 Wash. 333, 194 P. 565 (1920).

The nuisance statutes are equally unclear, frequently referring only to "nuisance" in some, but not all, cases, in a context suggesting that they apply only to private or public nuisances. See, e.g., WASH. REV. CODE §§ 7.48.010, .050, .120, .160, .170, .180, .240, .280 (1957).

Part of the reason for the failure to distinguish private and public nuisances is that for some purposes, the principles and rules set forth in a statute or court decision are applicable to both types. This comment accordingly uses the term "nuisance" where the principle or rule seems to be applicable to both, or where the context otherwise indicates the intended application of the term.

237. WASH. REV. CODE § 9.66.010 (1957). Note that part (4) of this enumeration strengthens the conclusion that the basic difference between private and public nuisance is the number of persons or properties which are affected by a particular interference. WASH. REV. CODE § 9.66.020 (1957) continues:

An act which affects a considerable number of persons in any of the ways specified in RCW 9.66.010 is not less a public nuisance because the extent of the damage is unequal.

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river, bay, stream, canal or basin, or a public park, square, street, alley or highway; or,

(4) Shall in any way render a considerable number of persons insecure in life or the use of property;

Shall be public nuisance.

The statutory scheme described above has been construed by the Washington court as being "largely declaratory of the common law" of public nuisance, and as such, sufficiently specific to "apprise a defendant with reasonable certainty of the nature of the offense. . . ." ²³⁸ The general concept of public nuisance is thus embodied to a large extent in decisional law; ²³⁹ however, the numerous statutes declaring particular conduct, places, and things to be public nuisances ²⁴⁰ re-

238. *State v. Primeau*, 70 Wn. 2d 109, 112-13, 422 P.2d 302, 304-05 (1966) summarizes the court's position:

Statutes purporting to denounce public nuisances are usually couched in general language, but if the wording apprises a person of common understanding of the conduct sought to be proscribed, then it is not too vague or indefinite to meet the constitutional tests. The language of RCW 9.66.010 as here invoked, does, we think, inform a person of ordinary understanding that one commits a nuisance, *i.e.*, a crime against the order and economy of the state, by committing any acts in an unlawful manner in such a way as to annoy, injure or endanger the comfort, repose, or health of any considerable number of persons.

The wording of the statute, although broader in at least one respect, seems largely declaratory of the common law, and, thus, for many years has been deemed sufficiently specific to define a nuisance to persons of ordinary understanding. . . .

Although the charge must apprise a defendant with reasonable certainty of the nature of the offense, it is usually deemed sufficient if it enables him to prepare his defense and plead any judgment in bar to a subsequent prosecution for the same offense. . . .

239. Much of the decisional law discussed under the heading "private nuisance," *supra*, is applicable to the law of public nuisance as well. See notes 241-245 and accompanying text, *infra*.

240. See notes 253-268 and accompanying text, *infra*.

Markham Advertising Co. v. State, 73 Wn. 2d 405, 420, 439 P.2d 248, 257-58 (1968) quoting *Clark v. Dwyer*, 56 Wn. 2d 425, 431, 353 P.2d 941, 945 (1960), *cert. den.* 364 U.S. 932 (1961), suggests the permissible range of legislative enactments relating to public nuisance by the court's view of the scope of the "police power":

It must be borne in mind that the state constitution is not a grant, but a restriction on the law-making power, and the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions. Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. . . .

Markham contains a thorough discussion of the relationship between the "police power" and public nuisance law, and upholds the Washington Highway Advertising Control Act of 1961 as amended, and certain regulations adopted thereunder. WASH. REV. CODE ch. 47.42 (1961). It would seem that substantial doubts as to the validity of certain prohibitions of the nuisance statutes would result from certain court decisions, however, such as those relating to the constitutionality of statutes relating to vagrancy and "status crimes." See generally A. Guomo, *Mens Rea and Status Criminality*, 40 So. CALIF.

quire that the basic content of public nuisance law be sought in both the decisional law of nuisance and the statutes which have been enacted to implement, modify, and expand the decisional law.

B. Actionable Public Nuisances in Washington

1. Uses and Conduct Neither Prohibited Nor Authorized by Statute or Ordinance

In the absence of a statute declaring that particular conduct is a public nuisance, the basic substantive inquiry is the same as that for private nuisance,²⁴¹ except that the unreasonable interference must affect "equally the rights of an entire community or neighborhood."²⁴² Therefore, the factors considered by the courts in deciding whether there is an "unreasonable interference" are of basic relevance in public nuisance cases.²⁴³ In deciding whether a public nuisance exists, the court may also consider the doctrine of nuisance per se, the character of the neighborhood, the sequence of events, and the defendant's capacity to control objectionable effects;²⁴⁴ however, these factors will probably be of less significance than in private nuisance cases because of the existence and importance of public policy, statutes, and ordinances relating to the particular use or conduct complained of.²⁴⁵

2. Uses and Conduct Authorized by Statute or Ordinance

By statute, "nothing which is done or maintained under the ex-

L. REV. 463 (1967); J. MURTAGH, *Status Offenses and Due Process of Law*, 36 *FORD. L. REV.* 51 (1967); Note, *Constitutional Attacks on Vagrancy Laws*, 20 *STAN. L. REV.* 782 (1968). A discussion of the possible impact of such cases is beyond the scope of this comment.

241. See notes 34, 233 and accompanying text, *supra*.

RESTATEMENT (SECOND) OF TORTS § 822, comment *a* (Tent. Draft No. 15, 1969) states that:

because of the traditional use of the one word "nuisance" to include both the public and the private invasion, the criminal law [of public nuisance] has tended to follow the rule [for private nuisance], although numerous special statutes have led to departures from it.

See RESTATEMENT (SECOND) OF TORTS § 826, comment *a*, Note to Institute (Tent. Draft No. 15, 1969).

242. See notes 234-235 and accompanying text, *supra*.

243. See notes 34-91, 241 and accompanying text, *supra*.

244. See notes 103-123 and accompanying text, *supra*.

245. See notes 246-269 and accompanying text, *infra*.

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press authority of a statute, can be deemed a nuisance."²⁴⁶ This provision applies to public as well as private nuisances;²⁴⁷ and municipal ordinances which authorize a particular land use have been recognized as precluding the finding that the use is a public nuisance,²⁴⁸ provided that the municipality had authority to enact the ordinance.²⁴⁹ But the court has refused to give such recognition to municipal ordinances which permit interference with public rights to the special injury of certain individuals and has enjoined such uses at the instance of such individuals.²⁵⁰ Thus, municipalities have only limited authority to identify conduct that is not to be deemed a public nuisance, as distinguished from the state legislature's apparently absolute authority.²⁵¹ Even so, the characterization of a particular nuisance as public or private may be decisive in actions where a land use is permitted by a local ordinance, since such an ordinance will probably not pre-

246. WASH. REV. CODE § 7.48.160 (1957).

247. See notes 95-100 and accompanying text, *supra*, for discussion of this statute and its application to private nuisance actions.

248. *Shields v. Spokane School Dist.*, 31 Wn. 2d 247, 254, 196 P.2d 352, 357 (1948) adopts the following language of *Robinson Brick Co. v. Luthi*, 115 Colo. 106, 169 P.2d 171, 173 (1946):

Where the legislative arm of the government has declared by statute and zoning resolution what activities may or may not be conducted in a prescribed zone, it has in effect declared what is or is not a public nuisance. What might have been a proper field for judicial action prior to such legislation becomes improper when the law-making branch of government has entered the field.

Cf. Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976 (1922); *Hughes v. McVay*, 113 Wash. 333, 194 P. 565 (1920). Neither of these opinions clearly identifies the action as a public or private nuisance action, but the number of persons affected by the alleged interference suggests that it affected "equally the rights of an entire . . . neighborhood," thus constituting a public nuisance. See notes 234-235 and accompanying text, *supra*.

This authority of municipalities with respect to public nuisances seems to be based on the dominance of the public interest in such cases and the recognition of municipal ordinances as proclamations of that interest. In this respect, private nuisances are distinguishable, and the private relationships governed thereby should be provided for by general statutes and decisional law rather than by municipal ordinances. See notes 3-14, 124-128 and accompanying text, *supra*.

249. See *State ex rel. Vandervort v. Grant*, 156 Wash. 96, 286 P. 63 (1930).

250. See *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *Anderson v. Nichols*, 152 Wash. 315, 278 P. 161 (1929).

In some cases, the municipality may have authority to act, but the effects of its action may be found to constitute a taking of private property, thus requiring that the municipality pay just compensation. See *Jacobs v. Seattle*, 93 Wash. 171, 160 P. 299 (1916).

251. Of course, the state may also be found to have acted in such a manner as to take private property for public use, thus being required to pay just compensation. See WASH. CONST. art. 1, § 16.

clude a finding of private nuisance but it may preclude a determination that the use is a public nuisance.²⁵²

3. *Uses and Conduct Prohibited by Statute or Ordinance*

The general nuisance statutes provide that certain conduct constitutes a public nuisance. These statutes deal with such matters as houses of prostitution,²⁵³ gambling establishments,²⁵⁴ places where intoxicating liquors are illegally kept or sold or fighting is conducted,²⁵⁵ places where drugs are used,²⁵⁶ and places where vagrants resort.²⁵⁷ In addition, the public interest in health and safety is reflected by declarations that health and safety hazards of various kinds constitute public nuisances.²⁵⁸ Littering is similarly prohibited.²⁵⁹ In addition to these extensive declarations in the general nuisance statutes, there are numerous statutes scattered throughout the Revised Code of Washington that declare certain conduct, places, or things offensive to public health and safety²⁶⁰ and the general welfare²⁶¹ to be public nuisances.

252. Compare cases cited in note 248, *supra*, with cases cited in note 98, *supra*.

253. WASH. REV. CODE §§ 7.48.050, .240 (1957). WASH. REV. CODE § 7.48.120 (1957) identifies as a nuisance "doing an act, or omitting to perform a duty, which act or omission . . . offends decency. . . ."

254. WASH. REV. CODE §§ 7.48.240, 9.66.010 (1957); 67.16.060 (1958) (horse races).

255. WASH. REV. CODE §§ 7.48.140 (8) (1957); 66.36.010 (1961).

256. WASH. REV. CODE §§ 7.48.240, (1957); 69.33.340 (1959); 69.40.080 (1969).

257. WASH. REV. CODE § 9.66.010(4) (1957).

258. WASH. REV. CODE §§ 7.48.010, .140, (1957); 9.66.050 (1957).

259. WASH. REV. CODE § 9.66.060, .070 (1967).

260. WASH. REV. CODE §§ 16.13.020 (1957) (animals running at large); 14.08.030(4) (1959) (structures, animals or plants encroaching upon airport protection privileges); 68.48.040 (1958) (cemeteries established in violation of statutes); 69.24.400(1) (1958) (eggs prepared or distributed in violation of statute); 70.20.170 (1958) (sources of filth or other causes of sickness found on private property); 68.28.060 (1958) (mausoleums or columbariums erected in violation of statute); 17.28.170 (1959), 70.22.050(2) (1967) (breeding places for mosquitoes); 86.15.090 (1961) (structures and accumulations of material which materially contribute to the dangers of loss of life or property from flood waters and which endanger the public health or safety); 86.16.090 (1961) (structures or works violating orders of the state supervisor of flood control); 76.04.380 (1959) (uncontrolled fires on forest land with no proper action to prevent their spread); 47.32.130 (1961) (structures or objects which threaten or endanger highways and persons travelling thereon); 47.36.180 (1961) (devices visible from highways, streets, or roads which endanger traffic); 46.61.075 (1967) (signs or devices which imitate or resemble traffic control devices); 90.03.350 (1961) (dams or controlling works constructed or modified without plans approved by the department of water resources).

261. WASH. REV. CODE §§ 69.04.100 (1958) (adulterated or misbranded articles in intrastate commerce); 75.20.060 (1955), 77.16.210 (1957) (dams or obstructions of streams without satisfactory fishways); 33.08.010 (1959) (business names in violation of savings and loan statutes); 77.12.130 (1955) (devices for catching game or fish in violation of law); 76.06.010 (1958) (forest insects and tree diseases which threaten permanent timber production); 15.17.200 (1969) (horticultural facilities violating statutes)

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Statutes also provide that first and second class cities have the power "to declare what shall be a nuisance."²⁶² A similar authority can be implied in the case of towns and third class cities by the statutory provision that:²⁶³

Every act or thing done or being within the limits of a third class city [or town] which is declared by law or by ordinance to be a nuisance shall be so considered in all actions and proceedings.

Towns and cities also have general statutory authority to enact ordinances,²⁶⁴ and counties have broad statutory powers to:²⁶⁵

[M]ake and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law. . . .

Thus, ordinances of municipalities may identify particular conduct, places, or things which are public nuisances.²⁶⁶ While there is little

or rules); 15.60.080 (1961) (apiaries in which diseased bees are found or which are constructed so as to hinder inspection); 15.08.010, .090, .190, .210 (1961) (plants, produce or property in a commercial area upon which are found pests or diseases injurious to nursery stock, fruit, and vegetables); 47.42.080 (1961) (advertising signs along highways in violation of law); 47.32.120 (1961) (structures or businesses making use or tending to invite patrons to make use of highway rights-of-way).

262. WASH. REV. CODE § 35.22.280 (1965) provides:

Any city of the first class shall have the power:

(1) . . . To declare what shall be deemed nuisance and to abate nuisances at the expense of the parties creating, causing or committing or maintaining the same, and to levy a special assessment on the land or premises whereon the nuisance is situated to defray the cost or to reimburse the city for the cost of abating the same. . . .

These statutes do not expressly restrict their applicability to public nuisances, but the context suggests that they are intended to apply thereto and not to private nuisances.

263. WASH. REV. CODE §§ 35.24.330, 35.27.410 (1965). Each of these sections continues: "All remedies given by law for the prevention and abatement of nuisances shall apply thereto."

264. WASH. REV. CODE §§ 35.22.200, .570 (1965) (first class cities); 35.23.440(1) (1965) (second class cities); 35.24.290(1) (1965) (third class cities); 35.27.370(1) (1965) (towns).

265. WASH. REV. CODE § 36.32.120(7) (1967).

266. See note 268, *infra*, which notes that municipalities probably cannot declare invasions of private rights to be public nuisances. A fortiori, municipalities should not have the power to declare invasions of private rights to be private nuisances, and no cases so holding have been found. *But* see note 269, *infra*.

A collection of selected nuisance ordinances dealing with buildings and structures, weeds, trees and other vegetation, noise, air pollution, animals, fowl and bees, encroachments on streets and sidewalks, and junk yards is found in E. CAMPBELL, G. SMITH, AND H. OLSON, NUISANCES—THEIR CONTROL AND ABATEMENT IN THE STATE OF WASHINGTON app. A (1949). These ordinances might be of considerable assistance to the draftsman, and the publication containing them is available from the Bureau of Governmental Research and Services, University of Washington, Seattle, Washington 98105.

case law delimiting the scope of a municipality's power to determine by ordinance what shall constitute a public nuisance, the cases definitely hold that there is such a limit;²⁶⁷ the rationale of the court appears to be that a municipality has no power to declare something a public nuisance unless it fairly can be said to fall within the general statutory definition of public nuisance.²⁶⁸

Other statutes and ordinances might also be relevant in deciding whether a public nuisance exists, because of the general definition of a nuisance which is premised on "unlawfully doing an act, or omitting to perform a duty. . . ."²⁶⁹ It is readily apparent that statutes or ordinances may provide that particular acts are "unlawful" or that a person has a particular "duty," and to the extent that they do, they may provide one of the basic elements of a public nuisance action.²⁷⁰ While

267. *Greenwood v. The Olympic, Inc.*, 51 Wn. 2d 18, 21, 315 P.2d 295, 296 (1957) states:

If [the stairs which collapsed] became a nuisance, it was because the city council of Seattle, by ordinance No. 72200 (the 1942 building code) declared them so to be. *A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.* [Emphasis added.]

See *Kirkland v. Ferry*, 45 Wash. 663, 664-65, 88 P. 1123, 1124 (1907), which reversed the trial court's dismissal of an action, but suggested:

[W]e are inclined to think that the town of Kirkland had no authority to pass the ordinance in question, and to declare specifically that the building as kept was a public nuisance.

Cf. State ex rel. Warner v. Hayes Investment Corp., 13 Wn. 2d 306, 125 P.2d 262 (1942); *Manos v. Seattle*, 173 Wash. 662, 24 P.2d 91 (1933); *Shepard v. Seattle*, 59 Wash. 363, 109 P. 1067 (1910); see generally Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743 (1963); 6 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 24.58-24.92 (rev. 3d ed., 1969).

268. This would seem to be the most reasonable interpretation of the statement: "A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance." *Greenwood v. The Olympic, Inc.*, 51 Wn. 2d 18, 21, 315 P.2d 295, 296 (1957). See notes 233-237 and accompanying text, *supra* (statutory definition of public nuisance).

The general limitation on police powers is that they be exercised "to promote the public health, morals, safety, or welfare." *State ex rel. Warner v. Hayes Investment Corp.*, 13 Wn. 2d 306, 317, 125 P.2d 262, 266 (1942). It is probable that this limits the power of municipalities to the declaration of invasions of public rights which are public nuisances. The power to declare invasions of private rights public nuisances does not extend to municipalities. See *Warner, supra*; *Manos v. Seattle*, 173 Wash. 662, 24 P.2d 91 (1933).

269. WASH. REV. CODE § 7.48.120 (1957). Since the quoted language is part of the general definition of nuisance, including private nuisance, it would seem that a statute or ordinance declaring conduct to be unlawful might also be construed to satisfy the "unlawful" or "duty" element in a private nuisance action, as well as public. *But see* note 266, *supra*.

270. The court rarely decides by looking for legislative declarations of "duties" and "unlawful acts," probably because of the common law origin of the wrongs recognized in nuisance actions. However, some cases have been decided on a strict analysis of legislated duties and unlawful acts. See *Lakoduk v. Cruger*, 47 Wn. 2d 286, 287 P.2d 338 (1955).

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statutes or ordinances may identify unlawful conduct or duties, the courts also recognize common law rights and duties as adequate bases for public nuisance actions, in the absence of such enactments.²⁷¹

C. Remedies for Public Nuisance

1. Criminal Sanctions

Public nuisances are crimes,²⁷² and:²⁷³

[E]very person who shall commit or maintain a public nuisance, for which no special punishment is prescribed; or who shall wilfully omit or refuse to perform any legal duty relating to the removal of such nuisance; and every person who shall let, or permit to be used, any building or boat, or portion thereof, knowing that it is intended to be, or is being used, for committing or maintaining any such nuisance, shall be guilty of a misdemeanor.

While this statute suggests that persons in addition to property owners who create a nuisance may be convicted of a misdemeanor, other statutes expressly provide that criminal liability will rest on persons who have the "care, government, management, or control" of certain places which are public nuisances²⁷⁴ and on successive owners who neglect to abate continuing nuisances.²⁷⁵

In early cases, the Washington court clearly held that a property owner who knew that his tenant was using property in a prohibited manner was criminally liable for nuisance.²⁷⁶ The court has also held

271. See notes 241-243 and accompanying text, *supra*.

272. WASH. REV. CODE § 9.66.010 (1957) provides: "A public nuisance is a crime against the order and economy of the state."

The criminal character of the conduct, place, or thing identified in the nuisance statutes does not depend on the criminal character of the defendant's acts under the general criminal statutes. *State v. Shanklin*, 51 Wash. 35, 97 P. 969 (1908).

273. WASH. REV. CODE § 9.66.030 (1957).

See WASH. REV. CODE §§ 9.66.050 (1957); 9.66.070 (1967) (providing for certain persons to be guilty of misdemeanors).

274. WASH. REV. CODE § 7.48.140 (1957) (applies only to public nuisances provided for in that section).

275. WASH. REV. CODE § 7.48.170 (1957) states:

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property caused by a former owner, is liable therefor in the same manner as the one who first created it.

276. *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 P. 753 (1914).

If the owner knows of the public nuisance, and especially if he benefits from it, it

that a property owner cannot be subjected to criminal penalties in the absence of his actual or constructive knowledge of the existence of the nuisance.²⁷⁷ It seems that the appropriate knowledge requirement for such criminal convictions would be actual knowledge of the acts or omissions constituting the nuisance, or knowledge of such other facts as would put an ordinarily prudent man on inquiry.²⁷⁸

The criminal code does not provide a specific punishment for public nuisance convictions, but merely classifies the crime as a misdemeanor.²⁷⁹ The general nuisance statutes, however, prescribe punishment by "a fine not exceeding one thousand dollars" where no other punishment is specially provided.²⁸⁰ This would suggest that there is

would seem that he might be found criminally liable for conspiracy. WASH. REV. CODE § 9.22.010 (1956) provides:

Whenever two or more persons shall conspire—(1) To commit a crime; . . .

Every such person shall be guilty of a gross misdemeanor.

Note that the penalty for a gross misdemeanor is fine or imprisonment, WASH. REV. CODE § 9.92.020 (1957). Punishment is by fine only in most cases of public nuisance. See note 281 and accompanying text, *infra*.

277. State *ex rel.* Kern v. Emerson, 90 Wash. 565, 571, 155 P. 579, 582 (1916) suggests the extent to which constructive knowledge may be found:

The suppression of a nuisance is essentially a proceeding *in rem*, and to hold an owner to constructive knowledge of the uses to which his property is put is not an unreasonable rule, for the order of abatement operates upon the property, and not upon the person. The suppression of a nuisance of which the owner has knowledge, or which is so long continued and under such circumstances that knowledge will be implied, is a burden attaching to the ownership of all property. The rule is as old as the law of nuisance itself.

See State *ex rel.* Lundin v. Campbell, 95 Wash. 701, 163 P. 279 (1917).

278. WASH. REV. CODE § 9.01.010 (1956) provides definitions and rules of construction of the criminal code. Subsection (4) provides:

The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

While this standard should be applied to criminal prosecutions, it is not necessarily appropriate for civil actions for public nuisances and will probably not be applied. See State *ex rel.* Dow v. Nichols, 83 Wash. 676, 145 P. 986 (1915).

279. WASH. REV. CODE § 9.66.030 (1957). The statute applies only to public nuisances "for which no special punishment is prescribed." It is therefore necessary to examine remedial statutes related to the statute upon which an action is based to identify any specific sanctions that might be provided for. See, e.g., WASH. REV. CODE §§ 9.66.060-.070 (1967); 748.050-.110 (1957).

280. WASH. REV. CODE § 7.48.250 (1957) provides:

Whoever is convicted of erecting, causing or contriving a public or common nuisance as described in this chapter, or at common law, when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars and the court with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided: Provided, That orders and warrants of abatement shall not be issued by justices of the peace. (Emphasis added).

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no punishment by imprisonment except where otherwise specifically provided.²⁸¹

2. *Civil Remedies*²⁸²

(a) *Abatement*. Abatement may be ordered by a superior court, notwithstanding a pending or concluded criminal action.²⁸³ Municipalities or public officers may abate public nuisances under authority granted them by statutes,²⁸⁴ and:²⁸⁵

Any person may abate a nuisance which is specially injurious to him by removing, or if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

(b) *Equitable Remedies*. With the exception of certain types of nuisances, there is no express statutory authorization of actions to enjoin public nuisances;²⁸⁶ however, the Washington court has granted injunctive relief in public nuisance cases where such relief was deemed appropriate under the rules of equity.²⁸⁷ The previous discussion of

281. WASH. REV. CODE § 9.92.030 (1957) states that:

Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars.

In view of the punishment prescribed by WASH. REV. CODE § 7.48.250 (1957), this statute should not generally be applied in public nuisance prosecutions. But some public nuisances may nevertheless be expressly punishable by imprisonment. See, e.g., WASH. REV. CODE §§ 9.66.069-.070 (1967).

282. WASH. REV. CODE § 9.01.120 (1956) provides:

The omission to specify or affirm in [the criminal code] any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, shall not affect any right to recover or enforce the same. The criminal nature of public nuisance should accordingly have no effect on the availability of civil remedies therefor.

283. *Id.*; WASH. REV. CODE §§ 9.66.040 (1957); 7.48.090, .250, .260 (1957).

284. WASH. REV. CODE § 7.48.220 (1957) provides: "A public nuisance may be abated by any public body or officer authorized thereto by law." See note 290, *infra* (authorizations of cities and towns, prosecuting attorneys and the attorney general).

285. WASH. REV. CODE § 7.48.230 (1957). A discussion of liability for an abatement found to have caused "unnecessary injury" is found in *Nystrand v. O'Malley*, 60 Wn. 2d 792, 375 P.2d 863 (1962).

286. See, e.g., WASH. REV. CODE § 7.48.060 (1957).

287. See *Harris v. Skirving*, 41 Wn. 2d 200, 248 P.2d 408 (1952); *Kirkland v. Ferry*, 45 Wash. 663, 88 P. 1123 (1907); *Ingersoll v. Rousseau*, 35 Wash. 92, 76 P. 513 (1904). *Ingersoll*, at 95-96 states:

[C]ourts of equity have from the earliest times exercised jurisdiction to prevent and abate public nuisances, notwithstanding there has (sic) concurrently existed the common law remedies of indictment and action on the case. The jurisdiction was grounded on the inadequacy of the legal remedies; it being within the power of the

equitable remedies in private nuisance cases is applicable to public nuisance since the equitable characteristics of the remedy govern its application rather than the nature of the substantive claim.²⁸⁸

(c) *Damages*. The state, municipalities, and public officers are not authorized to bring damage actions for public nuisances, except in cases where a state or municipality suffers a property loss caused by such nuisances.²⁸⁹ In cases where an individual is authorized to bring an action for public nuisance, the principles relating to a determination of damages are the same as those applicable to private nuisance actions.²⁹⁰

(d) *Declaratory Judgment*. The availability and utility of declaratory judgment actions relating to public nuisance are probably coextensive with that relating to private nuisance, except for the broadening impact of the following statute:²⁹¹

A person . . . whose rights, status or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.

(e) *Parties*. There is no reason to expect any rule as to the civil liability of individuals to be different in public nuisance cases from the rules applicable to private nuisance cases.²⁹² It would seem to be possible to bring a public nuisance action against the state,²⁹³ and the

courts of equity, not only to abate an existing nuisance, but, to do what the courts of law could not do—interpose and prevent threatened nuisances, and, by perpetual injunction, make their remedies effectual throughout all future time.

288. See notes 135-162 and accompanying text, *supra*.

289. No Washington cases have been found, but this proposition seems self-evident. In a damage action, a governmental entity would be suing as an individual in the sense that its power to sue would be of a similar scope and nature.

290. Note that "special injury" in this context refers to the right to bring an action, not the measure of damages.

291. WASH. REV. CODE § 7.24.020 (1956). See notes 198-199 and accompanying text, *supra*.

292. See notes 203-208 and accompanying text, *supra*.

293. See notes 211-212, *supra*; *Ames Lake Community Club v. State*, 69 Wn 2d 769, 420 P.2d 363 (1966); *Botton v. State*, 69 Wn. 2d 751, 420 P.2d 352 (1966).

The statutes referred to in notes 211-212 apply only to tort liability. All public nuisances are theoretically crimes. See note 272, *supra*. Nevertheless, their criminal nature is questionable at best when the public nuisance is created by a governmental entity. Even assuming that public nuisances are crimes, however, they also constitute tortious conduct, and liability should follow under the statutes. See note 297 and accompanying text, *infra* (statute authorizes civil action); RESTATEMENT (SECOND) OF TORTS § 821C, comment a (Tent. Draft No. 15, 1969) (liability in tort for public nuisance); *cf.* cases cited in note 294, *infra*.

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courts appear to be quite willing to entertain public nuisance actions against cities and counties, notwithstanding their authority to declare certain conduct to be or not to be a public nuisance.²⁹⁴ It would appear that public nuisance actions against governmental entities should be recognized, since such actions may be the only immediate recourse of an individual or another governmental entity against land use abuses by governments. Such actions would generally be limited by express legislative declarations based on the public interest, as would any other public nuisance action.²⁹⁵

Generally, a public officer, the state, or a municipality may bring a civil or criminal action for public nuisance.²⁹⁶ On the other hand, the statutes provide:²⁹⁷

A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself but not otherwise.

294. See notes 209, 210, 212, *supra*; *Elves v. King County*, 49 Wn. 2d 201, 299 P.2d 206 (1956); *Shields v. Spokane School Dist.*, 31 Wn. 2d 247, 196 P.2d 352 (1948); *Bales v. Tacoma*, 172 Wash. 494, 20 P.2d 860 (1933).

295. See notes 246-252 and accompanying text, *supra*.

296. See *State ex rel. Tollefson v. Mitchell*, 25 Wn. 2d 476, 171 P.2d 245 (1946); *State v. Lew*, 25 Wn. 2d 854, 172 P.2d 289 (1946); *State v. Terry*, 99 Wash. 1, 168 P. 513 (1917).

For statutory authorizations of cities and towns, see notes 262-263, *supra*; prosecuting attorneys, see WASH. REV. CODE §§ 36.27.020(3), (4) (1963); attorney general, see WASH. REV. CODE §§ 43.10.030(1), (2), (4) (1965).

297. WASH. REV. CODE § 7.48.210 (1957).

Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1007 (1966) explains the reasoning behind the rule:

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. This is no less true when the rights of the crown have passed to the general public. Defendants are not to be harassed, and the time of the courts taken up, with complaints about public matters from a multitude who claim to have suffered. And at least in the ordinary case the interference with most of the public will be, if not entirely theoretical or potential, at least minor, petty and trivial. This insistence upon the rejection of the trivial has been especially marked in the decisions. . . .

The special injury requirement could be conceptualized as a matter of standing to sue, with analysis based on that concept; however, the long history of the special injury requirement and the numerous cases addressed to it lead to the conclusion that it should be analyzed in light of these particular cases. See Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966). It seems that most questions of standing are considered in the context of the substantive issues presented. See, e.g., Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362 (1960) (relationship between administrative agencies and the judiciary); Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438 (1968) (constitutionality of legislation). See generally Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

Of course, substantial interference with the plaintiff's rights will be required in order for him to bring a private action for public nuisance, and this requirement must be met in addition to the special injury requirement.

This right exists, notwithstanding criminal²⁹⁸ or abatement proceedings²⁹⁹ having been brought by the public, and it is generally held that if the plaintiff's circumstances cause him to suffer a kind of harm which the public at large or members of the public in general do not suffer, he has sustained *special injury*.³⁰⁰ Ownership of property injured by a public nuisance is generally recognized as constituting special injury,³⁰¹ but other types of injury may be required if the damages complained of are not to property.³⁰² It would appear that class actions brought by large numbers of individuals specially injured by a public nuisance would be effective against certain types of interferences, like those affecting a neighborhood or persons engaged in certain occupations.³⁰³

The special injury requirement has generated a conflict between those who argue that an individual must suffer a different kind of injury from the public in order to show special injury and those who argue

298. See note 282, *supra*.

299. WASH. REV. CODE § 7.48.180 (1957).

300. The court has long held that the injury to the plaintiff must differ in kind from the injury to the public, not just differ in degree. See *Jones v. St. Paul, Minneapolis and Manitoba Ry.*, 16 Wash. 25, 47 P. 226 (1896); *Griffith v. Holman*, 23 Wash. 347, 63 P. 239 (1900); *Ingersoll v. Rousseau*, 35 Wash. 92, 76 P. 513 (1904).

The early cases tended to impose a strict requirement of special injury, tending to restrict private actions; see *Jones, supra*. *Jones* was overruled by *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 P. 632 (1909). Subsequent cases suggest a fairly liberal special injury requirement which extends to the point of obscuring the "kind-degree" distinction. See *Ingalls v. Eastman*, 61 Wash. 289, 112 P. 372 (1910); *Vetter v. K & K Timber Co.*, 124 Wash. 151, 213 P. 927 (1923); *Lampa v. Graham*, 179 Wash. 184, 36 P. 2d 543 (1934); *Kemp v. Putnam*, 47 Wn. 2d 530, 288 P.2d 837 (1955).

PROSSER, at 609, comments:

But the confusion which surrounds the whole matter, the uncertainty which has prevailed as to what is "kind" or "degree," and the occasional tendency to find a difference in kind where one may at least suspect that only one in degree is really present, suggest that this is, if anything, an argument in favor of allowing recovery to anyone who suffers actual damage.

See notes 304-308 and accompanying text, *infra*; see generally RESTATEMENT (SECOND) OF TORTS § 821C (Tent. Draft No. 15, 1969); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

301. See *Park v. Stolzheise*, 24 Wn. 2d 781, 167 P.2d 412 (1946); *Anderson v. Nichols*, 152 Wash. 315, 278 P. 161 (1929); *Ingersoll v. Rousseau*, 35 Wash. 92, 76 P. 513 (1904).

302. See *Olsen v. Bremerton*, 110 Wash. 572, 188 P. 772 (1920); *cf. Diking Dist. No. 2 v. Calispel Duck Club*, 11 Wn. 2d 131, 118 P.2d 780 (1941).

303. WASH. CIV. R. SUPER. CT. 23 specifies the requirements for bringing class actions. These requirements appear to be met in the case of many private actions for public nuisance, and class actions should be encouraged by the courts to settle appropriate cases. *But see Kemp v. Putnam*, 47 Wn. 2d 530, 288 P.2d 837 (1955) (upholding action of individuals, but not of class).

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that a greater degree of injury is sufficient.³⁰⁴ This dichotomy is probably more academic than might be suspected at first glance, and in any event the Washington court has tended to obscure the kind-degree dichotomy to the point where it is fairly safe to say that the distinction does not decide the issue of special injury.³⁰⁵

As a matter of policy, a strict special injury requirement would seem to be based on the premise that non-enforcement is a legitimate technique of administering public laws.³⁰⁶ There appear to be only two legitimate arguments for such administrative decisions. They are: (1) that non-enforcement of the public's rights is justified by the circumstances of a particular case, or (2) that there are insufficient public funds to prosecute a particular action, in view of the demands on available funds by higher public priorities. The first of these arguments is probably without justification from the public interest point of view,³⁰⁷ but in any event, the refusal of public officials to take action should not deprive a person who suffers substantial injury from re-

304. See RESTATEMENT (SECOND) OF TORTS § 821C, Note to Institute (Tent. Draft No. 15, 1969); PROSSER, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

305. See cases cited note 300, *supra*.

In Washington, a public nuisance can be found where certain rights of a considerable number of individuals are interfered with. See note 235, *supra*. It is therefore possible to have a public nuisance without any rights common to the public being affected. It seems that in these cases, the special injury requirement could not require injury different in kind from the public's injury, because there is no injury to the public at large. This should be a persuasive argument in favor of abandoning the difference in kind rationale of special injury in Washington. There is support for this view even in the older English cases. F. POLLOCK, *THE LAW OF TORTS* *336 (1887), in his discussion of nuisance, states:

Where a distinct private right is infringed, though it be only a right enjoyed in common with other persons, it is immaterial that the plaintiff suffered no specific injury beyond those other persons, or no specific injury at all. Thus any one commoner can sue a stranger who lets his cattle depasture the common; and any one of a number of inhabitants entitled by local custom to a particular water supply can sue a neighbour who obstructs that supply. (Emphasis added).

306. Legislative decisions to bar nuisance actions can be implemented by legislative authorization of certain conduct; thus, the legislature can extinguish or limit private or public nuisance actions regardless of the special injury requirement. See notes 95-100, 232-252 and accompanying text, *supra*. This means that only administrative decisions to not enforce public nuisance law are affected by private actions, and the special injury requirement protects only these decisions.

307. If public nuisance law prohibits conduct which should not be prohibited, the statutory and decisional law should be modified, but the discretion of the prosecuting authority should not be invoked. When administrative discretion is relied on, it results in overbroad prohibitions with selective enforcement, thus permitting the administrative authority to select those offenders who will be prosecuted. This creates opportunities for abuse of certain individuals who are prosecuted for acts which are not the object of real

covering for his injury just because the injury also occurs to the entire community or neighborhood. The second argument might justify a public official's refusal to bring an action, but a private action under such circumstances should be permitted and perhaps welcomed by the public as a means of securing ancillary public benefits.

It is not suggested that any remedy should be granted in any individual's attempt to bring a public nuisance action, and limitations on private remedies by legislative enactment are definitely justified;³⁰⁸ however, there is justification for adopting a liberal judicial standard of special injury, as the Washington court appears to have done, since non-enforcement as a technique of administering public law does not justify severe restraints on private actions for damages.

III. ALTERNATIVE CAUSES OF ACTION

A. Nuisance Constituting Trespass

It has already been noted that some physical invasions of property might constitute a trespass as well as a nuisance, while some physical invasions, such as those involving air-borne particles which are deposited on the plaintiff's property, are actionable in Washington only as nuisances.³⁰⁹ There are procedural advantages in trespass actions, such as a longer period under the statute of limitations and no need to prove substantial injury, which have led plaintiffs to argue that certain air-borne invasions constitute a trespass and are actionable as such,

public concern and enables certain individuals who can exert political pressure to escape prosecutions which would be in the public interest.

308. See note 102 and accompanying text, *supra*; but cf. *Ingersoll v. Rousseau*, 35 Wash. 92, 76 P. 513 (1904) (injunction against public nuisance in action by neighboring property owner).

309. The Washington court has consistently held that the two year statute of limitations applies to nuisance actions, including actions for invasions of air-borne particles. See note 195, *supra*.

The issue was squarely decided in *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash. 1954) *aff'd* 236 F.2d 224 (9th Cir. 1956), where the district court applied the two year statute and refused to award nominal damages, stating at 488:

In an action on the case, it is necessary for plaintiff to allege and prove more than formal injury; but when trespass be proven, liability is absolute and at least nominal damage must be awarded. Even though it were assumed that solids in the form of minute particulates from defendant's plants have been deposited on plaintiffs' lands, the injury, if any, resulting therefrom was consequential, the action is on the case, and awards of nominal damages would not be justified by the facts or required by the law.

See Note, *Trespass—Unseen Particles Constituting Invasion—Distinguished from Nuisance*, 35 WASH. L. REV. 474 (1960).

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and some courts have recognized such invasions as trespasses.³¹⁰ The reasoning of such courts is based upon the fact that there is no material difference between an invasion of a large visible object and a small or molecular particle.³¹¹ The recognition of such offenses as trespasses undoubtedly offers the ultimate in protection to landowners who suffer from air pollution, partly because of the procedural advantages noted above, but largely because most air polluters create

310. *Fairview Farms, Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D. Or. 1959) decided that under Oregon law, invasions of air-borne particulates constituted a trespass, the court stating at 184:

As the Oregon Supreme Court has never been faced with a situation as here involved, this court must anticipate what that court would hold if confronted with a controversy such as that presented here.

The court discussed the *Arvidson* case, *supra* note 309, and concluded that it reflected Washington law, which was not applicable to the *Fairview Farms* case. The court noted that a motion was made in *Arvidson* to remove the case to the Oregon District Court and that the motion was refused because the Oregon court had no jurisdiction to adjudicate trespasses on real property in Washington. 176 F. Supp. at 188.

The *Fairview Farms* court anticipated the Oregon Supreme Court's decision correctly, since *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790 (1959), noted in 35 WASH. L. REV. 474 (1960), 45 CORNELL L.Q. 836 (1960), 39 TEX. L. REV. 243 (1960), 1961 WASH. U.L.Q. 62, rendered a similar holding less than a month later. The principle upon which the *Martin* opinion was based was stated at 342 P.2d 792 as the basic distinction between trespass and nuisance:

Trespass and private nuisance are separate fields of tort liability relating to actionable interference with the possession of land. They may be distinguished by comparing the nature of the interest invaded; an actionable invasion of a possessor's interest in the exclusive possession of land is a trespass; an actionable invasion of a possessor's interest in the use and enjoyment of his land is a nuisance.

The court thoroughly discussed the cases, authorities and reasoning underlying the arguments, and at 793-94 concluded:

It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. . . . The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm.

If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way, we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

We are of the opinion, therefore, that the intrusion of the fluoride particulates in the present case constituted a trespass.

See generally Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968).

For discussions of similar problems and the doctrinal difficulties they pose, see Corbridge and Moses, *Weather Modification: Law and Administration*, 8 NAT. RES. J. 207 (1968); Note, *Legal Remedies for "Cloud-Seeding" Activities: Nuisance or Trespass?*, 1960 DUKE L.J. 305. See also *Southport Corp. v. Esso Petroleum Co.*, [1953] 3 W.L.R. 773, [1954] 3 W.L.R. 200, noted in 1954 CAMB L.J. 172; 17 MOD. L. REV. 579 (1954); 106 L.J. 35 (1956) (tanker in emergency pumping oil into sea near beach).

311. See note 310, *supra*.

public nuisances which would require special injury to be shown before a private action could be brought, while trespass actions by landowners do not require a showing of special injury.³¹² Under Washington law, there is also a possibility that joint liability may be imposed on more than one contributor to such a trespass, but that the liability of contributors to a nuisance would be several.³¹³ The Washington court should recognize invasions of property by air-borne substances as trespasses, extending to plaintiffs in such actions the advantages of suing in trespass rather than nuisance.

B. Nuisance Constituting Constitutional Taking or Damaging

One of the fundamental rights protected by the due process clause of the fourteenth amendment is the right to just compensation for private property which is taken for public use.³¹⁴ Traditionally, a physical invasion of land was required in order for a taking of property to be found, and the physical invasion requirement excluded many nuisances from the protection of the just compensation requirement.³¹⁵

312. The statutory period of limitations is generally longer in trespass actions. *See* notes 309-310, *supra*. In addition, substantial injury need not be proved in trespass cases, but it must be shown in nuisance actions. *See* note 309, *supra*. It would also appear that a plaintiff would not have as serious a problem with statutes authorizing conduct in trespass cases, since there is no express statutory declaration that such conduct cannot be deemed a trespass, but there is such a statute applicable to nuisance. *See* notes 95-102, 246-252, and accompanying text, *supra*; *but cf.* *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash. 1954) *aff'd* 236 F.2d 224 (9th Cir. 1956), discussed in notes 309-310, *supra*.

Even though a court concludes that an invasion of particulates constitutes a trespass for some purposes to the advantage of the plaintiff, it may conclude that the action sounds in nuisance for other purposes of advantage to the plaintiff. For example, some courts have held that the statute of limitations for trespass applies, but that an action is not barred by a statute giving an administrative agency "primary jurisdiction" over air pollution, because the statute expressly exempted nuisance actions from the "primary jurisdiction" bar. *Reynolds Metals Co. v. Martin*, 224 F. Supp. 978 (D. Or. 1963) *aff'd* 337 F.2d 780 (9th Cir. 1964); *Renken v. Harvey Aluminum, Inc.*, 226 F. Supp. 169 (D. Or. 1963); *see* WASH. REV. CODE §§ 70.94.230, .370 (1969) (nuisance actions and air pollution control).

The special injury requirement should not restrict private actions for public nuisance in air pollution cases; however, a strict interpretation of the requirement could preclude a finding that the plaintiffs suffered injury different *in kind* from the public. *See* notes 297-308, and accompanying text, *supra*.

313. *Robillard v. Selah-Moxie Irr. Dist.*, 54 Wn. 2d 582, 343 P.2d 565 (1969) strongly suggests that independent contributors to torts other than nuisances are jointly liable, whereas independent contributors to nuisances are severally liable. *See* notes 214-220 and accompanying text, *supra*.

314. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897); *see* E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 1177-85 (N. Small ed. 1964).

315. *See Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963), *noted in* 16 VAND. L. REV. 430 (1963); *see also* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

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The Washington state constitution, however, requires just compensation for taking *or damaging* property.³¹⁶ In a recent case, the court held that this language requires compensation for interferences with property which are not trespassory, and that no physical invasion of property is needed in order to require that just compensation be paid.³¹⁷ This case was based upon basic nuisance concepts, although in form it was an inverse condemnation rather than a nuisance action.³¹⁸

The case noted above and several other cases suggest that the plaintiff's right to freedom from interferences which constitute nuisances is a property right, of which he cannot be deprived without just compensation.³¹⁹ This proposition presents no insurmountable difficulties

316. WASH. CONST. art. 1, § 16.

317. *Martin v. Port of Seattle*, 64 Wn. 2d 309, 391 P.2d 540 (1964) held that article 1, § 16 of the Washington State Constitution required that owners of residential property near Seattle-Tacoma International Airport be compensated for the interference with the use of their land caused by low altitude flights of jet aircraft which did not invade the airspace directly over the plaintiffs' lands. The court based its decision on its conclusion that an earlier case which involved direct overflights, *Ackerman v. Port of Seattle*, 55 Wn. 2d 400, 348 P.2d 664 (1960), had construed the term "property," as used in Article 1, § 16, "to include the unrestricted right to use, enjoy, and dispose of the land." 64 Wn. 2d at 313. The court then addressed itself to the traditional "taking" problem at 316-18:

This requirement, that a landowner show a direct overflight as a condition precedent to recovery of the damages to his land, is presently stressed by some federal courts in construing the "taking" as contemplated by the Fourteenth Amendment. . . . We are unable to accept the premise that recovery for the interference with the use of land should depend upon anything as irrelevant as whether a wing tip of the aircraft passes through a fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which *interfere with the use and enjoyment of their land.* (Emphasis added).

In addition to the above, further reason exists in Washington for refusing to adopt the overly strict interpretation of "taking" pressed by the appellant. The language of the ninth amendment of the Washington Constitution provides for just compensation of not only a "taking," but also a "damaging." The specific purpose of the addition of language beyond that of the United States Constitution is to avoid the distinctions attached to the word "taking" appropriate to a bygone era.

318. See cases cited in note 317, *supra*.

319. *Id.*

Snavely v. Goldendale, 10 Wn. 2d 453, 117 P.2d 221 (1941) held that a city's pollution of water was of sufficient magnitude to constitute a public nuisance, and was therefore a taking or damaging of property requiring just compensation under the Washington Constitution. The court expressly refers to the concept of public nuisance in its opinion, making it quite clear that nuisance theory is an adequate rationale to support a claim for protection under the Washington Constitution. See also *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962) (discussion of airport noise case in terms of nuisance and the just compensation requirement).

Several other Washington cases suggest that the court is liberalizing the just compensation requirement generally. Note, *Liability for Diking Floodwaters: Rejection of the "Common Enemy" Doctrine*, 44 WASH. L. REV. 516, 520 n.23 (1969) notes that:

[T]he Washington court has held the word "damages" in Article 1 § 16 of the state

for the development of nuisance law;³²⁰ however, there is an additional provision of the Washington constitution which could be of adverse consequence to the development of private nuisance law, namely, the prohibition of *taking* private property for private use.³²¹ While this provision may limit the authority of the legislature and the courts, it will probably not interfere with reasonable modifications of the substantive and remedial law of nuisance, and it should be regarded as a valuable safeguard of property rights since it will offer some protection against extreme actions by governmental entities.³²² In this regard, counsel should consider the possibility of a cause of action based on the Washington constitution in cases where defenses peculiar to nuisance actions present serious hazards to a cause of action based solely on nuisance.

constitution extends just compensation to damages beyond those compensable under the United States Constitution. *Brown v. Seattle*, 5 Wash. 35, 41, 31 P. 313, 315 (1892); *Conger v. Pierce County*, 116 Wash. 27, 34, 198 P. 377, 379 (1921); *Martin v. Port of Seattle*, 64 Wn. 2d 309, 391 P.2d 540 (1964). The cases have extended compensable damages so that distance from public works, *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P. 576, 577-578 (1902), substantiality of damage, *Ackerman v. Port of Seattle*, 55 Wn. 2d 400, 405, 348 P.2d 664, 667 (1960); *Martin v. Port of Seattle*, 64 Wn. 2d 309, 318, 391 P.2d 540, 546 (1964), willfulness of the damage, *Boitano v. Snohomish County*, 11 Wn. 2d 664, 120 P.2d 490 (1941), and even physical invasion of property, *Martin v. Port of Seattle*, 64 Wn. 2d 309, 316, 391 P.2d 540, 545 (1964) may be irrelevant in determining whether they are compensable.

See generally *Stoebuck, Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); *Munro, Aircraft Noise as a Taking of Property*, 13 N.Y.L.F. 476 (1967); *Sax, Takings and the Police Power*, 74 YALE L.J. 36 (1964); *Comment, Nuisance—As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963); *Comment, Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963); *Comment, Inverse Condemnation: A Growing Problem?*, 3 TULSA L.J. 169 (1966).

320. See notes 321-322, *infra*.

321. WASH. CONST. art. I § 16 provides:

Private property shall not be taken for private use. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question of whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

This provision could be construed to prevent substantial modifications of the substantive rights now recognized under the concept of nuisance. However, the constitutional language suggests that the likelihood of this interpretation by the court is remote, *i.e.*, the quoted language applies to "takings" of private property whereas the just compensation provision applies to "taking" or "damaging" property. Since the court's decisions recognizing nuisances as requiring compensation emphasize the term "damaging," it would seem that such holdings would not necessarily result in concluding that a nuisance plaintiff's rights were so extensive as to be "untouchable" for private use.

321. See also *Missouri Pac. Ry. v. State of Nebraska*, 164 U.S. 403 (1896); E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1177-85* (N. Small ed. 1964) (federal due process question relating to takings of property for a private use).

322. If the court held that plaintiffs' rights under nuisance concepts were protected

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CONCLUSION

Any analysis of nuisance law has dangerous pitfalls, in light of the reluctance of the courts to base their decisions on a system of articulated rules, and these pitfalls probably account for the legal community's apparently increasing reluctance to utilize nuisance as a mode of land use control. On the other hand, nuisance law appears to have the potential to play a viable and important role in the total system of land use controls, and this suggests that there is a need to analyze its principles and utilize it as a modern land use control device. These observations have led to the analysis presented in this comment and its suggestions for development and application of nuisance law. The basic approach of the comment has been to elucidate the *principles* of nuisance law and the *factors* affecting court decisions on nuisance in an attempt to aid in applying nuisance law to novel land use problems which are continually arising in a dynamic and complex era of land utilization.

As for the apparent reluctance of practitioners to use nuisance actions, it is suspected that the main reasons for this reluctance are: (1) the availability of zoning and other administrative mechanisms for individuals to effect controls on a neighboring owner's uses of his land; and (2) the modern tendency of many lawyers to believe that legislative and administrative land use control systems are the most effective mechanisms to employ for their clients. Perhaps these reasons are sufficient to justify a decision to argue an individual case before an administrative board rather than a court; but from the public's point of view, a board responsible for determining the public interest and effecting that interest by enacting comprehensive land use controls is *not* an appropriate forum for deciding individual cases based on

by the no private property for private use provision of WASH. CONST. art. I, § 16, it is possible that legislative or judicial restrictions on injunctive remedies would be held unconstitutional. For example, a statute might provide that a land use located in a proper zone but causing a nuisance could not be enjoined. Without the injunctive remedy, the plaintiff's property would, in effect, be "taken;" this being prohibited by the provision. See note 260, *supra*.

It appears probable, however, that the no-taking-for-private-use provision will not be applied to nuisance, whereas the just compensation requirement will. See note 321, *supra*. The legislature and courts should therefore have power to limit remedies, except that the plaintiff's rights to just compensation (or damages) must be preserved. Land owners would thus seem to be protected from legislative or judicial decisions extinguishing causes of action or damage remedies.

private interest, especially where private actions with effective remedies are available to protect property owners injured by particular types or manners of land use.

Thus, it seems that nuisance law should be recognized as a modern mode of land use control and integrated with other modern modes of land use control. If this is done, the flexibility and appropriateness of nuisance law for certain types of land use problems should result in a more effective over-all system of land use control.

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