

MODERNIZING PUBLIC NUISANCE: SOLVING THE PARADOX OF THE SPECIAL INJURY RULE

*Denise E. Antolini**

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* Assistant Professor of Law, University of Hawai'i at Manoa, William S. Richardson School of Law; former Managing Attorney, Mid-Pacific Office, Sierra Club Legal Defense Fund, Honolulu, Hawai'i; J.D. 1986, University of California at Berkeley, Boalt Hall; A.B., 1982, Princeton University. Mahalo nui loa (many thanks) to my colleagues Professors Eric Yamamoto and Jon Van Dyke; to law students Bonita Chang, Cody Minatodani, and particularly Adrienne Yoshihara; to Betsey and Roy Essoyan; to the herculean editors and staff of Ecology Law Quarterly; and, especially, to my family. Contact the author at: antolini@hawaii.edu.

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"[J]udicial action only achieves . . . legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society."¹

"Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice."²

INTRODUCTION

The Bush Administration's efforts to roll back vigorous enforcement of federal environmental laws are reigniting the interest of scholars and practitioners in common law remedies as judicial tools to address a wide range of environmental ills.³ For

1. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

2. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 473 (1970).

3. Eric Pianin & Michael Grunwald, *Bush Plan Shifts Power Over Polluters to States*, WASH. POST, Apr. 10, 2001, at A03 (discussing Bush Administration's proposal to cut Environmental Protection Agency enforcement staff and budget, "mark[ing] a significant departure from a more aggressive policy of federal enforcement and prosecution of polluters since the EPA's creation in 1970"), available at <http://www.washingtonpost.com/wp-dyn/articles/A62130-2001Apr9.html>. In anticipation of the conservative environmental agenda of the new Bush Administration, environmental lawyer Robert F. Kennedy, Jr. and nationally known torts lawyers from fifteen different firms launched a major litigation campaign to address water pollution from factory hog farms in North Carolina using, among other tort theories, public nuisance and a tobacco-style direct "mass tort" approach rather than the politically vulnerable Clean Water Act. Douglass Jehl, *Fearing Bush Will Win, Groups Plan Pollution Suits*, THE N.Y. TIMES ON THE WEB, Dec. 7, 2000, available at <http://www.nytimes.com/2000/12/07/politics/07ENVI.html>. Confirming that the

the past thirty years, tort and environmental law commentators have touted the state common law tort of public nuisance as a potentially powerful and flexible remedy for community-based social and environmental problems,⁴ as well as an important interstitial remedy to complement the increasingly complex framework of federal and state statutory schemes.⁵ Particularly

special injury rule is still a weak link of public nuisance claims for such plaintiffs, the trial court recently dismissed the North Carolina hog pollution case for lack of standing, despite a range of allegations of damage including to a fishing business. James E. Shiffer, *Suits aimed at hog farms dismissed*, NEWS&OBSERVER.COM, at <http://www.newsobserver.com/friday/news/Story/414510p> (last visited Mar. 30, 2001).

4. See, e.g., John W. Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165, 170 (1972) [hereinafter Wade, *Environmental Protection*] (expressing hope that "judicial growth and development" of public nuisance doctrine will "meet the mounting problems of protecting the environment"); John Harleston & Kathleen M. Harleston, *The Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S.C. L. REV. 379, 380 (1989) ("nuisance law survives today amid apparently comprehensive federal and state environmental regulations because of its nearly infinite flexibility and adaptability and its inherent capacity to fill gaps in statutory controls"); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 399 (1990) ("public nuisance law can play a vital role in the protection of public rights and, in particular, public rights to a cleaner, healthier environment"); James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T 29 (1990) (describing public nuisance as "inherently flexible and uniquely capable of application to abate pollution, clean up contaminated sites, and recover damages"); Gwyn Goodson Timms, Note, *Statutorily Awarding Attorneys' Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733, 1738-39 (1992) [hereinafter Note, *Public Watchdog*] ("Public nuisance can be a potent component of the artillery of law against pollution."); Michael C. Skotnicki, Note, *Private Actions for Damages Resulting from an Environmental Public Nuisance: Overcoming the Barrier to Standing Posed by the "Special Injury" Rule*, 16 AM. J. TRIAL ADVOC. 591, 594-95 (1992) [hereinafter Note, *Overcoming the Barrier*] (noting that public nuisance provides an appropriate remedy for modern environmental problems); Andrew J. Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law To Affect the Location of Pollution*, 27 ENVTL. L. 403 (1997) (arguing that nuisance law has advantages over modern environmental statutes and therefore should be preserved as a supplemental remedy); Interview with Victor M. Sher, former President, Sierra Club Legal Defense Fund, currently partner with Miller, Sher & Sawyer (Sacramento, Cal.), in Honolulu, Hawaii (Sept. 25, 1998) (describing public nuisance as the "model of litigation of the future" for environmental pollution cases).

5. See John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 279, 281 (1972) (public nuisance "fills in the cracks," e.g., for air pollution, noise, odors, vibrations, and aesthetic harm); James D. Lawlor, *Right to Maintain Action to Enjoin Public Nuisance As Affected by Existence of Pollution Control Agency*, 60 A.L.R. 3d 665, 669 (1974) (until federal statutes are more comprehensive, "public nuisance suits retain their vitality"); David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883, 887 (1989) (public nuisance can "fill regulatory gaps left by environmental statutes"); Miles Tolbert, Comment, *The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in*

where the statutory avenues for redress are incomplete, weak, or under siege, attention has turned toward restoring the vitality of public nuisance as a supplemental or alternative cause of action.⁶ Unfortunately, two doctrines historically have limited the utility of public nuisance as a cause of action to redress community problems: the thoroughly entrenched "special injury rule" and its constant companion, the strict "different-in-kind" test.⁷ Commentators have long criticized the traditional rule and test as unduly restrictive and illogical, barring worthy tort cases

the Exxon Valdez Litigation, 14 HARV. ENVTL. L. REV. 511, 526-27 (1990) [hereinafter Comment, *Public as Plaintiff*] (noting that a "common law approach boasts more flexibility and may readily be adapted to all varieties of pollution"); Abrams & Washington, *supra* note 4, at 393 ("As broad and detailed as environmental regulation is today, however, there still exist large gaps in the law" that can be covered by public nuisance.); Fredric D. Bellamy, *Common Law Environmental Nuisance Claims - Problematic Limits and Potential Growth*, SA88 A.L.I.-A.B.A. 145, 148 (1996) (public nuisance can "fill at least some of the void between the environmental statutes").

6. See Frank E. Maloney, *Judicial Protection for the Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145 (1972) ("statutory remedies are failing, often because of insufficient funds for adequate enforcement"); Hodas, *supra* note 5, at 887 ("courts and private citizens have the opportunity to transform the public nuisance doctrine into a powerful and influential common law tool"); Robert R. Lohrmann, Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1109 (1970) [hereinafter Comment, *Environmental Lawsuit*] (noting that environmental statutes are undermined by "powerful industrial lobbies," and unwilling, unable, and underfunded government enforcement agencies); Note, *Public Watchdog*, *supra* note 4, at 1739-45 (public nuisance fills statutory gaps when administrative remedies are "slow," restricted, or too weak). This observation is also based on the author's own experience as a public interest litigator with the Sierra Club Legal Defense Fund for eight years and participation in strategic discussions during the 1990s, when the conservative backlash against federal environmental laws and citizen suits prompted the law firm to look anew at common law causes of action.

7. This article refers to the "special injury rule" and the "different-in-kind" test together as "the traditional doctrine." The special injury rule is the traditional requirement that, to be a proper plaintiff in a public nuisance suit, a private plaintiff must demonstrate what has become known as "special" injury - e.g., physical harm or economic loss. See *infra* notes 28-30 and accompanying text. The predominant test for application of this rule is the "different-in-kind" test, which requires that plaintiff's special injury be "different than that suffered by other members of the public." RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979) (Who Can Recover for Public Nuisance). Traditionally, the rule and this test have been virtually synonymous, but are often distinguished in this Article in order to understand the role of the competing minority "different-in-degree" test, which requires only that the plaintiff be hurt "more than" or "beyond" the general public. See *infra* note 222 and accompanying text. This Article's proposed actual community injury rule, see *infra* Part V, would replace the special injury doctrine with a test that requires shared injury not unique to the plaintiff.

and preventing judicial inquiry into the merits of the plaintiffs' allegations of injury to the community values the tort protects.⁸

8. See Jeremiah Smith, *Private Action for Obstruction To Public Right of Passage* (pts I & II), 15 COLUM. L. REV. 1, 7, 142 (1915) [hereinafter Smith, *Private Action*] ("The adoption of a rule making it a requisite that there should be particular kinds or classes or actual damage must not unfrequently [sic] result in denying remedy to a man who has sustained very substantial damage . . . [a]nd it must not unfrequently [sic] result in allowing a tort-feasor to escape civil liability, although his act has caused substantial loss."); Note, *Right of Private Individual to Damages for Public Nuisance*, 2 MINN. L. REV. 210, 214 (1918) [hereinafter 1918 Note] ("It would be highly unjust and inequitable to say that he has no right of redress in a private action on the ground merely that the injury had resulted from an act which is a public nuisance in itself, and because other persons might have been injured and damaged in the same manner and to the same extent . . .") (quoting *Page v. Mille Lacs Lumber Co.*, 55 N.W. 608, 610 (Minn. 1893)); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 570 (1st ed. 1941) [hereinafter PROSSER, HANDBOOK (1st ed. 1941)] (noting courts' "great[] difficulty" in applying the special injury rule and "little consistency in the decisions"); Boyd D. Taylor, *Control of Stream Pollution*, 33 TEX. L. REV. 370, 374 (1955) (pointing to Texas courts' application of the special injury rule in public nuisance cases as a procedural barrier to addressing water pollution); JOHN G. FLEMING, THE LAW OF TORTS 381 (6th ed. 1983) (noting that the rule "in its most extreme form" had "defeated the claims even of commercial fishermen for loss of their livelihood against polluters of public waters on the ground that their rights were no different from that of the general public"); William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1010 (1966) [hereinafter Prosser, *Private Action*] (suggesting injustice of denying remedy when loss is "common to the whole community"); Julian C. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1135 (1967) (noting courts' use of the different-in-kind rule and concluding "if the courts persist in their 'kind' rather than 'degree' distinction, the increased understanding of the widespread effects of what has previously been thought of as localized air pollution may render the private [public] nuisance action against air pollution less frequently available than in the past."); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 n.45 (1970) [hereinafter Sax, *Public Trust Doctrine*] (suggesting that, "while nuisance law should not be ignored," it cannot be an effective common law doctrine to address pollution issues because it "is encrusted with the rule that permits lawsuits to be initiated only by the state attorney general, and not by private citizens."); JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 160 (1970) [hereinafter SAX, DEFENDING] ("in most every state [a citizen protesting a polluting factory] would be thrown out of court and told that conduct affecting him solely as an individual citizen, in common with every other citizen, can be challenged only by public officials"); Frank P. Grad & Laurie R. Rockett, *Environmental Litigation—Where the Action Is?*, 10 NAT. RES. J. 742, 743 (1970) (suggesting that the special injury rule poses a barrier to effective nuisance actions in the environmental area); Comment, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734, 740 (1970) (observing that the special injury rule and different-in-kind test "[o]ften . . . becomes a problem of semantics especially when various types of environmental nuisance have the same substantive effect on the community at large, but more seriously threaten the health and welfare of residents in close proximity to the source"); Note, *Environmental Law—Nuisance—Injunctive Relief Denied in Private Action for Nuisance Created by Industrial Polluter—Boomer v. Atlantic Cement Co.*, 45 N.Y.U. L. REV. 919, 923-24 n.30 (1970) ("proof of special damages is difficult, especially in heavily populated areas because even a blatant polluter will often have the defense that the offensive conditions are actually the result of a multiple of sources of pollution, and the harm is suffered by the public in general."); Bryson &

The special injury rule/different-in-kind doctrine—attributed to ancient English case law and adopted almost universally by United States courts—is an anomaly in tort law. It limits up front the type of plaintiff who can bring a tort action. Only those who can first prove some injury that is “special,” “particular,” or “peculiar,” defined as “different-in-kind” and not just “different-in-degree” from the general public who might also be affected by the nuisance, be it a house of prostitution⁹ or a polluting factory, may bring an action.¹⁰

The traditional doctrine presents a paradox: the broader the injury to the community and the more the plaintiff's injury resembles an injury also suffered by other members of the public, the less likely that the plaintiff can bring a public nuisance lawsuit. Thus, if the rule is applied rigidly, it prevents plaintiffs with otherwise cognizable injuries from proceeding if

Macbeth, *supra* note 5, at 264 (“The particular damage rule has unjustifiably thwarted the development of public nuisance law and forced plaintiffs to employ less appropriate causes of action.”); Wade, *Environmental Protection*, *supra* note 4, at 167 (noting “anomaly that if the defendant succeeded in injuring all in the community alike then no private remedy was available at all”); Mark A. Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453, 456, 459 (1974) (noting the strict application of the special injury rule “has long troubled both courts and commentators” and calling it “archaic” and “outmoded”); Tim E. Sleeth, Note, *Public Nuisance: Standing to Sue Without Showing “Special Injury”*, 26 U. FLA. L. REV. 360, 366 (1974) [hereinafter Note, *Public Nuisance*] (calling rule “an obstacle preventing recovery for injury actually sustained” and resulting in “the lack of forum for the community to redress any common injuries”); Kenneth S. Boger, *The Common Law of Public Nuisance in State Environmental Litigation*, 4 ENV. AFF. 367, 378 (1975) (“a serious obstacle to the emergence of the common law of public nuisance as a major environmental weapon at the state level is what has been termed the standing problem”); 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER, § 2.2, at 36 (1986) [hereinafter RODGERS, AIR AND WATER] (stating the rule has been applied with “absurd results” and calling it a “relic”); Hodas, *supra* note 5, at 888 (calling the special injury rule “the greatest hurdle facing private plaintiffs who bring a public nuisance action for damages”); Comment, *Public as Plaintiff*, *supra* note 5, at 514 (“in trying to limit the number of suits by individuals representing the general public, the special injury rule actually requires that these representatives be as unrepresentative of the public as possible.”); Note, *Overcoming the Barrier*, *supra* note 4, at 593 (arguing that the special injury rule “has created a significant barrier to standing for private plaintiffs suing for an environmental nuisance that has caused them injury”); Bellamy, *supra* note 5, at 163 (rule is “principal impediment” to use of public nuisance law by raising the barrier to potential plaintiffs); Christopher Panoff, Comment, *In Re The Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL. L. 701, 710, 713 (1998) [hereinafter Comment, *Exxon Valdez*] (calling special injury rule “the greatest hurdle facing private plaintiffs suing for public nuisance,” “counterproductive,” and “stifling”).

9. Prosser, *Private Action*, *supra* note 8, at 1000; see *infra* notes 47-51 and accompanying text.

10. See RODGERS, AIR & WATER, *supra* note 8, § 2.1, at 29-30; see also *infra* notes 47-51 and accompanying text.

many others in the community actually or theoretically share the injury. Many courts interpret the doctrine as requiring the plaintiff to prove a "unique" injury,¹¹ not only widening the gap between the plaintiff's personal stake and that of the public's, but also directly undermining a plaintiff's ability to be a "representative" of the threatened public interests.

The restrictive traditional doctrine is commonly justified by reference to its ancient roots—dating to a 1535 King's Bench case¹²—as a limited delegation to a plaintiff of the sovereign's police power to enforce laws against "purprestures,"¹³ *i.e.* encroachments on the land of the Crown. Courts perceived a need to prevent multiplicity of similar actions in order to protect defendants' resources, conserve courts' resources, and prevent trivial suits.¹⁴ While this tripartite rationale made sense in medieval times when the concept of a "public" lawsuit was in its nascent stage, it has substantially less appeal in the context of the modern American legal system that is now accustomed to the private attorney general concept and has a sophisticated judicial process and decades of experience with dramatic developments in federal environmental standing, class actions, and injunctive suits. Now encrusted with over four centuries of caselaw and often misleading commentary, the "ancient" doctrine has become an anomalous technical defense in tort law, acting as an unduly strict gatekeeper rather than honoring the fundamental purpose of public nuisance—to protect public values from tortious injury.

To date, however, serious criticism of the traditional doctrine and calls for liberalization by distinguished torts and environmental scholars—from William L. Prosser to William H. Rodgers, Jr.¹⁵—as well as the bold rejection of the doctrine for injunctive actions in the *Restatement (Second) of Torts* Section 821C,¹⁶ have utterly failed to penetrate the case law. Although the federal law of standing in environmental and administrative law cases has undergone dramatic evolution since the 1960s,¹⁷ equally important but more obscure rules determining who can

11. See *infra* note 90 (discussing the *Exxon Valdez* decision) and note 336; see also, *e.g.*, *Liddle v. Corps of Engineers*, U.S. Army, 981 F. Supp. 544, 558 (M.D. Tenn. 1997) (applying this conservative interpretation of traditional doctrine and dismissing neighbors' lawsuit against a YMCA camp for lack of "unique" injury).

12. The 1535 case is discussed in detail *infra* Part II.A.

13. See *infra* note 33.

14. See *infra* note 30.

15. See *supra* note 8 and *infra* Part III.B and notes 504-507.

16. See *infra* Part IV.B.

17. See *infra* Part IV.A.

sue privately for state common law public nuisance have been stubbornly resistant to change. Other than Hawaii's lone adoption almost twenty years ago of the *Restatement's* modified formulation,¹⁸ the judiciary and the bar seem unaware of or uninterested in the *Restatement's* invitation to embrace public nuisance in order to redress shared community injury. Although courts still struggle with application of the different-in-kind test (often bending the rule to avoid unfair results), the traditional doctrine is nonetheless repeated like a mantra in virtually every public nuisance case.

Many thoughtful commentators have criticized the special injury rule and bemoaned its entrenchment.¹⁹ A few critics have suggested that it be eliminated entirely,²⁰ and a distinguished handful has proposed alternative formulations.²¹ In light of the unique ability of public nuisance to be a flexible community-based remedy for community-based problems in state courts and given the puzzling persistence of the special injury rule and different-in-kind test, it is important to seek a deeper understanding of why these calls have gone unheeded and whether it is possible, as a practical matter, to modernize this important cause of action with an alternative approach to the doctrine.

This Article seeks to break new ground in solving the special injury rule paradox by focusing on *why* the rule has become so embedded in American jurisprudence. Without understanding the reasons for the large gap between scholarship and jurisprudence, it seems impossible to advance the languishing dialogue regarding the modern role of public nuisance and the merits of the traditional doctrine. This Article therefore places a special emphasis on a detailed legal history of the rule—from “olde” English cases, to early American critique, to the *Restatement (Second)* debates—than has previously been

18. See *infra* notes 127-140.

19. See *supra* note 8.

20. See, e.g., Rothstein, *supra* note 8, at 479 (“By abolishing the special injury rule the courts can revitalize the law of public nuisance and make it a valuable device for private parties.”).

21. Smith, *Private Action*, *supra* note 8, at 2 (suggesting an “actual pecuniary damages” test); Prosser, *Private Action*, *supra* note 8 (supporting the different-in-degree formulation); FLEMING, *supra* note 8, at 381 (suggesting a “more liberal approach” based on difference-in-degree); RODGERS, AIR & WATER, *supra* note 8, § 2.2, at 37 (proposing that “any person injured in fact should be able to sue for equitable relief or money damages”); Hodas, *supra* note 5 (advocating the rejection of the rule and defining the limits of liability with a tort proximate cause analysis).

presented in the literature. Justice Holmes observed that an understanding of the law first requires a study of its history:

It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.²²

This Holmesian critique proves liberating, as it suggests that the history of the special injury rule actually provides support for a more liberal alternative interpretation—either a “different-in-degree” approach, an “actual (pecuniary) damages” test, or, as this Article suggests, a new “actual community injury” rule. By luring the dragon into the open and examining it carefully, we can take a fresh look at the prospects for positive developments in the future of the doctrine. Taming or killing the dragon of legal history is essential to developing alternative approaches to the rule and to modernizing public nuisance.

Part I of this Article sets out the legal landscape of public nuisance and the traditional doctrine, and then provides three diverse illustrations of cases in which the special injury rule and different-in-kind test have barred private plaintiffs with cognizable injuries from the courts in public nuisance cases. Part II sheds new light on the English legal history of the rule and different-in-kind test, starting with a close examination of the 1535 case and ending in the mid-1800s. In Part III, the Article examines early American views of the traditional doctrine, and discusses how Prosser, despite struggling with the strict test, enshrined the conservative trend in the case law when drafting the *Restatement (Second) of Torts*. Part IV analyzes the 1970 rebellion by members of the American Law Institute against Prosser’s resigned formulation of the strict test and the resulting infusion of newly developed federal standing law into the *Restatement’s* formulation of the special injury rule. Part V seeks to explain why the *Restatement’s* attempt to eliminate the strict rule in injunctive cases failed. It then draws some lessons to apply to alternative formulations of the rule, and suggests an “actual community injury” standard that directly addresses the persistent paradox and that may help revitalize public nuisance’s

22. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

role as a flexible, community-based remedy for a diverse range of social and environmental problems.

I

PUBLIC NUISANCE AND THE SPECIAL INJURY RULE: THREE ILLUSTRATIONS OF THE PARADOX

[T]he better is the defence of wrongdoers, the more numerous the persons whom they have injured, and the more extensive and wide spread the consequences of their injurious acts. A principle like this would undoubtedly be grateful to all wrongdoers; but it would hardly commend itself to the sufferers."²³

Public nuisance is an anomaly in tort law, exhibiting hybrid characteristics of both private torts and public law. As a private action, public nuisance still retains features virtually unique among torts, such as the need to demonstrate that public rights are at stake, the balancing of harm and utility, the availability of injunctive relief in addition to money damages, the lack of certain common defenses, and the existence of a "standing test"—the special injury rule. Because public nuisance is a uniquely powerful tort, embodying a private attorney general concept, courts adhere to the special injury rule as a way to limit access to this unusual remedy. Section A explores the basic contours of public nuisance and the special injury rule and Section B illustrates, through three sets of modern cases where the courts grappled with the application of the traditional doctrine, the paradoxical barrier posed by the rule.

A. *The Doctrinal Landscape: Public Nuisance and the Special Injury Rule*

Although the three types of modern nuisance share some common doctrinal history and are often confused by bench and bar,²⁴ there are important differences among them. At one end of the spectrum, there is a *private* nuisance action brought by a *private* plaintiff, typically involving conflicting contemporaneous and adjoining land uses, where the plaintiff has a legal interest in the land that is being adversely affected by the defendant's

23. *Brown v. Watson*, 47 Me. 161, 164 (1859).

24. See Prosser, *Private Action*, *supra* note 8, at 999; see also F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 490 (1949) (noting the confusion); Abrams & Washington, *supra* note 4, at 390 (observing "much confusion and so little understanding of public nuisance").

nearby nuisance activity.²⁵ At the other end of the spectrum, there is a *public* nuisance action for interference with public rights such as health, welfare, and comfort brought by a *public* (governmental) plaintiff. For example, a state might bring such an action through its criminal or civil statutes or through a common law civil action (historically called "common nuisance"²⁶).

In the middle, there is the hybrid tort—private plaintiff/public nuisance—also for interference with public rights, but brought by a *private* plaintiff as a common law action. These private plaintiffs, according to the traditional doctrine, must show some recognized type of "special," "particular," or "peculiar" injury.²⁷ According to the entrenched black letter test, an injury is sufficiently "special" if it is *different-in-kind* and not just *different-in-degree* from the injury to the general public.²⁸ As expressed in Section 821C of the *Restatement (Second) of Torts*: "In order to recover damages in an individual action for a public nuisance, one must have suffered *harm of a kind different* from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."²⁹ The longstanding tripartite rationale for the different-in-kind rule is that it preserves the role of the sovereign to enforce the law, prevents multiplicity of actions, and

25. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821D (defining private nuisance); see also *id.* § 821E (Who Can Recover for Private Nuisance), §§ 822-831 (Private Nuisance: Elements of Liability).

26. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *167 (1763) ("*Common nuisances* are a species of offenses against the public order and economical regimen of the state; being either a doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires"); William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 30-35 (1948) (citing the Statute of 12 Rich. II, c. 13 (1389) (Eng.)); see also J.R. Spencer, *Public Nuisance—A Critical Examination*, 48(1) CAMBRIDGE L.J. 55, 58 (1989) [hereinafter Spencer, *Critical Examination*] (discussing the evolution of "common" nuisance to public nuisance).

27. See *infra* Part II (discussing evolution of rule's terminology in English caselaw).

28. E.g., PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 571; Prosser, *Private Action*, *supra* note 8, at 1009.

29. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821C(1) (actions for damages) (emphasis added). Under Section 821C(2)(a), the different-in-kind rule also applies to actions seeking injunctive relief ("In order to maintain a proceeding to enjoin or abate a public nuisance, one must (a) have the right to recover damages, as indicated in Subsection (1) . . ."), but Section 821C(2)(c) carves out the exception for citizen suits and class actions, which only Hawai'i has adopted. See *infra* Part I.B (discussing *Akai*).

discourages trivial lawsuits.³⁰ Although this Article focuses only on the hybrid nuisance action, a brief discussion of the basic nature of nuisance law and public nuisance in particular is warranted to provide context for the paradox of the special injury rule.

1. A Brief History of Nuisance Law

Modern American nuisance law has its roots in medieval England, which gave birth to the tort as a judicial response to community conflicts caused by changing land use patterns and social conditions.³¹ As early as the twelfth century in England,³² the only remedy for common nuisance, known then as "purprestures,"³³ was a criminal writ³⁴ brought by the Crown.³⁵ This was a police-power based remedy for interference with the rights of the sovereign.³⁶

Eventually, this right of the sovereign was partially shared with private citizens as urbanization and the dawn of the industrial age generated or increased both conflicts among land

30. Prosser, *Private Action*, *supra* note 8, at 1007 (commenting that the three-part rationale had been "stated many times"); *see also* 4 BLACKSTONE, COMMENTARIES, *supra* note 26, at *167 (stating that common nuisances "are indictable only, and not actionable; as it would be unreasonable to multiply suits by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects").

31. HERBERT SPENCER, JUSTICE: BEING PART IV OF THE PRINCIPLES OF ETHICS 81 (Appleton ed. 1891) ("In encampments of savages and in the villages of agricultural tribes, no one was led, in pursuit of his ends, to overshadow the habitation of another. . . . In later times, when towns had grown up, it was unlikely that much respect would forthwith be paid by men to the claims of their neighbors")

32. C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT, at 3-5 (1949) (dating the roots of nuisance back to ancient writs in twelfth-century England).

33. 4 BLACKSTONE, *supra* note 26, at *167 ("Where there is a house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*."); Prosser, *Private Action*, *supra* note 8, at 998 ("purprestures . . . were encroachments upon the royal domain or the king's highway.")

34. For a more detailed discussion of the history of the writs related to nuisance, *see generally* G.D.G. HALL, THE TREATISE OF THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL xii-xiii (Clarendon Press, Oxford 1993); 3 BLACKSTONE, *supra* note 26, at 222; FIFOOT, *supra* note 32, at 93; Prosser, *Private Action*, *supra* note 8, at 997-98; PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 550-51.

35. *See* 3 BLACKSTONE, *supra* note 26, at 219 - 20 ("no *action* lies for a public or common nuisance, but an *indictment* only . . . only the king [can act] in his public capacity of supreme governor, and *pater-familias* of the kingdom.")

36. *See generally* Sevinsky, *supra* note 4, at 29 ("At heart, then, public nuisance is not a tort; rather, when asserted by the sovereign, it is essentially an exercise of the police power to protect public health and safety.")

uses and adverse external effects that impinged on the property rights of nearby residents and on the basic quality-of-life "rights" (e.g., open waterways, clear roads, wholesome air, and civil society) enjoyed by neighbors and the general public. Nuisance provided a flexible judicial remedy to address these conflicts between land use and social welfare, and, surprisingly, plaintiffs often won their individual legal battles against the relentless march of social and economic progress.³⁷

Centuries later, the American states incorporated the notion of public nuisance both through common law and by statute.³⁸ The states enacted broad statutes making nuisance a crime³⁹ and covering a wide range of activity offensive to health, safety, and welfare, and morals.⁴⁰ Specific types of nuisances, such as "houses of ill-repute," unsanitary housing, and fireworks, were targeted for criminal sanctions as common nuisances.⁴¹ Although *criminal* enforcement remains the exclusive province of

37. See *infra* Part II.B (discussing English cases from the 1600s through 1800s) [The English Cases].

38. Prosser, *Private Action*, *supra* note 8, at 999. The early American definition of common nuisance was "a miscellaneous group of minor criminal offenses, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to the public." PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71a, at 549.

39. Critics have suggested that the modern need for any criminal sanctions for public nuisance is less urgent than before the modern statutory era. See Spencer, *Critical Examination*, *supra* note 26, at 76 (British commentator J.R. Spencer observing that "[o]ver the last hundred years . . . virtually the entire area traditionally the province of public nuisance prosecutions has been comprehensively covered by statute.").

40. See RODGERS, AIR & WATER, *supra* note 8, § 2.2, at 35 ("Virtually every state has a sizable list of statutes branding as public nuisance a wide range of activities."); see also Bradford W. Wyche, *A Guide to the Common Law of Nuisance in South Carolina*, 45 S.C. L. REV. 337, 339 (1994); Harleston & Harleston, *supra* note 4, at 381 (state "[s]tatutes may define and prohibit nuisances in general terms or define specific activities as public nuisances"). When many states modernized their penal codes in the 1960s and 1970s to add specificity to the proscribed behavior, they significantly narrowed the scope of some public nuisance statutes. See *Marsland v. Pang*, 5 Haw. App. 463, 476 (Haw. App. 1985) (holding that court had equitable powers to enjoin nuisance under general common law even though statute no longer provided general statutory authority for abatement). See, e.g., H.R.S. Ch. 712 (Offenses Against Public Health and Morals) and § 712-1271 (2000). Hawaii's nuisance statute allows government, individuals, or organizations to enforce the statute, but applies only to prostitution, obscenity, gambling, and drugs/intoxicating compounds as defined in the Chapter. *Id.*

41. See, e.g., 4 BLACKSTONE, COMMENTARIES, *supra* note 26, at *168 ("The making and selling of *fire-works* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, by statute . . .").

the governmental public plaintiff,⁴² some states also allow private citizens to bring civil abatement actions under their common nuisance statutes.⁴³

The American states also inherited from English law *civil* or common-law public nuisance, enforceable both by the government and by qualified private plaintiffs. By the sixteenth century, the English courts had begun to recognize civil actions brought by private plaintiffs for "crimes" against the public.⁴⁴

Historically, the type of conduct proscribed by all three kinds of nuisance has been difficult to define. Numerous scholars have expressed exasperation in their attempts to describe the boundaries of this "mongrel" tort.⁴⁵ Medieval English cases

42. Prosser, *Private Action*, *supra* note 8, at 999 (calling state enforcement "the normal remedy" for public nuisance).

43. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 339, 413 (1942) [hereinafter Prosser, *Nuisance Without Fault*] ("There are Texas statutes, however, of a type rather uncommon elsewhere, which authorize a suit by any private citizen to enjoin the continuance of certain designated public nuisances such as bawdy-houses and gaming resorts, without proof of any damage whatever to himself."); Bryson & Macbeth, *supra* note 5, at 279 & n.185 (listing six states with public nuisance statutes that allow citizens to bring the action); Rothstein, *supra* note 8, at 465 (citing eight states with statutes allowing private actions for public nuisance, most enacted between 1969 and 1974). The statutory grant of the right to bring a citizens suit for public nuisance is, of course, one possible solution to the special injury rule paradox (particularly attractive, perhaps, because it addresses concerns about interference with state sovereignty). Few states, however, have such statutes, and some of the ones that do allow broad standing limit their use narrowly to "social vices." See, e.g., H.R.S. § 712-7210 (suit to abate place of prostitution, obscenity, gambling, drugs can be brought by "any citizen of the State residing within such county . . . or any organization"). Use of such statutes for environmental protection is not common. *But see* Kirk v. U.S. Sugar Co., 726 So. 2d 822 (Fla. App. 1999) (allowing a plaintiff's lawsuit against a sugar company's pollution under Florida's public nuisance statute, which eliminated the need to show special injury).

44. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 551. See *infra* Part II.B, discussing the English Cases. The view that public nuisance actions brought by private plaintiffs are inherently criminal in nature has been deeply embedded in the common law and the torts literature but was rejected by the American Law Institute in the 1970s. See Abrams & Washington, *supra* note 4, at 366 (noting that the concept of public nuisance's criminal nature today is based on "repetition of obsolete black letter law in scholarly works and court dicta," and "[a]lthough some courts still define public nuisance as a crime, the concept of criminality ultimately was dropped from the *Restatement (Second)*"); cf. Prosser, *Private Action*, *supra* note 8, at 999 (reiterating that public nuisance is "a species of catch-all low-grade criminal offense"). Criminal public nuisance is now "exclusively a creature of statute" not the common law. RODGERS, AIR & WATER, *supra* note 8, § 2.2, at 35; see also Abrams & Washington, *supra* note 4, at 365 (explaining that public nuisance as a crime does not exist in modern American common law, but only by statute).

45. See Newark, *supra* note 24, at 480 ("the subject as commonly taught comprises a mass of material which proves so intractable to definition and analysis that it immediately betrays its mongrel origins"); see also Jeremiah Smith, *Torts Without Particular Names*, 69 U. PENN. L. REV. 91, 110-12 (1921) (noting that the term "private nuisance" has been "severely criticized" as "too broad, too general"); Spencer,

focused on purprestures—such as obstructions of the highways and waterways—but, over time, “the principle had been extended to cover such other invasions of general public rights as interference with a market, smoke from a lime-pit, and diversion of water from a mill.”⁴⁶ The term “nuisance” came to “mean[] all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”⁴⁷

Public nuisance has been particularly hard to define. Prosser’s oft-repeated colorful list includes “obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law,”⁴⁸ as well as rights highly valued in modern society—from public decency to quiet neighborhoods, pollution-free air,⁴⁹ and clean streams.⁵⁰ In the modern environmental context, private plaintiffs have used public nuisance to challenge leather tanning operations, parks in disrepair, noisy campers, shopping centers, helicopters, buildings, polluting vehicles, plants, airports, dumps, and interference with viewplanes and sunlight.⁵¹ Although this “amorphous and mutable quality seems to vex scholars more than it does the courts,”⁵² it does help explain courts’ tendency to enforce strictly the ostensibly bright-line special injury rule, as a way to clamp down on public nuisance claims that are often quite different from the normal run of tort cases.

Critical Examination, *supra* note 26, at 56 (calling nuisance “a chameleon word, with a meaning technical or general, depending on who is using it when and where”); PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 550 (noting “a rather astonishing lack of any consideration of [the meaning and limits] of nuisance on the part of the legal writers”).

46. Prosser, *Private Action*, *supra* note 8, at 998; *see also* Prosser, *Nuisance Without Fault*, *supra* note 43, at 420 (“A nuisance in brief . . . may be merely the right thing in the wrong place, – like a pig in the parlor instead of the barnyard.” (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926))).

47. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 549. Because the range of rights it protects is so hard to define, Prosser called it “unhappily . . . a sort of legal garbage can.” Prosser, *Nuisance Without Fault*, *supra* note 43, at 410.

48. Prosser, *Private Action*, *supra* note 8, at 998.

49. Air pollution was considered a nuisance as early as 1611, when the King’s Bench decided the frequently cited case of William Aldred, who claimed a hogstye near his house “corrupted” and “infected” the air. *William Aldred’s Case*, 77 Eng. Rep. 816 (K.B. 1611).

50. *See, e.g.*, FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 639 n.(a) (2d ed. 1861).

51. *See* RODGERS, *AIR & WATER*, *supra* note 8, § 21, at 29-30.

52. Harleston & Harleston, *supra* note 4, at 383. The authors concluded that “this adaptability explains nuisance law’s survival in environmental litigation.” *Id.*

The now classic black-letter definition of public nuisance is found in Prosser's *Handbook*: "A public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all."⁵³ The key element to a *public* nuisance claim, in contrast to a *private* nuisance claim, then, is that the annoyance, inconvenience, or injury must be to a *public* right or interest (e.g., a public road or beach), not just a private one.⁵⁴

2. Unique Aspects of the Three Types of Nuisance Actions

Although amorphous in definition, all nuisance actions have in common three important doctrinal aspects that provide unique scope to their application by the courts: substantiality of interference, unreasonableness of the defendant's conduct, and equitable flexibility.

The first important limitation on nuisance actions imposed by the common law is that the defendant's interference with the plaintiff's right, public or private, must be "substantial" or, in equity, threaten to be substantial.⁵⁵ The standard for distinguishing a substantial or "material" interference from a mere annoyance is (or, at least, according to Prosser, should be) a "community standard": "definite offensiveness, inconvenience or annoyance to the normal person in the community."⁵⁶ The

53. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 566; see RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821B(1) ("A public nuisance is an unreasonable interference with a right common to the general public."); see *id.* § 821B(2) (Interference with a public right is unreasonable when it involves "public health, the public safety, the public peace, the public comfort, or the public convenience").

54. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 568. The line between a public and private right is often blurry, and some have severely criticized public nuisance's sloppy inclusion of what are essentially personal injury negligence cases under its broad sweep. See Newark, *supra* note 24, at 489 (arguing personal injury cases should not be "converted" into public nuisance suits); FLEMING, *supra* note 8, at 380 (allowing personal injury claims under nuisance "blur[s] the boundaries"); Spencer, *Critical Examination*, *supra* note 26, at 82-83 (criticizing overlap between negligence and nuisance); Gilbert Kodilinye, *Standing to Sue in Private Nuisance*, 9 LEG. STUD. 284, 289-90 (1989) (noting that English courts disallow such blurred claims but Canadian courts do not). While I agree with Newark that allowing purely personal injury claims to masquerade as public nuisance claims is inappropriate, a more sound basis for the objection is that personal injury does not reflect injury to the community (see *infra* Part IV), rather than that public nuisance is concerned only with the protection of land values, which is not true. The current special injury rule encourages the overlap, while the actual community injury rule proposed in this Article would better separate these distinct torts.

55. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 557.

56. *Id.* at 558; see Prosser, *Private Action*, *supra* note 8, at 1002 (stating that interference must be "a substantial one, objectionable to the ordinary reasonable

nuisance must affect "the ordinary comfort of human existence as understood by the American people in their present state of enlightenment."⁵⁷ The term excludes "trifles," "petty annoyances," and "disturbances of everyday life."⁵⁸

The second important judicial limitation on nuisance is that the defendant's interference with the public right must be unreasonable. This element requires balancing clashing individual and societal interests, using "the familiar process of weighing the gravity and probability of the risk against the utility" of the activity.⁵⁹ Unlike most torts, where a key issue is the nature of defendant's mental state, the core issue in many, if not most, public or private nuisance cases is the substantiality of the interference caused by the invasion of plaintiff's interest,⁶⁰ which naturally involves the "ultimate question of 'reasonable use.'"⁶¹ This element is often highly contested and the subject of much "scholarly discourse."⁶² Ultimately, the reasonableness test allows more extensive judicial control over the otherwise very broad reach of nuisance lawsuits and "reduce[s] the scope of the nuisance doctrine, enabling courts to find that certain

man"). *But see* RODGERS, AIR & WATER, *supra* note 8, § 2.5, at 49-50 (severely criticizing the objective standard for failing to protect the "elderly, isolated, and physically vulnerable").

57. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 558; *see also* HILLIARD, *supra* note 50, at 631 ("Is the inconvenience more than fanciful, or one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to the plain, sober, and simple notions among the English people?"). To determine "substantial interference," courts may also consider whether the nuisance is repetitious or permanent, or only temporary. Newark, *supra* note 24, at 488 ("there are plenty of dicta . . . to support the view that true nuisance must have some permanence about it"); PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 561 (stating that the consideration of continuous or recurrent objectionable behavior is a factor, though not determinative).

58. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 558. Courts seem to have had little trouble weeding out cases involving trivial injuries. Prosser, *Private Action*, *supra* note 8, at 1007 (courts' "rejection of the trivial has been especially marked in the decisions"); 1 JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF TORTS WITH NOTES, AND A SUMMARY OF PRINCIPLES 712 n.1 (3d ed. 1912) (citing English cases where courts weeded out "sentimental, speculative, trivial discomfort or annoyance").

59. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 561-62. *See also* RESTATEMENT (FIRST) ON TORTS, § 826 (1939) (stating the utility test). The utility test represents a judicial attempt to control the potentially "disproportionate consequences of injunctive relief." *See* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 780 (1986).

60. Prosser, *Private Action*, *supra* note 8, at 1004; *see* FLEMING, *supra* note 8, at 383-84.

61. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 562; *see* Prosser, *Private Action*, *supra* note 8, at 1003 (discussing the reasonableness requirement).

62. Abrams & Washington, *supra* note 4, at 375 & n.100.

interferences with the use and enjoyment of land [are] not actionable."⁶³

Thirdly, nuisance is also unusual among the common law torts other than trespass because of the potential for broad judicial discretion and control over remedies, which include money damages and potent equitable relief, such as injunctions and abatement. Damages recovered in nuisance cases include the typical range of losses recognized in tort, such as the lost value attached to use or enjoyment of the land, actual crop loss, and injury to health.⁶⁴ Damages may also include economic loss.⁶⁵ What makes nuisance perhaps most distinctive in tort law, however, is the availability of equitable relief as a long-standing remedy for both private and public nuisance.⁶⁶ Once

63. Lewin, *supra* note 59, at 780. *But see* RODGERS, AIR & WATER, *supra* note 8, § 2.6, at 62-64. Some activities have, traditionally, been considered nuisances "per se" because the activity is harmful regardless of operational, location, or other defenses. *Id.* § 2.5, at 59. *Contra* PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 563-65 (rejecting concept of "absolute" or "per se" nuisance as a "half-developed notion" with "little modern justification").

64. *See* PROSSER, HANDBOOK, *supra* note 8, § 74, at 588 (discussing the range of damages available).

65. *See* Prosser, *Private Action*, *supra* note 8, at 1013 (noting that the "earliest recognition that pecuniary loss to plaintiff might be particular damage" was *Hart v. Bassett*, discussed *infra* Part II.B); *see also* Spencer, *Critical Examination*, *supra* note 26, at 74 (noting that in "most" of the earliest public nuisance cases brought by private plaintiffs, the damages sought were for purely economic loss); FLEMING, TORTS, *supra* note 8, at 381 n.20 (noting that economic losses are recoverable in public nuisance in contrast to negligence rule barring such recovery); RODGERS, AIR & WATER, *supra* note 8, at 588 (noting potential recovery of business income). The nuisance exception to the economic loss rule may be a perverse early product of the special injury rule—that is, economic losses provide a convenient and compelling way to show "unique" and substantial injury (*see infra* Part II.B). The exception, however, has prompted criticism. *See* Spencer, *Critical Examination*, *supra* note 26, at 74 (recognizing that this unique advantage public nuisance offers to private plaintiffs—allowing the recovery of purely economic loss, when this type of damages is not allowed to be recovered for other torts, provides another reason for the abolition of this cause of action). To add to the doctrinal complexity, subjecting this exception to the economic loss rule to the different-in-kind test has prompted courts to disallow recovery of otherwise cognizable economic losses where the economic injury is widespread, *see supra* Part I.B.3 (*Nebraska Innkeepers* case). The unfairness of that result has prompted California and some federal circuits to carve out the "commercial fishers" exception to the exception. *See* Part I.B.1 (discussing *Exxon Valdez* cases).

66. *See* PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 74, at 589 (explaining that the equitable remedy was established in eighteenth century English cases). *See also* Spencer, *Critical Examination*, *supra* note 26, at 66 ("It seems that people first began to seek injunctions in cases of public (as against private) nuisance in the late eighteenth and early nineteenth century."); Lewin, *supra* note 59, at 779 n.23 (equity jurisdiction to abate private nuisance in America "was well established long before Declaration of Independence").

they determine injunctive relief is appropriate,⁶⁷ courts expressly engage in a balancing of the parties' and the public's interests to determine the equitable remedies.⁶⁸ Because damages are rarely adequate to remedy the often irreparable injuries to private property or to the public commons posed by a substantial and unreasonable nuisances, nuisance cases are particularly well-suited for equitable relief.⁶⁹ Not surprisingly, according to Prosser, "the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damage."⁷⁰ Public nuisance also allows the unique remedy of self-help or "abatement."⁷¹

3. *The Uniqueness of the Public Nuisance Cause of Action*

Public nuisance offers plaintiffs several important strategic advantages. Its primary advantage is a more direct focus on the merits—the existence of the nuisance, the injury, and the appropriate remedy—than is available in many statutory cases, where the focus is often on procedure or violations of permits or standards.⁷² Moreover, public nuisance gives plaintiffs the

67. The usual prerequisite to finding that injunctive relief is appropriate is that the plaintiff has no adequate remedy at law, that is, that money damages are inadequate. See Maloney, *supra* note 6, at 147.

68. RODGERS, AIR & WATER, *supra* note 8, § 2.6, at 65.

69. See PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 74, at 589; see also RODGERS, AIR & WATER, *supra* note 8, § 2.6, at 67. For a thorough critique of the economic perspective on the efficiency of relief in nuisance actions, see Lewin, *supra* note 59, at 785-801. For a law and economics analysis comparing damages and injunctive remedies for nuisance, see A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1111 (1980).

70. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 555. See also RODGERS, AIR & WATER, *supra* note 8, § 2.5, at 56-57 (discussing "anticipatory nuisance"). The importance of equitable relief in public nuisance cases underscores its close relationship to public law, discussed further in Part V.B.2, *infra*.

71. Abatement is a historical remedy for nuisance. See McRae, *supra* note 26, at 33; Lewin, *supra* note 59, at 779 (1986) (assize of nuisance allowed for abatement); FIFOOT, *supra* note 32, at 9 ("The period of self-help . . . was limited to four days."); PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 74, at 592 (stating that self help must be reasonable force used in a reasonable manner). The remedy is still recognized today. Rothstein, *supra* note 8, at 455.

72. A successful lawsuit under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), for example, results in an appropriate Environmental Assessment or Impact Statement and injunctive relief to maintain the status quo until the process is completed. Once the proper document is done, NEPA provides an unhappy citizen little leverage for challenging the agency's substantive decision. See Lawlor, *supra* note 5, at 668 (unlike NEPA, public nuisance allows attack on the merits).

opportunity to obtain damages⁷³ and injunctive relief,⁷⁴ lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion,⁷⁵ avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates a fault requirement, and circumvents any pre-suit notice requirement.⁷⁶

Given that federal and state environmental statutes are never likely to form a seamless web of environmental protection and that national political shifts can poke huge holes in the web, there will always be an important practical role for public nuisance.⁷⁷ Public nuisance also plays an important social role in vindicating community values by protecting "the basics of human existence (health, abode, the right to be left alone)."⁷⁸ Moreover, public nuisance is the judicial tool designed to reconcile conflicts created by the social and environmental externalities of land use. Thus, by "enforcing reciprocity . . . nuisance law expresses deeply held preferences of the human species."⁷⁹ Public nuisance can also enhance economic efficiency by forcing cost-internalization.⁸⁰ As a remedy particularly well

73. Money damages are always available in tort cases but are not allowed in environmental citizens suits. Maloney, *supra* note 6, at 145; Wyche, *supra* note 40, at 338 n.15 ("Although many [environmental] statutes allow 'citizen suits' against violators, the citizens who prevail will secure monetary relief only for their attorneys and the government.")

74. See, e.g., Tom Kuhnle, Note, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 221-23 (1996) (describing advantages, including greater prospects of damages and access to injunctive relief, of public nuisance cases over CERCLA for private landowner plaintiffs in hazardous waste contamination cases).

75. RODGERS, AIR & WATER, *supra* note 8, § 2.2, at 33 ("the defenses of prescriptive rights, estoppel, laches, and the like are unavailable if the conduct at issue is a public nuisance"); Comment, *Public as Plaintiff*, *supra* note 5, at 527 ("while federal citizens suits have statutes of limitations of five years, public nuisances have no such limitations since laches and prescriptive easements do not run against the public"). See also RESTATEMENT (SECOND) OF TORTS § 821C cmt. e, at 34 (Tentative Draft No. 15, 1969) [hereinafter Tentative Draft No. 15] ("One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations, and laches do not run against the public right, even when the action is brought by a private person for particular harm.")

76. The typical notice requirement in federal citizen suit litigation is sixty days. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b) (1994).

77. Maloney, *supra* note 6, at 163.

78. RODGERS, AIR & WATER, *supra* note 8, § 2.1, at 30-31.

79. *Id.* § 1.1, at 4.

80. Note, *Public Watchdog*, *supra* note 4, at 1745 (explaining that damages not only compensate and deter, but force industries to bear the external costs of their polluting activities).

suited for "localized" problems, it has "contributed consistently to the just resolution of neighborhood environmental conflict."⁸¹

In short, the public nuisance cause of action brought by a private plaintiff is a bizarre hybrid tort—it combines a collection of characteristics unique among torts, including substantiality, fault-free liability, balancing/unreasonableness, economic loss recovery, and injunctive relief, with some strategic advantages over statutory environmental law remedies. Although public nuisance is a broad and flexible cause of action with great promise as a remedy for community injury, the following illustrations show that American courts have used the strict different-in-kind test as an unduly rigid gatekeeper to control broad access to this powerful tort.

B. The High Barrier Posed By the Special Injury Rule: Three Illustrations

This section illustrates the special injury rule's high barrier to judicial access. Subsection One reviews how courts applied the rule to bar Alaska Natives' claims for damage to their subsistence fishing practices caused by the 1989 *Exxon-Valdez* oil spill. Subsection Two evaluates the contrasting results in two 1970s beach access cases that turned on the special injury rule—one in Florida and another in Hawai'i. In subsection Three, the use of the rule by defendants to fend off two communities' claims of perceived threats to their welfare in the 1980s—one from widespread business losses and another from a large homeless shelter—demonstrates the limits on the continuing utility of the tort imposed by the special injury rule. These three illustrations suggest that the special injury rule remains alive and well and that the judiciary is continuing to bar plaintiffs' access in a broad range of cases, even where the courts acknowledge that injury exists and that the application of the rule may be unjust.

1. The Exxon-Valdez Oil Spill: Differential Treatment of Recreational, Cultural, and Commercial Fishing Claims

The massive eleven-million gallon *Exxon-Valdez* oil spill in Prince William Sound, Alaska in 1989 contaminated thousands of miles of Alaskan waters and beaches, causing untold environmental, economic, and cultural damage to Alaska

81. RODGERS, AIR & WATER, *supra* note 8, § 2.1, at 33.

residents.⁸² The largest oil spill in North American history prompted a similarly large number of lawsuits,⁸³ including civil litigation by the State of Alaska and the federal government that resulted in a complex consent decree for natural resources damages that totaled over \$1 billion.⁸⁴ Injuries to sports fishers (for damage to their recreational activities), to Alaska Natives (for damage to their subsistence fishing), and to commercial fishers (for damages to their livelihood), however, were not included directly within the government settlement.⁸⁵ Using public nuisance theory and other causes of action, these three groups pursued their claims outside of the governmental litigation.

In the first suit, the Alaska Sports Fishing Association and several individuals filed a public nuisance class action complaint, alleging injuries totaling \$31 million to over 130,000 persons in the class who used the affected area for sport recreation.⁸⁶ In 1993, the district court overseeing the *Exxon Valdez* cases reaffirmed the traditional special injury rule and different-in-kind test for damages claims and dismissed the sport fishers' claims because they were "common to the general

82. Comment, *Exxon Valdez*, *supra* note 8, at 703.

83. Comment, *Public as Plaintiff*, *supra* note 5, at 511 & n.1 (noting over 1300 claims against Exxon). Numerous groups and individuals also sued Exxon. Captain Hazelwood, and others for a variety of injuries. See Comment, *Exxon Valdez*, *supra* note 8, at 727 n.4 (listing cases) & 703 (by 1989, Exxon faced over 153 lawsuits, including 58 class actions, had already paid more than \$91 million to fishers and others who lost income and had spent more than \$1 billion on cleanup, an amount expected to double).

84. See *In re Exxon Valdez*, 1993 WL 735037, at *2-*3 (D. Alaska July 8, 1993) (discussing related cases brought by governments under federal environmental statutes); *In re Exxon Valdez*, 1994 WL 182856, at *4 (D. Alaska, Mar. 23, 1994) (describing \$1 billion trust).

85. A variety of environmental groups filed related actions alleging both common law claims and statutory violations. A lawsuit filed in 1989 by environmental groups the National Wildlife Federation, the Wildlife Federation of Alaska, and Natural Resources Defense Council included a mixture of common law and statutory claims for injuries to the rights of the groups and their members to use and enjoy the affected areas for camping, hunting, fishing, and conservation purposes. See Comment, *Public as Plaintiff*, *supra* note 5, at 511-19 (predicting the groups' lawsuit would fail because of the special injury rule, unless the plaintiffs could convince the court to adopt the *Restatement's* modified rule for equitable actions). The Sierra Club and other national environmental groups filed a parallel statutory lawsuit under the federal Clean Water Act, Section 505(a), and the Resource Conservation and Recovery Act, Section 7002(a). *Id.* at 521. However, these statutory claims could result only in civil penalties and injunctive relief, not damages, and suffered from other procedural vulnerabilities, even if they could show federal standing. *Id.* at 521-26.

86. *In re Exxon Valdez*, 1993 WL 735037, at *1, *aff'd on other grounds*, Alaska Sports Fishing Ass'n v. Exxon Corp., 34 F.2d 769 (9th Cir. 1994) (holding that U.S. and Alaska were proper trustees for recovery of natural resources damages under federal statutes and that the consent decree barred private claims for lost recreational use under *res judicata*).

public."⁸⁷ Concerned about the breadth of the class and the potential for duplication of claims already paid by Exxon to the government,⁸⁸ the court hinged its decision on a classic application of the special injury rule for public nuisance. The court ruled that the "only losses the governments did not settle and receive damage for are those that accrued to individuals that are different in kind and not just degree from those suffered by the public."⁸⁹ The sport fishers had not alleged unique damage, such as soiled fishing gear, and, therefore, the court barred their claims.⁹⁰

One year later, the same court rendered a similar decision applying the traditional special injury rule and strict different-in-kind test to a claim by Alaska Natives for loss of cultural and subsistence rights that the governments' civil suits also did not cover. In the "Alaska Natives" case, the plaintiffs brought a class action lawsuit on behalf of 3,455 Alaska Natives for injury to their non-economic "subsistence way of life" caused by the oil spill.⁹¹ The court granted judgment in their favor on certain claims for the commercial value of their fishing losses,⁹² but the plaintiffs sought additional compensation for their distinct cultural losses.⁹³ The Alaska Natives' subsistence claims, based on federal maritime law, faltered not on whether the Alaska Natives had cognizable subsistence fishing and gathering rights,⁹⁴ but rather on the technical standing barrier posed by

87. *Id.* at *2.

88. *See id.* at *2 & nn. 20 & 24.

89. *Id.* at *4.

90. While the court itself declined to use the term "unique," *see id.* at *4 n.21, its strict application of the different-in-kind rule amounted to such a requirement, and the same court later used the term "unique" in dismissing the subsistence claims by the Alaska Natives. *In re Exxon Valdez*, 1994 WL 182856, at *2 (D. Alaska, Mar. 23, 1994).

91. *Alaska Natives Class v. Exxon Corp.*, 104 F.3d 1196, 1196-97 (9th Cir. 1997). The class in the case, based on maritime public nuisance law, was ultimately defined to include 3,455 individual Alaska Natives and excluded Native villages and government entities. *Id.*

92. *Id.* at 1197-98 (finding the natives' economic claims satisfied the special injury rule, leading to settlement of the harvest claims).

93. The "subsistence" claim was based on the Alaska Natives' dependence upon natural resources, which "reflects a personal, economic, psychological, social, cultural, communal, and religious form of daily living." *Id.* The Alaska Natives could not bring a *private* nuisance lawsuit because they had no possessory interest in the lands affected, which were either governmental or Native corporations' lands. *In re Exxon Valdez*, 1994 WL 182856, at *3.

94. Although on appeal the Ninth Circuit Court of Appeals doubted whether the subsistence claims constituted "compensable injury," *Alaska Natives Class*, 104 F.3d at 1198, the issue was not before the appellate court, and the district court had expressed no difficulty with recognizing the rights at issue, observing that they were

the traditional doctrine.⁹⁵ Even Exxon acknowledged that the plaintiffs' subsistence lifestyle rights were legally recognized, but argued that "all Alaskans have the same right,"⁹⁶ and, therefore, under the special injury rule, the injury was (paradoxically) too widespread, defeating the Alaska Natives' claim. The district court granted summary judgment to Exxon, finding that, despite cultural differences between Alaska Natives and other rural Alaskans, "both had suffered injury of the same kind."⁹⁷

In 1997, the Ninth Circuit Court of Appeals affirmed the dismissal of the Alaska Natives' claims. Although admitting that "the oil spill affected the communal life of Alaska Natives,"⁹⁸ acknowledging that "the oil spill may have affected Alaska Natives more severely than other members of the public,"⁹⁹ and even agreeing that the injury was "potentially different in degree than that suffered by other Alaskans," the court nonetheless found it "was not different in kind."¹⁰⁰ The appellate court agreed with the court below that subsistence rights were "shared by all Alaskans" and therefore that damage to those rights did not constitute a "special injury."¹⁰¹

In contrast to its dismissal of the sports fishers' recreational claims and the Alaska Natives' subsistence claims, the district court allowed a similar third set of claims by commercial fishers, despite widespread shared injury, by applying the Ninth Circuit's

based, in part, on the Alaska National Interest Lands Conservation Act, which expressly recognized that subsistence use "is essential to Native physical, economic, traditional, and cultural existence." *In re Exxon Valdez*, 1994 WL 182856, at *2. Yet, the district court doubted that the cultural deprivation claim was individually cognizable. *Id.* at *5. Rather than address the merits of the claim, however, the district court relied on the special injury rule to cut short the case, finding that the rule essentially required "unique" injury, *id.*, and therefore the Act's parallel recognition of subsistence rights of all rural Alaskans, including non-Natives, defeated the Natives' claims. *Id.* at *2.

95. Plaintiffs in the Alaska Natives case apparently conceded that the special injury rule applied to their claims. *See In Re Exxon Valdez*, 1994 WL 182856, at *1. They had little choice because the same court had earlier applied the rule to the claims of the sports fishers, *see supra* notes 86 - 90 and accompanying text, the rule is firmly entrenched in the United States, *see infra* Part III, and because even the RESTATEMENT (SECOND) ON TORTS' modification of the rule in Section 821C(2)(c), *see infra* notes 471 - 475 and accompanying text, does not apply to claims for damages, only to injunctive relief cases. *Alaska Natives Class*, 104 F.3d at 1198 (holding that the *Restatement* rule for damages precludes the plaintiffs' claim).

96. *In re Exxon Valdez*, 1994 WL 182856, at *2.

97. *Id.* at *4.

98. *Alaska Natives Class*, 104 F.3d at 1198.

99. *Id.*

100. *Id.*

101. *Id.* For a discussion of the substantive merits of the Alaska Natives' claims, *see Comment, Exxon Valdez, supra* note 8, at 719-27.

"narrow and limited"¹⁰² "commercial fishers' exception"¹⁰³ to the economic loss rule.¹⁰⁴ The court allowed the commercial fishers to proceed to the jury on claims for lost profits due to sockeye losses in the Kenai River, price diminishment due to perceived lack of quality, and for losses due to actually oiled or closed fishing areas, but denied claims for reduced permit and vessel values and for losses in areas not contaminated or closed.¹⁰⁵

The unequal application of the traditional special injury rule and the different-in-kind test in these three related *Exxon Valdez* fishing cases illustrates the inconsistency with which modern courts apply the doctrine to bar claims of community injury. The court barred the recreational fishers and Native Alaskan plaintiffs—who represented actually injured communities—from ever getting to the merits of their claims for the ironic reason that the broader community was also similarly injured. In both cases, the district court gave substantial credence to the merits of the plaintiffs' claims, and the court's strict ruling on the public nuisance special injury rule diverged substantially from Alaska's "very generous standing rules" under its own state law.¹⁰⁶

102. *In re Exxon Valdez*, 1994 WL 182856, at *6.

103. *See id.* at *5 -*10. The district court based its ruling on *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974), which allowed claims of commercial fishers whose fisheries were contaminated and closed by the Santa Barbara oil spill, carving out a specific exception to the traditional economic loss rule in federal maritime cases that was established in the seminal case of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (an injured person must have suffered direct physical harm to recover economic losses). The Fourth, Fifth, Ninth, and Eleventh Circuits recognize the "commercial fishers' exception." Shay S. Scott, *Combining Environmental Citizens Suits and Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 393-94 (1993); *see also id.* at 393 (explaining that the reason for the "anomaly, according to the courts, is that fishermen were traditional favorites of the court sitting in admiralty" and are therefore "entitled to the full protection of the law, including the right to recover economic losses, despite not having a proprietary interest in uncaught wildlife").

The *Exxon Valdez* district court was so bothered by the doctrinal inconsistency of the commercial fishers' exception that it certified the issue for an appeal, which was never taken. *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991). In response to the *Exxon Valdez* spill, Congress enacted the Oil Pollution and Prevention Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761 (Supp. II 1990). OPA "abrogates the rule in *Robins Dry Dock* and the special injury requirement for standing under the common law tort of public nuisance by providing a private right of action for damages against parties responsible for spilling oil in United States waters or on the shoreline." Scott, *supra*, at 397 (citing 33 U.S.C. § 2702(a)).

104. *See supra* note 65.

105. *In re Exxon Valdez*, 1994 WL 182856, at *6, *7 & *9.

106. Comment, *Public as Plaintiff*, *supra* note 5, at 518 (discussing Alaska decisions that hold a litigant could satisfy the basic adversity requirement by meeting the lesser of either interest-injury standing or citizen-taxpayer standing, and the injury need not be great).

Moreover, the court itself was concerned by the injustice that resulted in carving out an exception to the rule for commercial fishers but not for others suffering similar losses.¹⁰⁷

The Ninth Circuit's affirmation of the denial of the Alaska Natives' claim sparked renewed scholarly criticism of the special injury rule as "outmoded"¹⁰⁸ and "arcane."¹⁰⁹ Yet, even this most recent criticism of the rule—though bringing to light the lack of judicial access for all of those admittedly injured by one of the largest environmental disasters of the twentieth century—will most likely again fall on deaf ears. The recency of the decision, and the Ninth Circuit's strong endorsement of the traditional common law rule, serves fresh notice to observers and practitioners that the special injury rule and the strict different-in-kind test are today still deeply entrenched in American jurisprudence, will continue to restrict the use of public nuisance by injured communities, and may even be gaining new "vitality."¹¹⁰

2. Public Beach Access: Contrasting Results in Florida and Hawai'i

Few public nuisance cases arise from disasters as large as the *Exxon Valdez* oil spill.¹¹¹ Almost all public nuisance cases

107. See *supra* note 103 (discussing court's certification of the issue for appeal).

108. See RODGERS, AIR & WATER, *supra* note 8, at v (Preface, Supp. 1998) ("A decision of the Ninth Circuit has kept alive the outmoded 'special injury' requirement to deny Alaska Native 'subsistence lifestyle' claims arising out of the Exxon Valdez oil spill.").

109. Comment, *Exxon Valdez*, *supra* note 8, at 726 (criticizing the Ninth Circuit's decision as "a lost opportunity to aid the evolution of public nuisance law by eliminating the arguably arcane special injury rule").

110. See RODGERS, AIR & WATER, *supra* note 8, at 8 (Supp. 1998). Since the Ninth Circuit's *Exxon Valdez* decision, approximately twenty state and federal decisions have involved applications of the special injury rule, although none directly rely on that federal decision. See *infra* note 153.

111. The October 2000 "Coldwater Creek" spill of 250 million gallons of coal sludge from a storage lagoon in Kentucky, which devastated a close-knit mountain community and polluted over 100 miles of rivers, is a poignant reminder that large-scale environmental disasters can still occur despite modern environmental regulations. See Peter T. Kilborn, *Coal sludge inundates struggling mountain community*, S.J. MERC. NEWS, Dec. 25, 2000, at 14A (noting that the coal sludge spill was 20 times the volume of Exxon-Valdez). A small local law firm recently filed a state class action lawsuit against the coal company for personal and property damages to over 200 homeowners, including a public nuisance allegation. Telephone Interview with Christy Smith, Law Offices of John Kirk (Pikeville, Kentucky) (May 21, 2001). Oil and chemical spills have often prompted public nuisance claims under federal maritime law. See, e.g., *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), *aff'd*, 559 F.2d 1200 (1st Cir. 1977) (public nuisance claim by fishers, clambers, businesses, and recreational users arising from 100,000 gallon oil spill by tanker in

arise from much smaller, community-based problems that rarely make a blip on the national litigation radar screen. For those individuals and communities involved, however, these cases are vitally important. Public nuisance provides a potential litigation tool that (unlike most statutory remedies) is uniquely able to address smaller-scale community issues that are usually out of reach of federal and state statutes. Two cases from the far-flung coastal reaches of the United States—Florida and Hawai'i—that were brought to preserve public access to community beaches provide dramatically different illustrations of judicial approaches to the special injury rule and help to define the parameters of the debate over modernizing the doctrine.

In the earlier case, *Save Sand Key v. United States Steel Corporation*,¹¹² decided in 1973, the Florida intermediate court of appeals rejected the strict different-in-kind test and allowed community groups' public nuisance claim challenging a private corporation's plans to build condominiums on a sand island. Save Sand Key alleged that U.S. Steel had commenced construction of rental and high-rise apartments as part of a development plan for the island of Sand Key and fenced portions of the area, interfering with the public's rights to use the beach, constituting a purpresture.¹¹³ U.S. Steel moved to dismiss on the basis that Save Sand Key had no right to sue because it did not allege a "special injury differing in kind from injury to the general public."¹¹⁴

The trial court agreed and dismissed Save Sand Key's claim,¹¹⁵ but the intermediate court of appeals reversed,¹¹⁶ boldly rebuffing the special injury rule's different-in-kind test. The

Cosco Bay, Maine); *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981) (public nuisance claims by fishers, seafood businesses, and related businesses arising from massive chemical spill of Kepone into James River and Chesapeake Bay); Louisiana *ex rel. Guste v. M/V Testabank*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) (public nuisance claims brought by fishers and related plaintiffs for injuries resulting from the collision of two ships in the Mississippi River, which caused toxic chemical spill and river closure). As explained above, however, some of these cases fall under the commercial fishers' exception to the rule and, although some have argued that they indicate a new trend toward reformulation of the rule based on an "injury in fact" test and proximate cause principles, *see Hodas, supra* note 5, at 896; Scott, *supra* note 103, at 398, maritime claims have a distinct history from the typical state common law nuisance claim and may not be generalizable.

112. *Save Sand Key v. United States Steel Corp.*, 281 So. 2d 572 (Fla. App. 1973), *rev'd on appeal*, 303 So. 2d 9 (Fla. 1974).

113. *Save Sand Key*, 303 So. 2d at 9-10.

114. *Id.* at 10.

115. *Id.*

116. *Save Sand Key*, 281 So. 2d at 572.

intermediate court held that the community non-profit organization was entitled to bring a public nuisance action against the corporation for its plans to develop a condominium along Sand Key beach if it had directly and personally suffered an injury, whether or not the right or injury was special to its members or was shared in common with the public generally.¹¹⁷ Forging into new legal territory, the intermediate court first found that the special injury rule "serves no valid purpose in the structure of the law and should no longer be a viable expedient to the disposition of these cases."¹¹⁸ Second, it embraced the then-emerging concept of organizational standing in federal administrative law cases¹¹⁹ and rejected the defendant's arguments about potential multiplicity of claims, concluding that the increasing use of the class action mechanism would limit duplicative litigation.¹²⁰

Scholars hailed the decision as the death knell of the traditional doctrine and a welcome alignment of public nuisance law with major new developments in federal standing law.¹²¹ The enthusiasm was short-lived, however. One year later, on appeal, a deeply divided Florida Supreme Court¹²² "quashed" the

117. *Id.*

118. *Save Sand Key*, 303 So. 2d at 11.

119. *Id.* ("a bona fide non-profit organization may sue for and on behalf of some or all of its members who have been or will be directly and personally aggrieved in some manner relating to and within the scope of the interests represented and advanced by such organization."); see Part IV.A (describing the development of federal standing law).

120. By the time of the intermediate court's decision (July 19, 1973), the American Law Institute had adopted, but not yet published as part of the RESTATEMENT (SECOND), the modified special injury rule for public nuisance cases seeking injunctive relief. See *infra* Part IV.B. The court did not mention the proposed new rule, which would have directly bolstered its novel position.

121. See Rothstein, *supra* note 8, at 458, 459 [calling it the "first American jurisdiction to repudiate the special injury rule"]; Comment, *Public as Plaintiff*, *supra* note 5, at 516 ("Florida was the first state to apply the Supreme Court's interest-in-fact test to public nuisance [in *Save Sand Key*], but noting it was later reversed); Note, *Public Nuisance*, *supra* note 8, at 366 ("By refusing to apply inflexible and outdated standards that prevent, rather than promote, an efficient administration of justice, the instant court has demonstrated Florida's expanding judicial desire to allow citizen participation in the resolution of problems that directly affect them, whether individually or in common with the community."); Boger, *supra* note 8, at 379 (commenting that, if the intermediate opinion held up, Florida "would become the first to sanction private action for public nuisance without a showing of special injury").

122. Despite the majority's strong rhetoric, the vote in the Florida Supreme Court was a close 4-3, reflecting the intensity of views over this issue. In his dissent, Judge Ervin strongly supported the concept that citizens should be able to step in when "there is neglect or refusal on the part of public officials . . . to protect . . . rights" for the use and enjoyment of navigable waters, tidelands, and sovereign areas for

intermediate court's decision and chastised it for straying from precedent.¹²³ The majority called the abandonment of the special injury rule "a significant change in the law with which we cannot agree."¹²⁴ Moreover, it forcefully and deliberately retrenched the traditional doctrine: "We adhere resolutely to our [prior] holding[s] relative to the concept of special injury in determining standing."¹²⁵

Due to the Florida Supreme Court's iron-fisted interpretation of the special injury rule and different-in-kind test, Save Sand Key never had the chance to have a hearing on the merits of its claims, right or wrong, that U.S. Steel Co.'s development interfered with community access rights to the beach. Hopes for sparking a revolution in public nuisance doctrine were forcefully dashed, and the traditional doctrine remains the law in Florida today.¹²⁶

Eight years later, the Hawai'i Supreme Court reached the opposite result in a similar beach access case, *Akai v. Olohana*.¹²⁷ In *Akai*, private landowners between Spencer Beach Park and Hapuna Beach Park on the Kona coast of the island of Hawai'i had, since 1954, closed to the public a two-and-a-half mile stretch of beach with ancient trails.¹²⁸ Native Hawaiian William Akai, Jr. spearheaded a class action suit for a variety of

bathing, boating, fishing, and other recreational uses based on "inalienable trust doctrine" principles. *Save Sand Key*, 303 So. 2d at 14. Ervin called the majority's decision "pretexts of one sort or another to favor the private sector, whether on standing to sue or otherwise, over the general public in disputes concerning the general public's traditional rights to enjoy public lands." *Id.*

123. *Save Sand Key*, 303 So. 2d at 13 (citing Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. App.), cert. denied, 200 So. 2d 178 (Fla. 1967) (rejecting the public nuisance claim of an anglers' club seeking to stop fill operations at a Florida key, and holding by way of denying certification that the plaintiffs had failed to satisfy the different-in-kind test)).

124. *Save Sand Key*, 303 So. 2d at 13.

125. *Id.*

126. See Shawn M. Willson, Comment, *Exactng Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws After Dolan v. City of Tigard*, 12 J. LAND USE & ENVTL. L. 303, 338-39 (1997) (noting Florida Supreme Court's strict application of special injury rule).

127. *Akai v. Olohana*, 65 Haw. 383 (Haw. 1982).

128. *Id.* at 384. Another important difference between *Save Sand Key* and *Akai* was the position the States took in each lawsuit. In *Save Sand Key*, the State of Florida dropped out after the local government reached a settlement. Note, *Public Nuisance*, *supra* note 8, at 365. In *Akai*, the State of Hawai'i, though named as a nominal defendant, actually supported the plaintiff's position, "welcom[ing] private actions to complement the State's activities in securing public beach access because the State lacks the resources to pursue vigorously all possible claims." *Akai*, 65 Haw. at 391. The position of the State in each case likely affected the courts' decisions.

state constitutional, statutory, and common law claims, including public nuisance, seeking two classes: a narrower one composed of nearby landowners and residents who sought to use the beach trail and a broader one composed of all other Hawai'i residents who used or were deterred from using the trail.¹²⁹ The trial court certified the class action, and the Hawai'i Supreme Court granted defendants' request for an interlocutory appeal.¹³⁰

The appeal to the Hawai'i Supreme Court focused on the application of the traditional special injury rule to the public nuisance claim. The court recited the traditional formulation of the rule, the strict different-in-kind test, and the oft-repeated tripartite rationale for the rule.¹³¹ Unlike the Florida Supreme Court, however, the Hawai'i Supreme Court decided to follow the "trend in the law. . . away from focusing on whether the injury is shared by the public, to whether the plaintiff was in fact injured."¹³² The court noted that the American Law Institute had just published a rule (Section 821C(2)(c)) that rejected the traditional doctrine in injunctive relief cases where the plaintiff brought either a class action or a citizens suit, in line with developments in federal standing law.¹³³ The court pointed to its own cases that "broadly construed standing in other administrative law cases,"¹³⁴ mentioned the growing recognition of the public trust doctrine,¹³⁵ and concluded "it is unjust to deny members of the public the ability to enforce the public's rights when they are injured."¹³⁶ Any danger from a multiplicity of suits was "greatly alleviated by a proper class action," as a

129. *Id.* at 384-85; *see also id.* at 391-93 (discussing class certification).

130. *Id.* at 385.

131. *Id.* at 386.

132. *Id.* The court specifically cited the United States Supreme Court's liberalization of federal taxpayer standing in *Flast v. Cohen*, 392 U.S. 83 (1968), one of the key cases that spawned the modern federal standing doctrine. *See infra* Part IV.A (discussing *Flast* and subsequent cases).

133. *Akau*, 65 Haw. at 387 n.3. The court also cited the 1974 casenote on the *Save Sand Key* decision (Note, *Public Nuisance*, *supra* note 8), but did not mention the Florida case or its reversal.

134. *Id.* at 387. A year before *Akau*, the Hawai'i Supreme Court had decided what has become the leading Hawai'i case recognizing broad organizational standing, *Life of the Land v. Land Use Commission*, 63 Haw. 166 (1981) (adopting a "personal stake" standard). Like many other states, Hawai'i's state administrative law standing doctrine is *more liberal* than federal standing decisions constrained by Article III. *Akau* is also considered a leading case in Hawai'i that "lower[ed] standing barriers in cases of public interest." *Pele Defense Fund v. Paty*, 73 Haw. 578, 592 (1992) (citing *Akau*).

135. *Akau*, 65 Haw. at 388; *see infra* Part IV.A (discussing Professor Sax's public trust work).

136. *Akau*, 65 Haw. at 388.

judgment would bind "the members who are all those allowed to sue," thus preventing "inconsistent judgments."¹³⁷ Therefore, following the *Restatement* test, the court held that "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action."¹³⁸ The new liberal "injury in fact" test for public nuisance adopted by the court was derived, as the new *Restatement Second* test encouraged, from federal standing law: "a plaintiff has standing if he can demonstrate some injury to a recognized interest such as economic or aesthetic, and is himself among the injured and not merely airing a political or intellectual grievance."¹³⁹

Unlike the Florida Supreme Court in *Save Sand Key*, the Hawai'i Supreme Court in *Akau* allowed the plaintiffs to proceed to a hearing on the merits of their claim.¹⁴⁰ The Florida case represents the rule, however, and *Akau* still stands alone almost twenty years later as the only state court decision expressly to abandon the traditional special injury rule and to adopt the *Restatement* modification. The contrast in judicial philosophies about the proper role of the courts and the adaptability of the common law to changing social needs could not be starker, and these decisions describe well the parameters of the debate over the rule.

3. Community Welfare: Economic Losses and Threats to the Social Fabric

Although commentators' attention has focused on public nuisance in an environmental context, most public nuisance cases arise from situations involving threats to social welfare and business loss. Two contemporary cases, one involving economic losses to a business community and another involving a perceived threat to neighborhood social fabric, demonstrate that, even in cases where a conservative court may be more sympathetic to these types of plaintiffs, courts have applied the traditional doctrine strictly across-the-board to bar claims without regard to the plaintiff's social stripes or the environmental context.

137. *Id.*

138. *Id.* at 388-89.

139. *Id.* at 390.

140. *Id.*

In *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*,¹⁴¹ businesses in South Sioux City, Nebraska, sustained millions of dollars in economic losses¹⁴² when the Siouland Veteran's Memorial Bridge spanning the Missouri River between Iowa and Nebraska was closed because of construction defects. The Iowa Supreme Court held that the businesses could not sustain a public nuisance claim¹⁴³ against the contractor because they had not suffered "special" damages—the economic losses were widespread within the entire community affected by the bridge closure.¹⁴⁴ Although the court acknowledged that the question "is admittedly one of policy," that "recovery may be warranted in some cases," and that "[s]evere pecuniary loss is usually a special type of harm," it held fast to the traditional rule and found that "if a *whole community* suffers such loss, then it becomes a public wrong and the plaintiff cannot recover."¹⁴⁵ Pointing out the paradox of the different-in-kind test, the court noted that, by characterizing their case as a class action on behalf of themselves and "all other owners, operators, and employees" of similarly situated restaurants, bars, motels, and other retail establishments in the affected communities, the plaintiffs directly undermined their ability to argue their damages were "special," thus defeating the public nuisance claim.¹⁴⁶ Ironically, if the plaintiffs had ignored the broader economic losses to the community, they would have had a better chance of success.

In the second social welfare case, a New York community civic association's attempt to obtain a hearing on its public nuisance claims against a newly-opened homeless shelter in its neighborhood was also denied based on the alleged lack of special injury. In *Spring-Gar Community Civic Association, Inc. v.*

141. *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984).

142. The Nebraska Innkeepers Association alleged a total economic loss to the business community of \$65 million, including its motel and restaurant complex called the Marina Inn, and sued on behalf of all other persons in Sioux City and South Sioux City "connected with restaurants, bars, motels and other retail establishments." *Id.* at 125.

143. The plaintiffs apparently alleged the public nuisance theory for the first time on appeal, *id.* at 126, having lost in the trial court on a negligence claim under the "uniformly" accepted tort rule that economic losses are not generally compensable in tort absent physical injury. *Id.*

144. *Id.* at 130.

145. *Id.* (emphasis added).

146. *Id.*

Homes of the Homeless, Inc.,¹⁴⁷ a civic association and nearby residents sought to enjoin a building owner and the City of New York from continuing to use a building that already housed 125 families as a homeless shelter. The court rejected the claim, citing the New York courts' firm adoption of the special injury rule¹⁴⁸ and finding that "plaintiffs have not shown how they would be damaged in a way that is different from the rest of the community."¹⁴⁹ Despite the court's concerns about the social impacts of the large facility in that community,¹⁵⁰ the court declined to hear the civic association's claim.¹⁵¹

Although these are two disparate factual situations, *Nebraska Innkeepers* and *Spring-Gar* both illustrate state courts' continuing reluctance to allow even businesses and civic groups to use public nuisance to redress acknowledged economic and social problems that have or threaten to have widespread adverse impact on local communities.¹⁵² Ironically, in both cases, if the injury had been more limited and isolated, the plaintiffs' chances of success on the public nuisance claim would have

147. *Spring-Gar Community Civic Ass'n, Inc. v. Homes of the Homeless, Inc.*, 516 N.Y.S.2d 399 (Sup. Ct., Queens County 1987).

148. *Id.* at 403. The court relied on the leading case in New York, *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 (App. Div. 1983), a perfect illustration of the kind of public nuisance case that makes courts hesitant to loosen up the traditional doctrine. In *Burns*, two New York City law firms sued on behalf of all professional and business entities in the City against the Transport Workers Union and union officials to recover business losses sustained during an illegal transit strike in 1980. Based on the special injury rule, the *Burns* court denied the claim, finding that the injury was not peculiar but was so general and widespread as to defeat the claim. *Id.* at 334-35. Such claims are problematic because the facts involve a diffuse economic dispute and its infinite ripples, unlike typical nuisance cases that are based on a defendant's localized land-based threat to the health, welfare, or safety of an identifiable community. Although such claims may seem to be bases for objecting to a special injury rule, including this Article's actual community injury proposal, such cases can be appropriately barred by finding that a strike is simply not a nuisance or under the traditional proximate cause analysis. See Hodas, *supra* note 5 (analyzing proximate cause limitations in public nuisance cases).

149. *Spring-Gar Community Civic Ass'n*, 516 N.Y.S.2d at 403.

150. *Id.* at 400-02.

151. See also *Planned Parenthood League of Massachusetts, Inc. v. Bell*, 677 N.E.2d 204 (Mass. 1997) (allowing an abortion clinic, as a representational plaintiff, to use public nuisance theory to obtain an injunction against anti-abortion protestors). Cf. *Armory Park Neighborhood Ass'n v. Episcopal Community Services*, 712 P.2d 914, 918 (Ariz. 1985) (holding that a neighborhood residents' association had standing to sue a shelter that served meals to the indigent under a public nuisance theory because the damage to the use and enjoyment of its members' properties, such as clients trespassing and urinating on lawns, was different-in-kind from harm to the general public).

152. See also *Sears v. Hull*, 961 P.2d 1013, 1018 (Ariz. 1998) (rejecting, under the special injury rule, nearby residents' public nuisance claim against a proposed gaming operation because of the commonality of complaints).

been significantly greater. Thus, the most unrepresentative plaintiffs have the best chance of making a "representative" public nuisance claim. This is particularly problematic considering that the claim at issue is a *public* (not private) nuisance claim—that is, the plaintiffs have a cause of action only because of the actual or threatened injury to *public* (not private) values.

Plaintiffs similar to recreational fishers, Native Alaskans, beach users in Florida, businesses in Nebraska, and community groups in New York continue to feel the draconian impact of the ancient special injury rule and different-in-kind test. So far, the only plaintiffs to convince courts to void the rule are beach users in Hawai'i and commercial fishers in some federal circuits.¹⁵³ Even in cases where courts acknowledge the underlying merits of the plaintiffs' claims, the rule acts as an unfair, technical threshold restriction on court access. For defendants, the rule provides a clean and simple defense to substantial potential liability for widespread community injury. Indeed, as Judge Appleton suggested in 1859, the greater the injury, "the better is the defence."¹⁵⁴ To better understand the doctrinal context for this unfortunate paradox, this Article next examines the historical bases for courts' strict application of the rule, suggesting that the conventional understanding that the strict wording of the rule is justified by ancient case law may well be mistaken.

153. The post-*Exxon Valdez* case law on the special injury rule continues to demonstrate courts' conservative approach to the doctrine. See, e.g., *Bologna v. Kerr-McGee Corp.*, 95 F. Supp. 2d 197 (S.D.N.Y. 2000) (applying New York's strict interpretation of the doctrine but finding response costs for hazardous waste clean-up to be sufficient injury); *Oliver v. AT&T Wireless Serv.*, 90 Cal. Rptr. 2d 491 (Cal. App. 1999) (emphasizing that California law requires application of the different-in-kind test, "not merely different in degree"); *Prescott v. Leaf River Forest Prod., Inc.*, 740 So. 2d 301 (Miss. 1999) (rejecting a public nuisance claim against a pulp mill for lack of special injury); *Lewis v. General Elec. Co.*, 37 F. Supp. 2d 55 (D. Mass. 1999) (finding that the plaintiff's decreased land value was sufficiently different "than that borne by the general public"); *Sears*, 961 P.2d 1013; *K.C. 1986 Ltd. Part. v. Reade Mfrg.*, 33 F. Supp. 2d 1143 (W.D. Mo. 1998) (applying Missouri's strict special injury rule to bar a public nuisance claim in a groundwater contamination case); *Liddle v. Corps of Engineers, U.S. Army*, 981 F. Supp. 544 (M.D. Tenn. 1997) (dismissing neighbors' lawsuit against a YMCA camp for lack of "unique" injury); *Planned Parenthood*, 677 N.E.2d 204. For a summary of special injury case law from 1970 until the 1997 *Exxon Valdez* decision, see *infra* note 535.

154. *Brown v. Watson*, 47 Me. 161, 164 (1859).

II

EXAMINING THE "ANCIENT" SPECIAL INJURY RULE: THE TWISTED HISTORY OF THE DIFFERENT-IN-KIND AND DIFFERENT-IN-DEGREE TESTS

The modern judicial and scholarly view of the special injury rule and different-in-kind test is heavily saddled with the baggage of the supposedly long history of the rule, which is usually traced to sixteenth century English cases. Courts and commentators refer to the origin of the rule and the test as though their age made them truisms beyond discussion. This Article seeks to reinvigorate the modern promise of the public nuisance cause of action by re-examining the twisted history of the different-in-kind and different-in-degree tests. This excavation suggests that not only has the oft-cited seminal "1535 case" been misconstrued, but that it and the cases that followed for the next three hundred years articulated a different-in-degree test and not the more restrictive modern different-in-kind test. Moreover, the different-in-kind test arose not from public nuisance cases but from a line of railroad compensation cases involving different law and policy considerations. If this new interpretation can be brought to light, perhaps judicial minds may be less inclined to adhere to tradition merely for tradition's sake and be more open to a reformulation that solves the paradox of the special injury rule. As Oliver Wendell Holmes commented on the development of the common law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."¹⁵⁵

A. Reinterpreting the Anonymous 1535 Case: Fitzherbert's Hypothetical Horse

Scholarly articles, treatises, and the *Restatement (Second) of Torts* uniformly point to an "anonymous" King's Bench decision in 1535¹⁵⁶ as the seminal case supporting the special injury rule, the different-in-kind test, and the familiar rationale.¹⁵⁷ A close

155. Holmes, *supra* note 23, at 469.

156. Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535).

157. See, e.g., 3 BLACKSTONE, COMMENTARIES, *supra* note 26, at *220 (using the facts and dicta of the 1535 case, without citation); FLEMING, *supra* note 8, at 380 n.8 (citing the 1535 case); 8 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 424 (2d ed. 1937) (using the erroneous date of 1536 for the case); FIFOOT, *supra* note 32, at 98; RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821C cmt. a ("The first recorded case permitting a private action in tort was decided in 1536."); PROSSER, HANDBOOK

examination of that case suggests, however, that it may have been misinterpreted in two important ways. First, the famous "holding" of the case is dictum, based on a hypothetical posited by a dissenting judge. Second, even this dictum was later misconstrued as supporting the more restrictive different-in-kind test instead of the different-in-degree test, arguably setting legal doctrine on the wrong path for the past 450 years.¹⁵⁸

The reported facts of the 1535 case decided by the King's Bench are sparse, and the opinion itself is only three paragraphs long.¹⁵⁹ The unnamed plaintiff seeking the writ *sur son cas* (on his case) alleged that the defendant had obstructed the King's highway, in an undisclosed manner, so as to prevent the plaintiff from traveling from his house to his fields. Only two justices' opinions are reported: Chief Justice Baldwin's majority opinion and Justice Fitzherbert's dissent. Baldwin concluded, in a one-sentence opinion that appears to be the holding,¹⁶⁰ that the

(1st ed. 1941), *supra* note 8, § 72, at 569-70 ("Tort liability for public nuisance seems to have originated in 1536, when it was first held that the action would lie if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance. This qualification has persisted, and it is uniformly held . . ."). Prosser, *Private Action*, *supra* note 8, at 1005 ("The break away from [the position that public nuisance could only be remediated by the King] came in an anonymous case in the yearbooks of 1536."); *Presentation of Restatement of the Law, Second, Torts, Tentative Draft No. 15*, 46 A.L.I. PROC. 267, 284-85 (1969) (citing case); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 90, at 646 & n.37 (5th ed. 1984) [hereinafter PROSSER & KEETON] ("Tort liability for public nuisance originated in an anonymous case in 1536 . . ."). Cf. Smith, *Private Action*, *supra* note 8, at 142, 142-43 & n.65 (stating that the 1535 case was "not . . . entitled to great weight" (emphasis added)).

158. See Newark, *supra* note 24, at 483-85 (calling the 1535 case "the case which set the law of nuisance on the wrong track," because it allowed a personal injury action under the guise of nuisance, which he called "heresy," a different criticism than the one raised in this Article).

159. The translation history of this case creates some interpretational difficulties. The Yearbook version is written in fractured French and Latin. See Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535). The earliest translation in America appears to be in Jeremiah Smith's 1915 article. Smith, *Private Action*, *supra* note 8, at 142 n.65. William Holdsworth then published a partial translation in his 1925 treatise *History of English Law*. 8 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 424 & n.6 (Methuen & Co. Ltd., n.d.) (1st ed. 1925). Two other translations appeared in 1949: C.H.S. Fifoot (Hertford College, Oxford), in his *History and Sources of the Common Law: Tort and Contract*, originally published in 1949, *supra* note 32, at 98; and F.H. Newark in his article, *The Boundaries of Nuisance*, *supra* note 24, at 483 (providing partial translation). Prosser's 1966 article, *Private Action*, recites only one passage of the case without attributing the source of the translation, but the passage is verbatim the 1949 Newark translation. Prosser, *Private Action*, *supra* note 8, at 1005. Compare *id.* with Newark, *supra* note 24, at 483.

160. See FIFOOT, *supra* note 32, at 98 (translating Chief Justice Baldwin's holding as recited in accompanying text). The Chief Justice's opinion appears to be the "majority," even though only two opinions are reported. As discussed below, however,

plaintiff had no cause of action, reasoning that the only available remedy for such a public nuisance was a criminal writ by the Crown and justifying the restriction based on concern for multiplicity of legal action:

It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the Leet¹⁶¹ and there he has his redress, because it is a common nuisance to all the King's lieges,¹⁶² and so there is no reason for a particular person to have an *accion sur son cas*; for if one person shall have an action by this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case.¹⁶³

Dissenting, Justice Fitzherbert found, "to the contrary," that the plaintiff should have a cause of action, and his explanation emphasized that this was so because the plaintiff had "more" and "greater" of an injury than others—that is, I argue, a difference-in-degree—not that the injury was "particular," "peculiar," "distinct," "unique," or "different in kind":

I agree well that each nuisance done in the King's highway is punishable in the Leet and not by an action, *unless* it be where one man has suffered *greater hurt or inconvenience* than the generality have; but he who has suffered such *greater*¹⁶⁴ *displeasure or hurt* can have an action to recover the damage which he has by reason of his special hurt.¹⁶⁵

Then, Fitzherbert launched into a hypothetical and "incautious obiter dictum"¹⁶⁶ that would become the legendary hypothetical horse symbolizing the special injury rule doctrine:

If one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made

history has discarded Baldwin's view and either adopted the opinion of the apparent dissenter, Justice Fitzherbert, as though it were the opinion of the court, or suggested that Baldwin agreed with Fitzherbert, even though the text of the case supports neither interpretation.

161. The "leet" was the early English criminal court. BLACK'S LAW DICTIONARY 901 (7th ed. 1999).

162. "Lieges" describes the King's subjects. *Id.* at 831.

163. This translation is from FIFOOT, *supra* note 32, at 98.

164. *Id.* Fifoot translates the modifier of "displeasure or hurt" as "greater," *see id.*, and Newark's translation instead uses "more." Newark, *supra* note 24, at 483. The original fractured French text is "plus grander hurt ou incommoditie [sic]" and "pluis displeasur ou hurt [sic]." Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535).

165. FIFOOT, *supra* note 32, at 98 (emphasis added).

166. Newark, *supra* note 24, at 482; *see also* Spencer, *Critical Examination*, *supra* note 26, at 74 (noting "Fitzherbert's dictum").

this ditch across the highway, because I have suffered *more damage* than any other person. So here the plaintiff had *more convenience* by this highway than any other person had, and so when he is stopped he suffers *more damage* because he has to go to his close. Wherefore it seems to me that he shall have this action *pour ce special matiere*; but if he had not suffered *greater damage* than all other suffered, then he would not have the action.¹⁶⁷

Fitzherbert's dicta supports the rule that the plaintiff must show *some damage or inconvenience* to establish the new cause of action, but the test he articulates is a flexible one and does not support the prevailing interpretation that his opinion established the strict different-in-kind test. Although it is true that the hypothetical personal injury and downed horse would constitute a different-in-kind injury, Fitzherbert uses language that expresses the *different-in-degree* standard: he consistently uses the words "greater" (four times) and "more" (three times). Nowhere in his opinion does Fitzherbert use words indicating that he would require a different *in kind* damage—he uses the term "special" only once ("special hurt"),¹⁶⁸ and he does not use the words "different," "peculiar," or "particular." Although the meaning of Fitzherbert's example is ambiguous because he has mixed together an inconvenience with a personal injury and property damage, the language he uses facially supports a less restrictive test for the plaintiff.

Subsequent scholarly descriptions of the 1535 case suggesting that it was the genesis for the rule requiring "peculiar damage or an inconvenience *other than* that endured by the public at large"¹⁶⁹ are not well grounded in the text. Indeed, Fitzherbert's language suggesting a different-in-degree test has been buried in history and, instead, Fitzherbert's hypothetical horse has become the "stock example" of the different-in-kind rule for the past 465 years.¹⁷⁰ Two of England's early treatise

167. FIFOOT. *supra* note 32, at 98 (emphasis added to English words).

168. *Id.* Fitzherbert uses the term "special" one other time ("ce special matiere" or "this special matter/subject"), but it is an apparent reference to the lawsuit generally, not the injury rule. *Id.*

169. *Id.* at 96 (emphasis added).

170. Newark, *supra* note 24, at 483-84 (explaining the reason this "choice tid-bit" about the "horseman who fell into the newly dug ditch" eventually became "the stock example of particular damage grounding an action of nuisance" in England was because it was in the *Abridgements* and "could hardly escape being cited by the court"). See also 1 JOHN SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW: WITH NOTES 320 (Richard H. Collins & Robert Arbuthnot eds., 9th ed. 1903) [hereinafter 1 SMITH, LEADING CASES] (describing the "familiar instance put by the textwriters, if A digs a trench across the highway, this is the subject of an

writers appear to have sparked the historical misinterpretation of the 1535 case, and their great influence likely infected the development of American scholarship and jurisprudence at its earliest stage. Lord Edward Coke's *Commentary Upon Littleton*, appearing in 1628, was apparently the first to interpret and to focus scholarly attention on the 1535 case.¹⁷¹ In his commentary, Coke used Fitzherbert's dictum to explain the special injury rule, and Coke adopted the now-entrenched terminology "particular" and "special" injury, as well as the restrictive concept that commonality of injury prevented a legitimate claim:

But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leet or in the torn, unless any man hath a *particular damage*; as if he and his horse fall into the ditch, whereby he received hurt and loss, there for this *special damage*, which is *not common to others*, he shall have an action upon his case; and all this was resolved by the court in the king's bench.¹⁷²

Unlike Fitzherbert, whose dissent would require only "greater" injury, Coke's interpretation suggested that the injury must be "special" or "particular," *i.e.* distinct and "not common" or shared, such as personal injury or property damage.

A later influential interpretation by William Blackstone in 1768 cites *Coke on Littleton* and repeats the same misleading interpretation of Fitzherbert's dicta, phrasing the test even more strictly than Coke: "Yet this [general] rule [barring private plaintiffs from public nuisance actions] admits of one exception; where a private person suffers some *extraordinary damage*, beyond the rest of the king's subjects, by a public nuisance; in

indictment; but if B falls into it, then the particular damage thus sustained by him will support an action"). The 1535 case and Fitzherbert's horse were also cited with varying accuracy in many subsequent public nuisance cases. *See, e.g., Williams' Case*, 77 Eng. Rep. 163, 164 (1592) (slightly mis-quoting Justice Fitzherbert's view as "more particular damage"); *Fowler v. Sanders*, 79 Eng. Rep. 382 (1614) (upholding plaintiff's action for personal injury when his horse stumbled due to defendant's obstruction of highway, citing the 1535 case and *Williams' Case*, stating the rule as "special damage").

171. *See* 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAW OF ENGLAND § 56a (1832 ed., 1979) [hereinafter 1 COKE, INSTITUTES (1832 ed.)] (Coke's treatise *Institutes of the Laws of England, or a Commentary Upon Littleton* is popularly cited as *Coke's Institutes* or *Coke on Littleton*); *see also* FIFOOT, *supra* note 32, at 96 ("The position was summarised by Coke and by him transmitted to future generations."); 1918 Note, *supra* note 8, at 211 (noting that Coke's statement of a "particular damage" requirement has been the basis of nearly all actions for damages sustained by private parties for public nuisance).

172. 1 COKE, INSTITUTES (1832 ed.), *supra* note 171, § 56a, n.(c).

which case he shall have a private satisfaction by action."¹⁷³ Thus, Blackstone suggested the test required virtually unique damage, again substantially restricting the type and number of potential plaintiffs more than Justice Fitzherbert's opinion suggested.

Although one is naturally hesitant to challenge the scholarship of legal legends like Coke and Blackstone, the text of the 1535 case does not, in fact, appear to support their interpretation or their introduction of restrictive terms to the rule. Support for this criticism comes from English legal historian H.S. Fifoot, who severely criticized the accuracy of their scholarship. In 1949, Fifoot commented: "neither Coke nor Blackstone were remarkable for historical scholarship. Coke was skeptical or credulous as might serve his turn and did not scruple to tamper with his sources; Blackstone, though with more interest in legal history, was capable of ludicrous errors."¹⁷⁴ Yet, despite his misgivings, Fifoot reiterated Coke and Blackstone's (mis)interpretation of the 1535 case.¹⁷⁵

Early twentieth century commentary perpetuated the error. William Searle Holdsworth's *A History of English Law*, published in 1924, stated: "It had been laid down by Fitzherbert in 1536 that an action would lie for a public nuisance, if the plaintiff could show that he had suffered *special damage over and above the ordinary damage* caused to the public at large by the nuisance."¹⁷⁶ Holdsworth too miscast the rule of the case as requiring "special" damage "over and above" that "ordinary" or common to others, instead of using Fitzherbert's "greater hurt or inconvenience" test.¹⁷⁷ Holdsworth's commentary is particularly

173. 3 BLACKSTONE, COMMENTARIES, *supra* note 26, at 220 (emphasis added); *see also id.* (citing Co. Litt. 56. 5 Rep. 73).

174. FIFOOT, *supra* note 32, at 73; *see also* Stanley N. Katz, *Introduction to Book 1*, in 1 BLACKSTONE, COMMENTARIES, *supra* note 26, at iii-v (U. Chicago Press ed. 1979) (describing Blackstone's unsuccessful attempt to practice law, and his judicial career, which was "as undistinguished and uninteresting as his progress at the bar," adding he was "a notably poor trial judge, more frequently reversed on appeal than any of his peers"); *see also* John H. Langbein, *Introduction*, in 3 BLACKSTONE, COMMENTARIES, *supra* note 26, at iv (Blackstone's "reasoning was, we think, sometimes mistaken" and "untrustworthy" on historical narrative); *see also id.* at viii (noting Blackstone's creation of a "falsehood" in stating history of equity).

175. FIFOOT, *supra* note 32, at 96 (reiterating the rule requiring "peculiar damage or an inconvenience other than that endured by the public at large") (emphasis added).

176. HOLDSWORTH, *supra* note 157, at 424 (emphasis added).

177. *Compare id.* with FIFOOT, *supra* note 32, at 98. Holdsworth's discussion of the case also incorrectly suggested that the Fitzherbert opinion was the holding (instead of dissent and dicta). HOLDSWORTH, *supra* note 157, at 424. He further

important because it appears to be the sole source for the interpretation of the 1535 case by William L. Prosser, whose *Torts Handbook* singularly crafted American tort law on this issue.¹⁷⁸ Thus, it appears that Coke in the seventeenth century, Blackstone in the eighteenth century, Holdsworth in the early twentieth century, and Prosser, whose influence continues to this century, all misconstrued the seminal special injury rule case. Whether their interpretations were deliberate, unwitting, or sloppy is both difficult to judge and ultimately unimportant. They have cumulatively shaped the conservative tradition of the rule. Examination of the next three hundred years of English cases reinforces the conclusion that the rule's legal origins have been misunderstood.

B. Reexamining the English Decisions: Substantial Support for the Different-in-Degree Test

1. The Orthodox Line of English Public Nuisance Cases

A review of the "orthodox line"¹⁷⁹ of English cases in the three hundred years that followed the 1535 decision provide some insight into how courts simultaneously embraced Justice Fitzherbert's dictum proposing to allow private parties to sue for public nuisance, yet struggled to develop jurisprudential parameters for the type of injury required of the new plaintiff,

mischaracterized the opinion of Chief Justice Baldwin as "dissent," *id.*, ultimately inverting the proper legal weight of the two opinions in the case.

178. See PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 569 & n.41 (citing the 1535 case, *Williams' Case*, and Holdsworth). Prosser's sole reliance on Holdsworth is also indicated by the fact that Prosser used Holdsworth's apparently erroneous date of 1536 for the case. *Id.* at 569. Modern scholarship has relied almost exclusively on Prosser's characterization of this case. See, e.g., L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, TULSA L.J. 355, 356 (1994) ("In an anonymous case in 1536, it was first held that a public nuisance can also give rise to a private tort claim if the plaintiff can show that, as a result of the public nuisance, he sustained injuries *different in kind* from those suffered by the public in general.") (emphasis added) (citing PROSSER & KEETON, *supra* note 157, at 646 & n.37); Comment, *Public as Plaintiff*, *supra* note 5, at 513 n.8 ("The [distinct injury] rule itself dates to an anonymous case in the yearbooks of 1536," citing Prosser, *Private Action*, *supra* note 8, at 1005 n.73).

179. Newark, *supra* note 24, at 484 (emphasis added) (stating he had "no complaint" about the "orthodox line" of cases that stood for a "greater hurt or inconvenience" rule); *id.* at 484 n.24 (citing as "principal cases" *Hart, Paine, Iveson, Chichester, Hubert, Rose, and Greasly*, discussed herein); see also Smith, *Private Action*, *supra* note 8, at 143-44 (citing *Hart, Paine, Iveson, Chichester, Rose, and Greasly*); FLEMING, *supra* note 8, at 382 & nn. 22-23 (citing *Hart and Rose*); Hughes v. Heiser, 1 Bin. 463, 467-68 (Penn. 1808) (citing *Hart, Paine, Iveson, and Chichester*).

chiefly because of concerns about multiplicity of actions.¹⁸⁰ This re-examination further supports the conclusion that, contrary to the common scholarly understanding, the different-in-kind test was *not* universally adopted in the early English cases and many of the decisions used a more liberal test that can be interpreted as either a different-in-degree test or an “actual damages” test.¹⁸¹ Indeed, the dominance of the different-in-kind test over the different-in-degree test appears to be a fairly recent invention, and, even then, inappropriately borrowed from a line of railroad compensation cases that expressly noted that the liberal different-in-degree test was the rule in public nuisance cases.

In 1681, in *Hart v. Basset*, the King’s Bench closely followed Chief Justice Fitzherbert’s language and articulated a different-in-degree test.¹⁸² In *Hart*, the defendant had illegally obstructed the way to plaintiff’s barn with a ditch and a gate, so that plaintiff was forced to “carry [goods] by a longer and more difficult way.”¹⁸³ The court rejected the defendant’s multiplicity argument,¹⁸⁴ holding that the plaintiff had shown “particular damage, for the labour and pains he was forced to take with his

180. The multiplicity concern, however, was not universally accepted. Chief Justice Holt’s opinion in the oft-cited 1703 voting rights case *Ashby v. White*, strongly rejected the other justices’ concerns about multiplicity and formulated the rule in terms that equated to “actual” injury: “it is no objection to say, that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have an action. So if many persons received a private injury by a public nuisance, every man shall have his action” *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), reprinted in SMITH, LEADING CASES, *supra* note 170, at 268, 296.

181. See Smith, *Private Action*, *supra* note 8, at 143 (suggesting that several of the English cases were best interpreted as supporting an “actual damages” rule, not a different-in-degree test, citing *Hart*, *Iveson*, *Chichester*, *Rose*, and *Greasly*); see also *id.* at 144 n.69 (calling *Pain* defective in its pleadings, not inconsistent with his actual damages rule).

182. T. Jones 156, 84 Eng. Rep. 1194 (K.B. 1681).

183. *Id.*

184. *Id.* at 1194-95. The defendant cited *Williams’ Case*, 77 Eng. Rep. 163 (1592), which was not a nuisance case but nonetheless is often cited in older public nuisance cases for the multiplicity rationale. The case involved a claim by a lord of a manor that the local vicar had failed to celebrate “divine service” in the manor’s chapel and to administer him the sacraments. The court rejected the claim and expressed concern about “multiplicity”—“so infinite actions for one default,” *id.* at 164—words often repeated in later public nuisance cases. See, e.g., *Paine v. Patrich*, 90 Eng. Rep. 715 (K.B. 1692) (The plaintiff brought a public nuisance action against a defendant who had built a bridge that hindered the plaintiff’s river passage. The court rejected this claim, finding that no “particular damage” was alleged, and that “therefore this action will not lie; and chiefly to avoid multiplicity of actions; for by the same reason that it may be brought by the plaintiff, it may be maintainable by every person passing that way.”).

cattle and servants, by reason of the obstruction."¹⁸⁵ *Hart* recognized that greater inconvenience was of sufficient weight to sustain the plaintiff's public nuisance claim.

In 1699, *Iveson v. Moore*¹⁸⁶ approved a plaintiff's claim for obstruction of a passage used for his coal hauling business. Justice Gould recited the special injury rule as requiring damage "more peculiar to [the plaintiff] than any other of the King's subjects," based on the rationale of avoiding multiplicity of suits.¹⁸⁷ He concluded that the "stoppage of the way" was such a "special damage."¹⁸⁸ The court was split,¹⁸⁹ but after referral, the plaintiff prevailed.¹⁹⁰

Reminiscent of *Hart*, in *Chichester v. Lethbridge*, decided in 1738, the King's Bench found for a different-in-degree plaintiff whose carriages had been blocked by defendant's obstruction of the highway.¹⁹¹ Chief Justice Willes concluded, based on *Hart*, that the plaintiff had sufficiently shown his particular injury because he "was attempting to travel this road several times with his coach, but could not by reason of these obstructions."¹⁹²

The editor's notes to the *Chichester* case confirm that, as of 1738, the injury exception to the general ban was in flux, and the "general rule" that a private party did not have an action for a common nuisance (*i.e.* Chief Justice Baldwin's majority view) "seems to have been admitted by all the cases on the subject."¹⁹³ However, "a question has frequently arisen whether the damage stated in each particular case were sufficient to bring it within the exception to the general rule; and this question has received

185. *Hart*, 84 Eng. Rep. at 1195.

186. 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (K.B. 1697).

187. *Id.* at 1226.

188. *Id.*

189. See *Hubert v. Groves*, 1 Esp. 148, 150, 170 Eng. Rep. 308, 309 (N.P. 1794) (noting that the court in *Iveson* was "divided" 2-2 on the interpretation of the special injury rule).

190. *Iveson*, 91 Eng. Rep. at 1230. See *Smith, Private Action*, *supra* note 8, at 143 n.66 (noting that *Iveson* held for the plaintiff after reargument before the Court of Common Pleas and barons of the Exchequer).

191. Willes, 71, 125 Eng. Rep. 1061 (C.P. 1738).

192. *Id.* at 1062 ("we admit the general rule, but think that in this case there are particular damages assigned sufficient to support the action. The rule is laid down in [*Coke on Littleton* 56], that no one can have an action for a nuisance or obstruction in a common highway, without assigning some particular damage; and this to prevent multiplicity of suits; for otherwise every subject of England might maintain an action for the same obstruction.")

193. *Id.* at 1063 & n.[a]1 (citing the 1535 case; *Feneux, Paine, Fowler*, and *Iveson*).

various determinations according to the circumstances of each case."¹⁹⁴

In 1815, the King's Bench decided *Rose v. Miles*,¹⁹⁵ one of the most often-cited English cases on the special injury rule. *Rose* supports the conclusion that the English courts allowed plaintiffs with different-in-degree injuries to come within the special injury rule exception.¹⁹⁶ In *Rose*, the defendant's barge had obstructed the plaintiff's use of his barges on a creek for goods, wares, and "merchandizes," forcing the plaintiff to use a more expensive overland route for his business.¹⁹⁷ Chief Justice Ellenborough found that the plaintiff satisfied the special injury rule because his damage "is something different[,] for the plaintiff was in an occupation, if I may so say, of the navigation" and "[s]urely this goes one step farther, this is something substantially *more injurious* to this person than to the public at large, who might only have it in contemplation to use it If a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage."¹⁹⁸ *Rose*, therefore, like *Hart* and *Chichester*, suggests that a plaintiff could satisfy the special injury rule by showing "more injury" —that is, *more* inconvenience, even though an alternative route was available—and not necessarily a distinct or unique one.¹⁹⁹

194. *Id.* Fifty years later, in *Hubert v. Groves*, 1 Esp. 148, 170 Eng. Rep. 308 (N.P. 1794), the court took a more conservative view, finding that a merchant forced to take a "circuitous and inconvenient" way for his personal and business use could not sustain a public nuisance action, finding the remedy was "by indictment only." *Id.* at 308. The court later refused to change its decision even after plaintiff's counsel brought the *Hart* case to its attention. *Id.* at 309. At least one American court held, however, that *Hubert* was "not authority here" because it contradicted the pre-revolutionary war decision in *Chichester*. *Hughes v. Heiser*, 1 Binn. 463, 468 (Penn. 1808) (noting that not all English cases can be reconciled). See also *Heer Dry-Goods v. Citizens Rwy. Co.*, 41 Mo. App. 63, 78-79 (1890) (criticizing *Hubert* as a "doubtful decision").

195. 4 M. & S. 101, 105 Eng. Rep. 773 (K.B. 1815).

196. See 1918 Note, *supra* note 8, at 216 (citing *Rose's* interpretation the rule as: "consequential damages are particular and special although the immediate damage is *not different in kind*") (emphasis added).

197. *Rose*, 105 Eng. Rep. 773.

198. *Id.* at 774 (emphasis added).

199. Contrary interpretations are possible, however. Perhaps Ellenborough allowed the cause of action only because the plaintiff could show a pecuniary injury—lost business profits. See *supra* note 186-188 (in *Iveson*, lost profits were recognized as sufficient injury); see also *supra* note 65 (discussing an exception to the economic loss rule in public nuisance cases). He did, however, use the term "more," as well as "different" in describing what he found to be "particular damage" and emphasized that the rule does not include trivial or theoretical wrongs. In the last of the noted line of early English cases, *Winterbottom v. Derby*, 2 L. R. Ex. 316 (1867), the court rejected the plaintiff's claim of unspecified expense and inconvenience caused by the defendant's repeated blockage of a public footway, but

Implicit judicial acceptance of some different-in-degree plaintiffs continued in *Greasly v. Codling*, decided in 1824.²⁰⁰ The plaintiff sued for common nuisance because the defendant had shut and kept closed a gate across a public highway, causing the plaintiff a four-hour delay in his coal-hauling operations. Chief Justice Best held for the plaintiff, concluding "even in a case of public nuisance, if any one has been distinguished in injury, he may sue the offender."²⁰¹ Best then concluded that the case before the court was indistinguishable from *Rose*, where the court seemed to accept loss of "additional income" as special injury.²⁰² *Greasly* can be read to support a rule that pecuniary loss is always special injury, but it would overstate the case to suggest that the loss must be different-in-kind.

Overall, the English cases do not present a unified view of the special injury rule and its application. *Hart*, *Iveson*, *Chichester*, and *Rose* strongly suggest a "greater inconvenience" rule, grounded in Justice Fitzherbert's dissent in the 1535 case. A few other cases seem to require a higher showing of injury and strongly express the courts' concern about multiplicity. Indeed, the English courts still have not resolved this issue.²⁰³

2. *The English Railroad Compensation Cases*

As of the late 1800s, the English courts had not formulated the different-in-kind rule that is now so entrenched. What then is the source of the different-in-kind rule if not "ancient" case law? The origins of the different-in-kind test appear to be traceable to a line of English railroad compensation cases in the late 1800s that are, upon examination, not only inapposite but actually support the more liberal interpretation of the earlier public nuisance cases.

The railroad cases did not involve public nuisance claims but rather involved judicial interpretation of acts of Parliament that allowed compensation for legislatively-authorized railroad

nonetheless acknowledged that the cases articulated a "greater inconvenience" rule. *Id.* at 320. Given the insubstantial nature of the injury alleged and the lack of pecuniary damage, the court's concerns focused on the multiplicity problem. Chief Baron Kelly concluded that the injury was "common to all who might wish it" and articulated a restrictive version of the rule as requiring "some damage peculiar to himself, his trade, or calling." *Id.* at 322.

200. 2 Bing. 263, 130 Eng. Rep. 307 (C.P. 1824).

201. *Id.* at 307-08.

202. *Id.* at 308; see also *id.* (opinion of Justice Park, distinguishing *Paine* and finding *Rose* indistinguishable).

203. Spencer, *Critical Examination*, *supra* note 26, at 74-75.

companies' expansion projects that "injuriously affected" private lands.²⁰⁴ The litigants and the House of Lords looked to the injury rule in public nuisance to guide their determination of compensable injuries under the acts. Even though the Lords acknowledged that the rule of public nuisance was a different-in-degree test, the more conservative different-in-kind rule that emerged from these railroad cases ultimately bounced back into public nuisance law and, ironically, became the foundation for the modern different-in-kind test.

The two seminal railroad compensation cases are *Caledonian Railway Co. v. Ogilvy*,²⁰⁵ a Scottish case decided by the House of Lords in 1856, and *Metropolitan Board of Works v. McCarthy*,²⁰⁶ decided by the House of Lords eighteen years later in 1874. In *Ogilvy*, the plaintiff landowner claimed that a new Caledonian Railway line crossed so close to his lodge and gate that it greatly interfered with his access to the main road, rendering it "dangerous and alarming" to ladies and horses.²⁰⁷ The railroad argued against any compensation on the basis that the inconvenience was so widespread that "all the King's subjects" were affected, and it was "the necessary consequence of a lawful act done by the Company."²⁰⁸ Although *Ogilvy* ultimately denied the plaintiffs' claim and rejected a different-in-degree test for the railroad cases, the case is important because it suggests that, even as of 1856, a leading jurist interpreted the public nuisance cases as supporting the different-in-degree test. Moreover, the case demonstrates that the different-in-kind test from the railroad cases was a response to distinct policy issues, such as the spectre of widespread litigation, the legislative authorization for the expansion, and the social need for the new transportation systems.

In *Ogilvy*, the Lords were concerned about the implications of allowing a railroad compensation claim based on

204. The Land Clauses Consolidations Act and the Railway Clauses Consolidation Act provided compensation for private landowners "injuriously affected" by the railroad projects, and to interpret this provision the English courts looked to the similar legal issues raised in public nuisance cases. See, e.g., *Caledonian Railway Co. v. Ogilvy*, 2 L.R. SRD. App. 229 (1857) (Eng.), reprinted in 2 JOHN F. MACQUEEN, REPORTS OF SCOTCH APPEALS AND WRITS OF ERROR, TOGETHER WITH PEERAGE, DIVORCE, AND PRACTICE CASES, IN THE HOUSE OF LORDS 229 (1857) [hereinafter *Ogilvy*].

205. *Ogilvy*, 2 L.R. SRD. App. at 229.

206. *Metropolitan Bd. of Works v. McCarthy*, 7 L.R. E. & I. App. 243 (1874) (Eng.), reprinted in CHARLES CLARK, VII THE LAW REPORTS, ENGLISH AND IRISH APPEAL CASES 243 (1875) [hereinafter *McCarthy*].

207. *Ogilvy*, 2 L.R. SRD. App. at 230.

208. *Id.* at 232.

inconvenience.²⁰⁹ Lord Chancellor Cranworth argued against compensation, and cautioned that the analogous rule from public nuisance cases was much more liberal and should not be applied to the railroad cases. Cranworth emphasized that the public nuisance test of that era, which he characterized as different-in-degree, was the *correct* test in its proper context.²¹⁰ Cranworth distinguished the public nuisance cases from the issue before the House, that is, compensation for the railroad's encroachments, because Parliament had deliberately sought to relieve the railroads of such liability to individuals.²¹¹ If it had been a *private* defendant, the plaintiff *could* have recovered for "more frequent repetition of the same damage,"²¹² but such a rule, Cranworth concluded, would not be appropriate under the railway compensation acts, which required actual damage to land.²¹³

The House of Lords later relied on *Ogilvy* in *Metropolitan Board of Works v. McCarthy*.²¹⁴ The vigorous debate among the Lords in *McCarthy* also confirms that the "ancient" special injury doctrine was more liberal than believed today. In *McCarthy*, the municipal defendant had built a government-authorized embankment on the Thames River that destroyed the plaintiff's access to Whitefriars Dock, a public dock, which he used for his adjacent building supply business.²¹⁵ Like *Ogilvy*, the primary issue was whether the plaintiff was entitled to compensation under the railroad act's "injuriously affected" provision. In arguing for judgment for the plaintiff, Lord Chelmsford offered

209. See *id.* at 233 (Lord St. Leonards stating: "There is a level crossing by a railway near my house in the country. This is an inconvenience, no doubt; but no one affected by it has ever thought of seeking compensation.").

210. *Id.* at 235 (stating that if the *Greasley* case were applied to the railroad acts context, it "would certainly entitle everybody who is stopped for a minute while the gates are shut to an action for damages; because it would be said, under the authority of that case, which I think is a *very correct decision*, that where an act is done, such as shutting gates across a public road, without the authority of Parliament, that gives the parties a right of action.") (emphasis added). St. Leonards shared Cranworth's concern about compensating *Ogilvy* for the interference with the access to his lodge. He found the inconvenience to the plaintiff just part of the "unavoidable consequence" of railroad expansion and distinguishable from that suffered by "the rest of the Queen's subjects" only by degree. *Id.* at 250-51.

211. *Id.* at 236 ("if there were not an Act of Parliament, [the facts of this case] *would* entitle them to bring an action against the Railway Company") (emphasis added).

212. *Id.*

213. *Id.* at 236-37; *id.* at 238 (citing railway cases where compensation was allowed for "personal and private injury to the land").

214. *McCarthy*, 7 L.R. E. & I. App. at 243.

215. *Id.*

what is apparently the first recorded statement of the modern different-in-kind rule, purportedly, but mistakenly, based on *Ogilvy*.²¹⁶

Although Lord Penzance agreed that the railroads should compensate the plaintiff, he suggested that Chelmsford's different-in-kind test was much too strict and favored the different-in-degree rule that he believed was actually used in the public nuisance cases.²¹⁷ Lord Penzance acknowledged the clouded history of the rule and stated: "It is well, therefore, to look back at the older cases in which this exception was first established to ascertain the exact terms in which it is expressed."²¹⁸ He emphasized that the language of *Iveson* and other cases suggested a "more than" rule.²¹⁹ He rebuffed Lord Chelmsford's proposal for a different-in-kind rule and concluded that "[t]he Judges do not say a damage of a *different kind or description* from that suffered by other subjects, but 'more than' and 'beyond' their fellow citizens."²²⁰ Lord Penzance concluded that the proper public nuisance test (which he would have applied even in the railroad compensation context) was one of "difference in degree" not "difference in kind," but, regardless, found that the plaintiff still satisfied the latter because he derived special value from the proximity to the highway that the defendant destroyed.²²¹ Requiring the jury or arbitrator to find this special value, he suggested, provided a sufficient limitation

216. *Id.* at 257 ("[In *Ogilvy*, t]his House held that the damage sustained was one which, though it might be *greater in degree*, was *not different in kind* from that to which all her Majesty's subjects were exposed, who were also prevented having free and open communication with the high road, their access to it being in the same manner liable to interruption and delay. . . . The question therefore is, whether the Respondent, as the owner of premises which were in close proximity to the public drawdock, has by its destruction suffered an injury *different in kind* from that of the public in general?") (emphasis added). *But see* discussion of *Ogilvy*, *supra* notes 205-213 and accompanying text. In *Ogilvy*, Lord Chancellor Cranworth not only did not use the "in kind" terminology, but he expressly found that the courts had *properly* used the different-in-degree test for public nuisance cases. Ironically, Lord Chelmsford in *McCarthy* ultimately found the plaintiff's injury to be different "in kind" because the plaintiff's property value was diminished by his loss of access to the dock. *McCarthy*, 7 L.R. E. & I. App. at 257.

217. *Id.* at 261-64.

218. *Id.* at 263.

219. *Id.* Lord Penzance even interrupted the argument of counsel for the plaintiff to emphasize the "more than" rule. *Id.* at 251 (after counsel mentioned that his client had suffered "particular damage," Lord Penzance stated: "More than the rest of the subjects.>").

220. *Id.*

221. Lord Penzance would, however, have limited the injuries allowed in railroad cases to "damage or injury to the 'land' of the claimant considered independently of any particular trade that the claimant may have carried upon it." *Id.* at 262.

on the breadth of the tort.²²² Lord Penzance also criticized the long-accepted multiplicity justification for a strict interpretation of the injury rule. He stated:

If this limit be thought a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in doing so) it cannot be predicated and proved that the value of the lands depends on this position relatively to the highway which they occupy.²²³

Ultimately, amidst the Lords' debate on the special injury rule and the appropriate test, the Exchequer Chamber's judgment for the plaintiff was affirmed. In short, *McCarthy*, the case that invented the different-in-kind rule, is poor—if not adverse—authority for proponents of the strict test in public nuisance doctrine. The case was decided in a different context under the railroad compensation acts, and, when the Lords did directly address the public nuisance rule, they characterized it as a different-in-degree rule. If anything, the case supports the more liberal interpretation of the English cases.²²⁴

By carefully reexamining the recognized line of English cases dating from Fitzherbert's "incautious obiter dictum" in the anonymous 1535 case until the emergence of the different-in-kind language in the railroad compensation cases, several conclusions about the supposedly "ancient" roots of the special injury rule are apparent. First, the 1535 case—or at least the dissenting opinion—did launch the hybrid private plaintiff/public nuisance cause of action and did express a concern about multiplicity of lawsuits, but it articulated a different-in-degree, not different-in-kind, test, although it used neither of these phrases. Second, many of the subsequent cases did not settle on a strict formulation of the rule and can be

222. *Id.* at 263-64 (Lord O'Hagan agreed with Lord Penzance that the different-in-degree test should apply to the plaintiff's claim, stating that "if a person has sustained a particular damage *beyond that of his fellow citizens*, he may maintain an action in respect of that particular damage.") (emphasis added).

223. *Id.* at 264

224. In a similar case a few years later, the House of Lords purported to follow *McCarthy* and distinguish *Ogilvy* in upholding compensation to spinning mill owners whose access had been diminished or cut off by a railroad project. See *Caledonian Ry. Co. v. Walkers' Trustees*, 6 L.R. App. Cas. 259 (1882) (Eng.) (applying the rule of "special or peculiar" damage to land, and holding for the plaintiffs).

interpreted as supporting different-in-degree or "actual injury" tests. Third, the different-in-kind test is not ancient at all; rather it is, at most, an invention only about 100 years old. Fourth, its roots are bastardized, as it emerged in cases that were not about public nuisance, but railroad compensation, which involved different law and policy concerns. Ironically, the railroad compensation cases confirm that the truly ancient public nuisance rule was the more liberal different-in-degree test.

A skeptical historical look at the roots of the restrictive different-in-kind test suggests that modern scholarship and jurisprudence should not simply accept the conservative formulation of the test as handed down by Coke, Blackstone, Holdsworth, or even Prosser. Unfortunately, however, the historical misperception about the English cases has unduly colored the modern view of the rule and encouraged the judiciary to perpetuate it. Once this history is recognized as more fluid, complex, and even contrary to prevailing belief, courts, in the interests of modernizing this important tort, may be more willing to consider alternatives to the currently strict formulation.

III

AMERICAN ENTRENCHMENT OF THE SPECIAL INJURY RULE AND THE DIFFERENT-IN-KIND TEST

More than three centuries after the seminal English case, as America adapted English common law for its own use in the late 1800s and early 1900s, American decisions demonstrated variability, flexibility, and confusion in articulating the special injury rule and applying the appropriate test. Although a distinct trend toward the stricter different-in-kind test began to emerge in state decisions in the late 1800s,²²⁵ early American decisions also exhibited an intriguing divergence of views between state and federal courts. While state courts favored the more conservative different-in-kind test purportedly adhered to in the English cases,²²⁶ federal courts tended to follow the different-in-

225. See Smith, *Private Action*, *supra* note 8, at 144 (discussing "the general drift of English authorities up to 1867" and noting "more conflict" in the early American cases, *i.e.* up to 1915); see also 1918 Note, *supra* note 8, at 211 (commenting on the considerable confusion in the American case law: "much perplexity has arisen [as to] . . . whether the particular injury must be different in kind from that sustained by the public").

226. See 1918 Note, *supra* note 8, at 212, 214 (concluding that the different-in-kind rule "generally has been accepted" and was then emerging as the "majority rule"). The favored rule in the American state courts was supposedly derived from Rose, that "in order to maintain an action for a public nuisance, a private individual must prove that he thereby suffers a *particular, direct, and substantial injury*." *Id.* at

degree test.²²⁷ Overall, American case law exhibited more conflict than that of England²²⁸ about the meaning of “special” injury and the appropriate test, whether different-in-kind or different-in-degree, or something else.²²⁹

As the early American state court trend began to tilt strongly toward adoption of the restrictive different-in-kind test, a prominent critic—Harvard Law School Dean Jeremiah Smith—urged courts to liberalize the rule.²³⁰ Several decades later, Boalt Hall School of Law Dean William L. Prosser revived Smith’s critique and offered his own intellectual misgivings about the rule.²³¹ Despite the weighty criticism, however, the rule became considerably more entrenched in the twentieth century.²³² Ultimately, Prosser’s own “post-realist” “Consensus Thought”²³³ approach to the issue led him to abandon his own concerns and to reinterpret the case law to enshrine the traditional doctrine into a now-classic black letter *Restatement* rule.²³⁴

A. *Early American Views of the Traditional Special Injury Doctrine: Judicial Conservatism, Smith’s Criticism, and the Neglected “Actual Damages” Test*

An examination of Smith’s critique of the special injury rule illuminates the jurisprudential journey of the traditional doctrine from early England to America. Smith’s views also lay the

212 (emphasis added). This interpretation, however, distorts *Rose*. See *supra* notes 195-199 (noting that *Rose* allowed damages to bargee for expenses due to route change that was different, “more injurious,” and therefore “particular damage”). Not surprisingly, “[t]he difficulties under this definition have been almost as perplexing as under the rule laid down by Lord Coke.” 1918 Note, *supra* note 8, at 212.

227. See 1918 Note, *supra* note 8, at 213-14 (noting several federal court decisions that preferred the different-in-degree rule). See *infra* notes 252-254 and 274 (discussing *Piscataqua* and *Carver*).

228. Unlike in America, the “modern tendency” in English cases at the time, according to noted comparative law Professor John Fleming, was “to reject the elusive distinction between difference in kind and in degree, and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else.” FLEMING, *supra* note 8, at 382 & nn. 25-28 (citing English cases from 1867-1963).

229. Smith observed that, among American cases, “there has been a strong tendency to give exceptional reasons for sustaining the action, instead of attempting to evolve and state a general principle,” an approach he considered “entirely erroneous.” Smith, *Private Action*, *supra* note 8, at 144-45.

230. See *infra* Part III.A.

231. See *infra* Part III.B.

232. See *infra* notes 351-365 and accompanying text (discussing Prosser’s view of the case law); see also *infra* Part IV.D and notes 153 and 535 (discussing recent cases).

233. See *infra* Part IV.B and note 291 and accompanying text.

234. See *infra* Part IV.C.

foundation for review of the doctrinal developments in the influential *Restatement Second* project and the distinctive imprimatur of Prosser on this issue.

Although his views on the public nuisance issue may have, until recently, disappeared into the dustbin of legal history,²³⁵ in 1915, Jeremiah Smith, one of "the leading torts theorists of the late nineteenth century,"²³⁶ published a pointed indictment of what he called the "erroneous"²³⁷ different-in-kind rule. Ultimately, he rejected both the different-in-kind and different-in-degree interpretations and instead proposed an alternative reading that he believed was better grounded in the case law and tort law generally: an actual damages test. Despite Smith's great influence in other areas of tort law,²³⁸ his pragmatic²³⁹ and early realist views²⁴⁰ on the different-in-kind rule did not prevail. His critique is, nonetheless, worth examination both because it

235. Although Prosser cites Smith's article in his 1966 article, Prosser, *Private Action*, *supra* note 8, at 997 n.1 & 1008 n.96, and in Tentative Draft No. 16 of the RESTATEMENT (SECOND) ON TORTS § 821C (Tentative Draft No. 16, 1970) [hereinafter Tentative Draft No. 16], Smith's article does not otherwise appear to have been noticed, let alone discussed, by the modern critics of the rule. *But see* Bryson & Macbeth, *supra* note 5, at 252 n.48 (citing Smith's 1915 article, but apparently only because Prosser also cited it in his Tentative Draft No. 16).

236. *See* G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 643 (1982) (noting that Smith, a Harvard Law School graduate, practiced law before being appointed to the New Hampshire Supreme Court and later to the faculty of the Harvard Law School). *See also* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 61 (1993) (calling Smith a "'highbrow' intellectual with a strong interest in public affairs").

237. Smith, *Private Action*, *supra* note 8, at 157.

238. In 1917, Smith published a leading article on general nuisance law. Jeremiah Smith, *Reasonable Use of One's Own Property As A Justification for Damages to a Neighbor*, 17 COLUM. L. REV. 383 (1917) (discussing conflict between private property rights and imposition on rights of others). Smith was also the pioneer of the modern "substantial factor" test for causation. *See* Jeremiah Smith, *Legal Causes in Actions in Tort*, 25 HARV. L. REV. 103, 223, 303 (1911).

239. John F. Wirenius, *Helping Hand: The Life and Legacy of Learned Hand*, 25 SETON HALL L. REV. 505, 508 (1994) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994)) (calling Smith "wholly practical").

240. The legal realism movement emerged in the early 1900s and matured until approximately the 1940s. *See* G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 64 (1980). Smith's scholarship, which peaked during the transition from formalism (including "legal science") to realism, reflected strains from both approaches. Although some of Smith's scholarship took the "scientist" approach, *see id.* at 38, Smith also showed realist tendencies. A former state judge, Smith acknowledged that "judges make law," Louis H. Pollak, *Advocating Civil Liberties: A Young Lawyer Before An Old Court*, 17 HARV. C.R.-C.L. L. REV. 1, 3 (1982), and he was a prominent critic of legal formalism. *See* Joseph H. Beale, *Jeremiah Smith*, 35 HARV. L. REV. 1, 3-4 (1921) (describing how Smith's appointment to Harvard Law School after "thirty years of practical life" affected his teaching and scholarship).

further confirms that the different-in-kind rule is not unassailably grounded in early English and American cases and because it provides weighty doctrinal criticism that pre-dates, and thereby adds scholarly legitimacy to, the current push for liberalization by environmental scholars and advocates.

Smith took a fresh approach to interpreting the holdings of the English and early American cases, finding that the elemental rule underlying them was that "no private action can be maintained at common law, unless the plaintiff has sustained *actual damage*."²⁴¹ In his view, the more restrictive different-in-kind test was justified neither doctrinally nor on the basis of triviality or multiplicity. Smith vigorously attacked the idea that the damage to the plaintiff must be exclusive. His concern was not only that many cases had been misinterpreted, but that the more restrictive test led to confusion²⁴² and was simply bad law.²⁴³ With regret, Smith noted that the early views of *Coke on Littleton*, *Williams' Case*, and the 1535 case had heavily influenced courts, causing them to deny recovery to a plaintiff who had suffered very substantial damage when that damage did not fall within certain exceptional classes.²⁴⁴

Smith focused his criticism on two of the common justifications for the different-in-kind rule. First, as to triviality, he suggested that the danger was "purely imaginary."²⁴⁵ In tort, there was already a natural barrier to such frivolous suits because a plaintiff can "sue only to recover for actual damage which he has individually sustained."²⁴⁶ As to multiplicity, he noted the concerns were about hardship on defendants "who may be overwhelmed by an infinity of suits" and "[i]ncumbering the courts - clogging the dockets with a large number of 'trivial' suits, thus hindering the progress of more important

241. Smith, *Private Action*, *supra* note 8, at 2 (emphasis added).

242. *Id.* at 7. For an example of the judicial split during the early American period over how to apply the doctrine, see *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917). In *Bouquet*, the plaintiff owned a resort on the Hackensack River, and the defendant installed a plant upstream of the plaintiff. The plant discharged pollution that rendered the water in front of the resort unfit for fishing or boating. "The court held that the plaintiff had suffered no particular damage as distinct from the public at large and there could be no recovery." 1918 Note, *supra* note 8, at 215 & n.27. Compare *Bouquet* to *Bonner v. Welborn*, 7 Ga. 296 (1849), "where the court reaches a contrary result from the New Jersey court on almost identical facts." 1918 Note, *supra* note 8, at 215 n.28.

243. Smith, *Private Action*, *supra* note 8, at 7.

244. *Id.* at 2-3.

245. *Id.* at 4.

246. *Id.*

litigation."²⁴⁷ Smith, who had over twenty years of experience as a judge and practitioner, countered that a large number of claims would never result because of the practical impediments to plaintiffs bringing such cases, including the rules on costs, which "generally fall far short of making the plaintiff whole,"²⁴⁸ the necessity to pay for counsel, the out-of-pocket costs, the reluctance of lawyers to sue when the damages are small, and the risk of monetary loss even with a win on the merits.²⁴⁹ Given these constraints, he concluded that suits would be brought only if there was a reasonable prospect of recovering substantial damages, or where a suit was brought to test the legality of an action, such as obstruction of a road or erection of some other boundary.²⁵⁰ He added that, even if such claims were brought, "what special claim have the defendant to pity[?] *Ex hypothesi*, their acts were tortious."²⁵¹ Smith quoted a then-recent 1898 opinion, which he much favored,²⁵² by District of Columbia District Court Judge Brown in *Piscataqua Navigation Co. v. New York, N.H. & H.R.R.*²⁵³: "[A]lthough the defendant may be able to show that he has violated the theoretical right of every citizen, and that he has also inflicted upon several other citizens substantial damage and actual loss similar to that alleged by the libelants, such defense is without merit."²⁵⁴ Or, as Smith argued, if the public is defined as everyone who uses the obstructed way, then each individual member of the public should not be denied compensation for his actual loss solely because all of the other individual members have also suffered actual loss.²⁵⁵

247. *Id.* at 5.

248. *Id.* at 6.

249. *Id.*

250. *Id.*

251. *Id.* at 5.

252. Smith called Brown's *Piscataqua* decision "the better view" and "the most valuable extended American opinion, from our point of view" on the subject because "[t]he learned judge considers and satisfactorily answers some of the leading arguments often urged by defendant against the maintenance of a private action in this class of cases." *Id.* at 11, 145.

253. 89 F. 362 (D. Mass. 1898).

254. Smith, *Private Action*, *supra* note 8, at 11; see also *id.* at 5 (citing Judge Brown in *Piscataqua* as suggesting that if denying the remedy "shall become necessary, it certainly should be applied only when found necessary for the protection of the public and the courts, and should not be given to a wrongdoer to defend himself from the natural consequences of his wrong").

255. *Id.* at 15 n.52; *Walker's Trustees v. Caledonian R.R.* (1881), 8 Sc. Sess. Cas. (4th Series) 405, 420 (Lord Justice Clerk, Lord Moncreiff) ("I do not think it is sound to say . . . that an injury which is shared by the public cannot support a claim for compensation. It is more sound to say that if the injury be specific and proved it is of no moment how many other premises are also injured."); see also *Page v. Mille Lacs*

Smith's proposed interpretation of the caselaw, which would allow plaintiffs to bring a public nuisance claim if they suffered "actual damage," was based on the inherent requirement in torts that the plaintiff must prove "real" damage, neither imagined nor threatened.²⁵⁶ The plaintiff could proceed with a public nuisance action if he could allege and prove actual damage "consequent upon his exercise of a public right being interfered with, and distinct from the fact that it is interfered with."²⁵⁷ Smith approved of Judge Brown's formulation in *Piscataqua*: "Actual loss, proved as a matter of fact, is the gist of the private action."²⁵⁸ Smith's view of "actual damage," however, reflected the times and was not particularly broad—he meant *pecuniary loss*,²⁵⁹ not "delay, inconvenience, or hindrance to plaintiff."²⁶⁰ Nevertheless, he strongly objected to imposing any limitation other than the actual damage requirement.²⁶¹

Smith specifically rejected the different-in-kind formulation,²⁶² calling it the "alleged rule,"²⁶³ because he disagreed with the English commentary on the cases.²⁶⁴ He noted, first, that "[a]s to the *alleged* general rule, there is a

Lumber Co., 55 N.W. 608, 610 (Minn. 1893) (stating "It would be highly unjust and inequitable to say that he has no right of redress in a private action on the ground merely that the injury had resulted from an act which is a public nuisance in itself, and because other persons might have been injured and damaged in the same manner and to the same extent had they met the obstruction under like circumstances.").

256. See Smith, *Private Action*, *supra* note 8, at 11; PROSSER & KEETON, *supra* note 157, § 30, at 165 (explaining actual loss or damage as a required element of negligence).

257. Smith, *Private Action*, *supra* note 8, at 11 (citing POLLOCK, TORTS 612 (6th ed., 1892)).

258. *Id.* at 13 (citing *Piscataqua*, 89 F. 362). Smith also pointed to dicta in an even earlier American decision, *Lansing v. Smith*, 4 Wend. 9, 25 (N.Y. 1829), where Chancellor Walworth opined: "every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others who have suffered similar injury." Smith, *Private Action*, *supra* note 8, at 146 (citing Walworth).

259. Smith, *Private Action*, *supra* note 8, at 148 (stating that in a public nuisance action, plaintiff "also has an interest in having his business undertakings free from pecuniarily damaging interference by tortious conduct."); *id.* at 148-49 (arguing that prevention of performance of a contract is also sufficient injury); *id.* at 150-51 (suggesting that the cost of removing a public obstruction constitutes pecuniary loss or injury). As discussed *supra* note 65, public nuisance is an exception to the general tort rule against the recovery of economic losses.

260. Smith, *Private Action*, *supra* note 8, at 12; see also *id.* (contrasting pecuniary loss to an injury to plaintiff's "religious sensibilities," a reference to *Williams' Case*, see *supra* note 170, which would not constitute actual damage).

261. Smith, *Private Action*, *supra* note 8, at 13.

262. *Id.* at 21.

263. *Id.* at 15.

264. *Id.* at 14-15.

serious conflict of authority: first, as to whether it should be adopted; second, as to what interpretation and application should be given to it, in case of its adoption.²⁶⁵ While many American state courts professed to have adopted the rule, he argued that most federal courts,²⁶⁶ including the United States Supreme Court²⁶⁷ and various jurists, had squarely rejected the different-in-kind rule.²⁶⁸

Even among the states that “profess to adopt the alleged rule,” Smith found “a remarkable conflict of authority as to its interpretation and application.”²⁶⁹ In his view, this conflict and the “practical injustice” of the rule were strong arguments against its adoption.²⁷⁰ Smith also noted the particularly troubling interpretation by some courts that, if any other member of the public had suffered damage “similar in character or in kind” to the plaintiff, then no public nuisance remedy was available, *even if* the plaintiff had sustained “actual damage.”²⁷¹ He believed that this notion that the injury had to be “exclusive” was overly restrictive.²⁷² Smith concluded that the most honest, practical doctrinal approach was for courts to apply the “single and simple test of actual damage.”²⁷³

265. *Id.* at 15-16.

266. *Id.* at 16; *see also id.* (“It is firmly established by a long line of federal decisions that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, *either in degree or in kind*”) (quoting Wellborn, J., in *Carver v. San Pedro, etc.*, R.R., 151 F. 334, 335 (C.C. Cal. 1906)) (*emphasis added*).

267. *See id.* (quoting Wellborn, J., endorsing different-in-degree rule as “unquestionably the doctrine of *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 14 L. Ed. 249 [U.S. 1851-1852], where the Supreme Court stated that the restraint of a public nuisance may be obtained when the injury complained of is common to the public at large, and only greater in degree to the complainants.”).

268. *Id.* at 17 (quoting at length Lord Penzance’s opinion in *McCarthy*, *see supra* notes 214-224 and accompanying text, and two early American cases).

269. *Id.* *See also* HILLIARD, *supra* note 50, at 637 & n.1 (citing a series of cases that, he claims, stand for the proposition that inconvenience from the obstruction of a highway, which is a difference in *degree* not *kind*, “is a sufficient injury to maintain an action against the obstructor.”).

270. Smith, *Private Action*, *supra* note 8, at 17.

271. *Id.* at 18. Worse yet, in his view, some courts implied that if any other member of the public *might have incurred* similar injury, the remedy was unavailable. *Id.* at 18-19.

272. *Id.* at 19-20.

273. *Id.* at 21. Part V offers this Article’s proposal that Smith’s rule be modernized. Although Smith’s interpretation is more eloquent and accurate than those of prior scholars, his proposed rule of actual damages seems archaic today in light of modern standing law that generously defines injury as including injuries beyond economic and personal harm. *See infra* Part IV.A. Smith expressly did not support public nuisance action under a “pure” private attorney general theory, *i.e.* where there is no personal stake. *See id.* at 151 (“It is not enough that the plaintiff,

Smith's pointed criticism and attempt to move the judiciary toward a more liberal rule did not prevail. Over the next several years, the state cases generally moved more toward the conservative different-in-kind test.²⁷⁴ An 1890 intermediate court opinion in Missouri is indicative of the trend at that point in time. In *Heer Dry Goods Co. v. Citizens Railway Co.*,²⁷⁵ Judge Thompson reluctantly applied the different-in-kind test in denying a public nuisance claim by private individuals and businesses to enjoin a railway company from laying a sidetrack on a busy street in Springfield, Missouri. Despite finding that the Missouri Supreme Court had firmly adopted the strict test,²⁷⁶ Judge Thompson concluded that it was "not supported by the weight of authority" and that there was "a great contraity [sic] of decisions" on the rule, which courts had found difficult to apply.²⁷⁷ His review of the English cases led him to conclude that the proper rule was that the "action *may* be maintained, where, by reason of the peculiar situation of the plaintiff, the obstruction cuts off his access to and egress from his premises or place of business."²⁷⁸ Nonetheless, Judge Thompson felt

having no interest except as a member of the general public, desires to test the legality of the obstruction. He cannot constitute himself a champion of the public for that purpose.").

274. See Prosser, *Private Action*, *supra* note 8, at 1005-06 & nn. 77-86 (concluding that, from the late 1800s to the early 1900s, courts had consistently denied standing to private plaintiffs in public nuisance cases, including cases involving gaming houses, noise, highway obstruction, blockage of navigable streams, water pollution, and beach access); see also Wade, *Environmental Protection*, *supra* note 4, at 169 ("With essential unanimity [the courts] held that a plaintiff must suffer damage different in kind in order to maintain a tort action.").

For cases between 1845 and 1951 that articulated a strict different-in-kind test, see *O'Brien v. Norwich & Worcester R.R. Co.*, 17 Conn. 372, 375-76 (1845); *Dougherty v. Bunting*, 1 Sandf. 1 (N.Y. 1847); *Smith v. Lockwood*, 13 Barb. 209 (N.Y. 1852); *Willard v. City of Cambridge*, 85 Mass. 574 (1862); *Prosser v. City of Ottumwa*, 42 Iowa 509 (1876); *Innis v. Cedar Rapids I.F. & N.W. Ry. Co.*, 40 N.W. 701 (Iowa 1888); *Anthony Wilkinson Livestock Co. v. McIlquam*, 83 P. 364 (Wyo. 1905); *Walls v. Smith*, 52 So. 320 (Ala. 1910); *McKay v. City of Enid*, 109 P. 520 (Okla. 1910); *Livingston v. Cunningham*, 175 N.W. 980 (Iowa 1920); and *Schlirf v. Loosen*, 232 P.2d 928 (Okla. 1951).

For cases that followed a more flexible different-in-degree or actual damages approach, see *Hughes v. Heiser*, 1 Binn. 463 (Penn. 1808); *Lansing v. Smith*, 4 Wend. 89 (N.Y. 1829); *First Baptist Church in Schenectady v. Schenectady & Troy R.R. Co.*, 5 Barb. 79 (N.Y. 1848); *Brown v. Watson*, 47 Me. 161 (1859); *Piscataqua Nav. Co. v. N.Y., N.H. & H.R. Co.*, 89 F. 362, 365 (D.C. Mass 1898); and *Carver v. San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (S.D. Cal. 1906).

275. 41 Mo. App. 63, 77 (1890).

276. *Id.* at 77-78.

277. *Id.*; see also *id.* at 80 (noting contradictory American decisions).

278. *Id.* (emphasis added).

bound by Missouri's adoption of the conservative test and rejected the plaintiff's claim.

The conservative American judicial trend and Smith's criticism set the stage for the next major doctrinal development, Prosser's entry into the special injury rule thicket.

B. William L. Prosser and "The Great Dispute"²⁷⁹

Without doubt, William L. Prosser has been the dominant figure in the development of black letter tort law in the United States from the 1940s until the present, despite his death in 1972.²⁸⁰ A close examination of Prosser's writings on the special injury rule—a topic of particular fascination for him—is critical to understanding how the different-in-kind test and its flaws became so entrenched in American law. Prosser's strong scholarly views on the issue of the special injury rule and the different-in-kind test evolved from skepticism to resigned orthodoxy. Despite his earlier misgivings about the strict test and his own critical treatment of the issue in drafting the *Restatement (Second)*, Prosser's work ultimately enshrined the strict black letter test.

Prosser's *Handbook on Torts*, first published in 1941,²⁸¹ single-handedly revised for four editions until his death 1972, and still alive through his posthumous co-editors,²⁸² remains the

279. Prosser, *Private Action*, *supra* note 8, at 1008.

280. See Laurence H. Eldredge, *William Lloyd Prosser*, 60 CAL. L. REV. 1245, 1251 (1972) [hereinafter Eldredge, *Prosser*] (calling Prosser "a great Master of Torts"); Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986) (book review) [hereinafter Joyce, *Keepers*] ("Rarely in the history of American legal education has one author's name been so clearly identified with his subject as the name of William L. Prosser is with the law of torts. . . . His articles remain landmarks in the development both of the literature of torts and the law itself."); Wade, *Environmental Protection*, *supra* note 4, at 166 (calling Prosser "Mr. Torts in any lawyer's lexicon"); WHITE, *supra* note 240, at 156 (providing biographical information on Prosser). Prosser practiced law in Minneapolis, taught at the University of Minnesota School of Law, returned to private practice, and then taught at Harvard Law School for one year (1947), *id.*, before being lured away to become Dean of the Law School at the University of California at Berkeley (Boalt Hall). Eldredge, *Prosser*, *supra*, at 1247. He served as Dean until 1961 and stayed at Boalt until 1963. In 1963, he joined the "over 65" club at Hastings College of Law, teaching there until his death in 1972. Joyce, *Keepers*, *supra*, at 852 n.5.

281. PROSSER, *HANDBOOK* (1st ed. 1941), *supra* note 8.

282. After Prosser's death, new editors significantly reworked the treatment of public nuisance in the *Handbook* with a deliberately conservative slant, now providing modern courts and practitioners a truly distorted view of the doctrine that would undoubtedly not please the old master. See PROSSER & KEETON, *supra* note 157, discussed *infra* Part IV.D.

definitive treatise of the modern tort law era.²⁸³ Shortly after the relatively unknown Prosser, then in his eleventh year of teaching at the University of Minnesota Law School, published the handbook,²⁸⁴ the praise was resounding.²⁸⁵ Prosser's work represented an intellectual bridge between early American Formalism²⁸⁶ and the Realism movement that exploded during his tenure at the University of Minnesota Law School.²⁸⁷ Legal historian G.E. White called him a "post-realist conceptualist."²⁸⁸ Prosser did not merely summarize the law in a descriptive way but commented on and cleverly "clarified" areas of the law that were confusing, ill conceived, or underdeveloped. He "disassembled, inventoried, and recombined [cases] to illustrate the common values that, taken as a whole, [the cases] sought to

283. Prosser's *Handbook* soon became the most "widely adopted" treatise in tort law. Joyce, *Keepers*, *supra* note 280, at 852. See also John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CAL. L. REV. 1255, 1255 (1972) [hereinafter Wade, *Impressions*] ("Prosser on Torts! It has a completed sound, a belonging sound, a natural sound, a sound to be remembered for years to come.").

284. See Wade, *Some Impressions*, *supra* note 283, at 1255 (noting he had not "even heard of [Prosser]" when the *Handbook* appeared in 1941).

285. Prosser's text received high praise and critical reviews that were not, in fact, critical. See, e.g., Joyce, *Keepers*, *supra* note 280, at 854, 862; see also *id.* at n.11 (listing reviews). The most critical review was actually by Prosser himself in a "whimsical" article reporting the proceedings of the National Union of Torts Scholars ("NUTS"). See William L. Prosser, *Handbook of the Law of Torts*, 4 LA. L. REV. 156 (1941) (book review). Prosser satirically relayed the story of a meeting of his imaginary critics, all torts luminaries, called together to lambast his new book. Prosser had his critics poke fun at himself and every aspect of the *Handbook*, from the name to the price and the content. *Id.* at 157. The critics' meeting was even interspersed with disturbances, uproars, a fight, the ejection of a critic, cries of treason, and the arrival of the police. *Id.* at 158-60. The satire concludes with Prosser himself rising and stating that "he was very sorry, that he greatly regretted the whole matter, and that he would never do it again." *Id.* at 164.

286. WHITE, *supra* note 240, at Chapter 2 (discussing the impact of legal science on the law, 1880-1910); *id.* at 21 (describing legal science as "a mode—widely labeled scientific—that assumed knowledge to be complex and infinite but capable of orderly classification and analysis through the use of proper methodological techniques").

287. *Id.* at Chapter 3 (discussing the impact of realism on tort law, 1910-1945). "In its extreme form, Realism maintained that 'the participants in a case, the atmosphere it created, and the interests at stake were what determined [the case's] outcome, quite independent of rules or principles.' Indeed, militant Realists had scorned certainty and predictability as legitimate ends of the legal system, arguing that maturity and wisdom came with the recognition that legal issues were endlessly diverse, complex, and fluid." Joyce, *Keepers*, *supra* note 280, at 856 (citing WHITE, *supra* note 240, at 85).

288. WHITE, *supra* note 240, at 157 (Prosser's approach fused realism and "doctrinally oriented theories of tort law"), 163 (describing Prosser as a "conceptualist").

vindicate, (or, in Prosser's view, *ought* to vindicate)."²⁸⁹ Prosser's ability to categorize tort law with unusual fluidity, charm, and clarity, but also to be critical and advocate for new developments, may explain why the *Handbook* was so successful when it came out in the post-Realism 1940s, a time when the legal profession seemed to be searching anew for cohesive approaches to the scattered remnants of law left after the Realists' storm.²⁹⁰ In the context of this great theoretical debate, "Prosser had the good fortune to be the right person in the right place at the right time."²⁹¹ As the legal community reviewed and digested Prosser's new *Handbook*, it realized that the new "'Master of Torts' was appearing on the horizon to carry on the task of reforming the law of torts to serve 'the felt necessities of the times.'"²⁹²

In the introductory section to the Nuisance chapter of the *Handbook's* first edition in 1941, Prosser described the historical origins of the special damages rule as follows: "The remedy

289. Joyce, *Keepers*, *supra* note 280, at 855 & 876 n.75. Prosser "sponsored" the birth of a number of modern torts over the years. Well-known examples of Prosser's ability to shape tort law include: the development of the law on infliction of emotional distress, see William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); the privacy torts, see William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); and strict product liability law, see William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). According to Joyce, "Prosser's genius was to acknowledge and identify the various interests to be balanced, while relentlessly asserting (and, by copious citations and deceptively simple illustrations, seeming to prove) that the results of the cases, on proper analysis, were but multiple, somewhat varied yet ultimately consistent examples of Prosser's own general rules." Joyce, *Keepers*, *supra* note 280, at 858. Prosser's influence was often self-perpetuating. *Id.* at 867 n.75 (noting how the *Handbook* "revisers now can justify the propositions advanced in their text by reference to the cases that invoke the *Handbook* as authority!"). His method was not, however, without criticism. One scholar called Prosser's influence on strict products liability "clever exhortation built on a blurred interpretation of then-current legal developments." Joyce, *Keepers*, *supra*, at 861 n.52 (citing Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 416, 465 (1985)); see also Bryson & Macbeth, *supra* note 5, at 242-48 (criticizing Prosser's self-serving and careless citations regarding the special injury rule).

290. Joyce, *Keepers*, *supra* note 280, at 856 (discussing the 1940s criticism of the rise of "exuberant Realism" for its lack of "any comprehensive analytical framework").

291. *Id.* at 857. Prosser's approach helped to define what G. Edward White calls "Consensus Thought." *Id.* Consensus Thought "sought to reestablish a theoretical predictability in the law by drawing usable generalizations from the study of large numbers of cases with similar or overlapping fact patterns. Although exemplars of this school never reasserted the Scientists' claim that the principles so discovered should be accorded the status of eternal verities, neither did they accept the apparent view of many Realists that predictability was a goal not only beyond attainment, but also vaguely illegitimate." *Id.* at 857 n.31.

292. Eldredge, *Prosser*, *supra* note 280, at 1245.

remained exclusively a criminal one until the sixteenth century, when it was recognized that a private individual who had suffered *special damage* might have a civil action for the invasion of the public right."²⁹³ Then, in a subsection entitled "Special Damage" (later changed to "Particular Damage,"²⁹⁴ the term Prosser preferred), Prosser addressed what he later called "the great dispute."²⁹⁵ Prosser stated, "[t]he great dispute over particular damage has been whether it must be different in *kind* from that sustained by members of the public in general, or whether it is enough that it is substantially greater in degree."²⁹⁶

In this section of the *Handbook*, Prosser laid out the special injury rule in detail, pointing out its problems and voicing considerable discomfort with judicial adoption of the traditional rule and the different-in-kind test. Prosser noted the origin of the "special damage" rule in the 1535 case, adding that a "qualification" had persisted: "it is uniformly held that a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public."²⁹⁷ The courts' rationale, according to Prosser, was three-fold: "appointed representatives" were better suited to redress community wrongs; the rule protected defendants from a "multiplicity of actions" that might result from a more liberal rule;²⁹⁸ and it deterred cases that involved only minor interference with public values.²⁹⁹

293. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 71, at 551 (emphasis added). The cases Prosser cited for authority are discussed *supra* Part II.B. See also *id.*, § 72, at 566 (stating, in the black letter introduction for Section 72: "A private individual may maintain an action for a public nuisance only if he suffers *special damage*, distinct from that common to the public.") (emphasis added).

294. Prosser, *Private Action*, *supra* note 8, at 997 ("Since 'special damage' has connotations as to the kind of damage in connection with the pleading and proof of other types of actions, notably in defamation, 'particular' is obviously a better word, and it will be used hereafter.").

295. *Id.* at 1008.

296. *Id.*; see also 46 A.L.I. PROC., *supra* note 157, at 286 (Prosser remarking that he presented "seven solid pages of cases" and "elaborate case law built up, which is gone into at some length here, because the problem is, I believe, a rather important one, and calls for a pretty complete analysis.").

297. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 569-70 (footnote omitted).

298. *Id.* § 72, at 570 (footnote omitted). Prosser called this second rationale the "best reason."

299. Prosser, *Private Action*, *supra* note 8, at 1007. Prosser emphasized that "[t]his insistence upon the rejection of the trivial has been especially marked in the decision," yet he pointed out the interference in those cases would also not meet the "substantiality" standard. *Id.*

Having restated the rule and the rationale given by early courts, Prosser then proceeded, in his characteristic fashion, to look critically at how the courts had applied the rule. Like Smith, Prosser acknowledged that judicial application was often inconsistent and illogical,³⁰⁰ suggesting a fundamental flaw in courts' interpretation of the rule or, perhaps, in the rule itself. Courts had recognized that "special damages" could range from obstruction of public access³⁰¹ to personal injury³⁰² or injury to property, and perhaps even to interference with contract and pecuniary loss.³⁰³ While noting these cases represented "[t]he weight of authority," Prosser pointed out the existence of numerous conflicting decisions.³⁰⁴ Prosser also expressed his concern that courts were struggling with the split in the tests. To point out the paradox of the traditional different-in-kind test, Prosser used an example of a public nuisance creating widespread community losses from an obstructed public way: if

300. In the first and second editions, Prosser politely suggests "there is little consistency in the decisions." PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 570. In the Third Edition, he changed his comment to: "there is not always very great consistency in the decisions." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 89, at 608 (3d ed. 1964) [hereinafter PROSSER, HANDBOOK (3d ed. 1964)]. By the Fourth Edition, he stated wryly: "some rather fine lines have been drawn in the decisions." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 88, at 587 (4th ed. 1971) [hereinafter PROSSER, HANDBOOK (4th ed. 1971)].

301. Delay and inconvenience satisfied the requirement, according to Prosser, if the plaintiff could prove that "by reason of the delay he has been put to *special expense* of a different *kind*, and if he does so he establishes particular damage," even though "everyone else [in the community] encounters a *similar* loss." Prosser, *Private Action*, *supra* note 8, at 1016 (emphasis added). Prosser notes that the English courts and a few American courts "have gone to considerable lengths to equate loss of time with particular financial loss," to the point where pecuniary damage is virtually presumed for a business that loses time. *Id.* at 1017.

302. "[T]here can now be no doubt that the nuisance action can be maintained where a public nuisance causes physical injury." *Id.* at 1011-12. Prosser comments "[a]ll such cases present no problem." *Id.* at 1013. *But see supra* note 54 (discussing criticisms of using public nuisance for what should be negligence actions).

303. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 570-71 (footnotes omitted). According to Prosser, pecuniary losses "have received special protection." Prosser, *Private Action*, *supra* note 8, at 1013. Prosser uses the paradoxical example of commercial fishers making a "localized use of public waters" being allowed to recover. *Id.* The distinction between the commercial fishery and the "ordinary citizen deprived of his occasional Sunday piscatorial pleasure," according to Prosser, is that in the former case, even "where the business itself is not founded on the exercise of a public right," the type of pecuniary loss is "particular to the plaintiff, or to a limited group to which he is included" rather than "so general and widespread as to affect a whole community, or a very wide area within it," to the "common misfortune" and thus incognizable. *Id.* at 1014-15.

304. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, §72, at 570 (footnotes omitted). After citing seventeen cases in support of the general trend, Prosser cites eight cases "contra." *Id.* at nn. 46-49.

a defendant wrongfully obstructed a navigable stream, the owners of a steamboat line could not recover under a difference-in-kind theory because the entire community had also suffered the lost use of the river, a similar-in-kind injury.³⁰⁵

Prosser stated that one additional justification for the different-in-kind test was judicial convenience: it was easier to distinguish injuries by kind rather than degree. Judicial inquiry into degrees of injury would, the argument went, pose greater difficulty and perhaps result in more arbitrary line-drawing by courts. Courts faced this line-drawing problem in inconvenience and annoyance cases. The ends of the spectrum—a complete blockage of highway access or a remote obstruction that was only slightly inconvenient—were easy to spot.³⁰⁶ The cases in the middle, however—where the obstruction was relatively close and the detour long, or the obstruction far and the detour short—tested courts' ability to draw legitimate lines.³⁰⁷ At least on the surface, judicial decisionmaking was simpler under the different-in-kind test: "The fact that the plaintiff has occasion to use a highway or a navigable stream five times as often as anyone else gives him no private right of action when it is obstructed."³⁰⁸

This "ease of judicial decisionmaking" justification failed to convince Prosser. According to Prosser, "the whole matter" of distinguishing "kind" from "degree" was surrounded by confusion³⁰⁹ and hypocrisy.³¹⁰ Ultimately, he suggested that the doctrinal entanglement could be solved simply by "allowing recovery to anyone who suffers *actual damage*,"³¹¹ the proposal

305. *Id.* § 72, at 571 (footnote omitted); see also PROSSER, HANDBOOK (3d ed. 1965), *supra* note 300, § 89, at 611 (modifying the example and citing four American cases from the late 1800s and one decided in 1952); PROSSER, HANDBOOK (4th ed. 1971), *supra* note 300, § 89, at 591 (citing the same example of widespread community loss).

306. PROSSER, HANDBOOK (3d ed. 1965), *supra* note 300, § 89, at 610.

307. *Id.*

308. *Id.* at 608-09 (footnotes omitted).

309. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 571; see also *id.* § 72, at 571-72 & n.52; PROSSER, HANDBOOK (3d ed. 1965), *supra* note 300, § 89, at 609 n.71 (citing *Kaje v. Chicago, St. P., M. & O. R. Co.*, 57 Minn. 422, 424 (1894), as observing: "Where to draw the line between cases where the injury is more general or more equally distributed, and cases where it is not, where, by reason of local situation, the damage is comparatively much greater to the special few, is often a difficult task.")

310. Prosser noted the "obvious tendency of the courts which adopt the distinction to find a difference in kind where only one in degree is apparent." PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 572 (footnote omitted, citing four illustrative cases from 1924-1927).

311. *Id.* § 72, at 572 (emphasis added) (stating that court's confusion about the rule is, "if anything, an argument in favor of allowing recovery to anyone who suffers

offered twenty-three years earlier by Dean Smith.³¹² He observed that a "strong minority of the courts have rejected 'kind' and 'degree' as an artificial distinction, and have held that it is sufficient that the damage is materially greater than that of the ordinary person entitled to exercise the same public right, although it may be of the same kind."³¹³ Like Smith, he was confident that the risk of a flood of trivial cases was minimized by the fundamental rule of nuisance law that the harm be "substantial."³¹⁴

By the time of the *Handbook's* third edition in 1965, however, Prosser observed with some frustration, that, despite his "standing criticism" over the past two decades, "the distinction between kind and degree is firmly embedded in the court decisions."³¹⁵ Additionally, he had witnessed a further judicial shift toward the more restrictive different-in-kind test.³¹⁶ Nonetheless, Prosser continued to find the issue troubling and worthy of further scholarly debate. After publishing the second edition of the *Handbook*, Prosser began to air and to refine his views about the special injury rule while serving as the Reporter for the *Restatement (Second) of Torts* and contemporaneously publishing a law review article on the topic.

C. *The Drafting of the Restatement (Second) of Torts: Prosser Surrenders and Enshrines the Strict Test*

In 1955, the American Law Institute ("ALI") selected Prosser as Reporter for the massive *Restatement (Second) of Torts*

actual damage. The plaintiff should of course have no action for the infringement of a theoretical right which he shares with the public at large, but when that infringement causes his substantial harm, there is no good reason for denying him relief," citing Jeremiah Smith and the dictum of Chancellor Walworth in *Lansing v. Smith*, 4 Wend. 9, 25 (N.Y. 1829)).

312. See *supra* Part III.A. Prosser called Smith "the pioneer in this area as he was in so much else in the law of torts." Prosser, *Private Action*, *supra* note 8, at 1008. See also David Morris Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, 290 n.138 & 290 n.237 (1982) (stating that Smith was a strong "realist" influence on Prosser in many areas of tort law).

313. PROSSER, HANDBOOK (1st ed. 1941), *supra* note 8, § 72, at 572.

314. *Id.* (footnote omitted). Prosser expanded his rebuttal in *Private Action*, *supra* note 8, at 1007 & nn. 90-92 (pointing out that courts have readily rejected trivial complaints such as the minor inconvenience of opening and closing cattle gates, driving up a steep grade, or passing a wall protruding ten inches into the public way).

315. PROSSER, HANDBOOK (3d ed. 1964), *supra* note 300, § 89, at 609 (dismissing his own criticism with the words "However this may be, the distinction between kind and degree is firmly embedded in the court decisions.").

316. *Id.* § 89, at 608.

project.³¹⁷ Having already written extensively on public nuisance in the first two editions of the *Handbook*,³¹⁸ Prosser naturally took to the topic of nuisance, and public nuisance in particular, with substantially more enthusiasm than his predecessors on the first *Restatement* project, who had simply omitted the topic entirely.³¹⁹

Six years after his appointment, Prosser's attempt to capture the law of public nuisance for the new *Restatement* appeared in his Preliminary Draft No. 16 for the Advisory Committee meeting in June 1961.³²⁰ Prosser revamped the entire structure of the Chapter, making the most substantial changes to the sections on public nuisance and substantial harm.³²¹ After attempting to incorporate all of public nuisance into the existing private nuisance chapter, Prosser "finally gave up" and suggested it be

317. As the first step in the *Restatement* process, the ALI selects a Reporter who then selects a committee of "Advisers," consisting of the leading scholars, judges, and practitioners in the field. Then, the Reporter prepares a "Preliminary Draft" of the sections for the Advisory Committee. After revisions, the draft is then forwarded as a "Council Draft" to the larger ALI Council, consisting of fifty "leaders" of the ALI. Thereafter, normally the draft undergoes more revisions by the Reporter and emerges as a "Tentative Draft," which is then sent to each member of ALI in anticipation of the Annual Meeting traditionally held every May in Washington, D.C. After floor discussion and votes, the draft may be either accepted or "recommitted" to the Reporter. More revisions and tentative drafts may follow for subsequent Annual Meeting decisionmaking. See John W. Wade, *The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement To Continue the Trend*, 13 PEPP. L. REV. 59, 60-64 (1985) [hereinafter Wade, *Restatement: Tribute*]. Prosser's Advisers included the "top torts men in the country." RESTATEMENT (SECOND) OF TORTS second page (Preliminary Draft No. 16, 1961) [hereinafter Preliminary Draft No. 16].

318. Prosser also published an article specifically on Texas nuisance law shortly after his *Handbook* first appeared. Prosser, *Nuisance Without Fault*, *supra* note 43.

319. Chapter 40 of the first *Restatement* ultimately "deals entirely with private nuisance, and ignores the existence of tort liability for public nuisance, except for two paragraphs in the Scope Note, which only distinguishes it." RESTATEMENT (SECOND) OF TORTS Ch. 40 n. to council at 1 (Council Draft No. 24, 1967) [hereinafter Council Draft No. 24]. Prosser observed: "The explanation lies in the fact that the Chapter was assigned originally to the Restatement of Property, and was worked out by a Property drafting group. . . . The only Torts man included among the Advisers was Mr. Eldredge. . . . Regarding the Chapter as part of the Restatement of Property, the drafting group had no interest in public nuisance, and in general perhaps had little encounter with it. The result was that when the Chapter was transferred to the Restatement of Torts, public nuisance was entirely omitted from this Restatement." *Id.* See also 46 A.L.I. PROC., *supra* note 157, at 279 (remarks of Prosser, discussing the mysterious treatment of public nuisance in the first *Restatement*).

320. Preliminary Draft No. 16, *supra* note 317.

321. Compared to Sections 821A (Types of Nuisance), B (Public Nuisance), and C (Who Can Recover for Public Nuisance), which sprang directly from Prosser's hand, Section 821D (Private Nuisance) already had a home in the first *Restatement* and required little reworking.

inserted as a separate topic.³²² So, in 1961, for the first time, public nuisance found its own home in the *Restatement*.

In Preliminary Draft No. 16, Prosser took particular care presenting his analysis of the special injury rule. He drafted lengthy explanatory notes, completely new comments, and seven illustrations. Prosser added a new specific section on the special injury rule, Section 821C: "Who can recover for public nuisance." The new section started with a black letter statement of the special injury rule that enshrined the different-in-kind test: "For a public nuisance there is liability in tort only to those who have suffered special harm, of a kind different from that suffered by other members of the public exercising the public right."³²³ In a lengthy note to his Advisers, Prosser explained that he had reviewed the case law thoroughly and concluded that it followed the different-in-kind test.³²⁴

In Preliminary Draft No. 16, Prosser explained that Smith had argued in his 1915 article that "any one who suffers actual harm of any kind should have a cause of action in tort."³²⁵ Then, however, Prosser signaled that, contrary to his previous positions,³²⁶ he was almost ready to abandon Smith's view. Prosser either disingenuously or carelessly stated, "only one court has ever said this . . . [and] it is definitely not the law."³²⁷ He noted wryly, "[a] good many writers, including an incompetent named Prosser, have argued that a substantial difference in degree should be enough,"³²⁸ but he then set aside his misgivings and concluded that the cases weighed heavily against the different-in-degree test.³²⁹ Prosser expressed no

322. Preliminary Draft No. 16, *supra* note 317, at Ch. 40 n. to advisers.

323. *Id.* § 821C; *see also id.* § 821C cmt. b.

324. *Id.* § 821C n. to advisers; *see also id.* § 821C cmt. b. (explaining the traditional rationale).

325. *Id.* § 821C n. to advisers (1).

326. *See supra* note 311 and accompanying text.

327. Preliminary Draft No. 16, *supra* note 317, § 821C n. to advisers (1). The lone decision was, according to Prosser, *Brown v. Watson*, 47 Me. 161 (1859) (holding that the plaintiff could sustain a public nuisance claim based on the "greater than" rule after he was forced to take a more circuitous route home with a loaded wagon team because the defendant had obstructed the road with felled trees). The court awarded nominal damages for "trouble and loss of time." *Id.* Elsewhere, however, Prosser indicated that *Brown* was not the "lone decision." *See supra* note 309 (noting that in his *Handbook*, Prosser cited *Kaje v. Chicago, St. P., M. & O. R. Co.*, 57 Minn. 422, 424 (1894)).

328. Preliminary Draft No. 16, *supra* note 317, § 821C. Prosser was likely referring to Smith's critique and the 1918 Note, *supra* Part III.A, as well as Fleming's 1957 comparative tort law treatise. *See supra* note 8.

329. Preliminary Draft No. 16, *supra* note 317, § 821C n. to advisers (2). Prosser cites *Winterbottom v. Derby*, *see supra* note 199, and 18 American cases (dating from

concern with the breadth of the case law that recognized a wide range of injuries as sufficient under the rule.

1. Prosser's Private Action Article

Despite the confident tone of Prosser's Preliminary Draft No. 16, he had lingering doubts about the proper formulation of the special injury rule. He re-doubled his research on the issue and wrote a law review article called *Private Action for Public Nuisance*.³³⁰ His article used much the same framework and prose of the public nuisance sections in his *Handbook* and the Preliminary Draft, but he focused in detail on the thorny public nuisance issues and the great dispute over the proper special injury test.

In the article, Prosser again expressed his support for a version of the "actual harm" proposal offered by Smith, whose pioneering interpretation was now supported by Prosser's new Boalt colleague Professor John Fleming,³³¹ that any plaintiff who suffered *substantial* harm had an injury that, by itself, distinguished him from the general public.³³² Prosser, however, disagreed with the restrictive qualification, suggested by Smith and Fleming, that the substantial harm must be *pecuniary* in nature.³³³ Prosser quipped, "[w]ith deference, it may be suggested that this qualification goes far to give the game away before the first ball is pitched."³³⁴ He pointed out that there are many types of cognizable injuries, such as inconvenience, that are non-pecuniary.³³⁵ Moreover, Prosser rejected the notion that the

1867-1953) for support. *Id.* A few pages later, Prosser suggests that "we should follow the overwhelming majority [of the courts that] have rejected difference in degree and insisted on different in kind." *Id.* § 821C n. to advisers. His characterization seems overzealous. See *supra* note 313.

330. Prosser, *Private Action*, *supra* note 8. See 46 A.L.I. PROC., *supra* note 157, at 287 (Prosser mentioned that he "actually went to the unprecedented length of writing a law review article to deal with [the special injury rule] issue in the Virginia Law Review, and I wrote the article first, and then corrected the errors in this particular draft, instead of the contrary process, which is, I believe, usual among writers. [Laughter].").

331. See FLEMING, *supra* note 8 (Fleming, who published his comparative law torts treatise in 1957, joined Boalt's faculty in 1958, while Prosser was Dean). PROSSER, HANDBOOK (4th ed. 1971), *supra* note 300, at 587-88 & n.73 (referring to writers who proposed the substantial harm theory, adding a citation to Fleming).

332. Prosser, *Private Action*, *supra* note 8, at 1008 (emphasis added).

333. *Id.*

334. *Id.*

335. *Id.* (noting inconvenience "is a species of harm, and even substantial harm when the detour is long and onerous, but it normally includes nothing in the way of pecuniary loss."). Prosser accepted the breadth in the caselaw recognizing a wide range of injuries under the doctrine. See Preliminary Draft No. 16, *supra* note 317, §

injury must somehow be unique to the plaintiff: "Notwithstanding some *aberrations* in a few early cases, *particular damage* certainly does not mean *damage peculiar, exclusive or unique* to the plaintiff."³³⁶ Prosser's discomfort with the strict rule and its questionable history was obvious.

Despite his statements to the contrary in Preliminary Draft No. 16, Prosser then, as he had in his *Handbook*, suggested in *Private Action* that the different-in-degree cases had a substantial following: "It has often been held that the fact that other individuals suffer *the same kind* of damage, and even in *greater degree*, does *not* prevent any of them from recovering for it."³³⁷ Yet, Prosser then retreated, contradicting himself by describing these decisions as "occasional" and not explicit rulings, adding, with little authority, that "[w]hen the issue has been squarely presented, it has almost invariably been said that degree is not enough."³³⁸ In short, Prosser was unwilling to relax the test completely. For instance, Prosser stated that a private suit would fail if the "class becomes so large and general as to include all members of the public who come in contact with the nuisance."³³⁹ Although his analysis was less than clear, he appeared to want only to maintain the floor "substantiality" requirement. In other words, he suggested that at least several decisions support the *substantially* greater in degree Smith/Fleming position, but that no one advanced the more extreme *any* difference-in-degree concept.

Prosser concluded his argument for the modified Smith/Fleming rule by pinpointing one of the most troubling

821C, at 15 ("Physical injuries to person or property are of course treated as a different kind of harm."). Commonly accepted qualifying injuries included: a private nuisance (*e.g.*, fumes interfering with a private dwelling), *id.*; full obstruction of immediate ingress and egress to private property, whether the access was a private or public highway, *id.*; loss of contract or a pecuniary loss "to an established business" *unless* the public nuisance "affected a whole area of the community, and the plaintiff's los[s] of customers was common in the area." *Id.* § 821C, at 19.

336. Prosser, *Private Action*, *supra* note 8, at 1008 (emphasis added). This is, unfortunately, how many courts have come to view and apply the different-in-kind test—if the injury can be construed as common or shared, the plaintiff is disqualified.

337. *Id.* at 1008-09 (emphasis added). For his authority, Prosser cites thirteen cases—two federal cases (including Smith's favorite *Piscataqua*, *see supra* notes 252-254 and accompanying discussion) and eleven state cases beginning in 1869 and ending in 1962. *Id.* at 1009 n.99. Compare with Tentative Draft No. 16, *supra* note 235, § 821B cmt. g.

338. Prosser, *Private Action*, *supra* note 8, at 1009. Prosser cited two federal cases, including *Piscataqua*, three American state court cases, one Australian case, and one Irish case. *Id.* at 1009 n.100.

339. *Id.* at 1009.

problems created by the different-in-kind test: “[w]hat if there is pecuniary loss [a cognizable injury under public nuisance’s longstanding exception to the economic loss rule] and it is common to the whole community?”³⁴⁰ For example, what if the blocking of a river forces an entire town to import coal and other supplies by a more expensive route, resulting in significant costs to businesses and individuals?³⁴¹ Even though the loss is both pecuniary and substantial, Prosser observed that, in these types of cases, courts ignored the degree to which the plaintiff was affected and “insisted upon some distinct kind of damage.”³⁴² But, said Prosser, this stark choice between different-in-kind and different-in-degree is inappropriate.³⁴³ Rather, the justification for recognizing an injury based on degree as “particular damage” was that degree was actually an indicator of some special interest of the plaintiff not common to the community as a whole.³⁴⁴ Thus, “the degree can never be ignored when it bears legitimately upon the issue of kind.”³⁴⁵ Ultimately, however, Prosser concluded that, despite courts’ difficulties in applying the different-in-kind test and his own criticism, it was the prevailing view.³⁴⁶

2. Prosser Presents His Views to the ALI

Shortly after publishing *Private Action*,³⁴⁷ Prosser sent his revised draft of Chapter 40 and other portions of the *Restatement (Second)* to the full American Law Institute (“ALI”) Council, with minimal revisions.³⁴⁸ Prosser seemed well aware, however, that he had a new audience to persuade and was both straightforward about the challenging issues and ready to re-argue his position that the different-in-kind test predominated.³⁴⁹ In his list of questions for the Council, he noted that 821C was a new section where “[t]he position is taken . . . that there must be particular harm differing in kind from that suffered by the general public,” and then queried whether the Council agreed.³⁵⁰

340. *Id.* at 1010; see *supra* note 65 (discussing economic loss exception).

341. Prosser, *Private Action*, *supra* note 8, at 1009; see, e.g., *id.* nn. 107-112.

342. *Id.* at 1010-11.

343. *Id.* at 1011 (“This, however, is not the whole story.”).

344. *Id.*

345. *Id.*

346. *Id.* at n.113.

347. See *supra* note 330 and accompanying text.

348. Council Draft No. 24, *supra* note 319.

349. *Id.* at 1 (noting Advisers’ approval of his general new treatment of public nuisance).

350. *Id.* at “Suggested Questions for the Council.”

In presenting that section, he bolstered his restatement of the different-in-kind rule by highlighting the debate over this topic among torts writers, the evolution of his own views, and his exhaustive search of the case law.³⁵¹

Except for some notable challenges to his position on the exclusive criminal nature of public nuisance,³⁵² Prosser's draft on public nuisance issues emerged almost unscathed from the meeting of the Council in December 1967 and was re-issued as Tentative Draft No. 15 without significant changes to Section 821C.³⁵³ At the beginning, however, Prosser continued to suggest to the membership that Section 821C was new and "runs to considerable length, because of the variety of fact situations," then prophetically asked, "Is it approved?"³⁵⁴ Because there was

351. Instead of reciting the cases, he cited his then newly published *Private Action* article. *Id.* § 821C, at 16; see also RODGERS, AIR & WATER, *supra* note 8, § 2.2, at 36 ("A debate has raged on whether a difference in kind is often in reality only one in degree, with no less a luminary than Dean Prosser shifting to the 'different in kind' school after careful study of the reported cases."). Prosser's draft "set out the particular damage rule in its harshest form." Bryson & Macbeth, *supra* note 5, at 251. For a reporter to "restate" a rule despite his own misgivings was a delicate task. See W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 26 (1985) (quoting Professor W. Barton Leach that a drafter of the restatements "must either state a good rule which he knows perfectly well is not the law; or he must state a bad rule and by his very restatement entrench it further") (emphasis added).

Prosser did manage to inject back into his draft a watered-down version of his earlier argument for the less strict different-in-degree standard. Prosser suggested, as he had stated in his 1966 article, that the two concepts could be blurred: "[d]ifference in degree of interference cannot, however, entirely be disregarded in determining whether there has been difference in kind." Council Draft No. 24, *supra* note 319, § 821C, at 18. For example, if a person travels a road a dozens times a day, "he nearly always has some special reason to do so, and that reasons will almost invariably be based upon some special interest of his own, not common to the community. [Therefore s]ubstantial interference with that interest will be particular damage, sufficient to support the tort action." *Id.* He concluded that the degree of interference should continue to be "a factor of importance, which must be considered." *Id.*

352. As to the criminal character of public nuisance, Prosser noted that "[s]everal members of the Council have challenged the proposition that a public nuisance is always a crime." Tentative Draft No. 15, *supra* note 75, § 821B, n. to institute, at 16. But, "[a]fter rather intensive search, the Reporter sticks to his guns. First of all, all the text writers have so declared. . . . Second, there are broad general statements in a large number of cases that any public nuisance is a crime. . . . Finally, intensive search by the Reporter has failed to uncover a single case in which it has been held that there was a public nuisance although there was not a crime." *Id.* at 16-18. Despite his firm resolution, Prosser's position would later be rejected by the ALI membership. See *infra* note 467 and accompanying text.

353. Tentative Draft No. 15, *supra* note 75, § 821B, n. to institute, at 16.

354. *Id.* at xi.

no room on the agenda of the 1968 meeting,³⁵⁵ the Council bumped the issue to the May 1969 Annual Meeting. Troubled waters were ahead.

After fourteen years of work on the issue, 71-year-old Prosser finally had the opportunity at the 1969 Annual Meeting to present his Tentative Draft No. 15 in person to the broader legal community. ALI Director Herbert Wechsler's introductory comments presaged the public-law rebellion against the black letter special injury rule that would occur at the following year's annual meeting. Wechsler characterized Prosser's expansion of the nuisance chapter as "a matter of substantial import in a legislative age—an aspect, indeed, of the larger problem of how far the law of torts adds to the public sanctions that may be prescribed by statute the further sanction of a private action. There also is the question of whether the common law of nuisance really retains the vitality it had of old."³⁵⁶ Wechsler promised, "Dean Prosser's return to the rostrum of the Institute should thus provide an interesting day."³⁵⁷

When Prosser did return, he began his presentation by noting that "[t]he nuisance chapter offers a peculiar drafting difficulty because of the history of this particular chapter in the Torts Restatement."³⁵⁸ Prosser then jumped directly into the rationale for a new major emphasis on public nuisance [saying "[o]ne of the mysteries of the First Restatement of Torts to me is: What happened to public nuisance, and why isn't it in here? Obviously it has to go in."³⁵⁹ Prosser's presentation then combined the best of his drafts and his 1966 article. In addressing the definition of public nuisance, Prosser again defended the conservative view that "[a] public nuisance is a criminal interference with a right common to all members of the public,"³⁶⁰ to which he felt driven by the case law and statutes.

355. *Report of the Director*, 46 A.L.I. PROC., *supra* note 157, at 469 (stating "Last year's agenda left no room for a submission in torts . . .").

356. *Id.*

357. *Id.*

358. *Id.* at 277; *see supra* note 319 (discussing omission of the topic from first Restatement).

359. 46 A.L.I. PROC., *supra* note 157, at 279.

360. *Id.* at 282. Acknowledging that, on this issue, "the Reporter has again been challenged by members of the Council," Prosser then displayed some irritation, relaying how this particular debate "cost the Reporter a month out of his life trying to run down such [contrary] cases, and he found nothing whatever to support the position taken by the members of the Council. No case has been discovered in which there has been a public nuisance which was not a crime." *Id.* at 283. Prosser called the challenge of defining nuisance "exceptionally difficult," *see* Council Draft No. 24, *supra* note 319, § 821B, n. to council, at 9, and his definition was a very conservative

He was not "very happy about this particular situation and this problem," but, according to his extensive review, public nuisance was fundamentally criminal in character.³⁶¹ Upon hearing no objections from the floor, Prosser then proceeded to the next section 821C in the short time remaining for the nuisance discussion.

Prosser began explaining the special injury rule by referring to "the 1536" case. He erroneously explained that a man who was injured by riding his horse into a trench dug across a public highway by the defendant was allowed to sue "upon the ground that he had suffered special damage peculiar to him, and not shared in any way by other members of the public."³⁶² That case, he claimed, formed the foundation of the "special damages" or "peculiar damages" rule developed to require injury "of a kind different from the damages suffered by other members of the public who are exercising the same public right."³⁶³ Prosser then noted that this "opens up quite a door," and that there had been "a great deal of argument in the past about whether the damages suffered by the plaintiff have to be different in kind, or whether it is enough that he suffers damages differing in degree."³⁶⁴ But, he concluded that his review of the cases did not support a departure from the different-in-kind rule. He again articulated "[t]he chief explanation of the rule": that it prevents multiplicity of suits that might "harass defendants," creating "a rather intolerable situation."³⁶⁵ Then, noting that only five minutes remained in the time allotted, Prosser asked for comments. No substantive questions arose, and the section was "tentatively approved."³⁶⁶

one. Prosser explained: "This is the best I can do with this one. I have combed the law dictionaries, and Words and Phrases, and have not come up with anything better. . . . Can any one [sic] do better?" Preliminary Draft No. 16, *supra* note 317, § 821B, n. to advisers.

361. 46 A.L.I. PROC., *supra* note 157, at 283.

362. *Id.* at 285. Prosser's narrative further suggests that he never read the case, as the "facts" were only a hypothetical. See *supra* Part II.B.

363. 46 A.L.I. PROC., *supra* note 157, at 285. But see *supra* Part II.B (arguing that the different-in-kind rule was not characterized as such until the late 1800s, 300 years later).

364. 46 A.L.I. PROC., *supra* note 157, at 285.

365. *Id.* at 286.

366. When Tentative Draft No. 17 was issued, ALI Director Herbert Wechsler noted that Prosser's Chapter 40 on Nuisance was rushed and had been "barely reached in the discussion" due to the volume of other topics. RESTATEMENT (SECOND) OF TORTS vii (Tentative Draft No. 17, 1971) [hereinafter Tentative Draft No. 17]. Perhaps if more leisurely debate had been allowed, a final vote would have been taken and the 1970 rebellion, see *infra* Part IV, might never have happened.

Unfortunately for Prosser, the 1969 meeting would not be his anticipated curtain call. Because the discussion of the Chapter 40 on nuisance had been incomplete, the ALI "republished" the prior draft (No. 15) virtually in its entirety as new Tentative Draft No. 16 in April of 1970.³⁶⁷ Prosser and the ALI leadership assumed, however, that debate on the draft through Section 821C was over. They were mistaken.

IV

THE RESTATEMENT (SECOND) REBELLION: THE FAILED ATTEMPT TO INFUSE FEDERAL STANDING LAW DEVELOPMENTS INTO PUBLIC NUISANCE

Little did Prosser know that, at the 1970 Annual Meeting, an unprecedented "legal drama"³⁶⁸ would unfold that would significantly alter his carefully crafted special injury rule. The events would prove to be the final straw prompting his resignation. After an emotional debate, the ALI membership voted to override Prosser's draft statement of the special injury rule in order to infuse into public nuisance the principles of standing rapidly developing in new federal administrative law cases. The rebellion would mark a doctrinal watershed—the pinnacle of the attempt to harmonize private plaintiffs' access to public nuisance with emerging public law principles. The rebellion also represented an unprecedented grassroots challenge to Prosser's authority, reflecting the social upheaval of the times.

This "moment . . . so terribly burning in history"³⁶⁹ represented the convergence of dramatic social and legal events unfolding in the United States in the late 1960s: the social justice and environmental movements, and the parallel creation of modern federal standing law in administrative law cases.³⁷⁰ The major shift in the *Restatement's* position on public nuisance³⁷¹ was greeted with great enthusiasm by observers, particularly the new Reporter John W. Wade and the new generation of environmental law scholars and practitioners.³⁷² Ultimately, however, the great rebellion did not ignite a

367. Tentative Draft No. 16, *supra* note 235, at vii (Foreword by Director Wechsler) ("Tentative Draft No. 16 resubmits Chapter 40 on 'Nuisance,' which was before the Annual Meeting last year. Because time then did not permit discussion beyond Section 821C, the entire Chapter is being republished in this draft.")

368. Wade, *Environmental Protection*, *supra* note 4, at 165.

369. *Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16*, 47 A.L.I. PROC. 287, 300 (1970) (remarks of John P. Frank).

370. See *infra* Section A.

371. See *infra* Section B.

372. See *infra* Section C.

revolution.³⁷³ Only one court ever adopted the new *Restatement* position. For a variety of theoretical, doctrinal, and practical reasons,³⁷⁴ the *Restatement's* progressive view, as it is now formulated, is unlikely to ever take hold in the courts. By examining this modern doctrinal history, however, we can perhaps better clear the path toward an approach more palatable to courts and commentators alike.

A. The Emergence of Federal Standing Law

By the time of the ALI's annual meeting in May 1970, dramatic new developments in the federal³⁷⁵ law of standing had emerged and had begun to carve an entirely new landscape for national public law litigation. To understand the context for the ALI's rebellion against the special injury rule, it is important to explore briefly the explosive emergence of federal standing law in the late 1960s. These changes directly affected the debate over the special injury rule.

From 1939 until 1968, the well-established federal standing doctrine was based on the narrow "legal interest test."³⁷⁶ During this time, the private attorney general concept was not yet recognized, and the avenue for average citizens seeking redress on major policy disputes in federal courts was largely closed. Starting in 1968, four major Supreme Court cases "drastically liberalized the federal law of standing, giving it a new basic

373. See *infra* Section D.

374. See *infra* Part V.

375. Davis, *supra* note 2, at 468-69. Many states take a simpler approach to standing, avoiding the overly complex federal doctrine. "By and large, the state courts follow the common law attitudes in governing judicial review of administrative action, so that the judicial doors are widely open to anyone who asserts a legitimate interest; one who is hurt in fact has standing unless a statute or a 'public policy' requires otherwise." *Id.* at 468. State courts' more flexible approach to state standing law provides some optimism for the prospects of a liberalized special injury rule. See *infra* Part V.

376. See *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939) ("one is without standing unless 'the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"). Pre-*Tennessee*, during the nineteenth and early twentieth centuries, the federal courts had followed "the natural [common law] system," Davis, *supra* note 2, at 469, which more generously allowed standing. See also Chayes, *supra* note 1, at 8-9 ("[i]n the classical lawsuit, the standing problem could hardly arise. The issue was whether the particular plaintiff was entitled to the (usually compensatory) relief demanded from the particular defendant, when both plaintiff and defendant were private persons. The question of plaintiff's standing to sue merged with the question of whether plaintiff had stated a cause of action on the merit."). The proposal suggested by this Article (Part V, *infra*) is similar to this merits approach.

orientation."³⁷⁷ In these cases,³⁷⁸ the Court granted expansive new standing rights to economic interests, taxpayers, and tenant farmers, sparking a revolution³⁷⁹ in standing law.³⁸⁰

377. Davis, *supra* note 2, at 450.

378. In *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), a private utility sought to enjoin the Tennessee Valley Authority ("TVA") from supplying power to towns served by the plaintiff. In a unanimous decision, the Supreme Court held that a 1959 statute, which forbade the TVA from selling power from outside the area where it was a primary power source, was designed to protect private utilities from TVA competition and allowed the competing private utility standing to challenge the proposal. From *Hardin* emerged the bedrock standing principle that parties with statutorily protected interests have standing for judicial review.

A few months after *Hardin*, the Court decided *Flast v. Cohen*, 392 U.S. 83 (1968), holding that federal taxpayers can, under certain circumstances, demonstrate standing to challenge the validity of governmental expenditures, i.e. textbooks and other educational materials for use in parochial schools.

Two years later, the Court's decision in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), involved data processing service organizations seeking standing to challenge a rule of the Comptroller of the Currency that also allowed banks to provide such services. The Court rejected the *Tennessee* "legal interest" test, *id.* at 153, and adopted a new prudential "zone of interest" test, apart from the Article III case and controversy requirement. *Id.* at 153-54. In simultaneously decided *Barlow v. Collins*, 397 U.S. 159 (1970), the Court allowed standing to tenant farmers who sought to challenge a regulation that allowed landlords to charge them high interest rates for financing farm needs. The Court held that the tenant farmers had "personal stake and interest that impact the concrete adverseness required by Article III" and were clearly "within the zone of interest protected by the Act." *Id.* at 164.

Data Processing and *Barlow* thus introduced the now-familiar two-step framework for federal standing: first, the Article III test of "injury in fact, economic or otherwise," and second, the prudential "zone of interest" test. Davis, *supra* note 2, at 452-56. The Article III requirement has evolved into a three-part test: first, that the plaintiff allege a personal stake in the outcome of the controversy as to assure that concrete adverseness that sharpens the presentation of the issues (injury in fact); second, that the injury be fairly traceable to the injury or conduct (traceability); and third, that the remedy sought be suitable to redress the alleged injury (redressability). *Id.* Although this test arises from the distinct federal context, doctrinally it could be imported into the torts context without much difficulty - "actual injury" would constitute injury-in-fact, causation principles address traceability, and broad nuisance remedies would be available for redress.

379. See Bryson & Macbeth, *supra* note 5, at 253 (calling the cases a "near-revolution"); Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 231 (1969-70) (arguing that *Barlow* and *Data Processing* removed the barriers for citizen groups).

380. The United States Supreme Court's new approach had at least four primary sources, which also set the stage for the push to liberalize the special injury rule at the 1970 ALI Annual Meeting, see *infra* Section IV.B. First, it was prompted by new congressional authorizations of greater citizen participation in enforcement of the federal laws. Congress had enacted the Administrative Procedure Act ("APA") in 1946, 5 U.S.C. § 702 (1994), which authorized lawsuits against agencies by any person "suffering legal wrong" or "adversely affected or aggrieved."

Second, in 1940, the Supreme Court had issued *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), its "watershed case in the law of standing," Louis L.

Alongside these dramatic developments in the role of the judiciary in public law litigation, by the late 1960s, the awareness of environmental issues had exploded and was dominating the American consciousness. Media attention to ecology was constant,³⁸¹ grassroots pressure from groups like the Sierra Club had intensified,³⁸² the "public consciousness [was] rapidly being awakened particularly because dramatic and visible experiences of environmental deterioration [were] igniting previously only smoldering fires of discontent,"³⁸³ and congressional interest in "ecology issues" was strong, presaging a wave of new federal environmental statutes.³⁸⁴

Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 257 (1961) [hereinafter Jaffe, *Private Actions*], which "generated a strong current toward the broader concept of standing." *Id.* at 258. Subsequently, lower courts began to relax standing in some cases. See Hanks & Hanks, *supra* note 379, at 242.

Third, by the late 1960s, "public law" litigation (*see infra* Part V.B.2.) had made its big debut on the national litigation stage. Major federal lawsuits involving public housing, civil rights, and labor issues (often brought by the new breed of public interest law firm) were using statutory and constitutional causes of action to challenge major policy actions by government. See generally Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

Fourth, two prominent law review articles published in 1961 by Harvard's Louis L. Jaffe laid the scholarly foundation for the movement and sparked further commentary. See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter Jaffe, *Public Actions*] (arguing for expanded judicial review and standing in cases where individuals seek to vindicate the public interest) and Jaffe, *Private Actions*, *supra*, at 255 (arguing that standing of private citizens who assert a "distinct or discriminating impact" should not be "of right" but discretionary in administrative law cases).

381. See Gary Neustadter, Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 UCLA L. REV. 1070, 1070 & n.3 (1970) [hereinafter Comment, *Role of Judiciary*] (noting constant media attention to environmental issues).

382. *Id.* at 1070 n.3 (noting the National Environmental Teach-In of April 1970 and publication of a Sierra Club handbook for "environmental activists" called "Ecotactics").

383. *Id.* at 1070; see also David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970) (noting that the "explosion of concern for the environment . . . is the great political phenomenon of the last twelve months."). Ecological disasters like the Santa Barbara Oil Spill shocked the national consciousness. See Malcolm F. Baldwin, *The Santa Barbara Oil Spill*, in LAW AND THE ENVIRONMENT 5-47 (Michael F. Baldwin & James K. Page, Jr. eds., 1970) [hereinafter LAW AND THE ENVIRONMENT]. *Time* magazine declared 1969 "the year of ecology." James E. Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT, *supra*, at 106. Even scholarly articles declared the "ecological crisis." Comment, *Environmental Lawsuit*, *supra* note 6, at 1085 ("No reasonable man would deny that we are now living in a time of ecological crisis.").

384. Comment, *Role of Judiciary*, *supra* note 381, at 1070; see also *id.* at 1077-79 (discussing air and water pollution legislation as of 1970); *Environmental Law Bibliography*, in LAW AND THE ENVIRONMENT, *supra* note 383, at 375, 382-86 (listing 43 congressional hearings on environmental issues from 1967-1969); Note, *Public*

Despite the fact that very few lawsuits were reported under the precursors to our modern federal environmental statutes,³⁸⁵ there was a "growing awareness in the courts of the need for environmental controls."³⁸⁶ The Supreme Court's decisions in the new standing cases³⁸⁷ would prove to be "invaluable tool(s)" for public law litigators,³⁸⁸ especially environmental lawyers who were learning to use the Administrative Procedure Act, enabling acts for federal agencies, and the then-recently enacted National Environmental Policy Act.³⁸⁹ Congress was in the mood to give citizens a greater role in ensuring that government agencies fulfilled their conservation responsibilities.³⁹⁰

These developments in federal administrative standing law and the environmental movement converged to ignite the revolution in environmental litigation. In early 1970, University of Michigan Law Professor Joseph Sax persuaded Michigan to pass a novel citizen suit law.³⁹¹ The Michigan Act prompted similar legislation in several other states³⁹² and the modern

Nuisance, *supra* note 8, at 397 n.36, 398 & 400 (listing some of the then-recently enacted conservation statutes).

385. Grad & Rockett, *supra* note 8, at 749-52 (noting the small number of lawsuits under pre-1969 versions of environmental laws).

386. *Id.* at 747-48; *see also id.* at 748 ("the courts have expressly indicated an awareness of the dimension of environmental problems and of the public policies that reflect the prevailing public interest"); Sax, *Public Trust Doctrine*, *supra* note 8, at 473 ("Public concern about environmental quality is beginning to be felt in the courtroom.").

387. *See supra* note 378.

388. *See* Comment, *Environmental Lawsuit*, *supra* note 6, at 1087 & 1093; *see also* Sive, *supra* note 383, at 614-43 (discussing the emerging paradigm of environmental law cases).

389. National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et seq.*, 83 Stat. 852 (1970) (signed by President Nixon on January 1, 1970); *see generally* Hank & Hanks, *supra* note 379 (examining the usefulness of the then-recently enacted NEPA).

390. *See* Hanks & Hanks, *supra* note 379, at 253 (noting Senator Jackson's enthusiasm for "action forcing" procedures for federal agencies to protect the environment).

391. The Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, Mich. Comp. Laws Ann. 691.1201-1207 (Supp.1972), allowed "any person" or organization to sue for declaratory and injunctive relief against the government or private parties for "the protection of the air, water, or other natural resources and the public trust therein from pollution, impairment, or destruction." *Id.* § 2(1). *See also* Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972) (discussing experience with the new Act).

392. Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974) (analyzing Michigan Act as a "harbinger" of state and federal environmental litigation); Comment, *Environmental Lawsuit*, *supra* note 6, at 1130 (noting similar introductions in seven states as of July 1970).

concept of citizens suits was soon on its way to Congress.³⁹³ Federal environmental litigation³⁹⁴ was in its nascent stages.³⁹⁵ The major environmental public interest law firms that would dominate the scene for decades were taking shape.³⁹⁶ Interest among environmental lawyers and law schools in using the courts for environmental protection was exploding.³⁹⁷ "Large numbers" of environmental lawsuits, based on a diverse range of theories,³⁹⁸ were filed and beginning to be reported as they matured to the appellate level.³⁹⁹ With the standing developments came major liberalization in class actions⁴⁰⁰ and injunctive relief,

393. Congress passed the first federal citizen suit provision in the Clean Air Act, 42 U.S.C. § 7604, 84 Stat. 1706 (1970). Over the next two decades, Congress enacted a dozen new citizen suit provisions in various environmental statutes. See Comment, *Public as Plaintiff*, *supra* note 5, at 515 nn.17-19 (citing 12 environmental statutes enacted from the 1970s-1980s).

394. See Sive, *supra* note 383, at 614 n.7 ("No authority has as yet defined 'environmental litigation.' Asserting the privilege of the trampler in new snow or new fields of law, I mark the bounds of our steps without citation of authority. By 'environmental litigation' is meant adversary proceedings before courts or administrative agencies the results of which determine the use of significant natural or other physical resources.").

395. In September 1969, the Conservation Foundation sponsored the first national conference of environmental lawyers and scholars, including names now legendary in the field. The conference proceedings were published as *LAW AND THE ENVIRONMENT*, *supra* note 383. The conference included presentations on the cutting-edge issues of the day and resulted in the launching of the Environmental Law Institute and the *Environmental Law Reporter*. *Id.* at vii. Courses in environmental law were beginning to be offered, but environmental law texts and casebooks had not been published. See Sive, *supra* note 383, at 614.

396. See Sive, *supra* note 383, at 613 & n.6 (noting the emergence of Natural Resources Defense Council (NY), Environmental Defense Fund (NY), the Center for Law and Social Policy (Washington, D.C.), and the Conservation Law Society of America (San Francisco, CA), precursor of Sierra Club Legal Defense Fund (now EarthJustice Legal Defense Fund)).

397. Grad & Rockett, *supra* note 8, at 742 (reporting a "lively enthusiasm for environmental litigation" and "an explosion' of interest among law students"); Sive, *supra* note 383, at 613 (commenting on the proliferation of environmental law courses and societies).

398. Sax, *Public Trust Doctrine*, *supra* note 8, at 474 ("The cases present legal theories which are as diverse as lawyers' imaginations are fertile.").

399. As of January 1970, Professor Sax reported "several dozen such suits . . . to enforce air and water pollution laws." *Id.* at 473 & nn. 1-9 (listing cases). This enthusiasm spilled over into the torts bar. See, e.g., *Can Law Reclaim Man's Environment?*, 5 TRIAL 10-28 (1969) (essays exhorting trial lawyers to rise to the defense of the embattled environment using traditional tort tools and embracing the new public law techniques).

400. After Federal Rule of Civil Procedure 23 was "radically restructured" in 1966, Comment, *Environmental Lawsuit*, *supra* note 6, at 1100, some commentators predicted it would be a "potent weapon for redressing the injuries of large numbers of people with small individual claims against polluters"; see *id.* at 1097-98 ("the class action . . . would seem an ideal method of seeking redress in environmental litigation"); see also James E. Starrs, *The Consumer Class Action—Part II:*

which encouraged waves of lawsuits in the civil rights, consumer, and environmental areas.

These developments prompted a new stream of scholarship by federal administrative and environmental law commentators,⁴⁰¹ who were eager to address environmental problems⁴⁰² and were re-examining dusty legal tools, from the ancient remedy of *qui tam* to the common law of public nuisance.⁴⁰³ All of these profound social and legal developments

Considerations of Procedure, 49 B.U. L. REV. 407, 408 (1969) (calling class actions "the judicial analogue to the mass demonstrations of the streets"). Although enthusiasm for Rule 23 was severely dampened by the United States Supreme Court decision in *Snyder v. Harris*, 394 U.S. 332 (1969), which held that claims could not be aggregated to meet the \$10,000 jurisdictional amount requirement in diversity cases, Comment, *Environmental Lawsuit*, *supra* note 6, at 1101, this concern would not apply to most federal environmental litigation, which is based on federal question jurisdiction. It could seriously hamper, however, common law public nuisance class actions that seek damages in federal court, see *infra* Part V.

401. See *Environmental Law Bibliography*, *supra* note 384, at 392-412 (listing 222 articles on environmental law published in late 1960s).

402. Many of the now-legendary figures of the environmental law field called for pushing the envelope on new and old legal approaches. Professor Joe Sax advocated reinvigorating the public trust doctrine. Sax, *Public Trust Doctrine*, *supra* note 8, at 471. University of Washington Law Professor William S. Rodgers, Jr. argued that the newly enacted NEPA "created a statutory right to a safe and healthy environment." Comment, *Environmental Lawsuit*, *supra* note 6, at 1130. New York litigator David Sive suggested that "softening of the hard limitations on judicial review of administrative determinations" would provide an effective "balancing force" for environmental protection. Sive, *supra* note 383, at 650-51. Columbia Law Professor Frank Grad focused on the growing pains of the new environmental litigation movement and called for broad federal statutory remedies. Grad & Rockett, *supra* note 8, at 762.

403. Louise L. Jaffe, *Standing To Sue in Conservation Suits*, in LAW AND THE ENVIRONMENT, *supra* note 383, at 123, 131 [hereinafter Jaffe, *Conservation Suits*] ("Arguably the concept of representative plaintiffs now being developed in [federal standing cases] . . . may play a role in a revision of party concepts in nuisance cases. It could be urged that representative plaintiffs be allowed to take direction action against a public nuisance (after, perhaps, seeking without success to induce the public authorities to act) . . ."); Comment, *Environmental Lawsuit*, *supra* note 6, at 1097 ("it might be argued that the representative-plaintiff concept espoused . . . should be expanded to permit interest groups to initiate legal proceedings directly against a public nuisance."). Nuisance theory and case law was, after all, "the common law backbone of modern environmental and energy law." RODGERS, AIR & WATER, *supra* note 8, § 1.1, at 2; Abrams & Washington, *supra* note 4, at 391-92 (prior to the enactment of federal environmental statutes in the 1970s and 1980s, "public nuisance frequently offered the only remedy to secure the cleanup of toxic dumps" such as Love Canal, New York).

At the same time that commentators showed renewed interest in nuisance, they also pointed to the inabilities of the common law to address regional and national problems as a justification for enacting broad new federal statutory remedies. See Grad & Rockett, *supra* note 8, at 743 (suggesting that common law nuisance and trespass may have only "incidental effects on environmental protection," in part because of the special injury rule); see also Comment, *Role of the Judiciary*, *supra* note 381, at 1072-73 (noting the historical role of nuisance

converged to create the necessary conditions for a turbulent ALI meeting in 1970 and brought particular pressures to bear on the public nuisance section of the proposed *Restatement (Second)*.

B. The Restatement (Second)'s Rebellion

Arriving at the morning session of the ALI Annual Meeting on May 21, 1970, the aging "God of Torts"⁴⁰⁴ was probably weary.⁴⁰⁵ After fifteen years of hard work on the massive four-volume project, and some major intellectual battles,⁴⁰⁶ the 72-year-old Prosser was undoubtedly looking forward to putting the monumental undertaking to rest.⁴⁰⁷ Early that morning, however, while dressing for his final presentation, Prosser had badly cut his lip while shaving, showing up with less than his usual wit and dapper appearance.⁴⁰⁸ With only a few minutes remaining in the morning session, President Darrell introduced Prosser to

addressing localized pollution but dismissing its potential to address broad and complex environmental problems); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967) ("Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half-century, which indisputably call for comprehensive legislative planning."); Comment, *Public as Plaintiff*, *supra* note 5, at 515 (new statutory protections meant to "address the limitations of common law nuisance actions"); *Discussion*, in LAW AND THE ENVIRONMENT, *supra* note 383, at 248, 273 (remarks of Ralph Nader, asking "Is torts obsolete?" given the "silent," "long-term," "difficult to detect," and numerous sources of environmental threats); *id.* at 274 (remarks of William M. Bennett, suggesting one weakness of state common law was that it could not set firm precedent for other areas of the country).

404. Law students at Prosser's last teaching position, Hastings College of Law, compiled a list of the strengths and weaknesses of their various professors, and "when they got to Bill Prosser they listed his weakness as: 'He thinks he is God.' They listed his strength as: He is probably right." *Discussion of the Restatement of Law, Second, Torts, Tentative Draft No. 18*, 49 A.L.I. PROC. 188 (1973) (remarks of John W. Wade).

405. About the same time that Prosser was attempting to finish the *Restatement* drafts, he was also preparing the Fourth Edition of his *Handbook* and a new edition of his casebook. Wade, *Some Impressions*, *supra* note 283, at 1261.

406. Prosser called one such famous debate over assumption of the risk and its relationship to contributory negligence "The Battle of the Wilderness." *Id.* at 1258-59. On the floor of the 1963 Annual Meeting, Prosser had engaged in an extended debate—with "pluck," "vigor," "counterattacks," and "ruse"—against the dissenters, whom he dubbed "the Confederate Army." *Id.* The debate ultimately spilled over into the literature and is still the subject of discussion by courts. *Id.*

407. For the 1970 Annual Meeting, Prosser had prepared a 215-page draft, which "to provide a complete picture," *id.* at 1259, included the nuisance topics tentatively approved the previous year. See *supra* Part III.C.

408. Wade, *Some Impressions*, *supra* note 283, at 1259. Prosser's bad luck had started the day before when he "embarked on the wrong plane from San Francisco," arriving in New York instead of Washington, D.C., leading to a poor night's sleep and a "nervous" morning. *Id.*

wrap up the torts project. Darrell's opening remarks on Prosser's unfortunate personal appearance were inauspicious and indicative of the generation gap at the meeting that would soon become evident.⁴⁰⁹

After apologizing for his unusual appearance,⁴¹⁰ Prosser commenced by observing that it had been "an enormous while ago" that the ALI had considered the nuisance issue but that "we got through Section 821C That was, I think, cleaned up and approved."⁴¹¹ Therefore, Prosser hoped the discussion could continue to the next section, 821D, Private Nuisance. Prosser's hopes were quickly dashed.

Prosser asked for comments on private nuisance, and the can of worms began to open. Charles A. Bane, an Illinois practitioner, asked if he could reopen the public nuisance section.⁴¹² Bane then launched an attack on the rule from a conservative perspective—seeking to *weaken* public nuisance as a contemporary remedy. Bane argued that recent major statutory developments on environmental issues at the state and federal level warranted "removing entirely from the concept of nuisance those activities that are subject to regulation."⁴¹³ Essentially, he proposed "transferring the authority and the rule-making power from the courts [in nuisance cases] to a legislative or administrative agency" because the environmental field was "highly skilled [and] highly technical," suitable to administrative agencies.⁴¹⁴ Alternatively, he suggested that "compliance with administrative regulations should be a complete defense to the charges of maintaining a public nuisance."⁴¹⁵

Bane's remarks touched off a furor. Rising from the floor, a self-described "young cub" private practitioner from Arizona, John P. Frank,⁴¹⁶ rebuffed Bane's approach⁴¹⁷ and asked for a

409. 47 A.L.I. PROC., *supra* note 369, at 287 ("One of the most hazardous activities of the male part of mankind is the morning shave. I gather the younger generation, noting what the older ones did in the last century, are gradually abandoning it, but we of our generation still stick to our custom. This morning, our Reporter had a little accident, and I don't want him to feel a bit concerned about this, because he can perform no matter what happens to his lip.")

410. Prosser remarked "[i]t is, perhaps, just as well that my facial beauty is somewhat diminished. Otherwise, the effect of it might be rather overpowering. [Laughter]." *Id.*

411. *Id.* see also *supra* Part III.C.2

412. 47 A.L.I. PROC., *supra* note 369, at 288.

413. *Id.* at 288-89.

414. *Id.* at 289.

415. *Id.* at 290.

416. Telephone Interview with John P. Frank, Partner, Lewis & Roca, LLP (Phoenix, Az.) (Aug. 5, 1999) [hereinafter Frank Interview]. Though Frank was only 52

complete re-examination of the public nuisance section because of environmental concerns.⁴¹⁸ Noting that he was inspired by the pioneering citizen suit work of Professor Sax, Frank plunged ahead with his lengthy prepared statement,⁴¹⁹ completely changing the tone and direction of that morning's agenda. First, he expressed his overall concern that Prosser's traditional formulation of the rule would "lock the door before the horse gets out of the stable."⁴²⁰ Furthermore, he stated:

at the time, he was neither inexperienced nor a radical infiltrator. Born in Wisconsin, Frank received his L.L.B. from the University of Wisconsin in 1940, clerked for Justice Hugo Black during the 1942 term, and served as head of the Department of Justice's Civil Division in the 1940s. MARTINDALE-HUBBELL LAW DIRECTORY AZ138B (1998); Frank Interview, *supra*. Frank went on to receive his J.S.D. from Yale Law School in 1947, teaching law there from 1949-54. MARTINDALE-HUBBELL, *supra*. At the urging of Justice Black, Frank Interview, *supra*, he moved to Arizona for health reasons and entered into private practice with the Phoenix firm of Lewis and Roca, where he remains an active partner today. *Id.* Frank became a member of the ALI in 1962, was a "regular" at ALI meetings. Frank Interview, *supra*, was appointed to the ALI Council in 1973, and recently served as Chair of ALI's 75th Anniversary Committee. John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 615 n.1 (1998). He has authored numerous law review articles on topics ranging from equity, see John P. Frank & John Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380 (1954), to constitutional law and judicial biography. MARTINDALE-HUBBELL, *supra*. Perhaps not coincidentally, Frank was also a friend, admirer, and colleague of Wade. John P. Frank, *John W. Wade*, 48 VAND. L. REV. 591, 591 (1995) [hereinafter Frank, *Wade*].

417. 47 A.L.I. PROC., *supra* note 369, at 294 (although Bane's remarks gave Frank the procedural opening to launch his proposal, Frank vigorously disagreed with Bane's suggestion to shrink the utility of common law nuisance. He countered that reliance on administrative agencies was dangerous: "I must say with due regard for the problems of life in my State, at least, the chance that the public bodies will ever regulate the copper companies that are polluting the air over our State is very, very small.").

418. Frank's interest in the special injury rule was actually in the equitable, not the environmental, principles involved. In fact, he had "no experience with environmental issues at that point," Frank Interview, *supra* note 416, but he believed that for social policy reasons "we should be able to use equity to address pollution problems." *Id.* When he served as head of the Department of Justice's Civil Division in the 1940s, he focused on equity issues, particularly on labor relations during World War II. *Id.* Later, he taught equity subjects at Yale Law School. *Id.* Charles Allen Wright called him "the last equity lawyer in America." *Id.* Now one of ALI's most senior members, Frank is continuing to urge greater merger of law and equity and wants to see "the 1970 project," which he considered "the start of my long campaign to merge law and equity," come "to fruition." *Id.*

419. Frank obviously came prepared. He later commented: "If you are going to take on Prosser, you'd better be as ready for a funeral as for a fight." Frank Interview, *supra* note 416. Before the Annual Meeting, Frank had met with federal agencies and Sax, who was then in Washington, D.C. 47 A.L.I. PROC., *supra* note 369, at 292-93. Frank recalls that he "worked closely" with Sax, following "his leadership." Frank Interview, *supra* note 416.

420. 47 A.L.I. PROC., *supra* note 369, at 291.

What is happening at the moment all over America is that the people are asking to deal with pollution of air and of water and of land, that in this connection a developing body of law is beginning to formulate which is breaking the bounds of traditional public nuisance. What is happening in our portions of this Restatement is that we are clamping a ceiling down, and by this restatement of public nuisance we are making it impossible to use the courts for the most important single social function which at this moment law in its civil reach ought to have. And this is so regrettable a thing that it does deserve another look in the light of the rising tide.⁴²¹

Frank took issue primarily with two aspects of Prosser's draft: the characterization of public nuisance as fundamentally a criminal violation,⁴²² and the formulation of the special injury, different-in-kind rule. Frank attacked the very notion that the law should follow the venerable precedent set in the "1536" English case so often recited by Prosser,⁴²³ by stating, "I say respectfully that the fact that there was a limitation in 1536 is simply not good enough, and that it ought to be put aside, and that it is being put aside right now."⁴²⁴ Frank further referred to recent federal "standing"⁴²⁵ decisions where conservation organizations were allowed to bring lawsuits as public representatives for "abuses to our environment."⁴²⁶ According to Frank, there was "a new wave of development at the grass-roots level" that the ALI must not only recognize but "embrace."⁴²⁷

Although aware he was taking up precious floor time, Frank continued speaking on this "matter of utterly surpassing gravity to the people of this country."⁴²⁸ He quoted Justice Holmes that "

421. *Id.*

422. *Id.* According to Frank, the criminal characterization would prevent the public nuisance doctrine from being applied to modern environmental problems. "[P]ollution may be a crime against God and its nature, but it is not usually a crime against the laws of the state, so that by putting in that definition we make it impossible to reach the problem of the black cloud of filth which hangs in the air over my community and, I suspect, yours." *Id.*

423. *See supra* Part II.B.

424. 47 A.L.I. PROC., *supra* note 369, at 291-92.

425. *Id.* at 292. This appears to be the first suggestion that changes in federal standing doctrine be incorporated into public nuisance. (Prosser's 1966 article, *Private Action*, *supra* note 8, uses the term "standing" but only in the general sense, without reference to then-emerging federal developments. *Id.* at 1007.) To maintain the doctrinal clarity and because "standing" has a specific doctrinal meaning in federal administrative law, but not tort law, this Article does not use the term in the latter context.

426. *Id.* at 292.

427. *Id.* at 292-93.

428. *Id.* at 293.

'[a] river is more than an amenity, it is a treasure,'" and he urged the ALI to approach the relationship between public nuisance and the environment "in the spirit of the utmost imagination and of the utmost service," stating "we ought not be confined, or even limited in any way, by notions of other centuries dealing with other problems in this regard."⁴²⁹ He concluded that

the law of nuisance is at this moment just trying to fight its way out of the dark ages, and I think we should not lock this barn without taking into account the recent developments in environmental law, without taking into account the important developments in the law of standing of this very year in the United States Supreme Court.⁴³⁰

Frank argued that ALI, "as the leader of the profession in America," should allow and encourage "any citizen or any responsible group of citizens to . . . attack problems of pollution of air and water."⁴³¹ Amidst "a rather confused babble of voices,"⁴³² Frank sat down. Other private practitioners immediately rose to support Frank's offensive.⁴³³

Finally, an agitated Prosser⁴³⁴ responded to the suggestions by Bane and Frank, which he said were "obviously made under the considerable emotional stimulus [laughter] of the present pollution situation."⁴³⁵ Rebuffing Bane's move to limit the reach of public nuisance, Prosser called Bane's proposal "an emotional

429. *Id.* at 293-94.

430. *Id.* at 294 (Frank was undoubtedly referring to *Data Processing and Barlow*, decided by the United States Supreme Court on March 3, 1970, two months prior to the Annual Meeting).

431. *Id.*

432. Wade, *Some Impressions*, *supra* note 283, at 1259.

433. 47 A.L.I. PROC., *supra* note 369, at 294-95. Frank F. Jestrab, a private law practitioner from Williston, North Dakota, supported Frank's motion wholeheartedly and opposed Bane's suggestion. He noted that "[w]e know that the private action is used very often to effectuate public policy" (pointing to antitrust laws as an illustration) and that "it would be a great mistake to remove this problem from the field of private litigation." *Id.* California practitioner Herbert I. Lazerow also opposed Bane's comments and supported Frank's. He commented that administrative agencies in the area of pollution control were not "as well supplied and as well motivated as some of the more traditional administrative agencies," pointing to examples of insufficient staff and government prosecution from his home town of San Diego. *Id.* at 295. While it is tempting to ascribe a conspiracy to the group of "rebels," Frank neither knew the others well nor organized the events. Frank Interview, *supra* note 416. These were private business law practitioners from the far-flung corners of the United States. The lack of a common scheme suggests that Frank's timing and persistence were remarkable and that the tide and turmoil of national events were more powerful than perhaps we can appreciate today.

434. Frank Interview, *supra* note 416 (describing Prosser as "mad" that "some kid was walking on [the] grass" of "the number one torts guy in America").

435. 47 A.L.I. PROC., *supra* note 369, at 296.

reaction . . . [i]t is certainly not a lawyer's reaction to a specific problem."⁴³⁶ As to Frank's suggestion, Prosser's comments drew a sharp distinction between the private tort law world he had worked in and on for so long and the public law world that was emerging as the dominant litigation paradigm. Prosser conceded that his statement of the rule was "very narrow," but stated that it was limited to cases involving damages – not injunctive relief where a statute or "some court-made rule" permits it.⁴³⁷ He pointed out that many states have statutes permitting a private citizen to bring an abatement action for certain types of nuisances, but the *Restatement* was not at all concerned about those statutory remedies. Instead, it was concerned with damages actions only, and he offered that "there is absolutely nothing in this Restatement to limit or strangle or lock the stable door before the horse gets out We are concerned only with tort liability, which means liability for damages."⁴³⁸ He stated

I do not see the point of all this. As I say, I think it is a sort of emotional binge. It strikes me that these gentlemen are getting very much disturbed about the pollution situation, and that disturbance I share. I am as much worked up about it as anybody. I might even bring an action, if I could find one to bring, against some of the conditions in the miserable city of Berkeley where I live. I am sufficiently steamed up about it to be mad and want to do something. I'm entirely in sympathy with them. But I do not think that the way to take care of that is to change a section which provides what action I can bring for my own damages.⁴³⁹

With evident exasperation, he concluded,⁴⁴⁰ "[c]onsequently with humble submission, I don't think any of this is relevant. I don't think that any of it is a good idea. In short, I have practically nothing to say in favor of it. [Laughter and applause]."⁴⁴¹

Yet, the debate continued. Prosser's long-time friend and adviser Laurence Eldredge felt the Restatement should be more flexible.⁴⁴² Vanderbilt Law School Dean John W. Wade, who was destined to soon replace Prosser as the Reporter, picked up on

436. *Id.*

437. *Id.*

438. *Id.* at 297.

439. *Id.* at 297-98.

440. See Wade, *Some Impressions*, *supra* note 283, at 1259 ("Those of us who knew Bill well could sense that he was definitely upset, but it was not apparent to the audience as a whole.")

441. 47 A.L.I. PROC., *supra* note 369, at 298.

442. *Id.*

Prosser's caution that Section 821C addressed damages only and suggested that the comments to 821C be modified to indicate that it did not address injunctive actions.⁴⁴³ Prosser parleyed, suggesting caveats to clarify that the sections were not intended to limit injunctive actions.⁴⁴⁴ In an attempt to conclude the discussion, President Darrell called on Prosser to give the last word, but Frank impetuously interjected, urging once again a complete reconsideration of the public nuisance section and requesting a deep reexamination that would "affirmatively authorize injunction[s] for public nuisance cases," in order "to meet the problem at this moment in history when it is so terribly burning."⁴⁴⁵ ALI Director Herbert Wechsler ventured to propose a different compromise, siding with Prosser that the new public law standing revolution had no role in private law torts but also suggesting that courts could consider regulatory prohibitions in nuisance cases.⁴⁴⁶ Rather than quieting the debate, Wechsler's comments prompted another run of speakers to rise on both sides of the spectrum.⁴⁴⁷ Prosser spoke again, acknowledging that "[i]t is unquestionably the general rule that the only people who can enjoin a nuisance - a public nuisance - are those who have suffered some kind of particular special damage from it."⁴⁴⁸ He did not, however, believe the section should address statutory actions afforded to private citizens or the class action procedure. He added: "We are not stating procedure here. We are not stating class actions, or anything of that sort, and if we attempt to do so, that way madness lies."⁴⁴⁹ He emphasized: "We're not restating

443. *Id.* at 298-99.

444. *Id.* at 299. He mused that "this situation would have been very much improved if those had been inserted to start with, and we could have saved a good deal of time." *Id.*

445. *Id.* at 299-300.

446. *Id.* at 300.

447. John G. Buchanan of Pennsylvania complained that the definition in Section 821B was too broad. *Id.* at 301. Charles D. Breitel of New York agreed with Wade and Wechsler's suggestion for caveats that "would take care of everything that the pending motion legitimately is entitled to treat with." *Id.* at 302. He chastised the leaders of the rebellion for straying from the philosophical foundation of the *Restatements* and being distracted by pollution issues. *Id.* C. Dickerman Williams from New York supported Frank's motion. Although he assumed that Section 821C "correctly stated existing law," he wanted to see discussion of a broader rule, particularly given the developments of the class action. He proposed a complete rejection of the different-in-kind rule, so that "[f]or a public nuisance liability in tort is not limited to those who have suffered harm of a kind different from that suffered by other members of the public." *Id.* at 302-03.

448. *Id.* at 304.

449. *Id.*

all of the law, gentlemen; just some of it."⁴⁵⁰ Prosser further cautioned that changing the traditional rule was "not a good idea."⁴⁵¹ Despite Prosser's obvious displeasure with the intellectual ambush and the radical eleventh-hour proposal, the ALI membership nevertheless quickly voted 85 to 51 to "recommit" the objectionable sections of the public nuisance chapter back to its reluctant veteran Reporter for further revisions along the new liberal lines.⁴⁵² Darrell then asked the vanquished Prosser "what have we next?" Prosser replied: "Well, frankly, Mr. President, I don't know. We had arrived, I'd hoped, at Section 821D when we were interrupted, [laughter] and that was a long time ago."⁴⁵³

This dramatic clash over the *Restatement's* formulation of private parties' access to public nuisance marked an intellectual watershed in the long history of the special injury rule and represented a powerful new intersection of private law torts and public law developments. It reflected the broad social, political, and legal upheaval playing out across the United States in the late 1960s to early 1970s. It also signaled the *denouement* of Prosser's brilliant career. Shortly after the ALI meeting closed on that "unhappy day,"⁴⁵⁴ Prosser resigned from his position as Reporter.⁴⁵⁵ In July 1970, Prosser's friend and colleague John

450. *Id.*

451. *Id.* at 298.

452. 47 A.L.I. PROC., *supra* note 369, at 305. Similar objections from the floor by those "who took the environmentalist point of view" on Prosser's *private* nuisance sections also resulted in some of those provisions being "recommitted for further study." Wade, *Environmental Protection*, *supra* note 4, at 170. Wade's "[s]ubsequent meditation" on this issue resulted in controversial amendments to Sections 826 (unreasonableness of the invasion) and 829 (gravity vs. utility; serious harm), *id.* at 170-71, which are still controversial today.

453. 47 A.L.I. PROC., *supra* note 369, at 305. In contrast to Sections 821B and 821C, the later nuisance sections received virtually no discussion, except that Prosser quickly lost a dispute over whether Section 822 should require fault for private nuisance, leaving him once again to modernize the statement. Wade, *Some Impressions*, *supra* note 283, at 1259.

454. Wade, *Some Impressions*, *supra* note 283, at 1260-61 (observing that "that long day had taken a lot out of Bill. He was utterly exhausted and as he left he whispered to one of the committee, 'I've had it.' And we couldn't persuade him to change his mind during the summer that followed, no matter how much we tried."). See also Frank, Wade, *supra* note 416, at 593 (noting Prosser "put down the reportership in something of a spirit of indignation because of resistance from the floor"). Frank recalls: "I have no doubt that the distress over this matter [was what made him] decide to resign, especially over a matter of this kind." Frank Interview, *supra* note 416.

455. Tentative Draft No. 17, *supra* note 366 ("Shortly after the last Annual Meeting, Dean William L. Prosser resigned as Reporter . . . a position he filled with great distinction from the inception of the work in 1954.").

Wade took his place.⁴⁵⁶ Although Prosser continued to collaborate closely with Wade, Prosser's era, and his influence on this particular issue, was eclipsed by the times.⁴⁵⁷

C. John Wade's Apostasy

John Wade faced a monumental task when he replaced Prosser as the Reporter for the *Restatement (Second) of Torts*.⁴⁵⁸ Not only was there significant work to be done on Volumes Four, Five, and Six,⁴⁵⁹ but he needed to fill the enormous intellectual void left by Prosser. Wade, however, was well qualified for the mission.⁴⁶⁰ Considered "the most distinguished American legal scholar currently writing in the field of tort law,"⁴⁶¹ John Wade joined Prosser's Advisory Committee in 1965 and co-authored the fifth through ninth editions of Prosser's *Casebook*.⁴⁶² Although Wade had no obvious background or particular

456. RESTATEMENT (SECOND) OF TORTS (Reporter page) (Council Draft No. 32, 1971). Wade's close friendship with Prosser is recounted in his tribute *Impressions*, *supra* note 283, at 1255 (recalling that Prosser fondly called Wade "my partner in committing all the Torts.").

457. The entire *Restatement (Second) on Torts*, however, undoubtedly stands "as one of several monuments" to Prosser. Wade, *Environmental Protection*, *supra* note 4, at 166 n.5.

458. Wade served as Reporter from 1970 until 1982. Ronald J. Rychlak, *John Wade: Teacher, Lawyer, Scholar*, 65 MISS. L.J. 1, 19 (1995).

459. By the time of his resignation, Prosser had prepared and revised with his Advisers (including Wade) preliminary drafts for the remaining two torts volumes. Some areas of the remaining volumes, such as defamation and privacy, had also undergone "major upheaval," effectively outdating Prosser's drafts and allowing Wade to rewrite them completely. Joyce, *Keepers*, *supra* note 280, at 863 n.55.

460. Wade was the "consensus choice" among the advisers. Robert E. Keeton, *Restating Strict Liability and Nuisance*, 48 VAND. L. REV. 595, 607 (1995) [hereinafter Keeton, *Restating Strict Liability*] (noting Wade's intellectual and personal attributes, including his reputation for persistently seeking "common ground"). See also Victor Schwartz, *Dean John W. Wade: A Fitting Tribute*, 48 VAND. L. REV. 583, 584 (1995) ("It was natural that after Dean Prosser's health started to fail, Dean Wade was named to be Reporter . . ."). Frank called Wade "the best reporter [ALI] ever had." Frank Interview, *supra* note 416.

461. Parham H. Williams, Jr., *The University of Mississippi School of Law Memorial Lectures*, 48 MISS. L.J. 669 (1977). Wade completed his undergraduate and law school education at the University of Mississippi, then obtained his LL.M. from Harvard Law School. *Id.* His teaching career began at the University of Mississippi in 1936, where he taught for ten years. *Id.* He was "lured" to Vanderbilt in 1947 and named Dean in 1952, a position he held for another 20 years. *Id.* Throughout his career, Wade wrote over 75 "significant" law review articles in the fields of torts and restitution. Gilbert S. Merritt, *Dean John W. Wade*, 48 VAND. L. REV. 587, 589 (1995); see also *Tribute, Dean John W. Wade*, 48 VAND. L. REV. 571 (1995).

462. Gary Myers, *Dean John Wade and the Law of Torts*, 65 MISS. L.J. 29, 29 (1995). The *Casebook* is now incarnated as VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS* (10th ed. 2000).

professional interest in environmental issues,⁴⁶³ he viewed tort law as "the epitome of social engineering,"⁴⁶⁴ and ultimately viewed the restatement process as one that "reflect[ed] modern social and economic conditions and current mores and concepts of justice," rather than a cataloging of existing law.⁴⁶⁵ His progressive philosophy, interest in social developments, and mastery of restating the law⁴⁶⁶ led him to the point of apostasy following his mentor Prosser's long-standing grip on the special injury rule.

In approaching his task of revising the recommitted public nuisance section of Chapter 40, Wade took to heart the emotional debate during the 1970 Annual Meeting and significantly revised the nuisance sections to promote environmental applications. First, Wade addressed the criticism of Prosser's criminal definition of public nuisance by completely rewriting the definition in Section 821B to omit the reference to "criminal interference" and adding a completely new concept of "unreasonableness."⁴⁶⁷ The new definition was a flexible one that incorporated modern notions of balancing and policy: "A public

463. See Williams, *supra* note 461, at 670 (describing Wade's background, mentioning nothing related to environmental law or environmental issues); see also *Tribute*, *supra* note 461, at 571-82 (detailing Wade's extensive personal and legal background, indicating no interest in environmental law or environmental issues other than his 1972 article specifically on the *Restatement* revisions to the public nuisance section, Wade, *Environmental Protection*, *supra* note 4).

464. John W. Wade, *The Communicative Torts and the First Amendment*, 48 *Miss. L.J.* 671, 671 (1977). Wade, in fact, saw the purpose of tort law as "attaining a just result." Wade, *Restatement: Tribute*, *supra* note 317, at 64.

465. John W. Wade, *Second Restatement of Torts Completed*, 65 *A.B.A. J.* 366, 366 (1979) [hereinafter Wade, *Torts Completed*]; see also *id.* at 371 ("The American Law Institute has worked assiduously to bring the restatement of torts up to date and to make it accurately descriptive of the current state of the law and reflective of recognizable trends that foretell impending developments.").

The approach taken by Wade, and many others involved in the *Restatement (Second)*, see, e.g., Herbert Wechsler, *The Course of the Restatements*, 55 *A.B.A. J.* 147, 149 (1969), encountered significant criticism. See Keyes, *Misleading Quality*, *supra* note 351. Keyes called the *Restatement Second* "deceptive," *id.* at 25 & n.8, even "sin[ful]," *id.* at 40, bordering on unethical, *id.* at 51 n.132, undemocratic, *id.* at 53, and misleading in name, *id.* at 25. He was particularly critical of Wade's contributions. *Id.* at 35-36.

466. Kecton, *Restating Strict Liability*, *supra* note 460, at 595. He was a master facilitator, skilled at finding compromise. See Frank, *Wade*, *supra* note 416, at 593 (calling Wade a "pillow Reporter" because he "had the quality of a down pillow; push it here and it will give in but come out somewhere else"); *id.* ("He simply absorbed the sometimes turbulent membership.").

467. Tentative Draft No. 17, *supra* note 366, § 821B(1); see Wade, *Environmental Protection*, *supra* note 4, at 168-69; see *id.* at n. to institute ("strong objection was expressed by some members to the requirement that a public nuisance constitutes a crime, on the ground that this was too restricted and inhibited the incipient development of the law in the field of environmental protection").

nuisance is an unreasonable interference with a right common to the public."⁴⁶⁸

With respect to Section 821C, regarding "Who Can Sue," Wade's changes were even more significant, if not outright radical—at least with respect to equitable relief.⁴⁶⁹ To capture the fluidity in the developments in environmental litigation and to avoid attempting to hold the law "in frozen form,"⁴⁷⁰ he proposed adding a second rule—821C(2)—that would directly fuse modern public law developments onto private common law nuisance: "In order to maintain a proceeding to enjoin or abate a public nuisance, one must . . . have standing to sue as a representative of the general public, or as a citizen in a citizen's action, or as a member of a class in a class action."⁴⁷¹ Wade also added new comment "j":

Standing to sue: The reasons usually given for not permitting a damage action to a plaintiff not suffering damages different in kind—the prevention of both multiplicity of actions and bringing of trivial suits—are far less applicable to suits to abate or enjoin a public nuisance. While the traditional rule has been that even an action of the latter type cannot be brought unless the complainant has suffered damage different in kind, there are indications of potential change. Statutes allowing citizens' actions or authorizing an individual to represent the public and extensive general developments regarding class actions and standing to sue are

468. Wade, *Environmental Protection*, *supra* note 4, at 168; Tentative Draft No. 17, *supra* note 366, § 821B(1) and (2), n. to institute (adding comments that supported his proposed definition based on unreasonableness); Wade, *Torts Completed*, *supra* note 465, at 368. Wade's revised Section 821B articulated three factors necessary for finding "unreasonable" interference: (a) the circumstances would have constituted a common law crime of public nuisance; (b) the conduct is proscribed by statute, ordinance or regulation; and (c) the conduct is of a continuing nature or has produced a permanent effect that is detrimental and substantial, and the actor knows or has reason to know it. Tentative Draft No. 17, *supra*, § 821B(2). Wade acknowledged Prosser's citation of "ample authority" for his prior drafts on the doctrine's criminal roots but then rejected all of it as based on only "casual statements" and one case. *Id.* § 821B, at n. after cmt. j.

469. Like Frank, Wade favored the triumph of the merger of law and equity over "encrusted jurisdictionalism." Frank, *Wade*, *supra* note 416, at 594 (referring to Wade's development of a modern standard in Chapter 48, injunctions, that "pushes this jurisdictional antique as close to its ultimate grave as it will reach"). Frank recalls that he and Wade talked about these issues "endlessly . . . I had pushed him hard and he masked his exasperation." Frank Interview, *supra* note 416.

470. Wade, *Torts Completed*, *supra* note 465, at 371.

471. Tentative Draft No. 17, *supra* note 366, § 821C(2)(c). Wade acknowledged later that the terminology he used for Section 821C(2)(c) was "obviously circular language," but was intentionally vague because of the fluidity of the developing law. Wade, *Torts Completed*, *supra* note 465, at 368.

all pertinent. Since standing to sue is primarily a procedural matter, not fully appropriate for a restatement of the substantive law of torts, it has been regarded as outside this [sic] scope of this section to set forth the rules for determining when there is standing to sue for abatement or an injunction. The purpose of this subsection is to point out that there may be a distinction between an individual suit for damages and a suit in behalf of the public or a class action.⁴⁷²

Two months after conveying the new approach to the Council, Wade released Tentative Draft No. 17 for the 1971 Annual Meeting. Wade continued to propose substantial changes to 821C, expanding the section even further to emphasize the new approach.⁴⁷³ After stating the traditional rule in 821C(1), he broke 821C(2) into three parts, the first two of which simply stated existing law. Subsection (2)(a) allowed injunctive relief for anyone "qualified to sue for damages, as indicated in subsection (1)." Subsection (2)(b) provided that public officials or agencies may sue to represent the state or political subdivision.⁴⁷⁴ Subsection (2)(c) conveyed the new "environmental standing" concept: a private plaintiff in a public nuisance case could sue even if she did not have "special damages," if she had "standing to sue as a representative of the general public, or as a citizen in a citizen's action, or as a member of a class in a class action."⁴⁷⁵ As Wade subtly commented in his "Note to Institute": "The revision does not contradict the cases but does afford the opportunity for development in the area of environmental protection."⁴⁷⁶ He concluded: "The subsection is worded in such a way as to leave the courts (and the legislatures) free to proceed with developments regarding standing to sue without the

472. Tentative Draft No. 17, *supra* note 366, § 821C, at cmt. j.

473. In the Foreword to the Tentative Draft, ALI Director Wechsler summarized the major changes to be presented to the membership. He noted there was "major controversy on the floor as to the scope of liability for harm caused by a public nuisance, a topic the original Restatement had conveniently ignored." *Id.* at vii. First, "[t]he proposition that only a crime can be a public nuisance is rejected, in accordance with the judgment of the Meeting. The rejection is accompanied by cautionary reservations, necessary to avoid extrapolations of the concept that would plainly be excessive." *Id.* As to the second change, Wechsler commented that because "[t]he old law of public nuisance may well have a larger ecological significance than our ancestors perceived . . . [the Reporter's] suggested formulations strike a balance that the Institute should weigh with greatest care." *Id.*

474. *Id.* § 821C(2)(b). This subsection was non-controversial, but it had not been explicitly stated in the prior drafts. The government's ability to sue is firmly rooted in the ancient history of public nuisance and nuisance statutes. See *supra* Part II.A.

475. Tentative Draft No. 17, *supra* note 366, § 821C(2)(c).

476. *Id.* § 821C, at n. to institute. There were, of course, no cases directly on point, and the new rule essentially nullified the longstanding different-in-kind test.

restrictive effect which would be imposed by a categorical statement of the traditional rule which is found in a limited number of cases."⁴⁷⁷ Section 821C(2)(c) was "intended to leave the question of standing to sue open to procedural developments as they take place."⁴⁷⁸

By the time of the 1971 Annual Meeting—the third at which the public nuisance chapter received extensive discussion—the momentum behind the new liberal approach had grown considerably. Wade opened the late morning session by paying tribute to the ailing Prosser, who, he said, was with them "in spirit."⁴⁷⁹ Wade proceeded to discuss public nuisance, which he labeled "an extremely important topic," and "an area in which the ecologists, the environmental protectionists, are very much concerned and there is a considerable amount of flux and development and growth in the law in this area."⁴⁸⁰ He noted the "considerable amount of disagreement" at the prior Annual Meeting and the recommitment of two sections—821B and 821C—to Prosser for re-presentation. As to 821B, which substituted "reasonableness" for the criminal definition of public nuisance, the comments from the floor were effusive.⁴⁸¹ Wade effectively blocked some members' last minute attempts to reinject restrictive concepts into the section,⁴⁸² and the 821B was approved.

477. *Id.* § 821C, at cmt. j. Wade's comments were that of a classic crafter of the law. Characterizing the case law as "limited" was a bit misleading given his earlier statement that Prosser had eight pages of citations in Tentative Draft No. 16 in support of the rule. See *id.*, § 821C, at n. after cmt. j. The "new developments" in environmental law were, even according to Wade, a collection of federal administrative law, not state common law, cases. *Id.* Similarly, he generously stated that "[a] number of statutes authorize suits by a private citizen to abate a nuisance," *id.*, but then cited only three states (Florida, Michigan, and Wisconsin) and the newly enacted federal Clean Air Act. *Id.*

478. *Id.* § 821C, at n. after cmt. j.

479. As Wade put it: "I think that the time will come not too far in the future when people will look back on these days and they will make that traditional remark, 'There were giants in those days.' And they will realize that one of the tallest of the giants was Bill Prosser." *Discussion of the Restatement of the Law, Second, Torts, Tentative Draft No. 17*, 48 A.L.I. PROC. 49, 50 (1971).

480. *Id.*

481. *Id.* at 52 (comments of Lyman M. Tondel, Jr. (New York) calling the new definition "far superior"); *id.* at 62 (comments of Philip K. Verleger (California) stating the Reporter "has done an extraordinarily good job"); *id.* at 63 (comments of Frank complimenting Wade and the Council for a "perfectly splendid resolution of a truly difficult problem"); *id.* (comments of Fred B. Helms (North Carolina) adding an "Amen"); *id.* (comments of Charles H. Willard (New York) calling it a "superb job").

482. For example, Tondel suggested both that a defendant's compliance with a statute, ordinance, or regulation should bar a public nuisance claim, and that the concept of "legalized nuisance" (*i.e.* where a legislature expressly approves a

The discussion of 821C was more raucous. Wade acknowledged that Prosser was "the expert" on the special injury rule issue but noted the "sharp debate" at the prior year's Annual Meeting on "the availability of an action for public nuisance as a means of improving and protecting the environment."⁴⁸³ Wade explained that Prosser's traditional rule continued to make sense if the relief being sought were damages, but if the claim was for injunctive relief, the concerns about multiplicity of actions were not "as significant."⁴⁸⁴ He acknowledged that most of the cases in the injunctive relief or abatement context still applied the traditional rule, but he minimized their significance by adding "most of those cases are early cases, cases before the kind of problems which are now arising had begun to develop."⁴⁸⁵ The justifications for the rule had less force, and the development of the private attorney general concept in statutes warranted revision. His approach admittedly was "ducking, avoiding the issue of when there is standing to sue,"⁴⁸⁶ and he conceded that these issues were "a little bit outside my prime area of competency."⁴⁸⁷ Nonetheless, he felt that it was the best the ALI could do given the rapidly changing case law.⁴⁸⁸ Several members gave their immediate support to Wade's remarks. Bennett Boskey from Washington, D.C. called it "a very happy compromise"⁴⁸⁹ and quickly moved for approval, which Eldridge seconded.⁴⁹⁰ The motion carried unanimously, and the *coup* was complete.⁴⁹¹

nuisance) be included. *Id.* at 53-54. John G. Buchanan (Pennsylvania) suggested that the definition of public nuisance was so broad as to be meaningless, and he wanted to restrict it to interferences with the right to use and enjoy public *land*. *Id.* at 55. Judge W.W. Braham (Pennsylvania) proposed changing the definition to limit it to "the physical environment. *Id.* at 60. Except for the "legalized nuisance" concept, these suggestions were not adopted. *See id.* at 61.

483. *Id.* at 66.

484. *Id.*; see Wade, *Environmental Protection*, *supra* note 4, at 169.

485. 48 A.L.I. PROC., *supra* note 479, at 66-67.

486. *Id.* at 67; see also *id.* at 71 ("what we were intending to do was to duck that question, not to decide it, to leave it just open according to the procedure of a particular state").

487. *Id.* at 70 (regarding the wording of Section 821C(2)(c) and the difference between "a citizen in a citizen's action" and "a member of a class in a class action," Wade acknowledged "I would be ready to get enlightened advice on this as to the best language.>").

488. *Id.*

489. *Id.* at 67.

490. Boskey noted his concern with Illustration 12, the worst case scenario raised by Prosser in his *Private Action* article, see *supra* notes 340-344 and accompanying text, where, according to Prosser, a business would be barred from economic recovery against a defendant who blocked access to an isolated town because the injury was common, not different-in-kind. 48 A.L.I. PROC., *supra* note. 479 at 68. Wade agreed

When Prosser had announced his resignation shortly after the 1970 Annual Meeting, Prosser's colleagues noticed his weariness. Eldredge described a later vacation with Prosser to Yosemite National Park. Although Prosser's conversation "had never been better" and "his sense of humor was priceless," he seemed to tire quickly and appeared exhausted, "curl[ing] up on the back seat" during the long ride back to San Francisco.⁴⁹² Soon thereafter, Prosser was admitted to the hospital. He died on May 21, 1972, almost a year to the day after the consummation of the rebellion.

D. Scholarly Euphoria, the Redirection of the Handbook, and the Failed Revolution

Shortly after he had succeeded in incorporating the new "ferment"⁴⁹³ in public law standing principles into the *Restatement (Second) on Torts'* public nuisance section, Wade could hardly contain his enthusiasm for the new approach and how it responded to the felt need of the times.⁴⁹⁴ Although the traditional private law tort remedy "established to take care of an injury imposed by a single defendant on a single plaintiff" was not easily adapted to public injuries, public nuisance was "very amorphous and therefore malleable," and "would appear to provide more opportunity for aid in the legal effort to protect the environment than all of the other tort actions combined."⁴⁹⁵ He

that the illustration was troubling, that he did not know what case Prosser "had in mind," and said he would reconsider it. *Id.* The illustration was dropped in the final version. See RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821C, at 99.

491. 48 A.L.I. PROC., *supra* note 479, at 71. At the 1972 Annual Meeting, Wade reported on revisions to other sections of Chapter 40, but Section 821 was not mentioned, having been well settled. Wade mopped up the revisions in Tentative Draft No. 18, see RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 18, 1972), and Reporter's Proposed Official Draft, (making only stylistic and editorial changes), see RESTATEMENT (SECOND) OF TORTS (Reporter's Proposed Official Draft 1977). Volume 4 of the *Restatement (Second) on Torts* was finally "adopted and promulgated" by the American Law Institute on May 19, 1977 and published two years later in 1979, 14 years after Volumes 1 and 2, two years after Volume 3, and 24 years after Prosser started working on the project.

492. Eldredge, *Prosser*, *supra* note 280, at 1250.

493. Wade, *Environmental Protection*, *supra* note 4, at 169.

494. *Id.* at 166 ("quite as obviously this common law remedy [public nuisance] provided the greatest opportunity for attaining results which the ardent environmentalists desired.").

495. *Id.* at 166, 173-74. Wade reviewed six other related common law doctrines (trespass, negligence, abnormally dangerous conduct, products liability, riparian rights, and "intended consequences") for their potential application to pollution problems, concluding that they "really have very little to add to the availability and effectiveness of the relief offered by the two actions for nuisance." *Id.* Wade's

hoped that the new Section 821C(2)(c) "will provide meaningful guidance as to the current state of the law but will not constitute a strait-jacket inhibiting judicial growth and development to meet the mounting problems of protecting the environment in accordance with changing mores and concepts of what justice requires."⁴⁹⁶ With an optimism that history would prove unfounded, he concluded: "It is to be hoped that lawyers and judges and scholars will make substantial use of [the revised treatment of nuisance]."⁴⁹⁷

The earliest commentators on Wade's revisions were public interest environmental law practitioners John E. Bryson and Angus Macbeth,⁴⁹⁸ who gushed that the *Restatement* change "breathes fresh vitality into the concept of tortious public nuisance." The final definition as accepted by the ALI "provides the tort considerable space in which to develop and adapt to the needs of the time."⁴⁹⁹ Praising Wade's "substantial step toward liberalization,"⁵⁰⁰ they applauded the linking of public nuisance and general standing law: "This is a persuasive position—no sound reason exists for treating public nuisance standing as distinct from standing elsewhere in the law."⁵⁰¹ The authors were as optimistic as Wade that, now that the ALI "ha[d] put its authority behind bringing the law of public nuisance, at least as to injunctive actions, into harmony with the general body of procedural law," courts would soon follow.⁵⁰² Scattered commentary in public nuisance articles over the next several years also lauded the proposed liberalization of the special injury

comments about the future utility of the common law reflected a notable increase in scholarship touting the private law remedies of private and public nuisance for addressing pollution issues. *See id.* at 174 n.35 (citing ten law review articles between 1970 and 1972 focusing specifically on common law nuisance as an "environmental tool").

496. *Id.* at 169-70.

497. *Id.* at 170.

498. Bryson and Macbeth published *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, in 2 *ECOLOGY L.Q.* 241 (1972). They had served as staff attorneys for the Natural Resources Defense Council, litigating some important early federal standing cases.

499. Bryson & Macbeth, *supra* note 5, at 249.

500. *Id.* at 255.

501. *Id.* at 256.

502. *Id.*; *see also id.* at 263 ("The prospect for citizen public nuisance actions is, then, that standing will increasingly be determined according to the general principles of standing applicable elsewhere in the law. This desirable result has been given a substantial boost by the *Restatement*.").

rule and, despite the lack of cases, continued to purport to detect a liberal trend in the decisions.⁵⁰³

In the 1980s, the *Restatement* modification received a hearty endorsement from leading environmental scholar Professor William H. Rodgers, Jr., of the University of Washington Law School. In his 1986 treatise *Environmental Law: Air and Water*, Rodgers called it the "proper and efficient solution" because the purpose of the special injury rule was "indistinguishable from the functions of the law of standing," which had already been modernized.⁵⁰⁴ He characterized the "different injury" test as "an historical procedural appendage," no longer justified in an era when the private attorney general concept was well accepted.⁵⁰⁵ Despite the lack of cases directly on point, Rodgers also expressed his belief that courts were beginning to move toward unification of the special injury rule and federal standing doctrine.⁵⁰⁶ Citing *Akau*, he optimistically suggested that the "'different' injury super-standing requirement as a prerequisite to private enforcement of a public nuisance continues in full retreat, both by explicit rejection and by findings that the test is

503. *E.g.*, Lawlor, *supra* note 5, at 669 ("It can be expected that the proposed revisions of the Restatement (2d) of Torts, addressing itself to public nuisance law, and in particular to the application of public nuisance law to environmental concerns, will have a liberalizing effect on public nuisance law. In fact, a certain liberalization of public nuisance law may be detected in the cases discussed herein."); Note, *Public Nuisance*, *supra* note 8, at 366 n.65 ("The authors of the RESTATEMENT (SECOND) OF TORTS 19 (Tent. Draft No. 17, 1971), have also recognized that where the relief requested is an injunction or abatement, the special injury rule is far less applicable and there are indications of possible change."); *But cf.* Abrams and Washington, *supra* note 4, at 379 (mentioning Section 821C(2)(c), but without comment); Wyche, *supra* note 40, 346 n.72 ("Under the Restatement, any citizen, as a representative of the general public, has a right to maintain an action to enjoin a public nuisance [citing Section 821C(2)(c)]," but noting that the South Carolina courts had not addressed the issue); FLEMING, *supra* note 8, at 381 (citing Section 821C(2) and Bryson & Macbeth, *supra* note 5, noting in other countries "an undoubted modern tendency to reject the elusive distinction between difference in kind and degree"); Note, *Public Watchdog*, *supra* note 4, at 1751 (commenting, optimistically, that, because of the *Restatement* change, the "standing problem in equitable actions against polluters is easily overcome by plaintiffs").

504. RODGERS, AIR & WATER, *supra* note 8, at 37-38. Rodgers' handbook-style treatise *Environmental Law* (2d ed. 1994) also strongly emphasizes the role of nuisance as the historical and principal "backbone" of modern environmental law, *id.* at 112-13, but, unlike AIR & WATER, provides no discussion of the special injury rule issue.

505. RODGERS, AIR & WATER, *supra* note 8, at 37.

506. Rodgers optimistically suggested the liberal standing developments were influencing the "'different' injury test," but the cases he cited, *id.* at n.26, neither explicitly rejected the traditional rule nor adopted the new *Restatement* test. Indeed, the cases Rodgers noted as "unfortunate holdovers," *id.*, are actually more illustrative than exceptional.

satisfied by allegations of injury hardly distinguishable from the hurts suffered by everybody else."⁵⁰⁷ Similarly, Widener University Law Professor David R. Hodas observed in 1989 that the *Restatement* modification "did breathe new life into private actions for public nuisance," and suggested that "[i]n the past decade courts have begun to accept this invitation" to make "a fundamental change in the law of public nuisance."⁵⁰⁸ Even by 1989, however, the only supportive case Hodas cited was *Akau*.⁵⁰⁹ Hodas suggested that, even though courts were not expressly liberalizing the rule, they were bending the doctrine in a liberal direction.⁵¹⁰ Like Rodgers, Hodas concluded that "[p]ublic nuisance doctrine is in the midst of an important transformation,"⁵¹¹ and he urged elimination of the special injury rule "outright."⁵¹²

In the past decade, optimism has periodically re-surfaced,⁵¹³ but most scholars seem resigned to the fact that the traditional doctrine is thoroughly entrenched. Even Rodgers noted with obvious chagrin in his 1998 revisions to *Air and Water* that the Ninth Circuit's decision in *Exxon Valdez* "has kept alive the

507. *Id.* at 39-40 n.6 (citing *Akau*). Rodgers also cited Rothstein, *supra* note 8, which was published *after* the favorable *Save Sand Key* intermediate court decision but before reversal by the Florida Supreme Court, *see supra* Part I.B (discussing *Save Sand Key*). Rodgers' optimism, in turn, inspired others. *See* Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 56 *Miss. L.J.* 657, 659 n.12 (1989) (noting the different-in-kind rule but citing Rodgers for conclusion that it is not strictly enforced and that the modern trend is away from the rule).

508. Hodas, *supra* note 5, at 885-86.

509. *Id.* at 902 (discussing *Akau* as "an important step" and suggesting, without additional citation, that "courts seem increasingly prepared to impose only minimal standing requirements on plaintiffs seeking equitable relief").

510. *Id.* at 891. Hodas states that "courts have permitted at least some plaintiffs to proceed in almost every environmental public nuisance case, even when the court supposedly was applying the special injury rule," but that none of the cases cited mention the *Restatement* modification. *Id.* nn. 83-98 and accompanying text.

511. *Id.* at 907.

512. *Id.* at 888 ("private plaintiffs must not be barred at the courthouse door by an outdated special injury rule if public nuisance claims are to fill statutory gaps and help establish standards of reasonable conduct"). Hodas provided a compelling discussion of a series of cases in the 1980s that suggested, in his view, a "growing minority of courts now require that a plaintiff show only an injury-in-fact to gain standing," and he concluded that the issue then was how courts will "defin[e] the outer limits of liability with proximate cause analysis." *Id.* Most of these cases, however, involve federal maritime common law and the commercial fishers' exception, and are thus not typical nuisance cases, *see supra* note 104. This may explain why none mention the *Restatement* debate or modification.

513. *See, e.g.,* Comment, *Exxon Valdez*, *supra* note 8, at 709 ("These changes in the *Restatement* create the potential to transform the public nuisance doctrine into an important tool for environmental protection.").

outmoded 'special injury' requirement."⁵¹⁴ No new cases have adopted the *Restatement* proposal, and the old rule, he said, has "shown vitality in recent decisions."⁵¹⁵ In short, although the environmental law commentary was thoroughly favorable,⁵¹⁶ even sympathetic observers faced a near-impossible task finding any movement in the case law to support their hopeful claims.

In contrast to environmental commentators' glowing treatment of the *Restatement*, the general torts literature scarcely mentioned the rule's modification.⁵¹⁷ Worse yet, the post-Prosser Fifth Edition of the *Handbook*, edited by W. Page Keeton of the University of Texas⁵¹⁸ and his distinguished team of revisers not only grossly distorts the issue but, in a surprising divergence from the *Restatement* approach, calls for the *elimination* of public nuisance as a tool to address environmental problems.⁵¹⁹ Keeton

514. RODGERS, AIR & WATER, *supra* note 8, at Preface (Supp. 1998).

515. *Id.* at Preface, page 8. One of Rodgers' explanations for the entrenchment is the secondary role that nuisance plays in modern environmental litigation. See *infra* Part V.D.

516. Indeed, several commentators criticized the proposal for not going far enough, suggesting that the rule should also be eliminated for damages suits. Bryson & Macbeth, *supra* note 5, at 260 (criticizing Wade's proposal for being limited to injunctive actions); Comment, *Exxon Valdez*, *supra* note 8, at 712 ("the justification for maintaining the distinction between suits in equity and those for damages is particularly enigmatic."); Hodas, *supra* note 5, at 889 (calling distinction between *Restatement* approach to equity and damages cases "inconsistent[t]" and "anachronistic" in light of federal environmental litigation developments).

517. One of the few torts treatises to mention the rule change is John Fleming's *Torts*, a comparative tort law treatise focused on the common law of England, Australia, Canada, and other commonwealth countries. See FLEMING, *supra* note 9, at 381 n.19.

518. Because Prosser died before designating a successor editor for the *Handbook*, his publisher West was faced with selecting an editor without his input. West chose Professor W. Page Keeton, of the University of Texas, and his brother Professor Robert Keeton, of Harvard University, co-authors of West's leading torts casebook, to lead a team of revisers. Joyce, *Keepers*, *supra* note 280, at 853.

519. *Id.* at 864 & n.64 (nuisance was one of Keeton's three major revisions to the Prosser *Handbook*). Keeton initially made several stylistic changes to Prosser's fourth edition that deliberately undermine the recognition of public nuisance as a viable private cause of action. The chapter now emphasizes *private* nuisance before *public* nuisance, just the opposite of Prosser's prioritization. Compare PROSSER, HANDBOOK (4th ed. 1971), *supra* note 300, at Chapter 15, with PROSSER & KEETON, *supra* note 157, at Chapter 15. I suspect that Keeton changed the title for the public nuisance section to reinforce the conservative notion, which he apparently shared with Chief Justice Baldwin in the 1535 case, that the cause of action belongs not to private individuals but only to "the state." PROSSER & KEETON, *supra* note 157, § 90, at 643 ("Public Nuisance: Remedies Available to *the State*") (emphasis added). Keeton also misleadingly changed the title of the private nuisance section to "Private Nuisance: The Tort Action for Damages." Compare PROSSER, HANDBOOK (4th ed. 1971), *supra* note 300, § 87, at 619, with PROSSER & KEETON, *supra* note 157, § 89, at 640 (emphasis added). Keeton then excised Prosser's early references in the remedies section to the private right of action for public nuisance. *Id.* at 641. These changes

retitled the public nuisance section vaguely, calling it "The Tort Action—General Case Approach,"⁵²⁰ and he added an extensive new footnote that directly rejected (and simultaneously ignores, if that is possible⁵²¹) the *Restatement* rule modification. Keeton dismissed the "great debate" as "*agitation* for abolition of the rule,"⁵²² noting the lack of case support.⁵²³ Keeton then added an entirely new subsection, called "The Tort Action—A Recommended Approach"⁵²⁴ that takes a position 180 degrees different from the *Restatement* and suggests an extremely conservative⁵²⁵ construction of the private action-public nuisance rules that, if followed, would ultimately disembowel the cause of action.⁵²⁶ Without citing any supporting cases or commentary

conveyed a substantive disagreement. See Joyce, *Keepers*, *supra* note 280, at 873 n.115 (discussing Keeton's changes in the public nuisance section headings as contrasting with the rest of the edition, where "the revisers have been at pains to preserve at least the structure of the presentation that Prosser employed in earlier editions").

520. PROSSER AND KEETON, *supra* note 157, at 646.

521. Keeton's lack of references to the *Restatement (Second)* is surprising given its importance to courts, his other "frequent references" to it elsewhere, Joyce, *Keepers*, *supra* note 280, at 867, and the fact that both Keetons were Advisers to the *Restatement (Second)*. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at v.

522. PROSSER & KEETON, *supra* note 157, at 646-47 n.41 (emphasis added). Unlike in other areas of the *Handbook*, in this area, Keeton obviously does not place "correspondingly greater stress on contemporary developments," Joyce, *Keepers*, *supra* note 280, at 867.

523. PROSSER & KEETON, *supra* note 157, at 646-47 n.41 (neglecting to cite *Akau*).

524. *Id.* at 651.

525. By "conservative," I mean appearing to favor greater restrictions on citizen access to the courts for public nuisance claims. See also Joyce, *Keepers*, *supra* note 287, at 870-71 (noting the conservatism of the Keeton edition revisers). The Keetons' torts casebook provides some insight into their conservative views on the special injury rule. See PAGE KEETON & ROBERT KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* (1971). It neglects to cite the proposed RESTATEMENT modification in either of the two areas where it places nuisance cases (Chapter 3, "Interference with Property" and Chapter 12 "Strict Liability and Other Theories"), even though it tracks *Restatement* proposals in other areas. In the Preface, the Keetons express "doubts about [tort law's] relative usefulness [to address environmental problems] in comparison with administrative and political remedies." *Id.* at xviii. G. Edward White suggests that the Keetons were a product of the traditional doctrinal approach fostered by Harvard Law School. See WHITE, *supra* note 240, at 154.

526. Keeton attempted to support the "new approach" of disabling public nuisance by using fallacious illustrations from four supposed "classifications" of public nuisance cases. First, he suggested that claims that a public nuisance created by a purpresture upon public property (perhaps the most ancient of public nuisance examples) were, in essence, an action for trespass or negligence, not public nuisance. By definition, however, a trespass claim would not have been appropriate for any obstruction on *public* roads because the only appropriate plaintiff in trespass is the owner/possessor of the affected land. See *supra* Part II.A. Second, he suggested that all pollution cases ultimately involve "the use and enjoyment of *private* property," therefore, air, soil and noise pollution "must affect the plaintiff in a substantial way and for that reason constitute a *private* nuisance." PROSSER & KEETON, *supra* note

and without reconciling his new position with Prosser's, Keeton suggested "a better description of the results of cases would show that a private individual cannot complain of public nuisance either by way of maintaining a tort action for damages or by way of obtaining an abatement of the so-called nuisance unless the conduct has resulted in *the commission of an independent tort to the plaintiff*."⁵²⁷ If this were the case, of course, there would be no need or rationale for the public nuisance action, other than to graft an injunctive remedy onto a private tort action. Keeton's chapter on nuisance, in particular, "presents perhaps the most conspicuous example of strong disagreement" between Prosser and the revisers.⁵²⁸

These stylistic and substantive changes to the public nuisance chapter of Keeton's 5th Edition cloak this section of "Prosser on Torts," which is still the primary tort law reference tool for judges and practitioners, with a new, radically conservative tone and approach. State courts that continue to rely on "Prosser" as a key authority are provided no clues about the true doctrinal contours of the special injury rule.⁵²⁹ Without digging into the history or literature, courts undoubtedly attribute Keeton's views to the revered Prosser. Thus, ironically, Prosser's influence on the issue today now undermines decades of his own work on the issue and, most importantly, puts intellectual blinders on inquiring courts. Keeton's revisions do

157, at 651 (emphasis added). Again, Keeton misunderstands *public* nuisance doctrine and ignores the broad spectrum of cases where pollution affects more than just private land—indeed, the very point of the "ancient" public nuisance doctrine was to protect *the commons*, leaving its sibling private nuisance to cover injuries to private landowners (see *supra* Part II.A). Keeton's third and fourth examples of supposed misuse of public nuisance (unlicensed medical practitioners and moral vice cases), *id.* at 652, are also conveniently characterized strawmen drawn from the rag-tag margins of basic nuisance law.

527. PROSSER & KEETON, *supra* note 157, at 650 (emphasis added).

528. Joyce, *Keepers*, *supra* note 280, at 873. Joyce described Keeton's treatment of public nuisance "odd" because of the way that Keeton left in the Prosser text without explaining the new departures, in contrast to the style of revision elsewhere in the text. *Id.* at 874.

529. The new weighty West torts treatise authored by University of Arizona Professor Dan B. Dobbs, DAN B. DOBBS, *THE LAW OF TORTS* (2000), intended to fill the void left by the decades since Prosser's death and the now-dated Keeton edition, does not repeat the mistakes of Keeton, but it unfortunately indicates no particular interest in the special injury rule debate and states the traditional doctrine without indicating the *Restatement's* differing position, the controversy in the literature, or Keeton's mistreatment. See *id.* § 467, at 1335 (private action requires "harm [that] differs in kind from the harm caused to other members of the public generally"); *id.* at 1337 ("if the defendant's pollution causes respiratory problems for everyone in town, the plaintiff's respiratory harm does not differ in kind from that suffered by others and she cannot recover on public nuisance theory") (citing *Exxon Valdez*).

not, as Prosser might have condoned, “bury[] the dead, discreetly but finally, and showcas[e] the living.”⁵³⁰ Rather, Keeton appears to have buried the living and showcased an alien.⁵³¹ Given his devotion to the issue and the seriousness with which he viewed the scholarly debate over the special injury rule, Prosser would not be pleased.

Ultimately, a survey of case law since the *Restatement* rebellion thirty years ago confirms that only one court—the Hawai'i Supreme Court in *Akau*—has ever expressly adopted the proposed change to the special injury rule/different-in-kind test for public nuisance cases.⁵³² Although many courts have bent or confused the rule,⁵³³ and some jurisdictions have created an important exception for commercial fishing,⁵³⁴ the *Restatement* has not been rejected but, worse yet, simply ignored by courts.⁵³⁵

530. Joyce, *Keepers*, *supra* note 280, at 875.

531. *See id.* at 871 (stating that, particularly on the issue of public nuisance, “the Fifth Edition seems to be much less of a vehicle for reform than were its predecessors.”).

532. Comment, *Public as Plaintiff*, *supra* note 5, at 517; *see also id.* at 518 (“Hawaii consciously joined the movement toward expanded standing for public nuisance recommended by the *Restatement* . . .”); Abrams & Washington, *supra* note 4, at 389 n.171 (calling *Akau* a novel, unusual, hybrid case).

533. *See Hodas*, *supra* note 5, at 891.

534. *See supra* note 102 (discussing the commercial fishers' exception).

535. The cases applying the traditional different-in-kind rule in the past three decades are numerous. *See, e.g.*, *Venuto v. Owens-Corning Fiberglass Corp.*, 99 Cal. Rptr. 350 (1971) (applying different-in-kind rule to dismiss plaintiffs' claim for public nuisance against air emissions from fiberglass plant); *Clabaugh v. Harris*, 273 N.E. 2d 923 (Ohio 1971) (applying different-in-kind and different-in-degree rules and still finding residents of a farm community seeking to enjoin highway construction project during late night and early morning due to noise and vibration had no public nuisance claim); *Frady v. Portland Gen. Elec. Co.*, 637 P.2d 1345, 1349 (Or. App. 1981) (affirming dismissal of plaintiffs' complaint because injuries they sustained were not different from those suffered by others in the vicinity of an electricity generating turbine); *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315-16 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) (rejecting a property owner's public nuisance claim for ground water contamination from a chemical plant because plaintiff's economic loss was not different from that suffered by other members of the public); *cf. Westwood Pharmaceuticals Inc. v. Nat. Fuel Gas Dist. Corp.*, 737 F. Supp. 1272, 1281 (W.D.N.Y. 1990), *aff'd*, 964 F.2d 85 (2d Cir. 1992) (upholding, under the different-in-kind rule, and in light of the growing public need for avenues to address environmental contamination by hazardous substances, the public nuisance claim of a landowner that incurred response costs cleaning up a contaminated site); *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716 (W.D. Pa. 1994) (allowing a landlord to sue its tenant to recover damages from property contamination from a gas station, finding that pecuniary loss not common to the entire community was different-in-kind, and that the public right interfered with was the right to soil and water free of contamination); *Mayor and Council v. Klockner & Klockner*, 811 F. Supp. 1039, 1056 (D.N.J. 1993) (holding that a landowner with a contaminated water supply had alleged special injury different-in-kind from that suffered by the public in general and therefore could sufficiently allege a public nuisance claim); New York State Nat'l Org.

The next Part examines possible explanations for this failure to bridge the gap between the *Restatement* and the case law—between scholarship and jurisprudence.⁵³⁶

V

"THAT WAY MADNESS LIES"⁵³⁷: ALTERNATIVE APPROACHES TO MODERNIZING THE SPECIAL INJURY RULE

Given the underwhelming success thus far of the *Restatement's* attempt to modernize the traditional special injury doctrine, perhaps Prosser was right in his parting caution to the rebels at the 1970 ALI annual meeting—"that way madness lies."⁵³⁸ The strict different-in-kind test has, indeed, been amazingly persistent, despite its doctrinal infirmities and the chorus of critics.

This Part examines why the *Restatement* rebellion failed and the lessons we can draw from the experience when evaluating alternative formulations of the rule. In doing so, this Part seeks to discover if public nuisance can be modernized, or if it will forever be entangled in anachronistic "ancient" restrictions like the different-in-kind test. This Part sets a new stage for the discussion of alternative approaches by reflecting on the lessons learned from this Article's earlier examinations of the traditional doctrine.

To "tame the dragon,"⁵³⁹ this Part compares three alternative approaches to modernizing the "standing" doctrine for public nuisance: 1) the earliest departure from the traditional rule—the more liberal and truly ancient different-in-degree test; 2) the

for *Women v. Terry*, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989) (rejecting a public nuisance claim in a case where a coalition of women's organizations and abortion providers sought an injunction against anti-abortion protesters because the court was "unclear at this time what special damages the plaintiffs asserted" to support a claim different from the rest of the public); *Brown v. Scioto Cty. Bd. of Comm'rs*, 622 N.E.2d 1153, 1160 (Ohio App. 1993) (holding that a landowner who sued a county for strong odors from a sewage treatment plant could maintain private and public nuisance claims because interference with enjoyment and physical illness related to odors was sufficiently distinct and peculiar harm under the special injury rule); *Chemical Weapons Working Group v. U.S. Army*, 935 F. Supp. 1206, 1220 (D. Utah 1996) (nuisance claim alternatively dismissed on the basis of the different-in-kind rule). For a summary of the most recent (post-1997) special injury rule cases, see *supra* note 153 (listing cases), confirming courts' continuing conservative approach to the doctrine.

536. Comment. *Exxon Valdez*, *supra* note 8, at 701 ("Although many scholars question the continued application of the special injury rule in today's legal arena, it has not been abandoned.")

537. 47 A.L.I. PROC., *supra* note 369, at 304 (remarks of Prosser).

538. *Id.*

539. See *supra* note 22 and accompanying text.

proposed abandonment of the rule—the *Restatement* modification and “*Restatement Plus*” (that is, eliminating the rule for damages cases as well as injunctive relief cases); and 3) a new approach to the rule—an “actual community injury” rule, a modern reformulation of Smith’s actual (pecuniary) damages interpretation with a significant new focus on common injury to community rather than unique injury to individuals. This Part then considers the theoretical, jurisprudential, and practical implications of the proposals and evaluates the actual community injury rule in terms of the tripartite rationale for the traditional rule.

In viewing these alternatives, this Article maintains an overarching focus on two important purposes of public nuisance. First, the essential function of common law public nuisance is to protect *public* values, such as *public* health, safety, peace, comfort, or convenience.⁵⁴⁰ It is neither meant to be, nor likely ever to function properly as, a substitute for purely individual injury claims.⁵⁴¹ Second, law should protect these public values from unreasonable and significant interference, primarily from localized risk-creating activities by private landowners or businesses. Public nuisance should not replace the legislative function. Federal, state, and local statutory protections for broad social or environmental ills are an indispensable complement to common law remedies,⁵⁴² but public nuisance will always be needed to fill interstitial gaps,⁵⁴³ particularly for “localized”

540. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821B (“a right common to the general public”).

541. Public nuisance cases that seek damages as well as injunctive relief pose some doctrinal difficulties. If the basis of the lawsuit is to vindicate *public* values, then it may seem anomalous that the plaintiff receives individual damages, *e.g.*, for a loss to recreational fishing resources. On the other hand, the plaintiff *has* been injured, and even though most injuries in tort law cannot be “fixed” in the direct sense by money, monetary damages are tort law’s vehicle for compensation. In public nuisance cases, courts could address this problem by keeping the focus on the loss to the greater public, looking first toward injunctive relief rather than monetary damages, and also by considering whether damages paid can be held partially in trust to address the windfall problem rather than paid to the individual plaintiffs. If the plaintiff proves a personal injury *as part of* the damage to public values or widespread personal injury, then the normal tort rules for compensation should be applied to allow appropriate individual compensation on such claims.

542. See Grad & Rockett, *Environmental Litigation*, *supra* note 8, at 744 (noting doctrinal and practical limitations of a case-by-case approach for non-localized problems).

543. See *supra* note 5; Comment, *Environmental Lawsuit*, *supra* note 6, at 1135 (statutes “lack the strength or flexibility to adequately deal with small-scale pollution concentrated near the source”).

neighborhood problems⁵⁴⁴ and for significant aspects of regional disasters like the Exxon Valdez spill.⁵⁴⁵

For the affected community, the availability of a public nuisance remedy may be as important as the modern statutory safety net. Public nuisance may not be as broad or effective as statutory remedies, but it can be more targeted, flexible, and controllable, and can offer direct compensation. Moreover, as political winds shift and threaten well-used statutory remedies,⁵⁴⁶ the national environmental bar should take a renewed interest in common law remedies like public nuisance, which should remain available to private plaintiffs regardless of the shifts in the enforcement priorities of political agencies.

A. Three Alternative Approaches Toward Solving the Paradox

1. The Dusty Different-in-Degree Test

The now-forgotten twin of the traditional different-in-kind test was the different-in-degree test. As Fleming explained,

The more liberal approach is to allow recovery so long as the plaintiff's injury and inconvenience was appreciably *more* substantial, *more* direct, and proximate without necessarily differing in nature. This would include all personal injury and actual pecuniary loss, even from mere delay and inconvenience, provided it was 'particular' to him, i.e., exceeded in *degree* what was suffered by others.⁵⁴⁷

The work of tort critics Smith, Prosser, and Fleming, and this Article's own analysis suggest that this test derives from a fair interpretation of the English and some American

544. See *supra* note 4; see also RODGERS, AIR & WATER, *supra* note 8, § 2.1, at 33 (public nuisance has "contributed consistently to the just resolution of neighborhood environmental conflict").

545. See *supra* Part I.B.1.

546. See generally Sevinsky, *supra* note 4, at 30 (noting weakened federal enforcement after the "new federalism" of the 1980s); Richard J. Lazarus, *Essay: Fairness in Environmental Law*, 27 ENVTL. L. 705 (1997) (describing President Reagan's campaign against "excessive environmental regulation," and stating that after he was elected and Republicans gained control of the Senate, "environmentalists had substantial reason to anticipate a significant rollback"); WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 310-11 (3d ed. 1995) (describing emergence of Wise Use movement in mid-1980s, successor to the Sagebrush Rebellion in early 1980s); Warren L. Ratliff, *The De-Evolution of Environmental Organization*, 17 J. LAND RESOURCES & ENVTL. L. 45 (1997) (noting trend toward states' rights in environmental law).

547. FLEMING, *supra* note 8, at 381 (emphasis added).

(particularly federal) cases,⁵⁴⁸ and thus has considerably deeper historical roots than most modern courts and commentators acknowledge.

There are three important distinctions between the difference-in-kind test and the difference-in-degree test. First, the difference-in-degree test is arguably *more* faithful to the original language of the 1535 case and many of the subsequent old English cases.⁵⁴⁹ Second, the different-in-degree test describes how many courts have actually decided public nuisance cases, given the difficulty of applying the in-kind test.⁵⁵⁰ Third, the different-in-degree test opens the gate more widely to public nuisance plaintiffs by lowering, but not eliminating, the threshold barrier.⁵⁵¹ Although it presents less of a conundrum, the difference-in-degree test, however, suffers the same infirmity of accepting the paradoxical premise that a private plaintiff's injuries should be distinct from those of the community, even if only by degree. Therefore, although the degree test seems historically valid and doctrinally sound, it also emphasizes individual injuries over community values.

2. *The Restatement Proposal: Federal Injury-in-Fact Standing*

The more modern approach, as proposed by the *Restatement*, is to abandon the traditional rule and substitute modern federal standing law. Section 821C(2)(c) would grant private plaintiffs "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."⁵⁵² Wade and the *Restatement Second's* rebels intended to bring public nuisance law in line with developments in federal standing law and to eliminate the special injury rule, replacing it with the then-emerging federal injury-in-fact test.⁵⁵³

The *Restatement* rule, however, is limited only to injunctive relief cases. To recover damages, the plaintiff must still meet the

548. See, e.g., *supra* note 252 (discussing *Piscataqua*) and *supra* note 337.

549. See *supra* Part II.A & B (discussing the 1535 case and English cases).

550. See *supra* Part III.A (discussing Smith's criticism of judicial application of the traditional doctrine).

551. See *id.* (noting Smith's observations that just claims were being barred and that inherent limitations of nuisance doctrine would prevent an undue flood of litigation).

552. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821C(2)(c).

553. See *supra* Part IV.B (discussing the *Restatement (Second)'s* Rebellion).

strict different-in-kind test.⁵⁵⁴ Plaintiffs making injunctive claims would continue to face the double challenge of financing the lawsuit with no prospect of compensation. The *Restatement's* bold approach thus only partially opens the gate, and only those plaintiffs who are very highly motivated to obtain an injunction and who can somehow afford to litigate pro bono publico will pursue the claim. For the many public nuisance cases that involve damages, Section 821C(2)(c) maintains the traditional rule and paradox.

Some commentators have argued that the *Restatement* should have gone farther and eliminated the rule for damages cases as well, a "*Restatement Plus*" approach that, in effect, would eliminate the special injury rule entirely.⁵⁵⁵ Although this accomplishes the goal of eliminating the perceived injustice of the rule, it leaves courts without doctrinal guidance sufficient to bridge the jurisdictional and jurisprudential gap between federal standing law and state private damages case law. As discussed further below, simply importing federal public law developments into private common law torts, while expedient, leads to numerous challenges.⁵⁵⁶

3. A New Approach: An "Actual Community Injury" Test

Thirty years of experience with the *Restatement's* unsuccessful approach provide a foundation for exploring a new doctrinal formulation more aligned with the original nature and purpose of public nuisance as a community-based remedy. This proposal may also face barriers, which this Article explores, but an "actual community injury" standard would provide a more satisfactory doctrinal approach, would directly resolve the paradox of the traditional doctrine, and would allow state courts facing these issues in public nuisance cases the comfort of grounding their departure from the traditional doctrine in the familiar territory of state administrative law.

554. Compare RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 821C(1) with § 821C(2).

555. See *supra* note 516; see also Rothstein, *supra* note 8, at 475-79 (arguing for complete abolition of the special injury rule); RODGERS, *supra* note 8, § 2.2, at 106 (noting that in light of the *Restatement's* realignment of Section 821C with modern standing law for injunctive relief actions, "one wonders why the [damages] limitation remains in Section 821C(1)," and concluding that "[a]ny person injured in fact should be able to sue for equitable relief or money damages").

556. See *infra* notes 609-620 and accompanying text.

This "actual community injury" formulation is a modernized version of Smith's "actual damages" test,⁵⁵⁷ with two important distinctions. First, it would not limit recognized damages to pecuniary loss but would include modern injuries recognized in each respective state's administrative and environmental law, such as environmental and aesthetic harm. Second, it would focus on harm to the *community* instead of to the individual.

The actual community injury test solves the special injury rule paradox by re-orienting the doctrine to recognize explicitly that public nuisance is a *public* action—"an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations."⁵⁵⁸ If public nuisance is truly about protecting communities from threats to shared values of health, safety, and welfare, then those who seek to vindicate those values in the courts should *share* rather than *stand apart from* those values. Thus, the plaintiff must demonstrate both that she suffered the harm and that the injury is common and *not* unique or solely individual.⁵⁵⁹ Essentially, by turning the traditional special injury doctrine on its head, courts can ensure a truer alignment with the fundamental purpose of public nuisance actions.⁵⁶⁰ This should be the case regardless of whether the plaintiff seeks damages or injunctive relief.

Yet, this new rule would have its own natural doctrinal boundaries. An actual community injury standard would substitute for Section 821C and read:

To recover damages or obtain injunctive relief in a private action for a public nuisance, the plaintiff must have suffered an actual or threatened injury in common with the community that was the subject of the nuisance. "Injury" means substantial interference with community values, is not limited to pecuniary loss, may include environmental and

557. See *supra* Part III.A (discussing Smith's criticism of the traditional doctrine and his actual damages test).

558. Jaffe, *Private Actions*, *supra* note 380, at 302.

559. This proposal echoes those state public nuisance statutes that allow "any person" to step into the state's shoes and pursue such an action without showing special injury. See *supra* note 43. Few states, however, have such statutes, and those that do often limit the scope of such suits to social vices only. State-by-state statutory reform to broaden access is desirable but outside the common law focus of this Article.

560. In arguing for expanded public actions, Jaffe points out that in most early English mandamus cases, "there is little or no positive precedent requiring" special injury, Jaffe, *Public Actions*, *supra* note 380, at 1308, and that "many of the states do not insist even in constitutional adjudication that the plaintiff have an interest distinct from his citizen interest." *Id.* at 1309.

aesthetic injury, and may be defined according to the administrative law principles of the jurisdiction.⁵⁶¹

On the one hand, the actual community injury rule is much less restrictive than the twin traditional rules. It would not require the plaintiff to show that her injuries are either different-in-kind or even different-in-degree. They need not be different at all; rather they must be *common* injury, not unique, peculiar, special, or particular. But, there must be actual, not theoretical or speculative, injury personally suffered by the plaintiff. This would eliminate plaintiffs with no real injury and curious interlopers from outside the community.

Instead of looking to federal injury-in-fact law as the *Restatement* suggests, judges could look to state law to define injury, such as health problems or economic loss, and to state administrative law, which recognizes modern injuries such as aesthetic, conservational, and cultural losses. Defendants could challenge the representativeness of plaintiff's injury, but otherwise courts would treat nuisance more like other tort cases, where the determination of harm is inherent in the jury's view of the merits. Plaintiffs could argue common injury without jeopardizing their public nuisance case, their ability to sue as an organization, or their right to bring a class action.

On the other hand, the rule maintains important existing doctrinal boundaries on public nuisance, such as substantiality of interference, and adds a significant new one by requiring that the type of injury be to community, not individual, values. The trier-of-fact would determine what constitutes the "community" by looking at custom, history, contemporary social context, state statutes or local ordinances, and other evidence presented by the parties. For example, a homeowner plaintiff who complained of a small farm's hog sty in a rural agricultural area and brought a public nuisance case seeking broad damages or injunctive relief would be unlikely to show that the community values included air free of hog odor. A private nuisance case, however, based on

561. Prevailing plaintiffs could recover attorneys fees and costs under the "common fund" or "private attorney general" theory. Note, *Public Watchdog*, *supra* note 4, at 1735-65 (proposing that courts "jump start" public nuisance cases by awarding attorneys fees and costs to prevailing plaintiffs based on courts' inherent equitable power to invoke "common fund" and "private attorney general" exceptions to the traditional American rule requiring each side to bear its own costs and fees); Interview with Victor M. Sher, *supra* note 4 (noting the common fund exception in class actions as a viable theory for development); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 259-60 (1976) (discussing rejection of these theories in federal courts but noting that the "common benefit" exception is still a viable theory in state court).

interference with the plaintiff's right to use and enjoy his property, would remain a viable cause of action. The actual community injury rule would also eliminate from the realm of public nuisance those cases that are simply disguised personal injury negligence cases, where the plaintiff is seeking vindication of purely personal and not community values. The pedestrian injured by a falling awning could not show the broader community injury but would be left to the more appropriate negligence action.

Thus, the public nuisance plaintiff would more truly represent the public and protect public values, replacing privately motivated litigants seeking strategic advantage by cloaking private nuisance or personal injury cases in public nuisance claims. Concomitantly, the actual community injury rule would not make public nuisance totally accessible to environmental groups nor would it substitute for statutory redress. The emphasis on protecting local community values and the jurisdictional limitations of state courts would discourage cases (e.g., national air pollution cases) that reach beyond a court's concept of "community" and are the likely subject of state or federal statutory regulation as well as legislative attention. Absent such attention, a plaintiff may convince the court to broaden its view of "community" and intervene.

B. Theoretical Reflections on the Traditional Doctrine and Its Alternatives: Legal Realism, Public Law, and New Public Law Theory

The fundamental differences between the traditional doctrine and the three alternative formulations discussed above reflect a deeper theoretical tension among competing visions of the role of law in society. The debates over legal formalism versus realism, private versus public law, and new public law (legal process versus republicanism) all provide some insight into why state courts, even if aware of alternative formulations, might be reluctant to adopt a more liberal approach to judicial access.

1. Formalism and Legal Science Versus Realism: Understanding the Historical Entrenchment of the Traditional Doctrine

The different-in-kind test and the judiciary's firm adherence to it flow from a "formalist"⁵⁶² or "scientific" view of law that

562. Formalism, as described by Harvard Law Professor Joseph Singer, includes "mechanical jurisprudence" and the principles of legal science, i.e. "a logical, objective,

dominated the American legal landscape⁵⁶³, when the traditional doctrine became entrenched.⁵⁶⁴ Formalism⁵⁶⁵ suggested that judges should use “objective standards” that are “composed of rigidly defined concepts to generate specific legal conclusions by a logical, objective, and scientific process of deduction.”⁵⁶⁵ The traditional special injury doctrine naturally appealed to judges disposed toward formalism: it purported to provide a restrictive bright line test for determining who could bring a public nuisance claim⁵⁶⁶; it helped to limit the judicial role in cases that presented unusual demands on courts to intervene in community conflict⁵⁶⁷; and it provided judges a method for limiting the tort of nuisance, which was incongruous with the growing dominance of negligence law.⁵⁶⁸ Although courts often struggled with application of the doctrine because of the difficulty of drawing the different-in-kind line, on the surface the doctrine resonated with formalists because it provided an objective, seemingly clear, and purportedly historically justified way to weed out extraneous and “improper” plaintiffs.⁵⁶⁹

and scientific process of deduction.” Joseph W. Singer, *Review Essay: Legal Realism Now*, 76 CAL. L. REV. 465, 496-97 (1988). The “classical era” merged the view that the market-based private sphere was separate from the governmental sphere and the view that the “judicial method was . . . scientific, apolitical, principled, objective, logical, and rational.” *Id.* at 499.

563. The late nineteenth and early twentieth century “scientific” movement assumed law was “capable of orderly classification and analysis through the use of proper methodological techniques.” WHITE, *supra* note 240, at 21. “The conception of law as science substantially affected both the doctrinal state of tort law and the analytical techniques employed in the discussion of tort cases between 1880 and 1910.” *Id.* at 55. Tort law became dominated by the rule-based doctrinal approach. *Id.* at 38-39 (discussing the transformation of tort law into a distinct field of study with the goal of “doctrinal consistency, clarity, and predictability”).

564. *See supra* Part III (discussing the American entrenchment of the traditional rule in the late 1800s and early 1900s).

565. Singer, *supra* note 562, at 497-98.

566. The different-in-kind rule allowed judges to be more mechanical by avoiding judgments of variation in degree. *See supra* notes 306-308 and accompanying text.

567. *See* WHITE, *supra* note 240, at 61 (“The principle thrust of late nineteenth-century tort doctrines was to restrict, rather than expand, the compensatory function of the law of torts.”); *id.* at 58 (noting the dominance of the judge’s role in the scientific view, compared to the “subversive” role of the jury); *id.* (discussing Justice Holmes’ fears of the “corrosive effect” of juries on judicial doctrine).

568. *Id.* at 61 (noting that the negligence principle that dominated “scientific” tort law had “virtually” swallowed nuisance law by 1910).

569. *Id.* at 32 (discussing how the scientific case method emphasized that “analysis of an historical ‘line’ of cases could give fuller meaning to an extracted principle,” in contrast to recognizing the historical context or “felt necessities” of the times). The goal of providing a unifying classification scheme to tort law led some torts scholars, including even Jeremiah Smith, to propose that torts allowing liability without fault be eliminated entirely from the tort field. *Id.* at 38.

Given early English commentary's entrenched conservative interpretation of the case law and many American states' firm adoption of the doctrine in the late 1800s to early 1900s, the direction for a judicial formalist was well mapped out: follow the ample authority that reiterated the traditional rule. Moreover, for the formalist, the very idea of a private person acting as a private attorney general was contrary to the common law system.⁵⁷⁰ The formalist view was *laissez faire*—leave private parties to their own devices.⁵⁷¹ The “government was not fundamentally implicated in the processes and outcomes of private life. Instead, society was governed by individual free decisions and voluntary collaborative efforts.”⁵⁷²

In contrast, all three alternative formulations of the rule derive strength from the “realist” perspective. Legal realism—popular from the early 1900s to the 1940s⁵⁷³ and still highly influential through its modern successors such as critical legal theory⁵⁷⁴—attempted to unmask formalism. It suggested that “judges should make law based on a thorough understanding of contemporary social reality” and “fit the law to social practice and to satisfy the felt needs of society to achieve a ‘satisfying working result.’”⁵⁷⁵ Rules should not be applied “regardless of their social consequences” but rather with an eye toward the purposes of the law, social goals, and practical effects.⁵⁷⁶

The different-in-degree test represents a departure from the formalist/scientific mode of the traditional doctrine and is more realist in approach. It offers greater judicial flexibility, recognizes the artificiality of bright line tests, and considers the historical and policy context of the early case law. The impassioned plea of the rebels at the 1970 ALI meeting, Wade's approach in the

570. During the “classical period” from 1860–1940, legal theorists saw a sharp distinction between the private market-based sphere, within which the autonomous individual operated, and the public governmental sphere of government regulation. Singer, *supra* note 562, at 478. “The ultimate result of this reorganization and reconceptualization of private law was to portray the market as largely self-regulating and outside governmental control.” *Id.* at 481.

571. *Id.*

572. *Id.*

573. WHITE, *supra* note 240, at 63–64.

574. Singer, *supra* note 562, at 503 (arguing that current schools of thought, such as critical legal theory, are “both a reaction to, and a current version of, legal realism”).

575. *Id.* at 501 (quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION* 60 (1960)).

576. *Id.* Realists argue that judges should, and do, “balance pragmatically competing interests in light of competing policies, principles, and values,” by identifying alternative legal solutions to problems, by understanding the consequences of their decisions, by understanding the conflicts among values in each case, and by promoting social values. *Id.* at 502.

Section 821C revision, the call by environmental commentators for liberalization, and the proposed actual community injury rule even more explicitly and strongly share the realist vision of law. They deliberately depart from the traditional doctrine for the purpose of making public nuisance a more viable modern remedy to address current social needs. Although the very nature of the common law is to evolve,⁵⁷⁷ formalist jurists are loathe to deviate from what they perceive to be well-established doctrine. On the other hand, courts with a more realist or activist approach—like the Hawai'i Supreme Court in *Akau*—are eager to change with the times. The history of American legal theory, therefore, begins to deepen our understanding of why the traditional special injury doctrine is so firmly entrenched in tort law. The strict doctrine is a reflection of the larger formalist-scientific view that dominated American law at least until the mid-1900s, when the advent of realism set the stage for a transformation away from the rigidity of the early common law. At the same time, the arrival of “public law” offered another challenge to the traditional private law model. Exploring its application to nuisance law helps to explain the unique nature of the special injury doctrine.

2. *Private Versus Public Law: Another Perspective on the Traditional Doctrine*

“Public law” theory, pioneered by Professor Abram Chayes, describes another important conceptual difference between the two divergent jurisprudential approaches to the traditional doctrine, and aids our understanding of why doctrinal modification of the special injury “gate” is inherently difficult. To set up his public law theory, Chayes first describes the traditional private law model, where *private* law has five primary features.⁵⁷⁸ First, the private lawsuit is “bi-polar,” *i.e.* it is “organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a

577. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover ed. 1991) (“The life of the law has not been logic: it has been experience.”); *but see* WHITE, *supra* note 240, at 32 (suggesting that even Holmes’ view of history was to buttress “contemporary philosophical arguments rather than as a device by which to understand the ‘felt necessities’ of earlier generations”); BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 19-20 (1924) (“Overemphasis of certainty may carry us to the worship of an intolerable rigidity. . . . But hereafter, as before, the changing combination of events will beat upon the walls of ancient categories. . . . The law . . . must have a principle of growth.”).

578. Chayes, *supra* note 1, at 1282-83.

winner-takes-all basis."⁵⁷⁹ Second, the lawsuit is retrospective.⁵⁸⁰ The case involves "completed events, whether they occurred, and if so, with what consequences for the legal relation of the parties."⁵⁸¹ Third, this kind of civil adjudication involves interdependency, which means that the relief is linked directly to the substantive violation, such as paying money damages in a tort action.⁵⁸² Fourth, Chayes states that the lawsuit is "a self-contained episode."⁵⁸³ The judgment is typically confined to the parties, involving a transfer of money or specific performance that ends court involvement. Finally, a key feature of the private lawsuit is party initiation and control, meaning that the parties initiate and control the legal and factual issues, with the judge playing "neutral arbiter."⁵⁸⁴ This traditional private law model reflects the late nineteenth century vision of society based on notions of the autonomous individual and the role of courts as passive "adjuncts" that protected private activities and "stringently limited" governmental powers.⁵⁸⁵ Chayes' model parallels the nineteenth century's formalist-scientific view of the court system and traditional special injury doctrine.⁵⁸⁶

At first blush, the general field of common law torts fits well within the traditional private-law litigation world described by Chayes. The garden variety tort case—for example, a personal injury case arising from a car accident where driver Joe injures pedestrian Sara—can be seen as a bi-polar contest between diametrically opposed parties (Joe and Sara); a retrospective look at the parties' past conduct (Joe's driving and Sara's walking) and plaintiff's past injury (Sara's broken leg); a situation where the relief and the violation are interdependent (Sara's specific and general compensatory damages); a self-contained judicial task ending once the judgment is entered; and a case where there would be a high degree of party control and minimal

579. *Id.*

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.* Chayes acknowledged that this traditional model was "no doubt overdrawn" but was also "thoroughly taken for granted" and "central to our understanding and our analysis of the legal system." *Id.* at 1283.

585. *Id.* at 1285-88.

586. *See id.* at 1286-88 (describing the traditional private law model in formalist and scientific terms).

judicial control. Indeed, taking this simplistic view,⁵⁸⁷ torts may be the “paradigm[atic] private law field.”⁵⁸⁸

In contrast, Chayes' public law model focuses on the distinctive aspects of federal statutory and constitutional litigation used to settle public rights disputes.⁵⁸⁹ The primary features of the public law model, which operates primarily in the federal court system, include: (1) lawsuits arising from constitutional or statutory policies, instead of private rights; (2) often “sprawling and amorphous” parties, such as non-profit organizations or class actions, that may change during the litigation; (3) a judge actively dominating the case, often using

587. Realist scholars severely criticize this simplistic characterization of tort law. Singer, *supra* note 562, at 480-81; see also Leon Green, *Tort Law: Public Law in Disguise* (parts 1 & 2), 38 TEX. L. REV. 1 (1959), 38 TEX. L. REV. 257 (1960). Even classic tort law could be seen as a form of public law because it inherently expressed social decisions, e.g., about *which* injuries the courts should redress and *how*. See Singer, *supra*, at 486-87. If brought today, Joe and Sara's case is likely to be complicated by multiple parties, statutory issues, and punitive damages, will consider factors beyond the case itself, and may involve the judiciary in post-judgment appeals and enforcement actions. Modern products liability, class actions, and mass torts particularly resemble public law litigation. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

588. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 889 (1991).

589. For other definitions, see, e.g., L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579, 1580 (1989) (“any litigation to which a government or a governmental official is a party”); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 270 n.1 (1989) (defining public law litigations as “lawsuits which seek to vindicate important social values that affect numerous individuals and entities”). Public law litigation arose in response to federal legislation in the late 1800s and early 1900s that intruded on the private sphere of individuals and corporations. Chayes, *supra* note 1, at 1288-89 & nn. 35-36. Simultaneous changes in federal procedure, such as liberalized joinder, pleading, and intervention, complemented these substantive law changes and set the stage for the new model of litigation to dominate the federal landscape. *Id.* at 1289-91. Public law forcefully erupted on the American legal landscape in 1970s, ushering in a “new model of civil litigation.” Chayes, *supra* note 1, at 1282. This model was firmly incorporated into American law by the panoply of congressional statutes passed in the 1960s-1970s that included specific citizen suit provisions and allowed for the award of attorneys fees and costs to the prevailing plaintiff. The old private law model was criticized as “anachronistic” in a “postindustrial, multicultural democratic society.” Chayes recognized the realist influence on his public law model. *Id.* at 1304. See also Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 398 n.268 (1990) (discussing Chayes' public law model). The post-1970s environmental litigation movement is a classic illustration of this model. RODGERS, *AIR & WATER*, *supra* note 8, at Preface, p. v (“Environmental law makes a mockery of the traditional model of dispute where A sues B for a sum certain. . . . Environmental law arises in a world of many parties, where issues are linked together in mysterious ways, and each ‘definitive’ resolution is but the prelude to future bargaining, compromise, and defection.”).

outside experts, masters, and personnel; (4) a "predictive and legislative" inquiry, instead of a retrospective one; and (5) relief that is typically injunctive and prospective, with "widespread effects on persons not before the court and requir[ing] the judge's continuing involvement in administration and implementation."⁵⁹⁰

A public nuisance case is, virtually by definition, a hybrid of the typical Joe-Sara tort case and the typical environmental case. Let's suppose that, since his youth, Conrad has been a frequent and avid user of Blue Bay for his own enjoyment and recreation, as well as for tourism, recreational fishing, and commercial fishing businesses, but suppose also that he does not own land near the bay. Acme Corporation, an industrial manufacturing facility, has been discharging process wastewater into Blue Bay for years, in compliance with federal, state, and local laws. After beginning a new product line, Acme begins discharging new pollutants not regulated by its permits, causing Blue Bay near the facility to turn brown, smelly, and foul, resulting in fish kills.⁵⁹¹ As a result, Conrad can no longer use Blue Bay; he has lost personal and aesthetic enjoyment, recreational opportunities, food for personal consumption, and profits from his businesses. If Conrad's complaints to government regulators prove futile, Conrad can try to obtain free services from a public interest firm, which may turn him down because there are no easy permit enforcement issues, there is no prospect for fee recovery, and because it has higher priority cases in its large caseload. Conrad may resort to a local private attorney, who might decide to file a public nuisance lawsuit against Acme only after determining that the damages recovered might cover fees and costs, leaving a reasonable amount for the client.

Conrad's case is a hybrid of both the theoretical private and public law models. On the one hand, Conrad's public nuisance case has many attributes of classic private law tort litigation. The dispute is bipolar between Conrad and Acme; the suit requires application of the state's common law of public nuisance, not federal statutory or constitutional law; the focus is retrospective on Acme's and Conrad's past conduct; and Conrad is likely to seek money damages to cover his lost profits and uses and to

590. Chayes, *supra* note 1, at 1284 (describing all but the fourth characteristic); see also *id.* at 1302 (listing all eight characteristics of the public law model).

591. See, e.g., *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200 (4th Cir. 1986) (finding no NPDES permit violations because the discharge was not specifically prohibited).

pay his attorney fees and costs, rather than seek prospective relief.

On the other hand, Conrad's case has many important public law features and is unlikely to be as straightforward as described. A public-spirited and upset Conrad is likely to ask also for injunctive relief against Acme, invoking the court's inherent equitable authority to force Acme to change its operations, to monitor, and to clean up Blue Bay. He may seek damages for the community's resources, even though that would be difficult for a single plaintiff because of the special injury rule.⁵⁹² Moreover, unlike Joe and Sara's car accident case, the interdependency of the relief and the substantive violation are closer and more fluid in the public nuisance context. Conrad wants both monetary and injunctive relief, but unlike a jury's calculation of money damages, a court's view of the appropriate injunctive remedy will be largely a matter of judicial discretion.⁵⁹³ The court will be concerned about the interplay of existing government regulation and the need for future judicial enforcement, even though Conrad's public nuisance suit will never likely approach the high level of judicial intervention involved in complex federal public law cases, such as desegregation or hazardous waste clean up. Moreover, Conrad is likely to ask similarly affected community members Tate, Chase, and Kylie to join as plaintiffs to increase his leverage and spread the costs of litigation; his attorney may sue several defendants, including Acme's parent company⁵⁹⁴; and plaintiffs may pursue a class action to address the widespread community injury. Thus, even the "typical" nuisance case may have fundamental features quite apart from, and indeed contradictory to, the classic private law model of a typical tort lawsuit.

Conrad's public nuisance case lies, therefore, at the intersection of the private law universe of torts and the public law universe of statutory and constitutional law. It shares important characteristics of both worlds: it is polycentric, which

592. See *supra* Part I.B.

593. While common to the public law world, injunctions, whether affirmative orders to force positive behavior or negative ones to stop violations, are alien to the traditional tort case. Indeed, a common requirement of injunctive relief is that no adequate remedy at law (*e.g.*, money damages) be available to the plaintiffs. Except for public and private nuisance, no common law tort generally allows for injunctive relief.

594. See RESTATEMENT (SECOND) OF TORTS, *supra* note 7, §§ 834-840A (persons liable for nuisance); Interview with Victor M. Sher, *supra* note 4 (noting new developments in nuisance law that allow greater extension of suits to parent companies).

produces significant doctrinal tension; it involves public rights, not just private ones; and it may involve prospective equitable relief that affects the broader community. The special injury rule and different-in-kind test developed as a judicial "gatekeeper" to control the cases that flow through this intersection, similar to the standing rules in federal administrative law cases. Concerned with the tripartite rationale of sovereignty, multiplicity, and triviality, the English courts struggled for three hundred years to devise a rule that would control the nature and number of plaintiffs who could make use of what is essentially the sovereign's police power. The traditional doctrine reinforces the private, bi-polar, and retrospective nature of private torts, by allowing those claimants who most closely resemble the private law model greatest access to the courts.

The different-in-degree test alters this balance, but not radically. It retains language and doctrine from the ancient English cases but still acts as a gatekeeper that favors the private law model. In contrast, the *Restatement* rebels contended that the litigation tools such as standing and class actions that evolved from polycentric and prospective cases at the federal level should be the new gatekeepers. The *Restatement* proposal sought to realign the gate consistent with these new public law concepts and move public nuisance closer to the public law world of environmental litigation. The actual community injury rule would similarly move public nuisance closer to the public law model, but on a parallel, not merging, track—it would be based on state common law principles of actual damages and administrative law standing, but, unlike the *Restatement* proposal, it would not incorporate wholesale federal public law standing developments.

3. *New Public Law Theory: The Quest for Reform in Light of Public Choice and New Republicanism*

In addition to Chayes' original public law theory described above, new public law theory⁵⁹⁵ also provides some insight into the prospects for reform of the special injury rule. New public law scholarship includes two distinct political camps in legal

595. See Symposium: *The New Public Law*, 89 MICH. L. REV. 707 (1991). As explained above, see *supra* Part V.B.2, a primary contribution of original public law theory was the distinction it drew between the public law world dominated by constitutional and statutory issues and the private law world characterized by common law litigation. New public law theory arose from scholarly criticism that Chayes' model was too simplistic. See Symposium, *supra*.

academe: those from the more conservative public choice or legal process school and those from the progressive “new republicanism” or “community values” school.⁵⁹⁶ The traditional special injury rule is consistent with public choice theory, the different-in-degree rule straddles these two camps, and the *Restatement* rule and the actual community injury rule are consistent with new republicanism.

Public choice theory is “positivist,”⁵⁹⁷ focusing on an economically based world of individuals and groups pursuing their own self interest, as well as special interest group domination of politics, “provid[ing] an axiomatic pedigree to Blackstonian formalism.”⁵⁹⁸ Under the public choice view, the special injury rule would be necessary to maintain the separation of private law litigation from the essential legislative function of government.

From this perspective, redress of public nuisances is, as expressed in Chief Justice Baldwin’s 1535 opinion,⁵⁹⁹ best left to the sovereign. Public choice theorists would suggest that the federal standing model or the actual community injury rule improperly distorts the judicial role. By opening the door to such cases, courts would face questions of broad social, environmental, and political significance best left to the legislative and executive branches of government.⁶⁰⁰ In direct

596. See, e.g., Farber & Frickey, *supra* note 588, at 877-80. See also William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 743 (1991) (“New Public Law was the response of those in the baby boom generation” seeking to “seize the middle ground between Chicago School law and economics, which struck many as normatively impoverished and apologetic, and [Critical Legal Studies], which struck many as insufficiently affirmative in its agenda.”).

597. Farber & Frickey, *supra* note 588, at 879 (noting that public choice theory “applies the economist’s methods to the political scientist’s subject”).

598. *Id.* at 884 n.40 (explaining that public choice “shares much with Blackstonian common law formalism”). As discussed in Section 1 above, the formalist view espoused rigid adherence to doctrines scientifically extracted from the case law. See also *supra* notes 173-175 and accompanying text (discussing Blackstone’s influence on the development of the traditional doctrine).

599. See *supra* Part II.A.

600. To legal process theorists like Henry Hart, Albert Sacks, and Lon Fuller, “legal rules can be justified if they are created through a legitimate set of procedures by legitimate institutions keeping within their proper roles.” Singer, *supra* note 562, at 505-06. Echoing formalism and the private law model, Fuller further argued that “courts should refrain from deciding substantive legal questions that involve ‘polycentric’ tasks. These tasks include resolving disputes that encompass many parties or require policy decisions that have complex ramifications. . . . Such decisions cannot reasonably be reduced to the kind of binary choices that are capable of argument and just resolution by adjudication.” *Id.* at 506. The executive

contrast to the arguments of reformists, the *Restatement* rebels, Wade, and environmentalists, a public choice theorist would argue that "[w]hat is 'desirable' or 'advisable' or 'ought to be' is a question of policy . . . and its determination by the judiciary is an exercise of legislative power when [such choices] involve] political considerations."⁶⁰¹ Public choice theory would limit the role of courts in public nuisance cases to the traditional private law function of deciding bipolar disputes and would look askance at any liberalization of the traditional doctrine that would blur the dividing line between the legislature and the judiciary.⁶⁰²

In contrast, the new republican strand of new public law theory is "explicitly normative,"⁶⁰³ and "derives from a communitarian strain in modern political thought" that is "based on the allure of civic virtue" and is a "superior sphere in which citizens rise above their merely private concerns to join in a public dialogue to define the common good."⁶⁰⁴ New Republicanism⁶⁰⁵ "lends a historical, traditional aura to New Deal reformism."⁶⁰⁶ It describes well modern commentators' view that public nuisance lawsuits provide a powerful and appropriate tool

and its agencies, and not courts, are the legitimate institutions to address questions that require "continuing discretion" to choose between alternatives. *Id.*

601. *Id.* at 507 (quoting *Prah v. Maretti*, 108 Wis. 2d 223, 248 (1982) (Callow, J., dissenting) (quoting *In re City of Beloit*, 37 Wis. 2d. 637, 644 (1968)); see also Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 100-02 (1979) (suggesting that an agency remedy is more suitable for widespread public wrongs, such as air pollution).

602. See Yamamoto, *supra* note 589, at 356. The public choice view's strong sentiment against a broader judicial function is typified by Justice Scalia's view in his dissent in the recent *Laidlaw* standing case, arguing that turning the sovereign police power over to private citizens undermines the separation of powers necessary for democratic government. See *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 198 (2000) (Scalia, J., dissenting) (tracking this legal process view, attacking the very notion of citizen suits in the context of the federal Clean Water Act).

603. Farber & Frickey, *supra* note 588, at 879.

604. *Id.* at 877-79.

605. The term "New Republicanism" surfaced in the 1980s and is "unfortunately misleading," having "no particular connection to the Republican party." Farber & Frickey, *supra* note 588, at 877. In contrast to the political philosophy of liberalism, which focuses on individual human rights, neo-republicanism would use the machinery of government to "make the citizenry more virtuous by modifying existing individual preferences to further the common good." *Id.* at 879. The role of the courts, according to the latter approach, is to promote *public* values. *Id.* For more discussion of New Republicanism, see *Symposium, The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). See also Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 56-59 (1996); Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 382-83 (1991).

606. Farber & Frickey, *supra* note 588, at 884 n.40.

for private individuals to invoke to redress injuries to *community* values. Particularly where there are gaps in statutory remedies or lack of agency will, new republicans would say that public nuisance is a critical tool for achieving democracy and justice.⁶⁰⁷ This view would support modernizing the doctrine to protect communities from the externalities imposed by certain private property uses and would support expanding access to damages and injunctive relief by community members who can demonstrate actual shared injury.⁶⁰⁸

These three theoretical tools—legal realism, public law, and new public law theory—provide some valuable new insight into the conceptual tensions inherent in the traditional special injury doctrine as well as the alternative formulations. These fundamentally conflicting views of the role of law may be irreconcilable, but recognizing their different perspectives can clarify the debate and pave the way for a more sophisticated dialogue about modernizing public nuisance.

C. Jurisprudential Reflections: Considering State Courts' Perspectives

State courts are quite enamored with the traditional special injury doctrine and exhibit virtually no interest in exploring alternatives.⁶⁰⁹ This judicial entrenchment probably persists for several reasons, ranging from the compulsion to follow strong precedent, to judicial economy, jurisdictionalism, and a generally conservative approach to the balancing of private property rights and public values. To succeed, alternative formulations must be sensitive to these jurisprudential constraints.

The primary reason courts continue to adhere to the traditional doctrine seems to be the self-fulfilling prophecy of *stare decisis*, particularly where, as with this issue, the case law is perceived to have been virtually unanimous in its strict

607. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1045 (1968) [hereinafter Jaffe, *Citizen as Litigant*] (noting "democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking.").

608. See Farber & Frickey, *supra* note 588, at 905-06 (discussing the New Republican view that the "institutional insulation of judges and the deliberative qualities stressed by republicanism—judicial advantages usually considered only in the public law setting—will sometimes empower the common law judge as well to promote legal change in the pursuit of public values").

609. See *supra* notes 532-535 and accompanying text (summarizing modern case law).

approach for almost four centuries. State courts have at their disposal decades of public nuisance cases from their own jurisdictions that adopt the traditional doctrine,⁶¹⁰ which hardly leave room for innovation. The unusual court that has any inclination to look beyond the cases would most likely turn to Prosser's *Handbook* for guidance. There, it will find not only the traditional doctrine enshrined but no mention of the modified *Restatement* rule.⁶¹¹ Indeed, the current Keeton edition argues against the legitimacy of public nuisance as a tort altogether.⁶¹² For this reason, of the three alternative formulations, the different-in-degree test could be the most attractive to the courts if the courts could be convinced that the early legal history of public nuisance supports a different-in-degree approach as well as, if not better than, it supports the different-in-kind test.⁶¹³ Although a court may be reluctant to reinterpret supposedly "ancient" case law, preferring instead to rely on a well-established majority rule enshrined in modern American case law, if a court's blind faith in the "ancient" nature of the traditional doctrine can be shaken, then it may be persuaded to delve further into the debate over the traditional doctrine and approach the issue with a fresh perspective and a modern lens.

Similar to the conservative pull of *stare decisis*, the tendency of courts to favor the law of their own jurisdiction may also play an important role in the success of the traditional doctrine and the failure of the *Restatement* modification. By referring judges to "standing" law, Section 821C(2)(c) asks state court judges to look to federal standing case law and follow authority outside of their state's own common law. Particularly in a localized tort case, this may be an unappealing exercise for a state court judge likely to be concerned about state sovereignty and federalism. In unfamiliar territory that involves conflicts between community values and private property, judicial psychology may predispose judges to follow what is supposedly ancient, familiar, and traditional. Although impossible to prove, this factor may have played a role in the failure of the *Restatement* approach. The actual community injury rule proposal seeks to overcome this psychological stumbling block by encouraging state courts in public nuisance cases to look not at federal but at their own

610. See, e.g., RESTATEMENT (SECOND) OF THE LAW OF TORTS § 821C (Supp. 1998) (citing cases from fourteen states applying traditional doctrine).

611. See *supra* Part IV.D (discussing the redirection of the *Handbook* by its editors after Prosser's death).

612. *Id.*

613. See *supra* Part II.

state law in more familiar administrative and environmental cases. If state courts can be guided by their own state's standing case law, they might be more inclined to bring public nuisance up to the state's public law standards.

Another factor that may explain the conservative approach of state courts to the traditional doctrine is that they may believe that strict application of the traditional doctrine, although not always easy,⁶¹⁴ is much easier and more convenient than attempting to wrestle with the complex issues presented by a formal "standing" inquiry or a controversial environmental case.⁶¹⁵ Yet, in many ways, the traditional rule encourages judicial contortion because of its inherent paradox. In contrast, courts may prefer the actual community injury rule because it is more harmonious with the basic purpose of public nuisance. Given that the fundamental purpose of public nuisance is to protect community values against privately created risk, a court viewing a plaintiff whose injury is shared by others and therefore not unique should find it intellectually acceptable to allow that plaintiff to proceed in a lawsuit designed to protect those shared values. By requiring the plaintiff to set herself apart from the community, the traditional doctrine forces courts into the paradox.

Concerns about retaining control over cases, the proper judicial role, and protection of institutional legitimacy may also constrain courts from adopting a more liberal formulation of the rule. The traditional doctrine strengthens the role of the judge in public nuisance cases by presenting a dispositive threshold question of access. It prevents certain plaintiffs at the margins of the traditional tort law model from ever getting to a jury that might sympathize with the plaintiff's view of deteriorating community conditions. Without the different-in-kind test, the legitimacy of plaintiff's claim is much more likely to go to the jury, a jury that will deliberate on the substantiality of the problem and express the community's sense of the appropriate balance among conflicting values. Judicial reluctance to liberalize the traditional doctrine may reflect deep concerns about how such a move would erode the judge's ability to act as a gatekeeper, particularly in public nuisance cases that involve broad community conflict.

614. Comment, *Exxon Valdez*, *supra* note 8, at 710 ("although meant to be a bright-line rule, [the special injury rule] is often a difficult test to apply").

615. RODGERS, *AIR & WATER*, *supra* note 8, at 8 (Supp. 1998) (calling the special injury rule an "issue ducker" for the courts, allowing them to "dispose of claims likely to be peripheral to a statutory dispute").

On the other hand, the very purpose of public nuisance is to protect public rights. Denying access conflicts with the very purpose of the ancient tort. Although retaining legitimacy and moral force while handling public law-like cases may be, in light of the active judicial role required, more challenging for courts than handling the traditional private law docket, modern state courts handle a wide range of cases that involve complex and politically challenging issues, including not only mass torts and class actions, but difficult statutory and constitutional cases.

Another reason why state courts may adhere to the traditional doctrine and might be hostile to a more liberal test is that state courts today may be increasingly conservative in their view of the judicial role in addressing broader social problems. Particularly during the conservative movement of the 1980s, legal observers noted "preliminary signs of a countermovement" to the liberalized standing decisions of the 1960s and 1970s,⁶¹⁶ a sentiment that resonated with state courts.⁶¹⁷ The "reforms" supported by a coalition of the bar, judges, political conservatives, and Congress ultimately discourage litigation in the public interest by those "outside the political and cultural mainstream who are challenging prevailing legal, political, and social norms."⁶¹⁸ The Ninth Circuit's *Exxon Valdez* decision, which affirmed the traditional doctrine,⁶¹⁹ may exemplify this countermovement. The resurgence of the Republican Party in the 2000 elections suggests this political pendulum continues to swing and will continue to discourage judicial activism.⁶²⁰

In conclusion, a range of institutional, doctrinal, and political reasons may help explain courts' continued invocation of the traditional doctrine. These considerations will also affect the judiciary's attraction to alternative formulations of the rule. Nevertheless, the community injury rule possesses qualities

616. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1432 (1988).

617. According to Professor Sunstein, "[r]ecent and still quite tentative innovations in the law of standing have started to push legal doctrine [back] in the direction of what we may call a private-model of standing. Under this model, a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent." *Id.* at 1433.

618. Yamamoto, *supra* note 589, at 353. Professor Yamamoto has observed a parallel retrenchment in the use of civil procedure and class actions in the federal courts. *Id.*

619. See *supra* Part I.B.1.

620. See, e.g., Jonathan Groner, *Election Fight Lights Spark Under the Right: Galvanized by What They See as Judicial Overreaching, Conservative Lawyers and Scholars Prepare for Return to Power*, LEGAL TIMES, Dec. 4, 2000, at 20.

capable of allaying some of these concerns while resolving paradoxes in the application of the public nuisance tort.

D. Practical Reflections: Why Practitioners and Plaintiffs Underutilize Public Nuisance

An analysis of the prospects for modernizing the special injury doctrine would be incomplete without examining the role that practitioners and their clients play in the development of public nuisance law. Any proposal for reform, particularly one that represents a significant departure from the dominant rule, must have avid proponents. The natural proponents of a liberalized “standing” rule are plaintiffs’ attorneys and their clients. Courts are unlikely to move away from the traditional doctrine *sua sponte*, but they might consider the issue seriously if prompted by counsel who bring the trial and appellate courts compelling new reasons for reform.

This section explores the range of reasons why practitioners and plaintiffs fail to recognize the potential promise of liberalized versions of the special injury rule. Their underutilization of public nuisance is attributable to two factors: the nature of the split between the private and public-interest plaintiffs’ bar, and strategic considerations of costs and attorneys’ fees for each of these groups.

1. The Private Plaintiffs’ Bar

Two types of practitioners have an inclination to represent plaintiffs in public nuisance cases and would be interested in overcoming the traditional doctrine: private “local” state law torts attorneys and national public interest environmental attorneys.⁶²¹ The two groups, however, have very different approaches to litigation.

The same influences that constrain state jurists will likely hinder the first practice group from arguing for a liberalized formulation—the apparent enormity of adverse precedent and the lack of favorable secondary authority in the tort field, especially Prosser’s *Handbook*.⁶²² Focusing on the unpopular Section 821C(2)(c)⁶²³ and pointing to the isolated *Akau* case⁶²⁴

621. Interview with Victor M. Sher, *supra* note 4 (describing a distinction between lawyers that practice “mainstream” law and those that practice public interest law, and commenting that “lawyers are not fungible”).

622. See *supra* Part IV.D.

623. See *supra* Part IV.C.

624. See *supra* Part I.B.2.

may do a plaintiff's counsel more strategic harm than good. Moreover, the typical private practitioner is unlikely, where the doctrine is clear and adverse cases numerous, to spend the time it takes to dig into old cases, to unearth legal commentary, or to review the ALI debates to uncover criticism of the rule or to discover alternative formulations. Even if he did, rather than advocate for a new rule, a private practitioner is much more likely to massage the facts of the case to argue, first, that the nuisance is "mixed," that is, also a private nuisance thus avoiding the special injury rule,⁶²⁵ and, second, that his client's injuries are sufficiently different-in-kind to satisfy the traditional rule. Particularly where the plaintiff may already be perceived as a troublemaker for bringing the case and complaining about a neighbor or local business, a strategic practitioner's inclination is to make the case fit within the existing doctrinal framework and to de-emphasize the novelty of any claims. The more vigorously plaintiff's counsel argues for a modification of the traditional doctrine, the more convinced a court might be that the plaintiff should lose under existing law.

In addition, for private plaintiffs' practitioners, *i.e.* the torts bar, costs can present an enormous barrier to bringing and to winning public nuisance cases.⁶²⁶ Although public nuisance allows plaintiffs the opportunity, not available under federal environmental law, to recover personal damages, individual plaintiffs usually cannot afford to bring the case unless there is a strong likelihood of substantial economic recovery.⁶²⁷ For a private practitioner, a common law public nuisance case must pass the normal cost-benefit test for a torts case—would the damages award be sufficient to compensate the client, cover costs, and pay counsel?⁶²⁸ Moreover, because the *Restatement* rule is limited to injunctive relief actions, a practitioner has no financial incentive to argue for its application. Even if a court

625. Bryson & Macbeth, *supra* note 5, at 276 ("Liberalization of public nuisance law would obviate the necessity for plaintiffs and courts to fit their challenges and remedies within the property-protection standards of private nuisance doctrine. . . . [P]rivate nuisance [should] be reserved for situations in which the principal problem is invasion of property interests, and environmental threats to health, comfort, and beauty of the community will be treated—as they logically should—as public nuisances.").

626. Note, *Public Watchdog*, *supra* note 4, at 1757.

627. *Id.* at 1735 ("When citizens realize that the legal fees of a public nuisance suit often surpass any pecuniary gain, many are discouraged from taking action.").

628. State statutes that authorize citizens' public nuisance actions without fee recovery provisions may be underutilized for this reason. See Comment, *Environmental Lawsuit*, *supra* note 6, at 1127.

allowed the claim, a private attorney could not recover damages for his client, and the client recovers no funds with which to pay fees.

Thus the private practitioner will typically avoid public nuisance cases that seek only injunctive relief and promise complexity, costs, controversy, and compelling arguments from defendants about interference with property rights and economic dislocation. Under the *Restatement Plus* position, which would eliminate the rule for damages as well, or the actual community injury rule, the economic incentives for private practitioners would change dramatically because the plaintiff could seek damages for the full extent of the community injury. Although this would substantially reduce the economic barrier for this group of public nuisance practitioners, it would also raise new issues about the appropriate breadth and proper recipient of damages.

2. *The Public Interest Plaintiffs' Bar*

The second practitioner group—national and regional public interest environmental attorneys—face very different constraints and practical considerations that inhibit their advocacy of a liberalized rule such as the *Restatement* proposal. This group began in the early 1970s as a small number of national and regional public interest law firms.⁶²⁹ Although these practitioners have made a tremendous impact on the national environmental law landscape,⁶³⁰ they are still few in number,⁶³¹ and they typically have heavy caseloads, tight budgets, and little time or interest in common law remedies that lack the same “bang for the buck” as federal statutory claims. Although a handful of today’s more senior public interest lawyers might recall the *Restatement* fight or the discussion in the law reviews afterward,

629. See *supra* notes 395-396 and accompanying text.

630. Since the mid-1970s, public interest litigation has “increased significantly” and “public interest litigants have become institutionalized participants in administrative proceedings and in courtroom litigation challenging agency activity.” Tobias, *supra* note 589, at 293.

631. Charlie Halpern, *The Public Interest Law Movement in the United States*, in *INNOVATIONS IN THE LEGAL SERVICES* 101, 106 (Erhard Blankenburg ed., 1980) (stating that public interest practitioners constitute “a minute fraction of the lawyers in the United States”). Moreover, these lawyers are “clustered on the East and West Coasts,” and “[f]ew public interest lawyers devote their attention to representation in state and local matters.” *Id.* Based on the author’s experience in practicing public interest environmental law from 1988-1996, the size and composition of the environmental public interest bar has since significantly expanded, but public interest lawyers still generally avoid common law and state remedies.

the vast majority of public interest attorneys practicing today began their careers in the 1970s or 1980s and would find a window into the "great debate" only through the literature, which, given their intense litigation schedules, few have the luxury of perusing. Moreover, like private plaintiffs practitioners, public interest lawyers will, as a matter of strategy in controversial cases, seek to couch their claims in non-controversial ways so as to appeal to, or at least obtain a fair hearing from, naturally conservative courts.

The most significant barrier to this second group's interest in a rule change, however, is simply that, ever since the early 1970s, public interest attorneys in environmental, consumer, and civil rights fields have focused almost exclusively on the exciting, tailored, and rewarding federal statutory remedies rather than on common law approaches. The federal environmental laws passed in the 1970s and 1980s contain powerful and enforceable standards, expressly permit citizen suits, and allow recovery of attorney's fees and costs.⁶³² The vast majority of national and regional public interest law firms focus almost exclusively on these federal⁶³³ statutory remedies of the public law world.⁶³⁴

Thus, the public interest sector of the plaintiffs' bar—organizations with the resources to undertake large and controversial nuisance cases, the strongest inclination to argue vigorously for elimination of the special injury rule, and the greatest familiarity with liberal standing concepts from federal administrative law—ironically has little interest in public nuisance. Without an express statutory authorization to sue, a community nuisance case may be professionally unattractive and financially burdensome to the public interest bar. It also may not fit within a public interest law firm's mission that gives priority to issues of regional and national significance rather

632. See generally MICHAEL AXLINE, ENVIRONMENTAL CITIZEN SUITS § 1.02-03, at 1-5 to 1-10 (1993) (describing history of citizen suit provision in federal environmental laws); *id.* at Chapter 8 (discussing attorneys fees and costs).

633. Public interest litigators do also avail themselves of state remedies, such as a state's "little NEPA," see *supra* note 391 (discussing the early Michigan act), but these too are usually statutory, not common, law cases or remedies.

634. Interview with Victor M. Sher, *supra* note 4 (asserting that the environmental community "got lazy by following citizen suit provisions and statutory remedies, coupled with a preference for suing the federal government," and stating that the "contemporary environmental movement has not yet broken the mold of the early cases" based on citizen suit provisions and that it is "always difficult to break paradigms, you get comfortable and stop asking questions"); MAXWELL P. BARRETT, JR., EASTERN MINERAL LAW FOUNDATION, 14 PROC. § 14.02, at 3 (May 1993) (observing that public nuisance has lost most of its importance due to citizen suit provisions").

than localized disputes. For the public interest bar, then, a public nuisance claim may be, at most, a throw-away claim tacked onto a complaint that is otherwise grounded in federal statutory violations.⁶³⁵

For a public interest litigator, a public nuisance claim, if pursued, also requires a significantly different and less appealing approach to litigation than that required by statutory claims. Public nuisance claims may be more fact intensive and complex than statutory enforcement issues, requiring proof of injury and causation, and presentation to a state court jury.⁶³⁶ This is foreign territory for many public interest practitioners who, for strategic and economic reasons, gravitate toward federal⁶³⁷ citizen suits against the government.⁶³⁸ The typical citizen suit turns on issues of law,⁶³⁹ is based primarily on the agency's administrative record, minimizes factual disputes and evidentiary issues, and is presented to an Article III judge, who is, in theory, more independent than an elected or appointed state court judge.

Moreover, as is true for private practitioners, public interest practitioners who bring a public nuisance claim face substantial costs.⁶⁴⁰ If the claim is for injunctive relief only, it brings in no funds at all for the client to use in covering costs or attorneys fees. Although the lack of financial reward for clients is normal for public interest cases, attorneys fees and costs are usually available to plaintiffs and their counsel who prevail in federal

635. 4 WILLIAM RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTE § 8.D (1984) (discussing the role of nuisance claims under CERCLA's pendent jurisdiction); see also RODGERS, AIR & WATER, *supra* note 8, at 8 (Supp. 1998) ("The proliferation of statutes in recent times has pushed common law nuisance into a secondary role, and into the category of also-mentioned deep in counts seven or eight of the complaint.").

636. See Paul D. Rheingold, *Civil Cause of Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOK. L. REV. 17 (1967) (discussing the scientific and legal complexities of common law actions for air pollution); see also Comment, *Environmental Lawsuit*, *supra* note 6, at 1102-03 (noting the burden of proof requirement can present "a virtually insurmountable obstacle to the plaintiff in an environmental lawsuit").

637. Scott, *supra* note 103, at 407 (observing that environmental practitioners prefer the federal forum).

638. Interview with Victor M. Sher, *supra* note 4 (noting that, although early environmental law observers assumed that most citizen suits would be against polluters, the actual dockets show an "overwhelming percentage are brought against the federal, and some against the state, government").

639. *Id.* (commenting on the burden of proof problem, and stating that summary judgment provides an efficient early mechanism to win the case).

640. *Id.* (noting that, due to emphasis on factual issues, the costs of public nuisance cases can be significant compared to citizen suits).

citizen suits.⁶⁴¹ If the claim is for damages, which would be highly unusual for a public interest firm to pursue, there are even more institutional hurdles, such as the tax code prohibition on such firms taking cases that could be handled by private practitioners,⁶⁴² as well as the strongly held belief that recovery of private damages denigrates the fundamental mission of public interest law.

On the other hand, public nuisance presents some unique attractions for public interest practitioners that make it worth adding this arrow to the litigator's quiver. It offers the prospect of direct compensation to clients and communities, unlike federal environmental statutes that allow only injunctive relief or that require civil penalties be paid to the United States Treasury, not to the plaintiffs⁶⁴³; it allows for a jury trial⁶⁴⁴; and it provides the unusual opportunity for obtaining lucrative punitive damages.⁶⁴⁵ Moreover, public nuisance has the advantage of severely limiting the defenses a defendant can assert, giving plaintiffs some unique strategic advantages.⁶⁴⁶ Unlike many environmental cases that focus on procedure or what defendants call "technical violations," public nuisance focuses squarely on the merits and is brought directly against the source, not the government.⁶⁴⁷ Nonetheless, although some public interest firms have explored moving in the direction of greater use of common law remedies and recovering damages in environmental contamination cases, the approach has yet to be taken seriously.⁶⁴⁸

641. For any reformulation of the special injury rule to succeed in widening community access to the courts, the incentive for all types of practitioners may need to be financial. If the state courts could be persuaded to apply a "common benefit" or "private attorney general" theory to the attorneys fees/costs recovery issue, the incentives for private and public interest practitioners would change substantially. The realistic opportunity for fee and cost recovery would provide a stronger incentive to pursue such claims particularly where the loss is widespread to the community. See generally Note, *Public Watchdog*, *supra* note 4.

642. Halpern, *supra* note 631, at 101-02 (stating that public interest law firms are required to provide services to those "who were otherwise unable to purchase legal services").

643. AXLINE, *supra* note 632, § 7.02, at 7-4 through 7-5.

644. Interview with Victor M. Sher, *supra* note 4 (noting that an environmental lawyer might prefer a state jury in some pollution cases).

645. *Id.*

646. See, e.g., *id.* (stating that public nuisance "sucks the wind out of the statute of limitations defense").

647. Bryson & Macbeth, *supra* note 5, at 277 ("Public nuisance focuses, in contrast, on the merits: Does the activity in question unreasonably violate the rights of the affected community?").

648. Interview with Victor M. Sher, *supra* note 4 (noting the "huge need" to address environmental contamination and the "tremendous potential" of

In short, the private plaintiffs' practitioners who are most likely to bring public nuisance cases are the least likely to know about or to advocate for doctrinal change. The public interest practitioners who are most able to advocate for change, have almost no institutional motivation to pursue it. These practical dynamics suggest an important complexity inhibiting liberalization of the rule. The emergence of the relatively new environmental torts bar, a hybrid of tort and environmental lawyers, provides a source of optimism for bridging this gap between the two sectors of the bar described above. The toxic torts lawsuit for hazardous waste dumping dramatized in *A Civil Action*⁶⁴⁹ and the recent infusion of tobacco-style litigation tactics in environmental cases⁶⁵⁰ suggests that this new breed of attorneys is well suited to be the agent for modernizing public nuisance law.⁶⁵¹ Yet, if the plaintiffs' bar—private or public—does not vigorously advocate for change grounded in a new examination of doctrinal history, courts have little inspiration to modernize the doctrine.

The actual community injury rule may provide both private and public interest practitioners a new approach that combines their strengths as advocates for injured communities. For both groups, the rule would make public nuisance cases more attractive by significantly reducing the threshold "standing" barrier. In addition, by allowing plaintiffs with shared injuries to seek damages as well as injunctive relief, the actual community injury rule reinvigorates the normal economic incentive of the client and counsel in tort litigation. In particular, plaintiffs' counsel may have a greater ability to bring public nuisance class

contamination cases not being brought by established environmental public interest firms and environmental organizations).

649. See LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION (1999) (based on Jonathan Harr's bestselling book, A CIVIL ACTION, about the *Anderson v. Cryovac* case in Woburn, Massachusetts. Jan Schlichtman, the lead attorney in *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st. Cir. 1988), is advising the local law firm handling the Coldwater Creek case, see *supra* note 111, indicating increasing cross-fertilization between the typical small-town practitioner and experienced environmental torts lawyers in such cases. Smith Interview, *supra* note 111 (noting Schlichtman's involvement). See also *supra* note 3 (discussing mass-tort style case brought for pollution by hog farms in North Carolina).

650. See Margaret Graham Tebo, *Fertile Waters*, A.B.A. J., Feb. 2001, at 36, 38 (suggesting that recent victories in tobacco cases and toxic tort cases are creating a "new wave of environmental litigation" by building on classic state law tort theory); but see *id.* at 39 (noting that standing is still a "high" hurdle in such cases). See *supra* note 3 (noting dismissal of hog farm case for lack of special injury).

651. Victor Sher's cutting-edge MTBE groundwater contamination cases in California are another example of this new hybrid litigation. See Tebo, *supra* note 650, at 39; see also Interview with Victor M. Sher, *supra* note 4.

actions. Currently, to show special injury, they must emphasize the uniqueness of their client's injuries, which contradicts their claim for common interests required in a class action suit. The public interest bar may also have more interest in the actual community injury rule for the same reasons. A lowered "standing" barrier, the promise of damages, and class actions all make public nuisance more attractive strategically and financially.

E. The Actual Community Injury Rule and the Tripartite Rationale

The actual community injury rule has important advantages in light of the theoretical, jurisprudential, and practical considerations discussed above, and it also satisfies the well-accepted tripartite rationale for the traditional doctrine—sovereignty, multiplicity, and triviality.

1. Sovereignty

The conservative position taken by Chief Justice Baldwin in the 1535 case—that redress for public nuisances should reside only in the power of the sovereign—continues to have vigorous and powerful adherents today. United States Supreme Court Justices, from Harlan in the 1960s⁶⁵² to Justice Scalia today, raise this objection to federal citizen suits.⁶⁵³ Public nuisance presents fewer concerns than federal citizen suits, however, because it is typically brought against private defendants and not against the government.⁶⁵⁴ The implications for usurping police powers are therefore more attenuated. Moreover, the general concept of allowing a public action against private defendants is grounded in a long line of English and American

652. See *Flast v. Cohen*, 392 U.S. 83, 119-20 (1968) (Harlan, J., dissenting) (criticizing the concept of private attorneys general in taxpayer actions because "[t]he interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration").

653. See *supra* note 602 (referring to Justice Scalia's dissent in *Laidlaw*).

654. I found few cases where a private citizen successfully sued a governmental entity under a public nuisance theory for creating a nuisance. See *e.g.*, *Littleton v. State of Hawaii*, 656 P.2d 1336 (Haw. 1982) (finding the City and County of Honolulu liable for injuries caused by a floating log to a woman harvesting seaweed in shorebreak, focusing on a state statute that requires counties to keep shorelines free of debris). A suit against the government for failing to take action to address a private party's nuisance would likely be barred as a disguised mandamus action. See Comment, *The Environmental Lawsuit*, *supra* note 6, at 1087.

cases.⁶⁵⁵ To supporters, citizen suits effectively supplement the role of democratic government.⁶⁵⁶ Moreover, today, the American political and judicial system are, after three decades of public law litigation, comfortable with the concept of citizen suit litigation⁶⁵⁷ and experienced at managing the difficulties posed by large and complex public law cases even at the state level.

In any event, as with federal environmental lawsuits, public nuisance cases, even under the more generous actual community injury rule, pose minimal threat to state sovereignty because they supplement rather than supplant government action. Few, if any, individuals or community groups would have the interest to initiate and pursue costly litigation if the government is simultaneously addressing the problem. When statutory remedies exist, defendants will undoubtedly argue that they should pre-empt the common law remedy. Judges and juries presented with public nuisance cases where there is ongoing government action would naturally consider it in determining the appropriate remedy. Government always has the options of intervening in the case or taking legislative action.

Where governmental resources, willpower, or priorities differ significantly from those of communities, however, communities could present their claims to courts. Because public nuisance is a community-based interstitial remedy, and because of courts' inherent discretion to define a nuisance and impose the remedy, expanding the public nuisance avenue presents little or no threat to the sovereignty of government.

2. Multiplicity

State courts are naturally concerned about the potential for multiplicity of lawsuits that result from increased judicial access.

655. See Jaffe, *Public Actions*, *supra* note 380, at 1269 (discussing the common law "prototype" of public actions, the ancient "prerogative writs of mandamus and the bill in equity for an injunction").

656. See Jaffe, *Citizen as Litigant*, *supra* note 607, at 1044 (citing the importance of citizen suits to include citizens in government and to prevent the problem of agency capture); SAX, DEFENDING, *supra* note 8, at xviii (citizen litigation is "an essential format for reasserting participation in the governmental process"); see also *id.* at 57 ("*Litigation is thus a means of access for the ordinary citizen to the process of governmental decision-making. It is in many circumstances the only tool for genuine citizen participation in the operative process of government.*"); Jaffe, *Public Actions*, *supra* note 380, at 1292 (public law actions are "at the least, not inconsistent with our democratic premises, and arguably they reinforce them").

657. See Jaffe, *Public Actions*, *supra* note 380, at 1292 ("*The widespread and ever-growing acceptance of public actions by the state courts and legislatures attests to a deeply felt need and provides adequate support of their use.*").

If a claim can be based on common injury, courts and defendants risk being burdened with numerous piggy-back claims. Properly defined, however, multiplicity does not mean simply more lawsuits or many plaintiffs, rather it means "multiple lawsuits involving the same nuisance or against the same defendant," that is, duplicative litigation.⁶⁵⁸ The constraints on multiplicity differ between injunctive and damages actions.

In an injunctive relief case, given the inherent flexibility of the remedy, courts' broad discretion in formulating the remedy, and the economic and non-economic costs of litigation, the multiplicity risk is low to none. Even the actual community injury rule's risks of multiplicity are largely imaginary and rhetorical.⁶⁵⁹ Using a version of *Akau*⁶⁶⁰ for illustration, if Kainalu brought the initial lawsuit and *won* injunctive relief in the form of an order for the landowners to keep the trail open, no other community member would have a reason to file his own copy-cat lawsuit. Even if Kainalu lost his quest for an injunction, the defendant could argue—and a court could find—that a second suit was barred under the doctrines of *res judicata* and collateral estoppel.⁶⁶¹

658. Although defendants may understandably complain about numerous plaintiffs, when there is actual injury to each of them, a defendant should answer for its actions to all of those injured. See *Piscataqua Nav. Co. v. N.Y., N.H. & H.R. Co.*, 89 F. 362, 364 (D. Mass 1898) (commenting on criticism that "actual pecuniary loss" test would lead to "an intolerable multiplicity of suits," as "hardly justified by the experience of the courts" and, even if restrictions were necessary, "it certainly should be applied only when found necessary for the protection of the public and the courts, and should not be given to a wrongdoer to defend himself from the natural consequences of his wrong").

659. See *Davis*, *supra* note 2, at 470-71 (commenting that the relaxed standing requirements of state courts did not appreciably increase dockets); see also *Sax & Conner*, *supra* note 391, at 1003 (noting the "modest number" of filings under the landmark 1970 citizen suit provisions drafted by Sax); *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970) (rejecting the multiplicity criticism and recognizing courts' ability to exercise judicial discretion to deter multiple and frivolous suits); *United Church of Christ v. FCC*, 359 F.2d 994, 1,005-06 (D.C. Cir. 1966) (fears of flood of suits "are rarely borne out," due to costs of litigation); *Bryson & Macbeth*, *supra* note 5, at 254 ("nuisance lawsuits are so costly and difficult to bring that it is extremely unlikely that defendants and the courts would be burdened with numbers of harassing or unjustified suits should the standing requirement" be relaxed).

660. See *supra* Part I.B.2.

661. The doctrine of collateral estoppel can bar non-parties from bringing subsequent litigation under a variety of theories. See generally CHARLES A. WRIGHT ET AL., 18 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4454 (1981) (discussing preclusion by representation, including class actions, associational plaintiffs, "virtual representation," and governmental and citizens enforcement actions); see also *id.* § 4458 (discussing *res judicata* and issue preclusion in the context of governmental, official, and citizen litigation).

The concern about burdensome multiplicity is applicable primarily, if not exclusively, to damages suits, where the likelihood of duplicative litigation would depend, in part, on the extent of the injury and the size of the initial award. The *Nebraska Innkeepers*⁶⁶² case illustrates, however, that these concerns are misplaced. If the damages award to the Innkeepers was either none or low—below \$20,000—several practical disincentives would discourage a second law suit by nearby Motel A. Motel A would have to pay the costs of the lawsuit and it may still have to pay its own attorneys' fees if the case is not taken on a contingent fee. If Innkeepers recovers a substantial sum, say \$1 million in damages, however, Motel A would have a significant incentive to bring the second lawsuit. Yet, Motel A will still incur intangible costs, such as time, energy, and damage to its reputation; it will incur out-of-pocket costs; and it will be subject to the political, economic, and legal risks of suing a defendant who may be a greater economic force in the same community. Motel A may still run afoul of a statute of limitations or laches⁶⁶³ because it chose to wait in the weeds. In addition to these practical limitations on Motel A's suit, the risk of duplication is reduced by either offensive or defensive use of class actions.⁶⁶⁴ Moreover, *res judicata* and collateral estoppel

662. See *supra* Part I.B.3.

663. See *supra* note 75 (discussing limited defenses to nuisance).

664. The complex issues of class action environmental lawsuits are beyond the scope of this Article. For present purposes, however, it is notable that the suitability of class actions in public nuisance cases is unclear. Federal Rule of Civil Procedure 23, the primary vehicle for class actions, applies, of course, only to federal actions. The typical public nuisance cases will be brought in state court, and state class action rules vary considerably. See WRIGHT ET AL., *supra* note 661, § 1782 & n.24 (referring to commentary on state class actions lawsuits); Comment, *Environmental Lawsuit*, *supra* note 6, at 1098 ("pollution traceable to the activities of a single industrial firm and affecting a substantial number of neighboring individuals would certainly appear to be an apt subject for class litigation."); *Biechele v. Norfolk & W. Ry. Co.*, 309 F. Supp. 354 (N.D. Ohio 1969) (allowing class action in a public nuisance case against a coal storage and shipping facility but neglecting to mention the special injury rule). But see James W. Elrod, Comment, *The Use of Federal Class Actions in Mass Toxic Pollution Torts*, 56 TENN. L. REV. 243 (1988) (arguing for the viability of pollution cases under Rule 23); Rothstein, *supra* note 8, at 472 (noting that the "vitality of Biechele" in federal courts was "completely destroyed by the Supreme Court's recent decision in Zahn" that held separate and distinct claims based on a paper company's pollution of a lake could not be aggregated for purposes of meeting the jurisdictional amount requirement). See also *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (holding the amounts claimed by each class member may not be aggregated to establish the amount in controversy required for federal jurisdiction unless plaintiffs show joint interest); see also WRIGHT ET AL., *supra* note 661, § 1782, at 67 (noting "the jurisdictional amount requirement may prove a significant barrier to environmental class action suits" and observing that *Zahn* was an environmental case brought by landowners for water

could also prevent multiple lawsuits on the same issues,⁶⁶⁵ discouraging practitioners from over-filing. If Motel A overcame these barriers, then the additional compensation may well be just and appropriate.

The same objections based on multiplicity concerns were raised regarding federal and state citizen suit provisions but have proven largely if not wholly unfounded.⁶⁶⁶ Additionally, organizational plaintiffs in federal environmental cases can, by consolidating claims that otherwise might be brought separately, function to control the multiplicity problem.⁶⁶⁷ In short, the multiplicity rationale appears to present few, if any, reasons in the modern litigation era to object to the more generous access for public nuisance plaintiffs offered by the actual community injury test.

3. Triviality

The last part of the tripartite test—triviality—is an obvious concern to courts considering a replacement for the special injury rule, but modern doctrinal and practical constraints on such litigation respond to this concern.

In general, the tort system weeds out the trivial from the substantial in at least five ways. First, plaintiffs themselves have little incentive to sue for trivial injuries, given the real and intangible personal costs of litigation. Second, practitioners' own economic interests act as a gatekeeper. Plaintiffs' counsel have an incentive to avoid claims with trivial or small injuries because

pollution); Interview with Victor M. Sher, *supra* note 4 (commenting on his "aversion" to class actions due to the commonality problem); Rothstein, *supra* note 8, at 471 (noting that class actions in public nuisance cases have been "almost a total failure" because of the special injury rule and the normal "pitfalls" such as class composition and representation, injury in fact, and in the federal courts, jurisdictional amount); Comment, *Exxon Valdez*, *supra* note 8, at 520 (suggesting that the environmental groups' public nuisance case could have been framed as a class action to satisfy the *Restatement* rule, but "to do so would create a protracted certification struggle").

665. See *supra* note 661; see, e.g., Note, *Public Nuisance*, *supra* note 4, at 364 ("precedential value of a prior decided case on a given point and the principles that adhere with the doctrine of *res judicata* would restrict the number of actions brought").

666. See *supra* note 659; see also Comment, *Environmental Lawsuit*, *supra* note 6, at 1127 (noting that, even in the two states with statutes permitting private individuals to sue to enjoin a public nuisance, "few citizens of those states have chosen to take advantage of the opportunity" because of the "prohibitive expense involved").

667. See *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 617 (2d Cir. 1965) ("Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.").

they are unlikely to recover sufficient compensation for their time and expenses. Third, defendants and judges are often able to dispose quickly of trivial claims through dispositive motions, either by finding that the prima facie case fails or there is insufficient evidence for the jury. Fourth, particularly in damages cases, juries are unlikely to be sympathetic to trivial claims against defendants in their own communities and will award either small or no damages, making plaintiffs worse off than before the case. Fifth, when considering injunctive relief, judges balance the equities and are unlikely to issue an injunction if the injury does not justify interfering with the defendant's activity or land use.

With respect to this Article's actual community injury rule, courts would apply the common terms "actual or threatened" to ensure that the injury or the threat is real and not imagined, speculative, or fabricated. The value injured must be one important to the community, not just personal or marginal. In fact, the actual community injury rule may better screen out trivial claims than the traditional rule, which ironically emphasizes the unique, peculiar, and special nature of the plaintiff's injury. For example, the loss of subsistence fishing rights by over three thousand Alaska Natives in the *Exxon Valdez* case is undoubtedly more substantial than the soiling of one boat's fishing gear. Yet, under the current rule, the latter injury would pass as special injury and be compensable, while the former would not.⁶⁶⁸

Moreover, the actual community injury rule would encourage state courts to apply their own state tort, administrative, and environmental law principles to determine if an injury is cognizable. Although John Wade commented that, under the *Restatement (Second)*, Section 821C(2)(c), state courts are to look to their own state law,⁶⁶⁹ the intent of the rebels and the entire thrust of the proposal—and its citizen suit language—was to persuade states to track *federal* standing developments.⁶⁷⁰ Many state courts began following federal standing law in the 1970s and 1980s and have now developed their own versions of the traditional three part "injury in fact" test.⁶⁷¹ Plaintiffs who allege injuries not traditionally recognized under the special injury rule, such as environmental injury, could point to contemporary

668. See *supra* Part I.B.1 (discussing *Exxon Valdez* rulings on fishing claims).

669. See *supra* note 486.

670. See *supra* Part IV.A & Part IV.B.

671. See, e.g., *Bremner v. City and County of Honolulu*, 2001 WL 675369, *3-*4 (Haw. App. 2001).

definitions of injury in analogous administrative law contexts.⁶⁷² The issues of *how* to compensate for public losses like the subsistence or recreational fishing claims in *Exxon-Valdez*, which might be more novel for courts, would be left to the jury to determine.

In short, in the modern litigation world, the tripartite rationale for the traditional special injury doctrine should not pose a significant barrier to judicial consideration of alternative formulations such as this Article's actual community injury rule. The tripartite rationale now seems as anachronistic as the ancient rule itself.

CONCLUSION

Even in the modern statutory era, public nuisance offers a unique and powerful common law remedy for a community's social and environmental problems. Historically, however, courts' strict application of the traditional special injury rule and the purportedly "ancient" different-in-kind test has significantly limited its effectiveness. Despite thirty years on the books, the ALI's proposal to broaden private plaintiffs' access to public nuisance by incorporating liberal federal standing principles through the *Restatement (Second) of Torts*' Section 821C(2)(c) has gained little judicial attention or support in the case law.

This Article explored the doctrinal history of the special injury rule with a focus on understanding why courts have so firmly adhered to the traditional rule in the face of substantial scholarly criticism. The jurisprudential, doctrinal, and practical reasons for the failure of courts to adopt the ALI's more liberal proposal suggest that the traditional rule will remain firmly entrenched unless the dragon's shaky historical and doctrinal roots are exposed to greater scrutiny.

A new "actual community injury" test, which would require a private plaintiff in public nuisance cases to show shared, not unique, injury should be advocated by practitioners and scholars and adopted by courts. It is more harmonious with the fundamental purpose of public nuisance and contemporary notions of community injury. The very point of public nuisance is to protect and to vindicate shared community values, yet the traditional doctrine runs afoul of these concepts. The actual community injury rule honors the unique legal and social role of public nuisance and discourages those claims that are truly

672. See *id.* at 4 (stating that aesthetic and environmental harm are cognizable interests); *id.* (recreational interests); *id.* at 5 (cultural and religious interests).

private in nature. In this way, the remedy of *public* nuisance directly matches the evil of community injury. By adopting this new rule, the judiciary would be facilitating rather than discouraging the vindication of community values.⁶⁷³

The actual community injury test would reasonably broaden access to public nuisance as a community remedy, make such claims more attractive to practitioners, and should render them more palatable to the state common law courts. Relaxed standing may also enhance environmental protection, particularly at the local level. When political winds shift at the federal level to disfavor statutory avenues of access such as environmental citizens suits, a renewed focus on state common law remedies can provide important supplemental paths for community and environmental justice. If the actual community injury rule can be used to cut the Gordian knot created by the crusty historical paradox of the special injury doctrine, public nuisance may continue to thrive in its vital role as a flexible community remedy throughout this new century.

673. See Yamamoto, *supra* note 589, at 389 ("Expressing one's views in a public forum links dignity and participation. Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills counted, in societal decisions they care about.") (citing Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights*, 1973 DUKE L. REV. 1153, 1172 (1973)).

