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NOTES

Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future

H. Marlow Green*

Introduction

The quality of the environment has become a concern of international importance. Although for the most part, legal environmental measures have taken the form of statutory provisions and governmental regulations, the common law remains a viable alternative remedy against environmental injury. Common law environmental actions should receive significant attention in the environmental law debates of our time, particularly as the European Union considers the form its environmental law will take. An accurate view of the historical development of common law actions against environmental harm will enhance any constructive and critical debate about the merits of common law actions. Such an historical survey also introduces the issues that arise in the debate over the merits of a common law, as opposed to statutory, attack against environmental harm. This Note lays the groundwork for the common law debate. First, it conducts a comparative historical analysis of the development of nuisance law in the United States and England; and second, it proposes a normative model for an international environmental common law. Relying on this model, the purpose of this Note is to demonstrate that although the development of

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30 CORNELL INT'L L.J. 541 (1997)

nuisance law in the United States and England has had a varied and confusing past, the common law may still play a significant role in the modern environmental arena.

With the exception of the discussion in Part I, which compares and contrasts the common law and statutory law, this Note treats the subject of common law remedies for environmental harm as a topic unto itself, without detailed analysis of statutory solutions. This Note explores how common law remedies would need to be structured in order to protect environmental values effectively in the absence of federal environmental legislation. The purpose of this approach is to demonstrate that the common law, by itself, has much to offer in the quest to improve the environment. The collection of remedies available at common law provide compensation for harm caused by pollution and allow the injunction of polluting activities.[1] Moreover, the common law also places the power to prevent environmentally abusive activities into the hands of those who are most likely to be injured: local property holders.

Part I of this Note is a brief and preliminary look at the common law system. Part II contains a comparative historical analysis of the development of common law nuisance and related doctrines in the United States and in England. Recognizing that the historical development of nuisance law has left it in a confused state in both countries, Part III proposes a property rights-oriented model for a common law based system of environmental law.

I. A Glance at the Common Law System

Many find it useful to divide "the law" into two broad categories: public and private law. "Public" laws are statutory-based rules and constitutional structures, created by legislative bodies. As such, they are considered an embodiment of the will of the people.

Private law is most closely associated with the common law. The term "common law" refers to the old English legal process of discovering and molding the law on a case-by-case basis. Originally, under natural law doctrine, judges considered themselves to be "discoverers of the law."[2] Natural law theory posits that there are "natural" rules of conduct inherent in humanity itself, most easily discovered by examining the evolution of customs of dealing.[3] Thus, the common law judge's role was to look to custom in order to discern the law that already existed and then to render

1. While concerns such as clean-up of hazardous waste sites, protection of habitats for wildlife, and the preservation of wilderness areas are significant, this Note focuses exclusively upon common law remedies against pollution.

2. *See* Friedrich A. Hayek, 1 Law, Legislation and Liberty: Rules and Order 83 (1973). The entire set of Hayek's discussions contained in Chapter Four, *The Changing Concept of Law*, and Chapter Five, *Nomos: The Law of Liberty*, provides an excellent overview of the ancient common law mentality and a representative example of natural law theory. *Id.* at 73-123.

3. *Cf. id.*

rulings based upon it.[4] Later, the notion evolved that similar cases ought to be decided alike and thus the concept of *stare decisis* (literally, "let the decision stand") was born.

An examination of the common law process reveals at least three related considerations that support the strength of common law over the statutory process. First, because the common law system of rule-determination relies upon the personal initiatives of parties to civil suits, the common law process ensures that the rules it formulates are based on careful and equitable contemplation of all information necessary to the resolution of a particular dispute.[5] Because winning a case depends upon the strength of a party's arguments, an impartial judge must rely on the parties to present the strongest arguments for ruling in their favor. If the judge perceives her role correctly, then her legal pronouncement will most accurately reflect the rule that should, and actually does, govern the situation.

On the other hand, legislatively-based public law may be characterized as one group of individuals creating rules that govern others. Obviously, if the first group actually represents the interests of the whole, then such a system operates effectively. The legislative process, however, rarely seems to find the equilibrium accomplished by the common law because it represents the interests of certain groups either too strongly or too weakly. Along these lines, scholars have argued that the evolution of special interest politicking[6] has led to an inefficient system of rent seeking.[7] Thus statutory law, in contrast to common law, is often the product of a more politicized and less informed rule-making process.

The common law's second strength is its nexus with freedom.[8] Arguments supporting this connection have focused on the natural law underpinnings of the common law,[9] the common law process as more conducive to developing law that, in market fashion, effectively accommodates the divergent needs and preferences of individuals in society,[10] and the

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4. *Id.* at 83-84 (*quoting* FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 151 (trans. S.B. Chrimes 1939)), 87.

5. This consideration forms one of Hayek's central arguments in support of the common law. *See generally id.* ch. 5.

6. For discussion of special interest groups, see generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

7. For an introduction to rent seeking issues and public choice analysis, see generally JAMES D. GWARTNEY & RICHARD L. STROUP, ECONOMICS: PRIVATE AND PUBLIC CHOICE 99-111, 579 (7th ed. 1995). *See also* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987). Gwartney and Stroup define the term "rent seeking" as "actions [by individuals and public interest groups] designated to change public policy–tax structure, composition of spending, or regulation–in a manner that will redistribute income toward themselves." GWARTNEY & STROUP, *supra*, at 105.

8. This argument is particularly important to classical liberals. *See* HAYEK, *supra* note 2, at 84-85, 94; BRUNO LEONI, FREEDOM AND THE LAW 95-111 (1991).

9. *See* HAYEK, *supra* note 2, at 84.

10. For an extended argument that equates the common law process with the market system, see HAYEK, *supra* note 2, ch. 5.

unchecked power of bureaucratic officials that legislation inevitably creates.[11] Indeed, a significant portion of the discussion in support of the common law may be reduced to efforts to protect individual liberty.

The common law's third strength relates to its ability to accommodate private property and free market ideals. As the following sections will demonstrate, the common law not only evolved out of and around a deep and abiding reverence for the value of private property and the right of a property holder to remain undisturbed in his quiet possession, but the common law also possesses important tools that enable it to delineate and enforce specific property rights, which in turn allow markets for the trading of such rights to operate smoothly. In the context of disputes arising from polluting activities, the strength of the common law lies in its ability to build a foundation for market transactions between polluter and pollutee by providing clear-cut rules of property and liability.[12]

The common law has much to offer in the search for an effective system to address environmental harm. It possesses a rich history reflecting the wisdom of centuries of human experience. Because of its rule-determination process, its connection with the ideals of liberty and its amenability to property rights-based solutions to environmental problems, the common law is in a unique position to address environmental harms in ways that the all-encompassing statutory regime leaves untouched.

II. The Development of Common Law Nuisance in the United States and England: A Comparative Analysis

This Part presents a comparative historical analysis of the developments in American and English nuisance law. It begins with a discussion of nuisance law's early English roots, demonstrating its foundation in strict liability. The analysis then proceeds to examine the radical shift in American nuisance law during the ante-bellum period from strict liability to a more weakened doctrine based in negligence liability. The next section explores developments occurring in the 1960s when American nuisance law returned to traditional strict liability principles, thereby creating common law doctrines fit to tackle the issues of the dawning environmental era. Drawing upon common law developments in New York, Pennsylvania, and Oregon, this analysis reveals a general "strong-weak-strong" pattern in the American evolution of nuisance law. This pattern is compared to the English development of nuisance law over a similar time period. While English courts flirted with a weakened version of nuisance in the mid-nineteenth century, English nuisance law—unlike American nuisance law—remained in its strong form until the 1960s.

11. *See* LEONI, *supra* note 8.

12. R.H. Coase provides the foundation for this argument in his seminal article *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also infra* Part III for discussion of the article.

A. Historical Notes on Nuisance, Trespass, and Related Actions

1. *Trespass, Case, and Strict Liability*

In Middle English common law, civil liability was based upon the powerful writ of trespass. Trespass was a form of action brought for direct and immediate physical contact with person or property.[13] However, trespass provided no remedy for a plaintiff bringing an action for indirect injury occurring *as a consequence* of the defendant's activity.

A commonly used example of the distinction between direct and indirect injury proceeds as follows.[14] Arthur is prancing along a rooftop carrying a log when he unintentionally drops the log on the walkway below. At that moment, Galahad happens to be walking on the sidewalk. The log hits Galahad on the head, causing him severe injury. Immediately thereafter, Lancelot comes waltzing down the walkway, trips over the log and falls on his head such that he sustains harm identical to that incurred by Galahad. Galahad may recover against Arthur under trespass. It does not matter that Arthur's action was unintentional; no inquiry is made into fault. Lancelot, on the other hand, has no cause of action in trespass. Because the physical action initiated by Arthur has come to a rest, Lancelot's injury is merely consequential.

Because of the injustice of differing results as in the cases of Galahad and Lancelot, a new writ of recovery was created for "trespass in a similar case."[15] Developed during the Thirteenth and Fourteenth Centuries, the writ became known as "trespass on the case" or "case."[16] The action lay for injury caused *as a consequence* of another's actions.

Although the distinction between trespass and case may seem clear in the preceding example, the difference can actually be quite subtle.[17] Suppose for example, Galahad, suffering a direct injury, decided to bring an action in case, stating that Arthur was carrying a log on a rooftop, while doing so dropped it, and *as a consequence* of that action the log fell onto Galahad's head causing him severe injury. Could Galahad recover in case?

In *Day v. Edwards*,[18] the Court of King's Bench considered a similar semantic argument, but maintained that the distinction between trespass and case was "perfectly clear"[19] and refused recovery "on the case" for an injury resulting from a direct act. *Day* is even more intriguing because the plaintiff injected negligence into the complaint.[20] The dispute arose from a

13. *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 359-65 (1951); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); E.F. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L. REV. 191, 191-201 (1965).

14. For a full rendition of this example, see Gregory, *supra* note 13, at 362-63.

15. *Id.*

16. *Id.*

17. *See, e.g.*, Scott v. Shepherd, 96 Eng. Rep. 525 (C.P. 1773) (holding that an action in trespass would lie where defendant threw a lit firecracker into a crowded market and injured plaintiff, even though several persons redirected the course of the firecracker).

18. 101 Eng. Rep. 361 (K.B. 1794).

19. *Id.* at 362.

20. *Id.* at 361.

classic vehicular accident; the plaintiff and defendant were driving horses and carriages on the same road in opposite directions, when a collision occurred.[21] The plaintiff did not allege that the defendant intended to cause the crash.[22] Although it is not entirely clear why the plaintiff chose case, it appears that he believed the element of negligence altered the trespass equation. As a result, the plaintiff alleged that as a consequence of the defendant's negligent driving, he had sustained injury.[23] However, the Court would not allow the issue of fault to be injected into the inquiry and stubbornly insisted that the distinction between immediate and consequential injury was the only issue to be resolved.[24]

Nine years after *Day*, the same Court of King's Bench was offered another invitation to infuse fault into the trespass and case inquiry. The case of *Leame v. Bray*[25] also involved a vehicular collision. This time, however, the plaintiff had brought an action in trespass and it was the defendant who proposed that because the defendant was merely negligent, the proper action should have been case.[26] Again, the Court held that fault was of no consequence to the distinction between trespass and case.[27]

These suits demonstrate that, with respect to civil liability prior to circa 1800, fault was simply not an essential inquiry to the common law courts. The issue of cardinal importance was whether the facts alleged in the plaintiff's complaint, if true, conformed to the form of action that was brought. If so, the plaintiff had a remedy. If not, the plaintiff's request for relief was refused. Because these questions formed the legal landscape of the old common law era, it is difficult to make broad statements concerning strict liability in the context of common law forms of action. When the issue of fault was present, it was treated as merely incidental. Because fault, for the most part, was not the central issue, any analysis of the concept of strict liability must proceed on a "per action" basis by exploring the strength of the legal maxim or rule in its statement and application.[28]

2. Sic Utere Tuo—*The Nuisance Rule*

In the twelfth century, Glanvill included the writ of the Assize of Novel Disseisin in his compilation of English laws.[29] One form of this early writ

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 362.
25. 102 Eng. Rep. 724 (K.B. 1803).
26. *Id.*
27. *Id.* at 726.
28. There has been an ongoing debate concerning the strictness of common law liability prior to circa 1800. Horwitz contends that old common law liability was strict. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 90 & n.156 (1977). Other commentators, however, drawing upon the existence of the defense of inevitable accident, have taken issue with this assertion. *See* Rabin, *supra* note 13, at 927; Roberts, *supra* note 13, at 203; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722 (1981).
29. R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND bk. XIII, chs. 34-36 & n.1 (G.D.G. Hall trans., 1965).

protected a plaintiff from interference with his easements or natural rights in land.[30] This form eventually acquired its own name–the Assize of Nuisance.[31] Because of its procedural limitations, the Assize of Nuisance was discarded in favor of a case action that lay for indirect and consequential interference or injury to the use and enjoyment of land.[32] Under this action, a plaintiff could sue for damages.[33] Later, courts of equity entered the picture and provided an injunctive remedy as well.[34]

In *William Aldred's Case* (1611), the plaintiff brought an action on the case in response to the defendant's offending hog sty.[35] The defendant explicitly invited the court to consider the social value of his operations as a defense to the nuisance action, stating that because his activities were "necessary for the sustenance of man . . . one ought not to have so delicate a nose."[36] But the court rejected the argument and instead articulated the doctrine of *sic utere tuo ut alienum non laedas*[37] ("one should use his own property in such a manner as not to injure that of another.")[38]

The *sic utere tuo* rule dominated seventeenth century property jurisprudence[39] and was alive and well at the time of Blackstone in the late eighteenth century. In discussing nuisance in his commentaries, Blackstone stated, "the rule is, 'sic utere tuo, ut alienum non laedas.'"[40]

In its articulation, the *sic utere tuo* rule is an absolute liability concept. Its formulation suggests that regardless of the legitimacy or social value of an offending activity, simply causing injury to someone's enjoyment of property creates a cause for recovery. Furthermore, *Aldred's Case* makes clear that the *sic utere tuo* rule was not only strict in its formulation, but was also strict in its application, i.e. the court would not allow questions of reasonableness or of the utility of the defendant's activities into its nuisance inquiry. The result of this strict application of the *sic utere tuo* rule was that "on the eve of the American Revolution, the rule of *sic utere tuo* provided absolute protection against interference with the essential attributes of land ownership."[41]

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30. *See* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 193 (1990) (containing an excellent discussion of the English origins of common law nuisance).

31. The term "nuisance" comes from the French language. The term is derived from Latin's "nocumentum," meaning loss, damage or detriment. *Id.* at 192.

32. *See id.* at 194.

33. *Id.*

34. *Id.*

35. 77 Eng. Rep. 816 (1611).

36. *Id.* at 817.

37. *Id.* at 821.

38. BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

39. *See* Lewin, *supra* note 30, at 196.

40. 3 WILLIAM BLACKSTONE, COMMENTARIES *217.

41. Lewin, *supra* note 30, at 196. For further support of the proposition that the *sic utere tuo* rule was an absolute liability concept, see HORWITZ, *supra* note 28, at 32; Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301, 307-08 (1990); Kurtz, *Nineteenth Century Anti-Entrepreneurial Injunctions–Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 622-23 (1976).

3. *Other Pre-1800 Absolute Liability Concepts: Trespass and Riparian Rights*

As demonstrated above, trespass was, essentially, an absolute liability concept. Despite the existence of the "inevitable accident"[42] defense, which allowed the defendant to plead that the plaintiff's injury resulted from an unavoidable mishap, the very nature of traditional trespass was the notion that proof of direct physical contact or intrusion, regardless of fault, established liability.[43]

With respect to water rights, common law doctrines governing riparian water users have also traditionally imposed absolute liability. The preeminent maxim in riparian rights cases was *aqua currit, et debet curerer, ut solebat es juie naturae* ("water runs, and it should run, as it is used to run naturally").[44] This "natural flow" theory, the traditional English rule,[45] held that persons who owned real property that adjoined a body of water were entitled to its uninterrupted flow. Under this doctrine, anyone diverting the natural flow or reducing the water quality was automatically held liable for violating the rights of riparians; no consideration of the social value of the violating action was entertained.[46] Furthermore, as with trespass, one invoking her riparian rights need not to prove harm; damage was presumed once interference with a riparian right was established.[47]

B. The American Weakening of the Nuisance Action

1. *The New York Example–Prior to 1900*

It is clear from the 1848 case, *Hay v. Cohoes Co.*,[48] that New York initially adopted the English *sic utere tuo* rule in all its strictness. The defendants in *Hay* were engaged in blasting to build a canal.[49] These activities caused rocks to be tossed onto the plaintiff's land, depriving him of safe use of his property.[50] The Court of Appeals noted that the defendant's activities were a lawful and nonnegligent use of property.[51] Nevertheless, it held that "[a] man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, *even for the purpose of a lawful trade.*"[52] The Court refused to entertain any defenses to the plaintiff's rightful recovery.[53] If the plaintiff's "absolute

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42. *See* Roberts, *supra* note 13, at 203.
43. *See* Gregory, *supra* note 13, at 362 ("trespass implied all the fault that was necessary for liability").
44. *See* Bellinger v. New York Central R.R., 23 N.Y. 42 (1861); *see also* D.H. Cole, *Liability Rules for Surface Water Drainage: A Simple Economic Analysis*, 12 Geo. Mason L. Rev. 35, 40 (1989).
45. Charles Donahue, Jr., Property: An Introduction to the Concept and the Institution 257 (3d ed. 1993).
46. *See* Elizabeth Brubaker, Property Rights in the Defence of Nature 58 (1995).
47. *Id.* at 57.
48. 2 N.Y. 159, 161 (1849), *aff'g* 3 Barb. 42 (N.Y. App. Div. 1848).
49. 2 N.Y. at 160.
50. *Id.*
51. *Id.* at 163.
52. *Id.* at 161 (emphasis added) (citation omitted).
53. *Id.*

right"[54] was harmed by the defendant's use, the offending use needed to be barred regardless of the detrimental effects upon industrial development.[55] Thus, the *Hay* doctrine afforded absolute protection to the rights of private property holders against harmful interferences with their quiet enjoyment of land.

The strong stand initially taken by the New York Court of Appeals, however, immediately buckled under the developmental pressures of industry. Indeed, the question became not whether the absolute rights of property holders were harmed, but whether property holders should receive any compensation for the destruction of those rights.[56]

In *Radcliff's Executors v. Mayor of Brooklyn*[57] the Court of Appeals created the doctrine of legislative authorization.[58] Under this doctrine, developers acting under state authorization were immunized from civil nuisance liability if they conducted their developmental activities in a nonnegligent manner.[59] According to the *Radcliff* court, "an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."[60] In effect, the doctrine of legislative authorization authorized developers to create a nuisance so long as their conduct was reasonable.

In response to the strict *sic utere tuo* rule, the *Radcliff* court stated that "a city could not be built under such a doctrine," adding as an afterthought, that the rule "may have been a wise one in [its] day; but it is not well adapted to our times."[61] With respect to the compensation issue, the court held that although the state constitution's takings provision might seem to apply, it was "not aware that this, or any similar provision in the constitutions of other states, has ever been applicable to a case like this."[62]

The doctrine of legislative authorization was New York's first step away from the absolute liability concept of nuisance toward the reasonableness standard of negligence. *Radcliff* represents the extension of negligence standards to developmental and industrial activities authorized by the legislature.[63] The doctrine's real impact was to hold legislatively authorized operations to the lesser reasonableness standard for their harm-causing activities.

After the *Radcliff* rule was extended to include the operation of rail-

54. *Id.* at 162.

55. *See* Halper, *supra* note 41, at 308.

56. *Id.* at 310.

57. 4 N.Y. 195 (1850) (plaintiffs brought suit against the city of Brooklyn in case alleging property damage from the city's efforts to build a road).

58. Some have referred to this doctrine as the defense of "statutory justification." *See* Kurtz, *supra* note 41, at 649-50; Lewin, *supra* note 30, at 197.

59. *See* Kurtz, *supra* note 41, at 650-51; Lewin, *supra* note 30, at 197; 4 N.Y. at 200.

60. 4 N.Y. at 200.

61. *Id.* at 203.

62. *Id.* at 198.

63. *See* Halper, *supra* note 41, at 310.

roads,[64] the Court of Appeals was only a short step from altogether discarding absolute liability from nuisance actions. In 1873, it took that step in *Losee v. Buchanan*.[65] An exploding boiler on the defendant's land had caused harm to Losee's property.[66] Speaking for the court, Judge Earl stated the *sic utere tuo* rule was "much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads."[67] Therefore, no justification remained for a strict application of traditional nuisance doctrine. According to the *Losee* Court, the measure of nuisance was no longer to be whether harm was caused as a consequence of the defendant's activities, but rather whether the defendant had exercised due care in conducting its activities.[68] "The maxim of *sic utere tuo, etc.*, only requires, in such a case [as the one before the court] the exercise of adequate skill and care."[69]

The *Losee* court addressed the issue of compensation by expounding the theory that private property holders receive compensation for the harms they suffer in the form of being privileged to live in an organized society.[70] In Hobbesian fashion, the *Losee* court stated that "by becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me."[71] Under this view, suffering the harms of nuisances created by industrial activities was merely part of the social contract.

Losee's negligence standard obviously favored active land uses typical of the industrial revolution over the interests of small residential property holders.[72] The opinion stressed the relative strength of interests in developmental uses of land.[73] In *Campbell v. Seaman*,[74] however, the Court of Appeals made it clear that smallholders would not inevitably lose to industrial uses when it upheld a judgment for damages and injunctive relief in an action brought by a smallholder against an offending brick factory.[75]

64. *See* People v. Kerr, 27 N.Y. 188 (1963); Bellinger v. New York Cent. R.R., 23 N.Y. 42 (1861). In *Bellinger*, the Court of Appeals also extended the defense of statutory justification to riparian actions. 23 N.Y. at 47.
65. 51 N.Y. 476 (1873).
66. *Id.* at 479.
67. *Id.* at 484.
68. *Id.* at 488.
69. *Id.*
70. *Id.* at 484.
71. *Id.*
72. *See* Halper, *supra* note 41, at 320.
73. 51 N.Y. at 484.
74. 63 N.Y. 568 (1876).
75. Halper, *supra* note 41, at 320. Harper views the *Campbell* decision as another in a line of post-*Hay* cases that led the Court of Appeals toward a more contextual and factual-based nuisance inquiry. *Id.* at 321. While *Hay* represents a simple analysis of whether harm was caused, Halper argues that the final result of the New York nuisance doctrine was a multi-faceted inquiry that, in the case of *Campbell*, took account of location and circumstantial considerations. *Id.* According to Halper, *id.* at 334-35, evidence that the distance from *Hay*'s "single-cell" inquiry to the "modern" contextual inquiry had

Booth v. Rome, Watertown & Ogdensburg Terminal Railroad[76] sits in stark contrast to *Hay* and illustrates how far from strict liability principles the Court of Appeals had marched by the turn of the twentieth century. Like *Hay*, *Booth* was a blasting case in which the plaintiff's house was damaged by the defendant's activities.[77] Unlike other jurisdictions that held blasting activities to the highest standards of care, the New York Court of Appeals held that blasting, in and of itself, does not create liability.[78] "Mere proof that the house was damaged by blasting [does not] alone sustain the action."[79] Reasonable care, even in the case of the inherently dangerous activity of blasting, was the standard for measuring liability.[80] Furthermore, the *Booth* court added even more context to the reasonableness inquiry. It explicitly incorporated a utilitarian consideration of public policy.[81] In short, reasonableness of land use became a matter of public policy.

In sum, the New York Court of Appeal's development of its nuisance law during the ante and post-bellum period travelled along a more or less clearly defined path from strict liability to reasonableness and interest balancing. The effect was that smallholding plaintiffs were forced to bear the accidental costs of industrial development. By the turn of this century, New York nuisance law had undergone a radical transformation from staunchly advocating the rights of smallholders (and consequently being a powerful remedy against environmental harm) to a weakened doctrine that left courts free to pick and choose which interests they would protect: smallholders or industrial developers.

2. *Nuisance Developments Beyond New York: Pennsylvania and the Restatement of Torts*

Between 1875 and 1935 similar developments in nuisance law were occurring in jurisdictions other than New York. Not long after *Losee*, the Supreme Court of Pennsylvania began consideration of a case that would come before it four times before the court would render its final

been earlier traversed. *See* Booth v. Rome, Watertown & Ogdensburg Terminal R.R., 140 N.Y. 267 (1893), *overruled by* Spano v. Perini Corp., 250 N.E.2d 31 (1969). For discussion of *Booth*, see *infra* notes 102-07 and accompanying text.

76. 140 N.Y. 267 (1893).

77. *Id.* at 271-72.

78. *Id.* at 273.

79. *Id. But see* Rylands v. Fletcher, 3 L.R.-H.L. 330 (1868).

80. 140 N.Y. at 277.

> >The test of the permissible use of one's own land is not whether the use or act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? [sic] having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

Id.

81. *Id.* ("Public policy is sustained by the building up of towns and cities . . . .").

disposition.[82]

The dispute in *Sanderson v. Pennsylvania Coal Co.*[83] centered around a defendant railroad's pollution of a stream. In the 1878 version of the case (*Sanderson I*), the court refused to allow a public interest argument, similar to those accepted in *Losee* and *Booth*, to justify an invasion of Sanderson's property rights.[84] But by 1886, the court had undergone a dramatic jurisprudential shift. In the final installment of the case, *Pennsylvania Coal Co. v. Sanderson* (*Sanderson IV*), the court adopted a negligence standard for nuisance and incorporated into its inquiry a consideration of the social utility of defendant's activities.[85]

Sanderson IV is noteworthy for its adoption of the "natural use" doctrine, which posits that the defendant is not liable to the plaintiff in a nuisance case so long as the defendant's use of her land is an ordinary or natural one.[86] But as the following passage makes clear, this doctrine is just another formulation of negligence:

> It may be stated as a general proposition, that every man has the right to the natural use and enjoyment of his own property and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnumn absque injuria*.[87]

But even more remarkable than its rejection of strict nuisance liability is the *Sanderson IV* court's explicit injection of social value considerations into the nuisance equation:

> We are of the opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a *great public industry*, which, although in the hands of a private corporation, subserves a *great public interest*. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a *great community*.[88]

In this short and tidy fashion the court reduced property interests, once deemed so sacred they received absolute protection, to "trifling

82. Sanderson v. Pennsylvania Coal Co., 86 Pa. 401 (1878) (plaintiff's appeal taken, nonsuit reversed and remanded for a new trial) [hereinafter *Sanderson I*]; Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302 (1880) (defendant's appeal taken and judgment affirmed); Sanderson v. Pennsylvania Coal Co., 102 Pa. 370 (1883) (plaintiff's appeal taken, judgment reversed and remanded for a new trial); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126 (1886) (defendant's appeal taken and judgment reversed) [hereinafter *Sanderson IV*]. Scholars have referred to these cases as *Sandersons I, II, III*, and *IV* respectively. *See also* Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1163-65 (1986).

83. *Sanderson I*, 86 Pa. 401. *See also* Bone, *supra* note 82, at 1163.

84. *Sanderson I*, 86 Pa. at 405-06.

85. *Sanderson IV*, 113 Pa. at 146.

86. *Id.*

87. *Id.* The phrase *damnum absque injuria* literally means "harm without injury," but is used to mean "harm without legal remedy." Further, this passage demonstrates the shift in emphasis from the plaintiff's property rights to the defendant's rights to conduct activities on his land.

88. *Id.* at 149.

inconveniences."[89]

This process of balancing not only the interests of the parties to a nuisance suit but also the interests of society at large had its most pronounced voice in the Restatement of Torts.[90] Under the first Restatement, a nuisance was defined as "a non-trespassory invasion of another's interest in the private use and enjoyment of land"[91] that is either "(i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."[92] The Restatement expressly incorporated a test for balancing utilities into the question of the invasion's reasonableness. "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the rule [previously stated], unless the utility of the actor's conduct outweighs the gravity of the harm."[93] Factors to be considered in gauging the *gravity of harm* were the "extent" and "character" of the harm, "the social value which the law attaches to the type of use or enjoyment invaded," locality considerations, and "the burden on the person harmed of avoiding the harm."[94] Factors to be considered in gauging the *utility of conduct* paralleled those to be considered in weighing the *gravity of harm*.[95]

One scholar has opined that the balancing test employed under the first Restatement "represented a radical departure from existing precedent."[96] According to Lewin, the significance of the first Restatement's balance of utilities test lay in its quantitative nature. Prior to the Restatement, the nuisance inquiry was more akin to a balancing of *interests* test where the "factors were considered qualitatively in a normative evaluation of reasonableness within a natural rights framework."[97] In contrast, the Restatement's test was a strict quantitative test that pitted the utility of the plaintiff's enjoyment against the utility of the defendant's activities together

89. *Id.* In *Pennsylvania Railroad Co. v. Marchant*, a case with facts similar to those in *Sanderson*, the Supreme Court of Pennsylvania stated, "There are some inconveniences, which, as was decided in [*Sanderson*], must be endured by individuals for the general good. Otherwise we would have an Utopia, where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard." 13 A. 690, 698 (1888).

90. RESTATEMENT OF TORTS (1934-1939). The Restatements of Law represent attempts by the American Law Institute to survey the statements of the common law rules laid down across American jurisdictions and to collect them into one coherent body. The effort has been viewed by legal scholars as an exemplary expression of legal positivism. *See* Lewin, *supra* note 30, at 210. Although the premise of the Restatements of Law (as the title suggests) is merely to restate the law as it actually exists in the various jurisdictions, informed by positivist legal theories, the Restatement often reveals itself to be a normative undertaking. The original Restatement of Torts was later superseded by the RESTATEMENT (SECOND) OF TORTS (1977). A third revision is presently underway in which the products liability provisions offer dramatic changes to previously existing provisions. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, (Proposed Final Draft 1996).

91. RESTATEMENT OF TORTS § 822 (1934-1939).

92. *Id.* § 822(d).

93. *Id.* § 826.

94. *Id.* § 827.

95. *See id.* § 828.

96. Lewin, *supra* note 30, at 211.

97. *Id.*

with calculations of social utility. Lewin concludes that although the influential torts scholar William Prosser described the reality of American nuisance law as conforming to the Restatement,[98] in fact, only a handful of jurisdictions adopted the Restatement's balancing of utilities test.[99] The rest continued to adhere to a "qualitative reasonableness test in which the utility of the actor's conduct was simply one of the many factors in the analysis of surrounding facts and circumstances."[100]

Lewin's evaluation suggests that by the turn of this century and beyond, nuisance doctrine was being stretched and pulled in a number of directions. A vast number of jurisdictions had shed strict liability in favor of negligence standards and balancing tests.[101] In addition, Prosser and the American Law Institute were calling for an even more direct utility balancing exercise, the effect of which was severely to undercut the security of the private property rights of plaintiffs in the name of societal advancement. In the midst of all the confusion in nuisance doctrine, however, the New York Court of Appeals began to question its pro-industrial stance.

C. The American Return to Traditional Principles

1. *The New York Example–After 1900*

Only seven years after the strong pro-developmental stand taken by the New York Court of Appeals in *Booth v. Rome, Watertown & Ogdensburg Terminal Railroad*,[102] the court began to signal its retreat back toward traditional nuisance principles. *Strobel v. Kerr Salt Co.*,[103] decided in 1900, involved an upstream salt producer whose activities salinated a river used by downstream farmers and mill operators. The trial court, operating under a pro-industry rationale, denied the plaintiffs injunctive relief.[104] But the Court of Appeals rejected defendant's social utility arguments, which drew support from *Sanderson IV*,[105] and granted the plaintiffs a new

98. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 580 (1st ed. 1941) (commonly referred to as *Prosser on Torts*).
99. Lewin, *supra* note 30, at 212.
100. *Id.* at 214.
101. As compiled by Kurtz, *supra* note 41, at 656 n.178; see, e.g., McCarthy v. Bunker Hill & Sullivan Mining & Con. Co., 164 F. 927 (9th Cir. 1908); Bliss v. Anaconda Copper Mining Co., 167 F. 342 (C.C.D. Mont. 1909); McElroy v. Kansas City, 21 F. 257 (C.C.W.D. Mo. 1884); Clifton Iron Co. v. Dye, 87 Alaska 468 (1888); Rouse v. Martin, 75 Alaska 510 (1883); Fisk v. City of Hartford, 40 A. 906 (Conn. 1898); Daniels v. Koekuk Water Works, 61 Iowa 549 (1883); Boston Rolling Mills v. Cambridge, 117 Mass. 396 (1875); Potter v. Saginaw Union St. Ry., 47 N.W. 217 (Mich. 1890); Edwards v. Allouez Mining Co., 38 Mich. 46 (1878); Fox v. Holcomb, 32 Mich. 494 (1875); Demarest v. Hardham, 34 N.J. Eq. 469 (1881); Dorsey v. Allen, 85 N.C. 358 (1881); Daughtry v. Warren, 85 N.C. 136 (1881); Brown v. Carolina Cent. Ry., 83 N.C. 128 (1880); Bourne v. Wilson-Case Lumber Co., 113 P. 52 (Or. 1911); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904); Galveston, Houston & San Antonio Ry. v. Degroff, 118 S.W. 134 (Tex. 1909); Wees v. Coal & Iron Ry., 46 S.E. 166 (W. Va. 1903).
102. 140 N.Y. 267 (1893).
103. 164 N.Y. 303 (1900).
104. *Id.* at 313-15.
105. 113 Pa. 126.

trial.[106] The court held that the Pennsylvania public interest doctrines had never been adopted in New York.[107]

In the 1903 case, *Sammons v. City of Gloversville*,[108] the plaintiff sued to enjoin a city from dumping sewage into a creek upon which his farm was situated. The city argued that it was legislatively authorized to pollute the creek based upon a city charter granting it power to construct a sewer system.[109] The city further contended that permanently enjoining its activity would be contrary to an overwhelming public interest.[110] Rejecting these arguments, the court maintained that the city's polluting activities constituted both a nuisance and a legislative taking, the latter being prohibited absent compensation.[111] The court held that the public interest could not defeat issuance of an injunction where a substantially damaging nuisance had been found.[112]

The New York Court of Appeals continued its march back toward traditional common law principles in *Whalen v. Union Bag & Paper Co.*,[113] holding that the balance of interests test had no place in New York nuisance doctrine. In *Whalen*, the defendant owned a pulp mill valued at $1,000,000 and employing 500 people.[114] The mill's operations polluted a stream causing damage to a downstream riparian farmer.[115] Speaking through Judge Werner, the Court of Appeals rejected the balancing test and upheld the injunction, stating:

> Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich. It is always to be remembered in such cases that "denying the injunction puts the hardship on the party in whose favor the legal right exists, instead of on the wrongdoer."[116]

This trio of cases had a significant impact on New York nuisance doctrine because it retreated from the doctrine of legislative authorization, refused to allow public interest considerations to justify pollution, and rejected the balance of interests test. There is, however, nothing in these opinions to suggest that the standard of care required of polluters was anything stricter than non-negligence. Indeed, the *Strobel* court adhered to the reasonable use rule, a negligence standard, as opposed to the strict liability

106. *Strobel*, 164 N.Y. at 317-23.
107. *Id.* at 320.
108. 175 N.Y. 346 (1903).
109. *Id.* at 351.
110. *Id.* at 352.
111. *Id.* at 353.
112. *Id.*
113. 208 N.Y. 1 (1913).
114. *Id.* at 3.
115. *Id.*
116. *Id.* at 5, *quoting* 5 POMEROY'S EQUITY JURISPRUDENCE § 530.

natural flow doctrine for riparian land owners.[117] This trio, with few changes, defined New York nuisance law as it existed from the turn of the century through 1970, the year the landmark decision of *Boomer v. Atlantic Cement Co.*[118] was handed down.

Boomer may be viewed as the paradigm for the modern-day application of nuisance law in environmental torts. It has been praised for creating an innovative remedy for those injured by industrial pollution.[119] Some, however, question the wisdom and inovation of the *Boomer* court's use of a conditional injunction in this scenario.[120] The case plays a significant role in this discussion not only because its arguably novel remedy serves as a good foundation for later comparison between damages and injunctive relief as remedies,[121] but also because it may represent a return to traditional nuisance doctrine and the use of strict liability.

Boomer involved a dispute between a cement plant and surrounding landowners.[122] As an external byproduct of its industrial operations, the plant injected large amounts of cement dust into the atmosphere.[123] The trial court found that Atlantic's operations constituted a nuisance, but refused injunctive relief because of the social utility, or benefit to society, of the cement plant's activities.[124] However, the trial court did award temporary damages to the plaintiffs.[125]

Unlike the lower courts, the New York Court of Appeals was more willing to grant injunctive relief to the plaintiffs. The court's willingness is best explained by detailing the dilemma it faced. Initially, it considered "the large disparity in economic consequences of the nuisance and injunction,"[126] an argument inviting them to compromise the plaintiffs' property rights in favor of industry. Next, it considered "[the] doctrine . . . that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted."[127] The court saw no way of reconciling the two doctrines because granting an injunction would have perverse economic consequences, but not granting

117. *Strobel*, 164 N.Y. at 320. Kennedy v. Moog, Inc., 264 N.Y.S.2d 606 (1965) demonstrates the precedential weight of the *Strobel*, *Sammons* and *Whalen* trio of decisions. In *Kennedy*, the supreme court for Erie County granted an injunction to small holding plaintiffs against the defendant sewage disposal plant. *Id.* at 616.

118. 257 N.E.2d 870.

119. *See, e.g.*, John E. Bonine & Thomas O. McGarity, The Law of Environmental Protection 246 (1984).

120. *See, e.g.*, 257 N.E.2d 870, 875 (Jason, J., dissenting) (questioning the wisdom of the majority's remedy). *See, e.g.*, Halper, *supra* note 41, at 301-302 (questioning the uniqueness of the *Boomer* remedy). Halper notes that the Court of Appeals was fashioning *Boomer*-type remedies against nuisance harm at the turn of this century. *Id.* at 341-49.

121. *See infra* Part III, sec. B.

122. 257 N.E.2d at 871.

123. *Id.*

124. *Id.* at 872.

125. Boomer v. Atlantic Cement Co., 287 N.Y.S.2d 112 (Sup. Ct. 1967), *aff'd*, 294 N.Y.S.2d 452 (N.Y. App. Div. 1968), *rev'd*, 257 N.E.2d 870 (1970).

126. 257 N.E.2d at 872.

127. *Id.*

an injunction would leave the plaintiff's property rights unprotected.[128]

The doctrine that forced the Court to consider the "disparity in economic consequences" was none other than the interest balancing test. From the language of the opinion, the true nature of the second doctrine is slightly more elusive. But a convincing argument can be made that the court was actually referring to the strict liability *sic utere tuo* rule of classic nuisance law. The language used by the court contains no reference to negligence or fault. The court states only that where a nuisance and substantial damage are found, an injunction shall issue.[129] By holding that the cement company's activities were reasonable in light of its location or that the cement company was not operating negligently, the court could have etched out an effective right on the part of cement plant to release its emissions under a reasonableness standard. But it chose not to create such a right; instead, the court applied a strict liability rule.

However, because the court's statement of this second doctrine contains a good measure of ambiguity, it is difficult to determine its parameters. Was the court simply referring to *Whalen*'s rejection of interest balancing, as Lewin suggests?[130] Was it assuming that a reasonableness standard would be used in determining the existence of a nuisance? From the language of the opinion, it is not clear to which doctrine the court was referring; although its refusal to avail itself of the opportunity to find no negligence suggests that the court assumed a strict liability standard applied.

What is clear is the court's perceived dilemma. Under the first balancing of interests doctrine, the smallholding plaintiff would surely lose. On the other hand, under the traditional doctrine, an injunction would necessarily issue against a large industrial operation. Neither result appeared just to the court, so it fashioned a compromise in the remedial process. After considering the option of granting a postponed injunction to afford the cement .company sufficient time to abate the nuisance, the court granted an injunction against Atlantic's operating the cement plant until such time as Atlantic paid permanent damages to the plaintiff for the harm caused by the nuisance.[131] If Atlantic paid permanent damages, then the court would not issue the injunction.[132]

It remains unclear why the *Boomer* decision has become perhaps the most famous nuisance case in American legal history. As previously suggested, its remedy is not particularly novel, considering the fact that the New York Court of Appeals was using the same remedy in similar nuisance actions at the turn of the century.[133] Perhaps *Boomer*'s notoriety is a product of its strategic placement upon the legal history time-line. Decided in 1970, *Boomer* could be cast as the great gate-keeper to the federal statutory

128. *Id.*
129. *Id.*
130. *See* Lewin, *supra* note 30, at 217.
131. 257 N.E.2d at 875.
132. *Id.* at 873-75.
133. *See supra* note 120.

environmental law period in which we live today. Maybe the simplest reason for *Boomer*'s fame is that for the purposes of teaching nuisance law in American law schools, *Boomer* provides an excellent fact scenario for teasing out the principles of various nuisance doctrines. Although *Boomer* may be perceived as epitomizing a common law response to the demands of a more environmentally conscious society, an even more revolutionary environmental common law doctrine had been developed by Oregon's highest court a decade prior to *Boomer*.

2. *The Oregon Example*

In the 1959 decision, *Martin v. Reynolds Metals Co.*,[134] the Supreme Court of Oregon launched a vigorous common law attack against environmental injury. In the context of a classic industrial pollution scenario, the court created a modern property rights-based common law doctrine suitable to the challenges of the approaching environmental era. Before setting forth the details of the *Martin* doctrine, however, a brief reconsideration of the historic distinction between trespass and nuisance is required.

As discussed in Part II.A, historically, a cause of action for trespass required a direct physical intrusion upon a property holder's possession. Nuisance, on the other hand, required consequential interference with a property holder's right to enjoy and use her land.[135]

The distinction between trespass and nuisance actions can be unclear. Suppose, for example, that Arthur conducts blasting activities on his land such that rocks are thrown onto Galahad's land. Trespass, it could be argued, would lay for the harm Galahad suffers because rocks directly invaded Galahad's possession. On the other hand, could it not just as easily be argued that nuisance is Galahad's remedy? After all, Galahad's harm was a consequence of Arthur's activities conducted while upon his own land. In fact, it was the latter argument that was accepted in the *Hay* case, where the New York Supreme Court granted the plaintiff relief on an action brought in case.[136]

The previous example is easily applied in a pollution situation. Instead of conducting blasting activities, suppose that Arthur operates a cement plant that deposits dust on Galahad's adjoining land. This scenario has been treated as a classic nuisance case.[137] But could it not just as easily be argued that a trespass occurred? Even though invisible particles were the offending agent, would not their intrusion upon Galahad's possession constitute a direct physical invasion?

These examples demonstrate that the question of whether a plaintiff has a remedy under classic notions of trespass or nuisance can easily become dependant upon a court's willingness to accept ridiculous seman-

134. 342 P.2d 790 (Or. 1959).
135. *See supra* notes 29-41 and accompanying text.
136. Hay v. Cohoes Co., 3 Barb. 42, (N.Y. Sup. Ct. 1848), *aff'd by* 2 N.Y. 159, 163 (1848) (Court of Appeals held defendant liable for "caus[ing] a direct and immediate injury" on an action brought in case.).
137. *See, e.g.*, *Boomer*, 257 N.E.2d 870.

tic arguments. Although largely relegated to history, the distinction between direct and consequential harm has still caused problems in this century.[138] The question of plaintiffs' ability to allege facts sufficient to support a legal action brought in trespass became critical in Oregon (and in other jurisdictions) not only because nuisance developed into a weaker remedy than trespass, but also because the statute of limitations for a trespass action was three times longer than that for a nuisance action.[139]

The Oregon Supreme Court's landmark environmental decision, *Martin v. Reynolds Metals Co.*,[140] must be read in light of a prior classic nuisance case decided by that court in 1948, *Amphitheaters, Inc. v. Portland Meadows*.[141] In *Portland Meadows*, the plaintiff owned an outdoor movie theater.[142] The defendant operated a race track on a lot adjoining the plaintiff's land.[143] Bright lights from the defendant's race track made it impossible for the plaintiff to operate its business.[144] The state supreme court dismissed the plaintiff's contention that the defendant's activities created an action in trespass, stating, "the mere suggestion that the casting of light upon the premises of a plaintiff would render a defendant liable without proof of any actual damage, carries its own refutation."[145] The court next considered the plaintiff's argument that the lights from the racetrack constituted a nuisance under the *sic utere tuo* rule.[146] In rejecting this contention, the court squarely adopted the reasonable use rule as stated in the Restatement of Torts.[147] Relying on what it considered the substantial social utility of the "highly beneficial element"[148] of light, the court held that the defendant's use of light did not constitute a nuisance.[149]

In *Martin v. Reynolds Metals Co.*,[150] the plaintiffs complained that Reynolds Metal's operation of an aluminum reduction plant caused airborne fluoride gases and particulates to settle on their land, making it unfit for raising livestock. Plaintiffs sued the defendant for trespass.[151] The defendant, relying on *Amphitheater* and insisting that no action in trespass could be brought on the basis of consequential invasions of property interests, contended that the plaintiffs' only action was in nuisance.[152] The plaintiff's problem stemmed from the statute of limitations, under which a nuisance claim would allow plaintiffs damages for only two years of harm suffered prior to filing the action, while a trespass claim would allow six

138. *See* DONAHUE, *supra* note 45, at 223-27.
139. *Id. See also Martin*, 342 P.2d 790, 791.
140. 342 P.2d 790 (Or. 1959).
141. 198 P.2d 847 (Or. 1948).
142. *Id.* at 848.
143. *Id.*
144. *Id.* at 850.
145. *Id.*
146. *Id.* at 851.
147. *Id.* at 852.
148. *Id.* at 858.
149. *Id.*
150. 342 P.2d 790.
151. *Id.* at 791.
152. *Id.* at 794.

years worth of damages.[153]

The first sentence of the *Martin* opinion is perhaps the most instructive: "This is an action of trespass."[154] In responding to the defendant's argument that the injury suffered by the plaintiff was merely consequential, the court launched into a scientific exposition regarding the "physical and chemical nature of the substance which was deposited upon plaintiffs' land" in which it described the reduction process that gave rise to the formation of the invading fluoride wastes.[155] Within this scientific framework, it considered the traditional distinction between trespass and nuisance, focusing upon the issue of direct versus consequential invasion.[156]

> It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in the atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E=mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be reframed.[157]

Viewed in light of the historical division between actions in trespass and nuisance actions in case, the court's scientific discussion is revolutionary. For centuries, the distinction between direct and consequential injury was of paramount importance in determining whether a plaintiff had alleged facts sufficient to afford a remedy. Here, where the plaintiff's correct or incorrect allegation of trespass would mean the difference of four years' worth of damages, the Supreme Court of Oregon questioned the wisdom that lay at the very foundation of such a distinction. At the atomic level, the court rhetorically inquired, are not all nuisances really trespasses anyway?

After breaking down the historical distinction between trespass and nuisance, the court determined that the true inquiry in a case involving the invasion of property interests, quite apart from investigating the directness of the injury, was simply whether the defendant's actions violated a legally protected interest of the plaintiff.[158] The inquiry fell into two parts. First, the court held that it needed to determine whether the plaintiff had a legally protected interest.[159] Second, continued the court, if it determined that the plaintiff's interest was worthy of legal protection, it then needed to determine if that interest was substantially invaded by the defendant's conduct.[160] It was through the dynamic relationship between these two inquiries that it became apparent to the *Martin* court that the laws of nui-

153. *Id.* at 791.
154. *Id.*
155. *Id.* at 791-92.
156. *Id.* at 793.
157. *Id.* (emphasis in the original).
158. *Id.* at 794.
159. *Id.*
160. *Id.*

sance and trespass "came very close to merging."[161]

The *Martin* court noted that trespass and nuisance effectively merge in the sense that "when inquiry is made as to whether the plaintiff's interest falls within the ambit of trespass law the courts look at the interference with the plaintiff's *use and enjoyment* of his land to determine whether his interest in *exclusive possession* should be protected and thus the two torts coalesce."[162] In other words, the historical nuisance inquiry that focuses its analysis upon the use and enjoyment of land was really the first part of the *Martin* court's new two-part analysis. Under *Martin*, when a plaintiff proves that another has interfered with the *use and enjoyment* of his land, he implicitly proves that he has a legally protected interest in *possession*. The second part of the analysis then comes to the forefront. Is the defendant's intruding activity substantial enough to demand legal redress?

The two inquiries are contextually interrelated. The second inquiry into the substantiality of the harm caused by defendant's intrusion must be evaluated in relation to the plaintiff's interest.[163] "The broader and more diverse the possessor's protectable interests the more sensitive they are to the violation by the defendant and the easier it is to find that his conduct, although apparently inconsequential, gives rise to liability."[164] In other words, according to *Martin*, a court must determine the scope of the plaintiff's property interests from the vantage point of the property-holding plaintiff. Thus, the plaintiff's perspective should dictate the grounds under which the substantiality of the defendant's invasion is to be determined. The court concluded that theoretically broad visions of property interests inhering in the plaintiff could mean that any invasion of the plaintiff's property interests would be substantial, as was true under historical trespass notions.[165] Thus, actual damage would not necessarily be a required ingredient under this nuisance/trespass hybrid. Thus, held *Martin*, if a court cannot determine a perfectly just resolution between the plaintiff and the defendant, it should err on the side of upholding property rights against interference.[166] The court in *Martin* had no trouble determining that the defendant's polluting activities fulfilled all the requirements of this trespass doctrine.[167]

In summary, the *Martin* court created a nuisance/trespass hybrid, to which it attached the label of trespass. This common law action against property invasion involved a two-part inquiry: first, whether the plaintiff had a legally protected property interest, and second, whether that interest was substantially invaded or harmed.[168] The two inquiries were dynamically and contextually related in that the substantiality of the defendant's invasion into the plaintiff's property right was positively related to the

161. *Id.* at 795.
162. *Id.* (emphasis in the original).
163. *Id.* at 796.
164. *Id.*
165. *Id.* at 795-96.
166. *Id.* at 796-97.
167. *Id.* at 797.
168. *Id.* at 793-94.

breadth of the plaintiff's legally protected interest.[169] The existence and scope of the plaintiff's property right was to be determined from the vantage point of the plaintiff, so that any errors in dispute resolution would be in favor of protecting plaintiffs' property rights from invasion. No inquiry was made into the directness or indirectness of the invasion, for the findings of modern science proved the futility of legal standards founded upon such a distinction. Additionally, no inquiry was made into the standard of care employed by the defendant in conducting its activities because all that mattered was the invasion. Thus, in 1959, the *Martin* court created a modern, concise, property rights-based common law doctrine that stood ready to tackle the pollution problems of modern society.

D. A Comparative Look at the Development of Nuisance Law in England

The following is a comparative analysis of the development of English nuisance law. Although English courts briefly flirted with the reasonableness standard in the mid-nineteenth century, unlike its American counterpart, English nuisance law remained on the strict liability standard until the 1960s. In recent decades, however, the House of Lords has significantly undermined the strength of English nuisance law by requiring plaintiffs to show that harm suffered from property encroachments was reasonably foreseeable.

1. *A Brief Flirtation with the Reasonableness Standard*

The 1858 case of *Hole v. Barlow*[170] involved a manufacturer of bricks whose activities caused a "noxious and unwholesome vapour to arise"[171] to the injury of the plaintiff's residential premises and garden spot. The trial judge instructed the jury that "no action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place," and the jury returned a verdict for the defendant.[172] On appeal, the Common Bench upheld the trial judge's rule of reasonable use in a convenient and proper place.[173]

Four years later, in the case of *Bamford v. Turnley*,[174] the Exchequer chamber took the opportunity to reconsider and reject the *Hole* rule. The facts of *Bamford*, which also involved a brick manufacturer, were indistinguishable from *Hole*.[175] The plaintiff relied on the strict liability statement of nuisance in *William Aldred's Case*[176] to argue that *Hole* was wrongly decided[177]. The court agreed with the plaintiff and overruled *Hole*.[178]

169. *Id.*
170. 4 C.B. (N.S.) 334 (1858).
171. *Id.*
172. *Id.* at 335.
173. *Id.* at 337.
174. 3 B. & S. 66 (Ex. 1862).
175. *Id.*
176. 77 Eng. Rep. 816 (C.P. 1611); *see also supra* notes 35-38 and accompanying text.
177. *Bamford*, 3 B. & S. at 68-69.
178. *Id.* at 76-78.

Justice Bramwell's opinion in the *Bamford* case sharply contrasts the New York nuisance law developments that were contemporaneously occurring.[179] Bramwell rejected the same public benefit justification for causing a nuisance that the New York court accepted when he stated the following:

> But it is said that, temporary or permanent, [causing a nuisance] is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain.[180]

Bramwell agreed that brick manufacturing provided benefits to the public. But he insisted that public benefit provided no excuse for allowing a party to escape liability for the harm he may cause to other members of society because the very concept of public benefit implies that all costs are taken into account in its determination.

Justice Bramwell also raised another important issue in his opinion. He recognized a pragmatic limitation upon the strict liability of the *sic utere tuo* rule. Bramwell noted instances of "burning weeds, emptying cesspools, making noises during repairs, and other instances that would be nuisances if done wantonly or maliciously,"[181] but nevertheless may be lawfully done. These instances, he held, must have some basis for exception from strict liability.[182] Bramwell stated that the principle for excepting such activities is "that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action."[183] He called these necessary acts "reciprocal nuisances."[184] He cautioned that such a principle would not apply to an industrial pollution case like *Bamford* "where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land."[185]

2. Rylands v. Fletcher—A Continuation of Strict Liability Nuisance Law

The case of *Fletcher v. Rylands*[186] was considered by the Exchequer Cham-

179. *See supra* notes 65-73 and accompanying text.
180. 3 B. & S. at 84-85.
181. *Id.* at 83.
182. *Id.* at 83.
183. *Id.*
184. *Id.* at 84.
185. *Id.* at 83.
186. 1 L.R.-Ex. 265 (1866).

ber in 1866 and then, as *Rylands v. Fletcher*,[187] by the House of Lords in 1868. The plaintiff in *Rylands* was the lessee of a mine. The defendant owned a mill on land adjoining the plaintiff's.[188] The defendant constructed a reservoir on his land without realizing that a series of mine shafts lay below its surface.[189] The water from the defendant's reservoir broke through these shafts and flooded the plaintiff's mine.[190] The Exchequer Chamber, per Justice Blackburn, held the defendant absolutely liable for the damage caused by the reservoir stating the rule to be "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril."[191] The House of Lords, per Lord Chancellor Cairns, sought to cast more light on Blackburn's reasoning by articulating a "natural user" principle, which stated that "if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have compained. . . ."[192]

Scholars have presented *Rylands* as the historical source of modern strict liability theory.[193] It has also been viewed as a doctrine of its own, related to, but separate from nuisance law.[194] However, in his seminal article, *The Boundaries of Nuisance*,[195] Professor Newark demonstrates that the rule in *Rylands* was simply a restatement of common law nuisance. Of *Rylands*, Professor Newark states the following:

> This case is generally regarded as an important landmark–indeed, a turning point–in the law of tort; but an examination of the judgments shows that those who decided it were quite unconscious of any revolutionary or reactionary principles implicit in the decision. They thought of it as calling for no more than a restatement of settled principles, and Lord Cairns went so far as to describe those principles as "extremely simple." And in fact the main principle involved was extremely simple, being no more than the principle that negligence is not an element in the tort of nuisance.[196]

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187. 3 L.R.-H.L. 330 (1868).

188. *Id.* at 331-32.

189. *Id.*

190. *Id.*

191. 1 L.R.-Ex. 265 at 279.

192. 3 L.R.-H.L. 330 at 338. Of Cairns's opinion, a noted British nuisance law scholar said the following: "[I]t was unfortunate that Lord Cairns thought that his own paraphrase would cast additional light. To attempt to improve on Blackburn J.'s carefully worded judgments is never a worthwhile occupation." F. H. Newark, *Non-Natural User and Rylands* v. *Fletcher*, 24 MODERN L. REV. 557, 561-62 (1961).

193. *See, e.g.*, JAMES A. HENDERSON ET AL., THE TORTS PROCESS 535-60 (4th Ed. 1994). Henderson and his co-authors implicitly present *Rylands* as standing for the proposition that uncommon ultrahazardous activities are subject to absolute liability. *Id.* at 551-52, *citing* George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547-48 (1972).

194. *See, e.g.*, A.J. Waite, *Private Civil Litigation and the Environment*, LAND MGMT. & ENVTL. L. REP., Nov.-Dec. 1989, at 113, 114-15; Cambridge Water Co. v. Eastern Counties Leather Plc., 2 W.L.R. 53, 71 (H.L. 1994) (opinion of Lord Goff of Chieveley).

195. F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (1949).

196. *Id.* at 487.

In his article, Newark sets out to dispel the confusion that had arisen during the turn of the twentieth century regarding the topic of nuisance law. He traces nuisance to its early roots in Glanvill's time and concludes that it was fundamentally a tort to land.[197] The distinction between nuisance and trespass, of course, was that trespass arose from a defendant's actions upon a plaintiff's land, while nuisance arose from a defendant's actions beyond a plaintiff's land, the result of which the defendant nevertheless caused harm indirectly.[198] According to Newark, the confusion in nuisance began when seventeenth and eighteenth century judges, seeking to develop the legal principle of negligence, stretched it into the sphere of physical injury.[199] The typical fact pattern of the cases to which the principle was applied involved a defendant leaving the flap door to his cellar open so that it stuck out into the road.[200] The plaintiff would be riding happily down the rode on his horse when, not seeing the flap, he would collide with it and injur himself.[201] Lacking any better form of action to provide recovery for plaintiffs' in this situation, judges would allow recovery in nuisance.[202] Essentially, Newark argues that, as a result of the infection of personal injury concepts into the realm of nuisance, the torts of negligence and nuisance became inextricably intertwined.[203] It was this blurring of distinctions that caused *Rylands* to be misinterpreted as being a revolutionary strict liability case when, in fact, it was merely restating the tautology that negligence is not an element in the tort of nuisance.[204] Professor Newark does admit one item of novelty in the *Rylands* decision, however. He agrees that, as between adjoining land owners, *Rylands* determined that an isolated escape (as opposed to an ongoing barrage of property encroachments) is actionable.[205]

This absolute liability rule of nuisance law was reaffirmed as the turn of the twentieth century approached and passed. Two cases illustrate this pattern. In the 1885 case, *Ballard v. Tomlinson*,[206] the defendant constructed a drainage system from the water-closet in his printing-house to a deep well for the purposes of dumping raw sewage into the well. The plaintiff owned a brewery operation and drew water from the same percolating source through a well on his own land.[207] The only real issue in the case was whether the plaintiff possessed a sufficient property interest in the percolating water as to support an action for nuisance.[208] Once the court determined that the plaintiff had such an interest, there was no further inquiry; the defendant was held liable for his harm causing activities

197. *Id.* at 482.
198. *Id.* at 481-82.
199. *Id.* at 483-86.
200. *Id.* at 484-85.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 487.
205. *Id.* at 488.
206. 29 Ch. D. 115 (1882).
207. *Id.* at 116
208. *Id.* at 120.

regardless of negligence.[209] In the 1909 case, *West v. Bristol Tramways Co.*,[210] fumes from the chemically treated wood along the defendant's tramline damaged the plants and shrubs in the plaintiff's nursery garden. The plaintiff, a market gardener, recovered in nuisance from the tramline company, notwithstanding the fact that the defendant was not found to be negligent.[211]

In summary, the supposedly novel "Rule in *Rylands v. Fletcher*" is no more than a restatement of the classic *sic utere tuo* rule of nuisance which was reaffirmed in *Bamford v. Turnley*.[212] This pattern of reaffirmation continued. While American nuisance law underwent a significant weakening process after the Civil War and through the turn of the twentieth century,[213] British courts retained a strong nuisance law that held defendants absolutely liable for the harm their activities caused. As Newark explains, however, English nuisance law continued to contain many confusing elements arising from the injection of physical injury into the nuisance conception and uncertainty about the simple nature of the *Rylands* holding.[214] Furthermore, the temptation to place nuisance on a reasonableness standard as the court did in *Hole v. Barlow*, persisted.[215]

3. *The English Weakening of Nuisance Through the Requirement of Foreseeability of Damages*

At least twice beginning in the 1960s, the House of Lords had the occasion to consider the issue of foreseeability of damages as a justification for dismissing claims against nuisance causing defendants. One of these occasions occurred in the *Wagon Mound (No. 2)*[216] case. In that case, the

209. *Id.* at 122, 124, 126.
210. 2 K.B. 14 (1908).
211. *Id.* at 21-22.
212. 3 B. & S. 66 (Ex. 1862).
213. *See supra* Part II.B.1.
214. *See generally* Newark, *supra* note 192.
215. *See* Hole v. Barlow, 4 C.B. (N.S.) 334 (1858); *see, e.g.*, Andreae v. Selfridge & Co. Ltd., 1938 Ch. 1 (in case where plaintiff hotel operator sued defendant construction company for injury resulting from the demolition and building activities of defendant on adjoining property, court affirmed verdict for plaintiff but decreased damages based on a theory of reasonableness). In contrast with the Oregon Supreme Court's holding in *Martin v. Reynolds*, *supra* notes 150-69 and accompanying text, it is worth noting the case, *Esso Petroleum Co. Ltd. v. Southport Corp.*, 1956 App. Cas. 218 (H.L. 1956). In *Esso*, bad weather and mechanical malfunctions forced a ship, for purposes of safety to vessel and crew, to discharge the oil it was carrying as cargo into the Irish Sea, just off the coast of Preston. Ocean waves carried the oil until it washed up onto plaintiff's land on the banks of the River Ribble. Plaintiff brought actions in negligence, nuisance and trespass, but failed to recover for damage suffered. The court decided the case solely upon the issue of negligence, but two Lords offered dictum to the effect that, on the facts, no trespass action could be supported either. *Id.* at 242, 244. Lord Tucker's reason for so concluding was because the harm plaintiff's suffered was not direct. *Id.* at 244. Lord Tucker reached his conclusion on the issue of trespass only a few years before the Oregon Supreme Court, under similar facts (pollutants carried by natural means from their source to plaintiff's land), and eliminated the direct versus indirect distinction between nuisance and trespass. *See supra* notes 150-69 and accompanying text.
216. Overseas Tankship (U.K.), Ltd. v. Miller Steamship Co. Pty., 1967 App. Cas. 617 (P.C. 1967) [hereinafter Wagon Mound (No. 2)].

defendant chartered the sea vessel, the *Wagon Mound*, which was docked at a wharf in Sydney Harbour.[217] At a nearby wharf, the plaintiff had two ships that were undergoing repairs.[218] In the course of doing the repairs the owners of that wharf were carrying on welding activities that caused hot pieces of metal to fly off and fall into the sea.[219] During the night, careless engineers caused a large quantity of oil to spill out of the *Wagon Mound*.[220] The oil collected in the wharf at which the plaintiff's ships were docked.[221] Naturally, sparks from welding set fire to the oil, which spread throughout the wharf causing damage to plaintiff's vessels.[222] The plaintiff brought actions alternatively in nuisance and negligence.[223]

The Privy Council's main concern was the unforeseeability of the damages. This lack of foreseeability was sufficient to overcome the negligence claim and prevent the plaintiff's from recovering damages. The real problem the Privy Council faced, however, was whether lack of foreseeability could prevent the plaintiff from recovering damages under the absolute liability notion of nuisance.[224] That is why they stated the issue as "whether [plaintiff] can recover notwithstanding the finding that [the damage] was not foreseeable."[225]

Next, the Privy Council began to explore the "close relation between nuisance and negligence"[226] in an attempt to determine whether foreseeability is an essential element of nuisance. The Privy Council was forced to admit that "negligence is not an essential element in determining liability for nuisance."[227] But after admitting such, they broadened the definition of nuisance to such an extent as to destroy its technical meaning by stating that "[n]uisance is a term used to cover a wide variety of tortious acts or ommisions and in many negligence in the narrow sense is not essential."[228] In essence, the Privy Council held that "nuisance" is really a synonym for "tort." As such, some nuisances (or torts) require a finding of negligence, and some do not. Having made these assumptions, the Privy Council was only a short step away from applying the foreseeability requirement to nuisance. If foreseeability can be applied to those nuisances (torts) where negligence is an essential element for recovery, then there is no reason to discriminate against such nuisances in favor of nuisances (torts) that do not require negligence. The Privy Council stated the proposition as follows:

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 636.
225. *Id.*
226. *Id.* at 637.
227. *Id.* at 639.
228. *Id.*

> It could not be right to discriminate between different cases of nuisances so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none.[229]

After creating this false dilemma, the Privy Council opted for the latter choice.

The problem with the Privy Council's reasoning in *Wagon Mound (No. 2)* is that the foreseeability exception it created to the strict liability rule of nuisance effectively swallows the rule in two respects. First, absolute liability should mean absolute liability. If the unforeseeability of damages is allowed to prevent a plaintiff's recovery under a strict liability rule, liability can hardly be called absolute. Second, the Privy Council went too far in equating the narrow action of *nuisance* with the broad category of *tort*. If such an equation, in fact, represents reality, then the *sic utere tuo* rule of nuisance is dead, and the exception has truly devoured the rule.

More recently, the House of Lords had the opportunity to consider this foreseeability issue again in the 1994 case *Cambridge Water Co. v. Eastern Counties Leather Plc.*[230] In *Cambridge Water*, the defendants, leather manufacturers, used chlorinated solvents to degrease pelts at their tannery approximately one to three miles from the plaintiff's water borehole.[231] The plaintiff was a municipal water company.[232] Approximately fifteen years before plaintiffs brought this action, the defendants' solvents seeped into the ground and through a complicated process they could not have foreseen, made water from the borehole unfit for human consumption.[233] The water company brought an action for damages on alternative grounds of negligence, nuisance, and the rule in *Rylands v. Fletcher*.[234]

Speaking for the House of Lords, Lord Goff of Chieveley defined the issue as whether foreseeability of damages was a necessary element of the rule in *Rylands v. Fletcher*.[235] A conclusion in the affirmative was a simple matter of wedding nuisance (which under the *Wagon Mound (No. 2)* was held to a foreseeability requirement) together with the rule in *Rylands v. Fletcher*. Goff began this quest by reviewing the history of nuisance and exploring the relationship between nuisance and the rule in *Rylands v. Fletcher*.[236] Goff took Professor Newark's argument[237] that *Ryland's v. Fletcher* was merely a statement that negligence played no part in the determination of nuisance and made it stand for the proposition that nuisance and the rule in *Ryland v. Fletcher* bore a close historical connection to one

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229. *Id.* at 640.
230. 2 W.L.R. 53 (H.L. 1994).
231. *Id.*
232. *Id.* at 57.
233. *Id.* at 59-60.
234. *Id.* at 57.
235. 2 W.L.R. at 76.
236. *Id.* at 72.
237. *See supra* notes 192-205 and accompanying text.

another.[238] Lord Goff stated his belief based upon *Wagon Mound (No.2)* that "the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance . . . ."[239] Next he reasoned that the close historical tie between nuisance and *Rylands* led to the conclusion that foreseeability of damage is an essential element under the rule in *Rylands v. Fletcher*.[240] Finally addressing an argument that a strict liability *Rylands* rule would be in closer harmony with recent tough environmental legislation, Goff responded that, on the contrary, the fact of tougher legislation dictates a lesser need for common law.[241] He thus concluded that "foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule [in *Rylands v. Fletcher*]."[242]

After *Wagon Mound (No. 2)* and *Cambridge Water*, is there any strict liability left in English nuisance law? Goff's opinion answers this question in the affirmative. He drew a distinction between a damages setting and an injunction setting. He stated that where an injunction is sought, its purpose is to restrain further harmful action by the defendant. As a consequence, the defendant must be aware of the harm she causes. "It follows that [cases where injunction are claimed] provide no guidance on the question whether foreseeability of harm of the relevant type is a prerequisite of the recovery of damages . . . .[243]" In short, strict liability is still the rule in an injunction setting.[244]

E. Summary

Nuisance began in England as a doctrine that delivered absolute protection to property holders suffering injury to the use and enjoyment of their land.[245] There was no inquiry into the reasonableness or social utility of defendants' activities.[246] Furthermore, there was no balancing of interests.[247] After circa 1850, in New York and other jurisdictions, nuisance law was transformed from a no fault liability concept into one based upon negligence standards that required courts to balance not only the interests of the respective parties to an action, but also public interests.[248] Such balancing created a development-friendly nuisance doctrine that forced those on whose behalf the doctrine was created to bear the "reasonable" costs of industrial progress.

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238. 2 W.L.R. at 72-74.
239. *Id.* at 75.
240. *Id.* at 78-79.
241. *Id.* at 80.
242. *Id.*
243. *Id.* at 75.
244. However, this conclusion rests upon a narrow reading of *Wagon Mound (No. 2)*. If the House of Lords meant what it said in that case, namely, that nuisance is merely another word for tort, then the role of strict liability in an injunction setting is severely undermined.
245. *See supra* notes 29-41 and accompanying text.
246. *Id.*
247. *Id.*
248. *See supra* Part II.B.

Almost immediately after the New York Court of Appeals announced its reasonableness doctrine for nuisance in *Booth*,[249] it appears to have recognized that such a doctrine inflicted severe harm on small landholders. One could hypothesize that New York judges began to perceive the scales of justice tipping too far in favor of industry. Perhaps, as the modern era was upon them, these judges recognized that industrial America was no longer comprised of small and relatively powerless entrepreneurs arguably in need of relief from no fault liability, but rather large scale operations with political clout to match. Perhaps, in visionary fashion, they foresaw that environmental concerns would become more significant as the world grew smaller. But this musing probably attributes to these judges the type of foresight that can only be achieved through hindsight.

The most exciting developments in American environmental common law, however, occurred in Oregon around 1960. In *Martin*, the Oregon Supreme Court not only returned to a traditional strict liability foundation, but also created an entirely new and stream-lined common law environmental action.[250] This nuisance and trespass hybrid rejected old common law distinctions that no longer possessed any significance in the modern era. The hybrid created a workable doctrine ready to respond to demands of the environmental era. Because the *Martin* court developed such an effective common law action against environmental harm, its work serves as the foundation of the model common law environmental action offered in Part III.

The development of English nuisance law was considerably different than that of the United States doctrine. Although the Common Bench briefly adopted a reasonableness standard in *Hole v. Barlow*,[251] the Exchequer Chamber quickly overruled it.[252] Aside from this flirtation, nuisance law in England remained founded upon strict liability until the 1960s, at which time the House of Lords undermined the absolute liability of nuisance by imposing upon plaintiffs the burden of showing that damages suffered from a nuisance were reasonably foreseeable.[253]

III. A Model Environmental Common Law

Recognizing that American and English developments significantly weakened nuisance law, the following discussion seeks to combine the best elements of nuisance law analysis from both countries into a model common law environmental action. It draws primarily upon the Oregon Supreme Court's *Martin* doctrine,[254] but also incorporates helpful rules and analyses from Lord Goff's opinion in *Cambridge Water*[255] as well as Justice

249. 140 N.Y. 267 (1893).
250. *See supra* notes 150-69 and accompanying text.
251. 4 C.B. (N.S.) 334 (1858).
252. *Bamford*, 3 B. & S. 66 (1862).
253. *See supra* Part II.D.3.
254. *See supra* notes 150-69 and accompanying text.
255. *See supra* notes 230-44 and accompanying text.

Bramwell's opinion in *Bamford v. Turnley*.[256] The model is outlined in a three-part analysis designed to formulate a viable common law response to pollution problems. The analysis explores the following issues: 1) the legal remedy to be used when protecting a plaintiff's property right from encroachment, 2) the standard of care or duty owed to the plaintiff by the defendant in pollution cases, and 3) valid defenses that may be raised in pollution cases. Additionally, it briefly revisits the *Martin* standard for determining substantial harm. If a plaintiff proves substantial harm from a property encroachment under *Martin*'s contextual standard,[257] the court would apply the following analysis: 1) an injunction should issue against the defendant's future polluting operations and damages would be due for past injury to the plaintiff in the case of ongoing polluting activities, and 2) the defendant would not be allowed to argue that she used all reasonable care in conducting her activities; however, 3) the defendant could raise a "coming to the nuisance" or "coming to the invasion" affirmative defense to avoid the injunction.

In conformity with *Martin*'s merger of trespass and nuisance, this model sheds old labels in favor of a new one that describes the fundamental nature of trespass, nuisance and related actions. From this point forward, the environmental common law action described will be referred to as an action against *property encroachment*.

A. The Framework: The Coase Theorem

R.H. Coase's primary observation in his seminal article, *The Problem of Social Cost*, was that voluntary market exchanges do not merely allocate goods efficiently, they also allocate costs efficiently. As long as a liberal bargaining environment continues to exist, Coase argued, parties who disagree over their respective land uses will always come to cost minimizing agreements.[258] Coase stated the proposition as follows, "It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production."[259] In other words, in the absence of transaction costs, an efficient allocation of resources will always result, regardless of how property rights are originally assigned.

The Coase Theorem is a defining work in law and economics scholarship.[260] Ironically, however, if Coase's beginning assumption of costless

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256. *See supra* notes 181-85 and accompanying text.
257. *See supra* notes 168-69 and accompanying text.
258. *See generally* Coase, *supra* note 12.
259. *Id.* at 15.
260. The study of law and economics is an application of economic and efficiency analysis to legal issues. Whereas questions of justice and legality have historically dominated judicial inquiry, the study of law and economics advocates that efficiency considerations additionally be taken account of in the adjudicatory process. For an introduction to law and economics scholarship, see DAVID W. BARNES & LYNN A. STOUT, LAW AND ECONOMICS: CASES AND MATERIALS (1982) and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

transactions were an accurate description of real-world conditions, there would be no need for a study of law and economics because courts' delimitations of rights would have no effect on the efficient allocation of resources. Consequently, judges would have no need to concern themselves with economic considerations in determining their assignments of property rights. In his article, Coase alludes to this result, stating that "if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast."[261] In the real world, however, transactions are rarely, if ever, costless. As a result, Coase observes, in situations where transaction costs are significant, courts' actions have a direct impact upon economic activity. In light of this fact, Coase concludes:

> It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.[262]

Thus the existence of transactions costs provides continued vitality to the school of law and economics. The remaining discussion is offered with Coase's observations in mind.

B. The Remedy Issue: Calabresi and Melamed's "View of the Cathedral" and Beyond

The presumption that transactions costs do not exist would dictate that it makes no difference whether a court grants or stays the injunction in a property encroachment setting. A court's determination to issue an injunction, under Coase's analysis, only demarcates the initial allocation of the property right at issue. When a court grants an injunction, it recognizes the plaintiff's property right, that is, the court finds that the plaintiff has a right to be let alone in the quiet enjoyment of her property. On the other hand, when a court refuses an injunction, it vests a property right in the defendant and grants a right to the defendant to use the plaintiff's property for pollution purposes. In either case, if the losing party values the property right more than the winner, an exchange will occur in which the losing party will purchase the right from the winner so long as transactions costs are less than the determined value of that right. Conversely, if the winning party values the property right more than the loser, then no exchange will occur, and the property right will still vest in the party that values it the most. But, as Coase observed, transactions costs are almost always present.[263]

261. Coase, *supra* note 12, at 19.
262. *Id.*
263. Coase, *supra* note 12, at 15.

Calabresi and Melamed, in their hallmark article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, conclude that because transfer costs exist, it is important for courts to possess a solid framework for analyzing the question of assigning property rights.[264] In the article, Calabresi and Melamed articulate a framework of "entitlements," protected by property, liability, or inalienability rules. They present this framework as follows:

> An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: .... Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.... An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.... It should be clear that most entitlements to most goods are mixed.[265]

Under Calabresi and Melamed's framework, the concept of "private property" may be viewed as an entitlement protected by a property rule. When an entitlement is thus protected, the private property holder may not be robbed of ownership unless he sells it voluntarily at a subjectively chosen price. Therefore, a court will enjoin any attempts to forcefully deprive a property holder of his rights. Thus, property rules deliver relief in the form of an injunction. Yet, as Calabresi and Melamed note, when a court denies an injunction in a nuisance action and instead orders the payment of damages, it has effectively abrogated the plaintiff's property right and sustained the defendant's right to take the plaintiff's property for an objectively determined compensation.[266] In short, the court has given its blessing to a forced sale of property. In such a situation, according to Calabresi and Melamed, private property may be said to be protected merely by a liability rule.[267]

The Calabresi and Melamed framework suggests that the distinction between cases in which damages, as opposed to injunctive relief, is the appropriate remedy inheres in the distinction between property and liability. If a right is protected by a property rule, then a court should issue an injunction. On the other hand, if a right is protected by a liability rule, the law permits the right to be destroyed and damages are the remedy. Their framework is based upon the prevalence of an environment in which a free exchange of rights can occur.[268] In brief, the framework suggests that when transactions costs are low and a property right vests in the plaintiff, a court should issue an injunction because, if the defendant values the

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264. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
265. *Id.* at 1092-93.
266. *Id.* at 1092.
267. *Id.* at 1105. This latter result is the same as that dictated by the *Boomer* remedy. *See* notes 130-31 and accompanying text.
268. *Id.* at 1106-10.

assigned property entitlement more than the plaintiff, the parties may freely exchange it.[269] On the other hand, if transactions costs are so high as to prevent an exchange from occurring, and the property right vests in the plaintiff, then a court should award damages because they embody the court's objective determination of the value of the right and an approximation of the exchange that would have occurred had the plaintiff valued the right more.[270]

Calabresi and Melamed's distinction between liability and property rules is useful, but its focus on transactions costs overlooks an even more fundamental basis for distinguishing between those cases in which damage awards rather than injunctive relief are appropriate.[271] The basic distinction between damages and injunctive relief, as alluded to by Lord Goff of Chieveley in *Cambridge Water Co. v. Eastern Leather Plc.*,[272] is essentially a distinction between relief necessitated by past and future harm. An analysis of the nature of the damages remedy reveals its essence as a remedy for past injury. When a plaintiff brings a legal action for past injury suffered from pollution, he seeks compensation for that harm. Injunctions, on the other hand, premised as they are upon the existence of an ongoing injurious intrusion, contemplate future harm. As such, they are preventative in nature. The presumption therefore exists that damages cannot remedy contemplated future harm because no injury yet exists that justifies compensation. In short, if a plaintiff seeks redress for past injury, the action is for damages. If he seeks protection from future injury, the action is one for an injunction.

It is in the context of future injury that Calabresi and Melamed's transaction costs argument becomes important. Within this context, the ques-

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269. *Id.*

270. *Id.*

271. Although the following discussion considers when injunctions, not damages, are the appropriate remedy in pollution settings, a prior question, posed by Coase's analysis, is why an injunction should be granted at all. In the absence of transactions costs, it does not matter to whom a property right is given because the principles of exchange dictate that it will eventually fall into the hands of the party who values it the most. In pollution cases, why should a court not simply refuse an injunction and allow the plaintiffs to pay the defendants to reduce their pollution? At least two reasons support the award of an injunction in pollution settings. First, an injunction functions to clearly define property rights. Not issuing an injunction when pollution occurs creates a murky atmosphere for exchange. Denying an injunction may not necessarily mean that the defendant owns the right to pollute, but rather it may only mean that the plaintiff has not proven harm. Because it is unclear whether the right vests in the plaintiff or in the defendant, exchange is undermined. Injunctions, on the other hand, unequivocally determine in whom property rights are vested. Therefore, the denial of an injunction should be reserved exclusively to cases in which the plaintiff has failed to prove harm. Second, injunctions are not only clear property rights definers, they clearly delineate rights *that already exist.* Common law has traditionally recognized that in a nuisance-type setting the property right inheres in the injured plaintiff. *See supra* Part II. Such recognition likely flows from a natural sense that polluters may not pollute as of right, but rather must pay for costs imposed by pollution. Therefore, granting injunctions, as opposed to taking no action, comports with the rule of law as developed by the common law.

272. 2 W.L.R. 53, 75 (H.L. 1994); *see supra* notes 243-44 and accompanying text.

tion becomes whether any cases exist wherein it would be more appropriate to award damages for contemplated harm than to award injunctive relief. In the setting of contemplated harm, the presumption should be that injunctions are the only appropriate remedy.[273] At least three values support this presumption. First, issuing injunctions for contemplated harm protects not only the property rights of the plaintiff, but also protects the plaintiff's liberty interests by securing her right to choose for herself the price at which she is willing to dispense with her property. Second, injunctions serve to internalize the true subjective external costs that the polluter imposes upon the plaintiff. Under Coasian analysis, if the defendant's polluting activities are more valuable than the plaintiff's use or possession combined with transactions costs, a voluntary transfer of the property right will occur under terms willingly and subjectively set by the disputing parties *despite the injunction*.[274] An award of damages serves to internalize only objectively determined external costs. Thus injunctive relief not only protects the plaintiff's right to determine freely and subjectively the value of her own property, it also facilitates market trading based upon more accurate valuations of property rights than does an award of damages. Third, a credible threat of injunction encourages bargaining between the polluter and the owners of property harmed by the pollution before the polluter begins its activities.

Each of the reasons supporting the use of injunctive relief rather than damages remedies in pollution cases is founded upon the notion that property rights are inherently connected with liberty. This point is critical because purely objective value analysis could lead one to conclude that damages are the preferred legal remedy in nuisance and trespass cases. The argument is often made that damages serve to internalize external costs, thus meeting the demands of efficiency.[275] A classic scenario illustrating this process involves an industrial polluter and a residential plaintiff harmed by the pollution. The polluter's activities impose costs upon the residential plaintiff that are not taken into account when the polluter decided its production levels. Using this inaccurate cost figure, the polluting industry produces more goods than society is prepared to purchase, leaving the plaintiff to bear the pollution costs.[276] Damages awards, it is argued, force the polluting firm to take its pollution costs into account when selecting its production levels. In this manner, damages force inter-

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273. Calabresi & Melamed raise some compelling objections to making such a presumption irrebuttable. *See infra* notes 280-83 and accompanying text.

274. Coase's contention that an exchange will occur once property rights are well defined (as happens with an injunction) rests upon the assumption that such an exchange *could* legally occur. Coase never addressed the question of whether a contract for the sale of an injunction right would be legally valid. No legal obstacles preventing such a transaction appear to exist. A private injunction represents a court's empowering a plaintiff to enforce her right to be let alone in the enjoyment of her land. It is up to the plaintiff to enforce the injunction. If the plaintiff desires to exchange her private right to an injunction for defendant's consideration, it would appear that she is entitled to do so.

275. *See, e.g.*, BARNES & STOUT, *supra* note 260, at 22-25; Orchard View Farms, Inc. v. Martin Marietta Aluminum, 500 F. Supp. 984, 988-89 (D. Or. 1980).

276. *Id.*

nalization of external costs.[277]

But a damages-only analysis ignores the value of freedom. Damage awards represent a court's objective valuation of the property right vesting in the plaintiff. No one, however, is better able to determine the value of the plaintiff's property right to the plaintiff than the plaintiff herself. Denying the plaintiff the opportunity to sit at the bargaining table and choose for herself whether to accept or reject the price a firm is willing to pay to possess a portion of her rights is an encroachment upon her liberty. Issuing damages in lieu of injunctions creates a power within firms equivalent to private eminent domain.[278]

Injunctions, on the other hand, serve both the values of efficiency and freedom.[279] If a firm is willing to pay the plaintiff's subjectively determined price, external costs have become internalized in precisely the same manner as they would be with a damages award, except that the value of the property right is determined subjectively by the person in whom the property right is vested; not objectively by the court. If the firm is not willing to pay the plaintiff's price for the right to pollute her property, then it (and therefore, society) does not value the right more than the plaintiff and should not be allowed to acquire it through judicial intervention. In either case, the value of efficiency is served because the property right vests in the party that values it the most. In addition, both the plaintiff and the defendant retain their freedom to enter into a voluntary exchange of the property right when their individual valuations so determine.

In arguing that transaction costs may be so high as to make damages a more appropriate remedy against contemplated harm, Calabresi and Melamed cite "hold-out" and related problems.[280] Hold-out "problems" can exist in any bargaining situation. Essentially, such problems result from the fact that human beings are not mind-readers and it is impossible to determine whether a person who insists that she values a property right to a certain degree actually values it to the level she insists. The bargaining situation between the polluter and an injunction-holding plaintiff or group of plaintiffs is not significantly different than the bargaining situation that exists on a used-car lot. No one but the polluter knows what value the polluter places upon a right to pollute. No one but the property owner knows what value she places upon her right to be free from such pollution.

The hold-out problem is illustrated in the following example. Suppose a polluter successfully bargains for the sale of property rights from nine of ten injunction-holders and the tenth "holds-out" for a higher price than the value he actually places upon the right. In this situation, if the tenth

277. *Id.*

278. *Cf.* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 740-41 (1979) (discussing the contention that a damages remedy in a nuisance setting creates a private right of eminent domain in the defendant, thus infringing on plaintiff's liberty).

279. *Cf.* A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075 (1980) (comparing the efficiency of damages versus injunctive remedies).

280. Calabresi & Melamed, *supra* note 264, at 1106-07.

injunction-holder insists upon holding out for a price far above that at which he truly values his right, and the firm pays it, he receives no greater windfall in quality than that received by a used-car salesman who collects his asking price for an automobile (which undoubtedly was greater than its true value to him). The firm's payment of the hold-out price demonstrates that it values the right to pollute at least as much as the hold-out price. Therefore, the property rights become vested in the party that values them most, even though a distributional problem exists between the ten injunction holders.[281] If the firm refuses to pay the hold-out price, a rational hold-out injunction-holder would reduce his price if he wants to receive any windfall at all. If the hold-out injunction-holder comes down in his price to the level at which he actually values his property right and the firm refuses to pay it, then the property right is vested in the party who values it the most, the injunction-holder. Therefore, the hold-out problem is not really a problem at all, but merely a manifestation of common bargaining processes.

A more perplexing transaction costs problem arises in a situation in which it is impossible to get all the potential injunction-holders to the bargaining table, either because they are too numerous or because of strategic behavior on their parts.[282] However, this argument merely reflects high transactions costs, which cannot justify infringement upon the plaintiff's right to freely determine the value of her property interest when she has proven that the defendant's activities have encroached her possession. It is only when the value of efficiency is not counter-balanced by the value of liberty that arguments justifying a damages award in lieu of an injunction become compelling.

Returning again to Calabresi's and Melamed's article, they refer to accidental personal injury claims as being within the class of cases in which transactions costs are so high that damages are the appropriate remedy.[283] It is true that damages awards are the appropriate remedy for personal injury cases, but such cases are generally classic examples of past injury. Calabresi and Melamed note that it would be difficult to give to potential victims a negotiable property right not to be injured by accidents in the future,[284] but such an example is fundamentally different than a pollution case involving a manifest pattern of injurious activity and intentional conduct. If a personal injury plaintiff were able to demonstrate a long-standing pattern of being beat-up by a street bully, then a clear case for past damages and an injunction against future abusive activities from the bully would be maintainable.

In summary, Calabresi's and Melamed's construct of entitlements protected by property and liability rules provides a good starting point for

281. This distributional problem is a separate issue, distinct from the value question. Even though one of the plaintiffs may receive a windfall in a hold-out situation, the property right still vests in the party that values it the most.

282. *See, e.g.*, Calabresi & Melamed, *supra* note 264, at 1106-07.

283. *Id.* at 1108-09.

284. *Id.* at 1108.

analyzing the issue of damages versus injunction. The true test, however, for determining whether it is appropriate to award damages, as opposed to injunctive relief, rests upon the simple difference between past harm, for which compensatory damages are due, and the prevention of future harm, against which an injunction should issue. Focusing upon this distinction portrays the fundamentally flawed nature of a damages remedy for contemplated harm, namely, that it fails to protect plaintiffs' liberty interests.

C. Fault and Duty

One of the difficulties with the term "strict liability" in the property invasion context is that to many people, the notion of liability is followed closely by visions of damages awards.[285] But where does liability, and particularly strict liability, fit in the context of injunctive relief against pollution? The distinction between past and future is also useful in answering this question.

Under negligence principles, the duty a defendant owes to a plaintiff is that of using objectively reasonable or ordinary care in conducting his activities.[286] Strict liability makes no such inquiry into whether defendants should be faulted for not exercising the level of care they were duty-bound to exercise. In the case of past harm—a damages setting—strict liability renders defendants liable for the harm they caused regardless of fault. In the case of contemplated future harm—an injunction setting—the strict liability concept has its application in keeping consideration of the reasonableness of a polluter's conduct or balancing of the interests out of a property invasion equation.

The distinction between the past and the future forms the dividing line between the two broad categories of cases one usually finds in the pollution context. The first type of case is associated with the past; a discrete polluting event. In this class of case, the defendant causes pollution, either accidentally or intentionally, in a one-time event. There is no pattern of polluting conduct and therefore no evidence of continuing activity against which an injunction should issue. Thus the remedy is damages, and the question to be answered is to what standard of fault the defendant ought to be held. The second class of case is associated with the future; an ongoing property invasion. In the case of continuing property invasion, courts have typically labelled the defendant's activity as intentional.[287] Because an injunction action seeks relief against future harm, a defendant is necessarily aware of the injury she is causing and therefore continuing her activities must be perceived as intentional conduct.[288]

285. *See generally* Calabresi & Melamed, *supra* note 264.

286. *See, e.g.*, Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

287. *See* DONAHUE, *supra* note 45, at 875.

288. Lord Goff of Chieveley made this point in *Cambridge Water Co.*, 2 W.L.R. 53, 75 (H.L. 1994) ("where an injunction is claimed, its purpose is to restrain further action by the defendant which may interfere with the plaintiff's enjoyment of his land, and ex hypothesi the defendant must be aware . . . .").

A conclusion that a no fault standard should apply in an injunction setting follows from the recognition that a pattern of continuing property invasions provides dispositive evidence of intentional behavior. Under standard intentional tort principles, an allegation of intentionally caused injury disposes of any need to inquire into the reasonableness of the harm causing activity. This principle follows from the recognition that in intentional tort actions judicial inquiry does not focus on the risk-creating nature or reasonableness of the defendant's conduct. Rather, judicial inquiry focuses upon whether the defendant desired or was "substantially certain" that harm-causing consequences would follow from her pollution activities.[289] Once intent is proven, only causation remains to be demonstrated in order to make out a prima facie case for recovery. Plaintiffs suffering from intentional invasions of their property interests should be treated no differently than plaintiffs suffering from intentional infliction of personal injury. Therefore, in an injunction setting, where the defendant's conduct is intentional, inquiries into fault are inappropriate, as are inquiries into the utility of the defendant's harm causing activities.[290] This is equally true when damages are requested for harm to property suffered from an ongoing invasion.

The context in which strict liability requires greater justification is that of past, discrete property invasion–a damages setting. It is in the case of discrete incidents of pollution that a defendant seems, at first glance, to be justified in claiming that the harm she caused was merely accidental and that she should only be held to a standard of reasonable care. However, two considerations support the imposition of strict liability in such cases.[291] The first consideration, based in fairness, provides that a negli-

289. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1977) ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."); *id.* § 282 (defining negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"). *See also* Garratt v. Dailey, 279 P.2d 1091, 1095 (Wash. 1955) (case remanded for determination whether five year old boy knew with "substantial certainty that the plaintiff intended to sit down where the chair had been before he moved it"); Vosburg v. Putney, 50 N.W. 403 (Wis. 1891) (holding boy liable for kicking a classmate even lacking intent to do harm); MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 759-64 (1987).

290. *See* DONAHUE, *supra* note 45, at 875. As noted by FRANKLIN & RABIN, *supra* note 289, at 762, it is odd that the prima facie case for intentional nuisance under the provisions of the second Restatement, *see supra* Part III.B., requires an inquiry into the reasonableness of the defendant's conduct. An apparent discrepancy exists between such a special standard for nuisance and regular doctrines of intentional tort that do not inquire into reasonableness. The second Restatement of Torts and most jurisdictions accept that ongoing invasions provide dispositive proof of intent (*see* DONAHUE, *supra* note 45, at 875), but nevertheless require the plaintiff who claims nuisance to prove an element not part of the traditional prima facie case for intentional tort. Franklin's and Rabin's observation forces one to ask why, once the plaintiff has proven intent, it would ever be necessary for a plaintiff to prove that the defendant's conduct was unreasonable as well. Perhaps a good answer is that a reasonableness standard, under the Restatement's structure, provides a loophole that opens the door to explicit utility balancing.

291. These justifications also apply in the context of ongoing pollution.

gence standard is only appropriate in cases where risks of accidental harm are reciprocated between the plaintiff and the defendant.[292] The second and more compelling consideration is grounded in an efficiency analysis.[293]

With respect to the reciprocity consideration, Professor George Fletcher, after conducting a study of tort cases, in which varying standards of liability were imposed, concluded that:

> The general principle expressed in all of these situations governed.by diverse doctrinal standards is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant–in short, for injuries resulting from nonreciprocal risks.[294]

Under Fletcher's analysis, strict liability should apply to situations where a defendant's conduct imposed a risk "greater in degree and different in order" from those imposed upon the defendant by the plaintiff.

A typical example of a situation wherein risks are reciprocal involves Arthur and Lancelot, pedestrians on a crowded sidewalk in a down-town business district during lunch time. While walking along the busy sidewalk, Arthur momentarily gazes over at a newsstand to catch a glimpse of the cover story on his favorite magazine. Not seeing Lancelot moving directly toward him, Arthur collides with Lancelot, who is unable to avoid the impact. Lancelot falls to the ground and suffers severe injury. The standard of care demanded in this situation, under reciprocity analysis, would be that of reasonable care. This conclusion is founded on the recognition that the risk of injury that Arthur's pedestrian activities imposed upon Lancelot were the same as the risk of injury imposed upon Arthur from Lancelot's pedestrian activities. Lancelot could just as easily have caused an accident that would result in Arthur's being injured. All that the law requires is that Arthur exerts ordinary or reasonable care in conducting his activities. Whether Arthur's injury-causing behavior was reasonable in the preceding example would be a question for the jury.

Under a reciprocity analysis, the case for holding industrial polluters strictly liable for the harm they cause is compelling. A typical industrial pollution situation pits a residential property owner against a firm that releases, for example, fluorides into the atmosphere. There is little risk that the residential property holder will release, even accidentally, chemical pollutants that will cause the firm's property substantial harm. Therefore, the firm should be held strictly liable for any substantial harm caused by the actualization of the polluting risks and imposed upon the residential plaintiff.

The more difficult cases under reciprocity analysis arise in situations between similarly situated plaintiffs, such as two residential plaintiffs, one

292. *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).
293. *Cf.* POSNER, *supra* note 260, at 160-67.
294. *Id.*

of whom pollutes the land of the other. But even in this situation the argument is still compelling that a residential polluter imposes nonreciprocal risks upon his community. Consider the example of Arthur, a residential owner. Arthur's hobby is painting automobiles and he prefers to store significant amounts of paint in his garage so that he can combine their various hues and shades in order to create a wide range of colors. Eventually, several paint cans rust and paint runs upon Lancelot's land, killing his trees, destroying the beauty of his landscaping. Arthur's paint storage created a risk unlike any that Lancelot's residential activities created for Arthur. Therefore, he should be held strictly liable for any damage that his storage activity causes to Lancelot's property. Indeed, unless Arthur could prove that his residential neighborhood contained a majority of home-owners who store large quantities of paint in their garage and that spillage accidents ordinarily occur, Arthur should be held to a standard of strict liability for the harm his storage activity causes.

Efficiency considerations also support the imposition of strict liability in a setting wherein damages are requested for past injury caused by pollution. The application of a negligence standard to an average tort case and a finding that a defendant exercised reasonable care in his conduct, results in the injured plaintiff being forced to bear the costs of the accident. In two situations, efficiency considerations support this result. First, the plaintiff is the least-cost avoider of the accident, i.e. the cost to the firm of taking the next available accident prevention measure (marginal cost) is greater than the marginal cost of accident prevention to the plaintiff.[295] Second, the defendant's level of activity is not beyond the optimum level in terms of social welfare.[296]

The least-cost avoider consideration was introduced in scholarly efforts to develop an instrumental framework to replace or to supplement negligence's case by case analysis.[297] These efforts to stream-line the civil liability system sought to develop categories of activities in which one class of actor was usually the least cost avoider of accidents. Under this approach, if a defendant's activities fall into a particular category in which actors similarly situated to the defendant are almost always the least-cost avoider, the defendant should be held strictly liable for any harm resulting from conducting his activities.[298]

In cases of discrete incidents of pollution, it is almost always the case that the polluter is the least-cost avoider of accidents. This conclusion fol-

295. For an introduction to least cost avoider analysis in the pollution context, see Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 654-57 (1971).

296. For a discussion of optimal activity levels, see POSNER, *supra* note 260, at 160-64. Oliver Wendell Holmes provides a third reason to let the plaintiff bear the costs of accidental injury, stating that the "general principle of our law is that loss from accident must lie where it falls . . . ." OLIVER WENDELL HOLMES, THE COMMON LAW 94 (1881).

297. *See generally* BARNES & STOUT, *supra* note 260, at 129; GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Michelman, *supra* note 295.

298. *See* BARNES & STOUT, *supra* note 260, at 129-30.

lows from the fact that usually the polluter possesses the greatest information about the risks of pollution from his activities. In the discrete industrial pollution setting, firms, and not local residential owners, are well-appraised of the pollution risks inherent in their manufacturing processes. In the case of Arthur, the automobile painter, it is Arthur who knows best what is in his own garage. Therefore, the polluters in both of these contexts should be subjected to strict liability because, by deduction, social welfare increases when lower-cost accident prevention measures are taken.

The second efficiency consideration concerns itself with ensuring that optimal levels of particular activities are achieved.[299] While negligence principles ensure that a cost efficient level of care will result in the conduct of any given activity,[300] it does not guarantee that an optimal level of activity, in terms of social welfare will be conducted. Judge Posner described this proposition as follows:

> The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk of harm of an accident will be less, or by reducing the scale of the activity in order to minimize the number of accidents caused by it. By making the actor strictly liable—by denying him in other words an excuse based upon his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.[301]

Holding polluters strictly liable for the harm their polluting activities cause would thus provide them with an incentive not only to develop more effective pollution control devices, as would exist under a negligence regime, but also an incentive to relocate, to change the scale of operations, or perhaps even to exit the industry altogether.

Moreover, when accidental pollution costs do not play a role in a firm's production level decisions, the firm will choose a level of activity greater than that for which society would be willing to pay had society considered such pollution costs. Consequently, sub-optimal production levels will result. An accurate determination of the pollution levels society is willing to tolerate can occur only if pollution costs are internalized into

299. *See* Indiana Harbor Belt R.R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990); POSNER, *supra* note 260, § 6.5; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

300. *See* McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987); United States v. Carroll Towing Co., 159 F.2d 169 (2d. Cir. 1947); BARNES & STOUT, *supra* note 260, at 92-104.

301. *Indiana Harbor Belt*, 916 F.2d at 1177.

production level decisions. Holding polluters strictly liable for the harm caused by their polluting activities will force this internalization.

In sum, both fairness and efficiency considerations compel the conclusion that polluters ought to be held strictly liable for the harm they cause, even by discrete incidents of pollution. Additional reasons for holding polluters to a strict liability standard are grounded in the high value associated with the notions of private property and of environmental well-being. Placing the burden of pollution costs, even those incurred accidentally, creates a judicial doctrine that compromises environmental quality by allowing greater pollution levels than social welfare dictates. Thus, the application of a strict liability standard for pollution serves to protect the combined values of private property and environmental vitality.

D. The "Coming to the Nuisance" or "Coming to the Encroachment" Defense

The following example serves to demonstrate briefly the mechanics of the "coming to the nuisance" or "coming to the encroachment" defense: Arthur operates a cement factory. Because he desired to avoid both liability for the pollution he might cause and being handed an injunction, he chose to locate his activities far away from the city, and hence, far away from potential plaintiffs. He located his operations on a large tract of rural land so that all the cement dust created as a by-product of his operations were deposited upon his own land. Arthur conducted his industrial activities in this manner over the course of two decades. The value of Arthur's land in the vicinity of his cement plant dropped significantly as a result of the constant barrage of cement dust. Arthur later decided that he did not really need all of the land surrounding his cement plant and so determined that he would sell a tract on the market at a low price. Being in the market for some inexpensive farmland and fully informed about the condition of the land, Galahad bought Arthur's lot at a very good price. Shortly after buying the land, Galahad became annoyed at the constant settling of cement dust on his property and brought a common law action against the invasion of his land.

Galahad presently claims that Arthur should be enjoined from continuing his operations and held strictly liable for the harm caused to Galahad's land. But Arthur contends that Galahad knew Arthur's cement plant caused dust to settle upon the tract of land in question but bought it anyway. Arthur insists that Galahad "came to the nuisance." Furthermore, Arthur contends that Galahad bought the tract of land in question at a significantly reduced price because of the cement dust problem. Arthur argues, in effect, that the costs of Arthur's pollution have become capitalized in the values of his land, including the lot sold to Galahad. If Galahad receives an injunction and damages, Arthur insists, Galahad will receive an undeserved windfall.

In this scenario, Arthur would be correct under the proposed model. When pollution costs have become capitalized in the surrounding land values, the defendant should have the right to raise such a defense to a prop-

erty invasion action. This affirmative defense would be successful if the defendant were able to demonstrate by a preponderance of evidence that, all things being equal, granting an injunction would cause a significant and unfair increase in the value of the plaintiff's property. A "coming to the encroachment" defense guards against plaintiffs' being able to gain undeserved windfalls by bringing property invasion suits when the costs of pollution have become capitalized in tracts of land bought at reduced prices.

E. Substantial Harm

The *Martin* model for determining substantial harm needs little additional explanation, but is worth highlighting.[302] Under *Martin*, the vantage point of the plaintiff determines the standard for substantial harm.[303] As a result, the especially sensitive plaintiff, one putting her land to a special use, will have adequate protection for such use. For example, a plaintiff may dedicate her land to the raising of buffalomps for their milk production. Buffalomp milk production, however, may be particularly sensitive to levels of fluoride gasses in the ambient air. Under *Martin*, the standard of harm in such a case should be measured from the vantage point of a land-use dedicated to buffalomp milk production, and the plaintiff would have the burden of showing substantial harm to her land use in that regard.

The *Martin* standard for determining substantial harm is ideal in the environmental law context for at least two reasons. First, it recognizes that not all land uses are equally sensitive to the effects of pollution. Therefore, plaintiffs who may dedicate their land to certain environmentally sensitive uses are not left without a remedy when their property rights are invaded. Second, the *Martin* harm standard focuses the court's attention on determining whether the plaintiff has in fact suffered substantial injury. Under a *Martin* standard, the common law would likely develop various contextual harm standards in accordance with different categories of land-use activities. Such developments would require hard scientific research and testable data. In short, scientifically founded information would be of prime significance under *Martin*'s standard for determining harm.[304]

F. Reciprocal Encroachment

Justice Bramwell's concept of reciprocal nuisances from his opinion in *Bamford v. Turnley*[305] also needs little additional explanation. This principle provides an exception to the general rule of strict liability for property encroachments arising from land uses that are common or ordinary. The reciprocal encroachment principle should be used with caution and with particular care in order to avoid expanding it beyond its limited scope. The pragmatic policy behind allowing for reciprocal encroachments is the discouragement of petty law suits. In keeping with Bramwell's principle,

302. *See supra* notes 163-67 and accompanying text.
303. 342 P.2d 790, 796 (Or. 1959).
304. Conversation with Richard L. Stroup, Political Economy Research Center (PERC) Senior Associate & Professor of Economics at Montana State University (June, 1995).
305. 3 B. & S. 62 (Ex. 1862). *See supra* notes 180-84 and accompanying text.

plaintiffs may recover damages and seek injunctions against harm caused by common and ordinary uses upon a showing of wantoness or malice.[306] It should be noted that this principle should never be employed in the context of industiral pollution of the property of residential plaintiff, as pollutive encroachments are per se exceptional.

G. Summary

If federal environmental statutes were abandoned in favor of the common law, the following is a summary of the model of law that would be necessary to effectively govern environmental harm. The foundation of the model comes from *Martin v. Reynolds Metals Co.*[307] The *Martin* inquiry is divided into two parts.[308] The first part asks whether the plaintiff has a legally protected property interest.[309] The second, asks whether the plaintiff's property right (assuming it exists) was substantially harmed by the defendant's activities.[310] These two inquires are intertwined, so that the question of whether a defendant has substantially harmed the plaintiff's property right depends upon the scope of the plaintiff's right. Further the scope of the plaintiff's right is determined from the vantage point of the plaintiff.

Ascertaining the appropriate remedy in a property invasion setting depends, essentially, upon the distinction between past and future. Past harm to a plaintiff's property rights, discrete or otherwise, receives its remedy in the form of compensatory damages. The ruling presumption in the context of contemplating future harm from ongoing pollution is that awards of damages instead of injunctions are inappropriate. Injunctions are the best remedy against future harm. Even when transactions costs are prohibitively high, in light of damage being done to a plaintiff's liberty interests by a court-forced sale of property rights, injunctions remain the only appropriate remedy in a future setting.

In the pollution setting, inquiry into defendant's fault is inappropriate. The defendant should be held strictly liable for any past damages caused by his activities and should not be allowed to plead reasonableness, social utility, or any other interest balancing arguments as a defense to an injunction. There are good reasons why such defenses were never allowed traditionally. First of all, ongoing pollution is intentional in its nature and, therefore, inquiries into fault are entirely irrelevant in actions to abate. Second, in cases of discrete incidents of pollution, not only do principles of fairness and equity favor the suffering plaintiff, but also considerations of efficiency. The defendant's only defense against an injunction in a case of ongoing and substantially harmful pollution is that the plaintiff "came to the invasion." Under this defense, the defendant must prove that the costs of its pollution became capitalized in land values and that the plaintiff

306. *See supra* notes 181-85 and accompanying text.
307. 342 P.2d 790 (Or. 1959).
308. *Id.* at 794.
309. *Id.*
310. *Id.* at 796.

receiving a legal remedy against the defendant's pollution would create a windfall of benefits for the plaintiff.

Conclusion

In the twentieth century, American and English societies have seen a dramatic shift from a rule of law founded upon the common law to a legal regime predominantly statutory in nature. So dominating is the presence of statutory law that few question the presumption that federal statutes, and not the common law, should grant the environment its legal voice.[311] This presumption ought to be tested and challenged.

Common law nuisance has undergone transformations in America and England that have weakened its effectiveness as a tool for environmental protection. A classic form of nuisance law, however, equipped with strict liability and the power to enjoin polluting activities would provide a powerful environmental cause of action. This Note advocates a return to traditional common law principles founded upon successful judicial efforts to address environmental concerns, efforts made a decade before the significant federal environmental legislation of the 1970s was introduced. But it is not only a return to traditional common law that is advocated, rather a contemporary version of it, fit to tackle the environmental problems of the modern era.

An underlying purpose of this Note has been to promote reflection and discussion upon a legal system that seems to have been either neglected or given short shrift in the international environmental debates of our time. Determining the scope of the common law within an international system of environmental protection is the topic of additional discussion. This Note argues that the common law ought to play a greater role in environmental protection. A common law solution to the problem of pollution should not be rejected in favor of statutory or regulatory solutions without closer examination of models such as that proposed in this Note.

311. *See, e.g.*, Jesse Dukeminier & James E. Krier, Property 822-23 (2d ed. 1988).