ON BEING A NUISANCE

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Nuisance is once again a hot topic in legal practice and scholarship. Public nuisance law is at the center of efforts to hold product manufacturers, energy companies, and internet platforms liable for billions in losses. Scholars have in turn offered competing accounts of the legitimacy and scope of this form of liability. Meanwhile, private nuisance has been the subject of renewed academic attention, including the issuance of new Restatement provisions, that aim to make sense of its distinctive features. Unfortunately, to date, these two lines of inquiry have mostly been pursued in isolation, a pattern that reflects the prevailing wisdom (famously articulated by William Prosser and others) that the two nuisances share nothing beyond a common name. To the contrary, this Article maintains that the key to practical and theoretical progress in this complex area of law is to appreciate that the two nuisances are variants of the same general concept. As variants, they do indeed differ: a private nuisance is a wrong involving the violation of another's right to use and enjoy their property, whereas public nuisance in the first instance does not turn on the violation of private property rights. And yet both nuisances involve wrongful interferences with others' access to, or use of, physical spaces or resources. By attending to and appreciating this common core, lawyers, judges, and scholars will be better positioned to develop nuisance law in a consistent and principled manner.

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Introduction

"There are . . . two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name . . . ."[1]

"'Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour.'"[2]

The tort topic of the moment is nuisance. In particular, cities, states, and tribes across the United States have invoked *public* nuisance law as a basis for claims against manufacturers and distributors of products including guns, lead paint, and opioid pain medications.[3] Public nuisance has also been invoked as grounds for courts to order energy companies to curtail their carbon emissions,[4] and to require internet platforms to take measures to protect the mental health of users, as well as to pay for

1 William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966).

2 *Id.* at 999 n.12 (quoting W.T.S. Stallybrass, Salmond on the Law of Torts (9th ed. 1936)).

3 *See* Linda S. Mullenix, Public Nuisance: The New Mass Tort Frontier 131–229 (2024) (describing several of these litigations in detail); Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 403 (2d ed., May 2023 update) (citing public nuisance suits for injuries caused by sale of guns, lead paint, and opioids).

4 David Bullock, *Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems*, 85 Mod. L. Rev. 1136, 1154–67 (2022).

education and treatment.[5] While state high courts have thus far tended to be skeptical of these claims,[6] greater receptivity from some lower courts has helped to generate multi-billion-dollar settlements.[7]

Unsurprisingly, the contours of public nuisance law have also been the subject of sprawling scholarly debate.[8] On the "pro" side are scholars who maintain that, by design, it confers on courts broad powers to address any widespread—and thus "public"—harms, especially when other branches of government don't.[9] Those on the "con" side argue that public nuisance law does not authorize suits that aim ultimately to obtain compensation for individual injuries.[10] Others have invoked substantive tort theory for guidance in determining the scope of

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5 Gene Johnson, *Seattle Schools Sue Tech Giants Over Social Media Harm*, Associated Press (Jan. 8, 2023), https://apnews.com/article/social-media-seattle-lawsuits-mental-health-965a8f373e3bfed8157571912cc3b542 [https://perma.cc/MJJ5-ZSQX].

6 *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1143 (Ill. 2004); In re Lead Paint Litig., 924 A.2d 484, 501 (N.J. 2007); State *ex rel.* Att'y Gen. of Oklahoma v. Johnson & Johnson, 499 P.3d 719, at 723, 729 (Okla. 2021); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 451 (R.I. 2008). *But see* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143–44 (Ohio 2002) (reversing dismissal of plaintiffs' public nuisance claims), *superseded by statute*, O.R.C. § 2307.71(A)(13) (2007) (barring public nuisance claims based on allegations that the defendant manufactured or sold a product that is defective under common-law standards of defectiveness); County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Cal. Ct. App. 2006) (reversing dismissal of public nuisance action against lead manufacturers seeking court-ordered abatement of lead-paint hazards). The Supreme Court of New Zealand recently ruled that a plaintiff suing energy companies for contributing to climate change, and thereby harming coastal lands that he and fellow tribe members use, had stated a claim for public nuisance and thus could proceed to trial in a suit seeking declaratory and injunctive relief. *Smith v. Fonterra Co-Operative Group Ltd.* [2024] NZSC 5 at 143–73.

7 Brendan Pierson, *CVS, Walmart, Walgreens Agree to Pay $13.8 Bln to Settle U.S. Opioid Claims*, Reuters (Nov. 2, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/cvs-walmart-walgreens-reach-tentative-12-bln-opioid-pact-bloomberg-news-2022-11-02 [https://perma.cc/CK4E-4BTB].

8 *See* J.W. Neyers, *Reconceptualising the Tort of Public Nuisance*, 76 Cambridge L.J. 87, 87 (2017) [hereinafter Neyers, *Reconceptualising*]; J.W. Neyers, *Divergence and Convergence in the Tort of Public Nuisance*, *in* Divergences in Private Law 69, 75 (Andrew Robertson & Michael Tilbury eds., 2016) [hereinafter Neyers, *Divergence*]; David Bullock, *Public Nuisance is a Tort*, 15 J. Tort L. 137 (2022); Hanoch Dagan & Avihay Dorfman, *Public Nuisance for Private Persons*, U. Toronto L.J. (2023); David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L.J. 61 (2022); Richard A. Epstein, *The Private Law Connections to Public Nuisance: Some Realism About Today's Intellectual Nominalism*, 17 J.L. Econ. & Pol'y 282 (2022); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003); Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702 (2023); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. Tort L. 1 (2011); Arthur Ripstein, *Public and Private in the Tort of Public Nuisance*, *in* Private Law and the State (Andrew Robertson & Jason W. Neyers eds., forthcoming 2024); Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DePaul L. Rev. 431 (2020).

9 *See* Dana, *supra* note 8, at 87, 103; Kendrick, *supra* note 8, at 747.

10 Epstein, *supra* note 8, at 291–92; Gifford, *supra* note 8, at 799, 813; Merrill, *supra* note 8, at 5.

liability.[11] Still others argue that broad forms of public nuisance liability should be embraced because useful and consistent with general tort principles, such as the (putative) principle that an actor who creates a risk of harm to members of the public incurs a duty to reduce that risk.[12]

These wide-ranging disagreements might seem merely to confirm Prosser's famous characterizations of the law of nuisance—public and private—as an "impenetrable jungle,"[13] as well as a "legal garbage can" and a "word [that] has been used to designate anything from an alarming advertisement to a cockroach baked in a pie."[14] Yet these statements are overblown. (The one about the pie is just plain wrong.[15]) Nuisance law for the most part hangs together. However, to see that it does requires the rejection of another Prosser-ism, namely, the idea—expressed in the first passage quoted above this introduction—that the "two . . . nuisance[s]" have almost nothing in common.[16] As their respective modifiers indicate, "private nuisance" and "public nuisance" do differ in important ways. Nonetheless, they *are* of the same genus. Thus, what Salmond's treatise (quoted by Prosser) offered as an absurdity turns out to be true: overhanging tree-limbs and gaming houses *do* fall within the same genus. Appreciating that they do, and how they do, is crucial to the proper adjudication of nuisance cases.[17]

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11 Neyers, *Reconceptualising*, *supra* note 8, at 94, 101 (invoking Kantian political theory); Ripstein, *supra* note 8, at 19 (same); Sharkey, *supra* note 8, at 433–34 (arguing that public nuisance law should be crafted to help efficiently deter acts causing economic loss).

12 Kendrick, *supra* note 8, at 716–21, 762–67.

13 William L. Prosser, Handbook of the Law of Torts § 71, at 549 (1941).

14 William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942) (citations omitted).

15 *Id.* (citing Carroll v. N.Y. Pie Baking Co., 215 App. Div. 240 (N.Y. 1926)). *Carroll* affirmed a jury verdict on a *negligence* claim by a plaintiff sickened by the sight of dead insects in the pie she was eating. The court mentioned nuisance law's willingness to treat nauseating odors as the basis for liability merely to counter the defendant's argument that (outside of intentional torts) liability cannot attach for injuries generated through smell or sight rather than physical impact. *Carroll*, 215 App. Div. at 241.

16 Prosser, *supra* note 1.

17 Other recent work aims to reconnect public and private nuisance. *See, e.g.*, Dagan & Dorfman, *supra* note 8, at 4–5; Epstein, *supra* note 8, at 310; Neyers, *Divergence*, *supra* note 8, at 74–77; Ripstein, *supra* note 8, at 18–19 (explaining that both private and public nuisance require violating the rights of the potential claimant). The argument of this paper, though developed independently and not tied as tightly to Kantian theory, shares important points of agreement (noted at various points below) with Neyers's exemplary writings in this area as well as Ripstein's. Likewise, while relying more on history and doctrine than egalitarian political theory, this Article, like Dagan's and Dorfman's, emphasizes the centrality to public nuisance law of use-rights and public spaces. And, with Epstein, it stresses the importance of rejecting Prosser's concept-skepticism, though I do not argue (as Epstein does) that the difference between private and public nuisance resides in who is authorized to commence an action when a nuisance is committed.

Part I focuses on an entirely different legal wrong—assault—to sketch the methodology this Article will deploy to analyze nuisance law. The remainder of the Article delves into history, doctrine, and tort theory to establish that private nuisance and public nuisance are two different instantiations of the same generic wrong, namely: *acting in violation of a norm of reciprocity so as to render certain spaces or resources unavailable or insecure for ordinary use*. To be clear, it does not break new ground to observe that notions of reciprocity and interference figure centrally in nuisance law. But there is value in articulating these ideas in a way that is true to case law and that captures with some precision how they figure in the two nuisances.

Building on important recent scholarly treatments of private nuisance, Part II explains that the reciprocity norm at the center of that tort is one of *neighborliness*, and the notion of interference at issue concerns intrusive activities or conditions that affect private property in a way that renders it unavailable or insecure for ordinary use by its possessor. Part III explains that, in the law of public nuisance, the reciprocity norm is one of basic civic obligation, and the interference is likewise an intrusive activity or condition, albeit one that, in the first instance, renders public spaces or resources unavailable or insecure for ordinary use. This Part also isolates the content of the "special injury" requirement that converts the crime or regulatory offense of public nuisance into a genuine tort. Finally, it provides a framework for analyzing public nuisance claims. According to this framework, courts should first consider whether the condition identified by the plaintiff generates the sort of interference with public use that meets the legal definition of a public nuisance, then identify which actor(s) can properly be deemed responsible for having created the nuisance, then determine which (if any) claimants have suffered the kind of setback that counts as a "special injury," which will in turn permit them more clearly to determine whether the appropriate remedy is abatement (or restitution for abatement costs) in vindication of public rights or instead genuine tort compensation to vindicate private rights.

As is true for most bodies of law, the political valence of nuisance law has varied. Today, progressives embrace public nuisance in particular as a means of advancing environmental protection, product safety, and other important goals.[18] Yet nuisance law has also been deployed by in-groups to exclude purportedly 'undesirable' persons and activities,[19]

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[18] *See supra* notes 3–4.

[19] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (invoking nuisance law by means of an infamous "pig in a parlor" metaphor to uphold single-family residence zoning laws). In some respects, however, the common law of nuisance has been less

and to limit the tactics that organized labor can deploy against capital.[20] The aim of this Article is not to provide an apology for nuisance law, nor to resolve all of the complex nuisance cases currently before the courts. Instead, it is to coax this oft-misunderstood creature into view and thereby promote principled law application and careful assessment.[21]

I
Methodological Prelude

This Article aims to make sense of nuisance law. A brief account of what it means, and doesn't mean, to "make sense" of this part of the law is therefore in order.[22] For two reasons, I will provide this account by focusing on a different tort: assault. First, while Prosser overstated nuisance law's messiness, he was correct that it is a relatively difficult nut to crack. Assault permits a more straightforward exegesis. Second, as explained in Part II, nuisance law turns out to contain echoes of the law of assault.

A. The Tort Concept of Assault

In Anglo-American tort law, the gist of assault is a threat of harmful or offensive contact, where "threat" includes both the threatener's issuance of the threat and the victim's apprehension of it. In recognizing assault as a tort that stands apart from others such as battery, false imprisonment, and negligence, courts have identified simultaneously a legal right not to be subjected to a distinctive kind of injury and a legal

effective as a tool of invidious discrimination than might have been expected. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 Harv. L. Rev. 1609, 1663 (2021) (explaining that "courts typically requir[e] showings of sufficient harm from an enterprise in order to provide a remedy in tort" in the apartment and commercial contexts). *See generally* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 Mich. L. Rev. 505 (2006) (exploring cases that rejected attempts to use nuisance law to enforce race-based housing segregation).

[20] *See, e.g.*, *In re* Debs, 158 U.S. 564, 591–93 (1895) (upholding the authority of federal courts, upon suit by the federal government, to enjoin strikes involving the use of force or violence to disrupt commerce).

[21] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (emphasizing the importance of accurate understandings of legal rules to judgments as to their potential usefulness). Unsurprisingly, given nuisance law's complexity, others have invoked Holmes's famous dragon metaphor in this context. *See, e.g.*, Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecology L.Q. 755, 764 (2001) ("Taming or killing the dragon of legal history is essential to developing alternative approaches to the rule and to modernizing public nuisance.").

[22] *See* John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 5–6 (2020) (outlining a pragmatic-conceptualist approach to analyzing tort law). *See generally* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 L. Theory 457, 470–84 (2000) (outlining an approach to legal reasoning that is practice-based yet takes legal concepts seriously).

duty to not inflict such an injury, while also providing victims of this wrong with the power to obtain redress from their wrongdoers.

Of course, courts enjoy leeway in determining what, precisely, counts as an assault. Nonetheless, the concept is malleable only up to a point. If a person harmfully touches another while the other is asleep, there is no "uptake" of the threat by the victim and thus no assault (though there might be a battery). Intentionally causing another to apprehend that they are about to be subjected to public ridicule is likewise not an assault. Assault's "imminence" requirement renders it inapplicable to indefinite threats.[23] What is true of assault is true of all other torts, including private nuisance and public nuisance (in so far as the latter is a tort). Each describes a distinctive way of wrongfully injuring another person.[24]

B. Definitions and Concepts

The tort concept of assault has a distinctive meaning. However, grasping this meaning is not merely a matter of looking up a definition. Conceptual analysis in law is a more nuanced, pragmatic, and theory-laden undertaking.

Here is the definition of assault in the Restatement (Third) of Torts:

> An actor is subject to liability to another for assault if:
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> (a) (i) the actor intends to cause the other to anticipate an imminent, and harmful or offensive, contact with his or her person . . . and
>
> (b) the actor's affirmative conduct causes the other to anticipate an imminent, and harmful or offensive, contact with his or her person.[25]

Consider now the following scenario. While hiking on a public trail, Dell observes Paige, a stranger, standing 50 feet ahead of him. Dell notices that large rocks are rolling down a hill toward Paige, and that,

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[23] State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 284–85 (Cal. 1952).

[24] For example, deceit (fraud) consists of a person making a misrepresentation to another intending to induce, and inducing, the other to rely detrimentally on the misrepresentation. DOBBS, HAYDEN & BUBLICK, *supra* note 3, at § 664. Strict products liability consists of a commercial seller injuring a consumer by sending a dangerously defective product into commerce. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998). To say each tort is a distinct wrong is not to say that a given act can only fit the description of one tort. For example, some conduct that amounts to a libel will also fit the description of intentional infliction of emotional distress. How courts should address these overlaps is a separate question.

[25] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 5 (AM. L. INST., Tentative Draft No. 4, 2019). My quotation omits a provision on transferred intent not relevant to the present discussion.

because Paige is staring at a trail map, she is unaware that she is about to be struck by them. Although Dell believes that it is almost certainly too late to save Paige, he shouts "Hey!! Look out!!" while also waving his arms above his head. As a result, Paige looks up, sees the rocks as they bear down on her, and is terrified. Happily, the rocks take odd bounces and miss her.

Does Paige have a valid claim against Dell for assault? Under a literal reading of the Restatement definition, the answer seems to be "yes." Dell engaged in affirmative conduct with the intent to cause Paige to anticipate imminent harmful bodily contact and caused such anticipation. But has Dell really assaulted Paige?

Threatening harmful or offensive contact is one thing; warning about such contact is another. Threats can be issued in elaborate and indirect ways. Thus, the analysis of this hypothetical would be different if, in cartoon-villain fashion, Dell had arranged the entire situation—including getting the rocks to release at just the right moment—as a scheme to terrify Paige. On the facts provided, however, it seems inapt to characterize Dell as having *threatened* Paige and apt instead to say that Dell *alerted* or *warned* Paige—i.e., informed her of an imminent harmful contact that she was about to experience.[26]

The point of the foregoing example is not to carp about the Restatement's definition. Instead, it is to demonstrate that even well-crafted definitions don't always map neatly onto concepts, which is why understanding concepts is more than a matter of looking things up.

Why think of assaults as threatenings (i.e., a threat of imminent harmful or offensive contact apprehended by the target of the threat)? Here it helps to remember that assault is a tort. And "tort," of course, is another legal concept. A tort is a wrongfully inflicted injury. Each tort identifies a way of interacting with another that is injurious and not-to-be-done.[27] Yet, although each tort is substantively distinct, all share the same analytic structure. Every tort consists of legally proscribed conduct by an actor toward the members of a class of persons that generates a legally recognized injury to a member of that class.[28] Conduct that is not

[26] Nor is this episode properly analyzed as an instance of liability being avoided because the "assault" was justified, given that Dell acted to protect Paige. Dell may not have believed his actions were going to save Paige. In any event, it mischaracterizes the situation to say that Dell had a good reason to assault Paige—he simply didn't assault her.

[27] Again, this is not the sort of proposition that is established merely by consulting a legal dictionary. Rather, it is an interpretive claim that contains doctrinal, historical, and theoretical dimensions. *See generally* Goldberg & Zipursky, *supra* note 22, at 1–2.

[28] To avoid any misunderstanding: Insisting that torts are *wrongs* still allows plenty of room for *strict liability*, understood as liability based on the violation of a rule of conduct that is insensitive to excuses. Most strict tort liability—including most strict nuisance liability, discussed below—is of this form.

wrongful as to such a person may be wrongful in some sense, but it is not tortious. Neither is conduct that is wrongful toward such a person but does not injure them.[29]

In seeking to understand the *tort* concept of assault, one is thus looking for a kind of interaction that ordinarily is wrongful as to, and injurious of, another. Threats of imminent harmful or offensive contact fit the bill. Merely alerting someone to a danger not of one's own making does not, which is in part why "alerting" and "warning" have never been the names of torts.[30] When considering any other tort—including private and public nuisance—the task at hand is the same: to isolate the distinctive mixture of wrongful conduct and injury that constitutes each of those wrongs.

In the U.S. legal academy, two commonly expressed concerns about conceptual analysis are its alleged ties to "transcendental nonsense" and "mechanical jurisprudence."[31] Neither association is justified. The foregoing treatment of assault makes no claim about how law, or our law, must be understood and organized. There could be a body of tort law that recognizes various torts but not assault. And there can be legal systems without tort law, or with a generic rule of liability for wrongdoing that, in the manner of some civil code provisions, specify one generic wrong rather than particular wrongs.[32] Moreover, while the mode of analysis employed here does presume that legal reasoning—particularly

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[29] Possession of certain narcotics is a legal wrong not involving injury to another. While possession sometimes will harm others, the offense is defined such that it can be committed even if it doesn't.

[30] Perhaps some warnings should not be given. For example, maybe Dell should not have warned Paige because doing so did not promise to make things better and may have made them worse. Even so, it would be incorrect to say that Dell assaulted Paige, or that he committed the tort of "warning." On this rendering, his wrong (if any) was negligently to inflict emotional distress. To be sure, variants on the situation described in the text might render Dell's conduct wrongful. For example, he would have wronged Paige if he issued the warning merely because he would get perverse pleasure from observing her fear. In this instance, the wrongfulness of the conduct would reside in Dell's malicious purpose and liability might attach for what some jurisdictions call "prima facie tort."

[31] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (arguing that legal concepts frequently are meaningless and thus unable to guide judicial decisions); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608 (1908) (arguing against those who maintain that adjudication consists of deductive reasoning on the model of a mathematical proof).

[32] Needless to say, the fact that Anglo-American tort law is the product of contingent choices hardly establishes that it lacks justification. In fact, liberal-democratic polities have good reason to provide a law of wrongs and redress to their members. A government that claims authority based on popular self-rule and a commitment to securing individual rights is one that ought to have law with rules that protect individuals against certain forms of mistreatment at the hands of others, and that empowers them to respond when such mistreatment occurs. *See* GOLDBERG & ZIPURSKY, *supra* note 22, at 111–46. Moreover, it is not difficult to see why, from a rule-of-law perspective, such a body of law will do well to identify

by judges applying common law—involves faithfully interpreting and developing existing doctrine, this hardly entails a mechanical or scholastic approach to adjudication. There are many instances in which the question of whether an assault (or another tort) has occurred will require judges to engage in a constructive form of interpretation that, without degenerating into crude instrumentalist reasoning, involves the exercise of—surprise!—*judge*ment.[33]

C. Torts: Common-Law and Statutory

Although the wrongs of tort law have tended to be articulated by courts in deciding cases, there are statutory torts. Take, for example, a statute that prohibits employers from intentionally taking an adverse employment action against an employee because of the employee's race, ethnicity, gender, sexuality, or religion, and further provides that any employee subject to such discrimination is entitled to sue the employer for compensatory damages. This legislation identifies an injurious wrong—a breach of the employer's legal duty to refrain from adversely affecting an employee's employment based on the relevant characteristics that also constitutes a violation of the employee's legal right not to be mistreated in that way. And it is a legal wrong that generates for the victim the power to obtain redress from the wrongdoer through the courts. In short, it identifies a tort.

The question of whether, and on what terms,[34] enacted law defines a tort is a question of statutory interpretation. In some instances, it will be apparent from the face of the statute, while in others it will not. For example, it may be unclear whether a statute setting limits on the emission of certain airborne pollutants identifies a legal wrong with the structure of a tort (an injury-inclusive, relational wrong), as opposed to a purely public wrong. Likewise, some statutes identify wrongs involving the infliction of injury on individuals yet fail to state whether they empower individuals to obtain redress from injurers based on statutory violations (the issue of implied rights of action). In state law

particular wrongs, particularly if they are *recognizable*, i.e., wrongs that track what ordinary citizens not immersed in law tend to regard as mistreatments. *Id.* at 341–50.

[33] *Id.* at 232–59 (outlining an approach to the adjudication of tort cases that is neither formalist nor reductively instrumentalist).

[34] Statutes that define wrongs that resemble recognized common-law torts might nonetheless best be interpreted to employ variants of common-law concepts or otherwise set distinct liability requirements. *See, e.g.*, John C. P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 Vand. L. Rev 1755, 1782–1803 (2013) (arguing that the fraud-on-the-market doctrine amounts to the recognition in federal securities laws of a new legal wrong adjacent to, but distinct from, the tort of deceit); Sandra F. Sperino, *The Tort Label*, 66 Fla. L. Rev. 1051, 1070–72 (2014) (warning against the reflexive importation of common law rules into the definition of statutory wrongs).

in the U.S., the question of whether a statute supports a tort claim often is addressed through the doctrine of negligence per se.[35] But, again, all torts, judge-recognized or statutory, have the same analytical structure. This will be important to keep in mind because, in contemporary law, public nuisance is in the first instance a statutorily-defined offense. While some public nuisances also amount to torts, those torts are parasitic on the commission of the underlying offense.

II
Private Nuisance: Unneighborliness and Intrusive Interferences with Use of Private Property

The job of a court faced with a lawsuit for assault is faithfully to apply the law of assault. This job is no different when the suit calls for application of private or public nuisance law (insofar as the latter gives rise to a tort claim). To do so properly requires isolating the distinctive notions of wrongdoing and injury that comprise the distinct legal wrongs of private nuisance and public nuisance.[36] The remainder of this Article aims to assist courts in this effort. It does so by first analyzing nuisance law's more familiar instantiation—private nuisance—then by turning its attention to public nuisance. As explained in the remainder of this Part, the tort of private nuisance consists of *unneighborly* conduct that interferes, *intrusively*, with another's use and enjoyment of their property.

A. Unreasonable Interference with Use and Enjoyment

Private nuisance has a pedigree in English tort law comparable to that of torts such as assault, battery, and trespass to land.[37] Standard

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[35] For example, if a statute bars automobiles from being parked on sidewalks and a pedestrian is injured when, rounding a corner, she slams into a car so parked, the jury will be instructed to find that (in the absence of a narrow set of excuses) the driver has committed negligence against the pedestrian. An indication of the resemblance of negligence per se to statutory torts is that, in English law, claims that courts in the U.S. would treat as negligence per se claims are treated as statutory tort claims. *See* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 Iowa L. Rev. 957, 975 (2014) (arguing that, despite nominal differences, the rules of negligence per se and statutory torts are "identical").

[36] *See infra* Part III. As is explained in Part III, public nuisance is in the first instance a crime or public wrong, but its commission can also sometimes constitute a tort.

[37] The thirteenth-century Bracton treatise discusses "wrongful nuisances." Henry De Bracton, 3 Bracton on the Laws and Customs of England 190 (Samuel E. Thorne trans., President & Fellows of Harvard College 1977) (1569), https://amesfoundation.law.harvard.edu/Bracton/index.html [https://perma.cc/3XG9-M8RL]. In the next century, royal courts started entertaining nuisance suits brought via the writ of trespass on the case. J.H. Baker, An Introduction to English Legal History 453 (5th ed. 2019). Until about 1600, some actions to abate nuisances were brought via the assize of nuisance. Janet Loengard, *The*

instances involve a person engaging in an activity that generates noises, vibrations, or odors that make it impossible or difficult for a neighbor to make use of land in their lawful possession. A city that builds and operates a sewage treatment plant that regularly produces nauseating odors and attracts flies, thus rendering the yards of nearby homes unusable, faces private nuisance liability to the homeowners.[38] It is likewise a private nuisance to operate a factory that emits airborne chemicals that discolor or strip the paint off a nearby residence.[39]

Whether an interference is "substantial and unreasonable"—I will use "unreasonable" as a shorthand for both—is judged relative to a baseline that reflects conditions in the locality in which the interference occurs.[40] Noises, vibrations, or odors that are a private nuisance in a suburban residential community may not be a nuisance in a densely populated urban area. Moreover, an interference ordinarily will not be deemed unreasonable unless it involves either ongoing bother or significant physical damage to the plaintiff's land. A loud, one-off house party that causes a neighbor to lose a night's sleep is not a private nuisance, but holding such parties weekly probably is. The same goes for vibrations from nearby construction that cause a residence to shake for an hour (not a nuisance) and vibrations that crack its foundation (possibly a nuisance).[41] Although a possessor often can recover for physical damage to property by invoking the law of negligence or abnormally dangerous activities, it also may be actionable in nuisance.[42]

Because private nuisances tend to arise out of ongoing interactions between neighbors, nuisance-generators will usually learn that they are doing something bothersome. However, nuisance liability does not require "intentional" or "knowing" interference.[43] The owners of a factory that emits gasses that destroy indigenous trees on private

Assize of Nuisance: Origins of An Action at Common Law, 37 Cambridge L.J. 144, 158 n.44 (1978).

38 Penland v. Redwood Sanitary Sewer Serv. Dist., 965 P.2d 964, 966 (Or. Ct. App. 1998).

39 Travis v. Martin Bros. Container & Timber Prods. Corp., 143 So. 2d 830, 832–33 (La. Ct. App. 1962).

40 *See* Restatement (Fourth) of Prop. § 2.1 cmt. g (Am. L. Inst., Tentative Draft No. 3, 2022) (identifying private nuisance as an activity or condition that "substantially and unreasonably interferes in a nontrespassory manner with the use and enjoyment of land in [another's] possession").

41 *Id.* § 2.1 cmt. i.

42 St. Helen's Smelting Co. v. Tipping (1865) 11 Eng. Rep. 1483 (HL) 1483–84, 1486 (appeal taken from Eng.) (activities causing material injury to property will typically be deemed unreasonable interferences). Thus, a possessor who suffers such damage might be able to recover in private nuisance even if the defendant did not act carelessly and was not engaged in an abnormally dangerous activity.

43 *See infra* text accompanying notes 85–132 (discussing private nuisance law's standard of conduct).

property located a mile away can face nuisance liability even if they first become aware of the impact when sued. However, as noted, before liability will attach, there must be a determination that the interference is unreasonable—a requirement that, again, calls for a context-specific, fact-intensive judgment about whether the burden the plaintiff is experiencing or has experienced is more than one is expected to endure.[44]

In each of the foregoing respects, private nuisance stands apart from its doctrinal cousin, trespass to land. There can be no trespass liability unless the plaintiff's land has been invaded by a person, thing, or substance that is of a certain solidity and is visible to the naked eye.[45] Moreover, a trespass cannot be entirely accidental: The actor must at least intend to enter or occupy the land in question, although they need not be aware that they are entering or occupying another's land.[46] Conversely, trespass liability attaches just as soon as there is an intentional physical entry; there is little or no consideration—as there sometimes is in nuisance cases—of values that might be served by the unpermitted entry.[47] Trespass liability also attaches irrespective of whether the entry causes further harm or disruption.

Private nuisance also differs from trespass (and most other torts) because it is typically formulated in terms that focus on the injury the plaintiff must suffer to have a valid claim, seemingly to the exclusion of any description of misconduct by the defendant.[48] To be sure, unreasonableness figures in standard descriptions of both nuisance and negligence. However, in negligence, unreasonableness—understood as the failure to act as would a person of ordinary prudence—serves forthrightly as the applicable *standard of conduct*. A car driver who drives reasonably (i.e., with ordinary prudence) is not subject to negligence liability because she has, by so driving, conducted herself in a manner that conforms to the relevant legal obligation. By contrast, a homeowner who is found to have exercised reasonable care to avoid

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44 An interference that is minimal or is more than minimal only because of a particular property's or possessor's idiosyncratic vulnerability is not a nuisance. *See, e.g.*, Ladd v. Granite State Brick Co., 37 A. 1041, 1041 (1895).

45 RESTATEMENT (FOURTH) OF PROP. § 1.1 cmt. h (AM. L. INST., Tentative Draft No. 2, 2021).

46 If a car being driven on a public road hits a patch of ice and, against the driver's will, slides off the road onto private property, the possessor has no basis for a trespass claim. However, if the driver was careless and the car damaged the property, there might be a basis for a negligence claim.

47 Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910) (finding trespass liability attaches even in cases of private necessity).

48 In fact, as is argued below, the idea of unreasonable interference does implicitly reference a norm of conduct, albeit not a norm of fault (in the sense of lack of diligence or care). *See infra* notes 92–132 and accompanying text.

vibrations emanating from their basement workshop to their neighbor's property can still be found to have committed a private nuisance.[49] The gravamen of a claim of private nuisance is *not* unreasonable (imprudent) conduct that interferes with another's use and enjoyment. It is *conduct that generates an unreasonable interference* with another's use and enjoyment.

An accurate sense of the "strictness" of nuisance law also requires appreciation of the fact that courts enjoy some discretion in deciding whether to refrain from enjoining activities that have been adjudged nuisances—discretion that they lack when it comes to ordering the defendant to pay compensatory damages for proven losses. Damages recoverable as a matter of right include the cost of repairs necessitated by the interference, inconveniences the plaintiff has experienced, and any diminution in the property's value attributable to the interference. Whether the plaintiff is entitled to injunctive relief requires the application of additional rules of remedial law. These include the rule that a plaintiff ordinarily is not entitled to injunctive relief if a damages award will provide her with an adequate remedy, and that an injunction will not be granted if doing so will impose an "undue hardship" on the defendant—a determination that requires consideration of the impact of the proposed injunction on the defendant, and of whether the defendant acted culpably in creating the nuisance.[50]

The next Section analyzes private nuisance law's standard of conduct. But doing so first requires getting a handle on its notion of "unreasonable interference." In standard instances, what sort of effects on the use of property count as unreasonable interferences with another's use and enjoyment of land?

As noted, activities that prevent possessors from using their land by generating unbearable odors, noises, or vibrations, or unintentionally causing physical invasions (e.g., accidentally diverting a stream and causing flooding to a neighbor's yard) are uncontroversial examples of the sorts of effects that can generate nuisance liability. By contrast,

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[49] P.H. Winfield, *Nuisance as a Tort*, 4 Cambridge L.J. 189, 199–200 (1931). As is discussed below, careless (imprudent) conduct can be the basis for private nuisance liability but is not necessary for it.

[50] Dennis v. Ministry of Defence [2003] EWHC 793 (QB) (appeal taken from Eng.) (declining to issue a declaration that would have had the effect of enjoining the defendant's deafening overflights given the importance of air force training); Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in* Boomer v. Atlantic Cement*)*, 4 J. Tort L. 1 (2012) (discussing judicial applications of the undue hardship rule); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 219–30 (2012) (explaining the terms on which courts have traditionally analyzed undue hardship in determining whether to grant injunctive relief).

there is no basis for a nuisance claim if Ursula wrongfully goads Phoebe into gambling away her wealth, such that Phoebe loses her comfortable residence and must live in her car—even though Ursula's misconduct has in some sense interfered with Phoebe's enjoyment of her land. Also, activities whose *only* ill effects are to reduce the value or profitability of another's land are not private nuisances (even though lost value or profits often provides the main head of damages in a successful nuisance action). The influential Australian *Victoria Park Racing* decision is illustrative. The defendant permitted a radio station to build a platform on the roof of his house so that station employees could view and broadcast horse races taking place at plaintiff's nearby track. The plaintiff suffered a loss of business and sued in nuisance, but the court rejected the claim, concluding that the requisite interference was absent.[51]

These no-liability examples attest to the fact that *private nuisance* really is a property tort. As Donal Nolan has emphasized, nuisance liability hinges on conditions or actions that adversely *affect the capacity of land to be used or enjoyed by its possessor(s)*.[52] In the words of an early U.S. tort law treatise: "any injury to lands or houses, which renders them useless or even uncomfortable for habitation, is a [private] nuisance."[53]

On the question of what it takes to render land or fixtures "useless or . . . uncomfortable for habitation," there has been considerable debate. One line of thought, tracing back at least to Richard Epstein's early work, suggests that in nuisance law, an unreasonable interference consists of a *physical* invasion of plaintiff's property, albeit not necessarily the sort of invasion by a person or visible object that is necessary to commit a trespass to land.[54] This framework has the advantage of explaining why the transmission of sound waves or gasses can count as nuisances, while also explaining decisions denying liability when an actor *blocks* natural light from reaching the victim's land (no physical invasion, no nuisance) or when an actor places a hideously ugly structure that the victim can't help but view from their home (no physical invasion, no nuisance). However, this framework has trouble accounting for cases

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51 *Victoria Park Racing & Recreation Grounds Co. v. Taylor* [1937] 58 CLR 479 (Austl.); *see also* Shuttleworth v. Vancouver General Hospital [1927] D.L.R. 573 (Can. B.C. S.C.).

52 Donal Nolan, *'A Tort Against Land': Private Nuisance as a Property Tort*, *in* Rights and Private Law 459 (Donal Nolan & Andrew Robertson eds., 2012). As noted above and below, although public nuisance also concerns interferences with access to and use of spaces, insofar as it is a tort, it is *not* correctly classified as a property tort because it can sometimes attach even if there is no interference with the plaintiff's use and enjoyment of their property.

53 1 Frances Hilliard, The Law of Torts 639 (2d ed. 1861).

54 Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Leg. Studies 49, 53 (1979).

holding that, in certain settings, a funeral home or burial ground can be a nuisance as to nearby property owners (no physical invasion, but sometimes nuisance).[55]

Other scholars, including Nolan, Christopher Essert, and Jason Neyers,[56] insist that it is a mistake to treat physical invasiveness as essential to private nuisance, and that any activity or condition that has a sufficiently adverse effect on the capacity of land to be used and enjoyed by its possessor counts.[57] Henry Smith, meanwhile, has advocated for an intermediate position, according to which nuisance law has a core that involves physical but non-trespassory invasions, but also a penumbra made up of non-invasive interferences.[58]

One way to reduce the distance among these views is to expand out from the idea of physical invasion to a broader notion of *intrusion*. To send malodorous gasses or deafening sound waves, or to divert a natural water course, onto another's land is certainly *one way* to intrude on it. But conditions that do not involve physical invasions can also be intrusive. A well-known modern nuisance case helps to illustrate this idea.

In *Mark v. State Department of Fish and Wildlife*,[59] the plaintiffs owned a residence located within a state wildlife area under the

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[55] *Id.* at 64. Epstein concluded that these and other cases that don't fit the physical invasion paradigm are instances in which courts have allowed liability for policy reasons even in the absence of a nuisance, strictly speaking. Others have argued that these are really public nuisance cases misdescribed as private nuisance cases.

[56] Donal Nolan, *The Essence of Private Nuisance*, *in* 10 Modern Studies in Property Law 71 (Ben McFarlane & Sinéad Agnew eds., 2019); Christopher Essert, *Nuisance and the Normative Boundaries of Ownership*, 52 Tulsa L. Rev. 85 (2016); J.W. Neyers & Jordan Diacur, *What (Is) a Nuisance?*, 20 Can. Bar Rev. 215, 233 (2011).

[57] Nolan, *supra* note 56, at 73. Conor Gearty has gone so far as to argue that private nuisance can only be rendered a coherent cause of action if cases of physical invasion are excluded from its ambit. *See* Conor Gearty, *The Place of Private Nuisance in a Modern Law of Torts*, 48 Cambridge L.J. 214, 218 (1989). Some of these disagreements may reflect jurisdictional variations in nuisance law. For example, state law in the U.S. tends to treat interferences with easements, withdrawals of lateral support, and diversions or obstructions of natural water courses away from private property as *sui generis* wrongs rather than private nuisances, whereas other jurisdictions treat at least some of these as core cases of nuisance. *See* Restatement (Second) of Torts chs. 39, 41 (Am. L. Inst. 1979) (presenting "interests in the support of land" and "interference with the use of water" as separate headings of tort liability); *id.* at ch. 39 (Scope and Introductory Note) (excluding interferences with easements from the scope of coverage of liability for withdrawal of support).

[58] Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965 (2004).

[59] 974 P.2d 716, 718 (Or. Ct. App. 1999), *rev. denied*, 329 Or. 479 (1999). On remand, the trial court found for the plaintiffs on their private nuisance claim and ordered injunctive relief. The court of appeals affirmed this decision. Mark v. State Dep't of Fish & Wildlife, 84 P.3d 155, 157 (Or. Ct. App. 2004).

management of the defendant agencies.[60] The agencies had adopted a management plan that designated certain beaches within the area as clothing-optional.[61] Plaintiffs' complaint alleged that, as a result, and to the agencies' knowledge, the plaintiffs, while on their own property, regularly witnessed adult nudity and sexual activity.[62] After the trial court dismissed the complaint, an intermediate appellate court partially reversed.

Mark has several interesting dimensions, one of which—concerning when it is apt to deem a background actor to have created a nuisance caused in the first instance by others—is explored below.[63] For present purposes, its salient aspect is the appellate court's conclusion that the plaintiffs' allegations of "uncontrolled and *intrusive* nudity occurring on the area immediately around their property" amounted to a private nuisance.[64]

As indicated by the word "intrusive," the (putative) immorality of the beachgoers' conduct was not sufficient to render it a nuisance.[65] What rendered the conduct in *Mark* tortious was that it *confronted* the plaintiffs, while on their land, with conditions that assaulted their senses and sensibilities. Professor Nagle's description of the plaintiffs' allegations helps convey the idea:

> [The wildlife area] . . . attracted thousands of nude sunbathers who enjoyed the beach immediately adjacent to the property owned by [the plaintiffs]. The couple was displeased. They were embarrassed to entertain friends or family in the presence of those using the adjacent nude beach. They were repulsed by the sight of public sexual activity.

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60 *Mark*, 974 P.2d at 721.

61 *Id.* at 721.

62 *Id.* at 718.

63 Specifically, the question of the grounds on which the agency could be held liable for the interfering behavior of the beachgoers. *Id.* at 722.

64 *Id.* at 720 (emphasis added).

65 This is hardly surprising. A great deal of immoral conduct—everything from marital infidelity to homicide—falls beyond the reach of nuisance law. Thus, whereas a brothel can sometimes amount to a public or private nuisance, an escort service that involves discreet visits by sex workers to clients' homes cannot. Ernst Freund, The Police Power: Public Policy and Constitutional Rights § 242, at 226 (1904) (noting that an act of prostitution is not itself a public nuisance but that if "not checked it is apt to become [one]"). A version of this point was once made by the English Attorney General in an argument before the King's Bench. *See* Rex v. Curl (1727) 93 Eng. Rep. 849, 850 ("[I]f [an act] is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are."); *cf.* Don Herzog, Household Politics 101–02 (2013) (discussing a London nuisance ordinance that authorized the imposition of fines on abusive husbands only insofar as the abuse disturbed neighbors).

> They were harassed by nudists who chided them for remaining clothed. They worried that the value of their property had declined.[66]

In sum, the Marks had a claim for nuisance because the beachgoers' activities *imposed on them* in their capacity as possessors in a way that hindered their use of their residence.[67] Intrusions or impositions of this sort—interferences with use and enjoyment that are assaultive in the sense of confronting the victim with actions or conditions that are oppressive or severely discomfiting—are at the core of private nuisance law.[68]

My treatment of *Mark* invites a rejoinder from anyone familiar with nuisance law. If being confronted while on one's property by others' sex acts counts as the sort of interference that supports a private nuisance claim, then it might seem that a possessor confronted from within their home by an aesthetically hideous sight (e.g., junked cars in their neighbor's front yard) should also have a claim. Yet, apart from cases involving malice (discussed below), courts in the U.S. have steadfastly declined to recognize nuisance liability for aesthetic conditions. The concept of intrusiveness I have invoked might thus seem unable to carve at the joints of doctrine.

In fact, aesthetic nuisance cases are distinguishable. For one thing, there is the worry that beauty—unlike morality—really is in the eye of the beholder. Relatedly, public sex acts tend to confront observers in a fundamentally different way than unsightly objects. Persons in the position of the *Mark* plaintiffs might understandably feel compelled to use their home's back door to avoid viewing (or having their children or guests view) the sexual activity. Or they might avoid (or instruct others to avoid) certain rooms from which there is a view of such activity. Few would have the same instinct when it comes to the prospect of viewing

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66 *See* John Copeland Nagle, *Moral Nuisances*, 50 Emory L.J. 265, 266 (2001).

67 *Mark*, 974 P.2d at 720. Some might argue that *Mark* is not a case of private nuisance but instead a case of liability for public nuisance causing a special injury. And indeed, the appeals court in *Mark* held that "the routine use of defendants' land for public sexual activity," if proven, would constitute such a public nuisance. *Id.* But *Mark* also found a private nuisance, and it is not difficult to posit a comparable case in which there would *only* be a claim for private nuisance. Imagine, for example, a couple that resides in a house next door to the Marks' residence. If they constantly use their backyard, which is out of public view but in plain view of the Marks' residence, as a locus for *al fresco* sex, the Marks would have (only) a private nuisance action.

68 The present account of nuisance-as-intrusion tracks to some degree what Professor Essert has described as instances of nuisance involving one person "besetting" another so as to interfere with the other's use and enjoyment of their land. Essert, *supra* note 56, at 108–09; *see also* J.E. Penner, Property Rights: A Re-Examination 153–54 (2020) (observing that Essert's notion of "besetting" helps explain instances of nuisance liability resulting from activities that involve affronts).

(or their children or guests viewing) junked cars or a hideous outdoor sculpture. That, ordinarily, there is no felt need to *fend off* the view of aesthetically displeasing objects or conditions, attests to the absence of an intrusion of the requisite sort.[69]

Admittedly, the line between a "moral" nuisance and an aesthetic nuisance will not always be clear. For example, suppose a suburban homeowner paints a mural on an exterior wall of his detached garage with images that are neither obscene nor pornographic but are so grotesque as to be the sort of thing that neighbors would reasonably feel inclined to take measures to avoid encountering it.[70] Also, as an articulation of private nuisance law's requirement of *unreasonable* interference, the notion of intrusion I am describing is partly normative. Thus, one might imagine a community of aesthetes whose members regard themselves as being "assaulted" in the requisite sense whenever hideously ugly objects come into their view. The nuisance law of that community might justifiably differ from our law.[71]

A notion of interference-as-intrusion may also help explain the U.K. Supreme Court's *Fearn* decision.[72] The Tate Modern gallery, located on the busy and built-up south bank of the Thames River in London, is a multi-story building. One of its upper levels features a wrap-around, open-air balcony that, on one side, provided a direct view into apartments with floor-to-ceiling windows located in a nearby building. At times, scores of gallery visitors would congregate on the part of the balcony with this view and would observe and take photos of the residents while in their apartments. Some residents sued for nuisance, and a divided court ruled in their favor.

Regardless of whether the case was decided correctly, the majority's position at least becomes intelligible when unreasonable interference

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[69] *See also* Thompson-Schwab v. Costaki (1956) 1 WLR 335 (AC) (appeal taken from Eng.) (adopting a similar rationale in finding defendant's use of premises for prostitution to be a private nuisance).

[70] Thanks to Ben Eidelson for pointing out this possibility. Molly Brady has unearthed an old case in which Connecticut's high court held the line by refusing to designate as a (public) nuisance a street advertisement for an exhibition that featured an image of a person described as a grotesque "Monster." *See* Maureen E. Brady, The Role of "Value" in Moral Nuisance Cases (Jan. 23, 2024) (unpublished manuscript) (on file with author) (discussing Knowles v. State, 3 Day 103 (Conn. 1808)).

[71] It is also fair to ask whether Anglo-American law is morally sound in limiting nuisance liability to conditions that are intrusive in the sense I have described. I am inclined to think that the law draws a morally defensible line, even if not a morally optimal one (whatever that would be). Thanks to Sandy Steel for raising these issues.

[72] Fearn v. Bd. of Trs. of the Tate Gallery [2023] UKSC 4 (appeal taken from Eng.); *see generally* Cheng Lim Saw & Aaron Yoong, *Throwing Stones in Glass Houses: Protecting Privacy Under the Law of Nuisance*, 28 Tort L. Rev. 145 (2022) (discussing *Fearn* in detail and arguing that it demonstrates a legitimate use of nuisance law to protect privacy interests).

is understood on the terms articulated here. For, while it might seem odd to characterize persons overlooking other persons as intrusive, there is precedent for doing so. Almost all U.S. jurisdictions recognize the privacy tort of "intrusion upon seclusion," and the prototypical intrusion for this tort involves one person *peering in or listening in* on another.[73] Leaving aside whether the *Fearn* plaintiffs had actionable privacy claims, the point is that there is nothing odd about supposing that some instances of persons observing others are properly cast as intrusive. The question is which sorts of observations count.

Again, context is critical. Recall *Victoria Racing*.[74] While the owner of a horse-racing track might have reason to complain about a person viewing its races from an adjacent building for purposes of broadcasting them, any such complaint raises concern of unfair competition (freeriding!), not oppressive viewing. By contrast, the *Fearn* plaintiffs—insofar as they established that throngs of gallery-goers were treating them like pet goldfish—could plausibly claim to have been subject to a type of overlooking that is intrusive.[75] And the intrusiveness in question may not have been a violation of their privacy, but rather a violation of an entitlement of the sort identified in *Mark*—an entitlement, while in one's home, not to be confronted with seriously discomfiting conduct or conditions.[76]

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[73] Restatement (Second) of Torts § 652B cmt. b (Am. L. Inst. 1977).

[74] *See supra* note 51.

[75] The extent to which the apartment owners should have anticipated being observed when they purchased their apartments is relevant to the proper analysis of the case and might even be grounds for distinguishing inhabitants of apartments visible from the street and higher-floor apartments. Building on the holding of *Mark*, as well as the Coasean idea of nuisances as reciprocal interferences, one could assert that it is the apartment dwellers who were unreasonably interfering with the ability of patrons to use and enjoy the gallery's balcony. While the gallery owner—unlike patrons, who are mere licensees—would have "standing" to sue for private nuisance, it could not prevail on a claim that the apartment dwellers' insistence that they not be gawked at was itself an unreasonable interference with the owner's use and enjoyment of the gallery, any more than the defendant in the classic case of *Sturges v. Bridgman* (discussed below) could claim that the plaintiff-doctor's demand for relative quiet was an unreasonable interference with the confectioner's business. *See infra* note 118 and accompanying text. Here, too, the notion of unreasonable interference as *intrusion* helps to explain why notions of reciprocal causation fail to capture the actual contours of private nuisance liability. By contrast, if the English high court had concluded that the Tate's operation of the balcony overlooking the plaintiff's apartments was not a nuisance, and if the apartment dwellers engaged in sex in plain view of patrons, then the gallery perhaps might have had a nuisance claim resembling the claim of the *Mark* plaintiffs. Thanks to Daniel Markovits for raising these issues.

[76] Here I differ from Saw and Yoong in arguing that *Fearn* can be understood as a true nuisance case, as opposed to a privacy case. *See* Saw & Yoong, *supra* note 72. *Fearn* is about whether the plaintiffs were entitled to be free from the oppressiveness of being overlooked by throngs of gallery goers, just as *Mark* was about whether the plaintiffs had a right not to be confronted by others' public sex acts. Although not raised by *Mark* or *Fearn*, an important

Consider the following variation on *Fearn*. Pascha and Desi own homes on adjoining lots in a woodsy residential neighborhood. In conformity with applicable codes, Desi constructs a raised deck in his backyard from which there is a view of the woods behind his house, but also a view into Pascha's kitchen and living room through the sliding glass doors at the rear of Pascha's house. An avid birdwatcher, Desi has made the deck accessible by means of an external staircase and has posted a notice on the website of his local ornithological society indicating that, on weekends during daylight hours, the deck is open for birdwatching. If the only consequence for Pascha of this arrangement is that the occasional birdwatcher shows up on Desi's deck and happens to observe her while in her kitchen and living room, she would have no basis for a private nuisance claim. By contrast, if hordes of birdwatchers regularly occupy Desi's deck and train their binoculars on Pascha's living space, it seems more apt to describe their presence as intrusive in the requisite sense.[77]

Skeptics of my effort to reconstruct private nuisance law around a notion of unreasonable interference qua intrusion might point to cases in which liability hinges on the defendant's having acted out of a malicious desire to harm the plaintiff. For example, in U.S. jurisdictions, a defendant who, purely out of spite, builds a fence that blocks sunlight from reaching the plaintiff's home is subject to nuisance liability even absent an intrusion of the requisite sort.[78] These cases, however, are explicable on the account offered here. The defendant's malicious conduct renders the consequence that the defendant set out to create an actionable interference, even granted that the effect would not be so regarded absent malice. One might say that the defendant's malice *estops* them from arguing that an interference of the requisite sort has not occurred, or that conduct that otherwise would not be intrusive becomes intrusive when it manifests malice.[79]

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issue in some nuisance cases will be whether the actor enjoys a legal privilege to engage in conduct that meets the definition of a nuisance. For example, a court might conclude that a resident who is understandably reluctant to use her yard because of regular, rowdy protest marches that pass by it has a valid nuisance claim, yet also conclude that organizers' and participants' free speech rights renders their conduct privileged. *See infra* note 236.

77 The idea of adversely affecting another's use and enjoyment of their land by a (non-trespassory) intrusion also covers nicely instances in which a defendant appropriates another's property by projecting an image onto it. Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1190–99 (2020).

78 *See, e.g.*, O'Cain v. O'Cain, 473 S.E.2d 460, 463–67 (S.C. Ct. App. 1996) (holding that evidence that defendant's placement of hogs near plaintiffs' properties was malicious supports a finding of a nuisance); JOHN MURPHY, THE LAW OF NUISANCE 45–47 (2010).

79 Jason Neyers has argued that the role played by malice in nuisance is illustrative of a general tort principle according to which an actor is subject to liability for targeting another for gratuitous harm, then inflicting it. J.W. Neyers, *Explaining the Inexplicable?*

Harder cases for the unreasonable-interference-qua-intrusion idea might be one in which the defendant makes land in the possession of another *unavailable*, as a practical matter, for ordinary use. Here's another hypothetical inspired by relatively recent events.[80] A mining company's helicopter is transporting equipment that includes a small container of powerful, pill-sized explosives. The explosives are designed to be detonated by radio signal, which means there is a small chance that they can be accidentally set off by a cell phone signal, although they cannot be detonated when in their insulated container. At the end of the flight, employees discover that the container at some point fell out of the aircraft. No explosions have been reported, so it is assumed that the explosives fell to the ground without detonating, though it is unknown whether they are still in their container. While the helicopter's flight path took it over uninhabited land, it briefly passed near the plaintiff's rural residence. When news of the missing explosives spreads, the plaintiff, who was away at the time, reasonably concludes that it is not safe for him to return to his residence until it is determined that the explosives pose no threat to him when on his land. Two weeks later, the company finds the explosives, still in their container, at another location.

The mining company has rendered the plaintiff's land unusable or insecure for ordinary use. Is it also a case involving interference in the form of an intrusion? Certainly it resembles some familiar nuisance fact patterns, especially those in which a possessor prevails against a neighbor for keeping explosives in excessive amounts,[81] or for maintaining a tottering structure or tree that is about to collapse onto the possessor's land.[82] The fact that, in this imagined case, the possessor is *kept off* his land, as opposed to being exposed to such danger while already on the land, seems immaterial. In other words, one way to

Four Manifestations of Abuse of Rights in English Law, *in* Rights and Private Law 309, 328 (Donal Nolan & Andrew Robertson eds., 2011).

[80] Lewin Day, *The Radioactive Source Missing in Australian Desert has Been Found*, Hackaday (Feb. 1, 2023), https://hackaday.com/2023/02/01/the-radioactive-source-missing-in-australian-desert-has-been-found [https://perma.cc/3K5B-E2LG].

[81] *See, e.g.*, Comminge v. Stevenson, 13 S.W. 556, 557 (Tex. 1890) (ruling that a reasonable jury could conclude that the defendant's storage of explosives near plaintiff's property, which was "a constant source of apprehens[i]on and alarm" and adversely affected the value of the property, amounted to a nuisance).

[82] Childers v. N.Y. Power & Light Corp., 89 N.Y.S.2d 11 (App. Div. 1949) (finding that a rotting tree that threatened to fall on plaintiff's property is a nuisance, such that plaintiff was privileged to abate it by entering defendant's land and cutting it down); Restatement (Second) of Torts § 201 cmt. d, illus. 2 (Am. L. Inst. 1965) (finding that the privilege to abate a private nuisance permits a possessor to enter another's land to tear down scaffolding in danger of falling on plaintiff's property).

interfere, intrusively, with another's use and enjoyment of their land, is to hang the Sword of Damocles over it.[83]

Finally, a concept of intrusiveness not only makes sense of case law but also befits a tort grounded in rights of possession.[84] Although trespass to land and private nuisance differ in ways noted above, their respective core directives—"Keep Out" and "Don't Unduly Intrude"—are complementary. For the possessor, there is a (limited) entitlement to be left alone; to be unmolested or undisturbed by others. For all others, there is an obligation to refrain from interacting with the land in a way that amounts to entering, occupying, invading, intruding, or imposing. Both torts are fundamentally about *doings unto others in their capacity as possessors of land*, as opposed to doings that happen to affect others adversely in their capacity as possessors of land.

B. Is Private Nuisance Really a Wrong? (Yes.)[85]

For harm to be actionable as a tort, it must be inflicted by means of conduct that is wrongful in the eyes of the law. Torts thus comprise two poles: they are not just about effects (or "patients"), but also about conduct (or "agents"). Assault, for example, consists of both the actor's intentional issuance of a threat of imminent contact to another (the conduct/agent pole) and the other's experience of apprehension (the effect/patient pole). Likewise, negligence involves careless conduct *and* harm (such as bodily harm), while defamation requires publication and reputational injury.

Apart from questions about private nuisance law's interference requirement thus lurks the question of whether the phrase "private nuisance" really describes a tort—i.e., not just a particular type of harm but also the violation of a standard of conduct. This is in part because, at least in some instances, the word "nuisance" is used to refer *only* to annoyance.[86] When so used, the word describes an effect, not a tort. It is also because, when jurists have tried to describe nuisance law's conduct/agent pole, they have often done so using terms sufficiently vague as

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[83] This imagined case might also fit the description of a public nuisance that is privately actionable because it causes special injury to the plaintiff. *See infra* text accompanying notes 277–323.

[84] Smith, *supra* note 58, at 970 (emphasizing that, despite their differences, private nuisance and trespass are both property torts).

[85] Portions of this Section build on the discussion of private nuisance in John C. P. Goldberg & Benjamin C. Zipursky, *The Place of Philosophy in Private Law Scholarship*, in Methodology in Private Law Theory: Between New Private Law and Rechtsdogmatik 277, 289–97 (Thilo Kuntz & Paul B. Miller eds., 2024).

[86] Prosser, *supra* note 14, at 416 ("Nuisance . . . is . . . a field of tort liability, a kind of damage done, rather than any particular type of conduct.").

to raise a skeptical eyebrow. These include the aphorism *sic utere tuo ut alienum non laedas* ("use what is yours so as not to harm what is another's"),[87] as well as the mostly negative suggestion that nuisance liability is bounded by the principle of "give and take, live and let live."[88]

Famously, Prosser concluded on these bases that "private nuisance" is not in fact the name of a tort. Indeed, in his view, that phrase could no more identify a tort than can the phrase "bodily harm."[89] In adopting this position, Prosser thus created a challenge for himself when it came time to draft the Second Torts Restatement. For, while he believed that, in tort law, the word "nuisance" is a source of great mischief, he also surely appreciated that Restatement provisions that employ neologisms tend to fare badly in the courts. His solution was to continue to deploy the problematic term "nuisance," while attempting to ward off confusion by highlighting what he took to be its true meaning: "as it is used in [this] Restatement," he said, "'nuisance' does not signify any particular kind of conduct on the part of the defendant. Instead, the word has reference to two particular kinds of harm . . . ."[90]

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87 Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3 (1894) (bemoaning the tendency of judges to present policy-driven decisions as "hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning").

88 J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. Env't L. 1, 6 n.29 (1993) (quoting Bamford v. Turnley (1862) 122 Eng. Rep. 27 (Ex Ch) 32–33; 3 B&S 66, 83–84 (Baron Bramwell) (appeal taken from QB)). In its *Fearn* decision, discussed above, the U.K. Supreme Court likewise expressed skepticism as to whether the adjective "unreasonable" offers any guidance on what sort of interferences ought to be avoided. Fearn v. Bd. of Trs. of the Tate Gallery [2023] UKSC 4 [18]–[20] (Lord Leggatt) (appeal taken from CA).

89 Others suppose that private nuisance law involves the recognition of a form of liability that does not hinge on the violation of a standard of conduct. Gregory Keating, for example, argues that nuisance law permits liability in accordance with a deontological principle of justice holding that losses caused by permissible conduct should be borne by an actor who benefits from causing them. Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. Tort L. 1, 9 (2012). A different iteration of skepticism about the content of nuisance law, sometimes expressed by legal economists, asserts that the word "unreasonable" in the phrase "unreasonable interference" is a reference to negligence law's standard of conduct. To reduce nuisance to negligence in this manner jibes with a reductively economic account of the purpose of nuisance law: namely, law operating to arrange property rights so that land is put to its highest-value use. *See* Smith, *supra* note 58, at 967. On this view—which runs contrary to settled doctrine—if a highly profitable factory cannot operate without causing nauseating smoke regularly to invade a nearby resident's property, there should be no nuisance liability just because the economic value of the factory renders the operation of the factory reasonable from a cost-benefit perspective. *Id.* at 968.

90 Restatement (Second) of Torts § 821A cmt. c (Am. L. Inst. 1979). This passage refers to "two particular kinds of harm" because the relevant Restatement provisions aimed to address liability for both "Public Nuisance" and "Private Nuisance." That distinction is not important for purposes of the present analysis. Except when recounting Prosser's distinctive usage, I use the phrase "private nuisance" to refer to the tort, not merely to harm involving interference with use and enjoyment of land. The first Restatement of Torts also displayed concerns about confusions that attend use of the word "nuisance." Restatement of Torts

And so, in the Second Restatement, the phrase "private nuisance," unlike the words "assault," "negligence" or "trespass," refers only to a species of harm, not to a tort. The occurrence of "private nuisance," so understood, is necessary but not sufficient for liability. Nauseating odors regularly wafting onto a person's property from an entirely natural source (e.g., sulfur smells from a dormant volcano) would meet its definition yet would not provide the basis for liability.

But if, following Prosser, one uses the phrase "private nuisance" only to describe the effect pole of a tort, and if tort liability hinges on a bipolar conjunction of conduct and effect—a proposition Prosser seems not to have questioned—by what standards were courts imposing or should they impose liability? On this question, he adopted an "incorporationist" strategy. What courts had implicitly done in cases in which possessors complained about interferences with use and enjoyment is to *borrow standards from other torts*. For example, if interference resulted from conduct by the defendant that lacked *due care*—a violation of the standard set by the tort of negligence—then the case would not merely be an instance of a private nuisance qua injury but an *actionable, tortious* private nuisance. Likewise, if the interference were purposefully or knowingly inflicted on the victim—a standard found in certain intentional torts—then there could be liability. So, too, if the interference resulted from the defendant having engaged in an abnormally dangerous activity (a separate category of strict tort liability).

Prosser was correct to point out that, relative to the way in which other torts are defined, typical formulations of private nuisance are unusual in the degree to which they emphasize the effect/patient pole of the tort. He was also right that, in some instances, conduct that would support liability for some other tort (such as conduct lacking due care), when it interferes sufficiently with another's use and enjoyment of their land, can constitute a private nuisance. He went too far, though, in concluding that the concept contains no independent standard of conduct and thus needed to borrow standards from other torts.[91]

Initially cutting against Prosser's approach is the fact that few if any other torts operate in this manner. Why would private nuisance be the one that relies on borrowed standards? In the end, however, meeting Prosser's challenge requires the identification of a conduct standard

ch. 40, intro. note (Am. L. Inst. 1939). It dealt with those concerns by avoiding the word altogether, instead referring to the tort of "non-trespassory invasion of another's interest in the private use and enjoyment of land." *Id.* § 822.

[91] *Accord* Smith, *supra* note 58, at 970.

within private nuisance on terms that capture and further explicate maxims such as *sic utere* or live-and-let-live.

Here is an effort in that direction. Unlike other torts, private nuisance is about conduct that is wrongful in the sense of lacking reciprocity. Hence the frequent references in judicial decisions to notions of "give and take" and "live and let live."[92] Specifically it identifies as wrongful conduct that is nonreciprocal in the sense of being *unneighborly*.[93] In prohibiting unreasonable interferences with use and enjoyment of land,[94] private nuisance law requires each of us to go about our lives in the manner of good neighbors.

Does "neighborliness" plausibly refer to a distinct norm of conduct? Drawing on literature, history, and political theory, Nancy Rosenblum in her book *Good Neighbors* makes a strong case that it does.[95] Residential neighbors, she notes, are "uniquely vulnerable to one another . . . because of the stakes, the depth and intensity of the interests we have in quotidian private life and the felt necessity of a degree of control

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[92] *See, e.g.*, Essert, *supra* note 56, at 89 (arguing that nuisance law instantiates a principle of fair and equal normative control over property); Penner, *supra* note 88, at 7–10 (emphasizing the extent to which reasonableness in nuisance is meant to leave all property owners in a locality free to engage in common and ordinary uses); Richard W. Wright, *Private Nuisance Law: A Window on Substantive Justice*, *in* Rights and Private Law 491, 491, 507 (Donal Nolan & Andrew Robertson eds., 2012) (arguing that "unreasonableness" in nuisance law is best understood as incorporating a "give and take, live and let live" principle); Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. Pa. L. Rev. 2131, 2142, 2169 (2015) (describing and developing a "mutuality" conception of reasonableness and discussing its applicability to nuisance law).

[93] Nuisance law has long been linked to notions of neighborliness. *See, e.g.*, 3 William Blackstone, Commentaries *217–18 (providing a description of nuisance as "any act therein, that in it's [sic] consequences must necessarily tend to the prejudice of one's neighbour," and linking its content to the biblical injunction to do unto others as we would have them do unto us). Fifty years ago, Robert Ellickson argued that courts ought to determine nuisance liability by conducting a sociological inquiry into whether, in light of its effects, the defendant's activity would be regarded as "unneighborly" by members of the affected community. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 731–33 (1973). I follow him in supposing that a focus on neighborliness, as distinct from negligence law's norm of ordinary prudence, can help capture the content of nuisance law, and that the application of this norm in particular cases turns in part on local conditions and understandings. However, I treat neighborliness as a legal concept expressed through nuisance law's notion of "unreasonable interference" rather than as a social fact (i.e., a set of beliefs held by members of a given community).

[94] Given that standard formulations of private nuisance require the interference to be both "substantial" and "unreasonable," one could also locate the unneighborliness dimension of the tort in the "substantial" interference requirement.

[95] Nancy L. Rosenblum, Good Neighbors: The Democracy of Everyday Life in America (2016). In focusing on salutary aspects of neighborliness, neither Rosenblum nor I aim to deny its invidious dimensions. *See, e.g.*, Richard R. W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms (2013).

over conditions at home."[96] This "chemistry of proximity"[97] lends itself to a distinct, circumscribed morality—a "minimal," "threshold," "sober" ethic that partakes of "basic decency, friendliness, [and] helpfulness."[98]

Rosenblum identifies three "signature elements" of the norms of neighborliness, which she collects under the heading of "the democracy of everyday life": (1) "reciprocity among 'decent folk'"; (2) "speaking out"; and—notably—(3) "live and let live."[99] "Decent folk" are persons who are "good enough,"[100] i.e., minimally attentive to the basic interests of those around them and thus trustworthy enough to be plausible candidates for a "give and take" relationship.[101] "Speaking out" indirectly references local noninterference norms—"what anyone would do, *here*"[102]—that, when violated, generate for neighbors an obligation to register a complaint with those who violate them. "Live and let live" means not looking too closely into others' affairs or taking advantage of knowledge of certain things they are doing that are probably wrong.

On this account, to be a good neighbor is not necessarily to be a good friend, good citizen, or good soul, nor is it to be just, charitable, or kind. The language of neighborliness, according to Rosenblum, is not "the language of rights or civic equality, justice or injustice . . . ."[103] In this context, she adds, "[t]he obverse of hostility and mistrust is not love but peaceable, guarded, quotidian encounters."[104] Good neighbors are minimally cooperative, civil, and tolerant, and abide by a principle of reciprocity with regard to the impositions they endure and inflict on each other.

Rosenblum's rendering of neighborliness obviously echoes nuisance law's emphasis on reciprocity, and its reliance on the "locality rule."[105] Still, there are reasons to question whether her analysis can

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96 ROSENBLUM, *supra* note 95, at 99.

97 *Id.* at 95.

98 *Id.* at 6–7, 11.

99 *Id.* at 11.

100 *Id.* at 118.

101 *Id.* at 11.

102 *Id.* at 108 (emphasis added).

103 *Id.* at 102. I construe Rosenblum's contention that neighborliness is not about "rights" to be a shorthand reference to certain political, civil, and legal rights individuals in a liberal society enjoy against the state. Doing so is consistent with her overall treatment of neighborliness, which clearly supposes that neighborliness includes the observance of a duty to refrain from unreasonably disturbing one's neighbors and hence a corresponding right not to be so disturbed.

104 *Id.* at 140.

105 *See* Sturges v. Bridgman (1879) 11 Ch D 852 at 865 (Eng.) ("[W]hat would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."); *see also* Penner, *supra* note 87, at 7.

be applied to nuisance law. Her focus is on extralegal mores,[106] and nuisance law (like tort law generally) does not adopt such norms in a direct or unfiltered manner.[107] Moreover, nuisance law applies among persons who are not actually neighbors: Think of a factory that generates airborne pollution that damages private land located several miles away, or of deafeningly loud low-altitude overflights.[108]

This last concern is less grave than it might seem. To appreciate why, it is important to grasp that neighborliness in private nuisance law is distinct from its more familiar counterpart in negligence law. In the landmark case of *Donoghue v. Stevenson*, Lord Atkin characterized negligence law as a legal instantiation of the biblical injunction to love one's *neighbor* as oneself.[109] But *Donoghue* was concerned primarily with the question of *to whom* a duty of care is owed, i.e., which persons count as one's "neighbor" in the eyes of negligence law, such that one incurs an obligation to them to take care not to injure them. In nuisance law, neighborliness does not specify the class of persons who are legally entitled to be free from certain interferences caused by others. Instead, it expresses the standard of conduct that, if met, renders such interferences nonwrongful. To be sure, the standard is one that is appropriate to govern the conduct of persons living in proximity to one another. But persons need not be literal neighbors to be subject to it.[110]

So understood, neighborliness nicely captures private nuisance law's agent/conduct dimension. As Rosenblum helps show, this norm has both undemanding and demanding aspects. On the undemanding side, being a good neighbor is compatible with being largely but not

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[106] Ellickson's hugely influential study of neighborliness norms likewise treats them as extralegal. *See* Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 4 (1991) (emphasizing that neighborliness norms are the product of "adaptive norms . . . that trump formal legal entitlements").

[107] Thus, even if, as a matter of positive morality, one owes one's neighbors a *pro tanto* obligation to refrain from consistently being unpleasant with them, it is not a nuisance merely to act in such a manner.

[108] *See, e.g.*, St. Helen's Smelting Co. v. Tipping (1865) 11 Eng. Rep. 1483 (HL) 1483 (appeal taken from Eng.); Dennis v. Ministry of Def. [2003] EWHC 793 (QB) (appeal taken from Eng.).

[109] [1932] AC 562 (HL) 580 (appeal taken from Scot.). The linkage of nuisance law to the biblical injunction to "do unto others" long precedes *Donoghue*. *See* 3 Blackstone, *supra* note 93, at *218 (suggesting that nuisance law attests to the extent to which English law "enforce[s] that excellent rule of gospel-morality, of 'doing to others, as we would they should do unto ourselves.'" (citation omitted)).

[110] Suppose that, in anticipation of a gathering of motorcycle enthusiasts, a group of motorcyclists travels to the town where the event will be held and spends the better part of two weeks riding unusually loud vehicles at all hours of the night on a quiet street with a single residence. The resident can justifiably complain that the motorcyclists, even though not literally his neighbors, are acting in an unneighborly manner, i.e., in a way that actual neighbors would owe it to each other to refrain from acting.

completely indifferent to others. For the most part, one need only refrain from being unusually bothersome. The particular form of reciprocity at issue requires a neighbor to put up with an array of hassles and disturbances generated by other neighbors, in exchange for which they are at liberty to generate comparable hassles and disturbances for others. On the demanding side, some activities that may be of considerable interest and value to the actor (and perhaps to the community) will count as wrongful (what she deems as occasions to "speak out") because unacceptably bothersome, even if unavoidably so.[111]

With regard to the demandingness of the neighborliness norm, Rosenblum offers the example, drawn from her own life, of a building resident who installed an air-conditioning system with a compressor located on the building's roof. Unfortunately, the compressor generated noise and vibrations that plagued the occupants of another unit.[112] As she relates it, this episode involved an extreme case of unneighborliness. The air-conditioner owner—whom she dubs the "noise bully"—apparently took "perverse pleasure in his sleepless neighbors' impotence," and even refused the offer of other building residents to pay to move the compressor.[113] But if the bullying aspect of this scenario is removed, the situation illustrates a more general point about neighborliness and nuisance. Rosenblum tells us that the resident's reaction when confronted with the ill effects of his conduct on his neighbor was to "insist[] that he was within his rights . . . ."[114] And it is perhaps understandable that he took this position. One might imagine him saying: "I'm not doing anything *wrong* here. I am following the rules. That my doing what I am allowed to do happens to generate a serious problem for someone else, well, sorry, that's not *my* problem."

Norms of neighborliness and private nuisance law sometimes function to limit or block this sort of putative justification. Sometimes one doesn't get to hang one's hat on the fact that one is doing something that is familiar and in many contexts permissible. Good neighbors don't do things that impose on others so dramatically. To use the language of a leading English case, even standard activities must be "conveniently done."[115] A person whose appliance is producing enough noise and

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111 While Rosenblum asserts that neighbors have a duty to speak out in response to unneighborly conduct, her analysis is consistent with a weaker claim, namely, that the *aptness* of speaking out in response to certain conduct attests to its unneighborliness. ROSENBLUM, *supra* note 95, at 12.

112 *Id.* at 97.

113 *Id.*

114 *Id.*

115 *See* Bamford v. Turnley (1862) 122 Eng. Rep. 27 (Ex Ch) 32–34; 3 B&S 67, 82–88 (Baron Bramwell) (appeal taken from Eng.) (holding that plaintiff's nuisance claim, brought after

vibration to prevent his neighbor from sleeping and otherwise living normally by the standards of the locality is a person who has engaged in conduct about which other neighbors should "speak out" (in Rosenblum's argot). In the language of the law, he is unreasonably interfering with his neighbors' use and enjoyment of their property and is thus subject to a private nuisance action.[116]

To maintain that neighborliness is a standard of conduct is not to assert that it stands completely apart from other standards. Failing to exercise care against disrupting the lives of others can amount to unneighborliness. If a business operates a facility in a place suitable for such facilities, but neglects to install modestly priced equipment that would dampen the noise generated by the facility, thereby subjecting nearby residents to deafening noise, the business's carelessness is (also) an instance of unneighborliness.[117] On the other hand, as explained, conduct can be unneighborly even if a defendant takes due care to avoid interfering with a plaintiff's use and enjoyment. This was the situation in *Sturges v. Bridgman*. The defendant, who operated a London confectionary with equipment attached to a wall shared with the plaintiff's residence, was ultimately ordered to remove the equipment simply because it constantly generated noises and vibrations that were intolerable, given the character of the neighborhood.[118]

I noted above that the idea of unreasonable interference at the center of nuisance ordinarily involves a defendant engaging in conduct that confronts the plaintiff with conditions that render the plaintiff's property unavailable or insecure for ordinary use. I also noted a special class of nuisance cases which provide for liability even in the absence of such effects. Thus, while courts in the U.S. have steadily held that the

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plaintiff's home was inundated with smoke from defendant's brick kiln, was valid despite its being in a suitable location). Thanks to Roderick Bagshaw for this reference.

116 *See, e.g.*, St. Helen's Smelting Co. v. Tipping (1865) 11 Eng. Rep. 1483 (HL) 1487 (Lord Westbury LC) (appeal taken from Ex Ch) (rejecting as untenable the defendant's argument that, so long as its interfering activity was taking place in a fit setting, "it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the [p]laintiff's property").

117 *See* Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 588–90, 613–14 (Tex. 2016). Note that, if the only impact on the residents is the disturbance they experience from the noise, they probably do not have viable claims for the tort of negligence. Conversely, conduct that causes physical harm to neighboring property (e.g., cracking the foundation of a neighbor's house) can sometimes generate nuisance liability even if there is no basis for a claim sounding in negligence or abnormally dangerous activity liability. *See, e.g.*, *Tipping*, 11 Eng. Rep. at 1487 (nuisance suit for property damage).

118 Sturges v. Bridgman (1879) 11 Ch D 852, 853–54, 865–66 (appeal taken from Eng.); *see also* A.W.B. Simpson, *The Story of* Sturges v. Bridgman*: The Resolution of Land Use Disputes Between Neighbors*, *in* Property Stories 11, 16–17 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

right to use and enjoy one's property does not include an entitlement to maintain a property's existing access to sunlight,[119] or to be spared from having to view aesthetically unpleasant objects or conditions on others' properties,[120] they have recognized liability for spite fences[121] and for "aesthetic nuisances" where the defendant has acted out of a desire to make the plaintiff miserable.[122] This, I would suggest, is entirely consistent with the idea of nuisance requiring neighborliness. Good neighbors don't mess with each other in this way. They are Rosenblum's "decent folk."

As these and other examples suggest, the determination of whether an actor has adhered to or violated private nuisance law's norm of neighborliness is fact-intensive, but this hardly renders it so vague as to be useless. It is easy enough to identify the difference between a homeowner in a residential neighborhood who, every now and again, is kept up at night by a neighbor's barking dog and a homeowner who is regularly kept up because a neighbor has decided to operate a dog kennel from her home. Absent a rule against it, ownership of a domesticated dog (or even several) is a customary and ordinary feature of residential living, and it is the nature of dogs that they will sometimes bark at inconvenient times. Anyone who lives in such a neighborhood is expected to put up with such things. The operation of a kennel in a residential neighborhood might well be a different matter.

If neighborliness is a norm of conduct—if private nuisance law directs us to refrain from interfering with another's use and enjoyment of their land by means of conduct that is unneighborly—then there must be instances in which a person seriously interferes with another's use and enjoyment of their land without violating the norm. (To say the same thing: If the norm of nuisance were simply "don't cause serious interference," it would not be a conduct-guiding norm, any more than would be a norm that says: "Never cause bodily harm to another person.") Here is such an instance: Dina owns a cabin in a wooded area with a few other homes nearby. Prudently (and otherwise legally), she on several occasions gathers and burns firewood in the stove that she uses for cooking and heating the cabin. The wood she happens to gather contains undetectable and very rare mold spores that become airborne

119 *See supra* note 78 and accompanying text.

120 *See supra* notes 63–68 and accompanying text.

121 *See, e.g.*, Geiger v. Carey, 154 A.3d 1093, 1113–14 (Conn. Ct. App. 2017) (applying Connecticut's "spite fence statute"); Austin v. Bald II, L.L.C., 658 S.E.2d 1, 3 (N.C. Ct. App. 2008) (applying North Carolina's common law rule against spite fences), *rev. denied*, 666 S.E.2d 737 (N.C. 2008).

122 *See supra* notes 78–79 and accompanying text.

in smoke from the burning wood, travel to her neighbor Norbert's property, and, over time, kill several indigenous trees there.

Dina has interfered significantly with Norbert's use and enjoyment of his land. Indeed, the interference is significant enough to count as "unreasonable" insofar as that term specifies the level of impact necessary to generate liability for private nuisance. And yet Dina should not face liability. This result is not explained simply by the fact that Dina took care not to cause harm to others for, as we have seen, even non-negligent conduct can be the basis for nuisance liability. Rather, it is explained by the fact that she did nothing unneighborly.[123] Once Dina becomes aware, or perhaps even if she reasonably should be aware, that her actions are interfering with Norbert's use and enjoyment of his land by physically damaging it, the situation changes. To continue burning the same wood under these conditions might well be unneighborly.

Readers may notice a resemblance between this hypothetical and the facts that produced the 1865 House of Lords decision in *St. Helen's Smelting Co. v. Tipping*, which affirmed nuisance liability for tree-killing smoke emitted by the defendant's smelter.[124] But the likeness is superficial. Already by the early 1800s, the devastating effects on vegetation of emissions from copper smelters were well-known and a source of conflict between landowners and farmers, on the one hand, and industrialists, on the other.[125] In short, harm of the sort experienced by Tipping was not only significant but entirely foreseeable to the defendant and almost certainly foreseen when the plant was constructed.[126] In the

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123 Some might argue that Dina should escape liability because private nuisances by definition consist of repeated or ongoing interferences with others' use and enjoyment. This appears not to be the law in the U.S., at least when the plaintiff's property is physically damaged in a way that hinders its use. *See* RESTATEMENT (FOURTH) OF PROP. § 2.2 cmt. j (AM. L. INST., Tentative Draft No. 3, 2022). To the extent the nuisance law of other jurisdictions contains this restriction, one way to understand it is as a per se rule of what *doesn't* count as unneighborly conduct.

124 St. Helen's Smelting Co. v. Tipping (1865) 11 Eng. Rep. 1483 (HL) 1486–88 (Lord Westbury LC) (appeal taken from Ex Ch); *see* Edmund Newell, *Atmospheric Pollution and the British Copper Industry, 1690–1920*, 38 TECH. & CULTURE 655, 671 (1997) (providing background); Ben Pontin, *Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence*, 75 MOD. L. REV. 1010, 1013–14, 1017–18 (2012) (explaining that the litigation arose out of a then-recurring problem of factories located in towns sending damaging pollution into the surrounding countryside).

125 *See* Newell, *supra* note 124, at 665 (noting that, by the early 1800s, it was common knowledge that smelter emissions could destroy local vegetation). Nuisance suits had been brought against the operators of copper smelters as early as the 1770s. *See id.* at 664, 666–72. Interestingly, Lancashire was not only the locus of the successful private nuisance suit in *Tipping* but had nearly a century earlier seen a successful public nuisance indictment brought against the owner of a copper smelter by the city of Liverpool. *See id.* at 663.

126 *See* Cambridge Water Co. v. E. Cntys. Leather PLC [1994] 1 All ER 53 (HL) 71–72 (appeal taken from Eng.) (unforeseeability of harm to another's property defeats private

end, *Tipping* seems mainly to stand for the now-familiar principle of nuisance law that a foreseeable, seriously damaging activity can count as a nuisance even if it is socially valuable, and even if the actor has taken all possible measures to minimize the damage, such that the only way to avoid causing harm (and liability) is to relocate the activity.

One other advantage accrues from understanding private nuisance as unneighborly interference, at least when it comes to interpreting tort law in the United States—it explains the compatibility of two seemingly contradictory propositions: (1) private nuisance is a strict liability tort; and (2) private nuisance liability stands apart from strict liability under *Rylands v. Fletcher*.[127] *Rylands* famously held that the owners of a reservoir that failed and flooded the plaintiff's mine were strictly liable for the damage caused. Ever since, courts and commentators have struggled to articulate its relation to nuisance law,[128] although courts in the United States generally treat *Rylands* as the font of a distinct form of liability based on abnormally dangerous activities.[129]

The foregoing analysis supports a distinction between *Rylands* liability and private nuisance liability. There is no suggestion in *Rylands* that the defendants behaved in an unneighborly or otherwise wrongful manner by arranging to construct and maintain a large reservoir on a rural property.[130] Of course, a bursting reservoir can wreak havoc on neighboring properties. But the creation of this risk was not enough to charge the defendants with being unneighborly, any more than it would be unneighborly to plant ordinary but shallow-rooted trees near the boundary between one's own land and one's neighbor's land notwithstanding that they are more prone than other trees to blow over in high winds. Rather, the *Rylands* defendants faced liability because they had engaged in a use of land that, although perfectly permissible, was "non-natural"—i.e., consisted of an activity, atypical for the community, that involved attempting to contain natural forces prone to

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nuisance liability). Just as reasonableness figures in different ways in negligence and nuisance law, so too does foreseeability. Thus, the fact that some version of foreseeability limits private nuisance liability does not mean that its standard of conduct is a negligence-like notion of fault, or that it does not impose a version of "strict" liability. *But see* Maria Hook, *Reasonable Foreseeability of Harm as an Element of Nuisance*, 47 Victoria Univ. Wellington L. Rev. 267, 276 (2016) (arguing that foreseeability's role in nuisance law renders it a fault-based tort rather than a strict liability tort). In nuisance, the absence of foreseeability is a basis for concluding that the defendant did not act in an unneighborly manner.

127 Rylands v. Fletcher (1868) 3 LRE & I. App. 330 (HL) (appeal taken from Eng.).

128 *See, e.g.*, *Cambridge Water Co*., 1 All ER at 71–72 (retroactively deeming *Rylands* to have been a private nuisance case); Prosser, *supra* note 14, at 425–26 (arguing that, in the U.S., courts that have purported to reject *Rylands* often apply its rule (wittingly or unwittingly) under the guise of applying nuisance law).

129 *See, e.g.*, Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 607–09 (Tex. 2016).

130 3 LRE & I. App. at 340–42 (Lord Cranworth).

escape and to cause damage if they escape.[131] In short, a crucial premise of *Rylands* was a determination that the defendants' maintenance of their reservoir was no more unneighborly than the maintenance on a suburban property of a large, healthy willow tree within falling distance of a neighbor's home. This explains why, in *Rylands*, liability had to take the form of full-blown strict liability—liability without any wrongdoing at all—as opposed to nuisance liability based on the violation of a strict (unforgiving) norm of neighborliness.[132]

C. Responsibility for Creating a Nuisance

One other aspect of private nuisance law requires attention. It concerns the question of *who* can be deemed responsible for the creation or maintenance of a condition or activity that counts as a private nuisance (i.e., to which actor(s) can a nuisance be attributed). In standard cases, the answer is obvious: If an industrial plant sends noxious fumes into the yards of neighboring residences, the owner clearly is a responsible party. More challenging questions of responsibility arise when the person or entity being sued is further removed from the activity or condition in question.[133]

This issue has sometimes been addressed by courts when confronting claims against landlords for nuisances in the first instance generated by tenants,[134] and against possessors who allow licensees to engage in

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131 *Id.* at 339–40 (Lord Cairns LC).

132 *See* John C. P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 745 (2016) (explaining the distinctiveness of the form of strict liability recognized in *Rylands*). My point is not that the owner of a willow tree that falls on neighboring properties is subject to liability under *Rylands*. Famously, only a few activities—including the use of reservoirs, blasting, and the keeping of wild animals—have been found by the courts to be "abnormally dangerous." *See* Dobbs, Hayden & Bublick, *supra* note 3 (identifying activities treated by courts as abnormally dangerous). It is instead that one can create non-trivial risks of damage to neighboring properties without acting in an unneighborly manner.

133 A late nineteenth-century treatise helpfully identifies some of the basic rules of responsibility for nuisance. *See* Leroy Parker & Robert H. Worthington, The Law of Public Health and Safety, and The Powers and Duties of Boards of Health 226–49 (Albany, Matthew Bender 1892). Versions of the attribution issue arise in other areas of tort law, such as negligence. *See generally* John C. P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 Wake Forest L. Rev. 1211 (2009) (analyzing distinct grounds on which courts hold a 'background' actor liable for an injury inflicted more immediately by another, independent actor).

134 *See* Restatement (Second) of Torts § 837 cmt. h (Am. L. Inst. 1979) ("The lessor's liability does not extend to activities of the lessee that he neither consents to nor has reason to know are intended at the time he makes the lease."); Cocking v. Eacott [2016] EWCA (Civ) 140 [23]–[24], [2016] QB 1080 (Vos LJ) (appeal taken from Eng.) (holding that landlord responsibility is not established by the mere fact of ownership nor by a failure to

certain activities on their lands.[135] *Mark*, discussed above, is an example of the latter. As the appellate court acknowledged, there was nothing in the plaintiffs' complaint suggesting that the state-agency defendants were vicariously liable for the beachgoers' actions. Nor did the fact that the nuisance-generating activity took place on land owned by the state and managed by the agencies suffice to render them responsible.[136] The court instead concluded that the agencies could be held liable only if they possessed "authority to exercise control over the behavior of the members of the public who congregate in the wildlife area and . . . either knowingly and intentionally, or with reckless disregard for the rights and safety of the public, failed to exercise control over nudity in the wildlife area."[137] Likewise, in *Fearn*, it was not the gallery's employees who were doing the gawking but rather its invitees. Nonetheless, the gallery was held responsible based on having "invit[ed]" its patrons to engage in the nuisance-generating activity.[138]

One of the many complexities raised by government entities' suits for public nuisance against product manufacturers—discussed below—is that the immediate source of the complained-about nuisance is often the actions of other actors. As *Mark* and *Fearn* suggest, this fact by no means establishes that manufacturers are free from liability. But it is important to the cause of clear analysis to isolate and analyze this aspect of the emerging law of public nuisance, just as must be done when applying private nuisance law.

III
Public Nuisance: Breach of Civic Obligation and Intrusive Interference with Use of Public Space

A private nuisance is at once a breach of a legal duty owed by one person to another to refrain from interfering with the other's possession

enforce a lease term forbidding the tenant's conduct; instead, the landlord must "authorise[]" or "participate directly" in the offending activity).

135 *See* Dibert v. Giebisch, 144 P. 1184, 1185 (Or. 1914) (noting in dicta that an owner is subject to nuisance liability for "willfully allow[ing] a nuisance to be created or to be continued by another on or adjacent to his premises in the prosecution of a business for his benefit and authority, when he had the full power to prevent or abate the nuisance").

136 Mark v. State Dep't of Fish & Wildlife, 974 P.2d 716, 720 (Or. Ct. App. 1999).

137 *Id.* at 721. By contrast, the court concluded that agency negligence in failing to prevent the sexual activity would not suffice. *See id.* at 721 n.5. On second appeal, the appellate court upheld an injunction requiring the agencies to prevent the plaintiffs from being confronted by the offending activities, thus affirming that the agencies' role was sufficiently robust to deem it responsible for the beach-goers' nuisance-generating actions. *See* Mark v. State Dep't of Fish & Wildlife, 84 P.3d 155, 164–65 (Or. Ct. App. 2004).

138 Fearn v. Bd. of Trs. of the Tate Gallery [2023] U.K.S.C. 4 [50] (Lord Leggatt) (appeal taken from EWCA (Civ)).

and a violation of the other's legal right to possession. By contrast, in the first instance, a public nuisance is a breach of a duty owed to the public and the violation of a right common to the public.[139] As its name suggests, in its pure form, a public nuisance is a public wrong, not a private wrong.

Two features of public nuisance law render it difficult to grasp. First, it has been defined in ways that suggest it lacks a substantive core. For example, on one standard description used in old English law, a public nuisance is the "doing [of] a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires."[140] To this unhelpful definition, William Blackstone added that public nuisances are "such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person . . . ."[141] Following William Hawkins and William Sheppard,[142] Blackstone elaborated with a seemingly random list of activities indictable as public nuisances (paraphrased here):

(1) obstructing a public way

(2) operating an offensive trade to the detriment of the public

(3) operating a disorderly establishment such as a brothel or gambling house

(4) running a lottery

(5) erecting or maintaining a cottage

(6) storing large quantities of explosives or making, selling, or setting off fireworks

(7) eavesdropping

(8) behaving as a common scold.[143]

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139 *See* 3 Blackstone, *supra* note 93, at *216, *219 (distinguishing private and public nuisance).

140 *See* 1 William Hawkins, A Treatise of the Pleas of the Crown 197 (London, Elis Nutt 1716).

141 4 William Blackstone, Commentaries *167.

142 *See* Hawkins, *supra* note 140, at 197–230 (describing public nuisances involving highways, bridges, and public houses); William Sheppard, The Court-Keeper's Guide for the Keeping of Courts-Leet and Courts-Baron 44–47 (London, G. Sawbridge, T. Roycroft & W. Rawlins 6th ed. 1676) (listing a range of public nuisances).

143 *See* 3 Blackstone, *supra* note 93, at *167–69. This is my paraphrase of the list in the first edition of the Commentaries. Blackstone criticized as "hard and impolitic" the treatment of cottages as public nuisances, using language arguably presaging modern criticisms of suburban lot-size restrictions, *id.* at *168, which may help explain why, in later editions of the Commentaries, cottages were left off this list. *See* Maureen E. Brady, *Cottages as Public Nuisances: The Long History of Land Use Regulation of the Poor* 1–3 (Harvard Pub. L. Working Paper, Paper No. 23-32, 2023), https://ssrn.com/abstract=4516150 [https://perma.cc/26QQ-V8TS].

Currently, a number of states have general public nuisance statutes.[144] These tend to borrow language from the formulations quoted above, thereby codifying a version of the common-law idea of a public nuisance.[145] Other statutes designate and prohibit particular activities as nuisances.[146]

A second source of confusion is that one who creates a public nuisance might find themselves facing a range of legal consequences, including: (1) a criminal prosecution; (2) "summary abatement" (e.g., an official or private citizen removing or destroying a nuisance-generating thing); (3) a civil action to abate the nuisance; or (4) a civil action to vindicate the legal right of an individual who suffers a different-in-kind injury as a result of the nuisance.[147] That the law authorizes these various responses, some of which are civil and some of which are criminal, makes classification difficult.

My analysis of public nuisance law will first tease apart its distinctive dimensions as a criminal and regulatory wrong, on the one hand, and a tort, on the other. This will in turn permit the identification of public nuisance law's conceptual core.

A. Enforcement Actions v. Tort Actions for Redress

When Blackstone deemed public nuisances to be "indictable only, and not actionable,"[148] he was characterizing them as crimes. Just by virtue of creating a structure that blocks a public way, a person was and is subject to prosecution.[149] To be sure, public nuisance has always been defined as a low-culpability offense—the progenitor of modern

144 *See* Prosser, *supra* note 2, at 999 (discussing the codification of public nuisance law).

145 How a statute of this sort interacts with common law presumably is a question of statutory interpretation. *See, e.g.*, City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 162 (Ill. 1982) (characterizing the Illinois public nuisance statute as "declaratory" of common law).

146 *See, e.g.*, Prosser, *supra* note 2, at 1000–01 ("[T]here are in every state a multitude of specific provisions declaring that certain things, such as bawdy houses, black currant plants, buildings where narcotics are sold, mosquito breeding waters, or unhealthy multiple dwellings, are public nuisances.").

147 *See infra* notes 148–64 and accompanying text.

148 3 Blackstone, *supra* note 93, at *167. In the England of Blackstone's time, criminal prosecutions typically were brought by private individuals. *See* Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750–1850: Policing, Private Prosecution, and the State*, *in* Policing and Prosecution in Britain 1750–1850, at 3, 23–24 (Douglas Hay & Francis Snyder eds., 1989). However, private prosecutions were understood to vindicate the rights and interests of the public, hence the division in the *Commentaries* between Book 3 (private wrongs) and Book 4 (public wrongs).

149 3 Blackstone, *supra* note 93, at *167.

mala prohibita such as the sale of adulterated food.[150] This is in part why responsibility for regulating public nuisances once fell to "leets," local governmental bodies that (in modern terms) were half-courts and half-administrative agencies.[151] It is also why they are commonly met with fines.[152] And it is why the offense is recognized as a crime even though, in many applications, it seems barely to meet notice and culpability standards usually thought to limit the legitimate scope of criminal law.[153] In fact, many modern statutes rendering public nuisances unlawful simply state as much without further elaboration.[154]

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150 *See id.* (classifying public nuisance as an offense "against the public order and oeconomical regimen of the state"); Parker & Worthington, *supra* note 133, at 251 ("Certain acts and omissions of duty of which the law takes cognizance, as constituting common nuisances or public wrongs, are generally defined in the penal code of the State or by local police regulations, or [are] undefined misdemeanors, and are visited with some species of penalty."); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56–67 (1933) (tracing the lineage of modern "public welfare offenses," such as the sale of adulterated food, to nuisance law).

151 *See* J.R. Spencer, *Public Nuisance–A Critical Examination*, 48 Cambridge L.J. 55, 59–60 (1989) (discussing leet jurisdiction in the public nuisance context).

152 *See, e.g.*, R. v. Medley (1834) 172 Eng. Rep. 1246, 1250 (fining defendants responsible for polluting a portion of the Thames in amounts that the court deemed more than nominal yet not severely punitive). Fines can be significant under statutes that treat each day on which a nuisance remains unabated as a distinct offense. *See, e.g.*, Tex. Health & Safety Code Ann. § 343.012(c) (West 2023). Some offenders may also face imprisonment. *Id.*

153 *See, e.g.*, Spencer, *supra* note 151, at 55 ("Everything in public nuisance [law] runs contrary to modern notions of certainty and precision in criminal law—and indeed, in civil law as well.").

154 *See, e.g.*, Fla. Stat. Ann. § 823.01 (West 2023) ("All nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals are misdemeanors [except for nuisances involving the use of a structure to sell controlled substances, which are felonies] . . . ."); Ga. Code Ann. § 41-1-2 (West 2023) ("A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals."); 18 Pa. Stat. & Cons. Stat. Ann. § 6504 (West 2023) ("Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor of the second degree."); Travelers Prop. Cas. Co. v. Actavis, Inc., 225 Cal. Rptr. 3d 5, 20 (2017) ("The [California] public nuisance statutes do not require a finding that the nuisance was created or furthered by intentional acts."). New York's statute was amended in 1965 specifically to add a mens rea requirement of intent or recklessness with respect to the creation or maintenance of a condition that endangers the health or safety of a considerable number of persons. *See* William C. Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 240 (noting that this element was added to give the offense "a 'greater criminal dimension'" (citation omitted)). In a jurisdiction that has adopted the Model Penal Code, recklessness perhaps sets the mens rea floor. *See* Model Penal Code § 2.02(3) (Am. L. Inst., Proposed Official Draft 1962) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or *recklessly* with respect thereto." (emphasis added)). On the other hand, the Code allows for strict liability "violations," defined as offenses so designated in a state's criminal law, or for which only fines or other civil penalties are authorized as punishments. *See id.* §§ 1.04(5), 2.05.

While criminal prosecutions remain available as a response to the commission of the public nuisance offense, they have taken a back seat to alternative enforcement regimes. In England, starting around 1800, "the usual method of repressing [a public nuisance] ceased to be prosecution in the criminal courts and became an injunction issued in the civil courts."[155] Public nuisance law thus provides an exception to the general rule that courts will not use their equitable powers to enjoin crimes.[156] Crucially, although these actions were and are civil,[157] and although they can in some jurisdictions be brought by individuals as well as officials,[158] they are *not* tort suits alleging a violaton of an

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155 Spencer, *supra* note 151, at 66. These actions, though brought by the Attorney General to vindicate public rights, tended to be styled as "relator actions"—that is, proceedings on behalf of putatively aggrieved private citizens. *See id.* at 67–69. It appears that private citizens could also, in their own name, commence proceedings in equity to enjoin even purely public nuisances. *See id.* at 69; Atty. Gen. v. Forbes (1836) 40 Eng. Rep. 587, 590; 2 My. & Cr. 122, 129 ("[I]ndividuals, who conceive themselves aggrieved, may come forward and ask the assistance of the Court to prevent a public nuisance, from which they have individually sustained damage." (citation omitted)). In the United States, the use of the equity courts to obtain injunctions against public nuisances appears to have commenced at about the same time. *See* William Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 127–28 (1996). As noted below, some states allow private actors to bring abatement actions.

156 *In re* Debs, 158 U.S. 564, 593–94 (1895) (emphasizing that a court's equitable jurisdiction over a public nuisance "is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law"); Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Jurisdiction*, 98 Notre Dame L. Rev. 699, 723–24, 726 (2022) (analyzing the grounds and limits of *Debs*'s holding that federal courts' equity jurisdiction authorizes them, in litigation brought by the federal government, to order the abatement of public nuisances, including obstructed public ways involved in interstate commerce); *see also* Parker & Worthington, *supra* note 133, at 251–52, 254–55 (noting the authority of governments to obtain injunctive relief in courts of equity to abate public nuisances); 2 Joseph Story, Commentaries on Equity Jurisprudence, as administered in England and America § 923 at 201–04 (Boston, Charles C. Little & James Brown 2d ed. 1839) (same).

157 *See, e.g.*, NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 477–78 (E.D.N.Y. 2003) (reviewing conflicting New York case law and concluding that it supports the use of a clear and convincing evidence standard in actions to enjoin a public nuisance).

158 State law in the United States has varied on this issue. *Compare* Conn. Gen. Stat. Ann. § 19a-343(b) (West 2023) (conferring on officials an "exclusive right" to bring actions to abate certain public nuisances), Tex. Health & Safety Code Ann. § 343.012(a) (West 2023) (authorizing county officials, agents, or employees to seek abatement after thirty days' notice to the defendant), *and* 58 Am. Jur. 2d *Nuisances* § 185, Westlaw (updated May 2023) ("Generally, a public nuisance gives no right of action to an individual, either for equitable relief or generally." (footnotes omitted)), *with* Cal. Civ. Code § 3493 (West 2023) (barring private actions to enjoin a public nuisance unless plaintiff can prove a special injury caused by the nuisance), Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 354–55 (1971) (same), Littleton v. Fritz, 22 N.W. 641, 642–44 (Iowa 1885) (applying Iowa statute authorizing individuals to bring civil suits to enjoin the operation of establishments selling intoxicating liquors without a permit), N.C. Gen. Stat. Ann. § 19-2.1 (West 2023) (authorizing a private individual who posts the required bond and resides in the county in which the alleged public nuisance is located to sue for an injunction unless "the alleged nuisance involves the illegal possession or sale of obscene or lewd matter"), Wis. Stat. Ann. § 823.01 (West 2023) ("Any

individual's right against wrongful injury. Rather they are equitable actions that aim to vindicate the right common to the public that is violated by the commission of the offense itself. Typically, they do so by generating a judicial order requiring the defendant to abate a nuisance that undermines or threatens public safety or order.[159]

Common law and state statutes also authorize officials or private individuals to abate summarily certain public nuisances.[160] On this basis, for example, officials can, after giving proper notice to the putative nuisance-generator, take actions to eliminate conditions that amount to a public nuisance and that pose a risk of imminent harm to members of

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person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same."), *and* Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America § 1251 at 598–99 (Little Brown & Co. 14th ed. 1918) (citing cases in which courts allowed a private citizen who suffers special injury as a result of a public nuisance to sue in equity to abate the nuisance). Presumably, in jurisdictions that allow individuals to bring abatement actions, an official action for injunctive relief or abatement precludes suit by an individual. *See, e.g.*, United States v. Olin Corp., 606 F. Supp. 1301, 1307 (N.D. Ala. 1985). During the Progressive Era, many states enacted statutes authorizing individuals to bring abatement actions as part of an effort to fashion effective legal responses to saloons, brothels, and other perceived threats to public order and morals. William J. Novak, New Democracy: The Creation of the Modern American State 167–79 (2022).

159 *See, e.g.*, State ex rel. Attorney General v. Canty, 105 S.W. 1078, 1084 (Mo. 1907) (enjoining a bullfight because it amounted to a public nuisance "injurious to the public safety and good morals"); State v. Patterson, 37 S.W. 478, 479–80 (Tex. Civ. App. 1896) (deeming the operation of a gaming house to be a public nuisance but declining to enjoin it given that its operation was not proven to be injurious to property or civil rights). It appears that courts presiding over a criminal prosecution would sometimes order abatement of the nuisance as part of the defendant's punishment. *See, e.g.*, Commonwealth v. Wright & Dame (Bos. Mun. Ct. 1829), *reprinted in* 3 Am. Jurist & L. Mag. 185 (1830) (imposing a fine on defendants and ordering destruction of their wharf). Although abatement orders are predicated on proof of the existence of a public nuisance as defined by criminal law, civil proceedings that give rise to such orders proceed independently of criminal prosecutions. Thus, an aquittal on a criminal charge of creating a public nuisance does not preclude liability to an abatement order. Murphy v. United States, 272 U.S. 630, 632 (1925) (ruling that, because abatement is not punitive, defendants who were aquitted of a public nuisance crime (as defined by the Volstead Act) were not placed in double jeopardy by an abatement order issued in a civil action addressing the same conduct); Restatement (Second) of Torts § 821B (Reporter's Note to Institute, at 18) (Am. L. Inst., Tentative Draft No. 15, 1969) (noting that persons responsible for a public nuisance may be immune from criminal prosecution yet subject to a civil abatement action).

160 *See, e.g.*, Hart v. City of Albany, 9 Wend. 571, 588–89 (N.Y. 1832) (affirming the legality of a city-authorized summary abatement of complainants' floating storehouse and discussing the availability of summary abatement); *see also* 66 C.J.S. *Nuisances* §§ 133–34 (May 2023 update); Novak, *supra* note 155, at 68, 141, 226 (noting the availability of summary abatement in the nineteenth-century). *See generally* William B. Meyer, *"No Quixotry in Redress of Grievances": How Community Abatement of Public Nuisances Disappeared from American Law*, 41 L. & Hist. Rev. 171 (2023) (observing that, until the mid-1800s, state law allowed any person, even one not affected by the nuisance, to abate the nuisance summarily, which sometimes resulted in mobs lawfully destroying offending structures).

the public. However, summary abatement is generally available only in response to actual nuisances (meaning that one who acts unilaterally to remove or destroy what seems to be a nuisance-generating thing will be held strictly liable if the thing is later deemed not to be a nuisance), and is limited to actions *necessary* to abate.[161] In some jurisdictions, certain local governmental entities—for example, city planning commissions—enjoy a broader power to issue abatement orders even absent a risk of imminent harm.[162] Costs incurred for summarily abating a nuisance generally are recoverable from the person(s) responsible for the nuisance.[163] Summary abatement measures are typically reviewable *ex post* through a tort action (such as a conversion action, if some structure or object owned by the putative nuisance-creator has been destroyed) or a mandamus action brought against a government entity that has ordered abatement.[164]

To summarize: A public nuisance in the first instance is a crime, albeit one that is commonly addressed through a civil enforcement action or summary abatement rather than a prosecution. To be sure, the crime is broadly defined, encompassing, at least in Blackstone's time, everything from blocking a public way to eavesdropping. What can count as a wrongful interference with a right common to the public is discussed in more detail below. Before addressing this question, however, I turn to the issue of whether or when, as a conceptual or analytic matter, a public nuisance is properly deemed a tort.

As noted above in connection with private nuisance, all torts have an injury (or patient) component and a conduct (or agent) component. Furthermore, in tort law, "injury" refers to a setback to some aspect of *individual well-being*, such as bodily harm, interference with possessory

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161 *See* Meyer, *supra* note 160, at 174; Lawton v. Steele, 23 N.E. 878, 879–81 (N.Y. 1890) (outlining circumstances in which summary abatement by officials or individuals had been authorized by English and New York law), *aff'd*, 152 U.S. 133 (1894).

162 *See, e.g.*, Benetatos v. City of Los Angeles, 186 Cal. Rptr. 3d 46 (Ct. App. 2015) (affirming the defendant commission's determination that the plaintiff's restaurant constituted a public nuisance, as well as its imposition of conditions on the restaurant's continued operation).

163 66 C.J.S. *Nuisances*, *supra* note 160, § 134; Parker & Worthington, *supra* note 133, at 280; Restatement (Third) of Restitution & Unjust Enrichment § 22(2) & cmt. h (Am. L. Inst. 2011) (noting that the unrequested performance of another's duty owed to the public supports a claim for restitution as necessary to avoid unjust enrichment); *cf.* United States v. Sunoco, Inc., 501 F. Supp. 2d 641, 648–49 (E.D. Pa. 2007) (allowing for restitution under CERCLA).

164 *See, e.g.*, *Benetatos*, 186 Cal Rptr. 3d at 1272 (deeming an administrative abatement order to be reviewable by mandamus proceeding); N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (affirming authority of city officials to seize and destroy food products suspected of being tainted, subject to the right of the owner of the products to prevail on a conversion claim by proving the seizure was unjustified).

rights, reputational damage, loss of privacy, and the like.[165] Thus, while the public nuisance offense is an injury-inclusive wrong, it is not of itself a tort, because the injury necessary for the completion of the offense is an interference with a right common to the public, *not* a right that vindicates an aspect of individual well-being.[166] To repeat, the offense is committed just as soon as a road is blocked or public waters are fouled, regardless of whether, at that moment, there has been any interference with some right or interest of a particular person. Hence, civil abatement and other enforcement actions responding to the offense itself tend to be brought by officials, and in any event are not brought by an individual suing in their own right.[167]

Yet, although the public nuisance *offense* is not properly described as a tort, conduct that meets the definition of the offense can *become* a tort if it generates a certain kind of follow-on effect—namely, an interference with certain aspects of a person's individual well-being. Since the 1600s, courts have deemed a consequential injury of this sort to confer on injury-victims a right of action to obtain redress. In short, if an actor is responsible for creating a public nuisance that causes an individual (or a number of individuals) to suffer particular damage or a "special injury" apart from the violation of the right common to the public, the individual is entitled to obtain redress from the actor for their injury.[168] Unlike civil abatement proceedings, a special-injury suit

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165 A version of this point is also true for torts committed against artificial persons, such as business entities. For example, a business that sues for the tort of tortious interference with a contract is claiming to have been deprived of the performance to which *it* was legally entitled.

166 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("[A tort] plaintiff sues in her own right for a wrong personal to her.").

167 *See* Parker & Worthington, *supra* note 133, at 252–53 (explaining that it is "well-settled" that individuals cannot sue for compensatory damages based only on the existence of a public nuisance (i.e., absent a special injury) since "[t]he private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons." (quoting Charles A. Ray, Negligence of Imposed Duties, Personal 75 (1891))). *But see* David Ibbetson, A Historical Introduction to the Law of Obligations 106 nn.62, 65 (2001) (observing that, at one time under English law, certain common nuisances that were not indictable might have been actionable by an individual even absent special injury). *See also* Harrop v. Hirst (1868) 4 LR Exch. 43 (Eng.). In *Harrop*, the plaintiffs resided in the district of Tamewater and sued the defendant for diverting water, thus rendering unreliable the spout on which district residents relied for their water. The jury found that the plaintiffs were not affected personally, but nonetheless awarded damages, which award was upheld. It is unclear from the opinion whether the right being vindicated was the public's right to the water or the plaintiff's private right of use and enjoyment.

168 Restatement (Second) of Torts § 821C(1) (Am. L. Inst. 1979). In so far as courts describe public nuisance suits as actions for a common-law tort, *see, e.g.*, People ex rel. Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 202 (App. Div. 2003), they are speaking loosely but not entirely inaccurately. A public nuisance is always in the first instance a public wrong or

of this sort, if successful, results in a judgment awarding compensatory damages and other forms of redress to the plaintiff for the violation of the plaintiff's own right.

Suppose, for example, a company is responsible for polluting public waters used for recreation and commercial fishing. In this situation, the relevant governmental official(s)—and, in some jurisdictions, an individual—can bring a civil enforcement action against the company that, if successful, will generate an order requiring that it abate the public nuisance (or provide restitution for the cost of summarily abating it). Meanwhile, commercial fishermen will likely have a claim for damages to compensate them for the special injury they have suffered—namely, their inability to use the damaged public resource for commercial purposes.[169] Likewise, a person responsible for blocking a public way is subject to liability for damage to a vehicle that results from the driver's having to swerve suddenly to avoid the blockage.[170] By contrast, the fact that one member of the community is particularly upset about, or happens to live relatively close to, a blocked way or polluted public waters does not suffice to establish the sort of special injury that gives rise to a viable tort claim.[171] Nor does the fact that some members of the community are somewhat more inconvenienced than others.[172]

Although the foregoing examples are relatively clear, it is easy to lose sight of the line between public nuisance qua offense and public nuisance qua tort.[173] This is because *the identity of the complainant in a civil action predicated on a public nuisance is an unreliable indicator of whether the suit is an enforcement action responding to the offense itself*

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offense. However, the rule authorizing civil liability for special injuries—i.e., the recognition of special injuries caused by public nuisances as tortious—is judge-made common law. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 & cmt. d (AM. L. INST. 2020) (specifying the terms under which an actor incurs public nuisance liability to others who experience financial losses as a result of the nuisance).

169 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 & cmt. d (AM. L. INST. 2020) (identifying commercial fishermen as a type of plaintiff often recognized by courts as special victims of public nuisances which harm natural resources).

170 *See, e.g.*, Verdict, Estate of Chang v. City of Milton, No. 18EV00442, 2023 WL 4881884 (Ga. Super. Ct. June 15, 2023) (verdict for plaintiffs suing on behalf of driver killed in a collision with a roadside planter that was deemed by the jury to be a public nuisance); Brown v. E. & Midlands Ry. Co. (1889) 22 QBD 391 (Eng.) (holding that, if it could be proved that plaintiff's wife was thrown from her cart and injured because her horse was scared by a mound placed by defendant on a public way, she is entitled to recover damages on a public nuisance theory). Thanks to Barbara Lauriate for pointing out *Brown*.

171 *See, e.g.*, Holland v. Steele, 961 N.E.2d 516, 525 (Ind. Ct. App. 2012). The question of what sort of setback counts as a special injury is discussed below.

172 *See, e.g.*, *In re* Lead Paint Litig., 924 A.2d 484, 498 (N.J. 2007) (citing approvingly prior decisions holding that greater inconvenience is not a special injury).

173 As pointed out in Kendrick, *supra* note 8, at 741–55 (explaining and pushing back on the formalist critique of public nuisance as tort).

or a tort action that provides an individual with the power to redress an injury to that individual. As noted, in some jurisdictions, an individual who incurs a special injury not only gains the power to sue to vindicate their own right, but also is empowered to commence an enforcement action.[174] For suits of the latter sort, the plaintiff gains standing to bring the enforcement action by virtue of their special injury but nonetheless sues as a private attorney general to vindicate the interest of the public.[175] And even when an individual sues in their own right for a special injury (rather than as a private attorney general), if the suit results in injunctive relief (as private nuisance suits for ongoing interferences with use and enjoyment of private property often do), it effectively generates the same legal result as a successful enforcement action (i.e., an order to the defendant to cease the nuisance-generating activity and perhaps to abate it as well).[176]

Just as individuals can sue in different capacities (private attorney general versus tort claimant), so too can governmental entities. Suppose an actor regularly dumps malodorous solvents in a public park, rendering the park unsuitable for use by the public, while also damaging a government-owned building located in the park. The relevant governmental entity, in its capacity as protector and vindicator of rights common to the public, can bring a civil enforcement action to abate the nuisance. Yet the same entity, in its capacity as property owner, can also bring a tort claim because it happens to have suffered a special injury: namely, an interference with its possessory rights in the damaged building.[177] This is why, in the case of a public nuisance that

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[174] *See supra* note 158; *see also In re* Debs, 158 U.S. 564, 582 (1895) (observing that abatement actions can be brought by specially injured individuals).

[175] *See* Littleton v. Fritz, 22 N.W. 641, 645 (Iowa 1885) (holding that an individual action to enjoin sale of intoxicating liquors as public nuisance, authorized by statute, "is for all purposes an action instituted [o]n behalf of the public, the same as though brought by the attorney general or public prosecutor," and that "[t]he plaintiff is by law made the representative of the public in bringing and maintaining the action"); PARKER & WORTHINGTON, *supra* note 133, at 256 (explaining that in a suit in equity brought by a private individual to abate a public nuisance, "the complainant acts on behalf of all others who are or may be injured, as a public prosecutor, rather than on his own account").

[176] *See, e.g.*, *Debs*, 158 U.S. at 592–93 (noting that many *public* nuisances are restrained as the result of *private* suits); RESTATEMENT (SECOND) OF TORTS § 821C(2) & cmt. j (AM. L. INST. 1979) (noting the availability of injunctive relief to an individual with a special injury suing on a public nuisance theory); *see also* Sampson v. Smith (1838) 59 Eng. Rep. 108; 8 Sim. 272 (holding that an individual plaintiff who proves defendant's steam engine created a public nuisance that caused him special injury by interfering with the use and enjoyment of his property is entitled to an order enjoining the nuisance-creating activity without need for the attorney general to be added as a party).

[177] *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (state government's abatement suit to halt defendant's works from discharging gases causing or threatening to cause substantial harm to natural habitat in Tennessee is not a suit to vindicate the state's

damages government-owned property, an appropriate representative of the government can sue for compensatory damages.[178]

The upshot of the analysis so far is that a public nuisance, in and of itself, generates liability to summary abatement or a civil abatement action that (in many jurisdictions) can be brought either by officials or by private citizens. In addition, in so far as a public nuisance causes an individual to suffer what the law regards as a special injury—a certain kind of setback to the individual separate and apart from the violation of the right common to the public—it further generates liability to a civil action that, if successful, entitles the plaintiff to redress for that injury in the form of compensatory damages, injunctive relief, or both.

Here, I take issue with Thomas Merrill's claim that it is simply a mistake to talk of public nuisance as a tort.[179] Merrill's view is that a public nuisance is always *only* a public wrong.[180] For the instances in which courts permit recovery by private plaintiffs based on proof of special injury—as in the cases posited above of the fishermen unable to fish and the driver with the damaged car—the fact that their recoveries flow from the public offense is (on his account) a mere coincidence. The offense does not actually ground these claims. Instead, the plaintiff prevails only because it just so happens that the defendant, in committing the offense of public nuisance, also commits an independently defined tort such as negligence.[181] On this analysis, the shipowner imagined above has committed two legal wrongs: the public wrong of public nuisance, which gives rise to an enforcement action (or summary abatement), and the private wrong of negligence, which gives rise to a tort action by adversely affected fishermen. As to the issue of liability to the fisherman, the fact that the spill is a public nuisance is irrelevant.

Merrill's argument rests in part on the following thought. Ordinarily, a tort plaintiff does not need to prove that the defendant committed a crime in order to prevail on their claim. If Oscar beats up Vince, Oscar may be guilty of the crime of aggravated assault but the criminality of the assault is not what renders Oscar liable to Vince on a tort claim for battery. Yet those who would treat public nuisance as

property rights); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1143 (Ill. 2004) (contrasting an abatement action by a city on behalf of the public (for which compensatory damages are not available) with a public nuisance action by a city alleging physical harm to its property or other direct injury (for which compensatory damages are available).

178 The question of which interferences with governmental interests count as special injuries is discussed below.

179 Merrill, *supra* note 8. For an extended critique of Merrill's contentions based on English and American decisions and treatises, see Bullock, *supra* note 8.

180 Merrill, *supra* note 8.

181 *Id.* at 14.

a tort suppose that the commission of the crime (plus a special injury) *is* what generates the victim's entitlement to redress. In Merrill's view, this bit of alchemy evidences a category mistake: crimes don't generate private rights of action, hence any suggestion that public nuisance can do so is confused.[182]

As noted above, however, public nuisance is far removed from the *mala in se* at the core of criminal law. And this matters for the question of whether it is cogent to treat public nuisances that generate special injuries as torts. While core crimes generally aren't thought of as giving rise to private rights of action, other offenses, particularly regulatory offenses, are. For example, in the U.S., a person who commits fraud in the sale or purchase of securities is subject to penalties under federal securities law and is also vulnerable to civil liability to persons injured by the fraud. And the basis for the civil liability is the regulatory offense.[183] Given that the public nuisance offense has long been understood to straddle the line between a crime and a regulatory infraction, the idea that its commission can give rise to a personal action for damages is unremarkable.

Alternatively, Merrill suggests that the recognition of civil actions arising out of public nuisance offenses flouts modern rules concerning implied rights of action.[184] Yet, while hostility to implied rights of action is the current position of the U.S. Supreme Court with regard to federal statutes,[185] state courts generally do not follow the same approach to state statutes, particularly for laws that contain relational directives that aim to protect classes of persons from certain injury-producing scenarios.[186] Relatedly, state statutory standards of care (such as statutes requiring the use by vehicles of headlights after dusk) routinely support negligence per se claims by persons injured by statutory violations.

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182 *Id.* at 11.

183 *See generally* Goldberg & Zipursky, *supra* note 34 (arguing that the Supreme Court's "fraud-on-the-market" doctrine identifies a distinct tort that is not recognized under state common law but is actionable under federal securities laws).

184 *Id.* at 37.

185 *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 575–76 (1979). Before it developed its current allergy to implied rights of action, the Supreme Court recognized tort liability for the violation of certain safety statutes. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916).

186 *See, e.g.*, Lawson v. Halpern-Reiss, 212 A.3d 1213, 1220 n.6 (Vt. 2019) (holding that a state statute requiring medical providers to maintain confidentiality of patient's medical information is properly construed to confer on patients a private right of action for violations); Restatement (Second) of Torts § 874A & cmt. h (Am. L. Inst. 1979) (explaining that when a statute protects a class of persons by proscribing or requiring certain conduct, courts may infer that it generates rights of action for such persons when they are injured by violations of the statute and providing factors courts may use in determining whether to infer a right of action).

Private actions for violations of state public nuisance statutes resulting in individual rights violations are not different in kind.[187] It is true that negligence per se is usually understood to be a matter of courts incorporating certain statutory safety standards into the common law of negligence instead of finding implied rights of action. But the line between these two characterizations is blurry, at best.[188]

It is also true that state courts will most readily infer that a statutory violation generates a private right of action for a plaintiff (*P*) when the express terms of the relevant statutory prohibition or requirement indicate that it was enacted for the benefit of a class of persons of which *P* is a member, and to protect against injury-producing scenarios of the sort that resulted in *P*'s injury. Yet the public nuisance offense does not by its terms specify a protected class, nor does it identify particular injury-producing scenarios as those it is meant to prevent. The connection between this offense and liability for violations of individuals' rights is thus less obvious. Still, Merrill goes too far in suggesting that courts cannot or should never interpret a statutory directive that, on its face, lacks the relational structure of common-law tort directives to support liability for individual rights-violations—various other considerations may still favor the recognition of such claims.[189]

Finally, Merrill's effort to explain liability to persons suffering special harm are ultimately unconvincing. In some instances, a defendant's conduct *will* constitute both the offense of creating a public nuisance and a freestanding tort such as negligence. But in others it will not. Indeed, given the rule of negligence law holding that actors generally are under no duty to take care against causing "pure" economic loss—even to those who might foreseeably suffer such loss—the recovery

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187 *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1979) (emphasizing this analogy).

188 It is no coincidence that the Supreme Court's *Rigsby* decision—which recognized a statutory right of action for injured railroad workers against their employers—has been characterized both as a negligence per se case and an implied right of action case. *Compare* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 67 (1992) (treating *Rigsby* as an implied-right-of-action case), *with* Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J., dissenting) (characterizing the claim in *Rigsby* as "a common-law negligence claim"), *and* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917) (suggesting that federal railroad safety laws altered the standard of care for negligence cases governed by them). Note also that the inquiry into the existence of an implied right of action resembles a negligence per se analysis in that courts typically look to see whether the plaintiff is the beneficiary of the protections afforded by the statute, and the scenario in which the plaintiff was injured was the type of scenario the statute was meant to prevent. RESTATEMENT (SECOND) OF TORTS § 874A & cmt. h (AM. L. INST. 1979) (implied rights of action); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 (AM. L. INST. 2020) (negligence per se).

189 *See* RESTATEMENT (SECOND) OF TORTS § 874A & cmt. h (AM. L. INST. 1979) (identifying various factors that favor treating a statutory standard of conduct as generating rights of action for persons injured by statutory violations).

by the fishermen in the pollution example seems explicable *only* by virtue of the private actionability of public nuisances that cause special injury to certain individuals.[190] In this case, there is no independent tort that explains the plaintiff's recovery. Likewise, even if a private actor responsible for creating a blockage of a public way can show that the blockage occurred despite the defendant's exercise of reasonable care, a person injured because of the blockage would presumably have a claim sounding in public nuisance, even though she would not have a claim for negligence.

In sum, Merrill overclaims by asserting that public nuisances are never privately actionable as torts. Nonetheless, his analysis brings to the fore a sometimes-overlooked feature of such liability. In contrast to a negligence plaintiff, a public nuisance tort plaintiff must establish the defendant's responsibility for the public wrong before being able to obtain redress to vindicate her own rights.[191]

B. Interference with Public Spaces and Breach of Civic Obligation

The preceding analysis isolates several questions that courts must answer to apply properly the law of public nuisance. Four are particularly important:

1. What are the elements of the public nuisance offense?

2. Under what circumstances can an actor whose actions contribute to the creation of a public nuisance be deemed responsible

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[190] Some courts have allowed recovery in these cases by reasoning that the fishermen have suffered damage to things in which they have a property interest, thus taking these cases outside the rule of no duty to take care against causing economic loss. But the attribution to fishermen of a property interest in as-yet-uncaught fish is a stretch. *See infra* text accompanying note 306. For these reasons, there is less of a mystery than Merrill suggests about the inclusion of a public nuisance provision in the Second Torts Restatement. *See generally* Bullock, *supra* note 8, at 144–51 (explaining that courts understood public nuisances to sometimes provide the basis for a tort action long before its inclusion in the Restatement). Indeed, its inclusion is no odder than the inclusion in that Restatement of provisions on negligence per se. Likewise puzzling is Merrill's contention that suits for individual injuries grounded in the defendant's commission of a public nuisance "proceed on the basis of a very un-tortlike analysis" by virtue of imposing forms of strict liability. Merrill, *supra* note 8, at 22. Liability for private nuisance is equally "strict." *Cf.* Bullock, *supra* note 8, at 167 (explaining how certain torts impose strict liability).

[191] While judges applying tort law can incorporate statutory standards (e.g., via the doctrine of negligence per se), they are also free to impose liability even in situations in which the defendant has *complied* with relevant statutory standards of conduct. Thus, a driver who causes a collision that injures another can be held liable for negligence even if the driver was fully complying with applicable statutes and regulations. Public nuisance law operates differently. If there is to be a tort action based on a public nuisance, it is *only* because the defendant has interfered with public right in a manner that would warrant an enforcement action against the defendant.

for committing the offense, such that the actor may be subject to prosecution or a civil enforcement action?

3. What type of individual setback counts as a special injury that will support a tort claim for redress against an actor responsible for creating the public nuisance that caused the setback?

4. For abatement actions in response to public nuisance offenses, what is the scope of the abatement remedy?[192]

The remainder of this article will focus on questions 1 through 3, starting with the first.[193] And its main contention will be that, in order to answer these questions, courts must appreciate the ways in which public nuisance, like private nuisance, turns on notions of reciprocity and interference with use and enjoyment, albeit notions distinct in substance from those in private nuisance law.

As noted above, both traditional general formulations and Blackstone's itemized list of public nuisance law have generated despair over the prospect of answering the first question. Yet there are interpretive and normative grounds for identifying a suitably constrained notion of public nuisance—one that has enough content to provide meaningful guidance to courts.

To isolate the idea of a public nuisance one must first distinguish two related but distinct topics. The power to order the abatement of a public nuisance is certainly *among* the overall scope of the courts' equitable powers. But it is not *exhaustive* of them. Yet courts sometimes have confused these two ideas, as is demonstrated by early- and mid-twentieth century opinions concerning whether to enjoin actors who repeatedly violated criminal prohibitions on usury by engaging in predatory lending, and who were not deterred from doing so by other legal sanctions.

Some courts hearing these cases granted injunctive relief and, in doing so, invoked public nuisance law,[194] with a few even holding that

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[192] In other words: How does one draw the line between monetary awards that cover costs incurred by a governmental plaintiff to abate a nuisance and monetary awards that compensate for harm suffered by the entity or individuals?

[193] The question of the scope of abatement remedies is critical, because an unduly capacious notion of abatement would efface the distinction between enforcement actions responding to public nuisances themselves and tort actions predicated on special injuries resulting from a public nuisance. Unfortunately, the topic requires analysis of remedial law beyond the scope of this already sprawling project.

[194] *See, e.g.*, State *ex rel.* Embry v. Bynum, 9 So. 2d 134, 142 (Ala. 1942); State *ex rel.* Moore v. Gillian, 193 So. 751, 752 (Fla. 1940); State *ex rel.* Smith v. McMahon, 280 P. 906, 908–09 (Kan. 1929); Commonwealth *ex rel.* Grauman v. Cont'l Co., 121 S.W.2d 49, 54 (Ky. 1938); State *ex rel.* Goff v. O'Neil, 286 N.W. 316, 319 (Minn. 1939); State *ex rel.* Beck v. Assocs. Disc. Corp., 77 N.W.2d 215, 228–29 (Neb. 1956). Thanks to Tony Sebok for bringing usury cases to my attention.

predatory lending on a large scale *is* a public nuisance.[195] However, in many of these cases, the courts did not go so far. Instead, they reasoned that the courts' power to enjoin genuine public nuisances supported—by analogy—their power to enjoin usurious lending when it was clear that criminal penalties were not sufficing to discourage the activity.[196] These courts rightly perceived that the issue of enjoining usury concerned the overall scope of courts' equitable powers, not the scope of public nuisance law.

Even more emphatically, other courts denied injunctive relief outright on the ground that the conduct in question did not amount to a public nuisance.[197] In *People v. Seccombe*, for example, Los Angeles city attorneys who had successfully prosecuted the defendants for issuing usurious loans sought to enjoin them from continuing to issue the loans on the ground that doing so amounted to a public nuisance. The intermediate appellate court affirmed the trial court's dismissal of the suit, reasoning that, whereas "the maintenance of a factory giving forth noisome gases, which . . . imperil [residents'] health" could be a public nuisance, usury—even when practiced in a way that promises to harm the "economic and financial well-being of a community"—is not.[198] Faced with a request to enjoin certain exploitative lending practices, the Massachusetts Supreme Judicial Court likewise declined to extend the provision of equitable relief beyond instances of "true public nuisance in the conventional sense and not involving the use of or injury to public or private property, encroachments upon public easements and the like."[199]

The second issue that has sometimes been unhelpfully conflated with the issue of what constitutes a public nuisance concerns the extent

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195 *See, e.g.*, *Embry*, 9 So.2d at 142; *Moore*, 193 So. at 752; *Goff*, 286 N.W. at 319.

196 *See McMahon*, 280 P. at 907–08 (invoking an Illinois public nuisance case in support of the proposition that courts' equitable authority is available to enjoin any wrongful conduct that is committed against enough persons to generate "far-reaching consequence to the public"); *Grauman*, 121 S.W.2d at 54 (enjoining the defendant's conduct irrespective of whether it constituted a public nuisance); *Beck*, 77 N.W.2d at 228–29 (same). Whether, in so ruling, these courts adopted unduly broad conceptions of courts' equitable powers is a question beyond the scope of this project.

197 *See, e.g.*, People *ex rel.* Stephens v. Seccombe, 284 P. 725, 726 (Cal. Dist. Ct. App. 1930); State *ex rel.* Boykin v. Ball Inv. Co., 12 S.E.2d 574, 581 (Ga. 1940); Commonwealth v. Stratton Fin. Co., 38 N.E.2d 640, 643 (Mass. 1941); *Ex parte* Hughes, 129 S.W.2d 270, 275 (Tex. 1939). In a related vein, the Pennsylvania Supreme Court once refused to enjoin the operation of a railroad on Sundays even though doing so violated a state criminal law, emphasizing that any number of criminal offenses—smuggling, for example—do not cause the sort of interference with public right that constitutes a public nuisance. Sparhawk v. Union Passenger Ry. Co., 54 Pa. 401, 423 (1867).

198 *Seccombe*, 284 P. at 727.

199 *Stratton Fin. Co.*, 38 N.E.2d at 642.

of a state or local government's "police power." Indeed, in the nineteenth century, courts and commentators would sometimes speak of these two concepts in almost the same breath, a pattern perhaps reflecting the focus of government regulation at the time on matters such as fire-prevention, sanitation, and the upholding of public morals.[200] However, the two ideas are distinct. This is an important point to emphasize, because falsely equating the scope of public nuisance law with the police power undermines the coherence of the former.

A good illustration of the risks of confusing public nuisance with the police power comes from the Texas courts. In its 1969 decision in *State v. Spartan's Industries, Inc.*, the Texas Supreme Court upheld that state's Sunday closing laws. In doing so, it referenced two prior decisions (*Hughes* and *Watts*) that respectively refused to enjoin, then enjoined, usurious lending:

> The defendants also contend that [the Sunday closing law], by interfering with their lawful business . . . declares a nuisance where there is none, and deprives them of property without due process of law. These contentions are without merit if the statute is a valid exercise of the police power of the state. . . .
>
> It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is declared to be a nuisance endangers the public health, public safety, public welfare, or offends the public morals. In Ex Parte Hughes, . . . [we] held that no injunction could be granted to stop the relator from collecting usury, since the laws of the state did not then define usury as a nuisance, either public or private. The Legislature then enacted a special statute against usurious lending and provided for an injunction for its enforcement. The statutory injunction was upheld in Watts v. Mann . . . . If the Legislature may prohibit an act, it may authorize an injunction against that act.

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[200] *See* Munn v. Illinois, 94 U.S. 113, 125 (1876) (describing nuisance law's maxim of *sic utere tuo ut alienum non laedas* as the "source [from which] come the police powers"); NOVAK, *supra* note 155, at 13–15, 43–44 (observing that *sic utere* was frequently cited in the nineteenth century as the foundation of the police power); *id.* at 61–62 (noting nineteenth-century jurists who described the police power at its core as the power to address nuisances). Even at this time, however, it was clear that the police power extended beyond the power to regulate nuisances (or, to say the same thing, that not every public wrong was a nuisance). *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. 299 (1851) (upholding statutes requiring use by certain ships of local pilots without suggesting that navigation without a pilot would constitute a public nuisance). Indeed, as Professor Novak makes clear, the *sic utere* maxim was itself treated as subordinate to the broader maxim of *salus populi* (the people's welfare), which was itself understood to authorize various forms of regulation. NOVAK, *supra* note 155, at 45. Thanks to Josh Getzler for pointing out the need to address the relation of public nuisance law to the police power.

> Thus we are brought back to the question of the police power of the state, which turns upon the question of whether there is a reasonable relation between Article 286a and the health, recreation and welfare of the people of the state.[201]

In this passage, the Texas court does not clearly assert that the operation of a business on a Sunday, any more than the charging of usurious interest rates, is subject to legislative control *by virtue of being a public nuisance*.[202] Nonetheless, it intermingles the two ideas. Of course, laws authorizing officials or individuals to abate genuine public nuisances (either summarily, or by suit to obtain court-ordered injunctive relief) are valid exercises of the police power. But they do not exhaust that power.[203] For example, a state minimum-wage law is valid police-power legislation. But such a law is not predicated on the idea that the payment of wages below the minimum is a public nuisance. The same is true for laws against unfair competition, as well as other laws regulating the terms of private contracts.[204]

What, then, is one to make of the suggestion in *Spartan's Industries* that legislatures have the power to "declare" certain activities or conditions to be public nuisances?[205] Doesn't this power entail that a public nuisance is merely whatever is declared to be so? Simply put: No. The decision of the New York Court of Appeals in *Lawton v. Steele*—a case eventually decided by the U.S. Supreme Court—helps explain why.[206]

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201 State v. Spartan's Induss., Inc., 447 S.W.2d 407, 413–14 (Tex. 1969), *appeal dismissed*, 397 U.S. 590 (1970). The question of the relation of state regulatory power to public nuisance law has also figured in the Supreme Court's "regulatory takings" jurisprudence. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (holding that "confiscatory" land-use regulations amount to regulatory takings unless they address conditions that meet the definition of a private or public nuisance).

202 *Watts v. Mann*, the decision referenced in *Spartan's Industries* that upheld the Texas legislature's authority to empower equity courts to enjoin the enforcement of usurious contracts, quite clearly emphasized that the issue in that case was whether the anti-usury legislation amounted to a valid means of pursuing the public interest, *not* whether charging excessive interest constituted a public nuisance. 187 S.W.2d 917, 927–28 (Tex. Civ. App. 1945).

203 Arguably, a related confusion—that of reading the power conferred on Congress by the Commerce Clause as roughly co-extensive with the power to address conditions amounting to or resembling public nuisances—played a role in some of the Supreme Court's *Lochner*-era economic due process decisions. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 270–71 (1918) (reasoning that Congress has the power to enact laws prohibiting the use of interstate transportation in connection with lotteries, diseased animals, impure foods, and the protection of women from "debauchery," but not a law banning the employment of child labor), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941).

204 *See generally* Freund, *supra* note 65 (canvassing the array of measures that states can enact pursuant to the police power).

205 *See* 447 S.W.2d at 413.

206 23 N.E. 878 (N.Y. 1890), *aff'd*, 152 U.S. 133 (1894).

In *Lawton*, fishermen brought a conversion action against, among others, a duly authorized state "game and fish protector" who had seized and destroyed their nets.[207] The defendant countered by invoking a New York statute that deemed the use of such nets to be public nuisances subject to summary abatement by state fish protectors and private citizens. The plaintiffs in turn argued that the statute was unconstitutional on various grounds, all of which the state high court rejected:

> The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law.[208]

Like the passage quoted above from *Spartan's Industries*, this one is easily misconstrued. In particular, it could be read to suggest that a state legislature—if exercising the police power and not violating any constitutional rights—can by fiat deem any manner of conduct to be a public nuisance. This would be an astonishing interpretation, however, for it would allow a legislature to designate a vast spectrum of conduct to be both criminal and abatable, often by summary proceeding, which would come close to enabling courts to wield their equitable powers in the manner of the old English Star Chamber.[209] Instead, *Lawton* articulates a substantially narrower rule, according to which it is open to legislatures to *declare particular activities or conditions that fall within the general concept of public nuisance to be public nuisances even though no court has yet done so*. This, after all, was precisely the effect of the New York legislation at issue. It addressed a classic public nuisance—the blockage of a waterway—and thus, in the language of the Court of Appeals, "*applied the doctrine of the common law to a case new in instance*."[210] In other words, the statute "declared" the use of

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[207] *Lawton*, 152 U.S. at 133–34.

[208] *Lawton*, 23 N.E. at 878–79.

[209] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (holding that a state legislature cannot render a condition a public nuisance merely by declaring it so).

[210] *Lawton*, 23 N.E. at 879 (emphasis added); *cf. Injunction—Prevention of Unlawful Activity*, 28 MICH. L. REV. 939, 940 (1930) (unsigned case note criticizing a Kansas decision that treated usurious loans as a public nuisance on the ground that, in so ruling, the court came "very close to the exercise of Star Chamber functions"). A prominent example of a statute that declared a public nuisance in the sense described in the text was the National Prohibition Act of 1919. Under it, any room, structure, or vehicle in which intoxicating

nets on certain waterways to be a public nuisance in the sense that it identified, in advance of judicial decision, a particular kind of waterway obstruction as a per se nuisance.

For its part, in a decision affirming the New York Court's decision, the U.S. Supreme Court emphatically rejected the nuisance-by-fiat understanding of state legislative power. While acknowledging (and indeed emphasizing) the authority of a legislature to identify new instances of public nuisances subject to summary abatement, the majority also made clear—as the Texas Supreme Court would later do in *Spartan's Industries*—that "the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so . . . ."[211]

So, not every species of conduct that courts can enjoin, or that states enjoy a power to regulate, is a public nuisance. But how, then, is one to understand this offense? Here we arrive at the central claim of this Article, which is that, even though they differ in important respects, public nuisance and private nuisance are two instantiations of the same abstract idea—the idea of conduct that violates a norm of reciprocity so as to interfere, intrusively, with the use of or access to certain spaces.

At the outset, one can identify numerous reasons for supposing that public and private nuisances share important characteristics, and hence that Prosser and Salmond—in the passages quoted at the outset of this Article—were dead wrong to maintain otherwise. Take, for example, California's basic statutory nuisance provision, which provides a singular, general definition of "nuisance," then is followed by separate provisions defining public and private nuisances.[212] This statute is hardly idiosyncratic. An early American treatise devoted to the subject of nuisance law also commences with a singular definition of nuisance before distinguishing its public and private variants.[213]

These authorities track English common law, which long invoked nuisance law without sharply distinguishing between public and

liquor was manufactured, sold, or kept in violation of the Act was "declared to be a common nuisance." Arthur W. Blakemore, National Prohibition: The Volstead Act Annotated and Digest of National and State Prohibition Decisions Including Search and Seizure with Forms 440 (3d ed. 1927) (reproducing Section 21 of the Act).

211 *Lawton*, 152 U.S. at 140. Molly Brady has noted nineteenth-century decisions denying *local governments* the authority to establish by fiat that certain nonintrusive activities or structures, such as wharfs, constitute public nuisances. Brady, *supra* note 19, at 1661–62.

212 Cal. Civ. Code §§ 3479–81 (West 2024); *see also* Mont. Code Ann. § 27-30-101 (West 2023); Wash. Rev. Code Ann. § 7.48.010 (West 2023).

213 Joseph A. Joyce & Howard C. Joyce, Treatise on the Law Governing Nuisances 2–20 (1906) (commencing with a general definition of nuisance, then distinguishing public and private nuisances).

private.[214] Centuries ago, the London assize of nuisance, while mainly focused on "private" nuisances, also entertained pleas for what today would be deemed "public" nuisances, particularly those concerning walls that collapsed or threatened to collapse onto public ways.[215] When (as noted above) English equity courts began in the 1800s to entertain actions to abate public nuisances, these were brought as relator actions in which the Attorney General sued on behalf of affected individual community members, again blurring the line between private and public nuisance.[216] The same overlap is likewise attested to in the (in)famous *Debs* case, in which the Supreme Court said: "The difference between a public nuisance and a private nuisance is that the one affects the people at large and the other simply the individual. *The quality of the wrongs is the same* . . . ."[217] Scholars have also long tended to treat the two types of nuisance together.[218] Additionally, in some jurisdictions, certain conduct can be deemed a public nuisance by virtue of its constituting the tort of private nuisance as to numerous individuals.[219] In this respect, the public nuisance offense has few, if any, counterparts. An individual whose negligent conduct ends up causing bodily harm to numerous victims is not by that fact alone guilty of a crime called "public negligence."

While, again, the offense of public nuisance is not an offense against private property, it has a proprietary dimension. Indeed, it is because public nuisances typically involve interference with the use and enjoyment of spaces that public nuisances have historically been subject to injunction notwithstanding the general rule that equity will not enjoin a crime.[220] It is also noteworthy that, when individual claimants sue for having incurred a special injury as a result of the defendant's creation of a public nuisance, the injury for which they seek redress is often the

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214 *See, e.g.*, F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 482 (1949) (suggesting that the resemblance between the blocking of a private way and the blocking of a public way led common lawyers to use the term "nuisance" to cover the latter cases); Gifford, *supra* note 8, at 790–91 ("To suggest . . . that public nuisance and private nuisance have little in common . . . is to ignore more than eight hundred years of intertwined history.") (citation omitted).

215 London Assize of Nuisance 1301–1431, at xx-xxix (Helena M. Chew & William Kellaway eds., 1973).

216 *See supra* note 155.

217 *In re* Debs, 158 U.S. 564, 592–93 (1895) (emphasis added).

218 *See, e.g.*, Spencer, *supra* note 151, at 58–59 (tracking scholarship from the thirteenth century onward that discusses public nuisance as an offshoot of private nuisance).

219 *See, e.g.*, People v. Rubenfeld, 172 N.E. 485, 486 (N.Y. 1930) (Cardozo, J.); *cf.* Soltau v. De Held (1851) 61 Eng. Rep. 291, 296; 2 Sim. (N.S.) 133, 144 (noting in dictum that an activity or condition that amounts to a private nuisance as to several persons does not necessarily constitute a public nuisance).

220 *See* Bamzai & Bray, *supra* note 156, at 730–31 (discussing property interests, including those affected by public nuisances, as providing a basis for obtaining equitable relief).

very sort of interference with use and enjoyment that would support a private nuisance claim.[221] Facially, these cases present a puzzle. Why would plaintiffs invoke *public* nuisance law to vindicate a right to use and enjoy their own property that would seem to be vindicable through a *private* nuisance action? In addition to enabling plaintiffs to avoid certain defenses,[222] doing so arguably permits them to establish, without further fanfare, that the interference was "unreasonable."[223] In this respect, many private actions for public nuisance resemble negligence suits in which plaintiffs avail themselves of the negligence per se doctrine. In these nuisance suits, the criminal offense is understood to be the legislature's pronouncement that the conduct in question *is* nonreciprocal and intrusive in the requisite senses and thus grounds for liability. That public nuisance has this significance for claims alleging interferences with the use and enjoyment of property further suggests it is deeply intertwined with private nuisance.

Given that it has been completely standard for jurists to treat nuisance as a singular concept, and that public and private nuisance law grew up together and remain deeply intertwined, there is plenty of reason to believe that the two variants share common features. So let us return to the idea, explained in Part II, of a private nuisance as unneighborly conduct that intrusively interferes with the usability of another's land. Following the order of presentation in Part II, I will first isolate the public nuisance analogue to private nuisance law's notion of unreasonable interference, then the analogue to its notion of unneighborly conduct.

Just as private nuisance is for certain purposes aptly characterized as "a tort against land,"[224] public nuisance can be described as a wrong against public spaces and resources. A public nuisance harms "those *who come in contact with it* in the exercise of a public right."[225] Exemplars are activities or conditions that impose on others so as to make it unduly burdensome to access, use, or enjoy roads, navigable waters, ambient air, and open spaces.[226] Notably, the concept of "public" at work here cannot

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221 Restatement (Second) of Torts § 821C cmt. e (Am. L. Inst. 1979) ("When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one.").

222 *See id.* (noting that prescriptive rights, statutes of limitations, and laches do not run against the public right).

223 *See supra* notes 91–126 and accompanying text.

224 *See* Nolan, *supra* note 52, at 460 (quoting Hunter v. Canary Wharf Ltd. [1997] UKHL 14, [1997] AC 655 (HL) (appeal taken from Eng.)).

225 W. Page Keeton, Dan D. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 90 at 645 (5th ed. 1984) (emphasis added).

226 *See* Neyers, *Divergence*, *supra* note 8, at 75 (noting that Canadian courts often describe public nuisance law as creating something akin to an easement with respect to public spaces).

be disaggregated—it is not a reference to the idea of many individuals being actually or potentially affected by the defendant's conduct.[227] Instead, the idea is that the defendant has acted so as to render spaces and resources that are not privately owned or possessed less usable.

Most familiar instances of public nuisance fit the foregoing general description. To block a public road or pollute public waters is to hinder the ability of members of the public to use and enjoy them.[228] To allow shallow water to gather in one's yard, thereby enabling malaria-bearing mosquitos to spread around the community, is to present residents with a health risk beyond what they are expected to endure, and which will discourage them from being out and about. The same goes for a person who walks about town, aware that they are infected with a highly contagious and very dangerous illness.[229] Insofar as brothels and other establishments are public nuisances, it is not simply because of the (putative) immorality of what goes on inside of them, but because they are, in Blackstone's terms, "disorderly"—they tend to come with various unpleasant accoutrements that confront persons in a way that significantly disrupts their ability to use or be in public spaces.[230] This is

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227 *See* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 726 (Okla. 2021) ("[A] public right is more than an aggregate of private rights by a large number of injured people."). In jurisdictions that treat conduct that disturbs numerous individuals as a public nuisance, *see supra* note 219 and accompanying text, what renders the conduct a public nuisance is that its disruptive effect on everyday life is felt widely in a given community or neighborhood. *See, e.g.*, People v. Rubenfeld, 172 N.E. 485 (N.Y. 1930) (Cardozo, J.) (holding that the jury was entitled to conclude that defendant's hosting of loud, late-night events was "something more than an interference with a single dwelling or even two or three," but instead "a plague to a whole neighborhood").

228 *See* Novak, *supra* note 155, at 124–25 (discussing nineteenth-century American obstruction cases); Commonwealth v. Barnes & Tucker Co., 319 A.2d 871, 882 (Pa. 1974) (finding that pollution of a stream used by the public constitutes a public nuisance).

229 *See, e.g.*, Rex v. Burnett (1815) 105 Eng. Rep. 835; 4 M. & S. 272 (upholding the conviction of an apothecary who inoculated infants with a live smallpox vaccine from his place of business in a manner that unduly risked the health of other members of the community); Rex v. Vantandillo (1815) 105 Eng. Rep. 762; 4 M. & S. 73 (affirming conviction for common nuisance based on carrying a child known to be infected with smallpox on a public way).

230 *See, e.g.*, Joyce & Joyce, *supra* note 213, at 565 ("The keeping of a bawdy house is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons . . . ."); Novak, *supra* note 155, at 158, 165 (noting the importance of publicness of behavior to an establishment being deemed a nuisance); *cf.* Animal Legal Def. Fund v. Olympic Game Farm, Inc., 591 F. Supp. 3d 956, 972–74 (W.D. Wash. 2022) (holding that keeping animals under cruel conditions is not a nuisance under Washington law because it does not affect the comfort, repose, health, or safety of others, or their use and enjoyment of private property). As is true for private nuisances, whether interfering activity will count as a public nuisance is heavily context-dependent. A sex shop that proudly displays its wares to passersby might be a public nuisance on Main Street in Smallville but not in Manhattan's Times Square. And, of course, standards concerning what counts as a condition that unduly burdens members of the public in their use and enjoyment of public spaces have changed over time.

also the basis on which seemingly innocuous activities such as "rope-dancing" have at times been deemed public nuisances.[231] And just as it can be a private nuisance to maintain a dilapidated structure that appears ready to fall on a neighbor's house, so too can it be a public nuisance to store powerful explosives close enough to a heavily populated area to put the local population in fear of being harmed when in public spaces.[232]

Still other examples of public nuisance attest to a focus on interferences with the ability of members of a community to proceed about their lives in public free from being burdened or accosted in certain ways. Thus, courts have allowed public nuisance claims against the owner of farm animals who intentionally arranged or recklessly allowed the animals to copulate in public view.[233] A direct descendant of these cases—one with links to the *Mark* case discussed in Part II—is *Bloss v. Paris Township*, in which the Michigan Supreme Court affirmed an injunction blocking the operation of a drive-in theater with a screen visible from nearby public streets showing films that "dwelt on the subjects of sex and the human anatomy."[234] In a similar vein, Claire Priest has identified horrific eighteenth- and nineteenth-century cases involving nuisance prosecutions of persons for *public* displays of cruelty toward enslaved persons and toward animals.[235] Vaguely related to these are prosecutions for indecent exposure. Notably, in a mid-nineteenth-century decision, the English Exchequer Chamber quashed a conviction where the evidence showed that the defendant exposed

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231 *See, e.g.*, Jacob Hall's Case (1671) 86 Eng. Rep. 744; 1 Mod. 76 (holding that defendant's erection of a stage on which rope-dancing was performed constituted a public nuisance given that "it did occasion broils and fightings, and drew so many rogues to that place, that [some inhabitants of the locale] lost things out of their shops every afternoon").

232 *See, e.g.*, Wilson v. Phoenix Powder Mfg. Co., 21 S.E. 1035, 1036 (W. Va. 1895). The storage of explosives is also amenable to treatment as an abnormally dangerous activity. However, its treatment as a public nuisance allows for enforcement actions that are not available to respond to conduct that is "merely" tortious. In some instances, the destruction of certain spaces might constitute public nuisances. *See, e.g.*, Beatty v. Kurt, 27 U.S. (2 Pet.) 566, 584 (1829) (Story, J.) (enjoining defendant from removing graves from a lot dedicated for use as a Lutheran church even though the building that once stood on the lot had collapsed, because removing the graves would amount to a public nuisance by making a sacred space unavailable to congregation members).

233 *See, e.g.*, Redd v. State, 67 S.E. 709, 712 (Ga. Ct. App. 1910); State v. Iams, 111 N.W. 604, 605 (Neb. 1907); Nolin v. Mayor of Franklin, 12 Tenn. (4 Yer.) 163, 164 (1833). Thanks to Carol Rose for pointing me to these cases.

234 157 N.W.2d 260, 261 (Mich. 1968). Whether this application of Michigan public nuisance law would today survive First Amendment scrutiny is a separate question. *See infra* note 236.

235 Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 L. & Soc. Inquiry 136, 144–45 (2019).

himself in the presence of one other person rather than in a way that might have been viewed by multiple persons.[236]

On Blackstone's list, the odd person out would seem to be the eavesdropper.[237] Unlike the so-called common scold—that is, a person in the habit of *public* quarreling—the eavesdropper seems ineligible for being held to have committed a public nuisance. After all, eavesdropping involves surreptitious listening and observation, which today we think of as an invasion of *private space*. However, one must appreciate that eavesdroppers were understood to be not only gatherers of private information but also distributors (i.e., gossips).[238] Part of what renders the unauthorized release of a person's private information injurious is that it changes the way those who receive the information view and act toward that person. For example, one who is depicted in a sex tape posted on the internet will have to contend with some or many people thereafter tending to think of them, in part, as "that sex tape person." At least in earlier times, members of a small community plagued by an eavesdropper might well be concerned about the extent to which neighbors knew things about them that the neighbors weren't entitled to

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236 Regina v. Webb (1848) 175 Eng. Rep. 271, 273–74; 1 Den. 338, 344–45; *see also* Novak, *supra* note 155, at 158 (explaining that the public-ness of indecent exposure is critical to it being deemed a public nuisance). In their *Webb* opinions, several barons invoked the example of blocked roads to explain why an indecent exposure must be public in order to constitute a public nuisance. Modern constitutional law limits the use of public nuisance law to regulate certain forms of expressive conduct. Thus, even if it is a public nuisance for a person to appear in public wearing clothes that carry a highly offensive message that greatly discomfits those who see it, such conduct may be protected speech. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 206–07, 217–18 (1975) (striking down on free-speech grounds a state law that designated the display of various forms of nudity in movies exhibited at drive-in theaters visible from a public place to be a public nuisance); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 711 (1931) (holding defendants to be privileged by the First Amendment to publish their periodical even if it constituted a public nuisance under state law). Thanks to Noah Feldman for flagging this issue.

237 Perhaps more so than eavesdroppers, lotteries seem to be an outlier, in that their evils were understood to consist of the exploitation and potential impoverishment of "the unwary." *See, e.g.*, Roby v. West, 4 N.H. 285, 288 (1828). As later editions of Blackstone's Commentaries note, in England, lotteries were declared public nuisances by specific legislation, but then legalized and regulated by subsequent legislation. 4 William Blackstone, Commentaries *168 (9th ed. 1783). The categorization of lotteries as public nuisances is arguably an instance of the sort of loose usage that treats the category of public nuisance as co-extensive with any conduct regulable by states in the exercise of the police power. *See supra* text accompanying notes 200–11.

238 *See* Julia Keller, *Eavesdropping: The Forgotten Public Nuisance in the Age of Alexa*, 77 Vand. L. Rev. 169, 184 (2024); Donald A. Dripps, *Eavesdropping, the Fourth Amendment, and the Common Law (of Eavesdropping)*, 32 Wm. & Mary Bill Rts. J. 37–43 (forthcoming 2024) (reviewing English and American law's treatment of eavesdropping as a public nuisance, and quoting from late-nineteenth-century American treatises that defined the offense as secretly listening, then "tattling").

know, which in turn might have made the prospect of social interaction in ordinary public spaces such as markets and town centers daunting. In sum, even though today there is good reason for the law to handle eavesdropping in other ways, it was hardly arbitrary for the pre-modern common law to deem eavesdropping a public nuisance.

As the numerous illustrations just provided demonstrate, the concept of a public nuisance thus bears more than a nominal connection to the concept of a private nuisance. With a few possible exceptions,[239] public nuisances consist of intrusive or oppressive conditions that make it impossible or too difficult for individuals to access or use public resources, or to interact publicly in ordinary ways with one another.[240] Public nuisances, in other words, unduly hinder community members in exercising their entitlement to use and enjoy public spaces as they are standardly used, whether by physically preventing them from doing so or by making it too dangerous or discomfiting to do so.[241] It follows that those pursuing tort claims based on having suffered a special injury as a result of a public nuisance must, as a prerequisite to recovery, show this type of interference.

As is the case for private nuisance law, application of public nuisance law is heavily contextual in application. Storage of vast amounts of explosives is appropriate in some locations, not others. Also, like private nuisance law, public nuisance law typically concerns repeated, ongoing, or permanent interferences with use and enjoyment. To construct a gate that blocks a public way is to cause a public nuisance. To hold an event or cause an accident that clogs a highway for a few hours, or that precludes use of one of several comparably convenient routes to the same destinations, is not.[242]

To sharpen the formulation of public nuisance on offer, it will help to provide examples of activities or conditions that do not amount to public nuisances. As suggested previously, whereas a brothel will

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239 *See infra* text accompanying note 269 (discussing the treatment by some authorities of the sale of tainted food for human consumption as a public nuisance).

240 *Cf.* Gifford, *supra* note 8, at 815 (stating that a public nuisance is "a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community" (quoting Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co., 646 N.W.2d 777, 782 (Wis. 2002))).

241 Public nuisance law, one might say, helps to ensure that individuals are not 'landlocked' in their own private spaces. *See* Ripstein, *supra* note 8, at 8–10 (explaining that access to public ways is a basic individual right).

242 *See id.* at 10 (observing that, with respect to public ways, the right common to the public is a right of access and use for purposes of getting from one location to another, not a right to benefit from that access or use, which explains why being inconvenienced by others who exercise that same right (as in the case of slow traffic caused by heavy volume) is not a public nuisance).

sometimes fit the description, a discreetly run escort service does not.[243] Similarly, storing powerful explosives in a populated area can constitute a public nuisance, whereas keeping firearms in a private residence does not.[244] Even actions that cause widespread harm are not public nuisances if they do not render public spaces inaccessible or insecure for ordinary use. Consider *Regina v. Rimmington*, in which the House of Lords overturned the public nuisance conviction of a defendant who had mailed packages containing highly offensive materials to more than 500 recipients.[245] As explained by Lord Bingham, it would "contradict the rationale of the offence and pervert its nature" to permit a public nuisance conviction "to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole."[246]

On a still larger scale, it may be helpful to recall the Vioxx saga. Merck manufactured and sold the pain reliever Vioxx. Relative to other pain relievers, Vioxx posed a heightened risk of heart attacks and strokes to some users—a fact about which Merck did not warn. Eventually, Merck faced thousands of claims for injuries and deaths allegedly caused by its tortious failure to warn, which claims were resolved through a $5 billion settlement. All told, the Vioxx suits obviously alleged harm to the "public" in the sense of widespread harm. Moreover, if the plaintiffs' failure-to-warn allegations are credited, this was an instance of harm tortiously inflicted, which is why the Vioxx episode is conventionally treated as a *mass tort*. And yet nothing about this episode provided a basis for a public nuisance claim. Whatever Merck did wrong, it did not burden individuals in their access to or use of public spaces and resources.[247]

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243 *See supra* note 65. Nuisance law's disparate treatment of two kinds of sex work—and more generally its willingness to regulate activities in public spaces on different terms than activities in private spaces—might raise concerns as to whether it operates unfairly on the basis of wealth, race or other characteristics that correlate with who tends to occupy or have access to different spaces. My effort to make sense of public nuisance law is not an effort to justify it in all or even several of its applications.

244 *See* Jupin v. Kask, 849 N.E.2d 829, 843–44 (Mass. 2006). In a related vein, even when the sale of intoxicating beverages was identified as a public nuisance in the law of some states, the same classification did not apply to excessive drinking in private. FREUND, *supra* note 65, § 453, at 484 ("A man may debauch himself [by drinking excessively] in private and the state will not interfere, unless the debauchery creates a public nuisance or disturbs the public peace." (citation omitted)).

245 Regina v. Rimmington [2005] UKHL 63 [2], [2006] AC 459 (HL) 466 (Lord Bingham of Cornhill) (appeal taken from EWCA (Crim)).

246 *Id.* at [37].

247 Gifford, *supra* note 8, at 817 (using the example of a product-based mass tort to emphasize the distinction between conduct resulting in numerous rights violations and conduct violating a right common to the public).

Another example of an implausible public nuisance claim can be found in recent headlines, although in this instance the claim is predicated on a proper understanding of what a public nuisance is. Several cities, including New York, have sued automobile manufacturers Kia and Hyundai because certain models of their cars (an estimated 8 million vehicles in total) are relatively easy to steal. Online third-party postings not only demonstrate how to steal them but encourage viewers (primarily adolescents and young adults) to do so.[248] The City's complaint alleges that the manufacturers are thus responsible for having generated a public nuisance by:

> contribut[ing] to a significant increase in vehicle theft, reckless driving, and the use of stolen vehicles in the commission of other crimes in New York City, thus endangering the safety and health of considerable numbers of New York City residents, depriving . . . residents of the peaceful use of the public streets and sidewalks, undermining City law enforcement efforts, increasing law enforcement costs and diverting law enforcement resources, and interfering with commerce, travel, and the quality of daily life in New York City.[249]

While vehicle owners might have valid individual claims based on the violation of consumer protection laws, and while it might be possible and desirable to have these claims aggregated in certain ways,[250] the assertion that Kia and Hyundai have created a public nuisance in New York City seems highly dubious. Leaving aside the issue, discussed below, of when an actor can be deemed responsible for conditions generated in the first instance by third-party criminal acts, there seems little ground for concluding that the greater incidence of theft has generated the requisite kind of effect on access to public spaces. In 2023 alone, approximately 250 vehicular fatalities occurred in New York City.[251] Moreover, the City experiences tens of thousands of injury-producing vehicular accidents per year.[252] Meanwhile, in February 2023,

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248 *See* Gareth Vipers, *New York Is Latest City to Sue Automakers Kia and Hyundai Over Car Thefts*, Wall St. J. (June 7, 2023), https://www.wsj.com/articles/new-york-is-latest-city-to-sue-automakers-kia-and-hyundai-over-car-thefts-ab751ce0?mod=pls_whats_news_us_business_f [https://perma.cc/2JVU-APEL].

249 Complaint at 33–34, City of New York v. Hyundai Motor Am., No. 1:23-cv-4772 (S.D.N.Y. June 6, 2023) [hereinafter Complaint].

250 A class action on behalf of individual owners was also filed against the manufacturers, resulting in a $200 million settlement. Vipers, *supra* note 248.

251 John Surico, *It Was One of the Deadliest Years for Cyclists in New York City*, Curbed (Dec. 21, 2023), https://www.curbed.com/2023/12/nyc-cyclists-pedestrians-vision-zero-record-high-traffic-deaths.html [https://perma.cc/7ZCM-WGJ8].

252 In January 2024 alone, there were 7,438 recorded motor vehicle collisions in New York City, and these resulted in injuries to several thousand persons, of whom about 1,100 were

NHTSA reported that the defects in the relevant Kia and Hyundai car models were linked to 14 reported crashes and 8 fatalities *nationwide*.[253] One need not be dismissive of the problems associated with the theft of these cars to conclude that, whatever the manufacturers have done wrong, it does not consist of creating the requisite interference with the ability of New Yorkers to go about their lives.

So, a public nuisance, and hence any tort liability predicated on a public nuisance, requires a sufficiently significant interference with the ability of community members to access, use and enjoy public spaces and resources that they are entitled to access, use, or enjoy. What else is required? In particular, in what sense must the creator of the nuisance be chargeable with conduct that falls below some legal standard of required behavior? In other words, what in public nuisance law serves as the counterpart to private nuisance law's notion of unneighborliness?

Given that public nuisance is in the first instance a crime, the answer to this question would seem to reside in its statutory definitions, and particularly in specified mens rea requirements. However, as noted above, public nuisance is an odd duck in that the statutes that define it often say little or nothing about its culpability requirements (or indeed any of its requirements). For example, Florida's criminal code, which designates public nuisance as (ordinarily) a second-degree misdemeanor, defines it simply as "[a]ll nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals."[254] Two companies prosecuted for this crime once argued for dismissal of the charges on vagueness grounds. Although their argument prevailed in the trial court, it lost at the intermediate appellate level.[255] The appellate court's explanation for its decision is revealing: It reasoned that the statute could be rendered sufficiently determinate if interpreted in light of the common law of nuisance.[256]

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cyclists and pedestrians as opposed to motorists or passengers. N.Y.C. Police Dep't, Motor Vehicle Collision Report Statistics Citywide, January 2024 (2024) https://home.nyc.gov/assets/nypd/downloads/pdf/traffic_data/cityacc.pdf [https://perma.cc/2DRJ-QXXR].

253 *Hyundai and Kia Launch Service Campaign to Prevent Theft of Millions of Vehicles Targeted by Social Media Challenge*, NHTSA (Feb. 14, 2023), https://www.nhtsa.gov/press-releases/hyundai-kia-campaign-prevent-vehicle-theft [https://perma.cc/9Q54-MVWG]. Note also that some (perhaps many) of the persons killed were involved in the thefts rather than bystanders. *See, e.g.*, Complaint, *supra* note 249, at 13–14.

254 Fla. Stat. Ann. § 823.01 (West 2023).

255 State v. SCM Glidco Organics Corp., 592 So. 2d 710, 711–13 (Fla. Dist. Ct. App. 1991), *overruled on other grounds by* Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001).

256 *Id.* at 712. Of course, constitutional law sets limits on the extent to which conduct can be criminalized through the use of vague prohibitions or strict liability rules. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (holding the president of a food retailer criminally strictly liable for its sale of adulterated food); Morissette v. United States, 342 U.S. 246 (1952) (explaining that public welfare offenses may not require proof of *mens rea*); United States v.

Defense counsel in the English *Rimmington* case similarly argued that his client's fundamental legal rights were being violated by virtue of his being prosecuted for the unduly vague crime of public nuisance. Lord Bingham's response to this contention mirrors that of the Florida appellate court. The general public nuisance offense (as opposed to specific statutory prohibitions) passes muster, he reasoned, if limited to standard common law instantiations.[257]

Absent specific statutory language to the contrary, the public nuisance offense (and, by extension, tort actions predicated on the commission of the offense) is properly understood to incorporate the notion of wrongdoing contained in its common-law progenitor. In keeping with the connections between private and public nuisance canvassed above, that notion hinges on the interference being "unreasonable" in the sense of violating a norm of reciprocity, albeit a norm of what might be termed "civic reciprocity" that governs relations among all members of a community instead of among neighbors.[258] As the English Court of Appeal once noted, much like the law governing neighbors in their interactions:

> [t]he law relating to the user of highways is, in truth, the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect

Dotterweich, 320 U.S. 277 (1943) (upholding a company president's criminal conviction under a strict liability standard for mislabeled drugs). This article does not address how, precisely, these limits affect or should affect the application of public nuisance law except to suggest that vagueness and due process concerns warrant the retention of the traditional, bounded conception of public nuisance as an unreasonable interference with the use of public spaces and resources.

257 Regina v. Rimmington [2005] UKHL 63 [36]–[37], [2006] AC 459 (HL) 483–84 (Lord Bingham) (appeal taken from EWCA (Crim)). Examples noted by Lord Bingham included: polluting a river; creating unbearable odors that render a public way unusable; knowingly taking a child or animal with a highly infectious and dangerous disease onto a public street; and operating a rifle range that induces crowds to shoot at pigeons so as to cause damage, disturbance, and mischief. *Id.* at [12]–[13].

258 *See* Novak, *supra* note 155, at 45 (noting that it was commonplace in the nineteenth century for jurists to associate nuisance law, and law more generally, with the ideal of a polity in which the liberty of each is secured through a regime of "reciprocal protection and respect"); *id.* at 49 (quoting James Kent's treatise for the proposition that "[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others"). Absent specific statutory guidance to the contrary, unreasonableness in public nuisance, like unreasonableness in private nuisance, might involve, but need not involve, conduct that is unreasonable in the negligence sense of imprudent. *See* McFarlane v. City of Niagara Falls, 160 N.E. 391, 391 (N.Y. 1928) (Cardozo, J.) (noting that some public nuisances involve negligence while others do not); *see also* Ripstein, *supra* note 8, at 12–13 (using the example of public roads to illustrate the claim that a public nuisance involves an individual using a public space or resource for something other than a proper purpose, and that such misuse need not involve wrongful intent or negligence).

> a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.[259]

Similarly, in explaining its reluctance to deem the regulation of property under public nuisance law as triggering a responsibility to compensate under the Takings Clause, the U.S. Supreme Court observed that such regulation "is consistent with [a] notion of 'reciprocity of advantage,'" adding that "one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[260]

On this understanding, road blockages, brothels, and other anti-social, injurious actions display a lack of reciprocity in the form of violating a basic *civic obligation*. As a member of a polity, one is required to put up with a host of inconveniences generated by others (as anyone who commutes on crowded roads or transit systems appreciates). But there comes a point at which an actor makes it too difficult for others to go about their lives in public. While this particular kind of irresponsibility often will take the form of either a knowing interference or an interference arising out of heedlessness or carelessness, there is no reason to suppose that it—any more than private nuisance law's notion of unneighborliness—boils down to a notion of intent or negligence. Indeed, as case law developed in connection with civil enforcement actions suggests, public nuisance liability, like private nuisance liability, will often be strict (in the sense of insensitive to possible excuses or otherwise unforgiving). A person who, despite exercising utmost care, builds a structure that encroaches on a public way, at least where it is foreseeable that such an encroachment might result—and certainly once they have reason to be aware of the encroachment—is one who has failed to heed a basic civic duty owed to all other citizens.[261]

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259 Harpur v. G.N. Haden and Sons, Ltd. (1933) 148 LT 303 (EWCA (Civ)) 309–10 (Lord Romer) (appeal taken from EWHC (Ch)). Thanks to Chris Essert for pointing me to this language. Arthur Ripstein captures this idea in the notion that each person has a right to use a public resource such as a road in ways that are consistent with eveyone else being able to use it. Ripstein, *supra* note 8, at 13.

260 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

261 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1050–51 (2d Cir. 1985) (holding that under New York law, an actor can be liable for a public nuisance "upon learning of the nuisance and having a reasonable opportunity to abate it," "irrespective of negligence or fault"); Commonwealth v. Barnes & Tucker Co., 319 A.2d 871, 883 (Pa. 1974) ("The absence of facts supporting concepts of negligence, foreseeability or [otherwise] unlawful conduct

This Section has identified a "throughline" that captures and makes sense of decisional law concerning what counts as a violation of a right common to the public. The key, I have argued, is to isolate certain features shared by public and private nuisances, especially the ideas of nonreciprocity (going beyond the normal bounds of "give and take") and of interference with access, use, and enjoyment. One can go further, however. The law of public nuisance has not only tended to "stay in touch" with the law of private nuisance—it *should* do so if it is to comport with basic notions of legality. Precisely because the conduct element of this offense is relatively ill-defined, because its mens rea requirements are often minimal, and because the offense stands to generate a criminal prosecution, civil or summary abatement proceedings, and follow-on tort liability in cases of special injury, it ought to be confined to conduct that has the features of a genuine nuisance—i.e., that unreasonably hinders the use and enjoyment of public resources and spaces or ordinary social interaction. Federal and state constitutional law may pose additional constraints on what can count under state law as a public nuisance beyond this constraint. But this constraint is, in a sense, the most basic.

In an important article, Leslie Kendrick has critiqued attempts to limit the scope of public nuisance liability based on "traditionalist" or "formalist" arguments.[262] Given the tenor of the present analysis, it would be natural to wonder whether her critiques undermine it.

Kendrick's focus is primarily functional and institutional: She is mainly concerned to demonstrate why it is plausible to suppose that more good than bad will come from courts adopting expansive forms of public nuisance liability. To clear the way for this claim, however, she also argues, historically, that public nuisance law has always been loosely defined, and, doctrinally, that an expansive notion of nuisance would be consonant with what she claims to be a basic principle of modern negligence law, according to which an actor who creates a discrete risk of physical harm to others, and either knows or should know of the risk,

is not in the least fatal to a finding of the existence of a common law public nuisance."); Restatement (Second) of Torts § 821B cmt. e (Am. L. Inst. 1979) (noting that, subject to possible constitutional limitations, public nuisance statutes can impose "strict criminal responsibility"). *See generally* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 Env't L. Rep. 10292 (1986). *Rimmington* assumed that conviction requires proof that the defendant either knew or ought to have known that their conduct would produce the effects constituting the violation of a right common to the public. Regina v. Rimmington [2005] UKHL 63 [39], [2006] AC 459 (HL) 485 (Lord Bingham) (appeal taken from EWCA (Crim)).

262 Kendrick, *supra* note 8.

incurs a duty to take reasonable steps to prevent the realization of the risk.[263]

Kendrick frames her account in opposition to a "traditionalist" view, according to which public nuisances can only arise out of uses of land, or at least cannot arise out of the sale of products.[264] My analysis relies on neither of these categorical claims. Indeed, it allows that a product manufacturer or seller can be liable for individual injuries resulting from a public nuisance if, under applicable legal rules, it can be deemed responsible for causing the sort of use-right interference that counts as a public nuisance and if that interference in turn causes a special injury to the plaintiff (discussed below).

The "formalist" critique, as rendered by Kendrick, comes in different varieties, but among them is a critique of the application of public nuisance law to widespread harms caused by the sale of products on the ground that such harms do not amount to a violation of a right common to the public.[265] Here we join issue. My contention, contrary to Kendrick's, and supported by the analysis provided above, is that "right common to the public" does, and should, specify a requirement beyond widespread harm or risks of such harm. Despite sometimes being formulated in broad terms, the public nuisance offense, I have argued, has overwhelmingly been limited to interferences with the use of, and access to, public spaces and resources. A court committed to applying the law—and thus taking seriously the concept of a public nuisance (even granted its uncertain borders)—cannot take the position that public nuisance liability should attach whenever the imposition or threat of such liability can address widespread harm on terms that promise to be net-beneficial to society.

Kendrick attempts to supplement her instrumental argument for something close to a blank-check conception of public nuisance with an appeal to doctrine, suggesting that such a conception would faithfully instantiate a legal principle according to which an actor whose actions have generated risks of harm to others must take further actions to reduce those risks. No source of which I am aware identifies such a principle as undergirding the wrong of public nuisance. Nor has any such broad principle received recognition elsewhere in tort law. Kendrick suggests that a court decision holding a product manufacturer to have caused a public nuisance by selling a product that it knows or should know is contributing to widespread harm is analogous to a decision that imposes negligence liability on a golfer who realizes or should realize

263 *Id.* at 716–21, 762–67.
264 *Id.* at 710.
265 *Id.* at 749–52.

that their errant shot might strike nearby golfers but fails to warn them, resulting in one being struck and injured.[266] As she acknowledges, however, decisions imposing negligence liability in cases such as that of the golfer purport merely to recognize a very narrow exception to the general rule that an actor's ability to protect or rescue another does not of itself generate a duty to protect or rescue.[267] Specifically, the duty is cast as a duty to take reasonable steps to ameliorate a discrete risk of *imminent* physical harm generated by the actor's own conduct, and that is posed to an identifiable class of potential victims. To be sure, it is possible to extend the rule of these cases.[268] Nonetheless, it is extremely aggressive (to say the least) to extrapolate from a narrowly cast exception to the no-duty-to-rescue doctrine in negligence law—one that, to my knowledge, has never on its own terms been applied to product manufacturers with respect to risks posed to the general public by their products—to a general principle that not only cuts across all of tort law (so as to extend to special injury public nuisance actions), but further extends into criminal law (which, again, is the law that defines the offense of public nuisance in the first instance).

C. Responsibility for Creating a Public Nuisance and the Special Injury Requirement for Tort Liability

Establishing that an actor has contributed to the creation of conditions that meet the definition of a public nuisance is the first step toward establishing the actor's liability to prosecution, a civil abatement action, and tort liability. But it is only the first step. Actors do not face liability of any sort if their contribution to the creation of the relevant conditions provides no basis for attributing legal responsibility to them for the conditions. And even if there is the right sort of connection between action and condition, there is still no *tort* liability (only potential criminal or civil enforcement liability) absent a special injury to a particular person or persons. This Section explores these additional liability requirements.

1. Responsibility

In responding to critics of expansive applications of public nuisance law, Kendrick notes that Sheppard's mid-seventeenth-century English treatise designates as a public nuisance the provision of unwholesome

266 *Id.* at 765.

267 *Id.*

268 *See, e.g.*, John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1709–15 (2002) (arguing that court-ordered medical monitoring can sometimes be justified by appeal to this affirmative duty doctrine).

foods or medicines for human consumption by a baker, brewer, or apothecary.[269] The idea may have been that offering items for human consumption known to be spoiled or adulterated generates risks of illness comparable to the risks generated by malarial ponds or when persons infected with deadly infectious diseases circulate in public spaces.[270]

Regardless of whether they constitute outliers, these cases illustrate another important point about public nuisance liability—one that again returns us to the law of private nuisance. Part II's discussion of the *Mark* case noted that, in addition to the question of whether the beachgoers' activities amounted to a private nuisance, there was also the question of whether, and on what grounds, the state-agency defendants could be deemed *responsible* for the nuisance-generating actions of the beachgoers. Similar issues of responsibility will sometimes arise in public nuisance cases. Assuming for purposes of analysis that the sale of tainted foods and medicines can sometimes constitute a public nuisance, there is no difficulty in supposing that the bakers and apothecaries who knowingly sell such items are properly deemed responsible for the offense.[271] In modern circumstances, by contrast, the attribution to product-sellers of responsibility for a public nuisance sometimes will require a more extended form of attribution.[272]

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269 Kendrick, *supra* note 8, at 716 (citing SHEPPARD, *supra* note 142, at 44–46). Blackstone, who relied in other respects on Sheppard's analysis, treated the sale of adulterated foods as a separate criminal offense not within the category of public nuisance. *See* 4 BLACKSTONE, *supra* note 141, at *162 (noting that the selling of unwholesome provisions had been rendered criminal by statute); *see also* Regina v. Rimmington [2005] UKHL 63 [14], [2006] AC 459 (HL) 471–72 (Lord Bingham) (appeal taken from EWCA (Crim)) (noting that it is "not entirely clear" whether the sale of unfit meat to the public constituted a common nuisance at common law); 2 JOHN H. COLBY, A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 27–28 (1868) (stating that sale of unwholesome food for human consumption is punishable either as fraud or as a nuisance).

270 *Cf.* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 390 (1879) (noting in a different legal context that members of the public depend on food inspectors "for protection against the diseases that might be engendered or disseminated by the sale of unwholesome food").

271 The same goes for one who dumps chemicals that reach and pollute groundwater (even if the polluted water is not on the defendant's property), *see* State v. Schenectady Chems., Inc., 117 Misc. 2d 960, 966 (N.Y. Sup. Ct. 1983), *aff'd as modified*, 103 A.D.2d 33 (N.Y. App. Div. 1984), and for a property owner who purchases property in the knowledge that it contains the nuisance-generating activities or conditions on it, *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1050–51 (2d Cir. 1985) (applying New York law).

272 *See generally* PARKER & WORTHINGTON, *supra* note 133, at 226–49 (discussing basis for responsibility for nuisances). As noted above, courts have developed various tort doctrines of attribution, often in connection with claims for negligence. *See generally* Goldberg & Zipursky, *supra* note 133, at 1218–44. The issue flagged in this Section is how those doctrines and perhaps others play out in the nuisance context. One such issue is the conditions under which governmental entities can be subject to liability for improperly authorizing activities

And at some point, the connection will be sufficiently attenuated that the grounds for attribution will run out. If an explosives manufacturer does not itself operate on terms that render it a public nuisance, but is the victim of a large-scale theft, and the thieves end up storing vast amounts of explosives in a densely populated area, it is presumably the thieves and not the manufacturer who is responsible for creating the public nuisance—at least if the manufacturer was not in cahoots with the thieves or grossly irresponsible in securing its facility against theft.

Or consider again commercial fishermen who recover compensatory damages from a defendant responsible for polluting public waters in which the fishermen have a right to fish. If, in this case, we imagine the defendant to be the owner and operator of an oil tanker that runs aground, the question of responsibility for the nuisance is itself straightforward: The shipowner is responsible. Now imagine a variant of this scenario. BladCo manufactures "bladders" that are used to line the inside of tanker ships and make it less likely that their contents will leak if a vessel is damaged or sinks. BladCo's bladders are manufactured in compliance with and efficacious to the extent required by federal safety standards. However, members of BladCo's sales force knowingly and materially overstate the efficacy of its bladders to the ship manufacturers to whom it markets its products. A particular ship manufacturer, Shipstream, purchases and installs BladCo's bladders in its tankers, then in turn sells one of its tankers, equipped with a BladCo bladder, to Oyl, an oil company. It is unclear to what extent Shipstream relied on BladCo's employees' misrepresentations in purchasing the bladders. One year later, Oyl's tanker is wrecked on a reef because of a piloting error, causing an oil spill that shuts down a public waterway, in turn depriving commercial fishermen of the ability to fish. If BladCo's representations overstating the efficacy of its bladders had been true, the spill would not have happened or would have been less severe.

As the creator of a public nuisance, Oyl is subject to an abatement action. As is discussed above and below, it is also subject to a tort action by the fishermen, given that the public nuisance caused them special injury. BladCo's liability, on the other hand, requires further analysis, just as the question of whether the agencies in *Mark* could be held liable for beachgoers' nuisance-generating activities required further analysis. In *Mark*, the court concluded that the agencies could be held

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that constitute public nuisances. *See, e.g.*, Schultz v. City of Milwaukee, 5 N.W. 342, 344–46 (Wis. 1880) (declining to hold defendant city responsible for a public nuisance created in the first instance by children sledding on public streets, and distinguishing a prior decision holding a municipal government responsible in nuisance for licensing an event that involved bringing two bears onto a public street).

responsible because they controlled the relevant spaces, were aware of the problematic sexual activity, and had in some ways encouraged, endorsed, or ratified it, rather than simply having been aware of it and having failed to take steps to prevent it. For the hypothetical I have posited, it is less clear that there is a basis for a comparable attribution of responsibility to BladCo. At least in standard instances, component-part manufacturers are not typically understood to bear a supervisory responsibility with respect to the conduct of purchasers of their products comparable to the responsibility of the agencies in *Mark* to control conduct taking place on land under their management.

To be sure, BladCo might face *some* liability for its employees' wrongful conduct. For example, it might be the case that, if Oyl is held liable to the fisherman, Oyl would have an equitable claim against BladCo for indemnification or contribution based on the misrepresentations made by BladCo's employees to Shipstream. What is less clear is whether the use of misrepresentations in the sale of an otherwise sound product suffices to provide a legal basis for attributing to BladCo what was in the first instance Oyl's interference with a right common to the public.[273]

As to principles of attribution, the same legality considerations, mentioned above, that counsel in favor of a constrained notion of public nuisance may also suggest that attribution to remote actors should be limited to instances in which there is an analogue to the sort of invitation, participation, or endorsement of others' nuisance-creating conduct seen in cases like *Mark* and *Fearn*.[274] This at least seems to be the suggestion of some of the courts that have resisted imposing liability on product manufacturers merely on the ground that they employed irresponsible sales tactics and had reason to foresee that others might misuse their products in ways that could generate effects constituting a public nuisance.[275] What, precisely, beyond the foreseeability of product

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273 *See, e.g.*, Pensacola & A.R. Co. v. Hyer, 14 So. 381, 382 (Fla. 1893) (holding that, although materials that gathered at the base of defendant's drawbridge blocked a public waterway, defendant was not responsible for creating the blockage and had no duty to maintain clear passages under and through it).

274 *See supra* text accompanying notes 133–38; *see also* Fleischner v. Citizens' Real-Estate & Inv. Co., 35 P. 174, 176 (Or. 1893) (holding that, if a tenant creates a public nuisance upon the premises during the term of the lease, "although the landlord cannot be made chargeable for the consequences in the first instance, yet, if he subsequently renews the lease with the nuisance thereon, he becomes chargeable for its continuance").

275 *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1136 (Ill. 2004) (declining to find firearms dealers' lawful sales to be a legal cause of the nuisance of illegal presence and use of firearms in Chicago); State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 731 (Okla. 2021) (abiding by common law criminal and property based limitations, holding that Johnson & Johnson's manufacturing, marketing, and selling of prescription opioids did not constitute a public nuisance under Oklahoma law); State v. Lead Indus. Ass'n,

misuse will suffice to permit the attribution of responsibility for creating a nuisance to a product manufacturer is a question for the courts.[276]

2. *Special Injury*

A person who suffers a special injury because of a public nuisance can sue an actor responsible for creating the nuisance to obtain redress for the injury.[277] However, the question of what counts as a special injury (or "particular damage") has generated considerable disagreement.[278]

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951 A.2d 428, 455 (R.I. 2008) (finding former lead producers not liable for public nuisance because defendants' manufacturing and selling lead paint did not interfere with a public right and defendants had no control over their product at the time of alleged injury); City of Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000) (refusing to find that defendant gun manufacturers' producing and selling of firearms constitute a nuisance in Pennsylvania), *aff'd*, 277 F.3d 415 (3d Cir. 2002); Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 266 (D.N.J. 2000) ("[I]t is evident that the defendants' allegedly wrongful conduct in this case could *never* ripen into a public nuisance absent the conduct of third parties."), *aff'd*, 273 F.3d 536 (3d Cir. 2001). Some authorities infer from the fact that abatement is the primary aim of enforcement actions the conclusion that actors who are not in a position to abate a public nuisance cannot be held responsible for it. *See, e.g.*, Roseville Plaza Ltd. v. U.S. Gypsum Co., 811 F. Supp. 1200, 1210 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); *Hunter*, 499 P.3d at 729; *see also* Gifford, *supra* note 8, at 819–24 (discussing the treatment of defendant control and abatement capability in public nuisance cases and related statutes and restatements). On this view, the reason a handgun manufacturer should not be held liable in public nuisance for a plague of gun violence in an urban neighborhood traceable to the ready availability of its guns is that the manufacturer will not be in a position to abate the nuisance. However, if enforcement actions can include not only claims for abatement, but also for restitution of costs incurred by a government entity in having performed the defendant's obligation to abate, this argument seems to miss the mark. On the argument of this Section, the issue turns on the proper application of principles of attribution, not on the capacity to abate.

276 A separate question of responsibility concerns whether an actor who is properly deemed responsible for a public nuisance that causes special injury to the plaintiff can nonetheless avoid liability on something akin to proximate cause grounds. In *Beard v. State*, 308 N.W.2d 185, 186–87 (Mich. Ct. App. 1981), the defendant's firing range was deemed a nuisance, but a divided appellate panel affirmed summary judgment for the defendant in a case brought by two teenagers who had removed a grenade from the range and were injured in an off-site explosion. The majority reasoned that nuisance liability only attaches if the dangerous condition that results in injury to the plaintiff was under the control of the defendant at the time the injury occurred. *Id.* at 187. A more plausible basis for this (contestable) judgment is that the plaintiffs, even though in fact injured, did not suffer what counts as a "special injury." *See infra* text accompanying notes 277–323.

277 As noted in Section III.A, in some jurisdictions, a special injury also confers on the victim standing to pursue a civil enforcement action. Courts and commentators seem to assume that the special injury requirement is the same regardless of whether the plaintiff is suing as private attorney general or in their own right.

278 *See generally* Antolini, *supra* note 21 (discussing the history of the special injury rule and criticisms of it); Gilbert Kodilinye, *Public Nuisance and Particular Damage in the Modern Law*, 6 Legal Stud. 182 (1986) (examining particular damage in case law from common law jurisdictions); Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage*, 15 Colum. L. Rev. 1 (1915) [hereinafter *Private Action Part I*] (examining English and American

Some matters are clear. A public nuisance such as a blocked road creates an inconvenience for anyone who might use the road, and thus the inconvenience of having to take extra time along another route to one's destination does not suffice, even if the inconvenience is greater in degree than that experienced by others.[279] A person being particularly concerned or upset about a public nuisance also does not generate a tort claim.[280] At the other end of the spectrum, certain personal injuries and property damage caused by a public nuisance will support a claim.[281] In the murkier middle are cases in which the gist of the plaintiff's claim to damages seems to be economic loss.[282]

While older English cases are not entirely consistent, most hold that a nuisance that blocks or hinders a person from doing their business—for example, a blocked channel that prevents the plaintiff from transporting or selling their goods—is actionable in tort by that person.[283] Yet, while

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authority on the right of action in cases involving an obstruction to a public right of way); Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage II*, 15 COLUM. L. REV. 142 (1915) [hereinafter *Private Action Part II*] (same).

279 *See* Paine v. Partrich (1691) 90 Eng. Rep. 715, 717; Carth. 191, 194 (holding that a delay in plaintiff's journey caused by defendant blocking a highway does not amount to special damage); *Private Action Part I*, *supra* note 278, at 12 (observing that courts have generally refused to find special damage when plaintiff only suffered delay, inconvenience, or hindrance from road obstruction without actual damage such as pecuniary loss).

280 *See, e.g.*, U.S. Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9, 13 (Fla. 1974) (holding that community group's particular concern that construction of buildings would limit public beach access is not sufficient to establish special injury and confer standing).

281 *See* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Mass. 1986) (holding that personal injury suffices to satisfy "special injury" requirement); Maynell v. Saltmarsh (1663) 83 Eng. Rep. 1278, 1278; 1 Keb. 847, 847 (finding special injury where plaintiff's corn spoiled prior to sale because of road blockage caused by the defendant); RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (AM. L. INST. 1979) ("When the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained."); *see also* Bullock, *supra* note 8, at 149, 149 n.76 (noting several American cases that recognized public nuisance as a tort, including *Lamereaux v. Tula*, 44 N.E.2d 789, 791 (Mass. 1942), which upheld a public nuisance claim for physical injury resulting from a fall on a public sidewalk made unduly slippery by defendant); Daniel v. Morency, 165 A.2d 64, 67 (Me. 1960) (dictum) (suggesting that a plaintiff who suffered physical injury because of a depression in a sidewalk would have a valid claim based on public nuisance but for her contributory negligence)); Kodilinye, *supra* note 278, at 182–83 (observing that courts in common law jurisdictions generally recognize particular damage when the plaintiff suffers personal injury or damage to property). Perhaps the first "special injury" judicial opinion—that of Fitzherbert, J., in a case from the early 1500s—posits that a person who suffers personal injury or property damage because of a blocked public way would be entitled to compensation from the creator of the nuisance. Anon., YB 27 Hen. 8., fol. 27, Mich, pl. 10 (1535) (Eng.).

282 In keeping with remedial rules generally applicable to tort claims, a person who, for example, establishes that they have suffered property damage as a result of a public nuisance is also entitled to economic losses parasitic on the injury that renders their claim cognizable.

283 *Compare* Benjamin v. Storr (1874) 9 LRCP 400, at 407–09 (Eng.) (holding that plaintiff was specially injured where defendant regularly blocked the narrow street in front of

these decisions might seem to suggest that business interruptions flowing from public nuisances are always special injuries, case law in England and the U.S. reveals a more complicated situation.

The complication traces at least back to two English cases. In 1835, the Court of Common Pleas in *Wilkes v. Hungerford Market Co.* ruled that the defendant's blocking of a public way, which diverted potential customers away from plaintiff's bookstore, had caused the plaintiff a special injury.[284] It thus stands for a relatively broad account of the types of business losses that are compensable under public nuisance law. Thirty years later, however, the House of Lords cast significant doubt on *Wilkes* in a case called *Ricket v. Metropolitan Railway Co.*[285] There, the defendant's construction obstructed a public way for about two years, which significantly reduced the foot traffic past plaintiff's pub.[286] The plaintiff sued for compensatory damages under English statutes that permitted property owners to obtain compensation when their lands were "injuriously affected by certain works."[287] However, the statutes incorporated common law standards of liability, which gave the Law Lords occasion to address *Wilkes*.[288] In doing so, they maintained that the losses suffered by the bookstore should not have been treated as a special injury because they were "too remote."[289]

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plaintiff's coffee house so as to hinder access and expose it to highly offensive odors), Rose v. Miles (1815) 105 Eng. Rep. 773, 774; 4 Maule & Selwyn 101, 103–04 (recognizing special injury where defendant blocked a waterway, forcing the plaintiff to transport his goods over land at considerably greater expense), Iveson v. Moore (1699) 91 Eng. Rep. 1224, 1230; 1 LD. Raym. 486, 495 (finding that plaintiff prevented from transporting coal by defendants' road blockage and forced to incur greater expense can establish special injury), *and* Hart v. Basset (1680) 84 Eng. Rep. 1194, 1195; T. Jones 156, 157 (deeming plaintiff, who was forced by defendant's blockage of a public way to take an alternative and more difficult route for storing items in a barn, to be specially injured), *with* Hubert v. Groves (1794) 170 Eng. Rep. 308, 308–09; 1 Esp. 148, 149 (finding that a merchant who used a public way to carry goods to and from his business could not prevail on a special damages claim against the defendant, who had blocked the road). Many of these and related decisions are reviewed in *Mehrhof Bros. Brick Manufacturing Co. v. Delaware, Lackawanna and Western Railroad Co.*, 16 A. 12, 13 (N.J. 1888), which allowed a special-injury-based public nuisance claim by the plaintiffs, who were prevented by an obstruction attributable to the defendant from sailing on the Hackensack river to transport their bricks to market.

284 (1835) 132 Eng. Rep. 110, 115–18; 2 Bing. N.C. 281, 293–96.

285 (1867) 2 LRE & I App. 175 (HL) (appeal taken from Eng.).

286 *Id.* at 176.

287 *Id.* at 176 & n.1.

288 *See* J.W. Neyers & Eric Andrews, *Loss of Custom and Public Nuisance: The Authority of* Ricket, 2016 Lloyd's Mar. & Com. L.Q. 135, 137.

289 *Ricket*, 2 LRE & I App. at 188 (Lord Chelmsford LC). Commentators have disagreed over whether *Ricket* formally overruled *Wilkes*. *Compare* Neyers & Andrews, *supra* note 288, at 150–51 (contending that the House of Lords rejected *Wilkes* in *Ricket*), *with* Kodilinye, *supra* note 278, at 185–86 (arguing that the House of Lords in *Ricket* decided the case on grounds other than particular damage and did not overrule *Wilkes*).

A similar pattern can be found in U.S. law. In 1966, Prosser noted some American decisions that followed *Wilkes* in treating any loss of business, or any loss of business experienced only by the plaintiff (or a few other businesses in the relevant community) as a special injury.[290] Yet there are numerous modern authorities that, like *Ricket*, cast doubt on this broad rendition of special injury. Two of the most important are *Rickards v. Sun Oil Co.*[291] and *Louisiana ex rel. Guste v. M/V Testbank*.[292]

In *Rickards*, the defendant's negligently piloted ship crashed into a drawbridge that was part of a highway that provided the only vehicular access to the plaintiffs' businesses. Because the route was unpassable for a period, the businesses suffered losses.[293] In *Testbank*, two container ships collided on the Mississippi River near the Gulf of Mexico. The collision released large amounts of a toxic chemical (PCP) stored in containers on one of the ships. In response, the Coast Guard closed the area to navigation and suspended commercial fishing for about three weeks. Local businesses, including boat rental operations, restaurants, and bait shops, sued for lost income.[294]

On the question of *negligence* liability, both *Rickards* and *Testbank* (applying New Jersey law and federal maritime law, respectively) ruled against the plaintiffs complaining of lost revenue resulting from the inability of customers to access their businesses. Indeed, the two decisions are now emblematic of the rule of negligence law sometimes known as the "pure economic loss rule"—i.e., the rule that an actor ordinarily owes no duty to others to take care against causing them even foreseeable economic loss (as opposed to personal injury or property damage).[295] Yet, while straightforward in this respect, both decisions pose a puzzle. After all, both involved paradigmatic public nuisances.

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290 *See* Prosser, *supra* note 1, at 1014–15, 1014 n.139 (citing, *inter alia*, E. Cairo Ferry Co. v. Brown, 25 S.W.2d 730, 731 (Ky. Ct. App. 1930) (finding that business that depends on customers reaching it via a road suffered special injury when defendant blocked the road); Johnson v. Mayor of Oakland, 129 A. 648, 649–50 (Md. 1925) (holding that lost business from lack of through-traffic caused by bridge closing is a special injury)).

291 41 A.2d 267 (N.J. 1945).

292 752 F.2d 1019 (5th Cir. 1985) (en banc).

293 *Rickards*, 41 A.2d at 268.

294 *Testbank*, 752 F.2d at 1020–21.

295 *See, e.g.*, S. Cal. Gas Leak Cases, 441 P.3d 881, 890 (Cal. 2019) (invoking *Testbank* for the no-duty rule); Aikens v. Debow, 541 S.E.2d 576, 584, 586–87 (W. Va. 2000) (invoking *Rickards* and *Testbank* for the no-duty rule); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 52–53 (1st Cir. 1985) (invoking *Testbank* in support of the no-duty rule). The modern font of negligence law's pure economic loss rule is *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). In that case, Flint chartered a ship from the ship's owner, but was prevented from using it (and profiting from its use) for two weeks because the defendant negligently damaged the ship while refurbishing it. *Id.* at 307. Although *Flint* is still widely cited, the facts of cases like *Rickards* and *Testbank* are more commonly invoked as paradigmatic for the application of the pure economic loss rule.

Equally clearly, the defendants were the creators of the nuisances, and thus would have been subject to prosecution or abatement actions. Finally, the plaintiffs appear to have been positioned comparably to the bookstore in *Wilkes*: They lost revenue because customers were prevented from reaching their businesses. Thus it seems that *Rickards* and *Testbank* might have allowed for the imposition of liability on a public nuisance theory, notwithstanding that they denied liability on a negligence theory. Yet neither did. Why not?

As it turns out, both suits included public nuisance claims, and in both cases the court, in less well-known aspects of their opinions, found these lacking as a matter of law.[296] The New Jersey court in *Rickards* assumed without deciding that the plaintiffs were "specially damnified" (i.e., suffered a special injury).[297] It nonetheless reasoned that proximate cause is as much a feature of public nuisance law as negligence law, and that the businesses' losses were too remote from the ship captain's negligence.[298] In *Testbank*, the majority seized on Prosser's suggestion (discussed in Part II) that "nuisance" is not actually the name of a freestanding tort but instead refers to a type of harm that only generates liability when combined with conduct that violates a standard set by some other tort, such as negligence.[299] It further concluded that, because the essence of the plaintiffs' allegation of wrongdoing against the defendants was negligent piloting, public nuisance law, as applied in the case at hand, should be understood to incorporate not only negligence law's standard of conduct, but also its no-duty rule for pure economic loss.[300]

Both of these explanations rest on the premise that public nuisance law should simply track negligence law. Yet, neither adopts Professor Merrill's position that public nuisance law does not provide an independent ground of liability.[301] And if the creation of a public nuisance that causes special injury is a tort as to a person who suffers

296 Note that the plaintiff in *Testbank*'s case caption is the State of Louisiana on the relation of its Attorney General. It seems that the State's claims for public nuisance were consolidated with the businesses' negligence and nuisance claims.

297 *See Rickards*, 41 A.2d at 270.

298 Specifically, the court reasoned that the forces put in play by the pilot's negligence had "substantially come to rest" once the bridge was damaged, that the plaintiffs' lost revenues were not a reasonably foreseeable consequence of the negligent piloting, and that liability for the lost revenues would be disproportionate to the gravity of the defendant's wrong. *See id.* at 269. Famously, in the *Wagon Mound* litigation, the English Privy Council similarly maintained that special injuries caused by a public nuisance are only actionable if reasonably foreseeable to the creator of the public nuisance at the time of acting. Overseas Tankship (U.K.), Ltd. v. Miller Steamship Co., [1966] 2 All E.R. 709, 717.

299 *See Testbank*, 752 F.2d at 1030.

300 *See id.* at 1030–31.

301 *See supra* notes 179–81 and accompanying text.

such an injury, why must it follow the rules of negligence? Suppose a person is physically injured in an accident but cannot prove careless conduct by the defendant. If it so happens that the accident resulted from the defendant's engaging in what the law deems an "abnormally dangerous activity," the person can still prevail in jurisdictions that recognize a freestanding tort action for persons who are physically injured by such activities.[302] Why not similarly conclude that a person who happens to have been accidentally caused economic loss by a public nuisance is entitled to recover for this loss even though an otherwise comparable plaintiff—one who experiences the same type of loss as a result of negligent conduct that does not amount to a public nuisance—cannot?[303]

There is a better explanation for the public nuisance dimensions of *Rickards* and *Testbank*, as well as for the English *Ricket* decision. To grasp it requires us, yet again, to attend to nuisance law as a whole and to the connections between private and public nuisance. As noted in Part II, at the core of a private nuisance suit is the plaintiff's claim that the defendant's conduct *affected the usability of the plaintiff's land*.[304] Thus, in private nuisance law, loss of revenue or diminution in property value in its own right does not establish unreasonable interference. If foul odors from Hal's hog farm make it impossible for Pru to use her nearby residence in ordinary ways, Pru may have a private nuisance claim against Hal. And if she prevails on that claim, Pru can recover damages that compensate her for any reduction in her home's value. But if the foul odors never reach Nicki's yard, she has no nuisance claim against Hal, *even if she can prove that its proximity to her home caused her to sell her home at a lower price than she would have otherwise*. Unlike Pru, Nicki cannot demonstrate that Hal has done anything to interfere with her land's capacity to be used by her in ordinary ways.

A version of this idea holds for special injury claims based on a public nuisance. For the *offense* to be committed, there must be the requisite interference with a right common to the public. For the *tort* to be committed, there must additionally be a distinct interference with

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302 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (AM. L. INST. 2010).

303 One might salvage the courts' conclusion about nuisance liability on the following rationale: Whenever a defendant is being sued in tort for public nuisance (understood as a freestanding tort), and whenever the evidence shows the defendant caused an interference with a right common to the public through careless conduct (rather than more culpable conduct), the rules for public nuisance tort liability should be understood to mimic the rules of negligence law. This is perhaps a defensible position but, for reasons noted in the text, it requires a defense.

304 *See supra* notes 51–53 and accompanying text.

the plaintiff's actual ability to access, use, or enjoy *some resource or space, whether public or the plaintiff's*. In *Rickards* and *Testbank* (as in *Wilkes* and *Ricket*), the businesses whose claims were rejected did not seek compensation for losses incurred by virtue of the defendants having affected a public space or the businesses' own properties in a way that rendered them less physically available to or usable by *the plaintiffs*. Rather, they sought compensation because the defendants had prevented potential customers from reaching their businesses.[305] The prospective customers suffered no special injury: *The customers* were all inconvenienced, but, as has been noted, inconvenience (including inconvenience with respect to the ability to frequent a business one would hope to frequent) does not count as a special injury. Meanwhile, for their part, the business owners could not establish special injury because the gist of their complaint was *loss of custom*, not that they were literally hindered in their use of the blocked way or the closed river, or their own properties.[306]

The distinction I am drawing not only fits most of the leading English public nuisance cases, but also explains an otherwise puzzling feature of *Testbank* and other decisions denying recovery for economic loss in suits featuring public nuisance claims. Although, as just explained, the Fifth Circuit in *Testbank* declined to allow recovery for economic losses suffered by a business that depended on the relevant segment of the Mississippi River being open, certain businesses were granted different (dare I say special!) treatment—namely, commercial harvesters of marine life.[307] Why?

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305 In *Smith v. City of Boston*, 61 Mass. 254, 254 (1851), the city's approval of the installation of railroad tracks resulted in the elimination of a portion of a public street that had previously provided access to lots owned by the petitioner. In an opinion by Chief Justice Shaw, the Massachusetts high court denied the petitioner's claim for damages on the ground that neither inconvenience (in accessing the properties by the use of other streets) nor diminution in the value of the properties sufficed to establish a special injury. *See id.* at 255–56. In dictum, Shaw added that a different result might obtain for a plaintiff who can prove that a public road closure prevented him from accessing his own property. *See id.* at 257.

306 *See* Neyers, *Divergence*, *supra* note 8, at 82–83 (arguing that hindering customers from purchasing a business's goods or services is ordinarily not a violation of a direct legal right enjoyed by the business); Ripstein, *supra* note 8, at 5–7, 19–20 (explaining the absence of recovery in nuisance for "pure" economic loss on the ground that a tort plaintiff can only prevail by establishing a violation of a legal right of her own, which, in the case of nuisance law, is a use-right). Under prevailing tort principles in U.S. law, the legal right against caused economic loss is, at most, a right that others not intentionally interfere out of malice or by improper means with discreet and relatively concrete business expectancies. *See* RESTATEMENT (SECOND) OF TORTS § 766B (AM. L. INST. 1979).

307 Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1049–50 (5th Cir. 1985) (en banc) (noting that commercial harvesters are entitled to recover because they suffered particular damages proximately caused by defendants).

One might suppose that these claimants could establish special injury on the ground of having suffered tangible damage to their property—namely, the marine life they planned to catch and sell—rather than lost revenue alone. Yet, the district court concluded that these claimants lacked any "proprietary interest in marine life until it is harvested."[308] Nonetheless, in a ruling left standing by the Court of Appeals,[309] it further ruled that they could prevail, and did so on terms consistent with the analysis offered here:

> [These plaintiffs] were exercising their public right to make a *commercial use* of those waters. The collision . . . and the resulting discharge of the PCP constituted a tortious invasion that interfered with the special interest of the commercial fishermen, crabbers, shrimpers and oystermen *to use those public waters to earn their livelihood* and the specific pecuniary losses which can be shown to have been incurred should be recoverable.[310]

In other words, an interference of the relevant sort with a person's use-rights counts as a special injury that will support tort liability based

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[308] Lousiana *ex rel.* Guste v. M/V Testbank, 524 F. Supp. 1170, 1173 (E.D. La. 1981), *aff'd in relevant part*, 752 F.2d 1019 (5th Cir. 1985) (en banc).

[309] *See Testbank*, 752 F.2d at 1021 n.2 (5th Cir. 1985) (en banc) (noting that the rights of commercial harvesters were not challenged in the appeal).

[310] *Testbank*, 524 F. Supp. at 1174 (second emphasis added). The English House of Lords similarly held that, where construction caused siltation on a river that required the plaintiff to incur increased dredging costs to maintain the shipping channel to its sugar refinery, the plaintiff incurred an actionable special injury that consisted of interference with its ability actually to use the river to carry out tasks that were part of its business operations. *See* Tate & Lyle Indus. Ltd. v. Greater London Council [1983] UKHL 2, [1983] 2 AC 509 (HL) 537; *see also* J.W. Neyers & Andrew Botterell, Tate & Lyle*: Pure Economic Loss and the Modern Tort of Public Nuisance*, 53 Alta. L. Rev. 1031, 1043 (2016) (arguing that *Tate & Lyle* distinguishes "actual pecuniary loss consequential on the infringement of a public right" entitled to recover from other types of "theoretical damage to a public right").

on a public nuisance, while pure economic loss does not.[311] Other courts have drawn the same line.[312]

The foregoing reconstruction of doctrine pertaining to the special injury requirement also helps make sense of other relevant decisions. Among the leading English decisions from the 1800s is *Rose v. Miles*. It concluded that the plaintiff established a special injury based on the defendants blocking a creek and thereby preventing the plaintiff from using several vessels that were already loaded with goods and in transit.[313] Lord Ellenborough explained that what most clearly distinguished the plaintiff from other members of the public was that he was "in the act

311 Here, obviously, I take issue with Catherine Sharkey's claim to the contrary, at least in so far as it is interpretive rather than purely prescriptive. *See* Sharkey, *supra* note 8, at 449–50 (arguing for a reframing of the special injury requirement to allow recovery by the most significantly affected plaintiffs in cases involving widespread financial harms). Notably, one of the cases Sharkey relies on for her claim that significant pure economic loss can constitute a special injury is *Stop & Shop Co. v. Fisher*, 444 N.E.2d 368 (Mass. 1983). *Fisher* unabashedly acknowledges that, for policy reasons, it abandons the traditional (and still majority) rule of special injury. *Id.* at 372–73. For the reasons stated in the text, recovery by commercial harvesters of seafood does not support Sharkey's contention that significant pure economic loss should count as a special injury. My account of special injury also departs, at least nominally, from the position taken in the "Economic Loss" provisions of the Third Torts Restatement, Section 8 of which states that an actor who creates a public nuisance is subject to liability for "resulting economic loss if . . . the claimant's losses are distinct in kind from those suffered by members of the affected community in general." Restatement (Third) of Torts: Liab. for Econ. Harm § 8 (Am. L. Inst. 2020). As a comment to this Section makes clear, this provision is presented as an "exception" to the general rule against recovery in tort for pure economic loss and hence by implication endorses the idea that economic loss can suffice to establish a special injury. *Id.* cmt. b. However, other comments to Section 8 observe that courts have in fact disallowed many claims for foreseeably caused economic losses resulting from public nuisances, while also tending consistently to allow recovery by certain classes of claimants, especially commercial fishermen. *Id.* cmts d & e. The Restatement's proffered explanation for this pattern is that plaintiffs who are denied recovery for economic loss will tend to be among many in the community who suffer the same loss, such that their claims fail under the rule that an injury is not "special" if it is experienced by many persons in the community. *Id.* cmts c–e. This explanation does not track the language of the courts and in any event is uncompelling given that, in cases such as *Testbank*, many commercial harvesters of marine life injured by a single incident were deemed eligible to recover. The account offered in the text—that commercial fisherman and certain other public nuisance plaintiffs can establish interferences with use-rights that distinguish their claims from claims for pure economic loss—more satisfactorily explains the pattern of holdings acknowledged in Section 8.

312 *See* Antolini, *supra* note 21, at 776–81 (discussing the Ninth Circuit's allowance of commercial fishermen's claims arising out of the Exxon Valdez oil spill and its denial of other businesses' claims); Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) (allowing oil-spill-related claims by commercial fisherman while distinguishing as nonviable a claim by individuals who would have used the polluted waters for recreation); Connerty v. Metro. Dist. Comm'n, 495 N.E.2d 840, 845 (Mass. 1986) (dictum) (suggesting that licensed clam-digger who is unable to pursue his livelihood because of pollution of public waters in principle has a valid tort claim against the entity responsible for the public nuisance).

313 (1815) 105 Eng. Rep. 773, 774; 4 M. & S. 101, 103–04.

of *using* [the creek] when . . . obstructed."[314] Likewise, as noted, courts have consistently deemed actionable in tort those public nuisances that cause interferences with use and enjoyment of private property of a kind that would support a private nuisance claim. Thus, the operator of a brothel that generates noises that unduly disturb the owner of a neighboring residence faces public nuisance liability to the neighbor. Likewise, a road blockage that prevents or unduly restricts the ability of the plaintiff to access her own residence is actionable in tort.[315]

The characterization on offer here also sits well with what is sometimes called the "free public services" doctrine (also known as the "municipal cost recovery rule"). This rule limits the ability of governments to recover for costs incurred because of torts committed against others. As noted in Part III, governments sometimes suffer setbacks that count as special injuries for which they can seek compensation. In particular, when government-owned property is damaged because of a public nuisance, the relevant entity, qua possessor, can seek compensation for the property damage and any parasitic economic loss. But governments do not enjoy a common-law right to reimbursement from an individual for outlays for public services simply because the individual's tortious conduct generated the need for those services. Indeed, under the free public services doctrine, local governments are barred from recovering for the cost of providing emergency services in the immediate aftermath of a tortiously caused car or plane crash, or any other conduct that was tortious as to someone other than the entity itself.[316] That there is no exception to this rule for conduct that creates a public nuisance further attests that pure economic loss does not count as a special injury.[317]

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314 *Id.* (emphasis added). Likewise, Justice Bayley stressed that the defendants had "in effect . . . locked up the plaintiff's craft whilst navigating the creek," *id.* (Bayley J), and Justice Dampier emphasized that the plaintiff "was interrupted in the actual enjoyment of the highway," *id.* (Dampier J).

315 *See* RESTATEMENT (SECOND) OF TORTS § 821C cmt. f (AM. L. INST. 1979) (preventing a plaintiff from accessing her own property suffices to establish both an unreasonable interference for purposes of private nuisance and a special injury for purposes of public nuisance).

316 *See, e.g.*, County of Erie v. Colgan Air, Inc., 711 F.3d 147, 152–53 (2d Cir. 2013) (applying New York's free public services doctrine to bar plaintiff county from recovering for extraordinary expenses incurred in responding to plane crash allegedly caused by defendant's negligence); *see also* Barbara J. Van Arsdale, Annotation, *Construction and Application of "Municipal Cost Recovery Rule," or "Free Public Services Doctrine*," 32 A.L.R. 6TH 261 § 2 (2008) (discussing the free public services doctrine and summarizing courts' approaches in construing the doctrine).

317 The rule I am describing concerns the ability of a government entity to prevail on a tort claim for compensatory damages against the creator of a public nuisance, not the ability of the entity to pursue a prosecution or an abatement action for the offence itself. *See, e.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1149–50 (Ohio 2002) (distinguishing nonrecoverable expenses incurred by a city in dealing with the aftermath of an accident

Identifying interference with individual *use-rights* as central to the determination of special injury also places a principled limit on tort liability for public nuisance in the following sense. There has long been a temptation to treat the special injury requirement in strictly empiricist and instrumental terms. The thought, emphasized by the likes of Jeremiah Smith and Prosser, is that there is a default principle in Anglo-American tort law according to which a person who experiences a nontrivial harm as a result of conduct by another that the law deems wrongful is presumptively entitled to compensation for their losses. The problem is that, for many public nuisances, the potential universe of claimants is huge. The special injury rule—the argument goes—solves this problem by limiting eligibility for compensation to those who have nontrivial losses (and are thus deserving of compensation) while setting them apart from all other (or most other) persons, thereby avoiding the potential for "too much" liability.[318]

A more principled way of understanding the special injury requirement can be located once we recall the observation in Part I that private tort actions based on public nuisances are a species of statutory tort. Central to the question of whether a statutory standard of conduct is properly construed to provide private rights of action is whether the statute protects certain classes of persons from certain types of injury-producing scenarios. The issue is whether the statute's requirements expressly or implicitly create a right in potential victims against being injured and a duty on the part of actors to refrain from so injuring them. It is implausible to construe public nuisance law as granting each member of the public an individual legal right against being caused *any* nontrivial loss by conduct of another that violates a right common to the public, or to construe it as imposing a duty on each of us to refrain from causing any nontrivial loss to another through conduct that violates a right common to the public. It is far more plausible to suppose that, implicit in public nuisance law's core prohibition is a relational directive

from costs incurred to abate an ongoing public nuisance). *See generally* Van Arsdale, *supra* note 316, at § 5 (discussing prominent court cases that distinguish abatement actions from the purview of the free public services doctrine). As I have explained, governments unquestionably are entitled to bring actions in response to public nuisances to abate public nuisances, and can seek restitution for reasonable abatement measures already undertaken. This distinction again illustrates the importance of rules for determining what counts as restitution for abatement and what counts as compensation for economic loss separate and apart from abatement costs. Expenses incurred to clear a blocked highway are abatement expenses. Lost tax revenues resulting from a business downturn caused by a public nuisance are not. The free public services doctrine as traditionally applied seems to hold that the cost of sending emergency responders to the scene of an emergency generated by a public nuisance does not count as abatement of the nuisance itself.

318 *See* Prosser, *supra* note 1, at 1007; *Private Action Part I*, *supra* note 278, at 3.

that each of us avoid interfering with another's use and enjoyment of public spaces and private property through conduct that interferes with a right common to the public. This is what makes special injuries "special" in a normative sense. They are not merely nontrivial losses or setbacks that happen infrequently enough so as not to generate too many lawsuits or too much liability. They are setbacks that, when caused in the right way, amount to violations of legal rights enjoyed by individuals.

To assert that an interference-with-use-right requirement is principled is not to deny that it leaves open important questions. As Jason Neyers has observed, a basic issue concerns when and why personal injuries count as special injuries.[319] His plausible suggestion is that the most satisfactory account is one that only allows recovery for personal injury when such an injury is parasitic on a violation of the individual's underlying use-rights.[320]

Other questions abound. Even if a person has suffered the sort of setback that counts as a special injury, does it cease to become "special" in the requisite sense if a significant percentage of persons in the same community also suffered roughly the same setback?[321] What type or extent of interference with use is required?[322] Relatedly, is there a "malice" exception comparable to the exception that applies to the rules determining what counts as an interference in private nuisance cases?[323] Suppose a business owner establishes that the defendant's

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319 *See* Neyers, *Divergence*, *supra* note 8, at 91–97 (discussing divergence in treatment of personal injury as a basis for special damage between English and Canadian courts).

320 *See id.* at 91–92. Such a rule appears to apply to trespasses to land. *See* Kopka v. Bell Tel. Co., 91 A.2d 232, 235–36 (Pa. 1952) (holding that possessor who suffers personal injuries because of defendant's trespass to his property can recover for those injuries without proving some other tort).

321 *See* Ripstein, *supra* note 8, at 15–16 (criticizing authorities maintaining that a setback experienced by many persons within a community cannot be a special injury).

322 *See, e.g.*, Greasly v. Codling (1824) 130 Eng. Rep. 307, 308; 2 Bing. 263, 265–67 (finding special injury where defendant's road blockage required plaintiff to take an alternate route that hindered his ability to deliver and sell coal on a particular day). *Greasly* may have turned in part on the fact that the defendant seems to have deliberately blocked the plaintiff in particular from using the way. For further discussion of malice in older English nuisance cases, see *infra* note 323.

323 *See supra* notes 78–79 and accompanying text. There is more than a whiff of malice in some of the older English special injury cases, some of which might today be treated as instances of tortious interference with business expectancy. *See, e.g.*, Chichester v. Lethbridge (1738) 125 Eng. Rep. 1061, 1063; Willes 71, 74 (holding that, where the defendant went so far as to block the plaintiff's lawful efforts to remove the road obstruction the defendant had created, the plaintiff suffered special injury from having to take a more difficult route to a barn); Iveson v. Moore (1699) 91 Eng. Rep. 1224, 1226; 1 Ld. Raym. 486, 488 (finding special injury in a case where defendants deliberately blocked the plaintiff from using a public way to transport coal from his colliery allegedly to induce buyers to purchase coal from a neighboring colliery owned by one of the defendants).

public nuisance has made it impossible or unduly difficult for the plaintiff herself physically to access and operate her place of business. This would seem to count as a special injury that would support liability sounding in public nuisance. But if the public nuisance at the same time prevents customers from reaching the business, can the defendant argue that the loss of business is not compensable because it was destined to happen even absent the special injury to the plaintiff? Courts have sometimes weighed in on these and other questions and will need to continue to do so if public nuisance law is to develop into a mature body of tort doctrine.

D. A Framework for Analyzing Public Nuisance Claims

The foregoing analysis aims to clarify how legal analysis of public nuisance law should proceed while appropriately leaving many issues for judicial resolution.[324] Its main lessons are as follows:

First, a court faced with an allegation of public nuisance must identify whether the condition identified by the plaintiff really is a public nuisance. For this task, they should seek guidance in the law of private nuisance, not because public nuisance is a wrong to private property, nor because the two nuisances cover precisely the same terrain, but because they bear a family resemblance in that each is concerned with violations of reciprocity norms and intrusive interferences with certain use-rights. Just as interferences with the use and enjoyment of another's property can take many forms, so too can interferences with a right common to the public. For example, it seems entirely plausible to suppose that the operation of an industrial plant in a manner that promotes the spread of infectious disease among workers, in turn threatening the health of nearby communities, generates the requisite interference. The same goes for actions that render portions of an urban area blighted and thus unfit or insecure for ordinary use by residents. However, the mere fact of harm to many individuals, or to public welfare in the abstract, does not suffice. And, as the remaining parts of the inquiry indicate, the

[324] What follows is meant to provide a logical sequence of analysis for public nuisance claims. It does not purport to specify the definition of a public nuisance or of special injury (which vary to some degree among jurisdictions), nor does it discuss possible affirmative defenses. *See* McFarlane v. City of Niagara Falls, 160 N.E. 391, 393 (N.Y. 1928) (Cardozo, J.) (recognizing contributory negligence defense at the time under New York law applies to special injury claims arising from public nuisances caused by the defendant's failure to exercise reasonable care). I also leave aside the question of whether, in U.S. jurisdictions, some of these issues are the province of juries rather than judges. Finally, it should perhaps go without saying that the question of whether actors can be held liable on a public nuisance theory is separate from the question of whether they should face liability on some other basis.

existence of a public nuisance establishes only a basis for a prosecution or civil enforcement action (including actions to abate, or seeking restitution for abatement), not liability to compensate a government-entity or individual for losses resulting from a violation of a legal right of their own.

Second, the court must next determine which actors can properly be deemed responsible for the public nuisance in question. In many cases (as in the case of a claim against an entity that does the relevant polluting or blocking) this inquiry will be straightforward. More difficult questions lurk, however, with respect to actors who only indirectly contribute to the creation of a public nuisance, particularly if their contributing conduct is otherwise lawful. It is probably this attribution problem, as much as any other feature of public nuisance law, that has led some courts to be hesitant, for example, to hold gun manufacturers liable in public nuisance even if there is a sense in which the ready accessibility of guns has played a role in blighting a community. On this issue, courts must consider various legal rules and principles that might (or might not) provide the basis for attributing the actions of one actor to another background actor, including doctrines of vicarious liability, affirmative duty, aiding and abetting, nondelegable duty, and ratification. In this class of public nuisance cases, absent a ground for deeming an actor to be responsible for nuisance-generating activities undertaken in the first instance by other persons, there is no basis for holding that actor liable in public nuisance.

Third, a defendant found responsible for a public nuisance in steps 1 and 2 is subject to a civil enforcement action (and to a claim for restitution for abatement expenses lawfully incurred), but is not subject to any individual actions for compensatory damages unless the nuisance causes a special injury. A special injury is a particular kind of setback experienced by the plaintiff—an interference with that person's or entity's ability to use and enjoy public spaces or private property. While plaintiffs who can demonstrate such an injury stand to obtain compensation for harms "parasitic" on this injury, including for personal injury, property damage, and economic loss, as is the case with private nuisance, economic loss by itself ordinarily will not suffice.

Fourth and more generally, the analysis of public nuisance claims requires a clear-eyed appreciation of the distinction between enforcement actions, on the one hand, and tort actions, on the other. As noted, an enforcement action is not a tort action seeking compensatory damages for harm. It is an action seeking a court order requiring an actor responsible for creating a public nuisance to put a halt to the nuisance-generating activity (if continuing) and to clean up the immediate effects of that activity. While "enforcement" is hardly a self-defining concept, it

is focused primarily on removing or eliminating nuisances (or obtaining restitution for the expense of doing so), as opposed to compensation for harms incurred in the aftermath of the nuisance.

Conclusion

Nuisance law is a nuisance.[325] It is complicated, at times maddeningly so. But it is neither an impenetrable jungle nor whatever it needs to be to enable courts to address pressing social problems. To be sure, nuisance law, private and public, can help to address such problems. But its promise resides in it being recognized as, and further developed into, a coherent body of law. For this to happen, lawyers and judges must grasp that, in law, there is a singular concept of nuisance with two variants, not two notions of nuisance that have nothing to do with each other.

325 In the colloquial sense.