

Finally, the tax without compensation cannot protect both parties' entitlements, but otherwise may protect or may violate the factory's and the laundry's entitlements. Obviously, relative to the tax with marginal compensation, entitlement protection is more difficult to accomplish. If the entitlement point is in the first or second region, whether the parties' entitlements are protected still depends on the level of the marginal tax and the parties' behavior. If the entitlement point is in the third region, the factory's entitlement is still violated, but now the laundry's entitlement may not be protected if the parties bargain destructively.

C. Concluding Remarks

It will be useful to relate the conclusions of this paper to the debate over the Coasian model discussed in the introduction. Since this paper is limited to the analysis of "small number" externality problems, only that part of the debate is discussed. Two general conclusions emerge from the analysis undertaken here.

First, the debate seems to have underemphasized the potential importance of the tax-subsidy approach for the "small number" case. Those who adopted the Coasian assumptions, as well as the critics who stressed "positive transaction cost" problems, generally considered only the property right or liability rule approaches. Even granting the critics' contention that problems of strategic behavior, limited private information, and multiple local optima are widespread in the "small number" case, the government may have much better information about the externality problem than the parties themselves. When this is so, it has been shown that *only* the tax-subsidy approach with (feasible) lump-sum compensation can simultaneously achieve the efficient outcome and protect entitlements.

Second, by stressing realistic reasons why the property right approach might fail to reach the efficient result, these same critics may easily be misinterpreted. Their criticisms, while valid, do not necessarily imply that the property right approach should be abandoned for some other approach. When the government also has limited information, it has been shown that no feasible alternative approach does systematically better in terms of efficiency. Moreover, to the extent that entitlement protection is important, the property right approach is clearly preferable.

NUISANCE LAW: CORRECTIVE JUSTICE AND ITS UTILITARIAN CONSTRAINTS

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I. INTRODUCTION: TWO MODES OF THOUGHT

THERE is in both judicial opinions and academic literature an undercurrent of despair about the present state of the law of nuisance.¹ It is not uncommon for commentators to describe it as the least systematic area of the tort law or to note that all too often it serves as the dumping ground for many disparate wrongs that do not neatly fit into any recognized doctrinal niche.² However untidy the law of nuisance, there is no suggestion that it be dispensed with in its entirety. Nuisance is a very old branch of the tort law, dating back to the early assizes, and at its core it protects the quiet possession and enjoyment of land.³ The important question is whether it is possible to reexamine and refine the law of nuisance in order, first, to reconcile it in some measure with the general principles of tort law and, second, admittedly with some tugging and hauling, to make it internally coherent.

To approach these general questions I adopt the following course of action. In the first part of the paper I will seek, while working up from the cases, to develop a substantive law of nuisance on the assumption that all

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¹ See, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973); F. H. Newark, *The Boundaries of Nuisance*, 65 Law Q. Rev. 480 (1949); William L. Prosser, *The Law of Torts* 571 (4th ed. 1971) [hereinafter cited without cross-reference as Prosser, *Torts*].

² See, on the classification problem, Newark, *supra* note 1, at 480-81.

³ See, for the early historical materials, Cecil Herbert Stuart Fifoot, *History and Sources of the Common Law*, chs. 1 & 5, at 3-23, 93-102 (1949). Fifoot notes that with nuisance its "very name—*nocumentum*—suggests the damage which he [*i.e.* the landowner] had suffered by conduct which nevertheless fell short of an actual dispossession," *id.* at 3, or it might be added, short of an actual entry as well.

cases should be decided solely with reference to principles of corrective justice: rendering to each person whatever redress is required because of the violation of his rights by another. At the outset the argument will thus proceed as if there were no administrative or practical constraints upon the enforcement of a conceptually ideal law of nuisance. The central features of the system will be clear and hard-edged, and dominant patterns of argument will parallel those used in other areas of tort. The discussion develops the following topics: the nature of the plaintiff's interest; the nature of the defendant's invasion of that interest; the basis of prima facie liability; and the affirmative defenses available to the basic cause of action.

The second half of the paper then examines (for want of a better term) the "utilitarian constraints" that interact with corrective justice principles to give nuisance law its distinctive flavor. The question now asked is to what extent should a whole range of costs—administrative costs, transaction costs, error costs—work their way into the fabric of the substantive rules. Whether in connection with the "live and let live" maxim or the locality rule, these costs demand compromises between principles of utility and principles of justice. They also provide clues as to how and when a system of private nuisance actions breaks down in the control of a large number of separate nuisance-like acts.

II. CORRECTIVE JUSTICE: THE POINT OF DEPARTURE

A. *The Plaintiff's Right*

The first step in the inquiry is the identification of the plaintiff's protected interest. Assume that *A* brings an action for assault and battery against *B*. *A* is not entitled to recover—no matter how close the causal connection, no matter how deliberate the harm—if *A* has no proprietary claim to his own person. If the body of an individual is unowned, then what *A* wants to describe as an assault and battery is simply a sequence of physical events initiated by *B*, but indistinguishable legally from *B*'s kicking a clod of unclaimed dirt. And if *A*'s body belongs to another, to *C*, then—as with slavery—the action is maintained not by *A*, the person physically injured, but by *C*, his owner, who has sustained legal damages. Every personal injury action thus rests on an unspoken assumption that each person owns his own body.⁴ So, too, with external things. The destruction of a chattel, or

⁴ The point has of course been recognized in the tort literature. See *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), "every person has a right to complete immunity of his person from physical interference of others, except insofar as contact may be necessary under the general doctrine of privilege." *Id.*, at 271, 104 N.W. 16 (1905). The same concern about individual integrity, even if misapplied, lies at the root of the modern informed consent doctrines, and, especially, in the active concern with experimentation on human subjects, much restricted as of late.

the laying waste of land has spatial-temporal dimensions barren of legal implications. They become tortious only when the chattel or land is owned by one person and its damage or destruction is attributable to another.

The importance of making ownership rights explicit is illustrated by the recent case of *Union Oil Company v. Oppen*.⁵ The plaintiffs were commercial fishermen who sued Union Oil for economic losses sustained when oil pollution from its wells in the Santa Barbara Channel killed the fish upon which the plaintiffs depended for their livelihood. The court held that the plaintiffs had a good cause of action, notwithstanding the general rule that no plaintiff could recover in negligence simple economic loss. In the course of its opinion the court sidestepped the particular rules for economic loss by applying what it conceived to be the standard analysis of negligence law. It thus asked whether the defendant had exercised reasonable care in the manner in which it conducted its drilling operations, and whether the consequent, albeit economic, loss to the plaintiff was of the sort reasonably foreseeable to someone in the defendant's position. After it answered these questions for the plaintiff—as it surely should have—the court buttressed its somewhat novel conclusion by the recent economic "least-cost-avoider" analysis of the tort law associated with Professor Calabresi. Conceding real difficulties in determining the best cost avoider, the court found that Calabresi's guideline—that "the loss should be allocated to that party who can best correct any error in allocation, if such there be, by acquiring the activity to which the party has been made liable"—supported liability of the defendant's oil business, because it was too much to ask the plaintiffs to "buy out" the defendant.⁶

Nowhere in its analysis, however, did the Court ask who owned the fish. If the fish were owned by the plaintiffs, the case would hardly be complex, either in terms of traditional negligence law or in terms of its modern economic reformulation. "You poisoned my fish," states ownership and causal connection, while the allegations of negligence (assuming they are required) have already been made.

Alternatively, the fish might have been owned by no one, in which event the appropriate precedents are not drawn from tort theory but from cases concerned with the capture of wild animals, like *Pierson v. Post*.⁷ Such cases have held that a person in hot pursuit of an animal is not entitled to complain if someone else captures it first. Presumably he could not therefore complain

⁵ 501 F.2d 558 (9th Cir. 1974).

⁶ It should be noted that Calabresi did not contemplate the "buy out" of the other's business in all or even most cases. Instead his use of the "best briber" test was designed only to identify that party best able, even in the face of high transaction costs, to find market means to minimize the costs of the harmful interactions. See Guido Calabresi, *The Costs of Accidents* 150-52 (1970).

⁷ *Pierson v. Post*, 3 Cai. R. (N.Y.) 175, 2 Am. Dec. 264 (1805).

if his adversary, having achieved capture, mistreats the animal, neglects it, or simply kills it. And so it is with unowned fish in *Oppen*. The plaintiffs who do not own the fish cannot complain if the Union Oil Company captures them. As they cannot complain of capture, they cannot complain of destruction after capture. As they cannot complain of destruction after capture, they cannot complain of it before capture. No theory of tortious liability can make up the plaintiffs' deficit attributable to their want of ownership.⁸

Lastly, assume that the fish are not owned by the plaintiffs but by some third party, *X*. *X* can of course maintain his cause of action for the property loss. The question is, should these plaintiffs be allowed separate actions for their own economic loss as well? Such actions are difficult to accept if the plaintiff's own conduct is tortious against *X*, except on the theory that the plaintiff should be allowed to steal the fish before the defendant destroys them. They become more tenable on the assumption that the plaintiff has a license (whether or not exclusive) to catch the fish, even if the current law is in a most unsatisfactory state on the question of interference with relational interests.⁹ Whatever the rule, it seems preferable to resolve this matter with *X* in the courtroom, especially if *X* happens to be the government. In any event the ownership question remains insistent, and it can be answered only with recourse to treaties, statutes, ordinances, custom, and grants.¹⁰ No general theory of tort law, however powerful or profound, can tell us who owns what at the outset. The result in *Union Oil v. Oppen* may in fact be correct. Yet its method of analysis, spurred on by a commendable distaste for pollution, is fatally flawed.

Tort law then presupposes some prior, independent method for defining and recognizing property rights both in the person and in external objects. Ownership of self is easily settled. Each person owns his body as of natural right and need not perform any positive act in order to perfect his title in himself. It is more difficult to obtain agreement about the correct rules that in principle govern the acquisition of land or chattels.¹¹ But for the purpose

⁸ See, for my views on this subject, Richard A. Epstein, *Intentional Harms*, 4 J. Legal Stud. 391, 423-41 (1975) [hereinafter cited as Epstein, *Intentional Harms*].

⁹ *Id.* at 423-41.

¹⁰ For an example of the problem, see the Pennsylvania statute, *The Fish Law of 1959*, Act of December 15, 1959, P.L. 1779, as amended, Pa. Stat. Ann. tit. 30, § *et seq.* (Purdon) (1977). Section 200 of the statute provides that: "No person shall put or place in any waters . . . any electricity, explosives or any poisonous substances whatsoever for the purpose of catching, injuring or killing fish. . . ." Section 202 of the statute provides for criminal fines. Section 310 notes that the intention of the statute is "to prescribe an exclusive system for the angling catching and taking of fish, and for their propagation, management and protection. . . ." In *Commonwealth v. Agway, Inc.*, 210 Pa. Super. ct. 150, 232 A.2d 69 (1967) the court held that the state "is not the owner of the fish as it is of its land or buildings so as to support a civil action for damages resulting from the destruction of those fish which have not been reduced to possession."

¹¹ For a recent philosophical discussion on the point, see Lawrence C. Becker, *Property Rights: Philosophic Foundations* (1977).

of tort law it is sufficient that the system has, in fact, settled upon the criterion of first possession—i.e., possession is prima facie evidence of title in fee simple—coupled with rules that govern the transfer and alienation of the property interests so created. Once acquired, the ownership of things is subject to the same entitlements and limitations as the ownership of the person. With land, for example, boundary lines have the same hard-edged quality as foul lines in baseball, while the ad coelum rule defines (within limits) the interest in the subsoil below and the airspace above.¹² Within these boundaries the owner has exclusive possession and control. The location of ownership rights within any society may be subject to intense political disputes. But such disputes are of no moment here as they determine only who may sue, not the grounds on which suit may be brought.

B. Defendant's Invasion

The next step in the delineation of the tort of nuisance under corrective justice principles is to specify the type of conduct by the defendant which amounts to an actionable interference with the plaintiff's interest. The task is complicated to some degree because the independent tort of trespass covers much legal ground, extending to all cases of entry upon the plaintiff's land (or the touching of the plaintiff's person, etc.) and even to cases where the defendant casts rocks or similar objects onto the plaintiff's land.¹³ Nuisances are invasions of the plaintiff's property that fall short of trespasses but which still interfere in the use and enjoyment of land.¹⁴ The cases make it quite clear that the forms of nontrespassory invasions are protean: fumes, noises, smells, smoke, gases, heat, vibrations, and kindred activities. The term "invasion" is not used as a disguised synonym for the legal conclusion that the defendant's activities are of the sort to which tortious liability should attach, where liability is at bottom imposed for other, possibly economic, reasons. Instead, the term "invasion" is a description of a natural state of affairs which in itself serves as a justification for imposing legal responsibility. That description in turn involves two separate tasks. It is first necessary to identify the act of the defendant to which liability attaches. The act requirement here serves the same function as it does in other tort contexts. It

¹² The full maxim is, *cuius est solum eius est usque ad coelum et usque ad inferos*, which roughly translated means, whosoever owns the soil owns up to the heavens and down to the depths. For extensive materials on the application of the maxim see Charles Donahue, Thomas F. Kauper, & Peter Martin, *Cases and Materials on Property* 298-325, 359-91 (1974).

¹³ See Restatement (Second) of Torts, § 158 & Comment i (1965); Prosser, *Torts* 69.

¹⁴ See, e.g., *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682 (1953); "The feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land, . . . any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance. . . ." *Id.* at 193; 77 S.E.2d at 689.

insures that liability is imposed upon the defendant for what he has done and not for what others might want him to do. It insures legal recognition of personal freedom and autonomy upon which respect for the individual must ultimately rest.¹⁵ Second, it is necessary to show that these acts cause harm to the person or property of the plaintiff in ways generally recognized and accepted in typical accident cases. The literal application of the invasion is of especial importance because it denies nuisance status to many common activities that diminish the value of neighboring land.

1. *The Act Requirement*

The plaintiff's cause of action in nuisance requires, at a minimum, a demonstration that the defendant has *created* the nuisance in question. One central implication of the act requirement is that the defendant cannot be held responsible for nuisances that are solely attributable to the land in its natural condition. Thus a defendant is not responsible for the odors which originate in a swamp upon his land,¹⁶ or for rockfalls which follow natural erosion brought about by wind and rain,¹⁷ or for bugs that infest the defendant's trees.¹⁸ There are, of course, borderline cases. In *Giles v. Walker* the defendant cleared his fields, and the thistles that grew there invaded the land of his neighbor.¹⁹ The court denied the cause of action without discussion, even though the defendant's act did facilitate the spread of thistles on the plaintiff's land. In other cases physical damage follows the abandonment or dilapidation of certain structures, for which relief is usually given, even though it is difficult to connect the plaintiff's harm with any act of the defendant, except perhaps that of original construction.²⁰

The plainest deviation from the act requirement is found in cases involving naturally planted trees whose limbs break and fall, injuring a passerby. Modern cases—largely for utilitarian reasons—tend to impose affirmative duties of inspection and maintenance upon owners of urban, but not rural, trees. This distinction is troublesome, because the act requirement requires

¹⁵ I have sought to defend the principle of personal autonomy at greater length in Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973) [hereinafter cited as Epstein, *Strict Liability*].

¹⁶ *Roberts v. Harrison*, 101 Ga. 773, 28 S.E. 995 (1897).

¹⁷ *Pontardawe Rural Council v. Moore-Gwyn* [1929] 1 Ch. 656.

¹⁸ *Merriam v. McConnell*, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1961).

¹⁹ *Giles v. Walker*, 24 Q.B.D. 656 (1890).

²⁰ See, e.g., *Puritan Holding Co. v. Holloschitz*, 82 Misc. 2d 905, 372 N.Y.S.2d 500 (1975). Indeed remedies against delapidation were available under the Roman Law. For so-called *damnum infectum*, without regard to the rigorous application of the act requirement, see William W. Buckland, *A Textbook of Roman Law* 727-28 (3d ed. 1963).

all trees naturally on the land to be treated alike.²¹ But one further refinement, long a part of standard tort theory, buttresses the modern urban-rural distinction. Where *A* has taken over or assumed a condition that has been made by *B*, it is possible to use the doctrines of adoption and ratification to attribute *B*'s actions to *A*. The relevant doctrine is illustrated in another context by *Sedleigh-Denfield v. O'Callaghan*.²² The defendant was held responsible for flooding caused when a culvert was improperly blocked by a trespasser, when his own caretaker cleared and maintained the culvert for several years after the trespasser's original actions. The adoption theory of *Sedleigh-Denfield* should work with natural events as well as with third-party conduct. Such adoption is not meant to be pure fiction that allows courts to pay lip service to the act requirement even as they circumvent it. Properly understood, it requires not only that the defendant benefited from the tree but also that he undertook its care and maintenance, as by having trimmed and watered it on a regular basis. This is more likely to occur in an urban area with its intensive land use, particularly with trees that border on streets or other populated areas. The distinction may therefore perhaps be defended, if only in approximate terms, on corrective justice grounds instead of upon the explicit utilitarian foundations upon which it usually rests.

Thus the usual difficulties with the act requirement also emerge in nuisance cases. There is, however, no need to dwell further on the matter, for most of the typical nuisance situations clearly satisfy the act requirement: manufacturing, mining, drilling, and other industrial activities involve not only single actions, but complicated and extensive networks of acts. We therefore turn to the second issue: whether it is possible to generate a causal theory that permits a *unique* assignment to the defendant of the harmful consequences of these activities in a manner conforming with the general

²¹ See, e.g., Prosser, *Torts* 355-56, for a representative statement of the urban-rural distinction, coupled with his recommendation "that the ordinary rules of negligence should apply to natural conditions, and that it becomes a question of the nature of the locality, the seriousness of the danger, and the ease with which it may be prevented." For an English case that expresses much doubt on the point, but which in the end holds that there is no evidence of negligence when the defendant does not routinely lop the crown of a large elm tree with root disease that might well have escaped expert detection, see *Caminer v. Northern & London Investment Trust Ltd.* [1951] A.C. 88; especially the opinion of Lord Radcliffe: "[It is said] that there is somehow a difference between legal responsibilities of the owner of a mature forest tree, in a built-up area, immediately adjacent to a busy street, and the responsibilities of the owner of a stand of timber bordering a country land. But is the difference only this, that the latter is entitled to take more chances at the expense of his neighbours than the former? I am not certain of the logic, for a tree or its branch only falls once; and it must be a poor consolation to an injured passer-by in the country lane to be assured that the chances were all against his being at the place of the accident the moment when it occurred." *Id.* at 111. This passage points up the weaknesses of the traditional negligence tests of the sort espoused by Prosser. Yet by not confronting the problem of the act requirement head on, Lord Radcliffe cannot deal with the difficulties that confront application of a theory of strict liability in this context.

²² *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880.

dictates of tort theory. Today there is much skepticism about the power of causal arguments and much confusion about their relationship to the assignment of rights in the original position. It is necessary, therefore, to treat these issues in some detail.

2. Causation and Remoteness of Damages

a. *Basic paradigms.* Most ordinary accident cases involve one of two causal paradigms.²³ The first is the direct and immediate application of force against the person and property. The second involves the creation of dangerous conditions, which upon a small application of external force releases energy that (by a direct application of force) causes injury to person or property. The classic instance of the first type of causation is the shooting or striking of another individual. The second paradigm is more complex, given the many substitutes for the direct application of force that preserves the essentially physical character of causal connections. Thus, dangerous conditions can involve stored energy released by some small external force, as in *Bird v. Holbrook*,²⁴ where a spring gun is tripped by the action of the plaintiff or a third party. Or it may, as in *Rylands v. Fletcher*,²⁵ involve placement of water in a reservoir whose bottom is too weak to hold its weight.

Combined, these two basic paradigms bear an obvious application to nuisance cases. In some circumstances it may well be that individual particles cross the boundary line between parties solely in consequence of the force imposed upon them by the defendant's activities. It is as though these particles were shot from a gun and struck the plaintiff, and this no matter what the defendant's primary purpose. In other cases, however, the path of individual particles may be more complex, as when they are buffeted by natural forces—wind, rain, gravity—before coming to rest on the plaintiff's property. In still other cases, as in thermal or noise pollution, the original particles may not cross the boundary at all, while their energy is transmitted through (repeated) contact to other particles which in their excited states are bumped across the line.²⁶ These intermediate forces, however, do not, under

²³ For a more comprehensive development of these arguments, see Epstein, *Strict Liability*, *supra* note 15, at 166-71, 177-89.

²⁴ 4 Bing. 628, 130 Eng. Rep. 911 (1828).

²⁵ 3 H.L. 330 (1868).

²⁶ It should go almost without saying that nothing in the reliance upon a physical-invasion test should be construed to either allow or require the much discredited distinction between damage caused by rocks thrown upon the plaintiff's premises by defendant's blasting and damages by concussion. That distinction was defended in the early New York case, *Booth v. Rome, W. & O.T.R.R. Co.*, 140 N.Y. 267, 35 N.E. 592 (1893), but repudiated in *Spano v. Perini Corp.*, 25 N.Y. 2d 11, 250 N.E. 2d 31, 302 N.Y.S. 2d 527 (1969). To the extent that this distinction is preserved in the law of eminent domain, see, e.g., *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), it reflects ill on that body of law.

the dangerous-conditions paradigm, sever causal connection. Even as each extends the causal chain, it has in turn been set in motion by forces for which the defendant is admittedly responsible. And if each individual particle, each individual event, is attributable to the defendant's activities, then so too is their aggregate impact which results in tangible and visible damages. The large number of separate invasions places nuisance actions in the same category as the cumulative trauma actions for asbestosis and silicosis. The distinct causal problems raised by all these cumulative causes are overcome within a corrective justice framework by the straightforward process of summation.

Causal arguments show that only physical invasion of protected interests gives rise to a prima facie case of liability. One implication of the position is the sharp distinction between those diminutions in land value that are attributable to physical invasions and those that are attributable to other activities of the defendant that fall short of such invasion—or to make the argument complete—threats of such invasions.²⁷ The former activities give rise to a cause of action, after which diminution in value becomes relevant on the question of damages. The latter activities simply generate shifts in relative land values without any legal consequences whatsoever. The distinction here is of broad application in a number of troubled areas. Yet before these can be considered it is necessary to examine the recurrent skepticism about the power of traditional causal arguments to resolve nuisance or, indeed, any tort cases.

b. *Causal nihilism.* The strategy of the physical-invasion test is to identify one element in a complex situation which can be described as the sole cause of the plaintiff's harm. As stated the argument does not take into account the problems of joint causation. At one level these problems are quite ordinary. It is surely possible to speak of *A* and *B* as the joint causes of *C*'s harm if both wield the stick that strikes the blow; and it is quite proper to speak of *D* and *E* as the cause of *F*'s harm if both poison *F*'s well.²⁸ By the same token joint causation arguments work where the conduct of plaintiff

²⁷ The invasion test alone does not capture the situation where a bomb is, for example, stored in the land of one individual. Here there is no question but that the storage of the bomb is in itself not tortious, just as the keeping of a wild animal in a cage is not in itself tortious. The problem is whether the neighbor must wait until injury for relief, or whether he is entitled to some remedy in advance of hazard. Viewed in this way the problem is not much different from that involved with the question whether habitual drunks should be kept off the public highway. The question of whether anticipatory relief should be given is one of the most difficult questions in the law precisely because it goes, not to the definition of the right, but to the choice of remedy for well-defined violations. For a discussion of the point, see Part II at 96-98 *infra*; and see also, Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165, 199-201 (1974).

²⁸ *Duke of Buccleuch v. Cowan*, 5 Macpherson 214 (Scot., Ct. of Session Cases, 3rd ser. 1866) (each of two polluters of a common river held jointly and severally liable). See also, *Lambton v. Mellish* [1894] 3 Ch. 163 (each of two organ grinders held for the noise created by both).

Value

and defendant, and not codefendants, is in issue. The noisome discharges that poisoned *F*'s well, for example, could have been made by *D* and *F*, not *D* and *E*.

The real question is whether arguments about joint causation can be extended beyond this traditional narrow mold to all cases of conflicts over land uses between neighbors. Professor Coase, in his classic paper on the subject,²⁹ argued in essence that they can. The central tenet of his causal nihilism is that causal arguments always point to the joint and coordinate responsibilities between the two parties to a nuisance suit. No matter what the particular facts in any given case, the conduct of both is in his view causally relevant because the unwanted interaction could have been avoided or prevented if *either* party to the conflict had altered his conduct. The argument, as stated, thus extends notions of joint causation far beyond their traditional contours. No longer are causal arguments associated with physical invasions of protected interests. Instead they are linked to any course of conduct that, wholly apart from any question of entitlements, the parties may undertake.

The weakness of the position is its failure to recognize that for legal purposes the question of causation can be resolved only after there is an acceptance of some initial distribution of rights. The importance of rights determination to the basic theory is made very clear by *Bryant v. Lefever*, one of the cases to which Coase devotes much attention in his analysis of causal reciprocity in nuisance law.³⁰ The plaintiff and the defendant were neighbors. For years the plaintiff used his fireplace in the ordinary way, without any damage or inconvenience to himself or any other person. Shortly before the action was commenced, the defendant tore down his old building and erected a taller structure, which he then topped with stacks of timber. Upon defendant's completion of his higher wall, the plaintiff's chimney smoked whenever he used the fireplace. On these facts the jury found that the defendant's conduct had caused the plaintiff a material inconvenience in the use and enjoyment of his own land, and awarded damages. The decision was reversed by the Court of Appeal, on the ground that nothing in the evidence supported the finding of a nuisance. In his opinion, Lord Bramwell addressed the contention that the defendant caused the plaintiff's harm:

... it is said, and the jury have found, that the defendants have done that which caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendant's causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough.

²⁹ R. H. Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1 (1960).

³⁰ *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79), discussed in Coase, *supra* note 29, at 11-14.

It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendant's wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who then causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put up the timber on theirs, and it is really the same though he did so before the timber was there. But (which is in truth the same answer) if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable.

[And Cotton, L.J., said:]

Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said this is a nuisance for which the defendants are liable. Ordinarily this is so, but the defendants have done so, not by sending on to the plaintiff's property any smoke or noxious vapour, but by interrupting the egress of smoke from the plaintiff's house in a way to which . . . the plaintiff has no legal right. The plaintiff creates the smoke, which interferes with his comfort. Unless he has . . . a right to get rid of this in a particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbour's land. Until a right had been acquired by user, the neighbour might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property on which the liquid filth arises. But the act of his neighbour would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.³¹

It is difficult to imagine passages which more explicitly emphasize the dual importance of invasions and rights to the law of nuisance. No act of the defendant physically invaded the defendant's premises. True, the defendant's wall prevented the escape of the smoke by blocking the natural flow of air. But the fact of obstruction is of no legal consequence until the right to unobstructed egress over the land of another is first established. The point about rights, moreover, was not an open one. Prior cases, in a correct application of the *ad coelum* doctrine, had already established that there was no natural right to air flow and that such could not be acquired through

³¹ As cited in Coase, *supra* note 29, at 12. The point applies with equal force to simple trespass cases. See, e.g., Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 *J. Legal Stud.* 13, 14 (1972), where Professor Demsetz argues it is possible to say either that the corn got in the way of the sheep or that the sheep trampled the corn. Yet of these two causal descriptions only the second is admissible once the ownership of the land on which the corn grew is recognized to be the plaintiff's.

prescription simply because a neighbor did not build up his land. Coase rightly notes that these unique causal arguments are possible if the wall is treated as "... the given factor. This is what the judges did by deciding that the man who erected the higher wall has a legal right to do so."³² The clear distribution of rights is precisely what makes it possible to make a unique determination of what conduct is causally relevant and what is not.

3. *The Physical-Invasion Test Applied*

Bryant v. Lefever serves as a useful prelude for a more detailed examination of particular nuisance situations. The obvious cases of noises, smells, gases, and the like need not detain us. They are universally held to be actionable as nuisances, consistent with the general position taken here. There are, however, a number of recurrent situations in which results are more problematic in that there is an evident tension between the asserted nuisance and the physical-invasion test. These cases include situations involving the blocking of views, the blocking of light and air, cemeteries and funeral homes, and aesthetic nuisances. In all these cases, there is no prima facie case of nuisance under a corrective justice theory.³³

a. *Views.* Consider first the possibility of allowing actions for the blocking of a view. In the usual situation *A* already has his house in place, and from it has a marvelous view over, if not of, *B*'s land. To the extent that *A* has a property right in that view, he can, under a nuisance-type theory, enjoin construction of that land be it by *B* or by anyone else (as property rights are good against the entire world) which interferes with his view. He may in addition claim damages for past harm resulting from construction completed without his consent.³⁴

The problem now is: how do we identify and account for the original rights of *B* against *A*? The analysis assumed that *A*'s house was already in place, and that it was therefore his view and not *B*'s that mattered. Yet what gives *A* the right as against *B* to construct his house in the first instance? The theory of rights that generates *A*'s claim against *B* allows *B* to insist as of

³² Coase, *supra* note 29, at 13.

³³ Nor, it might be added, is it an unlawful threat to do any of those things which might lawfully be done. The warning that a landowner might build upon his own land should not even raise the possibility of injunctive relief, given that this completed act may be done without adverse legal consequences.

³⁴ The use of such covenants itself speaks to the question of the original distribution of rights. Special consensual covenants are only needed where one party wishes to acquire some rights over the land of another that are not his as a matter of original right. It therefore follows that the use of restrictive building covenants, for example, presupposes that an unobstructed view is not protected by the basic rules of property, including the traditional nuisance actions. It hardly seems plausible to think that *A* could compel *B* not to build as of original right, he would pay him not to so build.

well, but there's uncertainty to settle.

right that *A*'s house obstructs his view (as opposed to being merely part of it) from the unoccupied hillside. Alternatively, *B* may claim that *A*'s original construction of his own house, despite its noninvasive character, is illegal conduct solely because it cuts off *B*'s rights of construction that otherwise would have been left unimpaired if *A* had left his land in its original condition. The search for *initial* entitlements—once the primacy of the ad coelum rule and the invasion requirement are dismissed—might well require that all land remain in its natural state. Such a conclusion clearly follows from this broad account of invasion if a landowner cannot, as is the case under strict liability principles, justify his conduct by an appeal to self-interest or public welfare. And the question will always be an open one under a negligence system where the "reasonableness" justifications will normally require case-by-case adjudication of the costs and benefits of this structure to the owner and his neighbors. *A*'s claim to an unobstructed view is attractive only because it is considered in vacuo. Yet the uniform protection of all views commits us to a set of entitlements that makes it impossible for anyone to use the land from which he might choose to look. Either all can build, or none can build; but no one can insist that he alone can build. The choice seems clear.

well, what about temporary property?

b. *Light.* The light cases illustrate the same general principles. With the shining of lights onto the plaintiff's land, the prima facie case is made out on corrective justice grounds, but is subject in many cases to defenses, based either upon the minimal level of the interference or upon the especially sensitive condition of the plaintiff's land.³⁵ With the *blocking* of light, however, there can be no actionability under the invasion test. The sound hostility to the recognition of the easement of "ancient lights" is well illustrated by *Fontainebleau Hotel Corp. v. Forty-Five—Twenty-Five, Inc.*³⁶ In that case, the plaintiff, owner of the then fashionable Eden Roc Hotel, sought to enjoin the defendants from constructing an eight-story addition to their main hotel building, located 20 feet from the property line. The injunction was sought on the grounds that the proposed increase in height would cast a giant shadow over the plaintiff's land during much of the afternoon, thereby ruining its appeal for swimming and sunbathing. The judge who heard the case at the trial level granted the injunction, not on the strength of any zoning ordinance or prescriptive right, but solely because he believed the defendant's conduct constituted an actionable nuisance under the maxim, *sic*

³⁵ See pp. 90-94 *infra*.

³⁶ 114 So.2d 357 (1959). The case which was once regarded as a kind of curiosity has assumed an increased importance with the recent growth of interest in solar energy, which has encouraged some commentators to abandon the traditional rule. See, e.g., Comment, Obstruction of Sunlight as a Private Nuisance, 65 Calif. L. Rev. 94 (1977). For further discussion, see p. 97 *infra*.

utere tuo ut alienum non laedas. As with other assorted noninvasive nuisances, the defendant's use of his land diminished the value of the plaintiff's land. Thus far the causal arguments, based upon temporal priority, have a surface attraction.³⁷ Yet on appeal the decision below was reversed, and rightly so, on the ground that the proper application of the *sic utero* maxim first required the identification of the plaintiff's right that is the subject of the alleged interference.³⁸ That right is not recognized, for, as in the view case, its uniform protection would either prevent the development of all land or hopelessly cloud the conditions under which it might take place. The *ad coelum* rule and the invasion requirement unambiguously deny recovery in the absence of special covenant. The plaintiff has not made out a prima facie case, so there is no need to consider ticklish questions of damage or possible justifications for the harms so inflicted. All blocking-of-light cases are treated in a uniform manner.

The conclusions here stand in sharp contrast to those required by other interpretations of nuisance doctrine. In his reformulation of nuisance theory, Professor Ellickson urges, for example, that no primacy be given to physical invasions which, as an evidentiary matter, should at best only mark off the most common forms of nuisance. In place of the physical test, he argues for a system which has as its initial presumption the rule that "a change in land use should result in liability of the host landowner only if the change is perceived as unneighborly according to contemporary community standards."³⁹ He then recognizes several defenses to the prima facie case, including those of plaintiff's hypersensitivity and plaintiff's failure to mitigate damages. This framework makes it impossible in *Fontainebleau* to dismiss

³⁷ Recall that these are in essence the same arguments that were used by the disappointed plaintiff in *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79). They are also used in effect by defendants, not plaintiffs, in the coming to the nuisance context. See pp. 72-73 & 98 *infra*.

³⁸ "This [case] is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. The maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. . . . It means only that one must use his property so as not to injure the lawful rights of another." *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.* 114 So.2d 35, 359. The opinion draws the distinction alluded to above between diminutions in value attributable to invasions of the plaintiff's property, and diminutions in value that result in no liability precisely because no invasion has taken place. Any system that attaches importance to liberty of action must respect this last distinction, even if it rejects the hard-edged invasion test.

³⁹ Ellickson, *supra* note 1, at 731-32. It is possible to object to Ellickson's proposed alternative on the purely economic ground that its administrative complexities, themselves a matter of great concern to him, serve to neutralize the assertedly favorable resource consequences of the proposed rule. Yet this line of attack only points up one of the central weaknesses of the unbounded economic approach. With adroit handling of the relative weights of costs of harm, costs of prevention, and costs of administration, it is possible to justify virtually any possible liability rule. As the second half of this paper indicates, no system of liability that purports to respond to the dominant sentiments of the cases can escape all of the uncertainty that these issues raise. The great comparative advantage of the corrective justice perspective is that by giving a noneconomic interpretation to much of the law, it provides a solid doctrinal foundation that prevents the complexities of the economic analysis from overwhelming the entire system of the tort law.

the plaintiff's case, without regard to surrounding circumstances, simply because there was no physical invasion. The initial question is instead the "neighborliness of the activity." That test is elusive in application, whether or not the caveat about "contemporary community standards" is given its due. The first question is whether hotels should be treated as part of a larger land use market, or, in view of their special use patterns, whether they should receive special treatment. If they receive such special treatment, is it relevant to ask about the size of other hotel grounds, the height of other hotels in the region, or about the general patterns of land deployment? And what should be done if the defendant is not a hotel, but a luxury condominium? Hard cases are everywhere: think only about the four-story apartment house next to the split-level home. The root of the matter is that the test of neighborliness, as broadly applied "to a change in land use," demands that we take into account a welter of factors which courts cannot isolate, weigh, or generalize.

The administrative difficulties are not the only objection to Ellickson's test. On a philosophical level, there is much about his test which undercuts one of the essential functions of private property, that of specifying for each person a domain of action in which he is not accountable to the whims or demands of any other group of individuals.⁴⁰ Private property is an external manifestation of the principle of personal autonomy. The neighborliness test, if applied in unrestricted fashion to cases beyond light, could raise the problem of tyranny by the majority, for it is difficult to determine which idiosyncratic forms of behavior are neighborly and which not.⁴¹ There is too much sensible content to neighborliness and reasonableness in the cases for

⁴⁰ Consider in this connection the account of the rights of property given by Blackstone: "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries on the Laws of England* 2 (15th ed. 1909). Indeed, as the Blackstone definition points out, the essence of liberty is unlimited control over some limited domain: where the boundaries of that domain are not defined by the invasion test, some substitute must be offered. It will not suffice to say that freedom ends where the inconvenience to others begins because it means that whenever others find it fit to protest the defendant has already lost on his individual liberty argument and must resort to some type of collective justification of his own activities.

⁴¹ The problem becomes quite acute when the question is whether it is possible to enjoin certain persons from living in certain neighborhoods because of their race, creed, or color. Under the classical noninvasion theories the answer is unambiguous in that one person living next door to another is not an invasion, no matter what the impact upon market values. It might of course be possible to argue that the threat of some (invasive) wrongdoing by a given person is sufficient to enjoin him from living in a certain location, but it is unlikely to the extreme that this case can systematically be made out, at least under any standards that are capable of universal application. Given his disenchantment with the invasion theory, it is not surprising that Ellickson has great difficulty with the racial exclusion cases that are pressed forward on private nuisance theories. See Ellickson, *supra* note 1, at 750-51. Ellickson's neighborliness test begins as an inquiry into sentiments as they exist. Yet in time, they like all other reasonableness tests, start to incorporate judicial and societal notions of what things ought to be.

any complete theory to dismiss them in their entirety. But their proper application—discussed in the second section of this paper—lies in the way in which they serve at the margins to soften the remorseless application of the corrective justice rule.⁴²

c. *Funeral homes and cemeteries.* The physical-invasion test is also subjected to pressure by cases applying the common law of nuisance to funeral homes and cemeteries. The source of the difficulty is not with the doctrine that the mere construction or operation of one of these establishments is not a nuisance in and of itself. Nor is it with the rule that says they may become nuisances to the extent that they, like other businesses, pollute underground waters or emit noxious odors. Rather the source of challenge lies in the clear majority of American cases categorizing funeral homes and cemeteries as nuisances simply because they are inconsistent with the character of the neighborhood—usually residential—in which they are located, no matter how they conduct their affairs.⁴³ The “depressing effect of a funeral establishment upon the sensibilities of a normal person” is deemed sufficient in itself to brand as nuisances funeral homes and cemeteries that reduce the value of homes in their immediate vicinity.

There is no defensible corrective justice method for allowing the relief simply because of the intangible values involved.⁴⁴ Indeed, if the cause of action is allowed there is the real question of whether it can be limited to cases involving the dead. Is it possible, for example, to use common law

⁴² See pp. 82-90 *infra*.

⁴³ For a collection of cases, see 75 A.L.R.2d 591 (1961); 50 A.L.R.2d 1324 (1956); 39 A.L.R.2d 1000 (1955).

⁴⁴ This majority position is so tenacious that it is profitable to ask whether there is any way to defend the result without abandoning the corrective justice approach to tort law. One possible approach, which takes its cue from the language of depressing effects, is to argue that what is involved here is the infliction of emotional distress. Yet actions for emotional distress are typically allowed only in two circumstances, both sharply distinguishable. The first class of cases involves the threat of force that frightens the plaintiff. The typical case is that of the speeding train that nearly strikes the plaintiff or someone in his vicinity. See, e.g., *Victoria Railways Commissioners v. Coultas*, 13 App. Cas. 222 (1888). The very centrality of force makes those cases inappropriate here. The second line of cases involves practical jokes and the like. Here too the grounds of distinction are obvious. The plaintiff who lives near a cemetery cannot show his own anguish, or mortification, much less the evil intentions of the defendant that border on malice.

Indeed with the practical joke cases, it may be asked why they are actionable at all given that they involve neither force nor the threat thereof. As a matter of tort theory, they should indeed be sharply distinguished from the emotional distress cases which do fit into the standard invasion model. Indeed the best way to approach these cases is to look upon them as breaches of implied contracts for good social behavior. The contract is of course not express, but it does arise from a course of dealing that is governed by strong if implicit social norms. The subject matter of the contractual breach need not be a physical invasion, and the standard of liability need not be strict. The cases in the area fit well within the contractual mold, as all involve direct personal contact between plaintiff and defendant. See, e.g., *Wilkinson v. Downton* [1897] 2 Q.B. 57, where the defendant as a practical joke told the plaintiff that her husband had been “smashed up” in an accident. See also *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920).

nuisance principles to deny relief against the construction of a home for orphaned children, or the bookstore of the Communist Party, or the erection of a hospital for the treatment of noninfectious disease, when all reduce the attractiveness of the neighborhood in the same fashion as a funeral home? And does it make sense to say that funeral homes in business districts must be tolerated no matter what their effect upon property values even as those in residential areas are prohibited? The funeral and cemetery cases work on models of causation—the cognitive dislike of certain activities by others—that cannot be admitted into the corrective justice framework.

d. *Aesthetic nuisances.* The last class of troublesome cases to be considered involves so-called aesthetic nuisances. These too can be broken off into two branches. Certain activities are described as aesthetic nuisances even though they fit snugly into the contours of the conventional nuisance actions. Cases for noise and for odors could be described as aesthetic cases, but this characteristic adds nothing to the invasion theory. It is therefore the second class of cases—noninvasive aesthetic nuisances—that come to the fore. The plaintiff may complain of an ugly house, an unkempt lawn, clothes hanging in front of the house, or even an obscene billboard.

At one level these cases are easy. The mechanical application of the physical-invasion test precludes any liability, and thus insulates the defendant from the economic losses sustained by the plaintiff. The principles of causation—operative as well in the cemetery, light, and view cases—charge the plaintiff's discomfort to his own independent judgment about an external state of affairs. The disenchantment of neighbors and the consequent decline in land values are not the subject of judicial intervention.

The physical-invasion test of the corrective justice theory thus yields unambiguous results in all the cases considered, be they concerned with views, light, cemeteries, or aesthetic nuisances. Yet the power of the theory seems in all cases to outstrip the capacity of the theory to command wholehearted allegiance. The tentative conclusions of this section will have to be reexamined in light of the cost constraints that are the subject of the second part of this essay.

C. *Basis of Liability*

Determining those activities which constitute nuisances does not complete the outlines of the prima facie case. Still to be resolved is the question of the proper basis of liability. Does nuisance rest upon strict liability, negligence, or intentional theories of wrongdoing?

Nuisances are usually the known by-products of purposive and repetitive activities sufficient to make the invasion intentional under the tort law's elastic definitions of intent: it is enough that the defendant knew that an

invasion consequent upon his activities would take place, even if he did not know, or desire, that it would cause harm.⁴⁵ This observation disposes of many cases, but it does not resolve the attendant theoretical issue. It does not explain why intention must be alleged when theories of negligence and strict liability are available.⁴⁶ And it does not explain why it is permissible to substitute the word "intention," such that intention to do the act is sufficient to cause the very harm of which the plaintiff complains. What is more, not all nuisances involve harms attributable to repetitive events; and the choice between negligence and strict liability is material in evaluating the possible justifications once the defendant's invasion, even if intentional, is established.

1. Isolated Nuisances

Many actions are brought on nuisance theories for isolated injuries. The common public nuisance suit brought for physical injuries resulting from the blocking or interference with a public right-of-way is one such action. Another is where a defendant blocks a culvert or a pipe that normally removes excess waters that in fact flood the plaintiff's land,⁴⁷ or erects piles of dirt which collect water that escapes onto the plaintiff's land.⁴⁸

In all of these cases the question of negligence or strict liability becomes

⁴⁵ "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." Prosser, Torts 31. See for particular cases that illustrate the proposition, *Vosburg v. Putney* 80 Wis. 523, 50 N.W. 403 (1891); *Baldinger v. Banks*, 26 Misc.2d 1086, 201 N.Y.S.2d 629 (1960). See also, for an endorsement of the "substantial certainty" test, Restatement (Second) of Torts § 13, comment *c* (1965).

⁴⁶ Note that the fact that the theory of intentional harms can be used does not make it necessary to use it. If, as I have argued, a strict liability theory is sufficient to account for all cases of harms as between strangers, then it should work in the nuisance area as well. What is more, the intentional harm theory should not be permitted to make actionable those forms of noninvasive conduct which were kept out of the tort area by the invasion requirement. The parallel here between the trade cases—in which malice does not make actionable competition that is otherwise lawful—and the nuisance actions for blocked views and the like should be clear. See Epstein, *Intentional Harms*, *supra* note 8, at 437-38. The point is also especially instructive because it shows one of the grave difficulties that emerge whenever an effort is made to develop a general theory of liability that is sufficient to make actionable both invasive and noninvasive conduct. The theory that makes only spite fences actionable, for example, requires invasive nuisances to be actionable only in the event of malice, a clearly unacceptable result. The theory that makes all invasive nuisances actionable on a strict liability theory requires all fences to be actionable, even if erected to enhance privacy. When discussed in the context of the basis of liability, the distinction between invasive and noninvasive conduct becomes all the more tenacious. There is no acceptable way to subject both forms of conduct to uniform results.

⁴⁷ *Johnson v. Winston-Salem* 239 N.C. 697, 81 S.E.2d 153 (1954); *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880. The last case was complicated by the fact that the obstruction was created by a trespasser, and only "continued" by the defendant.

⁴⁸ *Broder v. Saillard*, 2 Ch. D. 692 (1876).

acute because it is impossible to point to any deliberate invasion of the plaintiff's land or person, much less to any effort to cause harm thereby. It thus becomes necessary to face squarely the question whether the defendant should be held liable even though he has made all reasonable efforts to take steps to avoid the harm. On this question nuisance actions raise no special issues. The causal patterns in these cases are parallel in all significant respects to those in other actions for harms to strangers.⁴⁹ If, as I have argued, strict liability principles govern in ordinary tort actions, there is no reason why they should not apply here. They certainly apply in cases where the plaintiff sues upon the theory in *Rylands v. Fletcher*, where the defendant "brings, keeps or collects" something on his land. And, as nuisance cases differ only in detail from that action, it is advisable that the basis of liability in the one situation carry over to the other as well.⁵⁰ General causal arguments show quite conclusively that the defendant in nuisance cases inflicts harm upon the plaintiff, and not the other way around. That alone remains sufficient to fasten prima facie liability upon the defendant, even in the absence of negligence.

The uniform bias toward strict liability in nuisance cases is all the more remarkable given that the theoretical formulations of the negligence principles apply without modification to all forms of nuisance. Thus, even if it is assumed that certain types of nuisance activities carry with them a high risk of harm, nothing in principle requires the use of strict liability principles. If negligence is a sound rule, it should be sufficient for courts to demand the very high standard of care commensurate with both the expected degree of risk and magnitude of harm, such that some harms at least will be regarded as inevitable, and hence excusable, even if brought about solely by the

⁴⁹ Some qualification of this statement must be made with respect to the obligations of the government to maintain the public highways. The state in effect assumes the role of a public invitor and can, by virtue of this special relationship, be held subject to certain affirmative duties, much in the same manner as a private landowner. The public, like the private landowner, can be held responsible not only for those dangerous conditions that it has in fact created, but also for those which, although created by others, it did not remove when it had the opportunity to do so. The importance of the public duty, as distinguished from the mere opportunity of correction, is made evident by the fact that another passerby with full knowledge of the dangerous condition, and the easy means for correcting it, will nonetheless not be held responsible for the harm in question—the entire matter being but one specific application of the general good Samaritan principles at common law. See, e.g., *Turbeville v. Mobile Light & R. Co.*, 221 Ala. 91, 127 So. 519 (1930), where the court denied that any duty to rescue could be imposed "on a mere bystander who witnessed [the plaintiff's] misfortune and who was in no way legally responsible for his predicament." *Id.* at 93, 127 So. 521.

⁵⁰ For example, the only difference between the nuisance action in *Broder*, see text at note 48 *supra*, and the plaintiff's action in *Rylands v. Fletcher*, 2 H. L. 330 (1868), was that the plaintiff in *Broder*, did not deliberately collect or even accumulate the water in the mount of dirt. Yet as the theory of strict liability applies to all elements of the plaintiff's action, it follows that the less restrictive tests of *Broder* are correct, and that the rule in *Rylands v. Fletcher* is, on this point at least, too restrictive.

defendant. And what is true for the various species of nuisance cases applies not only to *Rylands v. Fletcher* but to similar principles dealing with the liability for fire, or for animals, or for blasting—ultrahazardous or abnormally dangerous activities.⁵¹ The strict liability rule persists in all these cases because it is clear beyond doubt that the defendant has caused harm in cases in which the plaintiff has a wholly passive role. The reconciliation of the strict liability exceptions to the basic negligence position should not come by making negligence a uniform rule of liability. It should come by recognizing that strict liability (coupled with affirmative defenses) is a superior rule of that law in all stranger cases in which either of the two principles might apply.

2. "Reasonableness" Justifications

The choice between negligence versus strict liability also emerges in assessing the possible justifications for (intentional) invasions of the defendant's property. In particular two arguments, uniformly advanced by defendants, are both rejected (rightly, on corrective justice principles) by the courts. The first of these defenses is that the defendant has adopted the latest and most advanced devices for nuisance prevention—has, in other words, taken all possible care to avoid the loss. The second is that the substantial benefits of the defendant's operations to the defendant and the community at large justify the nuisance that is admittedly created. There is nothing about the classical negligence formulas which compels the rejection of these defenses, and much in their ostensible toleration of cost-effectiveness arguments speaks towards their acceptance. Where the distribution of cost and benefits between persons is of no concern, then doubtless the large benefits realized by one person should offset the lesser costs that are suffered by another.

Yet the aggregation of costs and benefits across persons misses what is distinctive in a system of corrective justice, because it fails to recognize how individual rights form a *barrier* against collective judgments on overall maximization. The rejection of these two defenses shows that where the harm is caused to the property or person *A* by the actions of *B*, the benefits to

⁵¹ The suggested justification for the strict liability rule in these last cases offered in Richard A. Posner, *Economic Analysis of Law* 140-41 (2d ed. 1977), does not account for the rule. In Posner's view the strict liability principle is used because it is difficult to imagine any efficient set of plaintiff's precautions that could minimize damages in, say, blasting or wild-animal cases. But that argument goes to saying that contributory negligence will not, even if formally available, be much of an issue in these cases. See pp. 71-72 *infra*. It does not, however, go to the choice between negligence and strict liability with regard to defendant's conduct. With the plaintiff's conduct cast safely to one side, the incentive effects of the two systems should in Posner's view be the same, such that only distributional consequences separate them. The subdivision of stranger cases into strict liability and negligence is not consistent with any sensible theory, be it positive or normative, economic or moral.

B do not excuse or justify the harm inflicted upon *A* but, if anything, afford an additional reason for awarding compensation.

D. Affirmative Defenses

1. General

The last topic in our study of the nuisance law as a system of corrective justice is that of affirmative defenses. Here, as with the general body of tort law, it is possible to take two very different views on the subject. On the first of these, the existence of affirmative defenses allows the introduction of the vast array of utilitarian considerations that were systematically excluded from the *prima facie* case. On the second, affirmative defenses present the opportunity to take into account the plaintiff's conduct, to determine whether it requires the *forfeiture* of actions that are otherwise maintainable.

The first view is unacceptable because it renders trivial the aims and purposes of a theory of corrective justice. The point of that theory is not simply to organize the pleadings of particular cases but rather to insure that a single conception—that the antecedent conduct (promises, acts) by one party towards another is the sole source of their relative rights and duties—governs the entire body of tort law. Introducing utilitarian arguments as affirmative defenses undermines this point of view by allowing the calculus of costs and benefits to carry the day, if only at the second stage of the case. Taking into account the plaintiff's conduct, and judging it by the same standards applicable to the defendant's conduct, however, does not compromise the system. Instead it applies the same corrective justice principles in uniform fashion to both parties.⁵²

With many torts to the person or to movable property, the affirmative defenses play a very significant role even in stranger cases precisely because

⁵² For an interesting reexamination of the symmetry point, see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *Yale L. J.* 697, 722-23 (1978), where it is noted that the primary negligence of the defendant involves a risk of harm to others, where contributory negligence at its root involves the creation of a risk of harm towards self. That sharp dichotomy cannot, as Schwartz recognizes, be preserved throughout, as certain forms of improper conduct, such as speeding or drunken driving, hold out risks to both self and others. This point aside, the two classes of negligence (or causal wrongfulness, in a pure strict liability system) should be regarded as parallel for two distinct reasons. First, the risk of harm that one creates for one's self will always implicate others if by litigation it increases their exposure for loss. Second, the adoption of different views of negligence and contributory negligence creates real problems for both pure and comparative negligence systems whenever both parties are injured in a two-party accident, it being very awkward to say that each was responsible only for the injury to the other. Within the negligence system the point becomes complicated because of the difficulty of recognizing a duty of care to one's self. Although here the point is overstated as it is possible to treat the plaintiff's proper care as a *condition precedent* to suit, whose nonfulfillment can be pleaded as an affirmative defense. Within a strict liability system it is less complicated because there is less awkwardness in pure causal terms in speaking of a partially self-inflicted harm.

there are so many wrongful things that plaintiffs can do. Plaintiffs, for example, can drive as badly as defendants, and they can misplace or misuse their personal property to their own detriment. Torts to real property, of which nuisance in its common forms is one, however, provide much less scope for the application of recognized affirmative defenses.⁵³ Land itself is passive and hence can never invade the defendant's property, and there are only limited types of conduct in which a plaintiff can engage to bring about a sequence of events that results in its destruction. It is, of course, possible for the plaintiff to undermine a reservoir in which the defendant has stored water or to emit fumes from his own property that combine with some chemicals stored upon the defendant's property thereby creating a substance which in the end works harm to the plaintiff. In these cases the affirmative defenses should be recognized because of the causal dominance of the plaintiff's behavior over the defendant's: the plaintiff released the water in the defendant's reservoir; the plaintiff's invasion of the defendant triggered the defendant's invasion of the plaintiff.

2. Contributory Negligence

The previous account of affirmative defenses in nuisance cases helps explain why contributory negligence, generally regarded as applicable to all tort situations, is of such little consequence in nuisance actions.⁵⁴ Here the common account of the situation rests upon an argument from symmetry. Under strict liability, the argument goes, negligence is excluded from the prima facie case. Therefore consideration of negligence should be excluded from the defense, thus eliminating all traces of contributory negligence. This conclusion is odd because it implies that an expansion of the prima facie case necessarily requires the contraction of available defenses, when the greater threat of liability posed by strict principles only heightens the need for maintaining affirmative defenses. The confusion implicit in this line of argument is dispelled once it is recognized that the theory of corrective justice places symmetrical demands upon both of the parties, and thus judges their conduct by precisely the same standards.

The traditional contributory negligence defense (like the prima facie case of negligence) contains two distinct elements: the first is the invasion in physical terms of the defendant's person or property by the plaintiff; the second is the capacity of the plaintiff to avoid that invasion (and the consequent injury to himself) by the exercise of reasonable care. The argument

⁵³ Although the "default of plaintiff" defense is built into the *Rylands v. Fletcher* rule, it has received a narrow interpretation precisely because the types of things that plaintiffs do to enhance their vulnerability to harm are not invasive of the defendant's property.

⁵⁴ See generally Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984 (1952); and Prosser, *Torts* 608-12.

from symmetry does not eliminate the entire defense of contributory negligence. It eliminates only the unreasonableness requirements of its second limb. The causal—invasive—elements of the defense (represented by the word "contributory") should be preserved even if the reasonableness requirements are dispensed with. On this view contributory negligence in fact fails in most, but not all, nuisance cases for the same reason that the strict causal defense fails: the defendant cannot establish the plaintiff's invasion of a protected interest. The plaintiff does not invade the defendant's property because he does not close windows to keep out smoke and dust, or because he does not install an air purification system upon his own premises.⁵⁵ Just as the defendant owes no common law duty to aid a stranger, so too the plaintiff owes no duty to protect himself from those harms inflicted by a stranger. The principle, the tortfeasor takes his victim as he finds him, used in personal injury cases, carries over without modification to nuisance actions.

The strength of this general analysis, and its dependence upon the invasion test, is illustrated by two different issues in nuisance cases. The first concerns the role of contributory negligence defenses in cases of public nuisances. The second concerns the coming to the nuisance defense in cases between neighboring landowners.

a. *Highway cases.* The highway cases usually arise after the defendant places some obstruction that interferes with the movement along the highway. In cases of persons physically injured because of the obstruction—either by coming into contact with it, or by taking perilous and unsuccessful efforts to avoid it—contributory negligence (or at least some form of affirmative defense based upon plaintiff's conduct) has an important role to play. The essential issue is whether the plaintiff is an active party whose own motion combines with the obstruction of the defendant to bring about the plaintiff's harm. At one extreme, a speeding and inattentive plaintiff could not, under any theory, deny the causal relevance of his own conduct. At the other extreme, no defendant could implicate a plaintiff who, while using the highway in a normal and proper manner, was injured by a hidden obstruction. Some cases are more difficult. Thus in *McFarlane v. City of Niagara*⁵⁶ the plaintiff had previously seen in daylight the very obstacle over which she tripped in the dark. And in *O'Neill v. City of Port Jervis*⁵⁷ the decedent was killed when struck by a car after she, while in the care of her father, ven-

⁵⁵ "The owner of land who casts noisome smells into my house will not be heard to say that I could shut them out with greater care in closing doors and windows. He may not thus limit a use that except for his encroachments would be appropriate and natural." *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391, 394 (1928).

⁵⁶ *Id.*

⁵⁷ 253 N.Y. 423, 171 N.E. 694 (1930).

tured into the public street in order to get around an obstruction the private defendant (with city approval) had placed on a crowded sidewalk. In both of these cases the court held that the plaintiff's conduct, under the description of contributory negligence, was relevant to the jury's determination in the case. The precise formulation of the required standard of conduct is difficult. The plaintiffs in both these cases were, as public licensees, under some duty to discover and remember dangerous conditions, and they should in some instances be required to abandon rights of way to the wrongs of others, where the gravity of the risk warrants.⁵⁸ Yet what is important here is the relevance of plaintiff's conduct, not the exact standards by which it is judged.

b. "Coming to nuisance" cases. Unlike the highway cases, the "coming to the nuisance cases" are important for precisely the opposite reason, for they illustrate the limited role of affirmative defenses in typical private nuisance actions for noises, vibrations, and the like. The usual coming to the nuisance defense involves a defendant who has used land for a long period of time, while the neighboring land was, if not unused, devoted to a use of low intensity. Long after the defendant's use is established, the plaintiff changes his land use so that the noise or vibration from the defendant's land, which once was of no consequence, now creates disturbances. In *Sturges v. Bridgman*⁵⁹ the defendant had for many years operated heavy machinery in his confectioner's business. The plaintiff, a neighboring doctor, built an examining room so near to the machinery that the noise from its operation made it impossible for the plaintiff to examine his patients. The construction of the room, while subsequent, resulted in an unfortunate interaction that was avoidable—as Coase pointed out—by relocating either defendant's or

⁵⁸ The reason that "reasonableness" considerations intrude into cases of this sort is that the debate is no longer about invasion of rights but about the choice of remedies. The right issue is plain enough. With the blocking-of-the-road cases, the defendant has concededly interfered with the plaintiff's rights. The defense of assumption of risk seems to be available, but it is subject to an exception, analogous to that in cases of "duress of goods," whereby the plaintiff says that the defendant cannot make the plaintiff abandon either of two rights, his right to use the road or his right of redress in the event of injury. The choice of remedy is not so clear. One alternative has the plaintiff abandon the right and sue for damages caused by the inconvenience. This course of action subjects the plaintiff to all the hazards of small litigation and promises in many cases that no suit will be brought. The other alternative, recognizing the frailty of the remedy, allows the plaintiff to proceed with care and to maintain an action in the face of the assumption of risk defense in the event that damages occur. Where the plaintiff has an easy way to avoid the hazard, the first alternative seems proper, even when no action will be brought. Where the damages to the plaintiff from mitigation are more substantial, the second alternative becomes more attractive, particularly if the obstruction is not all that severe. See, e.g., *Clayards v. Dethick*, 12 Q.B. 439, 116 Eng. Rep. 932 (1848). See also Restatement (Second) of Torts § 496E (1965). The variations upon the theme are of course many, for a simple and routine situation raises some of the most difficult conceptual issues of the tort law, in which corrective justice and utilitarian values only imperfectly mesh.

⁵⁹ *Sturges v. Bridgman*, 11 Ch. 852 (1879).

plaintiff's operations.⁶⁰ What the plaintiff might have done is not the relevant test of causality. What is decisive is that the plaintiff's construction of the examining room, even if second in time, is in no sense a physical invasion of the defendant's property. The same tests that rule out actionability for noninvasive conduct by the defendant now work to preclude affirmative defenses based upon the plaintiff's noninvasive conduct. The nuisance is solely attributable to the vibrations from the defendant's machinery. The case should, under a corrective justice approach, be decided by ordinary nuisance principles, with the question of relative costs and benefits, however measured, wholly irrelevant.⁶¹

The point may be put in still starker form: a corrective justice theory should never have to utilize the coming to the nuisance defense if the plaintiff could treat the simple physical invasion as an actionable harm wholly apart from the consequential damages that it might cause. The coming to the nuisance issue is raised only because courts have, in large measure for utilitarian reasons, chosen to wait until the moment of physical disturbance before they impose any sanctions upon the nuisance-like activities of the defendant. With this delay in mind, the rejection of the coming to the nuisance defense is in effect best understood as one half of a judicially imposed bargain between landowners. On the one side the plaintiff is constrained from suing simply because the defendant has been engaged in nuisance-type activities. On the other side—and the point is expressly taken up in *Sturges v. Bridgman*—the defendant is estopped to claim by prescription from long use any easement to cause a nuisance,⁶² which he could do if the first invasion were regarded as an actionable wrong.⁶³ The virtue of the rule is that it delays, not hastens, disputes between landowners. Once the plaintiff is stopped from complaining about invasions that cause no tangible harm, it follows that the coming to the nuisance defense must be rejected to avoid the injustice of the plaintiff being deprived of both the right to quiet enjoyment of the land and all compensation for its wrongful invasion.

⁶⁰ Coase, *supra* note 29, at 13.

⁶¹ Thus the passage from Wood, *Law of Nuisances* § 435 (2d ed. 1893), quoted and criticized by 2 F. Harper & F. James, *The Law of Torts* § 22.8, at 1221 (1956), illustrates the basic position. "A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by the wrongful acts of another."

⁶² The prescription point bulks large in the judge's discussion of *Sturges v. Bridgman*, for there the defendant argued that the easement had been so acquired. The court responded to that claim as follows: "Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventable nor actionable found an easement? We think not." *Sturges v. Bridgman*, 11 Ch. 852, at 863, per Thesiger, L.J. By denying the action at the outset the court in effect adopts the forced implicit bargain in the text.

⁶³ The modern cases start the statute only from the moment of first harm. See Prosser, *Torts* 595.

III. UTILITARIAN CONSTRAINTS

A. *How Incorporated*

The first part of this essay has worked out the rules for nuisance law on purely corrective justice grounds. At many points there seems little tension between corrective justice principles and the desirable substantive results, as seems clearly the case with the preference for strict liability over negligence and with the acceptance of affirmative defenses. At other points, however, the corrective justice analysis does not seem to respond well to the situations it governs, as is the case with the uncompromising application of the physical-invasion rule and the treatment of the coming to the nuisance defense. In this part of the essay I expand the focus of inquiry to determine the extent to which utilitarian concerns require modification of the basic corrective justice principles. In some cases I hope to show that the dominance of utilitarian principles is well deserved. In other cases I hope to show that utilitarian principles are of no particular relevance, and in still others to show that there is no easy or principled resolution of the tensions created by these two persistent and diverse traditions within the law.

In approaching this subject, it is possible at one extreme to treat utilitarian considerations as furnishing the sole basis for appropriate liability rules, eliminating thereby all concern with corrective justice arguments. This position, which is as extreme in its own way as one that always ignores the economic consequences of legal rules, has not been accepted in the decided cases;⁶⁴ nor should it be accepted as a matter of legal principle. The fundamental weakness of the pure utilitarian point of view is that it fails to explicitly recognize *any* antecedent or natural rights that the legal system is called upon not to create but to recognize and protect. Rights and duties are treated as having explicit instrumental origins, without answering the recurrent question of how can "we assign" rights to certain individuals and im-

⁶⁴ Consider in this connection the rhetoric of but one case. "The substantial contention of the defendant is that it is engaged in a business of such extent and involving such a large capital that the value of the plaintiffs' rights sought to be protected is relatively small, and that therefore an injunction, destroying the defendant's business would inflict a much greater injury on it than it would confer benefit upon the plaintiffs. . . ."

I am unable to accede to this statement of the law. If correct the property of the poor is held by uncertain tenure, and the constitutional provision forbidding the taking of property for private use would be of no avail. As a substitute it would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner to his injury. . . . Public policy, I think, is more concerned in the protection of individual rights than in the profits to injure to individuals by the invasion of those rights." *McCleery v. Highland Boy Gold Mining Co.*, 140 F. 951, 952 (1904). Note the rule in *McCleery* reduces the role of discretion of injunctions in nuisance cases, a position closely associated with the corrective justice theory.

pose duties upon others in order to maximize some social goal, be it wealth maximization or income redistribution. It does not explain who that "we" is, or the principles by which that "we" lays claim to parcel out the rights which it alone must originally possess. The utilitarian theory, consistently applied, thus undermines any sense of individual liberty and autonomy, no matter what its social goal. Suppose it is argued that maximum happiness depends upon having some *A*'s every action subject to the will of some *B*, or upon the body of each woman being assigned as of right to each man, or upon treating killings and lootings as justified unless otherwise shown. The arguments are quite beside the point. Individual rights do not rest upon foundations so insecure that any fresh wave of empirical research may displace them. These rights do not rise and fall with each new refinement in economic theory, or with each daily discovery of a new market imperfection. The revulsion towards slavery, rape, and murder rests on the easily understood belief that each person is entitled to the protection of individual autonomy against the aggression of all others, no matter how numerous or powerful.⁶⁵ The principle of autonomy is often consistent with economic welfare (though less so with redistribution of wealth), but it should in any normative discourse be regarded as an end in itself and not as a contingent means toward some other end.

Enough I think has been said to show the inescapable intellectual difficulty that besets any system that makes light of any notion of individual vested rights. Enough, however, has *not* been said to show why and how the language of cost and consequences, like the language of rights, is also necessary to any working out of sound legal rules. Whatever the weakness of utilitarianism as a comprehensive moral philosophy, it takes heroic assumptions (*fiat justitia, ruat coelum*) to always treat all its consequences as irrelevant. Two points deserve particular attention in this context. The first concerns the administrative costs involved in the enforcement of legal actions under any specified rule of substantive law. The second concerns the obstacles created by high transaction costs that prevent individuals from redefining by private agreement before any dispute arises their previously settled mutual rights and obligations. Both deal, as it were, with recurrent frictions of the legal system: the first with problems which occur after a dispute has begun; the second with efforts to avoid a dispute before it takes place.

These administrative costs are a vivid reminder that the articulation of the

⁶⁵ "But as an interpretation of the basis of the principles of justice, classical utilitarianism is mistaken. It *permits* one to argue, for example, that slavery is unjust on the grounds that the advantages to the slaveholder as slaveholder do not counterbalance the disadvantages to society at large burdened by a comparatively inefficient system of labor. . . . the gains accruing to the slaveholder, assuming them to exist, cannot be counted as in *any* way mitigating the injustice of the practice." John Rawls, *Justice as Fairness*, 67 *Philosophical Rev.* 164, 188 (1958).

ideal substantive legal rule, even if the sole object of a corrective justice theory, says nothing about the mechanisms of its implementation: the parties must be brought to court, the facts of the case must be determined, and its judgment enforced. All of these tasks cost money, which in part is raised through involuntary exactions and public taxes. Corrective justice of unassailable purity simply may be unattainable given the imperfect and expensive machinery of adjudication.

Two points about these administrative costs are evident. The first is that as the amount in controversy becomes smaller it becomes increasingly unwise to devote substantial resources to the underlying dispute. If the only costs involved were private—and if these were internalized by appropriate rules on litigation costs—the excessive resources devoted to small claims would require no public control. The parties would all spend small sums as they would have only small sums at stake. But the private impulse to economize provides insufficient protection to the public purse, as there is no reason to believe that private parties will treat taxpayer expenditures as though they were their own. Some direct effort toward weeding these cases out of the system or shunting them off to less expensive forums seems clearly appropriate.

The second important variable is the uncertainty in application of any given substantive rule. Uncertain outcomes have many sources: the issues to be litigated may become less amenable to precise measurement and more open to honest differences of opinion; fraud and concealment may abound; and good evidence on essential questions may be hard to find. When the errors of individualized decision making become too great the system may be better off (i.e., make fewer errors) if gross and imperfect rules of easy application are substituted for perfect rules of difficult application.

The transaction costs incurred whenever private parties attempt any voluntary rearrangement of their rights and duties are also vital to the analysis. The effects of these costs are best illustrated by first assuming that all voluntary transactions are costless. Here, as Coase demonstrated, the resources in the end will belong to the parties best able to use them, no matter who originally owned them. Whenever the original assignment of rights is ideal, no further transactions will occur; whenever it is not, the interested parties will, by as many steps as it takes, reassign those rights until they hit upon the ideal configuration.

My point concerns not the truth of Coase's insight, but the way it meshes with a theory of corrective justice. In a world of zero transaction costs there is only one distribution of original rights that satisfies in full the demands of both corrective justice and wealth maximization: it is the assignment of rights specified by a theory of corrective justice. Such an assignment has a unique advantage in terms of moral theory, and it suffers no offsetting

efficiency disability. While the original distribution of rights does make a difference to the moral theory, it makes none to the economic. Since complete satisfaction of the justice requirements comes at no economic cost, the economic theory must give way.

The situation becomes more unsettled in the usual case of positive transaction costs which may preclude or impede the voluntary shift of resources to the party who can best use them. The initial distribution of rights may determine not only who enjoys the wealth associated with any given thing, but also the identity of its ultimate owner. Economic theory can no longer be complacent because the designated owner under a corrective justice theory, if not able to make the best use of a thing, may be unable to dispose of it to the party that can. To forestall that possibility, therefore, an ideal assignment of rights under an economic theory must vest each thing in the hands of the person who would ultimately own it if all voluntary transactions were costless. While there are immense technical difficulties in deciding how to package original rights to achieve or even approximate this end, the economic theory does provide a coherent program that works in sharp opposition to the distribution of rights required by a corrective justice theory.

The presence of administrative and transaction costs poses two questions for legal theory: First, in any given case, should the distribution of vested rights demanded by a corrective justice theory be sacrificed in order to promote some overall social objective? Second, under what circumstances should compensation from the new right holders be made to aggrieved parties once any compulsory reassignment of rights is in fact implemented?

The answers are not absolute but must be given in the form of two presumptions. By the first, the redistribution of rights by collective means should be the exception and not the rule. By the second, compensation from beneficiary to victim should in general be required, because forced exchanges represent less of an affront to corrective justice principles than do outright takings.

Yet here too there is a vital qualification: *implicit in-kind compensation* can obviate the need for explicit payment upon the admitted deprivation of a right.⁶⁶ Let us begin with the simplest of situations. Suppose that owners A

⁶⁶ The theme of implicit in-kind compensation was first identified and developed, though not in these words, in the classical article on eminent domain law, Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967). Perhaps the central point in Michelman's trenchant analysis is that the state need not make explicit compensation to those adversely affected by its actions where the distribution of benefits and losses tends to "even out" in the long run. In the course of his article, Michelman seeks at many points to undercut any connection between eminent domain law and the private law of nuisance. The centrality of the implicit compensation question to both areas suggests, however, that the connection between them is more organic than he supposed. Note for example that the coming to the nuisance problem has its precise eminent domain analogue. See, e.g., Hadacheck v. Los Angeles, 239 U.S. 394 (1915), and much of Michelman's most provocative writing is devoted to this problem. Michelman, *supra*, at 1198-01, 1236-38, 1242-45.

through *Z* each have identical plots of land. A legal rule not in conformity with corrective justice principles is then used in all disputes between members of the group. To the extent that the rule's incidence upon class members is uniform, and the rule does not benefit some third parties not members of the original group, then no compensation is in principle required, in spite of the universal deprivation of original rights brought about by collective means. *A* is worse off to the extent that he cannot do with his land what he could have done before, or to the extent he must do something which he previously was not obligated to do. Yet by the same token he is better off to the extent that the same regulation binds all others (*B* through *Z*) for his benefit. When the aggregate benefits exceed the aggregate costs, each person receives more from imposing the obligations upon others than he surrenders by becoming subject to those same obligations. This forced rearrangement of rights does compromise individual autonomy, because it abridges the right of all to decide whether to retain or to dispose of what they own. But its improper effect is softened because it is aimed at all for the benefit of all, and not at *A* alone for the sole benefit of others. The parallel restrictions upon others become implicit in-kind compensation for *A*, and likewise for all others in the group. With compensation thus assured there is no need to undergo the expensive and pointless process of making explicit offsetting payments, whose sole effect is to dissipate the welfare gains generated by the change in legal rules.

This rationale of the implicit in-kind compensation for the abrogation of the original distribution of rights becomes messy at the edges when some of the strict initial assumptions are relaxed. Thus it may be possible that all persons are better off by virtue of a change in entitlements but that some gain (whether subjectively or objectively) more than their pro rata share. Should payments be required to equalize the differences across persons? Then, too, most persons may benefit from the rule, though some will not, with the identification of winners and losers being dependent upon circumstances that may be unknown or unmeasurable at the time of the proposed legal changes; or many will surely win and some will surely lose, with the magnitude of the gains far outstripping that of the losses. We need not dwell upon the many hypothetical distributions of gains and losses to sense that there will come a point—itsself ill-defined—at which any implicit in-kind compensation will become so haphazard that it will not longer adequately redress the balance between individually aggrieved persons and those who have wronged them. As that point is approached, the case for compensation on an explicit case-by-case basis becomes stronger.

Although the argument for case-by-case compensation may become stronger, it is not absolute, for there are still administrative constraints. These are apt to be overwhelming where a large number of persons are both

entitled to compensation and obligated to pay it. The administrative problem becomes yet more acute for small, but not wholly trivial, claims. The problem is further complicated because all parties, whether innocent or responsible, must as citizens and taxpayers support the social institutions that supervise the payment of such compensation. Let these administrative costs be sufficiently large and it follows that *all* persons may be worse off in differing degrees if a systematic policy of individual compensation is pursued. The faithful application of a theory of justice can become so expensive as to be self-defeating. Some forced redistribution of wealth must be tolerated whatever the theoretical imperatives under a corrective justice theory.

I have not specified with any mathematical precision the circumstances under which it is appropriate to relax the severe constraints upon property rights and liability rules required by a theory of corrective justice. My previous analysis, however, suggests that the case for individualized explicit compensation will become progressively weaker as the following four factors become more dominant:

1. High administrative costs for claim resolution
2. High transaction costs for voluntary reassignment of rights⁶⁷
3. Low value to the interested parties of the ownership rights whose rearrangement is mandated by public rule
4. Presence of implicit in-kind compensation from all to all that precludes any systematic redistribution of wealth among the interested parties⁶⁸

B. Applications

1. Accident Cases

Much of the law of tort is devoted to an analysis of ordinary accident cases where the plaintiff complains of major physical harm attributable to a single sudden and isolated event, like a blow to the skull. Whether the accident arises out of a highway collision or the toppling of a wall, there is little or no need to limit the application of the basic corrective justice principles.

Administrative costs are not an unacceptable burden. The essential facts for liability are usually based upon readily measurable quantities of time,

⁶⁷ A question arises whether it is correct to treat the explicit legal barriers to transactions as a social cost to be overcome. One view is that, as they are in fact costs, they should be regarded as part of the basic problem. Another is that, as they represent legitimate actions of the legislature, they should be respected in their own right and not treated in the same fashion as the pure economic costs incurred in bringing together individuals who have a right to come together under the law.

⁶⁸ Note that this concern can only arise in a system which originally posits certain well-defined individual rights. If there is in effect no original distribution, then there is no baseline against which haphazard redistributions could be measured, and the only concern would be not with the size of individual benefits, but with the aggregate benefits of the whole.

position, and motion, at least under a system of strict liability. This basic certainty makes it possible to resolve most cases without expensive trials, so that the administrative costs are small relative to the amount in controversy. Indeed, comparing administrative costs to amount in controversy understates the benefits of the tort system because it systematically ignores the other major benefit of the tort law: the creation of desirable incentives that reduce the overall level of accidental losses. Costs do, of course, remain, but these are best controlled by sensible rules of procedure, which could include, for example, rules requiring losers to reimburse winners for all legal expenses.⁶⁹ The administrative costs involved in these accident cases do not call into question the soundness of the basic tort system.

The question of high transaction costs before dispute is somewhat more problematic. These costs do effectively preclude any voluntary transactions between private parties, but this fact does not justify abandoning basic tort principles. Taking only highway cases for the moment, there are many branches of government that are properly responsible for the movement of traffic on public roads. These agencies act not only with the regulatory powers of the state but with the proprietary powers of the owner of public lands. Acting with enhanced proprietary powers, they can and do structure access to public roads so as to reduce the level of accidents. Traffic lights, lane markers, speed limits, and other rules of the road are effective substitutes for private transactions. With these in place, it is doubtful that there would be much desire on the part of strangers to reshape their relationships further, even if such could be done practically. Again, the case for tort actions on corrective justice principles still remains strong.

Further, it is clear that in some physical injury cases the value of the rights involved is quite small, as for example in the host of road accident cases involving minor property damage to automobiles. In these cases much of the argument for automobile no-fault insurance rests, for example, on the hope that simple and certain devices can indeed resolve small claims. Yet by the same token the very simple rule that each person must bear his own losses becomes too crude a measure to be attractive for substantial personal injuries, and at least for these cases the traditional tort system has shown a much greater degree of tenacity. A common feature of all automobile no-fault systems is the preservation of tort actions for major losses, above some statutory threshold.

⁶⁹ Even where there are doubts about the operational efficiency of the system, the first impulse should be not towards its total repudiation but towards its procedural and substantive refinements. One of the great problems with the case for automobile no-fault is that it takes both the substantive and procedural features of the tort system as an integrated whole that cannot be subjected to intelligent piecemeal reform. Yet it seems clear that it should be possible to modify, for example, rules of discovery or costs without abandoning a negligence system, or to move from negligence to strict liability without abandoning the notion of individual redress between private parties.

A fourth, and perhaps most decisive, factor is that there is little probability the victim of a major accident will receive any compensation in kind for his losses that could begin to justify the total abrogation of tort claims. *A* breaks *B*'s leg. It may well be that *B* has broken *A*'s arm, or that it is possible that *B* will do so at some future time. Even if we take into account the possibility that *A* will injure *C* who in turn will injure *B*, it becomes idle threat to treat these hypothetical set-offs as adequate compensation for the injury that has been actually sustained. The abrogation of corrective justice principles thus runs into insuperable difficulties with respect to our fourth condition. Things will not balance out in the end if all major accidents are cast out of the tort system. The fourth factor resolves whatever doubts there may be in favor of the retention of the basic corrective justice arguments in the ordinary torts case.

It should not be supposed, however, that even apart from the law of nuisance utilitarian constraints have no influence upon the structure of tort doctrines. Consider for the moment actions for trespass brought against fliers for alleged violations of the upper airspace. Even before the legal analysis begins there is a strong, shared sense that the actions cannot be allowed, even if suits are appropriate for low-flying planes or for high-flying planes that disturb ground activities.⁷⁰ An eminently sensible way to reach this result is to repudiate the *ad coelum* maxim to the extent that implies ownership of the ground continues unabated to the heavens. The theoretical defense of this position is quite respectable. Ownership presupposes some original acquisition, and the possession of land does not embrace the upper airspace beyond the area of effective occupation.⁷¹

For immediate purposes, however, what is important is that all relief should be denied even if the *ad coelum* rule *does* determine the original ownership rights of the heavens. All relevant considerations point in the same direction. The damage to the plaintiff, measured by the diminution in value to the land, is slight. It is difficult, if not impossible, for all fliers, whether private individuals or public companies, to contract to obtain overflight rights with innumerable landowners. Yet such contracts would doubtless improve overall resource use. The administrative costs associated with these suits are apt to be great, especially if private parties can enjoin all overflights or bring restitution actions, not for the loss incurred, but for the benefits the defendants obtained. And last, there is a heavy element of reciprocal benefits that flow from the forced destruction of all actions. These

⁷⁰ See, William B. Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 Mich. L. Rev. 1313 (1958). For earlier articles on the subject, see Prosser, *Torts* 70, n.87.

⁷¹ See, e.g., Frederick Pollock, *The Law of Torts* 362 (13th ed. 1929).

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benefits do not become evident when attention is directed only towards one-on-one interactions between two immediate neighbors, for there is little possibility that the one would choose to fly over the land of the other. The reciprocal benefits are evident over a broader universe of discourse, as all landowners in their capacity as citizens can gain through increased air transportation. The widespread benefits of traveling by air and using goods shipped by air are thus properly brought into the case. While an occasional individual might suffer some psychological wrench from the forced loss of air rights, virtually all persons are far better off because of the universal over-flight easement. In cases of high overflights even the most expansive interpretation of the *ad coelum* rule must yield to utilitarian constraints. The actions for low-level flights and for substantial nuisances caused by high-level flights should and do survive.⁷² The emerging pattern of action and prohibition illustrates the interaction between corrective justice and utilitarian constraints. The former resists the influence of the latter in situations presenting the possibility of major, and random, injury.

2. Nuisance Cases

The nuisance law, unlike the law of accidents, does present abundant situations in which the four utilitarian constraints militate in favor of re-definition of property rights and liability rules without explicit compensation. We shall first investigate the problem in connection with three different rules: *a*) live and let live; *b*) the locality rule; and *c*) extrasensitive plaintiff. Thereafter we shall examine some ways in which the utilitarian constraints might be used to create new causes of action for an aggrieved plaintiff, and take a second look at some of the limitations upon recovery demanded by the pure corrective justice theory set out in the first part of the paper.

a. *Live and let live.* Under a pure corrective justice approach the invasion requirement is satisfied if a single particle placed in motion by the defendant crosses the boundary line, or if a single vibration upsets his comfort. The low level of the interference, though surely of note, goes only to the measure of damages for the particular harm or perhaps to the availability of injunctive relief. The matter, however, assumes a very different appearance when utilitarian constraints are taken into account, as is well demonstrated by Baron Bramwell's account of the "live and let live rule" in his opinion in *Bamford v. Turnley*.⁷³

The instances put during the argument, of burning weeds, emptying cess-pools, making noises during repairs, and other instances which would be nuisances if done

⁷² Restatement (Second) of Torts § 159 (1965).

⁷³ *Bamford v. Turnley* 3 B. & S. 66, 122 Eng. Rep. 27 (1862).

wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because of the hypothesis they are; and it cannot be doubted that if a person maliciously and without cause made close to a dwelling house the same offensive smells as may be made in emptying a cess-pool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases are properly used for testing a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live⁷⁴

As the quotation indicates, the rule of live and let live clearly satisfies the four requisites set out above for the abolition of the private cause of action

⁷⁴ *Id.* at 83-84, 122 Eng. Rep. 32-33. With Bramwell's opinion, compare the following passage from the Restatement of Torts. "It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." Restatement of Torts § 822, comment *j* (1939). The last sentence in this passage has an unfortunate looseness, but is by no means inconsistent with the basic theme of reciprocal implicit in-kind compensation. The possibilities of confusing this limited doctrine with a wholesale endorsement of the "reasonableness" tests cannot, however, be ignored. Prosser, having quoted the above passage at length, demonstrates a common and fundamental misconception of the basic problem when he writes: "Where the basis of the nuisance is negligence, the reasonableness of the defendant's conduct is obviously in issue, and is determined by the familiar process of weighing the gravity and probability of the risk against the utility of his course." Prosser, Torts 580-81. A similar confusion is found in his treatment of the "reasonable use" question in nuisance cases. *id.* at 596-602, which among other things does not indicate which of the multitude of factors are relevant to the actionability of the defendant's conduct and which to the choice of remedy, be it damages or injunctive relief.

A better sense of the problem is found in Winfield on Tort 396 (J. A. Jolowicz & T. Ellis Lewis eds. 7th ed. 1963): "In negligence, assuming that the duty to take care has been established, the vital question is, 'Did the defendant take reasonable care?' But in nuisance the defendant is not necessarily quit of liability even if he has taken reasonable care. It is true that the result of a long chain of decisions is that unreasonableness is a main ingredient of liability for nuisance. But here 'reasonable' means something more than merely 'taking proper care.' It signifies what is legally right between the parties, taking into account all the circumstances of the case. . . ." This passage recognizes the distinction between the two senses of reasonableness, but without some account of the issue of implicit in-kind compensation it cannot give a second account to reasonableness ("what is legally right between the parties") in any but the most conclusory terms. On the importance of the distinction between the two senses of the term, see the discussion of *Andreac v. Selfridge* [1936] 2 All Eng. Rep. 1413; [1938] 1 Ch. 1, at pp. 85-87 *infra*.

without any form of explicit substitute compensation. The large number of interested private parties and the protean forms of nuisance-like behavior both make it extremely unlikely that private agreements could soften the rigors of a pure corrective justice theory of nuisance law. Likewise, the administrative costs needed to resolve these low-level claims within the legal system would be very high, particularly in light of the small amounts in controversy. Finally, there is a high degree of implicit in-kind compensation between parties. The nuisances here are of such common and frequent occurrence that it is safe to assume that virtually all persons will be in separate individual instances both wrongdoers and victims. The high frequency and low intensity of claims suggest that they will, in sharp contrast to the accident case, most likely balance out. Any special effort to award individual compensation would, no matter how approached, only eat up the wealth of all the interested parties, leaving them all worse off than before. In general, private causes of action should be abrogated, leaving only informal social pressures in their place.

Of especial importance in this connection is the way Bramwell addresses the implicit compensation issue in his treatment of "reciprocal harms." He does not use the term to portray the want of a causal distinction between those who brought about an invasion and those who suffered its consequences. The premise of Bramwell's position is that these causal distinctions are indeed proper for each discrete nuisance case: two or more harms are "reciprocal," therefore, only in the sense that the victim of one nuisance is the perpetrator of a second.⁷⁵ The reversal of roles in separate occurrences is therefore the crucial element with each tort, as it were, providing the *justification* that makes explicit compensation unnecessary for the other.

The reciprocal injury test of Bramwell, properly understood, is important because it points to the proper interpretation of the "neighborliness" and "reasonableness" tests that are so frequently announced in nuisance cases. Earlier in this paper I criticized Professor Ellickson's test of "neighborliness"—one associated with "any change in land use"—because its broad scope made it easy prey to standardless and unprincipled litigation. When that test, however, is confined to Bramwell's low-level repetitive harm, it captures the essence of much of nuisance law. For one thing, it helps explain why acts of malice are not protected by the rule.⁷⁶ For another,

⁷⁵ Bramwell's sense of reciprocity is closer to that of Professor George P. Fletcher in his *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972). The differences, however, are two. Fletcher applies his theory to all manner of accidents and not only to those that involve low-level harms. And he speaks, not of the infliction of reciprocal harms *ex post*, but about the creation of reciprocal risks *ex ante*. As he uses the term, the principle of reciprocity can work great shifts in wealth between individuals. The very reasons, therefore, which make those shifts unacceptable as a matter of corrective justice make Fletcher's rule unacceptable in any across-the-board application.

⁷⁶ See, e.g., *Christie v. Davey* [1893] 1 Ch. 316. The defendant, much annoyed by the music

it accounts for the dynamic quality of the law not captured by corrective principles alone. The smells of horses are easily ignored under a live and let live rule in an age in which horses are the universal means of transportation, but those same smells raise very different questions now that the horse has given way to the automobile. The typical reciprocal low-level nuisance changes over time. The live and let live rule, unlike a theory of corrective justice, demands that the outcomes of particular cases change over time as well. The same principles are capable of extension to more difficult problems. The threshold level at which factory pollution becomes actionable, for example, need not remain constant over time. When technologies of control are in their primitive stages and income levels low, the levels of harm tolerated under the live and let live rule may be far higher than they are today. To the hard-edged quality of the corrective justice principles are thus added a set of time-bound and technology-bound limitations.

The "live and let live" rule also clarifies a similar ambiguity in the oft-repeated sentiments that the defendant's conduct constitutes a nuisance only if it is "unreasonable and substantial" under the circumstances. In one sense, the term "unreasonable" might be thought to import into the law of nuisance all the traditional concerns over relative cost and benefits. But this would mean the complete and unwarranted rejection of the strict liability rule required by corrective justice principles. Instead "reasonableness" in nuisance cases should be (as it usually is) understood as a synonym for the word "substantial" that directs judicial inquiry into the *level* of the defendant's invasion. Where that invasion falls below some background level—the level of the usual reciprocal risks that good neighbors inflict upon each other—then it is not actionable, whether the defendant was negligent or not. Where, however, the level of invasion clearly exceeds the normal level of background interference, corrective justice principles of tort liability between strangers emerge as dominant, for now nothing distinguishes this nuisance from a trespass. In both situations it is impact, not utility, that is the touchstone of liability.

The failure to so interpret the reasonableness requirement in nuisance cases tends upon occasion to lead to wrong results in individual cases. Consider the English case of *Andreae v. Selfridge & Co.*⁷⁷ The plaintiff was the operator of a residential hotel. The defendant over two periods, together in excess of a year, conducted extensive building operations in the immediate

lessons conducted by the plaintiff, interrupted them by screaming and whistling and by making noise by hitting trays. The injunction against this conduct was allowed in large part because of the asserted malice of the defendant, the judge noting that he would have taken a very different view of the case if the dispute had occurred "between two sets of persons both perfectly innocent." *Id.* at 326-27.

⁷⁷ *Andreae v. Selfridge & Co.* [1936] 2 All. Eng. Rep. 1413; *order varied* [1938] 1 Ch. 1.

vicinity of the hotel. Its contractors razed a number of existing structures, dug deep foundations, and erected large steel frame buildings upon the old sites. The constant use of heavy industrial machinery at all hours of the day and night created a substantial amount of noise, dust, and vibrations which made it impossible for ordinary people to vacation at the plaintiff's hotel. There was no question that the defendant's activities in fact amounted to a nuisance, but the defendant contended that the case came within the general rule of *Bamford v. Turnley* because its construction was "temporary" and therefore but a natural and ordinary use of its own land. Bennett, J., the trial judge, refused to accept the argument, holding that those major activities were anything but ordinary and necessary. He concluded: "All these acts may be very convenient, but I think that if you build in that kind of way and demolish in that kind of way . . . and . . . have caused pecuniary loss to your neighbour it is but fair that you should compensate your neighbour for what you have done rather than that he should suffer."⁷⁸ The appeal to corrective justice principles is apparent. The court then awarded the plaintiff full damages.

On appeal the court reduced the damages from £4,500 to £1,000, allowing the plaintiff to recover only for those harms caused by defendant's operations at unreasonable hours and in unreasonable ways. It then stated the basic obligations upon a defendant who sought to escape liability by showing that it had indeed acted with reasonable care:

Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say: "We will go on and do what we like until somebody complains." That is not their duty to their neighbours. Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: "But this would mean that we should have to do the work more slowly than we would like to do it, or it would involve putting us to some extra expense." All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. It is all a question of fact and degree, and must necessarily be so. In this case the defendant company's attitude seems to have been to go on until somebody complained, and, further, that its desire to hurry its work and conduct it according to its own ideas and its own convenience was to prevail if there was a real conflict between it and the comfort of its neighbours. That, to my mind, is not carrying out the obligation of using reasonable care and skill.⁷⁹

⁷⁸ *Andrae v. Selfridge & Co.* [1936] 2 All. Eng. Rep. 1425.

⁷⁹ *Andrae v. Selfridge & Co.* [1938] 1 Ch. 1, at 9-10.

This passage shows how easy it is to ignore the constraints implicit in the live and let live rule of *Bamford v. Turnley*, and to return in essence to a basic negligence position. In *Bamford*, Bramwell included "temporary repairs" as the type of conduct which all must suffer for the benefit of all. Yet the logic of his basic position applies only to repairs that fall clearly within the low level of reciprocal harms to which the utilitarian constraints apply. I may be able to fix my plumbing one day, just as you may be able to put down carpet on the next. In *Andrae*, however, the defendant's extensive construction was "temporary" only in the sense that it had to end with the completion of the project. It still far exceeded in magnitude the low-level harms to which the live and let live rule properly applies. Allowing the defendant a partial justification in *Andrae* worked a major and impermissible redistribution of wealth between strangers, for there is no remote likelihood, let alone real prospect, that the plaintiff would at some future time inflict an uncompensated harm of equal severity upon the defendant. The weakness in the Court of Appeal's decision was not that it made the wrong apportionment of the plaintiff's damages; it was in attempting to make any apportionment at all.⁸⁰

b. *Locality rule.* The most well-known statement of the locality rule is:

whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*; and where a locality is devoted to a particular trade or manufacture carried on by traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.⁸¹

The persistence of the locality rule in the decided cases cannot easily be squared with a pure theory of corrective justice, where the entire strategy of inquiry is to look at the conduct of the two disputants in isolation and to rebuff any efforts to allow their rights to be influenced, let alone determined, by the conduct or needs of third parties. Thus, a full-fledged system of strict liability for accidental injuries does not allow a suit between *A* and *B* to be influenced by what *C* did to either of them. The locality rule, far from isolating the defendant's conduct from its environment, consciously evaluates its actionability in relationship to its surrounding circumstances. It thereby excuses certain invasions solely on the ground that other persons

⁸⁰ Note that Coase, in commenting upon the case, is not troubled by the reduction in the damages awarded because he does not begin from a corrective justice basis. See Coase, *supra* note 29, at 23.

⁸¹ *Sturges v. Bridgman*, 11 Ch. D. 852, 865 (1879). For a similar expression of the same position, see *Campbell v. Seaman*, 63 N.Y. 568, 577 (1876): "A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance."

with sufficient frequency have committed like wrongs against other persons in the plaintiff's position. It is as though *A* could be excused for running over *B* because *C* has done the same to *D*, or *E* to *F*.

The good sense behind the locality rule can, I believe, be demonstrated by looking to the utilitarian constraints upon the basic theory of corrective justice. Clearly there are acute problems of transaction costs before disputes arise and of administrative costs thereafter. There are too many parties and too many discrete nuisances for either set of costs to be kept under control. With these nuisances, the special concern is that the level of harm is greater than that involved in the live and let live situation and may be quite substantial. The pressure therefore increases upon the last condition—that of implicit in-kind compensation. Notwithstanding, the *uniformity* of activities throughout any given area makes it highly likely that benefits obtained by having each person inflict limited nuisances upon the others will more than offset the losses sustained from having to tolerate the nuisances inflicted by others. This last point applies with obvious force to those parties in any given locality who are engaged in the same or similar activities. And it takes little imagination to extend it as well to persons whose welfare and success is dependent upon the continuation of the nuisance-like activity—think only of the restaurant which caters to workers within an industrial district.⁸²

The most problematic application of the locality rule arises (as our general discussion of utilitarian constraints indicates) when the land use is not uniform within a given region. A hypothetical situation discussed by the court in *Sturges v. Bridgman* illustrates the general problem: "for a man might go—say into the midst of the tanneries of *Bermondsey* or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such manufacture altogether."⁸³ The theory of pure corrective justice indeed demands just that result, for the combined efforts of all the people in the world, minus one, are not sufficient to deprive that single person of his vested rights. As the court in *Sturges* suggests, it is a result too unpleasant and counterintuitive to contemplate.

One might try to blunt the force of the example by claiming that this landowner is entitled only to damages and not to an injunction, the theory being that injunctions are a form of discretionary relief. Yet that argument underestimates the impact of damages and in any event surely places too

much weight on the word "discretionary." Injunctions are denied only for very strong reasons—where the harm inflicted by one (or several defendants) is substantial in extent. To escape the difficulties posed by the hypothetical case, therefore, it is necessary to show that utilitarian constraints are sufficiently powerful to dominate the situation. The first clue is that the owner of the vacant land is denied only some use, and not all use whatsoever. Even without that preferred use of the land, the land may still be sold. Its market price will no doubt be reduced because the land is encumbered with a judicially created easement that subjects it to a fair-sized nuisance. Yet by the same token its price will be increased because the owner is entitled to inflict nuisances of similar dimensions upon his neighbors. Given that the intensity of single use within a given region is apt to increase the land values of all concerned, the landowner will receive implicit compensation for the losses that he has suffered as part of the sale price for the land. Indeed the very certainty of the locality rule itself works to reduce the size of potential dislocations. By defining the property rights between neighbors with sufficient precision, the rule makes it unlikely that any person will buy land in heavily industrialized regions with the idea of using it for residential property.

By no means, however, does the rule itself confer a blanket immunity from nuisance actions. If one person creates a substantial nuisance towards his neighbor when measured against the normal background interferences within the locale, the locality rule provides no defense. The point was well put by Cozens Hardy, L. J. in *Rushmer v. Polsue & Alfieri Ltd.*

[It was contended] that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighborhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. . . . But whatever the standard of comfort in a particular district may be, I think that addition of a fresh noise caused by the defendant's works may be so substantial as to cause a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previous to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, . . . it is no answer to say that the neighborhood is noisy, and that the defendant's machinery is of first-class character.⁸⁴

⁸² See, e.g., the eminent domain case, *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354 (1918). Then the plaintiff owned a hotel that abutted a major business street upon which the City of Chicago erected elevated tracks. In passing on the plaintiff's eminent domain claim the court said that the "special benefit" arising from the increase in travel was a proper offset to any compensation award payable to the plaintiff. Again the implied logic of eminent domain cases echoes that of nuisance cases. See note 66 *supra*.

⁸³ *Sturges v. Bridgman* [1879] 11 Ch. D. 852, 865.

⁸⁴ *Rushmer v. Polsue & Alfieri, Limited* [1906] 1 Ch. 234, 250-51, *aff'd* [1907] A.C. 121. See also *Colls v. Home and Colonial Stores* [1904] A.C. 179, 185: "A dweller in towns cannot expect to have pure air, as free from smoke, smell, and noise as if he lived in the country . . . and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree. . . ."

emitted gasses of "sulphuretted hydrogen" that blackened the plaintiff's mats. On the one hand, the plaintiff was engaged in a "delicate" trade; on the other, the defendant's gasses were both "offensive" and "noxious." Here the rejection of the extrasensitivity defense is indeed proper, because the substantiality of the original invasion (over the background level) is sufficiently high to displace the utilitarian constraints.

The more difficult part of the analysis concerns low-level invasions that produce extensive harms. Judging the situation by the substantial resulting harm, it is surely defensible to apply corrective justice principles alone. Yet the unmistakable tendency in the cases is to treat the plaintiff's extrasensitivity as a complete defense. Thus in *Robinson v. Kilvert*⁸⁸ heat from the defendant's fireplace, when used in an ordinary manner, passed into the plaintiff's premises where it prematurely dried out the brown paper the plaintiff was processing. The court refused to allow damages or an injunction, expressly distinguishing *Cooke v. Forbes* on the ground that "there is a very broad difference between poisoning the atmosphere with sulphuretted hydrogen and doing something not in itself noxious, and which makes the neighbouring property no worse for any of the ordinary purposes of trade."⁸⁹ Likewise in the important Oregon case of *Amphitheaters, Inc. v. Portland Meadows*⁹⁰ the light from the defendant's race track was cast onto the screen of the plaintiff's drive-in theater. Even though the light's intensity on the screen was no greater than that of the full moon on a clear night, it reduced the visibility of the picture. The court denied the plaintiff any relief, and a commentator noted that the cases "warrant the generalization that if the intensity of light shining from adjoining land is strong enough to seriously disturb a person of ordinary sensitivities, or interfere with an occupation which is no more than ordinarily susceptible to light, it is a nuisance; if not, there is no cause of action. The court will not afford protection to hypersensitive individuals or industries."⁹¹

These extrasensitivity cases present the most difficult challenge to the proposed integration of corrective justice and utilitarian constraints. The level of damage tolerated under the extrasensitivity rule is far greater than that tolerated under either live and let live or the locality rule, and few extrasensitivity cases involve the prospect of frequent reciprocal harms that even out costs and benefits over the long run. In the end therefore it is tempting to say that the extrasensitivity defense may rest upon the belief that the efficiency losses of the corrective justice position are simply too great in

⁸⁸ 41 Ch. D. 88 (1889).

⁸⁹ *Id.* at 96.

⁹⁰ 184 Ore. 336, 198 P.2d 847 (1948). The case contains a full set of citations, both English and American.

⁹¹ 5 A.L.R. 2d 705, 706 (1949).

this narrow context, even when qualified by utilitarian constraints. That point is of course reinforced by the obvious fear that the very sensitive condition of the plaintiff will create intolerable limitations upon the freedom of actions of others, especially in light of the minimum level of the original invasion. The efficiency argument may not, however, be decisive, given that the costs to neighbors may not be very great. Both *Robinson* and *Amphitheaters* involve cases of one-on-one harms. In both the defendant knew (or had easy means of knowledge) of the need for action and had the means to do so cheaply and effectively. In *Robinson* the defendant could have installed insulation around the fireplace; in *Amphitheaters* the defendant could have erected barriers to block the light. The efficiency arguments are thus plausible, but not necessarily decisive.

There are, in addition, causal arguments that lend some support to the extrasensitivity defenses in nuisance cases. The gist of the argument is that the de minimis level of physical invasions is causally distinct from the massive damages that follow upon them. Such arguments have been made when minor physical conduct triggers massive psychological response,⁹² or where opening a package sets off a bomb inside.⁹³ They are surely more persuasive where the physical invasion consists not of actual physical contact but of small amounts of heat or light.

The implicit denial of causal connection in nuisance cases, moreover, is further borne out by the relationship between the plaintiff's extrasensitive condition and the defendant's possible malice. If extrasensitivity were regarded as an affirmative defense in low-level nuisance cases, then it could be overcome upon a showing of defendant's malice. That malice in turn is presumptively established where the defendant knew the plaintiff's condition and with hostile intent chose to act in a manner that harmed it. Where, however, the defendant wins because of a (presumed) absence of a causal connection between the defendant's act and the plaintiff's injury, then malice remains immaterial to the case. No allegation of defendant's mental state can repair a weakness in causal connection, by converting an independent event into a consequence of defendant's behavior.⁹⁴

The famous and difficult case of *Rodgers v. Elliot*⁹⁵ suggests that courts have implicitly adopted the strict causal view of this problem. The plaintiff, while convalescing from a traumatic experience, sent a messenger to the defendant's church asking the warden not to ring the bells on Sunday as he usually did, specifically mentioning the plaintiff's susceptibility to convul-

⁹² *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960).

⁹³ *Nitro-glycerine Case*, 82 U.S. (15 Wall.) 524 (1872).

⁹⁴ See Epstein, *Intentional Harms*, *supra* note 8, at 433-41.

⁹⁵ 146 Mass. 349, 15 N.E. 768 (1888).

sions. With a broad hint of malice, the bells were rung and the convulsions followed. The plaintiff's claim for damages was denied by the court. Putting aside the sensible objection that the church bells were a nuisance of sufficient magnitude even to ordinary individuals close by, the denial of relief, clearly motivated by the concern that a single sensitive individual could control the activities of all around him, is best understood as adopting the position that the plaintiff's convulsions should not be treated as a consequence of a low-level invasion.

The position of *Rodgers v. Elliot* has been adopted in a recent Massachusetts decision⁹⁶ where, in denying relief to an extrasensitive plaintiff who sued the defendant for casting light onto his land, it was observed: "this [plaintiff's] argument assumes that the defendant's knowledge of the plaintiff's sensitivity to harm, without more, imposes a duty on the defendant to avoid the use of his property which will cause that harm. This is not the law."⁹⁷ The argument here is exactly the same as that which says that the defendant's knowledge of the plaintiff's helpless peril is not sufficient to raise an obligation to rescue. The parallel is not as exact on one level because there is no invasion in the good Samaritan case and a clear invasion in the case of noise and light. Yet once "live and let live" removes these cases from the list of "legal" invasions, the parallel between the two cases becomes exact. The problem of low-level invasions that is of special importance in nuisance cases arises in other parts of the tort law, and throughout it receives the same uneasy response. The case law is far from ideal, but it represents, on balance, the best that we can do.

3. Expanding Nuisance Law

The previous discussion has shown how utilitarian constraints have worked to remove from the legal system some physical invasions that are in principle actionable under the nuisance principles of corrective justice. This section deals with the converse situation, where the same utilitarian constraints support the creation of nuisance-like actions even in the complete absence of a physical invasion. The recognition of new causes of action raises fresh difficulties because these actions will not decrease, but increase, the administrative costs of the legal system. Nonetheless, in certain well-defined circumstances the increase in mutual benefits to all concerned justifies those greater administrative costs.

a. *Lateral support.* Making certain forms of noninvasive conduct actionable within the nuisance context can make good sense. An example is the

⁹⁶ *Lynn Open Air Theatre, Inc. v. Sea Crest Cadillac-Pontiac, Inc.*, 1 Mass. App. Ct. 186, 294 N.E.2d 473 (1973).

⁹⁷ *Id.* at 188, 294 N.E.2d at 474.

duty of lateral support between neighboring landowners.⁹⁸ Here the mutual dependence among neighbors is apparent, because excavation on A's land creates the serious danger that B's nearby land will either cave in or erode away. Yet the classical corrective justice theory provides no action under these circumstances, since the digging up of one's own soil does not constitute a physical invasion of a neighbor's land. Without an affirmative duty of support, the plaintiff's loss, no matter how serious, must be borne alone. All manner of transactions might create necessary duties, but these will in practice be frustrated by the need to negotiate a large number of complicated individual agreements whose particulars will be difficult to determine, given the obvious uncertainties as to the intentions and needs of all the interested parties.

The crucial question in these circumstances is to determine the appropriate measure of support, given that one essential condition for the creation of the new cause of action is that it not work an implicit redistribution of wealth between parties. Here in manner (happily) consistent with the general theory, the law makes the fundamental distinction between land in its natural state and improved land. The judicial duty of support only extends to unimproved land: no owner is allowed to undermine the support of neighboring land. In the interests of simplicity, the primary obligation falls upon the adjoining landowner, but if that land in its natural state is not sufficient to support the plaintiff's land, then like duties are imposed on more remote parties.⁹⁹ This limitation upon the duty of support makes it unlikely that the implied reciprocal easements will work any dramatic shift in wealth, as virtually all neighbors will be better off by sharing the benefits and burdens in roughly equal proportion. And given that the duties are expressed in strict and not negligence terms, the only issue of importance in litigation will be causation, a question that can in most cases be resolved at a reasonable cost, particularly since it involves mainly physical issues (e.g., why did the land shift) which are most amenable to judicial scrutiny and evaluation.

The second half of the distinction concerns the possible support obligations with respect to structures and improvements placed upon the neigh-

⁹⁸ See generally 50 A.L.R. 486 (1927); 59 A.L.R. 1252 (1929).

⁹⁹ See, e.g., *Corporation of Birmingham v. Allen*, L.R. 6 Ch. D. 284, 289 (C.A. 1877), where Jessel, M. R. said: "Now, what is the right of the adjoining owner? As I said before, it is to the support of his land in its natural state—support by whom? The Judges have said, 'Support by his neighbour.' What does that mean? Who is his neighbour? It was contended that all the landowners in England, however distant, were neighbours for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbour for this purpose." This rigid progression establishes a set of priorities that eliminate most joint causation questions.

bors' lands. Here an unqualified obligation of additional support will in fact be unacceptable because of the substantial redistribution of wealth that it can work among neighbors. By virtue of the invasion requirement, *A* has no control, or right of control, over the nature and type of structures that *B* builds on his own land. Yet recognition of the more comprehensive duty of support could result in the unhappy situation whereby the intensive and early development of *B*'s land will deprive *A* of any opportunity (short of buying out *B*) of making like use of his own property. As with views, light, and coming to the nuisance situations, *B*'s claim is unacceptable because it abridges his neighbor's rights without compensation, whether implicit or explicit.

Nonetheless, the problem is ripe for a more focused judicial intervention. The other extreme, with its utter absence of any obligations with respect to neighboring structures, foreshadows potentially disastrous consequences both to the immediate neighbors and to innocent third parties. To escape these consequences, the common law courts have hit upon an ingenious but simple solution, well within their regulatory capabilities. Any party intending to build must give reasonable *notice* to any neighbor of his proposed construction, when there is reasonable cause to believe that the construction will threaten the improvements that are already in place. And in similar vein the neighbor must then be allowed some reasonable time in order to shore up his own improvements, or in the alternative, to purchase special rights of support. Whereas support obligations themselves are much too onerous, notice obligations, which minimize conflict and facilitate consensual agreements, are not. The common law solution reached is consistent with the basic theoretical structure urged in this article, and shows how the scheme can be sensibly, if cautiously, extended to noninvasive conduct.

b. *Noninvasive nuisances reconsidered.* The use of utilitarian considerations to create the cause of action in the case of lateral support makes it desirable to reexamine the previous conclusion, reached on corrective justice grounds alone, that noninvasive nuisances are never actionable. With both views and light, utilitarian constraints do not control. First, there is little likelihood that overall utility will be increased if implied easements of light and view are created by judicial means. Although sometimes imposed by consensual agreement, in most situations these covenants are nowhere to be found. Judicial imposition of special easements might eliminate the need for some voluntary transactions, but on balance it would create the need for many additional others. Second, the administrative costs of the system could be increased by the addition of further causes of action, particularly since the content of the new easements would be indefinite in the highest degree. And, finally, the shifts in values between neighboring landowners would in both cases be very substantial and very unsystematic, depending upon such variables as the location, shape, and use of each particular plot.

Let it be supposed, for example, that the successful use of solar energy requires the creation of easements of light. The easements that must be created will vary in extent and importance as a function of the special situations of the parties that they burden and serve. There is, moreover, little likelihood that each party so burdened can expect to recover benefits in rough measure equal to the values that they have been forced to surrender. The overall importance of such elements may be a concern of national energy policy, but, if so, full attention must be focused upon the individualized consequences of any collective decision. Collective need may justify the rearrangement of property rights, but not without compensation.

The corrective justice approach to light and views is more powerfully challenged in cases of spite fences. The motive test (whatever its weakness) has an apparent dual advantage: it avoids the open-ended and explicit comparisons of costs and benefits that are everywhere the bane of the legal system; and it removes the need to make specific collective determinations about height, shape, color, and the like, which are again difficult to generate through common law decisions. Yet this approach requires a costly inquiry into motive and tends to break down where both "legitimate" and "illegitimate" desires lie behind a single act. Matters of new fences, height restrictions, and roof antennas cannot for the most part be handled through gross tests that concentrate more on motive and less upon conduct and appearance. The widespread use of planned unit developments and the myriad restrictions that they contain are both evidence of the degree to which the common law of nuisance with its simple invasion tests cannot approximate the "efficient" distribution of rights between neighbors. Organized covenants are of course not practicable in established neighborhoods, however valuable in new tract developments. Making spite fences private nuisances by judicial decision or legislative enactment¹⁰⁰ may pick up the slack in some cases, but it will surely complicate matters in many others. I remain suspicious of the modern trend that makes these fences actionable but recognize that nothing in the logic of the situation can make the case for liability disappear. Again the clash between corrective justice and its utilitarian constraints leads to irreducible uncertainty at the margin.

The aesthetic nuisance cases are further evidence of this tension. It takes little imagination to conceive of cases in which some restraint upon singular ugliness is much wanted. It taxes common law methods greatly to identify those cases in fact. It may well be that a prohibition against obscene billboards in residential areas will prove both workable and sensible, if only because the sanctions will rarely have to be imposed. The myriad of other aesthetic cases are not nearly as amenable to common law rule. It could well

¹⁰⁰ A statute which allowed landowners the absolute privilege to erect fences six feet high, but which prohibited spite fences in excess of that height was sustained against constitutional challenge in *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889).

be argued that restrictions upon the size and placement of signs in a busy downtown district would offer net benefits to all regulated shopkeepers. A sensible system would work to increase the visibility of all signs; to improve the light and appearance of the area; and to prevent by law any individual shopkeeper from capturing the benefit of neighborly restraint by erecting his own large sign. Such schemes for aesthetic control can be developed and they do make sense given utilitarian constraints. But common law judges cannot by private actions deal with the complicated interplay among the various interested parties. The responsible concern with utilitarian constraints mandates a move towards direct statutory and regulatory controls. Although subject to frequent abuse, in a number of cases these restrictions can be a useful alternative to common law nuisance actions.

There is last the question of whether utilitarian constraints require some revision of the coming to the nuisance rules. As will be recalled, the pure corrective justice approach disregards all temporal elements. It thus allows the plaintiff both to build expensive structures of his own and to enjoin the continuation of the defendant's nuisance, no matter what the net dislocations created by the plaintiff's new projects. Ways of controlling this problem are legion. One possibility restricts the plaintiff to damages for the diminution in land value because of the defendant's nuisance. In effect the rule allows the plaintiff a full recovery without first having to make dubious improvements upon his own land. It involves a forced exchange of a property interest for money, but not the exchange of an interest for an interest. Yet this rule does not take into account the possibility that the conflict between land use will emerge as the plaintiff's construction progresses, and it allows the defendant in all cases to force the plaintiff into litigation over the level of compensation required. Another approach is therefore to allow the construction to go to completion but to deny, delay, or condition the injunctions that might otherwise be automatically available to him. Such an approach is in fact followed by many courts,¹⁰¹ and while it has all the advantages of discretion it has all the familiar shortcomings of unpredictability. These problems in the end are, in all likelihood, unavoidable. A theory of rights may have powerful and unique solutions to the liability question, but the law of remedies will never have a hard-edged and rigorous structure, given its dual concern with both corrective justice and wealth maximization.

IV. THE DISINTEGRATION OF THE PRIVATE MODEL

The last and shortest part of this paper deals with the disintegration of private law mechanisms for controlling nuisances that occur even when

¹⁰¹ See, e.g., *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948); *Pendoley v. Ferreira*, 345 Mass. 309, 187 N.E.2d (1963); *Annot.*, 42 A.L.R. 2d 344 (1972).

utilitarian constraints are superimposed upon the basic corrective justice framework. In particular, the simple manipulation of the rules of private actions becomes progressively more incapable of accomplishing two desirable ends: (1) to limit activities that in the aggregate are far more harmful than beneficial; (2) to create a set of implied restrictions that equalize the benefits and burdens on subject individuals. When these conditions occur direct public regulation is the only possible way both to reduce harmful outputs and to equalize treatment across individual cases.

We can sketch only in very broad form the progression from nuisance to public regulation, showing the interplay between corrective justice and utilitarian principles. Two different cases, both previously encountered, illustrate the inadequacy of any system of private remedies. The first involves obstruction of public highways, and the second the problem of air pollution. Despite their obvious differences in subject matter, both cases share common features that can be incorporated into the general analysis.

A. Highway Cases

Let us return first to those frequent cases where the defendant obstructs a public highway, thereby creating a public nuisance. The plaintiff's damages may consist in physical harm or solely in the delay and inconvenience in travel. As a matter of corrective justice, damages under both heads are recoverable. The initial distribution of property rights is established in favor of the plaintiff, because the highway is defined as a place over which all persons have, within the rules of the road, the right to travel without interference or hindrance from others. The blocking of that right-of-way counts, therefore, as an invasion of plaintiff's right for which damages are *prima facie* appropriate. As a matter of corrective justice, the magnitude and nature of the plaintiff's loss affects the amount of recovery but not the basic cause of action. Corrective justice principles yield, however, in the case of low-level injuries involving reciprocal harms, where the offsets between parties prevent any major shift of wealth. The essence of this position is well captured in the traditional legal distinction between general and special damages. General damages are those suffered by the traveling public generally (i.e., in most cases) while special damages are those which are peculiar to one or a small group of individuals. The point of the distinction is, of course, that individualized remedies are inappropriate where the harms in question are *both* widely distributed and of a low level, but not otherwise. The ideal case for noncompensation on this view is that of traffic delays. At the opposite extreme lies the case of physical injury to an individual traveler. The persistent demand is to identify in approximate terms a sensible middle ground.

Consider only two fact patterns. The first involves an obstruction created by the defendant which forces a bus carrying children off the public highway. The magnitude of individual injuries and the number of claims call for the unqualified application of corrective justice principles, as much as when the defendant rams the children's bus. The second, and borderline, case involves a plaintiff who is blocked from entering his own land by the defendant's obstruction upon the public highway. If physical injury marks the line between general and special damages, the nuisance is not actionable. Long ago, however, the alternative view was adopted because "plaintiff had more convenience by this highway than any other person had, and so when he is stopped he suffers more damage because he has no way to go to his close."¹⁰² These damages are not widely diffused and they do appear to rise above the level of background damages for which the live and let live rule is appropriate. The case could be argued the other way, but without any major effect on the overall strategy. The crucial issue is not the correct resolution of all intermediate cases, but the clear sense of where and why the difficult cases tend to arise.

Thus far we have not ventured beyond the previous two levels of analysis. A closer look at cases of highway delay shows that conditions for applying utilitarian constraints upon the corrective justice theory are indeed by no means satisfied. Unlike the usual cases of live and let live, it is doubtful whether all parties concerned are better off if traffic delays occur without legal sanction. The party causing the inconvenience will have an incentive to take into account only his own delays, but not those of others. Likewise, there is no real confidence that all persons have an equal likelihood of being victims or perpetrators of the admitted wrong. Older, poorly maintained cars are much more likely to break down than newer ones; careless drivers are apt to have more accidents than careful ones; and heavy trucks may cause greater disruption than cars. It follows therefore that the dominant reason for denying individual remedies is the administrative costs associated with their prosecution. Yet the complete abandonment of the compensation ideal carries with it the unfortunate consequence, not that aggrieved parties will not collect trivial sums, but that injuring parties will not pay substantial ones. When private remedies are enforceable, incentive issues take care of themselves, as damages paid on individual claims provide signals that work to deter future wrongs by others. When administrative reasons call for the abrogation of private actions, the incentive arguments then assume an independent role, lest the wrongdoers need not pay anyone at all. It therefore becomes appropriate to institute fines or other public controls in highway cases in order to create some inducement to avoid the tie-ups which cause the

¹⁰² Anon., *Y.B. Mich.* 27 Hen. 8, f. 27, pl. 10 (1535), as translated in Fifoot, *supra* note 3.

very damages that in principle, if not in practice, should be actionable in private suits. The public at large benefits because fines and direct regulations reduce the likelihood of tie-ups; and prevention of repeated wrongs is worth more than trivial compensation for actual, if occasional, ones. The public also benefits because the fines help defray costs of administering the regulatory system. By the same token, the individual offender cannot complain because, even though burdened with a fine, he is spared the costs of a host of individual law suits for which he should in principle answer.

Corrective justice is, therefore, attenuated in a regulatory system. Yet even with a major institutional transformation, several points remain. First, corrective justice principles still help us decide who is a wrongdoer and who is an innocent driver. Even if it were in principle possible to pay bounties to those who did not block traffic (a realistic alternative with respect to single-source polluters), that course is not appropriate for moral reasons. The real question is the choice of remedies to be applied to highway accidents. Here it is difficult to make any hard and fast judgments. In the private law of nuisance, identifying invasions of an individual right has far greater intellectual rigor than the selection of the proper remedy once the invasion is identified. Such is the lesson of the coming to the nuisance question. The same dichotomy appears in the public context. Fines are the public analogue to damages; various restrictions upon entrance and use of the public highways are the analogues to various types of injunctions. In the private context no simple rule allows an automatic choice between one remedy and the other; so, too, in the public context some mix between damages and other forms of specific relief are doubtless required. Corrective justice arguments identify the wrongdoer; utilitarian constraints give some clue as to the nature and object of the public remedies. By its mix of fines and direct public controls, the system itself will aim only to reduce the inconveniences and the delays to an acceptable level, *not* to eliminate them in their entirety. The lesson of the live and let live rule is that it is simply too costly for all concerned to have a zero level of interference: low-level reciprocal harms should be tolerated in the public, as in the private, context. Likewise, the private law treatment of extrasensitive plaintiffs suggests that no system of public control should hope to accommodate the needs and desires of those whose preferences are at wide variance from the large bulk of the population.

B. *Air Pollution*

A similar analysis applies to the case of air pollution. Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights. Nonetheless with-

out some form of pollution control, the aggregate level of emissions will in most environments exceed the levels which most individuals regard as appropriate. Half of the live and let live maxim is satisfied in that most persons who cause air pollution suffer from it. Yet, unlike the usual live and let live situation, the damages that each inflict quickly become greater than the benefits that each receives. Public regulation is justified therefore not because we have invented a new form of wrong which was not cognizable as a matter of private law. It is justified because all private remedies are inadequate for the protection of admitted private rights, given the administrative complications that they spawn, even after taking into account the utilitarian constraints. The real challenge is not to identify pollution as a wrong: such is already done by the corrective justice principles of the private law of nuisances. It is to determine which set of public and private remedies will control the situation without creating the symmetrical error of overregulation of near harmless activities. Again the choice is among direct emissions controls, taxes, quotas, impact statements, and any other device that legal and technical minds might devise. And again reduction to low levels, not total elimination, is all that is required. The need for rough cost-benefit calculations becomes ever more insistent even as the problems to which they are addressed become ever more difficult. Against the backdrop, the language of absolute rights is muted but not forgotten. As in the other cases the progression from corrective justice to public regulation need not be seen as a set of haphazard steps not governed by any clearly discernible principles. It is possible, both in the pollution cases and in the others that we have considered, to trace the heritage of private law concepts into problems which, solely because of their bulk and unwieldiness, have become the proper subject of the public law.

UTILITARIANISM, ECONOMICS, AND LEGAL THEORY

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AMONG the severest critics of the use of economic theory to explain and sometimes to justify the principles of torts, contracts, restitution, and other fields of Anglo-American judge-made law¹ are those who attack the economic underpinnings of the theory as a version of utilitarianism.² Their procedure is first to equate economics with utilitarianism and then to attack utilitarianism. Whether they follow this procedure because they are more comfortable with the terminology of philosophy than with that of the social sciences or because they want to exploit the current tide of philosophical hostility to utilitarianism³ is of no moment. The important question is whether utilitarianism and economics are really the same thing. I believe they are not and, further, that the economic norm I shall call "wealth maximization" provides a firmer basis for a normative theory of law than does utilitarianism. This paper develops these propositions.

Part I addresses several preliminary issues, including the distinction between positive and normative analysis (and, within the latter category, be-

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¹ See, e.g., Richard A. Posner, *Economic Analysis of Law* (2d ed. 1977) [hereinafter cited without cross-reference as *Economic Analysis of Law*], and references cited therein; and, for some recent additions to the literature, Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *J. Legal Stud.* 1 (1978); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. Legal Stud.* 83 (1978); and George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods under the Uniform Commercial Code: An Economic Approach*, 91 *Harv. L. Rev.* 960 (1978). I use the term "judge-made" rather than common law to avoid lawyers' quibbles over the technical meaning of the latter term.

² For recent examples see Richard A. Epstein, *Book Review: The Next Generation of Legal Scholarship?* 30 *Stan. L. Rev.* 635, 645 n.35 (1978); and *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 *J. Legal Stud.* 49, 74-75 (1979).

³ For an example of the tendency in modern philosophy to treat utilitarianism dismissively see Robert Nozick, *Anarchy, State, and Utopia* 62, 201 (1974); and Bernard Williams, *A Critique of Utilitarianism*, in J. J. C. Smart & Bernard Williams, *Utilitarianism For and Against* 77, 149-50 (1967).