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Nuisance as a Strict Liability Wrong

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Gregory C. Keating¹

I. Tort Theory and the Law of Nuisance

The law of nuisance itself is preoccupied with harms that make living things wither and die— with foul odors and stenches, with coal dust and chemical waste, with cesspools and pollutants. Only theory has bloomed in the blighted terrain of the field. Here, ironically, nuisance law has shown a fertility which may not be matched by any other subfield of either tort or property. Fifty years ago, Ronald Coase’s great paper on “social cost” took examples drawn from the law of nuisance as its principal stimulation and subject.² The mode of analysis he inaugurated and the debates he started have not yet begun to wither.

The attractions of the field for economic analysis are plain and powerful. Nuisances are the regrettable side effects of productive uses of land clashing with one another, vivid instantiations of the problem of harmful externalities. The thought that we should address such harmful side effects by minimizing the costs they inflict, and thereby maximizing the overall value we extract from the clashing activities is so intuitive as to seem almost self-evidently correct. We prize the activities because they create economic value. It would be wasteful and irrational to forego them because they also do harm, unless the harm they do exceeds the value they create. Rationality itself seems to call for maximizing net value. Better yet, this simple but powerful line of thought plausibly promises to hold the key to the rational ordering of property and liability rules more generally. The choice between such rules might be made in a unified and rational way by investigating which legal instrument will best promote the maximization of wealth in the circumstances at hand³ With little exaggeration, then, we might say that the fouled landscape of nuisance law gave birth to nothing less than the economic analysis of law itself.

The law of nuisance itself, however, has proven surprisingly inhospitable to the theory it inspired, a fact which did not escape Coase. “The reasoning employed by the courts in determining legal rights” he wrote “will often seem strange to an economist because many of the factors on which the decisions turn are, to an economist, irrelevant . . . [S]ituations which are, from the economic point of view, identical [are] treated quite differently by the courts.”⁴ The nerve of the problem is this: for Coase, property rights and liability rules are purely instrumental. In nuisance cases, their application should be governed by the goal of

¹ William T. Dalessi Professor of Law and Philosophy USC Gould School of Law. I am grateful to the participants in the conference, especially to Eric Claeys, Henry Smith and Ben Zipursky, for illuminating comments and discussion. Separately, I am indebted to Scott Altman, Shmuel Leshem, Arthur Ripstein and Gary Watson for illuminating exchanges on the subject of this paper. .

² Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Calabresi & Melamed’s ideas have, of course, spawned a vibrant and sophisticated literature.

⁴ *Id.* at 15. The features of the cases that trouble Coase are fundamental to nuisance law. The courts ask who did what to whom, and decide the cases by determining what the rights of the parties are.

maximizing the total value extracted from the conflicting uses. Nuisance law itself is preoccupied with whether the defendant has wrongly harmed the plaintiff by unreasonably interfering with her use and enjoyment of land. For Coase, the question of whether the defendant has harmed the plaintiff is not only the wrong question, it is deeply confused. For Coase, when uses run afoul of one another, causation itself is reciprocal, and each use is equally responsible for the ensuing disvalue. Coase's annoyance with the law of nuisance⁵ thus has its roots in the fact that his prescription for reconciling conflicting uses is "not at all how the law usually proceeds. Courts routinely speak in terms of who has injured whom, and they often ask simply whether the plaintiff's rights have been invaded."⁶ Legal right appears to be one thing, economic rationality another.⁷

If this is not embarrassment enough, modern American nuisance law is also recalcitrant to the competing theories of tort advocated by philosophers. Philosophical theories of tort are broadly congruent with the framework of nuisance law in putting the questions of what rights people have, and who did what to whom, at the center of their thinking. Philosophers of tort have, however, developed the general thesis that tort law is about wrongs into the more particular claim that tort liability is predicated on the commission of "conduct-based wrongs."⁸ The concept of a "conduct-based wrong" fits fault-based wrongs well, but it

⁵ Coase was particularly exercised by the reasoning in *Sturges v. Bridgman*, 11 Ch. D. 852 (1879) and *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79). *Sturges* is the case of the confectioner causing vibration and noise and thereby interfering with the activity of the doctor on the other side of a common wall, who had recently constructed his examining room adjacent to that wall. For Coase, the "solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's." *Id.* at 9. For the court that decided the case, the violation of plaintiff's right to the reasonable use and enjoyment of its property was plain, and the defendant's main argument was that the nuisance had continued so long that defendant had acquired an easement by prescription. The defendants in *Bryant* had torn down their house, constructed a taller one on the same site, and stacked lumber on its roof. Subsequently, the smoke in the chimneys of plaintiff's adjacent house would back up (because the new, taller home blocked the passage of air). For Coase, the causation of "harm" was once again reciprocal, and the right question was how to arrange the legal rights of the parties in a way which would maximize the total value extracted from both uses. For the judges who decided the case, the question was whether the defendants had violated any right of the plaintiffs by constructing their taller house and stacking wood on its roof. They held that any "right [that] the wind should not be checked" is limited by the "rights of neighbors "to use their property in the various ways in which property is commonly and lawfully used." By this criterion, none of plaintiff's rights had been violated. A.W.B. Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 89-92 (1996) argues that the judges took no real interest in the economic question.

⁶ Henry Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970 (2004). For discussion and illustration of the invasion approach and discussion of its influence, see Richard A. Epstein, *Nuisance Law Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 53-56 (1979). See also Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986) (emphasizing the identification of nuisance with a rights invasion in late nineteenth century law); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL. STUD. 13, 26-35 (1985) (listing and examining four tests for nuisance); J.E. Penner, *Nuisance and the Character of the Neighborhood*, 5 J. ENVTL. L. 1 (1993) (defending the traditional conception of nuisance in which harm and invasion of right are central against modern developments which reflect the influence of balancing tests and economic ideas). The view taken of nuisance in this paper might be described as a modified invasion view, because it identifies nuisance with a particular kind of harm, violating a right.

⁷ In a striking recent paper, Harold Demsetz has suggested that the full articulation of legal rights really ought to be understood as a precondition, not a subject, for the efficient operation of markets. Harold Demsetz, *The Problem of Social Cost: What Problem?* Paper presented at USC Gould School of Law Center for Law, Economics and Organization Workshop (August 30, 2010).

⁸ These claims tend to characterize corrective justice theory and, to a lesser extent, civil recourse theory. For discussion, see Gregory C. Keating, "The Priority of Right over Repair," forthcoming *Legal Theory*.

obscures the distinctive features of modern American nuisance liability. When liability is predicated on fault, the law targets the conduct responsible for the infliction of injury. A judgment of fault asserts that defendant's conduct was wrongful, that the defendant should have conducted itself differently and thereby avoided inflicting injury. Fault liability criticizes *primary* conduct—conduct responsible for doing harm—not *secondary* conduct, that is, conduct concerned with making reparation for harm done. Fault liability holds that reparation is in order because defendant's primary conduct was wrong.

Liability in nuisance does not fit this template of conduct-based wrong because liability in nuisance is a canonical strict liability wrong. In its most important and distinctive modern form, nuisance liability faults *not* the primary conduct of defendants in inflicting harm, but their *secondary* conduct of failing to make reparation for harm justifiably inflicted. The distinctive contribution of nuisance law to tort is made by the law of intentional, unreasonable nuisance. That contribution is to predicate liability not on unreasonable conduct but on unreasonable harm. Unreasonable harm arises out of primary conduct which is reasonable. Its unreasonableness lies in the defendant's failure to step forward and repair the harm that it has done.

What nuisance law has to offer philosophical theories of tort, therefore, is instruction about the character of strict liability in tort—its formal structure and its substantive morality. Modern intentional nuisance law is a canonical instance of a strict liability wrong.⁹ More clearly, perhaps, than any other form of tort liability, nuisance shows that harm-based strict liabilities are constructed around the distinction between inflicting harm wrongfully in the first instance and failing to make reparation for harm reasonably inflicted. This form is the expression of a distinctive substantive morality. Modern intentional nuisance law embodies a morality of responsibility for harm which *should* be inflicted.

As embodied by its most important case—*Boomer v. Atlantic Cement*¹⁰—modern intentional nuisance law is constructed around two principles. The first is that nuisances should be abated when it is “feasible” to do so—when abating the nuisance will not require shutting down the valuable, productive activity responsible for its infliction. The second is that the cost of harm which cannot feasibly be avoided should be borne by those who deliberately inflict it in pursuit of their own ends, and who generally profit from so doing.

⁹ A large part of the paper will be devoted to an account of nuisance law, and especially its distinctive modern manifestation. That account differs from prevailing philosophical accounts, for example, from the short but provocative treatment given by ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 190-96 (1995). The account that I propose is close to Richard Epstein's important account, but differs in its emphasis on the idea of a distinctive modern nuisance regime. See Epstein, *supra* note 6. My account also differs sharply from most economic accounts. The dominant tendency of conventional economic accounts is to assimilate nuisance to negligence law, conceived economically as a matter of cost-benefit balancing. These accounts are perceptively criticized by Henry Smith in *Exclusion and Property Rules in the Law of Nuisance*, *supra* note 6, esp. at 992 (2004) (“evidence of courts engaging in cost-benefit analysis is surprisingly slight”). Smith's own view of the law of nuisance is much closer to the view taken in the text, insofar as it views nuisance as essentially strict. Smith's view differs from the view taken here in assimilating nuisance to trespass more than this paper does. This paper distinguishes the two torts sharply, on the view that trespass protects the right to exclusive control whereas nuisance protects the right to reasonable use and enjoyment. The right to exclusive control is a sovereignty right, and the tort of trespass is a boundary-crossing one, whereas the right in nuisance is right not to be harmed in a certain respect, and the tort is a harm-based one. See *infra* notes 14 & 20.

¹⁰ 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (N.Y. 1970). For convenience, I shall sometimes refer to modern nuisance liability as “the *Boomer* regime.”

Boomer states a unified view of responsibility for avoiding and repairing harm, and strict liability in *Boomer* is a morality of responsibility for unavoidable harm.

On the one hand, the morality of modern intentional nuisance law differs markedly from the morality of efficiency. First, that morality is concerned with the fair reconciliation of the rights of the parties, not with extracting maximum economic value from conflicting uses of land. Nuisance law's preoccupation with right and fairness, and not with efficient resource use, is most evident in the law's insistence that the costs of harm, which *should be inflicted*—that is, the costs of *justified* interferences with the reasonable use and enjoyment of someone else's land—ought to be borne by the party responsible for the infliction. Second, right, fairness and harm justify taking *more* than cost-justified precaution. The stringency of *Boomer's* feasible precaution standard is justified by the victim's right not to be harmed in the use and enjoyment of their property. *Boomer* is, indeed, a testament to the moral significance of harm for tort. Harm ought to be avoided if it can be avoided, and amends must be made for its infliction if it cannot be avoided.

On the other hand, in its insistence that reparation be made for harm justifiably done, the morality of modern nuisance law differs from the fault-based morality embraced by the corrective justice theorists who conceive of tort as a realm of conduct-based wrongs. For those theorists, when harm is not wrongfully inflicted it is no different from harm done by natural forces. With fault we have misfeasance and responsibility, without fault we have misfortune and bad luck.¹¹ The question of responsibility for reasonably inflicted, justified harm simply isn't on the table. Modern nuisance law denies this: it holds that (in the circumstances to which it applies) harm reasonably done ought to be repaired by the party who does it. Harm—not wrongful conduct—is the central preoccupation of nuisance law.

A. Strict Liability as a Conditional Wrong

Strict liability thus occupies a space that negligence liability tends to eclipse. In negligence, the obligation to repair arises from the wrongful infliction of harm, from the fact that unjustifiable injury was inflicted. In strict liability, the obligation to repair arises from the perception that the deliberate infliction of may give rise to responsibility to repair even when that infliction is justified. Whereas negligence addresses responsibility for harm which should have been avoided, strict liability addresses responsibility for harm which should *not* have been avoided, and focuses on who should bear the costs of that harm. In the circumstances where it governs, it holds that it is wrong to do harm without stepping forward and making good the harm done. The primary duty is not a duty not to harm; it is a duty to harm only through reasonable, justified conduct and to make reparation for any harm reasonably done.

A conduct-based wrong is one where a right is violated by an agent who has failed to conform her conduct to the standard required by the law. Fault liability is a canonical illustration; it predicates responsibility for physical injury on the judgment that the defendant

¹¹ See, e.g., Arthur Ripstein & Jules Coleman, *Mischief and Misfortune*, 41 MCGILL L. REV. 91, 113 (1995) (“For the agent who follows the moral law, his agency—for which consequences of his or her actions he or she is responsible or owns—pretty much ends with the intended consequences of his or her action...Simply substitute fault for the moral law. The person who is at fault opens himself or herself up to liability for unintended consequences of his conduct, including some that would not have occurred but for the conduct of others...Fault, far from rendering causation and agency otiose, actually defines the scope of their relevance”).

failed to conform her conduct to the standard of reasonable care.¹² Conduct-based wrongs express what I shall call *primary* criticism of conduct.¹³ The law lodges its criticism against the infliction of harm in the first instance, on the ground that the conduct responsible for the harm was wrong, and that the harm, therefore, should never have occurred. Strict liability, by contrast, predicates responsibility on the judgment that the conduct at issue was justified (or reasonable) *in inflicting injury, but unjustified (or unreasonable) in failing to repair the injury done*.¹⁴ This is *secondary* criticism of conduct. The law lodges its criticism against harming justifiably-without-repairing. This kind of strict liability identifies a kind of *conditional wrong*. It circumscribes a domain within which the infliction of harm is justifiable, but only on two conditions: (1) that the conduct inflicting injury is justified or reasonable; and (2) that reparation is made for physical harm done by that reasonable conduct.

Conditional privilege in the law of private necessity—the doctrine of *Vincent v. Lake Erie*¹⁵—illustrates the distinction between primary and secondary criticisms of conduct. The defendant ship owner’s conduct in lashing its ship to, and damaging, the plaintiff’s dock was reasonable not unreasonable, right not wrong. The defendant had the right to use the dock to save its ship from destruction at the hands of the storm, even if using the dock involved damaging the dock. The defendant’s privilege¹⁶ to trespass was *not* conditioned on doing no harm to the dock, a requirement which would have been virtually impossible to meet in the circumstances. The defendant’s privilege was conditioned on making reparation for any harm done to the dock, *even though that harm was done rightly and not wrongly*. The wrong in *Vincent* lay not in the defendant’s doing damage to the dock, but in the defendant’s failure to step forward in the aftermath of the storm and make good the damage done the dock. The defendant’s conduct was wrongful (or unreasonable) only insofar as defendant failed to step forward and volunteer to repair the damage done by its (reasonable) conduct.

Vincent’s strict liability is thus liability for unreasonable harm, not liability for unreasonable conduct. In *Vincent*, making reparation for the harm done by docking prevents the injustice

¹² The fundamental question in negligence law is whether conduct falls below “a standard established by the law for the protection of others against unreasonable harm.” Negligence law fixes that standard by the *conduct* of a “reasonable person in the circumstances.” RESTATEMENT (SECOND) OF TORTS § 283. See, e.g., *Ladd v. County of San Mateo*, 12 Cal.4th 913, 917 (1996).

¹³ I owe this term to Lewis Sargentich. Robert Keeton’s contrast between “fault” and “conditional fault” also describes the distinction drawn in the text. See *infra* note 18.

¹⁴ Strict tort liabilities based on violations of “sovereignty rights”— liability for trespass, conversion, and some batteries— do not meet the description in the text. These rights impose conduct-based duties not to cross the boundaries that they prescribe. See *infra* note 20.

¹⁵ 109 Minn. 456, 124 N.W. 221 (Minn. 1910).

¹⁶ Taxonomically, this is a complicated matter. In Hohfeldian terms, the ship’s privilege to enter is a right: the ship is entitled to enter, and the dock owner is under a duty not to resist. See Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests in of Property and Personality*, 39 HARV. L. REV. 307 (1926). This privilege is also a power in Hohfeld’s terms, because it enables the ship owner to alter its relations with the dock owner without the dock owner’s permission, as long as the ship enters the dock owner’s property for certain purposes (to save its own property), and conducts itself in certain ways (only does what is necessary to save its own property). Along with Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959), Bohlen’s article is a classic statement of the idea of strict liability I am developing in this paper. Similar positions have also been reached by others. See, e.g., Howard Klepper, *Torts of Necessity: A Moral Theory of Compensation*, 9 L. & PHIL. 223, 239 (1990) (“The need to compensate in the necessity cases is best explained by the wrongfulness of knowingly benefitting oneself by transferring a loss to another, however reasonably, and then letting the loss like with one’s unwitting benefactor. Such a transfer of the loss or risk is wrongful in that it does not allow the innocent party to freely chose the risks she is willing to undertake.”).

of shifting the cost of the ship's salvation from the ship owner who profits from it onto the dock owner who does not. The imposition of liability on the ship owner for failing to make such reparation rights the wrong of shifting the cost of the ship's salvation onto the dock owner whose property is the instrument of that salvation. The wrong in strict liability is thus "harming justifiably but unjustifiably failing to repair the harm justifiably done."¹⁷

Structurally, strict liability in tort resembles eminent domain in public law. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation from those whose property it takes. This is a two-part criterion. First, the taking must be justified; it must, that is, be for a public use. Second, compensation must be paid for the property taken. Strict liability in tort has a parallel structure.¹⁸ In negligence, the defendant's primary conduct determines liability, and it does so only when that conduct is wrongful. In strict liability, the defendant's conduct triggers liability when the defendant's failure to step forward and repair a harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, and not by those whose misfortune it is to find themselves in the path of someone else's pursuit of their own benefit, however reasonable that pursuit may be.

Strict liability thus involves both fairness or justice, and wrong or rights-violation. To say that it is unfair for an injurer to thrust the cost of its activities onto a victim is not the same as saying that the victim's right is violated by so doing. It may, for example, be unfair for me to rebuild my house and block the passage of air through your chimney. The loss to you may be great and the gain to me may be trivial. Unless you have a right to that passage, however, what I have done is not a legal wrong.¹⁹ Strict liability is thus justified both by the principle of fairness that those who benefit from inflicting harm on others should also shoulder the cost of that harm *and* by the further claim that the harm done is the invasion of a right so that failure to make reparation for harm done would be a wrong. Strict liability supposes that an injurer subject to a regime of strict liability does wrong when the injurer fails to step forward and repair harm rightly inflicted, and it makes this assertion because leaving the cost of the harm on the victim who suffers it shows insufficient respect for the

¹⁷ *Vincent* is thus a clear counter-example to the claims of some prominent tort scholars that strict liability involves a duty not to do harm, full stop. Jules Coleman and John Gardner hold views of this kind. See Jules Coleman, *Facts, Fictions, and the Grounds of Law*, in *LAW AND SOCIAL JUSTICE* 327 (Joseph Keim Campbell et al. eds., 2005). See also JULES COLEMAN, *THE PRACTICE OF PRINCIPLE*, 35 n19 (2001) ("The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the duty is a 'duty not to harm someone', while in fault, the generic form of a duty is a 'duty not to harm someone negligently or carelessly'."). See also John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ* 111 (P. Cane & J. Gardner eds., 2001).

¹⁸ This "private eminent domain" conception of strict liability may make its first appearance in American tort theory in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed in Thomas C. Grey, *Accidental Torts*, *VAND. L. REV.* 1225, 1275-1281 (2001) and at greater length in his unpublished manuscript *Holmes on Torts* (on file with author). Two other classic statements are Francis Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 *HARV. L. REV.* 307 (1926) and Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 *HARV. L. REV.* 401 (1959).

¹⁹ *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79).

victim's rights—rights of property in the case of both nuisance and conditional privilege to trespass in circumstances of private necessity.²⁰

Vincent is once again illustrative. It would not only be unfair for the ship owner to shift the cost of saving its ship off onto the dock owner; it would also violate the dock owner's property rights. The dock owner's right to exclude the ship must yield to the dire emergency—the “necessity”—in which the ship found itself.²¹ But there is no reason why the dock owner's right to the integrity of its property should give way. Saving the ship requires damaging the dock, but it does not require that the cost of saving the ship be shifted onto the owner of the dock instead of being borne by the ship owner who profits from doing that damage. Harm-based strict liabilities thus define a particular class of *conditional wrongs* where the law lodges its criticism against defendant's secondary failure to repair, not against defendant's primary, injury inflicting conduct.²²

B. Strict Liability and Intentional Nuisance

Fault theorists sometimes claim that *Vincent* is a foreign body in the law of tort, and propose to expel it in order to preserve the purity of tort law.²³ Intentional, unreasonable nuisance is the canonical harm-based strict liability in tort and proof that strict liability cannot be so easily purged from the field. In its modern form, intentional nuisance is constructed around a distinction between unreasonable conduct and unreasonable harm, and holds that reparation is due when unreasonable harm is inflicted. Liability for unreasonable harm is strict. Because unreasonable harm is contrasted with unreasonable conduct, intentional nuisance liability is the clearest expression of harm-based strict liability in the law of torts. The same kind of strict liability is also found in the doctrine of conditional privilege in the law of private necessity; in the liability of masters for the torts of their servants committed within the scope of their employment in vicarious liability law; in abnormally

²⁰ Two kinds of strict liabilities are prominent in the law of torts. Nuisance and conditional privilege in the law of private necessity are “harm-based.” In these cases the rights involved are rights which confer protection against some kind of harm, e.g., harm in the form of unreasonable interference with one's use and enjoyment of one's land. Other strict liabilities are “sovereignty-based.” These are predicated on interference with a right which is also a power of control over some prized zone of discretion, one's person, or one's property for example. The rights involved are examples of “autonomy rights,” and the torts proscribe unauthorized entry into a zone of autonomy. Battery in some of its incarnations, trespass, and conversion are examples of sovereignty-based torts. For reasons explained in the text, “harm-based” strict liabilities in tort are not conduct-based wrongs whereas “sovereignty-based” strict liabilities can at least be wedged into that category. For further discussion, see Gregory C. Keating, *Is the Role of Tort to Repair Wrongful Losses?* in A. ROBERTSON & D. NOLAN, EDS., *Rights in Private Law* (forthcoming, Hart Publishing, 2011).

²¹ “The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control. . .” *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221 (Minn. 1910).

²² It is possible to construe the concept of a conduct-based wrong in a way which obliterates the distinction between primary and secondary criticism of conduct. Asserting, say, that any conduct which violates a right is wrongful conduct obliterates the distinction. Some tort scholars including, perhaps, Ernest Weinrib and Arthur Ripstein, may hew to such a conception. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). The fundamental reason to reject this understanding of “conduct-based wrong” is that obliterating the distinction between primary and secondary criticism of conduct impairs our ability to understand strict liability in tort. We want categories which enable comprehension instead of frustrating it.

²³ The most prominent contemporary proponent of this view is Ernest Weinrib, who argues that *Vincent* is an instance of restitutionary liability. See WEINRIB, *supra* note 22, at 196-203. For Weinrib, tort is identified with fault liability, though not in so many words. But see Richard Epstein, *A Theory of Strict Liability*, 2 J. OF LEGAL STUD. 151, 158-66 (1973) (treating *Vincent* as a canonical case of liability in tort).

dangerous activity liability; and in product liability for manufacturing defects. These strict liabilities, however, do not cast strict liability itself into such sharp relief.

Intentional nuisance law addresses a circumstance that triggers the moral intuitions that make strict liability attractive. The productive, reasonable use of one piece of property inflicts persistent harmful fallout on other property, interfering with the reasonable use and enjoyment of that property. The noise and vibration from a confectioner's equipment interferes with a doctor's efforts to diagnose his patient's by listening to their heart and lungs. A cement plant interferes with the activities of its residential neighbors because cement dust and particulate pollution foul their yards and their homes. Making candy and cement are perfectly reasonable things to do, but so, too, are practicing medicine and living. Yet the exercise of reasonable care leaves us face to face with harms whose infliction is deliberate, reasonable, and certain. We want the activities but not the harms, yet in the most salient of nuisance cases that is precisely what we cannot have. What are we to do? Strict liability is nuisance law's answer to this question.

C. The Argument of the Paper

The paper will proceed as follows. The remainder of this section will orient our inquiry in two ways. First, it will summarize the distinctive, controversial claims that make *Boomer* a provocation for tort theory. Second, it will situate the law of nuisance in a general way, locating nuisance on the larger landscape of tort and property. Like trespass, nuisance is situated at the boundary of the two fields. Both torts are strict, and both torts protect property rights, but they differ in fundamental ways. Trespass protects the inviolability of zones of discretionary control whereas nuisance governs harmful spillovers. By virtue of this difference, reasonableness is fundamental to nuisance and largely irrelevant to trespass. *The* problem of nuisance is reconciling rights whose exercise tends to interfere with one another. Trespass, by contrast, is about a domain of essentially self-regarding behavior. Whether or not people act reasonably, their rights will rarely conflict. The two torts therefore tread different paths.

Part II digs into longstanding, central nuisance doctrines that determine the basic way in which nuisance law reconciles competing rights of reasonable use. Nuisance is not a gnarly field of law by property standards, but it is a thicket of sorts. Protean concepts of substantiality and reasonableness figure prominently in the law and open nuisance to radically different interpretations. Notwithstanding these complexities, Part II shows that traditional nuisance law is a regime of equal right and that nuisance liability is fundamentally strict.

Because nuisance law is tangled and elusive Part II is characterized by both untangling and reconstructing. Section A of Part II begins this untangling by showing that impact not conduct is the essence of nuisance, and how a form of intentional strict liability is, therefore, constitutive of the tort. Section B of Part II wades into some of nuisance law's thorny details—the hypersensitivity and “coming to the nuisance” doctrines, and the “live and let live” and “locality” rules. These longstanding doctrines fix thresholds for and limits to nuisance. Taken together they articulate a coherent regime of roughly equal right, a regime which grants to everyone the *equal* right to the use and enjoyment of their land by granting to everyone the right to the *normal* use of their land. The details of these doctrines flesh out ideas of reasonableness and reciprocity that are central to nuisance liability. Section C

follows the idea of reasonableness as it develops— in modern American nuisance law— into a distinction between unreasonable conduct and unreasonable harm. Unreasonable conduct is a familiar idea, namely, the idea of negligent conduct applied not to risk, but to conduct that is certain to cause harm. The idea of unreasonable harm, for its part, is a further refinement of strict liability in nuisance, a refinement which fully expresses the distinction between primary and secondary criticism of conduct. With this distinction in hand, the stage is set for *Boomer*.

Part III explains *Boomer's* perfection of modern nuisance law. The general structure of nuisance law is three-tiered. Low-level nuisances are governed by the “live and let live” rule. This rule defines a class of nuisances with respect to which equal right is equal right to inflict mutually beneficial harm. Doctrines like “coming to the nuisance,” the “locality rule,” and the “hypersensitivity” rule ingeniously extend this regime to cases where the harm is significant and even severe. When the threshold of actionable harm is crossed, modern nuisance law is governed by a distinction between unreasonable conduct and unreasonable harm. Nuisances attributable to unreasonable conduct are enjoined whereas those characterized by unreasonable harm trigger money damages as a matter of right. The unreasonable harm prong of modern nuisance law constitutes nuisance as a conditional wrong, a wrong whose strictness lies in criticizing not the infliction of injury in the first instance, but the failure to make reparation for harm reasonably done.

The great achievement of *Boomer* is to clarify the morality of both unreasonable conduct and unreasonable harm, thereby giving a clear representation of nuisance as a strict liability wrong. Under *Boomer*, harm-inflicting conduct is unreasonable when the harm inflicted might feasibly be avoided, when it might be eliminated without ending or crippling the activity responsible for its infliction. Unreasonable harm is harm that should be inflicted; it is the unavoidable side effect of productive use that we are not prepared to forego. Strict liability in *Boomer* is thus a morality of responsibility for unavoidable harm, a morality of responsibility for the harmful effects not of *wrongful* agency but of agency itself. Fairness, *Boomer* asserts, requires that unavoidable harm be borne by those who inflict it and who benefit from so doing.

Part IV examines *Boomer's* challenges to tort theory. The most important challenge that it mounts is to the dueling theses that now dominate thinking about tort. For legal economists, tort is a law of costs and benefits. For moral theorists, tort is a law of corrective justice and wrongful agency. For *Boomer*, it is harm not wrongful agency that matters most, with harm being something more focused and more detrimental than a cost. Harm impairs, seriously and perhaps permanently. *Boomer* suggests that harm is the missing concept in contemporary tort theory and of fundamental significance for tort. Harm should be avoided when it is feasible to do so and repaired when it cannot be avoided.

Boomer is also the canonical expression of modern strict intentional nuisance liability. Strict liability does not fit easily either with the prescriptions of law and economics or with the prescriptions of corrective justice theory. Strict liability is concerned primarily with who should bear the cost of justified harm, not with minimizing unjustified harm. Further, it is not a “conduct based wrong.” It predicates responsibility not on criticism of primary conduct for wrongly inflicting injury, but on criticism of secondary conduct. Strict liability criticizes the unreasonableness of an actor’s doing harm deliberately and in pursuit of its own profit, yet failing to bear the cost of the harm that is done. It criticizes the injustice of

appropriating the benefits while thrusting the burdens onto others. So doing is an unfair way of reconciling equal rights.

1. *Boomer's Burden*

The development encapsulated in *Boomer* is controversial. It is rejected, for instance, by Ernest Weinrib, and understandably so.²⁴ From the perspective of a theory which sees tort adjudication as concerned solely with the rights of the parties against one another, *Boomer* is a wrong turn. *Boomer* makes the rights of the parties before the court turn on the interests of others who are affected (those who stand to lose their livelihoods if the cement plant is closed), and the damage remedy that it grants, in lieu of an injunction, can be criticized for failing to restore the right it purports to vindicate. Plaintiffs, one might reasonably observe, do not get back the right to the reasonable use and enjoyment of their property. They must continue to endure the dust spewed by the cement plant, and that dust will continue to impair the use and enjoyment of their land. All that money damages do is compensate them for bearing the unavoidable cost of an activity that we are not prepared to live without. At the end of the day, the right to reasonable use that the plaintiffs in *Boomer* have is a diminished right.

In light of this line of criticism, *Boomer* bears the burden of showing that money damages reconcile fairly plaintiffs' and defendant's competing rights to the reasonable use and enjoyment of their land and that injunctive relief does not. *Boomer* meets this burden by responding that granting plaintiffs' request for an injunction is too one-sided: plaintiffs' rights to the unimpaired use would be robustly realized, but defendant's equal right to the reasonable use of its property would be stunted. Permanent damages affect a fair distribution of reasonable, or necessary, harm. This counterargument rests both on a claim about what is fair between the parties and on an appraisal of the interests of persons who are not before the court, most prominently, the interests of the 300 workers who stand to lose their jobs if the plant is shut down. Implicitly, the majority opinion in *Boomer* asserts that a right to money damages is— whereas a right to injunctive relief is not— justifiable to all of those affected by the plant's activity.

2. *Orienting Ourselves: Property, Tort and Equal Right*

Before we turn to examining nuisance doctrine in detail, it is worth our while to highlight in advance several fundamental characteristics of nuisance. To begin: nuisance is a matter of both property right and tort duty. The broad, general power to put one's land to any use reconcilable with one's neighbor's equal right to the reasonable use of their land is the right that the tort of nuisance protects.²⁵ The tort duty, however, partially shapes and constitutes the property right because the contours of the tort duty determine the boundaries of reasonable use and enjoyment. Nuisance enjoins landowners to "so use their property as not

²⁴ WEINRIB, *supra* note 22, at 195 n57.

²⁵ The idea that property encompasses a right of use is the subject of intense debate in modern property scholarship. On the one hand, that ownership of property entails a right to put that property to use is widely recognized. See Tony Honoré, *Ownership*, in MAKING LAW BIND (A. G. Guest ed., 1987). How to characterize that right is contested. I am thinking of the right to use as a standing, broad right and power, not as a matter of discrete, highly individuated uses authorized on a case by case basis. I am thus in agreement with the criticism of Coase advanced in Thomas Merrill and Henry Smith, *What Happened to Property in Law and Economics?* 111 YALE L.J. 357 (2001). I part company with Merrill and Smith in that I am not inclined to cast this right to reasonable use as an aspect of the right to exclude. In my view, keeping the two rights separate is essential to understanding the distinction between nuisance and trespass.

to injure another.”²⁶ The spelling out of that maxim determines the limits of permissible use.

Next, the tort of nuisance confers protection against a particular kind of harm. In conferring protection against harm from others and forbidding us to inflict harm on others, nuisance differs markedly from its companion real property tort, trespass, which guards the right to dominion over real property.²⁷ The two torts protect different kinds of rights and address different kinds of circumstances. Trespass guards the use of a power—the right to determine who and what will enter one’s property. That power of control may be violated simply by entering property without the permission of its owner, whether or not that entry causes harm and even if it is, in fact, beneficial.²⁸ Trespass is thus concerned with protecting a canonical zone of self-regarding conduct; it guards that zone against unauthorized intrusion. Nuisance, by contrast, guards use, not dominion, and protects not against unauthorized entry, but against unreasonable interference. Whereas trespass protects a domain of self-regarding conduct, nuisance is all about spillovers. It protects against effects emanating from other people’s use of their land. Harm—impairment of use—is a constitutive element of nuisance and irrelevant to trespass.

Nuisance law’s preoccupation with the reconciliation of rights whose salient property is that they clash makes reasonableness fundamental to the law of nuisance. The task of harmonizing equal rights whose exercise tends to interfere with one another requires adopting an objective point of view, the impartial point of view of a third person. Equal rights can be reconciled on terms that are justifiable to the distinct persons whose rights they are only if each person is prepared to regard the matter from a point of view that is neither their personal point of view nor the personal point of view of the party whose rights conflict with theirs. From that third-person point of view, the test of harmonization is whether or not an articulation of equal rights of reasonable use burdens the exercise of any one or more persons’ rights unfairly. An unfair burden is one which seriously impairs a right of use, and which might be alleviated without imposing a comparable burden on the exercise of anyone else’s rights. Nuisance protects *only* the right to *reasonable* use. It requires that the right to use one’s property be exercised only on terms that are justifiable to all of those affected by the exercise of that right.

By contrast, the tort of trespass guards the exercise of a power to exclude, which can, by and large, be exercised in accordance with the subjective preferences of the party holding the power. Trespass is not subject to a requirement of reasonableness. Objectively *unreasonable* exclusions of others are wholly legitimate.²⁹ With limited exceptions falling under the

²⁶ “Nuisance is based upon the maxim that ‘a man shall not use his property so as to harm another.’” Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 744 (1977). The court goes on to contrast zoning as a “far more comprehensive . . . vital tool for maintaining a civilized form of existence” for the benefit and welfare of an entire community.” *Id.* at 745 (citations omitted)

²⁷ Trespass is what might be called a “sovereignty tort.” It protects a zone of discretionary choice. The commission of a trespass requires only the impermissible crossing of a protected boundary, not the infliction of harm, loss, or injury. For a brief discussion, see Keating, *supra* note 20.

²⁸ See, e.g., Longenecker v. Zimmerman, 175 Kan. 719, 267 P.2d 543 (1954) (plaintiff, who mistakenly believed that defendant’s cedar trees were on its own property trespassed when it had them topped, trimmed, and cleaned because they were in fact on plaintiff’s property).

²⁹ Arguably, the conduct of the plaintiff in *Jacques v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) was unreasonable. Plaintiff refused to let defendant drag a mobile home across its property in the winter, even though doing so would cause no damage and would save defendant considerable expense. Defendant went ahead and did so anyway, and was held liable for punitive damages.

doctrine of necessity, rights to pick and choose who and what may enter our property simply do not require objectively fair reconciliation with the rights of others. Decisions about who to permit to enter one's property are incompatible with the rights of others only in rare cases where inability to enter will result in loss of life or destruction of property. What we do on our own property, and who we permit to enter, are generally our business and our business alone. Responsibility to others begins when what we do on our property harms others. That circumstance brings nuisance into play.

Other prominent, and sometimes puzzling, features of nuisance law fall into place once we recognize the fundamental features of the tort. For example, harm in nuisance law is both an important and a restricted category. Harm in nuisance law is nowhere near as broad as the economic idea of a negative externality. In nuisance, only physical harm and visceral assaults on sensibility are actionable. Strikingly, perhaps, in light of the attention legal economists have lavished on the field, pure economic loss generally does not count as harm.³⁰ Nor for that matter, does mere offense to sensibility. In part these limitations have their origin in direct inferences about what does and does not count as interference with reasonable use. But it is also the case that broader definitions of harm encompassing both pure economic loss and aesthetic affront would make it far harder to reconcile conflicting rights of use of land on fair terms. Perfecting a regime of *equal* right might be impossible if every negative externality were a nuisance. The only equal right compatible with an obligation not to precipitate any negative externalities might well turn out to be an equal right not to use or enjoy one's property at all.

It is far easier to avoid physically harming one's neighbors than it is to avoid diminishing the economic value of their property, and it is far easier to avoid viscerally assaulting their senses than it is to avoid offending their aesthetic sensibilities. Forbidding serious physical harm and severe assaults on sensibility limit but, generally do not cripple, the use of our own property. The same cannot be said of prohibiting any adverse economic impact, or any offense to sensibility. The law of nuisance as we know it permits us to block a neighbor's view or alter the flow of air across her property.³¹ If diminution in economic value constituted a nuisance we could not do so. In the same vein, the law of nuisance allows us to plant pink flamingoes in our front yards, and place satellite dishes on our roofs. If offense to aesthetic sensibility constituted a nuisance, we would surely do these things at our own peril.

Nuisance law's attachment to three distinct ideas of reasonableness also falls into place once we perceive tort's overarching structure and animating concerns. First, there are harms— apparent nuisances— that it is altogether unreasonable to complain about. These harms can neither be enjoined nor assuaged with money damages; they must simply be borne. These are “no liability” nuisances, harms whose infliction is reasonable and which others may reasonably be expected to bear without compensation. Second, in the wake of *Boomer* and the mid-twentieth century transformation of nuisance law, there are nuisances that issue from conduct that is unreasonable, and these may be enjoined. Third, there are nuisances that it is reasonable to inflict, but unreasonable to inflict without compensating

³⁰ See *infra* n. 55, and accompanying text.

³¹ Under the diminution in economic value criterion, classic examples of costs that are not nuisances such as the blockage of the channel of air from plaintiff's cellar in *Bryant v. Lefever*, *supra* note 5, and the blockage of the plaintiff's view by defendant's construction of a 14 story addition to its hotel in *Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fla. Dist. Ct. App. 1959) would be nuisances.

those for whom they are nuisances. Each of these senses of reasonableness articulates a regime of equal right with respect to a particular class of harms. The first class covers harms that neighboring landowners are better off bearing without compensation in exchange for the right to inflict equivalent harm without compensation. The second class covers harms whose infliction is unacceptable, harms which ought not to have been inflicted in the first place. The third class covers harms which it is reasonable to ask landowners to bear only if they are compensated for so doing.

To get a firm grip on the strict liability nuisances that are our principal concern, however, we must explore the law of nuisance in more detail.

II. Nuisance Law

A. Conduct and Wrong

Nuisance, we are often reminded, “is a field of tort liability rather than a single type of tortious conduct.” Its touchstone is “inconvenience to others, rather than the type of conduct involved.”³² Viewed from the vantage point of property law, a nuisance is damage which falls “short of an actual dispossession” and, indeed, of actual entry in the sense sufficient to sustain a claim of trespass.³³ Viewed from the vantage point of tort liability, nuisance is concerned with a particular kind of harm, namely, harm arising from interference with the right to the use and enjoyment of land.³⁴ The conduct giving rise to a nuisance, by contrast, is generally not distinctive in the same way. Indeed, any of three familiar kinds of conduct—intentional, negligent, or abnormally dangerous—may give rise to a nuisance. When nuisance arises out of negligent conduct or an abnormally dangerous activity, however, nuisance adds little if anything to the law of torts. Both general negligence liability and nuisance protect against damage to real property. Nuisance law counts property damage as an interference with the right to reasonable use and enjoyment and the law of accidents counts it as physical harm. Little, if anything, turns on this distinction. To isolate nuisance

³² *Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc.*, 41 N.Y.2d 564, 569 (1977) (citing WILLIAM PROSSER, *HANDBOOK ON THE LAW OF TORTS* 573 (4th ed. 1971)). The Copart court clearly distinguishes the impact or harm constitutive of nuisance from wrongful conduct. Writing about *Boomer*, the court observes “it is obvious that it was not a nuisance in which the substance of the wrong was negligence since it was held that ‘the evidence in this case establishes that Atlantic took every possible precaution to protect the plaintiffs from dust.’ [citation omitted] Rather, it would appear that the nuisance found was based on an intentional and unreasonable invasion. . . .” 41 N.Y.2d at 571. As this passage makes clear, a nuisance founded on “intentional and unreasonable invasion” is not based on conduct that is faulty or otherwise wrongful. The only objection that can be made to the conduct is that its impact invades plaintiff’s right.

³³ CECIL HERBERT STUART FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 3 (1949); Epstein, *supra* note 6.

³⁴ “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.” *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). There is some variation in, and dispute over, the breadth of the right. It may be describe as broad enough to cover “health or comfort,” for example. *Winget v. Winn-Dixie Stores, Inc.*, 4242 S.C. 152, 130 S.E. 363 (1963). Compare *id.*, with *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 660 (Tenn. 1904) (noting that plaintiffs complained of damage to their properties and also of being “annoyed and discommoded by the smoke” and suffering ill health). There is dispute over the extent to which the right covers injury to persons. See F. H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 482 (1949). The use and enjoyment of land is the touchstone and core of the right.

law's distinctive contribution to tort we need to subtract those aspects of the field that duplicate other tort doctrines and examine the residue that remains.

1. *Impact and Intentionality*

Two distinctive contributions to tort precipitate out, when we distill nuisance law down and isolate its additions to tort. First, the harms actionable as nuisances—the harms that count as interferences with the right to the reasonable use and enjoyment of land—include both sensibility-based and physical ones. The law of accidents by contrast is more preoccupied with physical harm. Nuisance law stands out within tort by virtue of its equal concern with both physical harm and a restricted set of harms to sensibility, albeit a set whose single most salient characteristic is a visceral character so pronounced as to be nearly physical. The stench emitted by cattle feed lot producing “over a million pounds of wet manure per day for 30,000 head of cattle”³⁵ is no mere mildly unpleasant odor. It is the kind of stench that overwhelms the senses, prompting nausea and physical illness. Even so, this protection of sensibility is exceptional in tort.

Sensibility-based nuisances shed light both on nuisance law's grounding in the right to the reasonable use and *enjoyment* of one's land and on the nature of tortious harm itself.³⁶ Sufficiently fierce assaults on our senses make our experiences impossible to enjoy, even if they do not make our land impossible to use. In addition, they do more than just inflict a cost on us. A cost is anything we experience as an impediment or disvalue. The frustration of a preference is a cost. Harms are worse. In their strongest and most distinctive form, harms target and negate our agency; they drive a wedge between our wills and the content of our experiences. We suffer harms and are disabled by them. They are done to us as victims, not by us as agents, and they thwart our ability to make our lives and our experiences answer to our intentions and expectations. Harms deprive us of mastery over our lives. When we are in their grip we are not in control of our lives. Visceral assaults on our senses overwhelm us in just this way. When confronted with the stench of wet manure from 30,000 head of cattle, we cannot just carry on with barbecues and garden parties.

The second feature of nuisance that stands out when its distinctive contributions to liability in tort are isolated is that “[n]uisances 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 [interference] consequent upon his activities would take place, even if he did not know, or desire, that it would cause harm.”³⁷ Intentional nuisance thus covers a special kind of circumstance, one where harm is the continuous or continual byproduct of an activity, not its end. The contrast here is to accidental harm. Accidents are also the byproducts of actions or activities, but accidents are byproducts which are episodic. An activity may be ongoing but the accidents it precipitates are sporadic, not continuous. Accidents, moreover, are defined

³⁵ *Spur Industries v. Del E. Webb Development Co*, 108 Ariz. 178, 183, 494 P.2d 700, 705 (Ariz. 1972).

³⁶ The conception of harm as a distinctive, morally significant category that the text uses has its roots in John Stuart Mill's writings, which connect harm and autonomy. JOHN STUART MILL, *ON LIBERTY* 109-110 (Henry Regnery Co., 1955) (1859). My particular conception of it is indebted to Seana Shiffrin's writings. See Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117, 123-24 (1999). This idea of harm is also at work in those exceptional cases where tort permits recovery for pure emotional injury. See Gregory C. Keating, *Is Negligent Infliction of Emotional Distress A Freestanding Tort?* 44 *WAKE FOREST L. REV.* 1131, 1171-76 (2009).

³⁷ Epstein, *supra* note 6, at 65-66.

by the loss of control. At the moment that it happens, an accident is an event that the party responsible for it cannot prevent. The substantially certain harms that are the subject of intentional nuisance law result from the exercise—not the loss—of control. In nuisance, harm is deliberately done.

The special circumstance of intentional nuisance—harmful fallout, deliberately inflicted—gives rise to a form of strict liability which confounds the customary tripartite division of tort law into intentional, negligent, and strict liability torts. Strict intentional nuisance liability requires reparation for harm done even though the activity responsible for the harm does not involve faulty conduct and would not give rise to liability under negligence principles. Liability attaches even though all justified precautions have been taken and even though no injunction requiring abatement can be obtained. The basis of liability for intentional, unreasonable nuisance is not that the conduct causing harm is wrongful and should be altered, but that the actor is interfering with the plaintiff's right to the reasonable use and enjoyment of its land and should, therefore, make reparation for harm justifiably done.³⁸ Intentional nuisance therefore exhibits the essential feature of strict liability in an especially clear way; strict liability is *not* liability predicated on wrongful conduct. This is theoretically important, particularly insofar as we are inclined to identify tortious conduct with wrongful conduct.

The possibility realized by strict intentional nuisance liability is illuminating for another reason as well. It brings to the surface a feature of nuisance that is fundamental to tort and cryptically encapsulated by the *Copart* court's remark that the cornerstone of nuisance is "inconvenience to others, rather than the type of conduct involved."³⁹ Put slightly less compactly, the pertinent feature of nuisance law is that

A nuisance does not rest on the degree of care used . . . but on the degree of danger existing even with the best of care. To constitute a nuisance, the wrongfulness must have been in the acts themselves [i.e., the consequence of the acts] rather than in the failure to use the requisite degree of care in doing them.⁴⁰

The juxtaposition here ought to jolt us. We are inclined at present to identify torts with conduct-based wrongs. For nuisance, however, conduct is inessential, and harm is decisive. To be sure, the harm in nuisance also violates a legal right, but all wrongs violate rights, even those wrongs that are not conduct-based. Nuisance thus shows us that identifying tort with wrongful conduct fits negligence liability but not tort as a whole. The counterpoint lesson of nuisance is that serious harm may have independent significance for tort. Its infliction may

³⁸ Warren Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 986 (1952) explains clearly why nuisance liability is not a species of fault liability: "In cases where the[re is a nuisance] either because the defendant is improperly causing noises, smells, vibrations or other harmful effects on the plaintiff's land or in cases where the defendant by the continuance of his activity creates undue risk to structures or persons on the plaintiff's land, it is clear that the activity is wrongful and cannot be made rightful by the fact that the utmost care is used in minimizing harm." The wrong lies in the impact, not the conduct. To be sure, defendant's conduct in these cases commits a legal wrong, but only because it violates plaintiff's right, not because it is independently subject to criticism as unjustifiable. This is particularly clear under the dominant strand of modern intentional nuisance law, crystallized in and epitomized by *Boomer*. Under this regime defendant's conduct can only be criticized when and because defendant fails to make reparation for the harm done by its violation of plaintiff's right.

³⁹ *Copart Industries v. Consol. Edison of New York Co.*, 41 N.Y.2d 564, 569 (1977).

⁴⁰ *Jost v. Dairyland Power Cooperative*, 45 Wis.2d 164, 173, 172 N.W.2d 647, 651 (Wis. 1969) (quoting *Bell v. Gray-Robinson Construction Co.*, 265 Wis. 652, 657, 62 N.W.2d 390, 392 (1954)).

be a matter of moral concern and a ground for tort liability even when the harm in question does not issue from wrongful conduct.

2. *Elements and Examples*

Before we can address this broad question, however, we need to characterize nuisance law more fully. Succinctly defined, “[a] nuisance is a substantial and unreasonable interference with the plaintiff’s use and enjoyment of his property.”⁴¹ This invites unpacking, and the court that offered this encapsulation went on to elaborate:

Generally, a private nuisance is that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property personal or real. Nuisance law is based on the premise that every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property. The traditional concept of private nuisance requires the plaintiff to demonstrate that the defendants unreasonably interfered with their ownership and or possession of land. A nuisance . . . is anything which hurts, inconveniences, or damages; anything which essentially interferes with the enjoyment of life or property.⁴²

Doctrine develops this further.

Doctrinally, the elements of (intentional) nuisance are easy to state, if not always easy to apply. First, “substantial” injury is required. Nuisance requires an impact “which hurts, inconveniences, or damages.” You can commit a trespass in the course of conferring a benefit on your victim,⁴³ but “[t]o prove the existence of a nuisance . . . the complained of interference must cause actual physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits; it must interfere seriously with the ordinary comfort and enjoyment of the property.”⁴⁴ Broadly speaking, nuisances are nontrespassory interferences. Entry—invasion—of the victim’s property is not required and dispossession is not effected. Not all interferences, however, are actionable; to be actionable a nuisance must be more than an annoyance or inconvenience.⁴⁵

“[P]eople who live in organized communities,” the *O’Cain* court tells us, “must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances consequent upon the *reasonable* use of property by others.”⁴⁶ Substantial and

⁴¹ *O’Cain v. O’Cain*, 322 S.C. 551, 562 (1996); 473 S.E.2d 460, 466 (S.C. Ct. App. 1996).

⁴² *Id.* (citations omitted).

⁴³ For a beneficial but trespassory crossing of a property boundary see *Longenecker v. Zimmerman*, 175 Kan. 719, 267 P.2d 543 (1954), where defendant trimmed, topped and cleaned trees on plaintiff’s property of bagworms, but without plaintiff’s permission to enter (mistakenly, defendant believed that the trees were on her property). For a beneficial but trespassory crossing of a personal boundary see *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), where defendant doctor operated on plaintiff’s left ear and cured its diseased condition, but without plaintiff’s permission (permission had been granted for an operation on the right ear).

⁴⁴ *Washington v. Suburban Sanitary Commission v. Cae-Link Corp.*, 330 Md. 115, 622 A.2d 745 (1993).

⁴⁵ *Walter v. Selfe*, 64 Eng. Rep. 849, 852 (1851) captures the basic idea here, albeit in a somewhat archaic vocabulary: “Ought this inconvenience to be considered in fact more than fanciful, more than one of mere delicacy and fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living but according to plain and sober and simple notions among the English people?”

⁴⁶ *Id.* (citation omitted, emphasis added). Torts like trespass and conversion, and battery in some of its incarnations, do not protect against harms. These torts protect a kind of autonomy right: they guard powers

unreasonable interference is therefore required, either in the form of physical harm or in the form of a substantial assault on sensibility. *O’Cain* itself involved odor and flies from hog farming, and it is merely one in a long line of stench found to be nuisances. Stenches, smokes, gases, fumes, noises, and vibrations may all be nuisances. The following examples are representative:

- large amounts of coal dust and smoke entering plaintiff’s property, infesting plaintiff’s food, clothing, and furniture, interfering with plaintiff’s water supply, and damaging the exterior of plaintiff’s house;⁴⁷
- noxious odors emitted by a sewage treatment facility;⁴⁸
- repeated flooding of farmlands caused by improper siting and construction of a building, damaging soil and crops;⁴⁹
- property contamination by leaking gasoline entering plaintiff’s property;⁵⁰
- rock dust, noise, and vibration from blasting in connection with the operation of a limestone quarry;⁵¹
- smoke, vibration, and fine particulate dust contamination emanating from defendant’s cement plant;⁵²
- nauseating odors emanating from a chicken processing plant;⁵³
- flies and odors emanating from the operation of a cattle feedlot.⁵⁴

By contrast, pure economic loss—“property depreciation alone”—is generally “insufficient to constitute a nuisance.” Similarly, pure emotional harm such as fears arising from the perception of an environmental risk, or the perceived undesirability of certain neighbors, will generally not suffice to make out a claim of nuisance.⁵⁵ The touchstone here is the right to the reasonable use and enjoyment of property, and the first contribution of the tort of nuisance to the construction of that right is to specify that only certain *kinds* of

which confer control over various important objects (conversion), spaces (trespass), or subjects (battery). Battery, for example, protects our authority over our persons “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.” Mohr, 95 Minn. at 271, 104 N.W. at 16. Trespass protects the right to exclusive control or dominion. Whatever its general merits, Blackstone’s definition of property as “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 *2, is a vivid description of the right protected by the tort of nuisance.

⁴⁷ *Wheat v. Freeman Coal Mining Corp.*, 23 Ill.App.3d 14, 319 N.E.2d 290 (Ill. App. Ct. 1974).

⁴⁸ *Washington v. Suburban Sanitary Commission*, 330 Md. at 115.

⁴⁹ *Russo Farms v. Vineland Board of Education*, 144 N.J. 84, 675 A.2d 1077 (1996).

⁵⁰ *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998).

⁵¹ *Crushed Stone Co. v. Moore*, 369 P.2d 811 (Okla. 1962).

⁵² *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (N.Y. 1970).

⁵³ *Bishop Processing Co. v. Davis*, 213 Md. 465 132 A.2d 445 (1957).

⁵⁴ *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 183, 494 P.2d 700, 705 (Ariz. 1972).

⁵⁵ *See, e.g., Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 487 N.W.2d 715 (1992) (according to prior cases “property depreciation alone is insufficient to constitute a nuisance” and “a cause of action for nuisance may not be based on unfounded fears. [W]e would think it . . . anachronistic that a claim of nuisance in fact could be based on unfounded fears regarding persons with AIDs moving into a neighborhood, the establishment of otherwise lawful group homes for the disabled, or unrelated persons living together, merely because the fears experienced by third parties would cause a decline in property values.”). *Compare id., with Mercer v. Rockwell International Corp.*, 24 F. Supp. 2d 735, 744 (1998) (“Kentucky law will not allow recovery for stigma absent some physical harm to the property.”).

interferences—*substantial* physical harms and substantial visceral assaults on sensibility—count as violations of the right, even *prima facie*.

B. Constructing Equal Right: Nuisance and Normalization

To a point all of this is clear enough. Nuisance requires the violation of a property right, the violation of that right requires harm, and the relevant harm may be either physical or sensibility based. The general idea of substantiality is also clear, at least in general. Harm, to be actionable, must rise above a threshold level. Above that threshold, harm is more than someone should be required to bear; it is unusual in character or excessive in extent, or both. Interferences which fall below the threshold are harms which people can be expected to bear. In general, physical injury is more than people should be asked to bear whereas mere offense to sensibility is something that people may reasonably be asked to bear. When it comes to sensibility-based harms, moreover, substantiality may rest irreducibly with perception. For beings who are constituted the way that we are, the stench of a cattle feedlot is overwhelming whereas the smells of a backyard barbeque are not.⁵⁶ Doctrinal refinement cannot add to acute perception.

This sense of clarity begins to dissipate when we notice that the threshold defining actionable harm in nuisance departs from our ordinary perceptions of substantiality in two striking and opposite ways. First, some substantial—indeed very severe—harms are not nuisances, because they are *peculiar* to certain persons or activities, suffered only by those whose sensibilities or constitutions are idiosyncratically susceptible to harm from the defendant's activity. Second and conversely, some substantial—though not severe—harms are not nuisances because they are highly *general*.

1. *Hypersensitivity*

In the first kind of case plaintiffs may experience allergic reactions to fumes so severe as to require hospitalization, or experience physical convulsions in response to the mere ringing of church bells.⁵⁷ These harms fail to sustain claims of nuisance not because they are insubstantial, but because they are idiosyncratic. “What constitutes a nuisance” we are told, “is not measured by its effect on the hypersensitive . . .”⁵⁸ What counts as a nuisance must be determined by the reactions “of ordinary people.”⁵⁹ Hypersensitivity is thus a limit on nuisance.⁶⁰

2. *Prima Facie Nuisances and the “Live and Let Live” rule.*

⁵⁶ Here too, though, the perception must be the perception of an ordinary, or normal sensibility. See *Walter v. Selfe*, 64 Eng. Rep. 849, 852 (1851).

⁵⁷ *Jenkins v. CSX Transp., Inc.*, 906 S.W.2d 460, 461 (Tenn Ct. App. 1995); *Rogers v. Elliot*, 15 N.E. 768, 772 (Mass. 1888). See also *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948) (hypersensitivity to light).

⁵⁸ *Jenkins v. CSX Transp., Inc.*, 906 S.W.2d at 462.

⁵⁹ *Rogers v. Elliot*, 15 N.E. 768, 772 (Mass. 1888).

⁶⁰ This is an apparent, but not a real, contradiction to the “take your victim as you find him” rule. The “take your victim as you find him” rule is a rule of proximate cause, a rule governing the extent of liability not its existence. The “take your victim as you find him rule,” therefore, presumes that the conduct involved is tortious toward the victim; what is unexpected is the extent of the injury suffered from that conduct. In nuisance, the “hypersensitivity rule” operates as a rule governing the existence of liability in the first instance. A sensibility-based nuisance is not a nuisance if it only offends the sensibility of a hypersensitive person.

In the second kind of case, the harms are substantial though not incapacitating. Here, too, the harms are not actionable, but because they are suffered quite generally. This is the circumstance of Baron Bramwell's "live and let live" rule.

The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by 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 cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding that there is no nuisance, though there is. . .

⁶¹

These are, as Bramwell recognizes, *prima facie* nuisances. If they are not to be treated as "all things considered" nuisances they must be justified as exceptions to the substantiality criterion that otherwise identifies an actionable nuisance.

We thus have two apparently opposite exceptions to the substantiality requirement. In the first case, severe harm is not actionable nuisance because it is too uncommon. In the second case, significant harm is not actionable nuisance because the harm is too common. To compound the puzzle, these two limits on actionable nuisance are of a piece with two others, namely, the narrow construction of the locality rule and the "coming to the nuisance" rule.

3. *The Locality Rule*

The locality rule holds that "[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."⁶² The locality rule thus holds that something fundamental to nuisance—either the actual gravity of the harm suffered by the plaintiff or the unreasonableness of having to bear that harm—depends on the character of the locality in which the plaintiff is situated. The basic thought here is that some uses of land are compatible with one another, so that distinctive zones devoted to particular uses of land (industrial, agricultural, residential, for instance) are roughly impervious to each other's characteristic fallout. Compatible uses do not harm one another. Nuisance may perplex Coase in many ways, but it matches his expectations in one important way. Nuisances often are "pig in the parlor" problems, and as long as we keep farms and residences separate, no one will be seriously harmed. This thought, however, does not quite reach to the plaintiff who does suffer harm, because her use of land—her residence in an industrial district, say—is harmed.

⁶¹ Bamford v. Turnley, (1862) 122 Eng. Rep. 27, 32-33.

⁶² Campbell v. Seaman, 63 N.Y. 568, 577 (1876). Compare *id.*, with Sturges v. Bridgman, 11 Ch. D. 852, 865 (1879):

[W]hether 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 out 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.

The locality rule must therefore rest on more than the assertion that compatible uses do not harm one another. The rule must also claim that harm to incompatible uses does not count as a violation of the right to reasonable use and enjoyment. When we cast about for support for this position, three kinds of argument come to mind. The first is the thought that the plaintiff has brought the harm upon herself— that the harm should be attributed to the character of plaintiff's use for which plaintiff is responsible, and not to the defendant's use. The second is that it is unreasonable for the defendant to complain of the harm that she suffers because repairing that harm asks too much of other people and too little of the plaintiff. Either the plaintiff's use should be made compatible with the defendants' uses or the plaintiff should bear the ensuing harm.

Standing alone, these two arguments are inadequate. The first argument invites a Coasean challenge: On what non-arbitrary basis can we say that the idiosyncratic use and not the prevailing use is responsible for the harm suffered by the idiosyncratic use? Why isn't the harm jointly caused, and why aren't the parties jointly responsible? To meet this challenge we must establish that and why the prevailing use fixes the standard of rightful use. The first argument, however, begs that question instead of answering it because it assumes that the prevailing use is within its rights in inflicting harm on the idiosyncratic use. The second argument— that it asks too much to demand that usual uses bend to accommodate unusual ones— also tends to assume that prevailing use is rightful use. If the prevailing use was a standing legal wrong, the cost of conforming it to other people's rightful demands would presumably be irrelevant.

These two arguments therefore need the support of a third, less evident, argument. That third argument asserts: (1) that the only justifiable right to reasonable use is an equal right to reasonable use; and (2) that normal use is a natural focal point for a regime of equal right. Because similar uses tend to be compatible, the obvious way to make rights of use equal is to make them rights to engage in similar activities. When equal right is connected to normal use in this way, the plaintiff whose use of her property is harmed because her use is incompatible with the character of her locality has not had her right violated. She does not have a right to use her property in a way which exposes it to harm from everyone else's use of their property. The right which she would have to have in order for her claim to prevail is a right which could not be generalized into a regime of equal right. Everyone else is not obligated to bend to her idiosyncratic needs; she must yield to theirs.

Put differently, because an idiosyncratic use cannot be made compatible with everyone else's use, its claim in the name of equal right must be rejected. The idiosyncratic use can only claim in the name of an idiosyncratic right. The flip side of this coin is that defendant's claims of right must prevail precisely because they rest on a conception of the right to reasonable use which *can* be generalized into a regime of equal right. This argument goes deeper than the first two. It explains why we might justifiably say that plaintiff has brought the harm upon herself and why she is asking too much when she asks others to conform their uses to her needs.

4. The Coming to the Nuisance Defense

On its face, the "coming to the nuisance" limitation on liability is of a piece with the "locality rule," at least if that rule itself rests on the precept that plaintiffs who bring their uses to locations where they suffer harmful fallout at the hands of preexisting uses cannot complain. In both kinds of cases the doctrine invites appeal to the justification that the

victims have brought the harms upon themselves. What is striking about the “coming to the nuisance” rule, however, is that it is narrowly construed so that priority in time does not usually determine priority in right.⁶³ In the typical coming to the nuisance case, the defendant has used its land for a relatively long period of time, whereas the plaintiff has recently altered the use of the land claiming to suffer a nuisance.⁶⁴ Priority in time always favors the defendant, yet the defendant does not always prevail. This is surprising if the rule rests *only* on the precept that plaintiffs who bring harms on themselves cannot then complain about those very harms.

The alternative here is suggested by the language of *Spur v. Del Webb*, declining to apply the doctrine to a developer who brought suit against a cattle feedlot, on the ground that the stench from the feedlot substantially impaired the ordinary use and enjoyment of plaintiff’s residential development. The feedlot, of course, had preceded the residential development. Nonetheless, the court refused to hold that plaintiff had come to the nuisance.

Were [Del] Webb the only party injured, we would feel justified in holding that the doctrine of “coming to the nuisance” would have been a bar to the relief asked by [plaintiff] Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the city.⁶⁵

5. Nuisance and Normalization: Reasonableness as Equal Right

One way to summarize this statement of “coming to the nuisance” doctrine is to say that it treats the “fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence [as] not in itself sufficient to bar [plaintiff’s] action, but [as] a factor to be considered in determining whether the nuisance is actionable.”⁶⁶ Temporal priority matters, but is not dispositive. It may, however, be as true and more discerning to say that what matters to nuisance law—under the “coming to the nuisance” doctrine, under the “locality rule,” and under the hypersensitivity doctrine—is which use can claim the mantle of being “normal.” With a little adjustment this thesis also fits the “live and let live rule,” which exempts *prima facie* nuisances from liability on the ground that the uses which inflict such harm are widespread. The uses subject to this rule are— for most, or normal, uses—mutually beneficial. Consider Baron Bramwell’s famous justification of that rule:

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 subjecting those who do them to an action. . . . There is an obvious necessity for such a principle as I have mentioned. It

⁶³ There are exceptions to this generalization. Ernest Weinrib cites *Miller v. Jackson*, [1977]3 All Eng. Rep. 338 as an exception. See WEINRIB *supra* note 22, at 195, n.57.

⁶⁴ *Sturges v. Bridgman*, 11 Ch. D. 852 (1879), is usually read as a coming to the nuisance case where priority in time does not determine priority in right. See Epstein, *supra* note 6, at 72. The opinion in the case indicates that the parties battled mostly over whether the defendant had been making candy and causing the nuisance for so long that it had acquired an easement by prescription (though the harm to the doctor was of recent origin). See *id.* at 852-54 and Smith, *supra* note 6, at 30. *Sturges* thus appears to assume that a coming to the nuisance defense either fails or is entirely unavailable.

⁶⁵ *Spur Indus. Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 707 (Ariz. 1972).

⁶⁶ RESTATEMENT (SECOND) OF TORTS § 840D (“Coming to the Nuisance”).

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 live. . . .

When, in “the common and ordinary use and occupation” of land and houses, neighbors expose each other to modest interferences with each others’ use and enjoyment of property, three conditions are satisfied. The relevant nuisances are modest, reciprocal, and mutually beneficial. First, the harm, though real, is modest in the sense that it is not crippling or disabling. One can still use one’s own land well enough, one must merely bear some inconvenience and annoyance. Second, the harm in question is roughly reciprocal because it is over some reasonable period of time both inflicted and borne by each landowner. Neighbors both suffer intermittent stenches from each others privies and intermittently emit such stenches themselves. The real but modest harms covered by the “live and let live” rule are thus a paradigm case of “implicit in-kind compensation.”⁶⁷ Third, insofar as the harms issue from and are the necessary (that is, unavoidable) consequence of “those acts necessary for the common and ordinary use and occupation of land and houses” each and every property owner is better off inflicting these harms on other landowners and suffering these harms at their hands in return. Forbidding these nuisances would prevent the ordinary use and occupation of land. Harm is fairly distributed, and the gains from inflicting the harms exceed the burdens of bearing them so that everyone is better off than they would be if the infliction of the harms were prohibited by the law.

Put differently, the intermittent or continual⁶⁸ harms governed by the “live and let live” rule are substantial, but not unreasonable. If substantiality were the only test, these harms would be nuisances, as Bramwell suggests. Substantiality is not, however, the only test of a nuisance; nuisances must be substantial *and unreasonable*. Here, reasonableness is not a synonym for rationality. As Richard Epstein rightly observes, the rhetoric of reasonableness “does not import into the law of nuisance all the traditional concerns over relative costs and benefits.” But it is not quite a synonym for “substantial” as Epstein thinks.⁶⁹ Reasonableness, in its primary sense, is different from rationality. Rationality, in its standard sense, is a matter of prudence; it is concerned with instrumental efficacy. When we act rationally we pursue our self-interest in an instrumentally intelligent way. Reasonableness is a matter of morality; it is concerned with what we owe to other people. We act reasonably when we take the interests of others into account and act on terms that they could accept as appropriate for regulating our competing claims.⁷⁰ Reasonable terms of interaction with respect to nuisances are not terms that serve our self-interest. Reasonable terms are ones that we would be prepared to accept if we were to change places with those impacted by our nuisances.

⁶⁷ As Richard Epstein emphasizes in his classic article. See Epstein, *supra* note 6, at 82-84.

⁶⁸ My point is that these harms are not usually continuous. Intentional nuisance also encompasses intermittent or continual harms, so long as they are substantial. I take Bramwell to concede the substantiality of these nuisances because he searches for an exception which covers them. He thus treats them as *prima facie*, but not all things considered, nuisances. They are “comparatively trifling” not “trifling”.

⁶⁹ Epstein, *supra* note 6, at 85.

⁷⁰ On this see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STANFORD L. REV. 311, 323-25 (1996).

It is unreasonable to demand that people not use their land so as to inflict the nuisances incident to the ordinary use and occupation of land on their neighbors because it is unreasonable to demand that people not put their land to common and ordinary use. Common and ordinary uses are ordinary and common precisely because they serve the needs and interests of most people. To deny people the right to such uses is to thwart the exercise of their agency in a fundamental way. Activities which are normally done in a particular society or location generally play an important role in people's lives and cannot be forbidden without seriously impairing people's freedom.

Conversely, it is reasonable to permit the infliction of such nuisances without compensation even though genuine (if "comparatively trifling") harm is suffered. For one thing, the right to inflict equivalent nuisances is more valuable than the right to be free of such nuisances. For another, both right and harm are reciprocal. Compensation is effected, but in kind not in money damages. Landowners are therefore normally made better off, not worse off, by the right to inflict low-level nuisances, even if they must bear the harms occasioned by their neighbors' reciprocal exercise of their equal rights to do so. Insofar as they do suffer nuisance, reparation for suffering that harm is superfluous; compensation is already supplied in kind. Landowners not only have the *right* to inflict equivalent harms, they generally *do* inflict equal harms. The right is routinely and continually exercised. Harm and benefit are actually reciprocal, not just formally so.

The "live and let live" rule thus constitutes a regime of both equal right and mutual benefit. In part, it does so because the nuisances it governs, though real, are "comparatively trifling." Landowners must take the "bitter with the sweet," but the bitter is mild and the sweet more than makes up for it. The nuisances governed by the "hypersensitivity" rule, by contrast, are anything but modest. Extra-sensitive plaintiffs suffer such things as convulsions and allergic reactions severe enough to send to the hospital.⁷¹ Surely, if everyone suffered such severe harms, the activities responsible for them would be considered unacceptable. Mutuality of severe convulsion or allergic reaction is mutuality of a severely detrimental state. Nonetheless, severity of harm is not dispositive, not the key to the doctrine. The most famous of hypersensitivity cases, *Rogers v. Elliot*, asserts that the question of what constitutes a nuisance must be settled by reference to the standard of "ordinary people, as it is in determining [questions of] negligence." Using the sensibilities of the hypersensitive as the benchmark for the imposition of liability would create a standard

so uncertain and fluctuating as to paralyze industrial enterprises . . . The character of [a use] might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night.

The hypersensitivity rule thus has the same underlying logic of reciprocity as the "live and let live" rule. Harm to the hypersensitive cannot be the test of nuisance— no matter how severe the harm is— because the sensibilities of persons in all of their variety and idiosyncrasy may simply be irreconcilable. It is only possible to construct a regime of equal right if we take as our touchstone the needs, interests, and sensibilities of "ordinary people".

⁷¹ The plaintiff in *Rogers v. Elliot*, 15 N.E. 768, 772 (Mass. 1888), suffered convulsions from the ringing of a church bell because plaintiff was recovering from sunstroke. Plaintiff in *Jenkins v. CSX Transp., Inc.*, 906 S.W.2d 460, 461 (Tenn. Ct. App. 1995), experienced the severe allergic reaction (to creosote fumes).

Taking the subjective sensibilities of the hypersensitive as the standard has a paralyzing effect on our ability to put our property to *any* use.⁷² We cannot be confident that any use will not be a nuisance to *someone*. Ringing church bells is, after all, pretty innocuous. If the sensibilities of the hypersensitive were the test, we would be hard pressed to foresee whether or when normally innocuous activities will inflict devastating harm, and we would find it hard indeed to plan against that hard to foresee possibility. When our normally innocuous activities do wreak this kind of havoc, moreover, *we* can only avoid that havoc by foregoing the offending activities. In addition, the burden of foregoing our normal lives and activities is as great to us as the harm those activities inflict on the hypersensitive. Even so, we might wonder why *our* claims to the reasonable use and enjoyment of our property should trump the competing claims of the hypersensitive. Why isn't this a circumstance that has no mutually acceptable resolution?

We should not, I think, minimize the harm that the hypersensitivity rule inflicts on the hypersensitive. The rule denies the hypersensitive access to normal activities; the plaintiff in *Rogers* cannot even lie at home in bed and recover from sunstroke. No rule in all of tort better illustrates the dictum that “every rule has its victim” and that is a disturbing dictum.⁷³ Nonetheless, we ought to also see that nuisance law has an answer, and that answer is not easily improved upon.⁷⁴ The answer that nuisance law gives is that its project is to deliver *equal* rights to the reasonable use and enjoyment of their land. This can only be done if we set our idiosyncrasies aside and attend to our common needs and shared interests. Only by abstracting from some of the particularities of our individual cases and assessing our needs and interests from an objective— that is, third-personal— point of view can we make our activities compatible. The claims of the hypersensitive must yield. The only right that can be held equally is a right that is compatible with the rights of others. The articulation of an *equal* right to reasonable use and enjoyment of land thus requires us to recognize some uses as necessary or normal, and to prefer those normal uses to idiosyncratic ones when the two conflict.⁷⁵

⁷² Richard Epstein argues that the same basic point explains why such rights as the “right to an unobstructed view” is not recognized by the law of nuisance. “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.” Epstein, *supra* note 6, at 61. The issue is raised by *Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fla. Dist. Ct. App. 1959).

⁷³ At least, this seems true in *Rogers*. In other cases, including perhaps plaintiff drive-in movie theater in *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948), hypersensitive plaintiffs may be the best avoiders of the harms that they suffer, as Robert Ellickson suggests. Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 752 (1973). Ellickson likewise ties nuisance to normal use. *Id.* at 748.

⁷⁴ Robert Nozick suggests what seems to be the right resolution. When our demands to engage in an activity deny others access to a normal life, we ought, collectively, to compensate those others for the deprivation of a normal life. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 78-84 (1974) (proposing a “principle of compensation” covering actions which are “generally done, play an important role in people’s lives” and which cannot be “forbidden to a person without seriously disadvantaging him”). Unfortunately, tort law is often not in the position to collect such compensation from society at large.

⁷⁵ Ernest Weinrib expresses a very similar idea when he says approvingly, that nuisance law prefers “the more general” use because the more general use realizes more fully the ideal of nuisance law as a regime of equal right. WEINRIB, *supra* note 22, at 194-95. Weinrib appears to think that nuisance law’s preference for the more general use follows simply from the fact that it must be possible to put property to some use. Since the right to

Once the depth of and justification for nuisance law's attachment to normal uses comes clearly into view, the "locality rule" and the "coming to the nuisance" defense, fall into place. Both doctrines prefer the normal use because the normal use realizes more fully the precept of equal right. Normal uses within a locality are compatible with one another in a special way as far as nuisance law is concerned: they inflict similar kinds of fallout on each other and they are presumably insensitive to similar kinds of fallout. Within some limit, homeowners in a residential zone stand to gain more from the right to waft the smoke from their barbeques onto their neighbors' properties than they stand to lose from the right to be free from smoke wafting onto their properties. They stand to benefit more from the right to make some noise in the course of throwing parties than they stand to lose from the right to more peace and quiet. Vibrations from the operation of candy-making equipment are disruptive to doctors using sensitive listening devices, but not to other confectioners operating similar equipment; the acrid smoke emitted by a coal-fired power plant will wreak more havoc on an auto preparation operation than it will on industrial activities that generate their own smoke and soot. And so on. The compatibility of uses within a district permits each landowner in the locality to enjoy equally the right to the reasonable use and enjoyment of her land by constructing specialized communities of reciprocal harm and benefit.

The "coming to the nuisance" rule, for its part, is the flip side of the "locality" rule. If you bring your auto preparation operation to a district defined by the operation of a power plant, you should not complain that the fallout from the prevailing use is a harm to you. It is unreasonable for you to expect that the rights of every other landowner in the locality should be tailored to your special needs, to the conditions necessary for you to exercise your right as you see fit. Nuisance law, like negligence law, is and must be "objective" because it reconciles the competing rights of a plurality of landowners. For those rights to be reconcilable, each landowner's exercise of his or her own right must bend toward uses which can be reconciled with each other landowner's exercise of their equal right. Normal or ordinary uses tend to be reconcilable whereas idiosyncratic uses tend to conflict. Because the first use is not necessarily the most common use in the present, priority in time is not dispositive under the "coming to the nuisance" defense. Under that defense, the normal use is usually and properly preferred to the older use. For rights to the reasonable use and enjoyment of land to be compatible, nuisance law must note changing patterns of land use, and it must prefer prevailing use to time-honored use.

6. The Omnilateral Structure of Equal Right

Before we turn to the way that nuisance law addresses those harms that exceed its threshold and escape its limits, it is worth observing that the bilateral structure of the normal nuisance lawsuit is not a reliable guide to the structure of nuisance law. In the abstract, primary rights and duties in nuisance are *omnilateral* not bilateral: *every* landowner has the right to the reasonable use and enjoyment of her land and every landowner is obligated to respect every other landowner's right to the reasonable use of her land. Concretely, primary rights and obligations are *multilateral* (or, if you prefer, locally omnilateral). Because the harmful

do so is a right that everyone holds equally, it follows that the general use is to be preferred to the idiosyncratic. This formal logic is not without power, but the content of nuisance law can be derived from this logic alone. Nuisance law's content, in my view, depends implicitly on a substantive account of people's common needs and interests, and this account justifies its preference for normal uses. See *infra* note 90, and accompanying text.

fallout from any given use of land extends only so far,⁷⁶ no one's right to the reasonable use and enjoyment of property needs to be consistent with *every* one else's equal right. The concrete content of any landowner's actual right to reasonable use and enjoyment is fixed by construing the right so that the same right can be enjoyed equally by other landowners within the community of those whose uses affect one another.

Corrective justice theory, with its emphasis on the bilateral or bipolar relation between the plaintiff and defendant in a tort lawsuit, can lead us astray in this respect. Richard Epstein, for example, proceeds from the first principle that, ideally, nuisance 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.”⁷⁷ Nuisances, on this view, are simply substantial “invasions of the plaintiff's property that fall short of trespasses, but which still interfere in the use and enjoyment of land.”⁷⁸ Physical invasion is something that can be determined solely by inquiring into what the defendant did to the plaintiff. Ideally, therefore, nuisance cases should be settled without reference to anything other than the interactions of the parties. In practice, however, the demands of corrective justice must give some ground to “utilitarian considerations”— to practical constraints and administrative costs. Therein lies the explanation for the “live and let live” and “locality” rules, the hypersensitivity limit, and the “coming to the nuisance” defense.⁷⁹

Thinking about rights in nuisance law as a matter of the bipolar relation of plaintiff and defendant blinds us to the fact that rights to reasonable use are general. Because the right to the reasonable use and enjoyment of land is a right enjoyed equally by all landowners, its content must be constructed by determining how that right can be specified in a way that approximates as far as possible the ideal of a realm of equal right and mutual benefit. The uses of the neighboring landowners must be compatible not just bilaterally, but multilaterally. The “live and let live” rule is illustrative in this regard. With respect to the modest harms that it governs: (1) each landowner has the right to and does inflict equivalent harms on his neighbor; (2) each landowner suffers equivalent harms from his neighbors; and (3) each landowner benefits from— is made better off, not worse off, by— this reconciliation rights. The locality rule is an extension of this same idea into specialized communities of reciprocal harm. The hypersensitivity limit on nuisance is justified by the fact that a right to keep others from interfering with one's own idiosyncratic activity, physical constitution, or sensibility, cannot be made equal and reciprocal. Further, the “coming to the nuisance” defense gives priority to normal uses over time-honored ones because normal uses tend to be mutually compatible.

⁷⁶ There are counter examples to this claim (e.g., air pollution), but those counterexamples consist of situations that escape the reach of nuisance law as an institution. The diffuse harms of air pollution cannot be justly and effectively addressed within the confines of private nuisance suits. For all practical purposes, then, the harms that concern nuisance law implicate a multilateral set of rights, not an omnilateral set. Formally, however, the right to the reasonable use and enjoyment of land is omnilateral. It is held by every landowner, and it holds against every other landowner.

⁷⁷ Epstein, *supra* note 6, at 50. This general premise is inconsistent with Epstein's recognition in the case of an ostensible “right to an unobstructed view” that the general acceptability of such a right determines whether it should be recognized. *Id.* at 85.

⁷⁸ *Id.* at 53 (fn. omitted).

⁷⁹ Epstein, *supra* note 6, at 50 and *passim*.

C. Reasonableness in Nuisance: Conduct and Harm

Reasonableness is a fundamental and contested concept in tort law generally. In its primary meaning, reasonableness is an irreducibly moral concept, concerned with our obligation to show due regard for the rights and interests of others. In its secondary meaning, however, reasonableness is a synonym for rationality, and reasonableness in negligence law is often cashed out as economic rationality.⁸⁰ Risky conduct is reasonable when its benefits exceed its costs and unreasonable when its costs exceed its benefits. On this account of the matter, reasonable means rational from a social point of view. Whatever one makes of this conception of reasonableness in the setting of negligence law,⁸¹ a more complex conception is plainly needed to make sense of reasonableness in modern American nuisance law. In that law reasonableness applies to both conduct and harm.

Two representative cases illustrate the modern distinction between unreasonable conduct and unreasonable harm. *Wheat v. Freeman Coal Mining Corp.*,⁸² a mid-twentieth century Illinois case, is a useful illustration of the kind of private nuisance where unreasonable harm is shown, but where unreasonable conduct is not shown, and probably cannot be shown. *Wheat* involved a standard instance of intentional nuisance—ongoing harmful fallout from the coal mine that the defendant opened and operated west of the plaintiffs’ popcorn farm, which preexisted the mine. The plaintiffs claimed and proved that “smoke and coal dust were constantly emitted from the mine and entered into plaintiff’s house.” The “dust interfered with their water supply, infested their food, clothing and furniture, and damaged the exterior of their house.” The smoke and “noxious gases . . . interfered with . . . the use of plaintiff’s home.”⁸³ The plaintiffs sought damages— not “an injunction restraining defendant’s activities”— and it secured them by showing that the impact of the defendant’s activity was substantial, intentional and unreasonable.

“[T]he substantiality of the invasion” was demonstrated by proving that this was not a case where “nothing more” was going on “than unpleasant and disagreeable odors, and those only occasionally perhaps sickening to a few who seem to be unduly sensitive or we might say allergic to such smells.”⁸⁴ Wheat’s “evidence amply supported allegations of continuing offensive odors and physical damage to their home.” The plaintiffs proved that the defendant’s conduct had a substantial *impact* on their use and enjoyment of their land, that the impact was both physical and sensory, and that its magnitude was not attributable to their idiosyncratic sensitivity. Under Illinois law the injury was intentional because “[i]ntentional for the purposes of liability under Section 822 [of the FIRST RESTATEMENT, follow in Illinois] is defined as including knowledge that the invasion of another’s interest is resulting or substantially certain to result. . . . [D]efendant would

⁸⁰ See Keating, *supra* note 70.

⁸¹ In my view, this is a mistaken account of negligence law. Reasonableness is a matter of morality, whereas rationality is a matter of prudence. Reasonableness requires giving appropriate weight to the interests of others and constraining one’s conduct accordingly. Rationality requires pursuing one’s own interests in an instrumentally rational way. When rationality is viewed from a social point of view, the aim is the instrumentally intelligent pursuit of society’s interests, here in minimizing the combined costs of accidents and their prevention. This collapsing of the claims of distinct persons into the interests of a single rational actor obliterates the questions of what we may demand from each other that are at the heart of negligence law. See Keating, *supra* note 70.

⁸² 319 N.E.2d 290 (Ill. App. Ct. 1974).

⁸³ *Id.* at 293.

⁸⁴ *Id.* at 294 (quoting *Gardner v. Int’l Shoe Co.*, 49 N.E.2d 328, 332 (Ill. App. Ct. 1954)).

know that some dust and smoke would be carried over to neighboring lands. Defendant's witness . . . testified that the defendant had been informed of the damage being done to plaintiffs by the operation of the mine.⁸⁵

The courts remarks on "unreasonableness" were terse.. It said, "The fact of physical injury, amply attested to by disinterested witnesses, makes the issue of whether or not the invasion was unreasonable a jury question." In addition, it said,

In *Feder v. Perry Coal Co*, (1935), 279 Ill. App. 314, the court held that one has a natural right to have the air over his premises reasonably free from impurities and while defendant has a right to use his property in such a way as he may choose, he has no right to substantially injure plaintiff by casting gas, fumes, dust on his premises.

The issue . . . is whether the injury caused to plaintiffs by the alleged nuisance is intentional and unreasonable, weighing the gravity of the injury to plaintiffs against the utility of defendant's conduct . . . [D]efendant's conduct was intentional within the meaning of the Restatement rule. Since plaintiffs introduced evidence of substantial injury, it became a jury question as to whether or not the injury was unreasonable. There was ample proof to support the jury's finding for plaintiffs.⁸⁶

This passage illustrates the ambiguity of the term "reasonableness" in nuisance law. The first paragraph speaks of reasonableness primarily in terms of injury causing conduct, whereas the second speaks of reasonableness primarily in terms of the gravity of the plaintiff's injury. The first formulation sounds in negligence. The second sounds in strict liability: the decisive question is "whether or not the *injury* was unreasonable." Liability is appropriate when the conduct is reasonable— when due care is exercised— but the interference with the plaintiff's right is nonetheless serious enough that the defendant should not have to bear it without compensation. Like traditional nuisance, strict modern nuisance looks to impact, not conduct. The distinction between unreasonable conduct and unreasonable harm is thus central to modern intentional nuisance.

Section 826(b) of the SECOND RESTATEMENT confirms this interpretation of modern law, treating unreasonable conduct and unreasonable harm as alternative forms of intentional nuisance.

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

- (a) the gravity of the harm outweighs the utility of the actor's conduct; or
- (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.⁸⁷

The moral logic at work in strict intentional nuisance, the RESTATEMENT explains, is the logic of eminent domain, applied to private interactions: "[i]t may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but

⁸⁵ *Id.* at 295.

⁸⁶ *Id.* at 296.

⁸⁷ RESTATEMENT (SECOND) OF TORTS § 826B.

unreasonable to continue it without paying.”⁸⁸ Strict liability in nuisance is concerned with distributing the cost of reasonable harm fairly. The actor responsible for the nuisance reaps the benefits that come from conducting the activity that inflicts the nuisance; it is only fair for that actor to take the bitter with the sweet and bear the burdens of its conduct along with the benefits. Though the Restatement does not say so, it would be wrong for the mine to thrust the cost of its activity off onto the farm. So doing would count the harm to the farmer and the farmer’s right to the reasonable use and enjoyment of its land, for nothing.⁸⁹

Strict intentional nuisance is of piece with the “live and let live” and locality rules in several important respects, and different in one other. The resemblances lie in their shared assumption that the conduct giving rise to harm is reasonable, their shared attention to the magnitude of the interference, and their shared interest in compensation. Under the “live and let live” and locality rules the harms that are tolerated are presumed to be reasonable, since they are the inevitable fallouts of activities that are part and parcel of the ordinary use and occupation of land. The imposition of the relevant harms is therefore justified, but this justification does not explain why they may be inflicted without compensation. Here, the magnitude of the harms and the existence of in-kind compensation do the work. The infliction of the permitted harms without the payment of monetary compensation is justified by the presence of in-kind compensation and by the fact that all of those governed by the rule are made better off being free to inflict the permitted harms on others, even though they must bear inflictions by others.

Modern strict intentional nuisance likewise applies to harms whose infliction is necessary or justified, and it also attends to and insists on compensation. It differs in insisting on actual— that is, monetary— compensation. In one sense, the reason why strict modern intentional nuisance insists on actual compensation is perfectly obvious: compensation in kind is not forthcoming. In a deeper sense, however, the reason is not so obvious: compensation in kind would not be desirable in the kinds of cases governed by strict intentional nuisance. We would not wish to live in a world where our neighbors had the right to blanket us with coal dust and choke us with noxious fumes, subject only to our reciprocal right to interfere with their use and enjoyment of their property in an equally damaging and harmful way. *Formally*, to be sure, a regime of reciprocal right to inflict serious harm would be a regime of equal right. *Substantively*, however, it would not be a regime of equal right worth having. Theorists of nuisance like Ernest Weinrib, who assert only that nuisance must be a regime of equal right miss this point.⁹⁰ Implicitly, nuisance law rests on an account of our interests. There is a level of interference which is not in our interests, even if it is reciprocated. We are not the sort of beings for whom high levels of coal dust and noxious gases are enjoyable, and what is normally in our interest figures centrally in

⁸⁸ *Id.* § 829A cmt. f. Comment b to § 829A remarks that “certain types of harm may be so severe to require a holding of unreasonableness as a matter of law, regardless of the utility of the conduct.”

⁸⁹ There is no gainsaying the fact that the RESTATEMENT provision is an ungainly papering over of deep fault lines in the law of nuisance. Even so, it is perplexing that the provision does not more explicitly recognize that the issue here is the reconciliation of “conflicting rights, where neither party can enjoy his own [property] without in some measure restricting the liberty of the other in the use of property, [and that, therefore] the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.” *Koseris v. J.R. Simplot Co.*, 82 Idaho 263, 270, 352 P.2d 235, 239 (1960) (quoting *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658, 667 (1904)). What the RESTATEMENT should say and does not say is that its standard for the treatment of unreasonable harm is meant to reconcile conflicting rights into a regime of equal right.

⁹⁰ WEINRIB, *supra* note 22.

nuisance law. Strict intentional nuisance of the sort found in *Wheat* is right to award monetary compensation because monetary compensation is preferable to compensation in kind. Money damages tend to repair the harm done, whereas compensation in kind invites compounding that harm by returning it in kind.

Attention to the appropriate level of harm directs us towards the place of unreasonable *conduct* in nuisance. Its domain, according to the RESTATEMENT, is injunctive relief: “The process of comparing the general utility of the activity with the harm suffered as a result is adequate if the suit is for an injunction prohibiting the activity.” The “action for damages” is different because it “does not seek to stop the activity [but] seeks instead to place on the activity the cost of compensating for the harm it causes. . . .”⁹¹ We can flesh out the basic distinction this comment draws by turning from *Wheat* to *O’Cain v. O’Cain*.⁹² In *O’Cain*, plaintiffs sought and obtained an injunction prohibiting defendants, who were hog farmers, from locating their “hogs on a small strip of land between the plaintiffs’ property and the road and directly in front of the plaintiff’s residence.” The court found this to be “an *unreasonable and unwarranted use of the defendants’ property* and [therefore] a private nuisance.” It did so “[e]ven though the general area of the property is rural, and the business of raising hogs is a legitimate business and likely to occur in such an area.”⁹³

The judgment made in *O’Cain* about the nature of the nuisance is different from the judgment made in *Wheat* and the respective remedies in the cases track these distinctions. *Wheat* notes that the suit is for damages and finds that the *harm* inflicted by the defendant’s activity is unreasonable. *O’Cain* finds that the *conduct* of the defendant is unreasonable and orders an injunction. The judgment here is akin to a judgment of fault in negligence, and the court’s test of whether an injunction should issue is a balancing one. The “benefits of an injunction to the plaintiff” must be balanced “against the inconvenience and damage to the defendant.” Courts should “grant or deny an injunction as seems most consistent with justice and equity under the circumstances of the case.”⁹⁴ Under this standard, the plaintiff prevails because, the court found, the plaintiff had suffered sensibility-based harm of a kind that a “person of ordinary tastes and susceptibilities would clearly find . . . objectionable.”

[H]aving the hogs in front of the house [had] caused [plaintiff] a lot of stress . . . the odor and flies have affected the use of their decks, [plaintiff] is embarrassed and ashamed to bring friends and family to [the]home . . . the odor was pungent and the flies so bad that [plaintiff] did not even want to be in her home anymore.⁹⁵

The defendants, by contrast, “had other, more suitable, land in the area on which to raise hogs.”⁹⁶ The natural way to read *O’Cain*’s language is as an application of the Hand formula with probability dropped out, because the harm is certain to occur. In Hand Formula terms, harm to the plaintiff was substantial, whereas benefit to the defendant was not.⁹⁷

⁹¹ *Id.*

⁹² 473 S.E.2d 460 (S.C. Ct. App. 1996).

⁹³ *Id.* at 467 (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ This is not the only possible reading of *O’Cain*’s language, and the text will suggest a more rights-oriented way, which may be more persuasive all things considered. Still, it strikes me that the utilitarian reading is the natural reading.

O’Cain’s test of unreasonable conduct raises the question of whether modern nuisance law differs from traditional nuisance law because social utility replaces equal right as the test of reasonable conduct. Before we parse *O’Cain’s* rhetoric, it helps to note that injunctive relief is subject to interpretation in both utilitarian and fairness terms. The utilitarian interpretation holds that the role of an injunction is to maximize value (at least between the parties) by prohibiting conduct whose costs outweigh its benefits. The fairness interpretation takes the role of an injunction to be to bring the level of interference down to the normal, mutually reciprocated, level of interference. The *O’Cain* injunction, for example, permits defendants to raise hogs on their property—the use is appropriate to the locality—but requires that the hogs be situated on the property in such a way that the fallout from raising them does not inflict abnormally great and objectionable harm. In other words, the injunction requires that the defendant inflict only the *normal* harm incident to raising hogs, a harm which is roughly reciprocal to the harms that everyone in the neighborhood both inflicts and suffers.

The fairness interpretation of injunctive relief may be most salient in cases where a partial injunction is issued. Consider an injunction ordering a defendant to moderate the activity at its racetrack so that the noise of the race cars is no longer “a substantial impairment of Plaintiffs’ peaceful enjoyment of their [residential] property.”⁹⁸ In utilitarian terms, this partial injunction is justified if it reduces the noise from the defendant’s activity just to the point where the marginal benefit of reducing the noise exceeds the marginal cost of doing so. In fairness terms, the injunction is justified if it reduces the noise from defendant’s activity to the level of generally reciprocated annoying noise. Once that reduction is achieved, there is no actionable nuisance left to enjoin. The noise that remains falls under the “live and let live” rule of no liability.

The place of utilitarian considerations in modern intentional nuisance law’s interpretation of reasonable conduct is not easy to pin down. Close reading of *O’Cain* itself suggests that something more modest than the maximization of wealth or social utility is going on, at least in this court’s test. *O’Cain* deploys its utilitarian rhetoric in the service of the larger end reconciling equal claims of right. The test does not focus on the wealth or welfare of society at large, but on what the plaintiff may reasonably demand of the defendant in light of the respective burdens the alternatives impose on the parties. The underlying question is one of justice; it is about the fair reconciliation of competing rights to the use and enjoyment of property. The test compares harms—or relative impairments of rights—and serves the end of doing justice between the parties. The party entitled to prevail is the party whose right to the reasonable use and enjoyment of land would otherwise be unjustly truncated. There is nothing specifically utilitarian or economic about the court’s rhetoric of “benefit,” “inconvenience,” or “damage”. It is merely ordinary moral talk about balancing conflicting rights.

Other case rhetoric, though, seems more robustly utilitarian. One leading case, for example, explains nuisance by saying that “[i]t traditionally required that, after a balancing of risk-utility considerations, the gravity of the harm to a plaintiff be found to outweigh the *social* usefulness of a defendant’s activity.”⁹⁹ A comment to Section 826 of the SECOND RESTATEMENT OF TORTS speaks of comparing the “*general* utility of the activity with the

⁹⁸ *McCombs v. Joplin 66 Fairgrounds, Inc.*, 925 S.W.2d 946, 951 (Mo. Ct. App. 1996).

⁹⁹ *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 745 (N.Y. 1977) (emphasis added).

harm suffered as a result.”¹⁰⁰ Prosser’s influential treatise on torts contains similar rhetoric.¹⁰¹ Well-known economic interpretations of nuisance expand on this rhetoric.¹⁰² These conceptualizations invite the inference that nuisance law aims at putting property to use in a way which maximizes overall utility or wealth. This end, we might conjecture, might be realized through iterated case-by-case balancing of social utility and harm. Cases actually following this prescription, however, are surprisingly scarce.¹⁰³ *Boomer v. Atlantic Cement*, a case which is often identified with the idea that nuisance law transforms from a regime of equal right to one of social utility- or wealth-maximization in the latter half of the twentieth century, turns out to embody a different and more demanding standard of reasonable conduct. It is, therefore, at best premature to suppose that the unreasonable conduct strand of nuisance represents the transformation of intentional nuisance from strict liability to negligence. Consequently, if it is premature to conclude that intentional nuisance has made such a shift, it is the right time to turn to *Boomer* itself.

III. The *Boomer* Regime

The preceding summary of nuisance law ends with an account of the doctrine as it existed in the latter half of the twentieth century. Given the elusiveness and plasticity of nuisance liability, this snapshot is not, I think, the only one that might be taken, but it is as fair a representation as any. By and large, it is the regime of the RESTATEMENT, especially the SECOND RESTATEMENT. *Boomer* fits fairly well into this regime. Indeed, it may be the sharpest crystallization of that regime. But *Boomer* itself is a transformational case, and it

¹⁰⁰ RESTATEMENT (SECOND) OF TORTS § 826 cmt. b. (emphasis added)

¹⁰¹ See WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS 581 (4th ed. 1971).

¹⁰² Richard Posner claims that nuisance law is about negligence in this economic sense. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 62 (6th ed. 2003) (“The standard most commonly used for determining nuisance is *unreasonable* interference, which permits a comparison between (1) the cost to the polluter of abating the pollution and (2) the lower of the cost to the victim of either tolerating the pollution or eliminating it himself. This is an efficient standard . . .”). See also WILLIAM M. LANDES & RICHARD A POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 48-50 (1987).

¹⁰³ The conviction that nuisance is about efficiency in this sense is widespread among economic commentators on the subject, but as Smith says, “evidence of courts engaging in cost-benefit analysis is surprisingly slight”. Smith, *Exclusion and Property Rules in the Law of Nuisance*, *supra* note 9. Smith’s paper contains an extensive sampling of the cases and commentary. The enterprise of classification is complicated by the fact that “[s]ome courts invoking the Restatement formulations do not engage in the cost-benefit test and appear to be hewing to a more traditional approach to nuisance. See, e.g., *Morgan v. High Penn Oil Co*, 77 S.E.2d 682 (N.C. 1952).” *Id.* at 993 n.84. One case taking such an approach, however, is *Carpenter v. Double R Cattle Company*, 701 P.2d 222 (Idaho 1985). *Carpenter*’s standing within Idaho law is unclear. The statutory definition of nuisance in Idaho looks to impact not conduct, but appears to permit damages only in addition to injunctive relief. See IDAHO CODE ANN. § 52-101 (defining “nuisance” as “[a]nything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . .”); *id.* § 52-111 (by a judgment a “nuisance may be enjoined or abated, as well as damages recovered). In *Payne v. Skaar*, 900 P.2d 1352 (Idaho 1995), the Idaho Supreme Court reads section 52-111 as authority to permit recovery of damages “*along with* an injunction or abatement” but not, apparently, as authority to award damages *in lieu of* an injunction or abatement. *Id.* at 1356 (emphasis added). *Carpenter* may therefore be the kind of case Henry Smith has in mind when, citing Robert Ellickson, he suggests that “one response of courts to rules requiring injunction even in the face of massive hardship is to manipulate the findings of liability. Given a choice between finding a nuisance with automatic injunction and finding no nuisance, courts may opt for the latter, leaving plaintiffs without even a damage remedy.” Smith, *supra* note 6, at 1042. I am grateful to Shmuel Leshem for bringing *Carpenter* to my attention.

therefore assumes a nuisance regime different from the one we arrived at by the end of Section II's exposition.

Boomer overturns a prior regime, which specifies that “where a nuisance has been found and where there has been any substantial damage shown by the party complaining, an injunction will issue.”¹⁰⁴ To be sure, this firm statement of prior doctrine may be a bit too neat. Injunctive relief is a matter of equity, strictly speaking, and the rule itself is subject to slightly different formulations.¹⁰⁵ Nonetheless, the essential idea is clear. Nuisance is about interference, invasion, impact; it is not about conduct. Showing substantial harm ordinarily triggers a right to injunctive relief, just as showing an unauthorized crossing of a real property boundary does.

Under the older regime, nuisance is closer to trespass. Both wrongs have a categorical quality. Liability turns on crossing a protected boundary in one case and on exceeding a permissible threshold in the other. They differ by virtue of the rights that they protect, but they share the same basic structure. Trespass is a matter of taking over property, of violating the plaintiff's right of dominion. Deliberately crossing the lines that define a property owner's zone of dominion without the owner's permission is all that the tort requires. Should the trespass be ongoing, the boundary will be restored by enjoining further crossings.¹⁰⁶ Nuisance, by contrast, is a matter of substantial interference with the owner's right to reasonable use. But it, too, will be remedied by requiring that the interference cease so that the right is restored. In both cases conduct which invades the relevant right commits the wrong, and in both cases, the right is restored by enjoining the conduct that violates the right. Balancing is neither called for nor appropriate, and the tortiousness of the defendant's conduct does not depend on its reasonableness.

Boomer's transformation of the law of nuisance is threefold. All three transformations are generally consistent with the regime of the SECOND RESTATEMENT; *Boomer's* distinctiveness lies in its clarity and in its details. First, the court declines to follow the rule that “an injunction should follow” when “the damage to plaintiff from defendant's [nuisance] is not

¹⁰⁴ *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 223 (1970). How best to state the rule in *Boomer* is debatable. See *infra* note 108.

¹⁰⁵ For example, the case that *Boomer* overrules— *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (N.Y. 1913)— never quite states the precise rule that *Boomer* imputes to it, namely, that an injunction should issue whenever the damage to plaintiff from a nuisance is “not ‘unsubstantial.’” *Boomer*, 26 N.Y.2d at 224. *Madison v. Duckworth Sulphur, Copper & Iron Co.*, 83 S.W. 658, 665 (Tenn. 1904) quotes approvingly a similar rule from *WOOD ON NUISANCES* 1182 (3d ed.): “. . . if the injury on the one hand is small and fairly compensable in damages, and the loss to the other party would be large and disastrous, an injunction will be refused and the party left to his legal remedy.” In *Boomer* itself, the trial court had declined to issue an injunction even though it found that a nuisance existed because it found “that an injunction ‘would produce great public . . . hardship.’” 55 Misc. 2d 1023, 1025, 287 N.Y.S.2d 112, 115 (1967). The trial court thus invoked principles of equity and the “undue hardship” defense. On its theory, the preexisting law of New York permitted the court to deny an injunction in the case. The Court of Appeal, however, took the view that denying the injunction required overruling *Whalen*. With respect to liability standards, this older regime was the traditional regime of strict intentional nuisance, which counted legally wrong conduct whose effect was to violate the plaintiff's right to reasonable use and enjoyment.

¹⁰⁶ ‘Generally an injunction will lie to restrain repeated trespasses’: *Planned Parenthood of Mid-Iowa v Maki* 478 NW 2d 637 (Iowa 1991) 639 (Larson, Carter, Lavorato and Snell JJ). See generally DB Dobbs, *Dobbs' Law of Remedies: Damages, Equity, Restitution*, 2nd ed (St Paul MN, West Publishing, 1993).

‘unsubstantial’¹⁰⁷ and orders an award of permanent damages instead.¹⁰⁸ In effect, *Boomer* transforms the nuisance law of New York by replacing the preexisting rule that an injunction will issue as a matter of right upon a showing of a significant nuisance with a rule that damages and only damages will issue as a matter of right.¹⁰⁹ Injunctive relief is now available only on showing that the harm to the plaintiffs from not issuing an injunction is greater than the harm to the defendants from issuing an injunction.¹¹⁰ Damages now follow automatically on a showing of *unreasonable harm*, whereas injunctive relief requires showing *unreasonable conduct*.

Second, *Boomer* introduces balancing into the heart of a body of law which had been essentially categorical.¹¹¹ Under *Boomer* the availability of injunctive relief depends on a balancing of hardships. *Boomer’s* third transformation is to alter the strictness of intentional nuisance law. The wrong in the traditional intentional nuisance regime is *both strict and*

¹⁰⁷ *Boomer*, 26 N.Y.2d at 224. (I have rearranged the order of the clauses.)

¹⁰⁸ Strictly speaking, an injunction was ordered in *Boomer*. The Court of Appeals’ ordered the cases “remitted to [the trial court] to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.” *Id.*, at 228. I am grateful to Ben Zipursky for reminding me of this. It would, however, be a mistake to make much of this point. The dissent reads the majority ruling as a “newly enunciated doctrine of assessment of permanent damages in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.” *Id.* at 228. Later courts read *Boomer’s* ruling this way, too. See e.g., *Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc.*, 362 N.E.2d 968 – (1977) (Fuchsberg, J., dissenting) (“... since the court found that the adverse economic effects of a permanent injunction which would close the plant would far outweigh the loss plaintiffs would suffer if the nuisance continued, it limited the relief it granted to an award of money damages as compensation to the defendants for the ‘servitude’ which had been imposed on their lands.”) The majority opinion itself in *Boomer* characterizes its holding the same way, saying that “it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation” and that the “theory of damage is the ‘servitude of land’ on plaintiffs imposed by defendant’s nuisance.” *Boomer*, 26 N.Y.2d at 228. The majority opinion does not specify the circumstances under which an injunction will issue but the New York Court of Appeals appears to read *Boomer* as endorsing the RESTATEMENT (SECOND) OF TORTS regime. In *Little Joseph Realty* the Court summarizes the law that *Boomer* made by citing § 826 of the RESTATEMENT (SECOND) OF TORTS (which distinguishes between unreasonable conduct and unreasonable harm) and stating that “it was logical in *Boomer*, where *the adverse economic effects of a permanent injunction far outweighed the loss plaintiffs there would suffer*, to limit the relief to monetary damages as compensation for the ‘servitude’ which had been imposed upon them.” *Little Joseph Realty*, 363 N.E.2d at 1168 (emphasis added).

¹⁰⁹ It is at least arguable that this is merely the expansion of an exception to the traditional rule that “if the injury on the one hand is small and fairly compensable in damages, and the loss to the other party would be large and disastrous, an injunction will be refused and the party left to his legal remedy.” WOOD ON NUISANCES, (3d ed.), 1182. I think the argument that *Boomer* is an expansion of this exception is mistaken. This rule establishes a threshold beneath which the impairment of plaintiff’s right of reasonable use and enjoyment is slight enough that money damages suffice to erase that impairment. The issue before the court in *Boomer* is not this threshold issue. In *Boomer* this threshold has been crossed, and the court is deciding *not* to issue an injunction, even though money damages are not adequate to erase the effects of the nuisance.

¹¹⁰ See, e.g., *Little Joseph Realty*, 363 N.E.2d at 1168. It is unclear just how seriously we should take rhetoric here, but it is worth noting that, when harms are compared, balancing is being done, but not balancing in traditional economic or utilitarian terms. Balancing in those terms compares costs and benefits. Anyone who accepts the premise of our normal moral thought that harms are asymmetrically worse than benefits is likely to find the balancing of harms less objectionable than the balancing of costs and benefits.

¹¹¹ The claim of the dissent in *Boomer* is that the court has fatally compromised the categorical character of nuisance law. Instead of vindicating the rights of the plaintiffs, *Boomer* licenses a continuing wrong, a continuing violation of those rights. Ernest Weinrib is in agreement. See *infra* note 119, at accompanying text. It is arguable that balancing was pervasive in nuisance law, but confined to the perimeters of the law. This seems to be the perception underlying Richard Epstein’s belief that nuisance law is a matter of corrective justice tempered by “utilitarian constraints.” See Epstein, *supra* note 6.

conduct-based—the wrong lies in invading the plaintiff’s right to reasonable use by inflicting substantial harm. The conduct that invades the right is wrongful for the simple reason that it invades the right. It *is* a wrong to invade the right. To vindicate the right, continuing conduct that violates the right must be enjoined.¹¹² Defendant’s duty is not to violate plaintiff’s property right, and that is a duty not to do harm, even by reasonable conduct. This is a matter of strict liability because liability does not turn on whether plaintiff’s conduct was reasonable or unreasonable, faulty or justified, but strict liability here is as much concerned with conduct as negligence liability is. The only difference is that whereas negligence enjoins inflicting harm by unreasonable conduct, strict liability enjoins inflicting harm *full stop*. Put otherwise, the “duty to succeed” is more stringent in traditional nuisance law than it is in general negligence law.¹¹³

Liability for nuisance remains strict under *Boomer* and the SECOND RESTATEMENT—because the plaintiff does not have to show unreasonable conduct to recover damages—but the distinction between unreasonable conduct and unreasonable harm which characterizes the modern regime changes the sense in which nuisance law is strict. Modern nuisance law is strict in the sense that it requires defendants whose primary conduct is *not* faulty, *not* unjustified, *not* enjoined, to make reparation for harm done. The wrong lies not in inflicting the interference with plaintiff’s right, but in failing to offer up spontaneously reparation for the harm done by that interference. The conduct responsible for the interference may and should continue, but only on condition that reparation is made by the party who does that harm. Compensation for harm done is a condition for the legitimate conduct of the activity.¹¹⁴ Put differently, the wrong is a conditional one. Interfering with plaintiff’s reasonable use and enjoyment of land is permissible, but only if reparation is made for the harm done by that interference. If reparation is not made, a wrong is committed.

The size of the gulf between the two nuisance regimes is significant. Indeed, the dissent in *Boomer* regards the majority’s decision as a radical reconstruction of the law of nuisance, and a reconstruction which makes a fundamental mistake of legal, moral, and political principles. The remedy approved by the *Boomer* majority is a violation of plaintiff’s property rights. It is a private taking: the wrongful, involuntary, and indeed *unconstitutional* imposition of a “servitude on land without consent of the owner, by payment of permanent damages where the continuing impairment of land is for a private use.”¹¹⁵ Precedents permitting the denial of an injunction despite a showing of substantial harm from nuisance “grounded their decision[s] on a showing that the use to which the

¹¹² This is the idea of corrective justice that Epstein rightly thinks lies at the center of traditional nuisance liability. Epstein perceives, correctly, that this is a matter of strict liability. Epstein, *supra* note 6, at 59, 67, and esp. 85 (explaining that the ambiguous concept of “reasonableness” in nuisance law does not refer to “concerns over relative cost and benefits” since “this would mean the complete and unwarranted rejection of the strict liability rule required by corrective justice principles” but to the magnitude and significance of defendant’s interference with plaintiff’s right; “it is impact, not utility, that is the touchstone of liability”). Ernest Weinrib also defends the traditional nuisance regime on the basis of corrective justice, but he denies (mistakenly) that traditional nuisance liability is strict. WEINRIB, *supra* note 22, at 190-96. It is worth noting that liability for trespass has the same essential structure as liability for nuisance, traditionally understood.

¹¹³ Thus, traditional nuisance liability conforms to Coleman and Gardner’s conception of strict liability as a conduct-based wrong which involves breaching a duty not to harm. See *supra* note 17.

¹¹⁴ See *supra* notes 13 & 18, and accompanying text.

¹¹⁵ *Boomer*, 26 N.Y.2d at 231.

property was intended to be put was primarily for public benefit.”¹¹⁶ The *Boomer* majority crosses a Rubicon by permitting private property to be taken for private benefit, simply on payment of fair compensation. In contravention of the constitution, *Boomer* licenses private eminent domain.¹¹⁷ Or so the dissent argues.

The dissent’s characterization of the remedy that *Boomer* orders is correct. The majority, indeed, embraces the characterization.

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damages is the ‘servitude on land’ of plaintiffs imposed by defendant’s nuisance. (See *United States v. Causby*, 328 U.S. 256, 261, 262, 267, 66 S.Ct. 1062, 90 L.Ed. 1026, where the term ‘servitude’ addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport). The judgment, by allowance of permanent damages imposing a servitude on land . . . would preclude future recovery by plaintiffs or their grantees.

The only difference between the majority and the dissent’s understanding of the decision is that the majority sees the remedy of money damages in exchange for the imposition of an involuntary servitude on the plaintiffs’ properties as the fair reconciliation of their competing rights of reasonable use and enjoyment.¹¹⁸ The dissent regards the remedy as a denial of plaintiff’s property rights.

¹¹⁶ *Id.* at 230.

¹¹⁷ “Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use,” and “by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.” *Id.* at 231 (citations omitted).

¹¹⁸ The majority opinion’s emphasis on the fact that there are rights of reasonable use on both sides of the case links *Boomer* to the other great modern nuisance case, *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). *Spur*’s famous “purchased injunction” resonates with the moral intuition that is unfair for the cattle feedlot— whose only “wrong” was to have seen the neighborhood in which it was situated transform into one incompatible with a feedlot— to have to bear the cost of the area’s transformation from agricultural to residential while others reap the benefits of that transformation. By condemning the feedlot as itself a legal wrong, traditional injunctive relief strikes a lopsided balance between the right of the defendant to the reasonable use and enjoyment of its land and the equal right of the plaintiff homeowners to the reasonable use and enjoyment of theirs. Because (1) the uses are incompatible; (2) neither party is culpably responsible for the existence of the nuisance (the infliction of the harm is the result of reasonable, not faulty, conduct); and (3) the parties have equal rights to use and enjoy their land, it seems only fair that the prevailing use should pay for the privilege of putting the feedlot out of business. Defenders of the traditional nuisance regime would, of course, object that this reasoning involves a solecism. The feedlot is committing a legal wrong and it, therefore, has no right to vindicate. Injunctive relief restores the plaintiff’s right and thus reinstates a regime of equal right. See WEINRIB, *supra* note 22, at 195.

Unlike *Boomer*, which both encapsulates the most characteristic modern nuisance regime and is the watershed after which nuisance law runs in a new direction, *Spur* is an isolated and exceptional case. We should therefore not make too much of it. But we should not make too little of it either. The “coming to the nuisance” circumstances of *Spur* are not so uncommon, and nuisance law’s preference for normal over abnormal uses often deprives landowners whose only fault is to find themselves in a world of new and incompatible uses of the right to put their property to its traditional and previously legitimate use. The case which so exercised Coase, *Sturges v. Bridgman*, 11 Ch. D. 852 (1879), is another case of this kind. The circumstances of these cases trigger a visceral sense that injustice is being done— that an unlucky landowner is being sacrificed on the altar of the general good and that justice to that landowner calls, at the very least, for

The moral and political principle at the heart of the dissent and the traditional rule is powerfully expressed by Ernest Weinrib, in the language of Kantian right:

Kantian right accounts for the injunction that remedies the nuisance. This remedy treats the plaintiff's use as an entitlement, and therefore as something that the plaintiff can insist upon exercising. Since the entitlement can be secured by the cessation of the nuisance, the remedy is to enjoin the defendant's conflicting use. In accordance with Kantian right, no considerations of community advantage or wealth maximization can justify the court's compelling the plaintiff to accept monetary damages in lieu of the exercise of the violated right.¹¹⁹

From Weinrib's point of view, *Boomer* repudiates the idea of nuisance law as a realm of equal right. There is, indeed, very reason to think that Weinrib regards *Boomer* as a case which makes the deep and fundamental mistake of sacrificing equal right to collective advantage.¹²⁰

Weinrib is not alone in regarding *Boomer* as a triumph of instrumentalism and a repudiation of right. Although the majority opinion makes its case in fairness terms, most of those who have celebrated *Boomer* have been legal economists. *Boomer* is one of the principal case law stimulations to, and examples for, a rich, sophisticated, and influential economic literature revolving around the choice between "property rules and liability rules."¹²¹ "Property rules" are identified with the remedy of injunctive relief, and "liability rules" are identified with the remedy of money damages. Because this literature is economic in inspiration and orientation, it is chiefly preoccupied with determining how to deploy these two kinds of rules in order to maximize the economic value extracted from activities whose interaction causes harmful externalities.

The broad outlines of *Boomer* resonate with this economic orientation, and it provides an attractive framework for thinking about the choice between injunctive relief and money damages. The majority opinion is plainly worried that awarding injunctive relief will drive the defendant out of business, and unjustifiably so because defendant's business does more good than harm. The dissent (which would have affirmed the traditional rule) might have allayed those fears by arguing that, if defendant's activity really was beneficial on balance, the defendant would be able to purchase the right to continue polluting from the plaintiffs and still turn a profit. Had they been informed by Calabresi and Melamed's framework, the majority might have rejoined that diverse kinds of transaction costs—the costs of bringing the plaintiffs together and bargaining to agreement, holdout problems, strategic behavior, collective action problems in general—could thwart any such efficient restructuring of entitlements. In light of these transaction costs, it is better for the court to award money damages, not injunctive relief. Money damages fixed at the proper level will operate as a kind of price system. They will induce the defendant to modulate its activities in light of their costs, and to search for appropriate pollution minimizing precautions. If damages are priced correctly, moreover, they will enable the market to measure the plant's utility. If the plant can pay properly computed damages and still turn a profit, we will know that its

compensation paid by those who are actively benefitting from the unlucky landowner's plight. These *are* reverse *Boomer* cases and the moral logic of *Boomer* does apply to them. *Spur* expresses that moral logic.

¹¹⁹ WEINRIB, *supra* note 22, at 195 (footnotes omitted).

¹²⁰ *Boomer* is cited in one of the footnotes as a case controverting the principle that Weinrib asserts. WEINRIB, *supra* note 22, at 195 n57. *Boomer's* specific fault is to make damages not injunction the normal remedy.

¹²¹ See Calabresi & Melamed, *supra* note 3. Calabresi and Melamed's framework is deeply indebted to Coase, and founds an important literature.

operation does more good than harm. Modern economic tort theory is capable of elaborating on these basic ideas with great subtlety, sophistication, and refinement.¹²²

For all its virtues, debate in these terms fails to track the reasoning and rhetoric of the opinions in the case.¹²³ The debate in *Boomer* is about the nature of the defendant's wrong and the plaintiffs' rights. The answer to that question of primary obligation is assumed to govern the secondary question of what the law of nuisance requires in the way of a remedy. Recall the dissent's complaint: "[i]n permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a permanent wrong."¹²⁴ The point is not that an injunction will induce the parties to maximize the total economic value extracted from their competing uses, but that plaintiffs' legal right is a right to the reasonable use and enjoyment of their land. The vindication of that right requires enjoining the defendants' wrongful interference with their use—full stop. Calculations of the economic consequences of ordering such an injunction have no place in the determination of the parties' rights. For its part, the majority insists that a right to permanent damages is "fair to both sides"—that it reconciles the competing rights of the parties to the reasonable use and enjoyment of their respective land more fairly than injunctive relief does.

Curiously, then, the majority opinion in *Boomer* is something of an orphan. The dissent has defenders who see the traditional regime that it endorses in the rights-oriented terms that it does. The majority position has its defenders, but those defenders offer a defense whose terms are not the majority's own. This is unfortunate because the majority opinion and the regime that it institutes implicate a distinctive and powerful political morality.

IV. *Boomer* and the Morality of Tort Law

Boomer is rightly regarded as a watershed. In its wake, the New York law of nuisance flows decisively in a different direction. Before *Boomer*, New York nuisance law is in accord with the regime that Ernest Weinrib, for one, both defends and takes to be the traditional law of nuisance.¹²⁵ Injunctive relief is the preferred remedy, available as a matter of course and a *de facto* right on a showing of substantial harm—substantial interference with the right to reasonable use and enjoyment of one's property. To be sure, injunctive relief was understood to be an equitable remedy so that it was formally wrong to say that injunctive relief was available as a matter of legal right. In addition, there may have been room to argue that the right to injunctive relief was defeasible by a showing of undue hardship. But to the

¹²² See, e.g., Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235 (1995).

¹²³ The framework also faces the more general difficulty that its forward-looking account is at odds with the backward-looking nature of nuisance law. The economic theory of nuisance presents nuisance as a regulatory device designed to induce the efficient management of a particular class of costs going forward, whereas nuisance adjudication presents itself as a backward-looking inquiry concerned with repairing wrongs and restoring rights. Corrective justice theorists have developed this point powerfully, arguing that economic analysis cannot offer a convincing account of tort adjudication. See Keating, *supra* note 20 for an explication of this critique.

¹²⁴ *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 230 (1970).

¹²⁵ *Id.*

New York Court of Appeals, these were quibbles. New York nuisance doctrine held that injunctive relief “should follow” whenever a nuisance was “not unsubstantial,” and the rule was settled enough and strong enough to require an injunctive relief in *Boomer* itself.¹²⁶ After *Boomer*, only money damages are available as a matter of right. *Boomer* thus pivots New York nuisance law from Weinrib’s traditional regime to the SECOND RESTATEMENT’s modern regime. Unreasonable harm entitles the plaintiffs’ to money damages, but unreasonable conduct must be shown to secure injunctive relief.

The shift transforms the very right to reasonable use and enjoyment of land. Remedies exist to enforce and restore rights, and therefore, are ordinarily governed by rights. But remedies are also partially constitutive of rights because the relief that they grant specifies the content of the right when it must be insisted upon. The right to money damages as reparation for a permanent nuisance is very different from the right to enjoin the nuisance. Injunctive relief restores the right to reasonable use and enjoyment in a strong and intuitively clear way: the defendant’s substantial interference with the plaintiff’s reasonable use and enjoyment comes to an end. The plaintiff may use and enjoy its property free of substantial interference. Awarding permanent money damages, by contrast, leaves the interference in place, and permits it to go on indefinitely. Permanent damages compensate plaintiffs for partial takings of the plaintiffs’ rights to the reasonable use and enjoyment of their land. Permanent damages do not bring the interference to an end and do not restore plaintiffs’ rights to use and enjoy their property free from substantial interference.

1. Strict Liability and the Significance of Harm

The right that is correlative to the remedy of permanent money damages is a right not to have to shoulder the cost of a substantial interference with one’s reasonable use and enjoyment of one’s land simply because that interference issues from another landowner’s reasonable use and enjoyment of their land. Contrary to currently influential claims, harm does not lose its moral significance just because it is inflicted without fault. Harm has intrinsic moral significance. It is bad for those who suffer it, and seriously so. Harm places its victims in conditions where they are stripped of their autonomy, disabled from making the world answer to their wills. In nuisance law, harm disables its victims from putting their own property to wholly legitimate uses and enjoyment. Because it impairs, and at the limit negates, autonomy, harm is something that morally responsible persons strive to avoid. They do not regard its infliction as a matter of moral indifference simply because its infliction cannot be avoided if other goods are to be realized.

The fact that, in cases subject to strict intentional nuisance liability, the conduct responsible for the harm is—by some standard of utility, efficiency, or justice—justified, is good and sufficient reason to permit defendant to inflict the harm. It is not, however, good and sufficient reason to permit the defendant to load the cost of that harm off onto its neighbors who have equal rights to the reasonable use and enjoyment of their land. Fairness requires that the defendant take the bitter with the sweet and therefore make reparation for the harm that it does. When the defendant stands to reap the benefits of the harm that it inflicts and the plaintiff does not, the fact that the harm is inflicted without fault is simply not sufficient reason for the plaintiff to suffer it without compensation.

¹²⁶ “Thus, within *Whalen v. Union Bag & Paper Co.*, supra, which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant’s cement plant is not ‘unsubstantial’ . . . and injunction should follow.” *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 224 (1970).

The rightfulness of the defendant's conduct in many intentional nuisance cases thus brings to the fore the fact that justifiability of harm does not settle the question of who should bear the costs of harm. Here, the moral intuition of *Boomer*—and of strict intentional nuisance more generally—is a simple and straightforward one. It is only fair that the party who benefits from the infliction of the harm should shoulder its costs. Plaintiffs and defendants have equal rights to the reasonable use and enjoyment of their land. Fault liability reconciles those rights in an unreasonably one-sided way. Under a fault regime, whenever the defendant's use of its land is free of fault, the defendant is entitled both to interfere substantially with the plaintiff's use and enjoyment of its own land and to interfere without compensating for the harm that it inflicts. That reconciliation of rights is too unfavorable to the rights of the plaintiffs and too favorable to the rights of the defendants.

Absent reciprocal, mutually beneficial infliction of harm, it is hard even to find a countervailing fairness argument that the plaintiff should shoulder the burden of defendant's use of its own land while the defendant reaps the benefits of that use. Nuisance law, after all, is not free to take Coase's view of the matter as a case where *disvalue* is itself reciprocal. Nuisance law adjudicates claims of right, and it has already found substantial interference with plaintiff's right by defendant. It is plainly unreasonable for defendant to expect plaintiff to bear the cost of *defendant violating plaintiff's right* because that violation is to defendant's benefit, and plainly reasonable for plaintiff to ask defendant to shoulder that cost. The puzzle, if there is one, is why this intuition should seem so powerful and evident in the case of intentional nuisance, even though it is routinely trumped by fault intuitions in other contexts.

The modern law of intentional nuisance as epitomized in *Boomer* and as generalized in the SECOND RESTATEMENT regime will not by itself unravel the mystery of tort law's longstanding division between strict and fault based liability. But it has important lessons to teach both about strict liability and about the character of tort law. One such lesson is the lesson that has already been stressed, perhaps too much. Harm-based strict liabilities¹²⁷ are important counterexamples to claims that tort wrongs are conduct-based, at least when conduct is taken to mean—as it does in these descriptions—*primary* conduct. The wrong in these cases lies in unreasonably failing to make reparation for harm reasonably inflicted, not in the conduct that inflicts the harm. Unless we are prepared to read these doctrines out of the law of torts, we ought to reject the thesis that tort is a law of conduct-based wrongs. Tort is a law of wrongs, but it addresses two forms of wrongfulness. Fault liability is predicated on criticism of conduct, but much strict liability is not. Strict liability, in one of its most characteristic forms, is predicated on criticism of secondary conduct; it faults the failure to make reparation for harm which has been reasonably inflicted. Modern strict liability is a conditional wrong.

A second lesson is that the division of tort liability between strict and fault-based wrongs goes deeper than is commonly recognized. It crosscuts the traditional division of tort into intentional and accidental categories, and goes beneath the conventional casebook organization of tort into intentional, fault-based, and strict liabilities. Even though core intentional torts are distinctive in embodying malevolent agency, intentional torts as a class

¹²⁷ Abnormally dangerous activity liability: the strict liability of masters for the torts of their servants committed in the course of their employment; and some strict product liabilities—preeminently strict liability for manufacturing defects; are other examples of harm-based strict liabilities, or more exactly, harm-right based strict liabilities.

do not constitute a distinctive category of wrong. Intentional torts fall either into the category of conduct-based wrongs— the *normal* battery is an instance of wrongful conduct— or into a category of strict liability. Some batteries involve innocent actions which are nonetheless tortious because they involve impermissible boundary crossings. Other intentional torts— nuisance is the prime example— involve liability predicated not on objectionable conduct, but on objectionable failure to make reparation for harm unobjectionably inflicted. Liability for both innocent batteries and wrongful failure to make reparation for harm reasonably done is strict.

2. *Fairness, Feasibility, and Unavoidable Harm*

Third, *Boomer* and the law of strict intentional nuisance shed light on the morality of strict liability. It is plausible, and from what little I can tell, common to read *Boomer* as a synthesis of utility and fairness. Utility requires refusing the injunction and permitting the plant to continue operating. Fairness requires compensating the plaintiffs for the harms that they suffer from the defendant's ongoing enterprise. The rhetoric of the case, however, invites an alternative account of *Boomer's* political morality, one which may be more interesting and surely is less discussed. That rhetoric suggests that strict liability is distinctively concerned with unavoidable risk, with its presence as a social fact, and with the fair distribution of the financial costs of the harm that it inflicts.

The *Boomer* court does not describe the harmful nuisance that Atlantic Cement inflicts as something which is merely net detrimental. The opinion takes as fact the finding of the trial court that “[t]he company installed at great expense *the most efficient devices available to prevent the discharge of dust and polluted air into the atmosphere*. . . . [T]he evidence in this case establishes that *Atlantic took every available and possible precaution to protect the plaintiffs from dust*” but “nevertheless . . . created a nuisance insofar as the lands of the plaintiffs are concerned.”¹²⁸ This is not the rhetoric of marginal benefit. This is the rhetoric of feasible precaution.¹²⁹ Harm should be prevented insofar as it is feasible to do so. It becomes infeasible only when further reduction of harm can be effected only by ceasing the activity responsible for the harm, and the activity is one we cannot forego. *Boomer's* standard of reasonable risk reduction thus demands more than efficient precaution. Harm should be reduced beyond the point of marginal benefit and to the point where further reduction would endanger an activity we are not prepared to forego. The natural way to summarize the overarching conclusion that the court's rhetoric implies is to say that the harm done by the plant was necessary—“unavoidable unless we are prepared to shutter the plant.” Faced with that choice, the court changed the controlling law. It was not prepared to shutter the plant.

The harmful fallout of the cement plant thus seems to meet two criteria. First, it cannot be reduced any further except by foregoing the activity. Second, we cannot forego the activity. The court's reasons why we cannot forego the activity seem to radiate out in concentric circles, albeit somewhat indistinct ones. In the inner circle there are the rights of the plaintiffs and the defendant. Rejecting the opportunity to fashion a comprehensive, if local, scheme of pollution regulation, *Boomer* frames the question the case presents as a question of justice between the parties: “A court performs its essential function when it decides the rights of parties before it.”¹³⁰ The justice to be done in *Boomer* is justice between

¹²⁸ *Boomer*, 55 Misc.2d, at 1024; 287 N.Y.S.2d at 114 (emphasis mine).

¹²⁹ On this see Gregory C. Keating, *Pricelessness and Life*, 64 MARYLAND L. REV. 159 esp. at 180-94 (2005).

¹³⁰ *Boomer*, 26 N.Y.2d at 222.

the plural plaintiffs and the single defendant. Consistent with this claim, the court defends its award of permanent damages as “fair to both sides.”¹³¹ Shutting down the plant would be an objectionably one-sided reconciliation of the rights of reasonable use at issue. It denies the defendant a legitimate and valuable use of its property.

3. *The Omnilaterality of Right*

This claim that injunctive relief would not do justice between the parties seems both true and sincere, but it is also plainly the case that the concerns of the *Boomer* court radiate beyond the particular interests of these plaintiffs and this defendant to embrace a larger circle of concern. The nuisance in *Boomer* is not a bilateral dispute between two neighbors. The harmful fallout from the defendant’s plant affects something roughly on the order of a neighborhood, and it extends forward indefinitely in time. The source of that fallout, moreover, is not the activity of a single person, but an enterprise that figures centrally in the lives of many people. “Respondent’s investment in the plant” the court reports, “is in excess of \$45,000,000. There are over 300 people employed there.”¹³²

These are not passing observations. When we join them with the court’s claim that it is determining the rights of the parties before it— not fashioning a comprehensive scheme of pollution regulation— the joint implication is that the rights of the parties depend in part on the interests and claims of others who are affected. Ordering an injunction and shuttering the plant would unreasonably burden not only the defendant but numerous nonparties, many of whom depend for their very livelihoods on the defendant’s continued operation. The rights of the parties thus turn on the legitimate interests of others. In other contexts, the proposition that the rights persons may reasonably demand depend in important part on the interests of others is familiar and accepted. Sophisticated theories of the first amendment recognize the partial dependence of the rights of speakers on the interests of audiences.¹³³ But the idea is unfamiliar in contemporary tort theory, which has lately been reasserting its attachment to the “idea of private law.” Tort rights, we are told, are bilateral and tort adjudication is bipolar. *Boomer* is counter-evidence once again.

Just as *Boomer*’s incarnation of intentional nuisance as a strict liability wrong is counterevidence to the thesis that tort is law of conduct-based wrongs, so too its articulation of rights is counterevidence to the thesis that rights in tort are essentially bilateral. In retreating from *Whalen*’s right to injunctive relief upon a showing of substantial interference, *Boomer* assumes that the right to the reasonable use and enjoyment of property must be articulated in a way which fairly reconciles the conflicting rights of a plurality of rights-holders. Going further, *Boomer* assumes that rights to reasonable use must be articulated in ways that are acceptable in light of the interests of third persons affected by the exercise and enforcement of those rights. The implicit case the court makes for its regime and against the traditional regime is that its regime takes appropriate account of the rights of all affected rights holders and the interests of affected third persons, whereas the traditional regime does

¹³¹ *Id.* at 228. Elsewhere in the opinion, the court describes permanent damages fixed by the court as “do[ing] justice between the contending parties.” *Id.* at 226.

¹³² *Id.* at 225 footnote. In refusing to issue an injunction the trial court noted “[t]he defendant’s immense investment in the Hudson River Valley, its contribution to the Capital District’s economy and its immediate help to the education of children in the Town of Coeymans through the payment of substantial sums in school and property taxes.” 287 N.Y.S.2d 112, 112 (N.Y. Sup. Ct. 1967).

¹³³ See, e.g., T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV., no. 4, Summer 1979 at 519.

not. *Boomer* thus denies that rights in nuisance are bilateral and assumes that they are omnilateral in theory and multilateral in practice. They are held by all landowners against all other landowners; they obligate reciprocally; and they must be articulated in a way which does justice to the essential interests of all those that they affect.

3. *Strict Liability and Unavoidable Risk*

Last, but surely not least, *Boomer* seems to take it as a bedrock truth that an otherwise beneficial industrial enterprise cannot be shut down simply because it inflicts substantial, unavoidable harms. It seems quite consistent with the spirit of the majority opinion to impute to it *Losee v. Buchanan*'s conviction that "[w]e must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and [i]e] at the basis of all our civilization."¹³⁴ *Boomer* would simply add cement plants and other modern inventions to the list. This thought that we must live with some harms because they are the necessary consequence of activities we cannot conceivably forego is, after all, a hard thought to resist. It may go without saying in the *Boomer* opinion because it does not need to be said.

The rhetoric of the *Boomer* opinions thus invites the conclusion that Atlantic Cement's plant is not just useful and net beneficial, but necessary and, indeed, indispensable. On this interpretation, the morality of strict liability in *Boomer* is a morality whose chief concern is with responsibility for harm which should not be avoided. Negligence liability holds that "I am not responsible for any damage [I] . . . unavoidably do my neighbor,"¹³⁵ whereas strict liability holds that unavoidable harms ought to be shouldered by those responsible for their infliction. This rhetoric of unavoidable harm is found elsewhere in the law of nuisance¹³⁶ and throughout the law of strict liability. We need abnormally dangerous activities and must, therefore, live with their irreducible risks.¹³⁷ We need public and private firms and must, therefore, acknowledge that harms are "likely to flow from [their] long-run activity in spite of all reasonable precautions on his own part."¹³⁸ We need products whose risks are regrettable but not eliminable by the exercise of proper precaution. In all of these cases, unavoidable and justified harms are inflicted, and strict liability is imposed.

V. Lessons for Tort Theory

¹³⁴ *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873).

¹³⁵ *Id.* at 485.

¹³⁶ *See, e.g., Clifton Iron Co v. Dye*, 6 So. 192, 193 (Ala. 1889) (refusing to grant an injunction because the nuisance was unavoidable; "[t]he utilization of these ores, which must be washed before using, necessitates in some measure the placing of sediment where it may flow into streams . . . and . . . this invasion of the rights of the lower riparian owner may produce injury" entitling him to damages but not injunctive relief).

¹³⁷ "What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions . . . The utility of his conduct may be such that he is socially justified proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the peril of the innocent person who suffers harm as a result of it." RESTATEMENT (SECOND) OF TORTS, § 520, cmt c.

¹³⁸ *Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 171 (1968) (quoting 2 HARPER & JAMES, THE LAW OF TORTS, 1377-78 [1956]). Strictly speaking, vicarious liability will not always apply to harms because agents may commit underlying torts which are "sovereignty-based" not "harm-based." The wrong in the master, however, remains the same: it consists of failing to make reparation for the tort of the servant even though the master's conduct in connection with the commission of that tort is beyond reproach. The strict liability of the master is, therefore, never a conduct-based wrong.

The law of intentional nuisance challenges both of the prevailing views of tort. On the one hand, nuisance is not a law of costs and benefits. It is a law of equal rights, and the rights are rights against a particular kind of harm. On the other hand, nuisance is not a law of conduct-based wrongs as modern corrective justice theory conceives that category. More clearly than any other body of tort law, perhaps, nuisance is concerned with conduct which is justified not wrong. Intentional nuisance law imposes liability on justified conduct because the costs of unavoidable harm ought to fall in the first instance on those who inflict such harm and benefit from so doing. Harm, not wrongful conduct, is the morally significant phenomenon to which nuisance law responds most deeply. Last, nuisance confounds the thesis that liability in tort is essentially bilateral. Primary responsibilities in nuisance law are omnilateral in theory and multilateral in practice. *Boomer's* break with traditional doctrine rests unavoidably on the argument that rights to the equal use and enjoyment of land must be articulated in a way which can be justified to all those that they affect.

Nuisance law is too ancient, too important, and too deeply embedded in the fabric of our law to be treated as an anomaly, or to be banished from the law of torts and sent to some legal nether world where it cannot confound our theories of tort. The lessons of nuisance law need, instead, to be absorbed into our understanding of tort. The deepest of nuisance law's lessons, moreover, are hardly archaic. The deepest of nuisance law's lessons have to do with responsibility for unavoidable harm, and unavoidable harm is a fundamental feature of an advanced technological society.