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NUISANCE AND THE NORMATIVE BOUNDARIES OF OWNERSHIP

Christopher Essert*

Abstract

A nuisance is an unreasonable interference with an owner's right to use and enjoy her land. The tort of nuisance must be understood if we are to understand the nature, scope, and justification of private property rights. As the latter task is among the most important ones facing legal and political philosophers in a democratic society, such as ours, the former is crucial. Yet, we lack anything like a viable theory of nuisance law. The two most prominent—the economic view and the physical-invasion view—both fail, doctrinally and normatively. Things are so bad for nuisance that it has been called a 'legal garbage can.' We can do better, and we need to do better. Nuisance law protects owners by protecting their normative control, their capacity to determine what will happen on their land, and protects the core of their rights as owners of real property. Moreover, the scope of nuisance law helps fix the scope of this normative control; in other words, nuisance is partially determinative of the normative boundaries of ownership. Looking at nuisance helps reveal a distinctive understanding of private ownership and thus, reveal property rights' place as partially constitutive of a just society. Looking at nuisance this way also helps us see why its core doctrines are what they are: the reasonability standard at the heart of nuisance, along with its core doctrines relating to locations, time, and the objectivity of nuisance all bring out a normatively attractive vision of nuisance law and, therefore, of private property rights.

I. INTRODUCTION

What does the tort of nuisance do? To some, the answer seems to be, 'who cares'? After all, nuisance is nothing more than a "legal garbage can" or an "impenetrable jungle."¹ This is curious. Nuisance is usually said to "provide remedies for conduct that causes *unreasonable harm to the use and enjoyment of land*"² or, in slightly different terms, to

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1. William L. Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 410 (1942); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 571 (4th ed. 1971). Prosser really did not like nuisance, evidently.

2. JOSEPH W. SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 333 (6th ed. 2014) (emphasis in original).

protect against “interferences with [the] right to use and enjoy *real property*.”³ A moment’s reflection on these formulas—Just what is it to use and enjoy land or to have that use and enjoyment interfered with? What is it to have a right to use and enjoy real property?—shows that the tort of nuisance sits close to the heart of a justification of property rights, a topic of perennial and crucial concern. A complete theory of property would help explain what counts and what does not count as a nuisance, since if we knew what the right to use and enjoy real property was, we would be closer to knowing what counts as interfering with it. And conversely, a complete theory of nuisance would help explain the rights definitive of ownership of real property, since the scope of what does or does not count as an infringement of that right would help us see the scope of the right itself.

So anyone concerned—as we all should be—with the nature and justification of private ownership should be concerned with nuisance law. Contemporary thinking about nuisance law, unfortunately, is scandalously impoverished. Most law students, to the extent that they are exposed to nuisance at all, are exposed to it only through its walk-on role in the development of law and economics. Nuisance is used as the central example in both Coase’s “The Problem of Social Cost”⁴ and Calabresi and Melamed’s “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral;”⁵ the two central works that define and set out the research program of contemporary law and economics. Radically simplified, these views tell us that nuisance is about ensuring the efficient use of land by comparing the use-values of land in order to ensure that low-value uses are not allowed to take place in such a way that make higher-value uses impossible, and thus, “avoid the more serious harm.”⁶ Given the prominence of these articles and the centrality of nuisance to them, a casual observer might be forgiven for thinking that the problem of nuisance has been solved, so to speak, and that we can (and should) understand it primarily as a tool for promoting or maximizing the efficient use of land (which maximization would on such views serve as the justification of private property).

Notwithstanding the overwhelming prominence of these economic accounts, it is not hard to see why one might worry about them. Courts deciding nuisance cases tend not to engage in anything that looks like cost-benefit analysis, comparing of the seriousness of harms, or any other form of economic analysis, for that matter. Instead, they characteristically and distinctively reason in what some have argued is the paradigmatic form of reasoning appropriate to private law, namely by reference to the rights of the parties. Perhaps the most famous American nuisance case, *Fontainebleau Hotel Corp v. Forty-Five Twenty-Five Inc.*,⁷ displays this form of reasoning at its clearest. This case is about a complaint made by the owner of the Eden Roc hotel in Miami beach, arguing that its neighbor, the Fontainebleau Hotel, was committing a nuisance by building up a new tower that would block sun rays from shining down on the Eden Roc’s pool area in the afternoon. In arguing this, Eden Roc relied on a Latin maxim—*sic utere tuo ut non alienum laedas*—

3. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 846 (3d ed. 2012) (emphasis in original).

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

5. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

6. Coase, *supra* note , at 2.

7. *Fontainebleau Hotel Corp. v. Forty-five Twenty-five Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

sometimes taken to be definitive of the tort of nuisance. The court rejected this argument, stating that: “This maxim does not mean that one must never use his own property in such a way as to do injury to his neighbor . . . it means only that one must use his property so as not to injure the lawful rights of another.”⁸ A property owner, the court held, has no right to prevent his neighbor from building up even when such building up blocked the free flow of sunlight onto his property, and so the Fontainebleau was not wronging the Eden Roc, notwithstanding that (as we can assume) by blocking that sunlight the Fontainebleau was surely causing the Eden Roc significant (economic) harm.

This sort of rights-based reasoning, which is pervasive in nuisance law, makes the economic accounts offered by Coase and Calabresi and Melamed difficult to swallow, at least as attempts to help us understand nuisance law.⁹ Seeing this, other scholars, amongst whom Richard Epstein is most prominent, have attempted to explain nuisance law in more rights-based terms. These scholars tend to emphasize the close relationship between nuisance and trespass. Many cases of nuisance can, like trespass, be viewed as an “invasion” of the plaintiff’s land: in trespass the invading force is a person or physical object visible to the naked eye, whereas in nuisance, it is a smell, or smoke, or sound waves.¹⁰ In emphasizing the relationship between trespass and nuisance, these views help us see that a core feature of nuisance law is the connection between nuisance and ownership. (This is why, at the most naïve level, there are chapters about nuisance in both torts and property casebooks). As the House of Lords put it in one of the leading contemporary common-law decisions, nuisance is a “tort against land.”¹¹ A nuisance wrongs a plaintiff not in some general way, but quite specifically in her capacity as owner of her land.¹² While the Eden Roc certainly was harmed by the Fontainebleau’s new tower and the shade it cast on the Eden Roc’s pool, the owners of the Eden Roc were not affected in their capacity as owners: they were still able to control what happened on that land. (As we will see, this is a crucial element of a correct account of nuisance.)

These physical invasion views, attractive as their attentiveness to the role of rights in nuisance is, have flaws of their own. Most importantly, they mistake a normative inquiry for an empirical one. On Epstein’s characterization, the basic inquiry in nuisance law is a physical inquiry, since nuisance for him is about an invasion, and “the term ‘invasion’ is

8. *Id.* at 359.

9. There are, of course, much more sophisticated economic accounts, some of which attempt to account for the rights-based structure of nuisance law. The best and most prominent defender of such an account is Henry Smith. Below, I discuss his treatment of nuisance. See Henry Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 966 (2004).

10. Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J.L.S. 49 (1979). See Simon Douglas, *The Content of a Freehold: A ‘Right to Use’ Land?* 7 MODERN STUDIES IN PROPERTY LAW (Nicholas Hopkins ed. 2013), for similar physical-invasion-based accounts; see also Simon Douglas & Ben McFarlane, *Defining Property Rights* (cited in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW (James Penner & Henry Smith eds. 2014)); J.W. Neyers & Jordan Diacur, *What (Is) A Nuisance?* 90 CAN. B. REV. 213 (2011); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1409 (2010).

11. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 702 (H.L.).

12. Christopher Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418 (2013). Strictly speaking, tenants and other occupiers of land can make claims in nuisance. But these claims are, like all of their rights, derivative to and subservient to the claims of the owner.

a description of a natural state of affairs which in itself serves as a justification for imposing legal responsibility.”¹³ Epstein here wants to identify the scope of the rights of an owner of real property directly with the physical boundaries of that land. This identification is wrong, for two reasons. One, the cases simply do not bear out Epstein’s account. Nuisances have been found in a wide variety of situations where it would be strained, at best, to say the defendant was invading the physical space of the plaintiff’s land.¹⁴ Moreover, as these cases help show, the physical account is normatively unattractive, just as Epstein’s well known and similarly physical account of personal injury torts is. The law of negligence is not simply the spelling out of the idea that one person cannot physical interfere with another person; it is rather the spelling out of the normative notion that persons ought to relate to one another on fair terms of interaction, treating each other as free and equal.¹⁵ The point is the same in nuisance law: the law of nuisance is not about physical invasions, it is about the terms on which owners can relate to one another and to others, about what would be fair and reasonable for an owner to ask others to bear. Interestingly, in seeing this element of nuisance come to the fore through reflecting on the failure of Epstein’s account, we can see what Coase and his followers got right: nuisance needs to be understood as “a problem of a reciprocal nature” that involves both the plaintiff and the defendant.¹⁶ While Coase saw this, he thought, wrongly, that the reciprocal nature of the problem could be understood in terms of causation of harms, whereas, we will see, we must understand nuisance as a problem of the reciprocal nature of private ownership and of private property rights. Each of the two best-known kinds of attempts to understand nuisance law fails. We can do better.

In what follows, I will present an account of nuisance that takes the best of both of these two well-known accounts and moves significantly beyond them in allowing us to see the centrality of the law of nuisance to a theory of property and, therefore, to any comprehensive account of a legal system in a just society. I will argue that nuisance law is about setting the terms of interaction that are appropriate for and proprietary to ownership. Nuisance is fundamentally a tort that protects ownership rights, but in so protecting them, it also partially constitutes them. Just what it is to be an owner of real property in the common law, in other words, depends on the content of the law of nuisance. Therefore, in order to have a successful justificatory account of private property rights—an account of what property rights are, how they are different from other private rights, and how (if at all) they can be morally justified—we need an account of the law of nuisance. Here, I provide such an account and tie it to the outlines of a novel and powerful account of private property rights.¹⁷

I will argue that ownership is about providing for each person a normative sphere or normative refuge in which they are in charge of others, and that the provision of such a sphere is constitutive of certain valuable forms of living together, and therefore, of a just society. I will suggest that only such an account of ownership is capable of revealing the

13. Epstein, *supra* note 10 at 53 (emphasis in original).

14. See cases discussed *infra* notes 53-62 and accompanying text.

15. See Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

16. Coase, *supra* note , at 2.

17. I defend the core of the account of property rights in land elsewhere: Christopher Essert, *Property and Homelessness* (forthcoming).

distinctive value of private property rights, the way in which they are not merely tools for the promotion of social welfare, but partially constitutive of a just society. Keeping in mind the reciprocal nature of such rights, their status as elements of a system of rights, will require us to see how the law of private nuisance works in setting what I will call the normative boundaries of property rights. Because property rights are justified in terms of the kind of normative control they give owners, the scope of this normative control must be understood in a way that allows for each owner to have fair and equal normative control over everyone else. Thus, the reasonability standard at the center of nuisance law is easily explained (and indeed required by the very idea of ownership): each owner can demand of every other that the other not use her property in a way that unreasonably prevents the one from using his. Thus, nuisance presents us with the common law's working out of the scope of private ownership.

Let me illustrate the basic idea of the account with the following (admittedly silly) example. In *The Chicken Roaster*, an episode of the television show *Seinfeld*, a Kenny Rogers Roasters restaurant opens directly across the street from Jerry and Kramer's building.¹⁸ On top of the restaurant is a large neon sign in the shape of a chicken, which floods Kramer's apartment, even through closed blinds, with a "huge red light." Then,

(KRAMER comes over, walks into the door jamb. Red light still blaring)

JERRY: How's life on the red planet? (shuts door)

KRAMER: It's killing me, I can't eat, I can't sleep. All I can see is that giant red sun in the shape of a chicken. (gets some cereal from the cupboard and pours it in a big bowl)

JERRY: Well, did you go down to the Kenny Rogers and complain?

KRAMER: Ah, they gave me the heave ho. You know, I don't think that Kenny Rogers has any idea what's going on down there.

(KRAMER takes a pitcher of red liquid from the fridge and pours it on his cereal.)

JERRY: What are you doing?

KRAMER: Getting some cereal

JERRY: That, that's tomato juice.

(KRAMER takes a big spoonful of cereal with tomato juice!)

(Spits out cereal)

KRAMER: That looked like milk to me! Jerry, my Rods and Cones are all screwed up!

Alright, that's it. I gotta move in with you Jerry.

(KRAMER takes the bowl to the trash can and proceeds to spill the cereal and tomato juice all over JERRY's wall in the area around the trash can.)

Hilarity aside, how should we understand a potential claim in nuisance by Kramer against Kenny Rogers Roaster? On the economic account, we would want to weigh whether or not shutting down the restaurant would cost more or less than forcing Kramer to sleep in the glare of its lights; it is hard to say how this calculation would turn out, but if the restaurant were particularly popular, Kramer might be out of luck. On the physical-invasion account, such as that offered by Epstein, as nothing is physically invading Kramer's property there could again be no nuisance. Something seems odd about this result: the lights shone by Kenny Rogers Roasters seem (to me at least) to be interfering in a direct and core way with Kramer's reasonable right to use and enjoy his own property. It

18. *Seinfeld: The Chicken Roaster* (NBC Television Broadcast, November 14, 1996).

seems that Rogers has, to use the words of a Canadian case, “cause[d] material discomfort and annoyance and render[ed] the plaintiff’s [i.e. Kramer’s] premises less fit for the ordinary purposes of life”¹⁹ On the account I will offer, these facts embody an almost paradigmatic nuisance, in that they show a case in which one owner’s capacity to use his property as a kind of normative refuge, where he is free to decide against others how things will be, is unreasonably interfered with by another owner’s use of his land. It is as though one owner, Kenny Rogers Roasters, is extending the normative control that he has in his land so as to allow him to decide what will happen on the land of another owner, Kramer. This is a wrong. A finding that this is a nuisance would allow Kramer to protect the normative boundaries of his land. In so doing, it would also help us to see what ownership is about along the lines of the account I described above.

I will argue for this account as follows. In Part 2, I will set out the two best-known accounts of nuisance—the law and economics account and the causal-invasion account—and show how each fails. In Part 3, I will turn to presenting my own account. I will first (3.A) introduce the idea of ownership and its justification as I propose it to be best understood. Then, (3.B) I will show how the reasonability standard that forms the doctrinal heart of nuisance fits into this account by showing how each owner’s rights and their normative boundaries are to be understood within a systematic realization of the idea of ownership. And I will continue this (in 3.c) by showing how the account uniquely explains why cases like the one I briefly discussed above constitute nuisances. In Part 4, I will turn to a more detailed review of some of the doctrinal features of the law of nuisance. Here, I will show how, on my account, the basic doctrines of the law of nuisance—its relation to nuisance (4.A), its objective standard (4.B), the role of the location of the nuisance (4.C), the fact that coming to nuisance is not a defense (4.D), and the injunctive remedy (4.E)—each reflect and vindicate the way I argue that nuisance is to be understood and related to the justification of private property rights. Part 5 briefly concludes.

II. WHAT NUISANCE IS NOT ABOUT

Most law students, if they learn about nuisance law at all, learn about it through a discussion of Coase’s famous article, “The Problem of Social Cost,” or Calabresi and Melamed’s just-as-famous “Cathedral” article. That is a shame, because these articles, insightful and important though they are, do not provide a good account of the law of nuisance. Other law students might get a more in-depth exposure to nuisance through a discussion of Epstein’s article or related “rights-based” views. Are these students better off? We might think so if they are drawn, through the Epstein article, to a realization of the implausibility of the economic account of nuisance. But two wrongs do not make a right. Views like Epstein’s suffer from significant problems of their own. In this Part, I will discuss each of these views in turn and show how neither of them can successfully provide an account of nuisance law.²⁰

As I do so, I will assume a certain kind of methodological stance in regard to what it would be to ‘provide an account of nuisance law.’ Essentially, I will take on the mantle

19. *Appleby v. Erie Tobacco* (1910), 22 O.L.R. 533, para. 9 (C.A.) (emphasis added).

20. This Article is about private nuisance. I say nothing about public nuisance, a different tort.

of private law formalism.²¹ This sort of way of understanding private law has a few important features. First, and most importantly, it takes seriously private law's own internal point of view on itself by attempting to understand private law's distinctive set of morally-tinged concepts on their own terms. Courts in private law cases talk about plaintiffs' rights, about defendants' duties, about liability requiring a wrong by defendant, and so on. Private law formalism attempts to understand the law in these same terms; it attempts to think deeply and carefully about what it would be for there to be a private law in which it made sense to think about defendant's liability being grounded on defendant's wronging plaintiff, about plaintiffs having rights against defendants, and so on. There are lots and lots of detailed and difficult questions that are internal to this way of looking at private law, and I will touch on some in what follows. But what is most important is how this way of looking at private law rejects the dominant Realist model according to which private law concepts are mere weasel words,²² or stand-ins or smokescreens used to cover up some deeper explanation of the law in terms of welfare maximization or class conflict or naked politics. These so-called deeper explanations might have a certain attraction insofar as, because they require a kind of sophistication (in the sense of knowledge of some non-legal area of inquiry, like economics or sociology) to understand them, they seem sophisticated. But sophistication is not always a virtue. Perhaps here, the naive explanation is to be preferred. Courts talk about private law in terms of rights, duties, and wrongs. Might it be worthwhile to take that talk seriously and see where it leads us? I think so. But enough about methodology. As always, the proof of the pudding will be in the eating.

A. *Nuisance is not (just) about Harm*

"The Problem of Social Cost" is the most-cited law review article of all time.²³ In light of that, it is by no means a surprise that its treatment of nuisance dominates the way that nuisance law is taught and understood. Given that dominance, I can summarize the central claim of the article's treatment of nuisance very quickly. After glossing the facts of *Sturges v. Bridgman*,²⁴ one of the best-known of the classic English nuisance cases, Coase writes:

We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.²⁵

As Coase's article has been discussed in so much detail in the half-century since it was written, it might be strange to identify any particular aspect of the article as *the* central claim. But insofar as Coase's discussion had influence over legal thinking about nuisance

21. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995), for fuller discussion and defense of this way of looking at private law; see also JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* (2001); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457 (2000); John Goldberg, *Introduction: Pragmatism and Private Law*, 125 *HARV. L. REV.* 1640 (2012); Henry E. Smith, *On The Economy of Concepts in Property Law*, 160 *U. PA. L. REV.* 2097 (2012).

22. This term is from GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

23. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 *MICH. L. REV.* 1483, 1489 (2012).

24. *Sturges v. Bridgman*, [1879] 11 Ch. D. 852 (U.K.).

25. Coase *supra*, note 4, at 2.

since it was written, these sentences bring out the content of that influence. Coase actually makes two claims: the first one is that the problem of nuisance is “reciprocal,” and the second one is that it is a problem of avoiding “the more serious harm.” The first one is, in a sense, correct. But, this is not the time to say why; I will explain that point below.²⁶ It is the second that concerns me right now. In explaining nuisance as a problem about avoiding *harm*, Coase locates nuisance law centrally within the broadly utilitarian framework of law and economics. On that framework, when one neighbor (A) does something that affects another (B), rendering some activities no longer possible for B, a decision about liability should, in the basic case, turn on whether A’s affecting activity is more or less valuable than the activities which B can no longer do: *the problem is to avoid the more serious harm*.

Calabresi and Melamed’s article, which is almost as famous as Coase’s,²⁷ rests basically on this same grounding. Again, this is a deep article with much of import to teach us. But, as with Coase’s article, the treatment of nuisance law is very simplistic and bears little or no relation to actual nuisance practice. The article’s main discussion of nuisance spells out in detail in various situations what the costs would be for giving a potential defendant an entitlement to commit the nuisance—to pollute.²⁸ In effect, Calabresi and Melamed are enriching our understanding of what it means to avoid the more serious harm while remaining firmly ensconced within that framework. These are the basic, classic economic accounts of nuisance. More developed accounts, of course, exist. On such accounts, the decision about whether or not A is to be held liable to B turns not only on the value of A’s and B’s activities (or, what is the same thing, the cost of A or B *not* acting), but also on the cost of enforcing such claims, the costs associated with each of A and B having to know about what is permitted and not permitted, and so on.²⁹

But the basic case is illustrative of the core idea in its insistence that the determination of liability is necessarily at base a question of costs and benefits. This is not a plausible way to provide an account of nuisance law. (Nor indeed is it a plausible way to provide an account of any aspect of private law, but that general point is not my concern.) This is for two related reasons. At an abstract level, a cost-benefit approach to understanding nuisance law fails to pay any heed at all to the language or concepts that nuisance law is replete with: nuisance is a “tort against land,”³⁰ that makes actionable “interferences with [the] right to use and enjoy *real property*,”³¹ that protects “the right to use and enjoyment of land,”³² a nuisance is a wrong. And rather than assume automatically that these words and concepts are merely “weasel words,” we might at least try taking them at face value. John Goldberg makes the basic point clearly, and provides one pragmatic justification for doing so:

26. See *infra* Part 3.A.

27. It is sixth on that same list. See Shapiro & Pearce, *supra* note 23, at 1489.

28. Calabresi & Melamed, *supra* note 5, at 1118.

29. Henry Smith’s account taking information costs into account is a good example. See Smith, *supra* note 9. See *infra* note 68 and note 74, for criticism of Smith’s view.

30. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 702 (H.L.).

31. GOLDBERG ET AL., *supra* note 3, at 846.

32. Donal Nolan, ‘A Tort Against Land’: *Private Nuisance as a Property Tort* 465 (cited in RIGHTS AND PRIVATE LAW (Donal Nolan & Andrew Roberston eds. 2012)).

As used in the law, words like ‘right,’ ‘duty,’ ‘power,’ ‘liability,’ ‘privilege,’ and ‘immunity’ have distinct (and often multiple) meanings. And there is much to be gained from approaching them from a perspective that is charitable—in the sense of not starting from the presumption that they are fictions, nonsense, or weasel words—yet analytical. The point in doing so is not to celebrate nuance for its own sake. Rather, it is that being nuanced about legal concepts can help us think through practical problems.³³

It might be, as Goldberg goes on to note, that some or all of the concepts at play in nuisance law “may prove to be irredeemably confused or unnecessary,” and so apt for abandonment.³⁴ But, we cannot begin to know that unless we examine these concepts on their own terms, and see if they can hang together in a way that helps us make sense of some part of the social world. Here, as elsewhere, we would do well to take Aristotle’s advice:

We must set out what appears to be true about our subjects, and, having first raised the problems, thus display, if we can, all the views people hold about these ways of being affected, and, if not, the larger part of them, and the most authoritative; for if one can both resolve the difficult issues about a subject and leave people’s views on it undisturbed, it will have been clarified well enough.³⁵

The strength of this sort of methodology is shown by the vastly improved understanding it has given us of other areas of the law, in particular tort law.³⁶

The abstract point is echoed, in a way, by the law of nuisance itself. The leading cases in the law of nuisance are the leading cases, precisely because they show that nuisance is not simply about avoiding the more serious harm.³⁷ Instead, these cases hold, again and again, that nuisance liability turns on the rights of the parties. The best-known judicial statement about the importance of rights in the law of nuisance is found in the famous *Fontainebleau* decision, where it was held that the defendant’s building up of a new hotel wing, which blocked the sun that shone on the plaintiff’s hotel pool, did not give rise to an action in nuisance, even though it undoubtedly harmed the plaintiff’s operations:

This maxim [*sic utere tuo ut alienum non laedas*] does not mean that one must never use his own property in such a way as to do any injury to his neighbor. It means only that one must use his property so as not to injure the lawful rights of another. [U]nder this maxim, it was stated that “it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.*”³⁸

33. Goldberg, *supra* note 22, at 1652.

34. *Id.*

35. ARISTOTLE, NICOMACHEAN ETHICS VII.1 1145b5-10 (Sarah Broadie & Christopher Rowe, trans., Oxford Univ. Press 2002) (350 B.C.).

36. On the general point that an account of law needs to make sense of the law’s self-representation and its moral phraseology, as Holmes put it, the references cited in *supra* note 20.

37. Coase, *supra* note 4, at 15 (“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.’”).

38. *Fontainebleau*, *supra* note 7, at 359 (citations omitted) (emphasis in original).

To similar effect, in the famous decision of the High Court of Australia, in *Victoria Park Racing*, which held that the defendant's building of a tower on his land to look at and broadcast over the radio the horse races taking place on plaintiff's land could not be a nuisance, one of the judges in the majority wrote, "It is essential to an action on the case in the nature of nuisance to prove that the acts complained of infringe a legal right of the plaintiff," and a bit later on continued as follows:

The plaintiff laid great stress on the maxim *sic utere tuo ut alienum non laedas*. The principle underlying the action on the case in the nature of nuisance is the same as that embodied in this maxim. It is essential for the application of this maxim that a wrongful act is committed and damage is sustained. "*Alienum*" must be taken to mean "the rights of the neighbouring owner."³⁹

Given the insistence, in these leading cases, that nuisance law is about protecting the rights of owners, that simply harming your neighbor without infringing her rights will never amount to a nuisance, any harm-based view of tort law, such as law and economics, will be inadequate as an account of the law.⁴⁰

B. Nuisance is not about Invasions

It is no secret that economic analysis of law is controversial, or, at least so far as most philosophically sophisticated lawyers are concerned, it simply cannot account in the right way for the core set of doctrinal concepts in private law. Indeed, for better or worse, a large majority of the private law theory work of the past generation has been dedicated to making these points. And indeed, the point is a well-known one, even in the law of nuisance. The other best-known treatment of nuisance law in American legal scholarship is surely Richard Epstein's article, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints." It was published in 1979.⁴¹

Epstein starts off with the very basic thought that "at its core, [nuisance] protects the quiet possession and enjoyment of land,"⁴² and proceeds, in a manner consistent with the methodological suggestions I made in the last section, with an aim to developing an account of nuisance law on which cases should be decided based on (Epstein's understanding of) the principle of corrective justice: "rendering to each person whatever redress is required because of the violation of his rights by another."⁴³ The question, of course, is what right or rights are violated by a nuisance. Some courts and texts describe nuisances as violations of "the right to use and enjoy" property, but at least on some readings, this is a problematic suggestion. Simon Douglas and Ben McFarlane have recently argued at length

39. *Victoria Park Racing & Recreation Grounds Co. Inc. v. Taylor*, (1937), 58 CLR 479 (Austl.) (citation omitted) (quoting GALE ON EASEMENTS 416-17 (8th ed. 1908)).

40. Certainly, some economists are not at all interested in providing an account of nuisance law in anything like the sense I am here. Their interest rather, is in the efficient resolution of disputes about neighbors and the effects of their activities on one another. Fair enough. They are not my target, except to the extent that by failing to even attempt to understand and take seriously the institution we currently have, they miss the chance to see the ways in which it reflects and helps to realize certain valuable ways of living with others. There is more to life than efficiency.

41. I was going to write that Epstein's article is old, but I have a certain interest in believing that something's being created in 1979 does not make it old.

42. Epstein, *supra* note 10, at 49.

43. *Id.* at 50.

that in private law, there is no right to use and enjoy one's property, since there are a great many cases in which a defendant has quite clearly interfered with a plaintiff's use and enjoyment of property, but no liability has followed.⁴⁴ Taking their cue from *Hunter v. Canary Wharf*, the leading House of Lords decision on nuisance law, Douglas and McFarlane claim instead that nuisance is very close indeed to trespass; they argue that a nuisance is (like a trespass) an infringement of the right that others not enter or cause anything to enter the three-dimensional area of space defined by one's land. The idea has a certain intuitive appeal, since "in the standard nuisance case, such as those involving fumes, smoke, noise, smells, etc., it is possible to say that there is something emanating onto—and hence crossing the physical boundary of—the claimant's land."⁴⁵ Thus, the idea is that a nuisance is like a kind of trespass. Instead of coming onto your land uninvited, I (indirectly) send something onto it, like smoke or noise. In *Hunter*, Lord Goff seemed to endorse a physical-invasion view when he refused to find liability for the defendant's towers' interfering with the plaintiffs' television signals, in part because nuisance liability "will generally arise from something emanating from the defendant's land."⁴⁶

Epstein shares this view. He draws a very close analogy between the right to property and the right to one's body, and claims that both are to be understood in physical terms:

[O]wnership of things is subject to the same entitlements and limitations as the ownership of the person. With land, for example, boundary lines have the same hard-edged quality as foul lines in baseball, while the *ad coelum* rule defines (within limits) the interest in the subsoil below and the airspace above.⁴⁷

That is, to own land, in Epstein's view, is to simply and to clearly control what happens within a particular three dimensional space.⁴⁸ An owner's rights to her land are thus infringed by incursions into this three-dimensional space. Some such incursions—those in which the invading object is a person or something visible to the naked eye—are trespasses. Others—those that "fall short of trespasses but which still interfere in the use and enjoyment of land"—are nuisances.⁴⁹ As ownership is understood by Epstein in physical terms, so too is nuisance:

The term "invasion" is not used as a disguised synonym for the legal conclusion that the defendant's activities are of the sort to which tortious liability should attach, where liability is at bottom imposed for other, possibly economic, reasons. Instead, the term "invasion" is *a description of a natural state of affairs which in itself serves as a justification for imposing legal responsibility*.⁵⁰

44. Douglas & McFarlane, *supra* note 10.

45. Douglas, *supra* note 10, at 372.

46. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 686 (H.L.).

47. Epstein, *supra* note 10, at 53.

48. See e.g. HENRY E. SMITH & THOMAS W. MERRILL, *THE OXFORD INTRODUCTIONS TO US LAW: PROPERTY* 32 (2010). It is sometimes called the "column of space" defined by the two-dimensional area of the land on the earth's surface, although geometrical pedants will insist that the shape is not a column. So far as I know, there is no special name for the shape, which is closest to a spherical sector (of a sphere with infinite volume, or perhaps a volume defined by the highest usable portion of the atmosphere), but a spherical sector is defined by a circular shape whereas the volume under question is defined by the irregular two-dimensional shape of the so-called parcel of land.

49. Epstein, *supra* note 10, at 53.

50. *Id.* (italics in original) (underlining added).

It is important to be clear about what Epstein is saying here. On this account of nuisance, the core of the wrong lies in one person acting in such a way as to lead to a *physical* invasion into the three-dimensional space that, on his account, defines another's property. Epstein emphasizes above that this is a matter of a "natural state of affairs,"⁵¹ which is to say that, at least in the first instance, we can understand whether or not a nuisance has taken place strictly by looking at the empirical state of the world: we ask simply, did this or that particle enter onto this or that land.

Now, there is an obvious intuitive appeal to this way of looking at nuisance law. Epstein's model does seem to match, at least on first glance, many of the paradigmatic nuisances—smoke, smells—which do involve something emanating from the defendant's land onto the land (that is, into the three-dimensional space) of the plaintiff. As I noted above, in English law, this point was endorsed by Lord Goff in his judgment in *Hunter*:

Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms—noise, dirt, fumes, a noxious smell, vibrations, and suchlike.⁵²

One can see why this would be an attractive way to look at nuisance law. As Henry Smith has noted, it is simple and cost-effective, in that it allows potential defendants to know, simply and easily, what kinds of activities would make them liable to plaintiffs in nuisance. And Simon Douglas has argued that this sort of conception of nuisance liability sets an attractive balance as between the rights of owners of different properties.

These advantages notwithstanding, this sort of view is wrong and must be rejected. There are several reasons. First, as Jules Coleman and Arthur Ripstein, drawing on Stephen Perry's work, showed conclusively in the parallel negligence context, Epstein's causal-strict-liability account of tort is fundamentally wrongheaded.⁵³ It presumes, without arguing for or defending, an implausible and morally quite unappealing conception of the nature of private law rights. Indeed, the law of nuisance bears this out. Why? We might say that it is because property is not physics:⁵⁴ "[I]t is elementary that a nuisance can be created without a physical intrusion."⁵⁵ The case books are rife with cases in which liability for nuisance does not rest on any kind of emanation by defendant onto plaintiffs' land. These cases include liability for removal of support;⁵⁶ for obstructing access to land;⁵⁷ for creating a (well-founded and substantial) fear that a neighbor's property would collapse onto one's own;⁵⁸ for the listing of an owner's phone number in a way that lead to an inordinate number of unwanted phone calls;⁵⁹ for creating a fear of contagion;⁶⁰ for the

51. *Id.*

52. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 686 (H.L.).

53. Coleman & Ripstein, *supra* note 15.

54. I owe this phrase to Ernie Weinrib.

55. *Seagraves v. Portland City Temple*, 522 P.2d 893, 895 (Or. 1974).

56. *Holbeck Hall Hotel Ltd. v. Scarborough Borough Council*, [2000] 2 All ER 705 (C.A.).

57. *J. Lyons & Sons v. Wilkins* (No. 2), [1899] 1 Ch. 255 (U.K.); *Guppys (Bridport) Ltd. V. Brookling*, [1984] 1 H.L.R. 1 (U.K.).

58. *Birmingham Dev. Co. Ltd. v. Tyler*, [2008] EWCA Civ. 859. Strictly speaking, this is in *obiter*.

59. *Macca v. Gen. Tel. Co. of Nw.*, 495 P.2d 1193 (Or. 1972).

60. *Stotler v. Rochelle*, 83 Kan. 86, 109 P. 788 (Kan. 1910).

sight of sex workers entering and exiting a brothel;⁶¹ for the sight of a large collection of junk cars;⁶² and for building an unsightly spite fence.⁶³ These cases could be multiplied.

Taken as a whole, these cases are not plausibly analyzed as cases in which a defendant's action is wrong because it infringes a right of a plaintiff that can be understood in spatial or physical terms.⁶⁴ We can see this most clearly by considering the attempt to do just that with respect to one such case. Recall Lord Goff's thought that nuisance liability "will generally arise from something emanating from the defendant's land."⁶⁵ He also noted that this rule could be relaxed "in relatively rare" cases, such as *Thompson-Schwab v. Costaki*, in which the sight of sex-workers was held to be a nuisance.⁶⁶ Douglas and McFarlane attempt to squeeze even this case into the causal invasion view:

Interestingly, Lord Goff describes the nuisance as consisting of the 'sight of prostitutes and their clients entering and leaving neighbouring premises:' this focus on sight, which necessarily requires the passing of light rays over the claimant's land, means even that rare case can in fact be reconciled to the general model of nuisance, in which a defendant will only be liable if he is responsible from something cross the boundary of claimant's land.⁶⁷

Well, one would have thought that this is close to a *reductio ad absurdum*: if light rays are a nuisance in this case, why not in every case?

It is clear that every owner of real property is bombarded, at all times, and from all directions, with light rays. But, it would be absurd to think that these "emanations" could ground nuisance liability. Instead, cases in which nuisance liability has been found for the effects of light have clearly stated the ground of such liability in quite different terms. Consider, for example, *Thompson-Schwab* to *Bank of New Zealand v. Greenwood*,⁶⁸ which Douglas and McFarlane mention in an attempt to bolster the Emanations Approach's interpretation of nuisance-by-light cases. There, the defendant was found liable in nuisance for the light that was reflected off of its glass veranda and into the plaintiff's offices. But, the judgment makes clear that such liability does not turn on anything like a physical invasion of the plaintiff's property. Rather, the light was a nuisance because it caused "considerable discomfort and inconvenience" and "irritation and complaint" to those within plaintiff's offices.⁶⁹ Another well-known case of nuisance by light is *The Shelburne v. Crossan Corp.*⁷⁰ There, the defendant owner of an apartment building had erected a large illuminated advertisement on the top of the building and the light from the sign was bright enough to make sleeping in a subset of the rooms inside the plaintiff's

61. *Thompson-Schwab v. Costaki*, [1956] 1 W.L.R. 335 (U.K.).

62. *Foley v. Harris*, 286 S.E. 2d 186 (Va. 1982).

63. *Apple Hill Farms Development, LLP v. Price*, 342 Wis. 2d 162, 816 N.W. 2d 914 (Wis App. 2012).

64. As I have said, a parallel here might be the attempt by some to try to understand tort law in terms solely of factual causation; but normative questions about responsibility need normative answers. See Andrew Botterell & Christopher Essert, *Normativity, Fairness, and the Problem of Factual Uncertainty*, 47 Osgoode Hall L.J. 663 (2009).

65. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 684-86 (H.L.).

66. *Id.*

67. Douglas & McFarlane, *supra* note 10, at 232.

68. *Bank of New Zealand v. Greenwood*, [1984] 1 NZLR 525.

69. *Id.* at 527.

70. *The Shelburne v. Crossan Corp.*, 122 A. 749 (N.J. Ch. 1923).

neighbouring hotel impossible. Again, liability was found without any reference to anything like an invasion or an emanation, and instead on the grounds that the defendant's sign "materially interfere[d] with the ordinary comfort physically of human existence" on plaintiff's property.⁷¹

Now we can return to *Costaki*. The sight of the sex workers, the court held, "constitute[d] a sensible interference with the comfortable and convenient enjoyment of his residence where live with him his wife, his son and his servants."⁷² It is of course possible, with Lord Goff, to treat *Costaki* as in some way anomalous, and understand liability here to rest on a different ground that liability in more common cases of nuisance by smoke, smells, sounds, etc. But surely it would be preferable to have a unified account of nuisance, on which liability in *Costaki*, in the nuisance-by-light cases, in the common emanations cases, and in the other non-emanations cases I mentioned above could all be explained in the same way. Such an account is available; in fact, it is the account that the law itself gives us. Look more closely at the passage cited just above. Notwithstanding the somewhat antiquated flavor of the reasoning in *Costaki*,⁷³ we might note in particular the reference to the plaintiff's family. This suggests that we can see the case as being about the capacity of owners of real property to control the behavior of others in at least some ways in order to, we might say, 'shut out' some parts of the world and have a place of normative refuge, safety, and so on. On a conception of ownership like this, the tort of nuisance acts to ensure that this normative refuge is protected and, in so doing, helps also to constitute its scope. I defend this conception in the next sections.

Before I do, I should briefly mention what Epstein himself says about this problem. Recall that his paper's subtitle is "Corrective Justice and Its Utilitarian Constraints." Echoing Lord Goff, in a way, Epstein recognizes that it is simply not possible to account for the entire law of nuisance on the basis of the empirical or causal account I outlined above, or at least not in a remotely normatively plausible way. He then goes on to characterize a large part of the law of nuisance in terms of the utilitarian constraints on the basic corrective justice framework. For someone who, like Epstein, believes in the role and importance of rights in private law, this is a stunning concession, which amounts to something very close to giving up the entire game. Why bother thinking about rights at all, if in so doing we need to account for a great deal of the law⁷⁴ in terms of non-right-based considerations. Before we characterize the law in these terms, we might instead search for a single, better account of the nature of the right in nuisance that would allow us to see all of the law as a reflection of this underlying right. I will embark on such a search in the remainder of this article.

71. *Id.* at 750.

72. *Thompson-Schwab v. Costaki*, [1956] 1 W.L.R. 335, 654 (U.K.).

73. See ALLAN BEEVER, *THE LAW OF PRIVATE NUISANCE* 22 n.30 (2013).

74. Epstein needs utilitarianism to explain the principle of 'live and let live' from *Bamford v. Turnley* (1860) 3 B. & S. 62, which is traditionally thought to be amongst the core doctrines of the law, along with the similarly prominent locality rule and the rule about harms traceable to the sensitivity of plaintiff as not grounding liability. See Epstein, *supra* note 10, at 82-94. Basically, he cannot explain anything non-trespass-like about nuisance without utilitarianism. This makes sense, as his physical conception of the right is really in its absolute best light a conception of the right in trespass.

III. WHAT NUISANCE IS ABOUT

We have seen so far that the two best-known accounts of nuisance are failures.⁷⁵ The economic account, as exemplified by Coase's brief treatment, fails to see how nuisance is not about balancing of harms but is about rights, whereas the putative rights-based account of the sort offered by Epstein focuses wrongly on the idea that a nuisance can be understood in terms of a natural, empirical event—a physical invasion of a physical space—and so is both implausible and unable to account for a core important part of nuisance law. Interestingly, though, each of these two views has something going for it. The latter has the basic idea of nuisance correct, namely that, as a part of private law, nuisance is to be understood in terms of the rights of the parties. (Indeed, this is where Epstein begins; he goes wrong because he has a bad account of a right.) What Coase has right, I have mentioned above briefly, but now want to focus on.

I said that, in discussing nuisance in his famous article, Coase landed on a crucial feature of the tort when he pointed to what he called 'the reciprocal nature of the problem':

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.⁷⁶

While Coase's own conception of reciprocity—reciprocity of harms—will not work, recognizing the reciprocal nature of the problem is crucial to solving it.

The crucial point is that nuisance is about the reciprocity of rights, and reciprocity of rights is not reciprocity of harms. It is better understood in terms of the possibility of rendering consistent and systematic a right of owners such that all owners have a set of rights that allows them to interact with one another (and with non-owners) on fair terms. The thought would be that to be an owner is to have a kind of interpersonal normative control, to have the right to determine whether or not others may act in certain ways.⁷⁷ But reciprocity of private law rights requires that the normative control that each owner has must be the same as the normative control that every other owner has. Thus, the rights of ownership limit themselves as part of a system; no owner can reasonably claim to have a right that her neighbor not act in some way unless at the same time she admits that her neighbor also has the right that she not act in that same way. This is not a feature of land, or of harms, or of causation understood empirically or extralegally. It is a feature of any system of *rights*. This means that we need to understand the systematic nature of the law of nuisance primarily in normative terms. The question about whether or not a defendant's

75. Henry Smith sees this too. His account of nuisance in terms of information costs and governance vs exclusion tries to solve the problem by saying how some cases are about exclusion – as Epstein thinks—while others are about cost-benefit analysis—as Coase thinks. But rather than getting the best of both worlds Smith gets the worst, since each of these views is, as I showed above, problematic not just in its failure to account for some of the cases but also on its own terms. Moreover, Smith is forced to say that not all nuisance cases are at base about the same kind of wrong, whereas my account shows a unity in the law. See Smith, *supra* note 9.

76. Coase, *supra* note 4, at 2.

77. Note that the control, being interpersonal and normative, is not control over states of affairs but fundamentally a kind of capacity to determine whether or not it would be permissible or justifiable for others to perform certain actions.

action constitutes an unreasonable interference with the use and enjoyment of a plaintiff's land, then, is a question about whether or not a system of property rights can admit of a systematic realization of the kind of interpersonal normative control that such a finding would entail.

"A nuisance is an unreasonable interference with another's right to use and enjoy her property."⁷⁸ Or as the House of Lords put it, nuisance is a "tort against land."⁷⁹ This means that it protects a right paradigmatically held by owners as owners—its role in a system of property lies in its helping to fix the scope of the interpersonal normative control that owners have as owners, or as I will say, *the normative boundaries of their ownership*. Since these boundaries are part of a system, they must be fixed in a way that we can understand as setting fair terms of interaction between owners and others. Adding to this, the central role played by the law's reasonability standard suggests that the kinds of actions that have been found to constitute a nuisance should be conceivable as forming a unified set whose membership is grounded on the fact that these actions (or their effects) unreasonably interfere with whatever it is that makes up the core right that ownership protects. Thus, the content of the law of nuisance, that is, the content of the fair terms of interaction appropriate to a system of ownership, partially constitutes the very content of the right of ownership itself. An abstract account of that right would, at the same time, help us understand why the various forms of nuisance count as unreasonable interferences with it. That is, if nuisance sets terms of interaction between owners and others appropriate to a rightful or justifiable conception of ownership, a theory of nuisance depends, in no small part, on a theory of ownership that can make sense of the content of nuisance.⁸⁰

A. *Towards a Theory of Property*

A complete presentation of a theory of ownership and its justification will need to take place in another forum. But a brief abstract discussion will be helpful here. To begin, we can divide justifications of property into two classes by asking the following type of question: taking as given the private-right-based structure of property law—the fact that to be an owner is paradigmatically to have the right that others not act in some ways—we ask whether or not this structure is designed to serve a goal that can be understood (and perhaps even achieved) independently of it. Most theories of property answer that it can: that property rights are a tool or instrument to be used to serve some interest⁸¹ that exists

78. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, OXFORD INTRODUCTIONS TO US LAW: TORTS 241 (2010).

79. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 702 (H.L.); see also Nolan, *supra* note 32, for clear discussion. To be clear, standing to bring a claim in nuisance is available not only for owners but also for others in possession of property, such as tenants. Whatever rights these others have are obviously derivative of the owner's interest, so I leave this point to one side.

80. So, I disagree in the strongest possible terms with Allan Beever, who denies that a theory of nuisance depends on a theory of ownership. See BEEVER, *supra* note 73, at 24. One way of expressing the problems with the two views considered in the previous Part of this article is that each fails because its account of nuisance rests on an incorrect account of ownership.

81. The two most prominent property theorists working today, Henry Smith and James Penner, both endorse a view of this sort, on which property rights are a tool to serve and protect the interest we have in the use of things. This is not the space to argue against this view at length. In my *Property in Licenses and the Law of Things*, 59 MCGILL L. J. 559 (2013), I suggested one reason to worry about it—that its conception of a "thing," is either too narrow to explain all of property or else problematically circular. Arthur Ripstein provides an argument along the lines of this paragraph and the next in his *Possession and Use* in Penner and Smith, *supra* note 10. The

independently of it, or some general advantage that is conceivable in non-property terms.⁸² But such justifications of property inevitably give rise to a ‘gap’ between the institution and its justification.⁸³ If property is to serve the general advantage (however conceived) but has a rule—or right—based form, how are we to understand those difficult cases, easy to find in the law,⁸⁴ where the general advantage that justifies seems to diverge from what is justified? (We can put this worry in narrower terms more directly applicable to the law of nuisance by asking why *do* courts insist on the sort of rights-based reasoning that Coase found “strange,” with its focus on the sorts of considerations that Coase thought “irrelevant”?)⁸⁵

We might return to our question and choose the other path: we might ask for a justification of property that justifies it as a “unique and indispensable [moral] tool”⁸⁶ required to solve a problem that only it can solve.⁸⁷ To be an owner, in abstract terms, is to have the right to determine how others act in some defined set of circumstances. To justify the institution of property (or ownership) in the terms outlined in the previous paragraph would be to show that this kind of interpersonal normative control achieves a kind of value (or perhaps serves a kind of interest) that can be achieved (or served) in no other way; it would be to show that the right *constitutes* rather than *produces* the value.⁸⁸ When it comes

interest-in-use view makes both Penner and Smith’s own treatments of nuisance problematic. Smith’s discussion of nuisance is a sophisticated law and economics version which aims to do a better job than Coase or Calabresi and Melamed’s accounts do of explaining the rights-based form that nuisance cases take. But Smith is committed to a view on which property rights are tools to the promotion of some other value—either the interest in use, in his mature work, or perhaps a more basic utilitarianism, in the nuisance piece—and so suffer all the flaws of that sort of two-stage view. *See id.* Penner’s view gets a lot right—including a very clear discussion of the flaws of a physical-invasion-based view like Epstein’s—but again fails in that it rests ultimately on Penner’s flawed theory of property rights. *See* J.E. Penner, *Nuisance and the Character of the Neighbourhood* 5 J. ENVTL. L. 1 (1993).

82. This is usually taken to be Hume’s view. He thought property just made us generally better off: DAVID HUME, *A TREATISE OF HUMAN NATURE* 494 (L.A. Selby-Bigge, P. H. Niddich eds., 2nd ed. 1978). In a more attenuated way, it was also Locke’s (he thought, among other things, that property was necessary to allow mankind to take advantage of the bounty of earth as God had given it. *See* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, II, 27–28 (Peter Laslett ed., 1994); *see* A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 236–264 (1992), for more on this interpretation of Locke; *see* ARISTOTLE, *POLITICS*, II.5 1263b3–14 (W. D. Ross trans., Clarendon Press 1957) (350 B.C.), for Aristotle’s thought that property was necessary for generosity. Kant had the other sort of view on which property solves the problem of not having property. *See* IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans. 1996).

83. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Means and Ends in American Property Law* 94 CORNELL L. REV. 959 (2009).

84. *See, e.g.*, *Jacque v. Steenberg Homes Inc.*, 209 Wis. 2d 605, 563 N.W.2d 154 (Sup. Ct. 1997); *Goulding v. Cook*, 661 N.E. 2d 1322 (1996); *Athwal v. Pania Estates Ltd.* [1981] 11 C.E.L.R. 17 (B.C. S.C.); *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

85. Coase, *supra* note 4, at 15.

86. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 508 (2008).

87. In the opening sentences of the *Nicomachean Ethics*, which is one of the two or three most important works every written in moral and political philosophy, Aristotle draws a distinction between two ways something can be for the sake of something else: ‘But a certain difference is found among ends; some are activities, others are products apart from the activities that produce them.’ (ARISTOTLE, *NICOMACHEAN ETHICS*, I.1 1094a3–4 (W.D. Ross trans., Clarendon Press 1957) (350 B.C.)). My thought here is that, while most take property to be a productive end of some good identified independently of property we might instead take it to be constitutive of some end that cannot be separated from it. *See* Christopher Essert, *How Law Matters in Why Law Matters*, 12 JERUSALEM REV. L. STUDIES 1 (2015), for a discussion of the distinction in slightly more general terms and as applied to theories of the nature of law.

88. This seems like a tall task, especially in the light of the fact that there are many quite different property institutions. *See* HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011). That is, that formal definition of property includes—and is definitely meant to include—not only property in land but also property in chattels,

to real property, to be an owner is to have the right to determine how others act with respect to some piece of land (or more precisely some three dimensional space).⁸⁹ But as we saw in the last section, the law of nuisance makes clear that this ‘with respect to’ needs to be understood in normative rather than factual terms. That is, the rights of owners are simply not rights to exclude from or prevent emanations into some physical space; rather, they are rights that (at least sometimes) provide owners with the ability to control others’ actions even when they have no physical impact on that space. Why?

It is a good thing that we can have rights against others that give us interpersonal normative control over others’ actions with respect to parts of the external world. It is a good thing that we are capable of extending our normative spheres beyond ourselves by becoming owners. Were there to be no such thing as property, the rights that we would have against others would be limited to our rights in our persons (and perhaps those rights we could obtain through voluntary undertakings). Thus, we would be lacking any normative protection against others except that which we have in ourselves; we would have nowhere to hide but in our own selves. Property provides a kind of additional protection; it provides us with a sphere in which we can determine how others act and so a sphere in which we are sovereign.

Private ownership of land is only justifiable, if it is justifiable at all, because it is valuable for us to be able to control others to have a right that they not act in certain ways defined roughly by reference to location, so that there can be the possibility of our being in charge of a location, so that we can experience a degree of sovereignty there and realize the value of a place of refuge in a way that cannot be realized except by being in charge of it in the sense of having a right over it. This is approximately the idea that underlies a certain set of currently popular views in political philosophy, including the notion of Republican freedom as non-domination, and the Kantian notion of freedom as independence.⁹⁰ In particular, the thought here is that, unless I am in charge of some location, then everywhere and always, I am in a location where others are in charge of me. And if others are in charge of where I can be, they are also in charge of what I can do, as everything that needs to be done needs to be done somewhere.⁹¹ Thus, in order to ensure that we as separate moral agents are not left to the mercy of others or left in a position in which we have no space of our own except the ‘space’ inside ourselves, we must create an institution of

certain kinds of intellectual property, some kinds of government-issued licenses, and other kinds of intangible property such as the right of publicity, as any plausible definition of property must. Essert, *supra* note 87. We might think—and I say this tentatively—that the justification of ownership in each of these situations needs to be taken separately, although in each case keeping in mind that what is to be justified is the form of interpersonal normative control (the *in rem* right of ownership) itself, and that avoiding the gap problem requires providing a normative interest or value that can only be served by that kind of normative relationship in that instance. Such a general justification (or better, set of justifications) of property is outside my scope here.

89. *Anchor Brewhouse Devs. Ltd v. Berkley House (Docklands Devs.) Ltd.*, (1987) 2 EGLR 173.

90. See PHILIP PETTIT, *REPUBLICANISM* (1997) or QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998); ARTHUR RIPSTEIN, *FORCE AND FREEDOM* (2009).

91. Jeremy Waldron, *Homelessness and the Issue of Freedom* 39 UCLA L. REV. 295 (1991).

property in land.⁹² On this conception of property, we might say that owners have a *normative refuge* constituted by their property.⁹³

B. Nuisance and Ownership

What does all this have to do with the law of nuisance? Once we recognize that the value of property in land is in the kind of normative refuge it provides to its holder—the value of being able to have the right that others not interfere with a certain space because of the kind of normative security that provides—we see that there is no *a priori* reason to think that this right will precisely protect some physical space against physical invasions understood empirically. Rather, the *normative boundaries* of the right will be set by normative considerations grounded on the value that justifies the right. In other words, owners' rights provide just that degree of interpersonal normative control that allows them to genuinely have the normative refuge the value of which justifies their right. This tells us why nuisance must include a reasonability standard: each owner acting on her own property cannot demand of other owners that they not act in ways which she would not at the same time allow them to demand of her. The reasonability standard sets fair terms of interaction by recognizing the proper degree of control that owners need to have in order for their property to genuinely serve as a normative refuge. *Thus, the law of nuisance sets the normative boundaries of the right of ownership by reference to the boundaries of the justification of the right in terms of a normative refuge.*

To illustrate this last point, consider *Sturges v. Bridgeman*.⁹⁴ Above, I quoted Coase on the reciprocal nature of nuisance. Immediately following that passage I cited, Coase specifically mentions *Sturges*:

[Consider] the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products.⁹⁵

As I have already said, Coase gets something right here and something wrong. He is wrong, as the law of nuisance makes quite clear, to think that what matters is a comparison of harms. Harm is a monadic category, and nuisance law is about the correlatively structured interaction between the parties.

92. I develop an account of property that tracks the preceding few paragraphs in my *Property and Homelessness* (forthcoming).

93. That is why a decision like *Armory Park Neighborhood Ass'n v. Episcopal Community Services* in Arizona 148, Ariz. 1, 712 P.2d 914 (1985), leaves such a bad taste in one's mouth. In this case, the court held that a soup kitchen created a nuisance by attracting homeless clients, who 'frequently trespassed onto residents' yards, sometimes urinating, defecating, drinking, and littering on the [plaintiff] residents' property. A few broke into storage areas and unoccupied homes, and some asked residents for handouts.' The idea that ownership of real property provides a kind of refuge from the world by giving owners a set of rights to control the actions of others, even sometimes extending (as in *Thompson-Schwab*) to controlling what one can see from one's home, is morally plausible only if this same kind of refuge is made available to everyone. The idea of a give and take or live and let live requires, it seems embarrassing to have to point out, that everyone has something to give and somewhere to live. See also Waldron, *supra* note 91.

94. *Sturges v. Bridgman*, [1879] 11 Ch. D. 852 (U.K.).

95. Coase, *supra* note 4, at 2.

But Coase is right to see that there is a sense in which this is a zero-sum dispute. Either the dentist wins, in which case he—and any other owner similarly situated—has the right that others not cause him to experience noise at or above the level in question. Or the confectioner wins, in which case he—and any other owner similarly situated—has no duty not to make noise at or above that level. The law of nuisance frames the dispute in such a way as to make it clear that there is obviously a level of noise about which plaintiffs such as the dentist cannot complain. The rule of live and let live means precisely that owners cannot expect to have complete control over others' action;⁹⁶ thus, this rule is at the heart of nuisance law.⁹⁷ Set the level of noise too low, that is, such that owners have an extremely expansive right to prevent others from making noise at all, and we will have given all owners the ability to determine how others act far beyond what is needed in order to realize the value of the interpersonal normative control that justifies the institution of property. Set the level too high, on the other hand, and the rights of owners will be too restrictive to be of any good, such that owners would have no rights to prevent others from making even noises that make occupation of the land impossible, denying the possibility of the owner having a normative refuge in the land and effectively effacing owner's claim to have any rights over the land at all, or as Weinrib put it, "negating the plaintiff's status as owner."⁹⁸

Therefore, the same rule of live and let live means that there is a level of noise—the level at which "[b]asic life activities, such as sleeping, resting, relaxing, working, studying, reading, or doing anything that required concentration, were impossible due to the loud noise . . ."⁹⁹—above which defendant would be creating a nuisance.¹⁰⁰ Between extremes lies the standard. Plaintiff owners have the right that others not make *unreasonable* noise. This is the standard that the law sets in recognizing that the rights of owners need to be systematically realized: each owner must have the same right as others not make noise above a certain level. The reasonableness standard is the law's abstract articulation of that

96. See *Bamford v. Turnley* (1860) 3 B. & S. 62 ("It seems to me that the principle . . . is this, namely, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action . . . [t]he convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."). See BEEVER, *supra* note 73, for an elaboration of the rule in rights-based terms.

97. The fact that Epstein is forced to explain this core rule in terms of a utilitarian constraint on his putatively corrective-justice based model of nuisance law shows the central failure of his account. See *supra* note 67.

98. WEINRIB, *supra* note 21, at 191.

99. *Whaley v. Park City Mun. Corp.*, 190 P.3d 1, 4 (Utah Ct. App. 2008). But note that this was just the allegation made by the plaintiffs whose claim was denied.

100. I am thinking something like this: "Most of the plaintiffs testified that their normal routine changes on fireworks Fridays. They must close their windows and turn off their air conditioners to keep out noise, smoke and smell. The noise, which some compared to being at a firing range, makes it difficult to carry on conversations. One plaintiff testified that he goes into his basement to escape the noise; others leave their homes altogether. Another plaintiff, who works between 2 a.m. and 7:30 a.m., misses her usual night's sleep, between 8 p.m. and 1 a.m., on fireworks nights. The reverberations from the fireworks make some plaintiffs feel that their homes are trembling. They experience the booms as earth shattering and like claps of thunder. Several plaintiffs have emotional reactions to the fireworks, feeling anxious, angry and frustrated. They also reported negative reactions from their family pets. One plaintiff spends fireworks evenings soothing her young daughter, born in July, 2000, who awakens frightened and crying from the explosions." *Esposito v. New Britain Baseball Club, Inc.*, 49 Conn. Supp. 509, 512-13 (Conn. Supp. 2005).

level.¹⁰¹ Here, as elsewhere, the articulation of the standard through the ideas of reasonability and the reasonable owner captures the correlativity and systematicity of the law, by asking owners to accept the same level of noise on their property which they expect others to accept as a result of their own activities.

In *Greenwood*, the nuisance-by-reflected-sunlight case, the court made exactly this point when it rejected defendant's argument that plaintiff could abate the nuisance by installing darker blinds, since "to expect these plaintiffs to provide sun barriers . . . as part of the give and take of business in the central city would in reality be to require them to accept total responsibility for elimination of the plaintiff's nuisance . . . the law will not require that."¹⁰² (In simple terms we could say: the very idea of my having a right against you implies that I have this right in light of some objective features of my situation and thus, presupposes that anyone else in that same situation must have the same right; thus, the rights need to be systematically defined by and limited against each other.) A Canadian court captured the idea very well in holding that a smell caused by a tobacco factory was a nuisance, because it "cause[d] material discomfort and annoyance and *render[ed] the plaintiff's premises less fit for the ordinary purposes of life . . .*"¹⁰³

It is important to see here just how deep the correlativity of the reasonability standard of nuisance law runs, on the kind of account of nuisance and property I am offering here. The reasonability inquiry is not into the reasonability of the defendant's action taken alone or the reasonability of the plaintiff's loss taken alone, but rather into the reasonability of the systematic arrangement of rights as between the parties that either result would entail.¹⁰⁴

A prominent tort law textbook put the point clearly in the middle of the twentieth century:

"Reasonable" as used in the law of nuisance must be distinguished from its use elsewhere in the law of tort and especially as it is used in negligence actions . . . But here 'reasonable' means something more than merely 'taking proper care.' It signified *what is legally right between the parties*, taking into account all the circumstances of the case . . .¹⁰⁵

101. And it is not at all clear that we can—or should—try to make the standard more precise when we talk about it in these abstract terms. The reasonability standard must be applied through an exercise of practical judgment and what it requires cannot be specified in the absence of a particular context to which it may or may not apply. See Martin Stone, *On the Idea of Private Law*, 9 CAN. J. L. & JURIS. 235, 242 (1996).

102. Bank of New Zealand v. Greenwood, [1984] 1 NZLR 534.

103. Appleby v. Erie Tobacco (1910), 22 O.L.R. 533, para. 9 (C.A.) (emphasis added).

104. As the court put the point in *Rogers v. Elliot*, 15 N.E. 768, 771 (Mass. 1888), "the right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may be reasonably required to submit to." Incidentally, this phrasing helps to see why, even though I have mostly talked about nuisances constituted by the defendant's actions, there can liability in nuisance for so-called continuing nuisances, situations in which a defendant is liable for preventing something from happening to plaintiff's land. Since nuisance is fundamentally about the terms of interaction between plaintiff and defendant, understood in normative terms, liability can be found when a defendant has failed to take actions that plaintiff has a reasonable claim to demand of him such as trimming overhanging tree branches, keeping brick and stone walls in good enough repair that their parts not fall onto plaintiff's land, and so on. In the language of one well-known English case, liability here depends obtains when defendant "fails to take any reasonable steps to bring [the interference with plaintiff's property] to an end . . ." See *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, 880. The thoroughly normative core of my account of nuisance makes cases such as this easy to explain.

105. WINFIELD, TEXT-BOOK ON THE LAW OF TORT 448 (2nd ed. 1950) (emphasis added) (cited in Russell Transp. Ltd. v. The Ontario Malleable Iron Co. Ltd., [1952] O.R. 621, para. 33 (Can.).

Nuisance is neither about the doing of defendant understood monadically, nor about the suffering of plaintiff understood monadically. Rather, it is about the doing of defendant only in relation to the suffering of plaintiff and about the suffering of plaintiff only in relation to the doing of defendant.¹⁰⁶ What matters is whether defendant's conduct was "reasonable as regards" plaintiff,¹⁰⁷ which is just another way of asking whether plaintiff has a right against defendant that defendant not engage in that very conduct. The analysis is shot through with correlative normativity.

One way to illustrate this is by seeing that the case law reveals that whether or not a certain kind of interference constitutes a nuisance depends on what activity of defendant is causing that interference. The leading House of Lords decision on nuisance, *Hunter v. Canary Wharf*, famously holds that plaintiff's loss of television reception caused by defendant's building up on his land was not a nuisance, since to hold would be to grant defendant a right that others not build up on their land, and "[a]s a general rule, a man is entitled to build on his own land."¹⁰⁸ The possibility of building up is quite close indeed to the core value of having property in land, since in effect its incidental to being able to decide where you are on your property, so a decision which gave one owner a right that others not build up would be very hard to square with the possibility of ownership of real property at all. But compare the result in *Hunter* with an earlier Ontario case, *Nor-Video Services v. Ontario Hydro*. Here, radiation from new high-voltage electrical lines installed by the defendant electrical company blocked plaintiffs' television reception, and this was held to be a nuisance because "proprietary interests entitled to protection were invaded by Hydro's action in constructing high power electrical installations . . ."¹⁰⁹ *Nor-Video* is sometimes taken to be in conflict with *Hunter*,¹¹⁰ but, notably, the House of Lords in *Hunter* did not see things this way.¹¹¹ The key to reconciling the cases lies in recognizing that the reasonability inquiry must be one which makes reference both to the plaintiff's right that others not interfere with her property *and* the nature of the duty that such a right imposes on defendants:¹¹² the two cases together stand for the proposition that a landowner does not have a general right that others not block her television signals by building on their land while at the same time having a right that others not perform some particular actions which interfere with a signal where a normal building would not. In fact, an Illinois case on this same issue makes the point quite clearly: "The principal issue in this case is whether defendant has a legal right to use the air space above its property subject only to

106. Here, as elsewhere, the language of doing and suffering is Aristotle's. See ARISTOTLE, NICOMACHEAN ETHICS, V. See also Martin Stone, *The Significance of Doing and Suffering*, PHILOSOPHY AND THE LAW OF TORTS 135 (Gerald J. Postema ed. 2001)).

107. *Nor-Video Services v. Ontario Hydro* (1978), 19 O.R. (2d) 107 (H.C.J.), para 5.

108. *Hunter v. Canary Wharf Ltd.*, [1997] 1 A.C. 655, 685 (H.L.).

109. *Nor-Video Services*, 19 O.R. (2d) at para. 37.

110. *Neyers & Diacur*, *supra* note 10. WEINRIB, *supra* note 21, thinks it is in conflict with *Fontainebleau*, which amounts to the same thing.

111. Lord Goff discussed the case (at 684-5) in noting that plaintiff's claim did not fail merely, because it was a claim based on access to television ("That interference with such an amenity might in appropriate circumstances be protected by the law of nuisance has been recognised in Canada, in *Nor-Video Services Ltd. v. Ontario Hydro*. However, as I see the present case, there is a more formidable obstacle to this claim. This is that the complaint rests simply upon the presence of the defendants' building on 'land in the neighbourhood as causing the relevant interference.").

112. See *Hay v. Cohoes Co.*, 2 N.Y. 159, 161 (1849), for a general statement of the idea. The requirement that a plaintiff's harm not be grounded on the plaintiff's peculiar sensitivity reflects this same point.

legislative limitation, or stated conversely, whether an individual or class of individuals has the right to limit the use of such property on the basis that interference with television reception constitutes an actionable nuisance.”¹¹³ The answer to the question is, it depends: individuals do not have any general right to limit the use of others’ property on that basis, but they do (or at least may) have a more limited right with respect to some uses, like high-voltage power lines.¹¹⁴ Thus, to determine whether or not defendant is liable in nuisance is not simply about comparing the costs or benefits of the two activities. Rather, it is a fundamentally correlative inquiry into the question of whether defendant, in performing *this* activity with *these* effects on plaintiff’s land, is unreasonably interfering with plaintiff’s control over her own property. And in performing this inquiry into reasonability, the court is also determining what it means to own property, as I will explain in the next section.

C. *Setting the Normative Boundaries of Ownership*

Return to the cases in which a nuisance has been found absent any physical invasion of a plaintiff’s land. The basic thought is the following: once we accept that ownership is about interpersonal normative control and that nuisance is about protection of ownership, there is no *a priori* reason to think that the protection offered by nuisance should be understood empirically in terms of physical emanations. Things like removal of support, obstructing access to land, creating a (well-founded and substantial) fear that a neighbor’s property would collapse onto one’s own, the listing of an owner’s phone number in a way that lead to an inordinate number of unwanted phone calls, creating a fear of contagion, the sight of sex workers entering and exiting a brothel, the sight of a large collection of junk cars, and building an unsightly spite fence are all, at least arguably and keeping in mind the reasonableness standard, things that could, “render property less fit for the ordinary purposes of life,” things that could render empty plaintiff’s entitlement to treat her land as a normative refuge.¹¹⁵

Note the ‘arguably.’ Perhaps some of these cases are not correctly decided, but whether they are or not is beside the current point. Let me explain. Suppose I am right that

113. *Hoogasian v. Sears Roebuck & Co.*, 287 N.E. 2d 677, 678 (Ill. 1972).

114. What should we say about nuisance claims grounded in plaintiff’s demand that defendant not build up when such building up would interfere with plaintiff’s solar panels? See, famously, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). On the analysis offered here, the plaintiff could only succeed in such a claim were she to show that her normative interest in controlling others’ conduct vis-a-vis her property required that they not interfere with solar access. (By contrast, the overall social benefit of solar power just cannot be the right kind of consideration to ground such a claim.) The court in *Prah* analogized the solar power access claim to some claims about nuisance and surface water, and there may be a way to draw on this comparison to help understand these types of cases. See *infra* notes 150-52; see also Michael G. McQuillen, Note, *Prah v. Maretti: Solar Rights and Private Nuisance Law* 16 J. MARSHALL L. REV. 435 (1983), for a careful discussion of *Prah*.

115. If the Coasean cost-benefit view of nuisance failed to explain the idea that nuisance is a tort against land because it failed to explain that nuisance is about rights, the physical invasion view championed by Epstein fails, because it misunderstands the relevant concept of land. Here, as in all of private law, the relevant concept must be normative, not empirical. My land is not merely defined by a three-dimensional space so that all and only physical interferences into that space will be wrongs. Rather, my land is a normative idea that is defined by reference to the three-dimensional space but will include also incorporeal hereditaments (see *infra*, note 124) and, crucially, some control over actions that occur outside the three-dimensional space if they unreasonably interfere with my ability to determine how things will be as between myself and others with regards to that space.

the core of ownership is the normative control that owners have over others. Suppose further that the scope of this normative control needs to be developed, through the law of nuisance, by determining what is required in order to realize that normative control and, given that such realization must be systematic, what constitutes reasonable terms of interaction between plaintiff and defendant. In the light of those suppositions, it is no surprise that we will have (reasonable) disagreements about which actions count as infringements of owners' rights. Perhaps granting owners the right that their neighbors not open a brothel gives them too much normative control. Or perhaps not. As one English judge recognized, these are "difficult questions."¹¹⁶

Simon Douglas, who, recall, supports a view like Epstein's, helpfully illustrates my point here when, having conceded that there are some cases of nuisance that do not involve physical boundary-crossings, he tries to defend his on normative (rather than legal or conceptual) grounds. (Epstein, too, has a kind of a normative defense of his own view, implausible though it may be.) Douglas seems to think that the only alternative would be a view on which owners had a general right that their use of their property not be interfered with. He rejects this option, because it would "prove very onerous on others," while on his sort of view on which owner has no such right, the owner "will not, in the normal course of things, be overly prejudiced."¹¹⁷ In other words, Douglas here makes a normative argument for a particular account of the boundaries of the rights of owners—he is doing precisely what I claim nuisance law must do.¹¹⁸ I think the substance of his argument is wrong, in particular, because he fails to see that there are more than two options, and that nuisance provides owners neither with the very limited right that others not allow physical emanations onto their property nor with the close-to-unlimited right that others not act in *any way* that interferes with owner's use, but rather with a much more limited right that others not act in ways that would be permitted by unreasonable terms of interaction. But even if I am wrong and Douglas is right about the substantive scope of the reasonable terms of interaction—that is, if the normative boundaries of ownership track the physical boundaries of land—that would only be because such physical control turns out to be the kind of normative control that is required by the value of ownership, and the overall picture of the relationship between ownership and nuisance that I am advocating would be preserved.¹¹⁹

I prefer my own account.¹²⁰ In both cases, the court's reasoning seems to rest its conclusion that defendant has committed a wrong on the idea that plaintiff ought to be able to be secure from these sorts of interferences; this is consistent with my thought that plaintiff's right in her property is justified by her interest in having a kind of normative refuge there. To this effect, consider *Hubbard v. Pitt*, an English case in which the court, in considering whether or not to grant a preliminary injunction in a nuisance case, allows for the

116. *Miller v. Jackson*, [1977] 1 Q.B. 966, 961 (U.K.).

117. Douglas, *supra* note 10, at 376.

118. See Avihay Dorfman, *Private Ownership* 16 LEGAL THEORY 1, 32 (2010), for a different version of the general claim that normative argument is required to set the boundaries of ownership.

119. Perhaps a more explicitly Kantian account of nuisance such as that offered in WEINRIB, *supra* note 21 or in Arthur Ripstein, *Tort Law in A Liberal State* 1 J. TORT L. ARTICLE 3, 26-28 (2007) could be understood to be making this kind of claim.

120. I would, wouldn't I?

possibility that defendant's picketing might constitute a nuisance if defendant's picketing amounted to "besetting" plaintiff with a view to compelling him to act in some way.¹²¹ Here again, the idea might be that plaintiff's interest in having a zone of normative refuge inside his property grounds a right that defendant's not "beset" him in this way. I think the 'decency' cases are to the same effect. In addition to *Costaki*, there is *Laws v. Florinplace*,¹²² another interim injunction case in which the question of whether defendant's pornography shop was a nuisance was held to be a triable issue. There the Court suggested that the "open use" of the defendant's shop might itself materially interfere with plaintiffs' use of their residences. To the same effect, is *Mark v. State Department of Fish and Wildlife* about a nude beach located on a defendants' land, where patrons' "intrusive nudity and sexual activity impair [plaintiffs'] use and enjoyment of their land"¹²³ and so, but for some procedural issues that do not concern us, "would thus constitute a private nuisance for which they could seek damages or an injunction."¹²⁴ More generally, the Court noted that "[u]ndesired exposure to sexual activity, such as the presence of a neighboring house of prostitution, is one of the traditional grounds for finding" a nuisance.¹²⁵ This last idea again brings home the thought that the interpersonal normative control that is basic to the rights of owners is associated with a conception of property as a normative refuge: I should be able to be in my home and not exposed to at least some things taking place outside of it.¹²⁶

IV. HOW NUISANCE WORKS

OK. We have made the pudding—by seeing how nuisance is an inquiry into the normative boundaries of ownership, and the kinds of control that owners reasonably ought to have over others—now it is time to eat it. In this section, I will show how the account of nuisance I have offered here, on which nuisances are infringements of the right of owners to control the actions of others, where this right is justified by owner's normative interest in having that very control, and where liability depends on the reasonable terms of interaction between owner and others, keeping in mind the systematic nature of owners' rights, can help to explain the basic doctrinal contours of nuisance law. This will vindicate my methodological starting point: by seeing how my account of nuisance law can actually

121. *Hubbard v. Pitt*, [1976] Q.B. 142.

122. *Laws v. Florinplace*, [1981] 1 All ER 659 (Ch. D).

123. *Mark v. State Dept. of Fish & Wildlife*, 974 P.2d 716, 720 (Or. Ct. App. 1999).

124. *Id.*

125. *Id.* at 719.

126. Again, the precise substantive contours of the law matter less than the abstract idea. The crucial point to keep in mind is that at least some of these cases make it very difficult to understand why we would think that the *normative* boundaries of owners' property—that is, the scope of their normative control—should directly mirror its *physical* boundaries. Imagine that your next door neighbor engages in some set of behaviors which do not involve any emanation onto your land but which make you uncomfortable using your garden. (Imagine that he engages, in open view, in sexual activity or in the use of his own garden as a latrine; or imagine that he constantly tries to make slightly off-color jokes.) It seems to me that such a neighbor plausibly could be said to be making your own property 'less fit for the ordinary purposes of life,' or creating a 'sensible interference with the comfortable and convenient enjoyment' of your property. Obviously tests of reasonability are crucial here, and a finding of liability could not rest on merely subjective distaste. But if one's home is really to be treated as one's home, it seems as though one ought to have a right not to need to close the blinds, look the other way, or otherwise have to bear the (non-physical) effects of some actions of this sort. Thanks to David Estlund and John Goldberg for discussion of these sorts of cases.

account for nuisance law, we will see how the basic doctrines of nuisance hang together to form a part of a coherent and plausible understanding of ownership. I will discuss five issues: the relationship between trespass and nuisance (in Part A), the objective standard for nuisance liability (in Part B), the role of a local standard in determinations of liability (in Part C), the idea that a plaintiff's having 'come to the nuisance' is not a defense (in Part D), and the correct understanding of nuisance remedies (in Part E).

A. *Trespass and Nuisance*

One question that might have formed in the reader's mind by this point is this: what about trespass? Supposing that the ownership is justified on the grounds that it provides a valuable kind of interpersonal normative control, one might wonder how the tort of trespass fits in, how it relates to the tort of nuisance, or more generally to the conception of property I have offered here. In this section, I address these questions. I show that trespass protects the same interest as nuisance does, the normative interest in having control over others. Simply put, trespass protects owners' right to the kind of normative refuge I described above by giving them the right that others not physically enter the space that defines their right. As I noted above, this is true in those cases where such an action would be to the general benefit without harming the owner, and even in those cases where it would arguably be to the benefit of the owner herself. And as I suggested above, we might seek to understand the tort of trespass to have these features not because it is a tool to protect some other interests understandable in the absence of property, but instead as a special tool that is partly constitutive of the very value embodied by its form.

Trespass protects owners' interpersonal normative control with respect to what they own. A form of wrongdoing that looks like trespass is a necessary concomitant of all forms of property: trespass to land, intellectual property torts, and the various kinds of intangible property such as property in hot news, the right of publicity or confidential information, and so on.¹²⁷ But here, I argue that such a tort is not enough; taking seriously the justification of property in terms of the value of the normative control that it provides requires us to recognize the need for a wrong like nuisance, a tort that ensures that owners' normative control is protected appropriately. So, trespass and nuisance are very similar torts indeed.¹²⁸ On the most extreme version of this thought, the division between trespass and nuisance is simply an historical accident;¹²⁹ perhaps, this is why the common law has never definitively drawn a line between trespass and nuisance. We need not be extreme, though. In fact, there does seem to me to be at least a plausible way to draw the distinction

127. See *Jacque v. Steenberg Homes Inc.*, 209 Wis. 2d 605, 563 N.W.2d 154 (Sup. Ct. 1997), *INS v. AP*, 248 U.S. 215 (1918), *Attorney General v. Guardian Newspapers (No 2)*, [1990] 1 AC 109 (HL), *Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988); see also the discussion of 'Intellectual Property Torts' in GOLDBERG & ZIPURSKY, *supra* note 78, at 250.

128. See Smith, *supra* note 9, at 1024. Henry Smith makes what seems to be the same point when he writes "Nuisance rests on a foundation of exclusion, whether this is labeled trespass or nuisance."

129. Notably, there is nothing like a division between trespass and nuisance when it comes to the wrongs associated with intellectual property. While in both cases, there is something that looks like trespass—mechanical reproduction of a copyrighted work or unlicensed working of a patented invention—and something that looks like nuisance in that it depends on a kind of reasonability standard—production of something substantially similar to a copyrighted work or of an invention which is equivalent in its pith and substance to a patented invention—in both areas of law there is just one wrong, infringement.

that is consistent with much of the law and which provides some further insights into the nature of real property.

But in what might seem like a digression, I want to start with prescriptive easements. The classic case of a prescriptive easement—a right of way formed by repeated use of a particular path¹³⁰—arises through repeated *trespass*. But if both trespass and nuisance involve essentially the same form of wrongdoing—performing some action that plaintiff owner has a right that defendant not perform—then one would expect that a prescriptive easement could arise through a *nuisance* carried on for the requisite period. And so it is: a good part of *Sturges v. Bridgman*, of course, deals with whether or not the defendant might escape liability for nuisance on the ground that the noise had been carried on for so long that an easement was created.¹³¹ It turned out he had not, but the possibility was clearly within the contemplation of the court. And this was recently confirmed by the UK Supreme Court; “the right to carry on an activity which results in noise, or the right to emit a noise, which would otherwise cause an actionable nuisance, is capable of being an easement.”¹³² Thus, at least so far as the law of easements is concerned, both trespass and nuisance have roughly the same structure, namely that defendant (in this case the dominant tenement holder) is acting in some way with respect to plaintiff’s land that plaintiff has a right that he does not. And in both cases, if this activity continues long enough (and the other conditions are met), a prescriptive easement comes into existence.¹³³

Turning now to the substantive question about the relation between trespass and nuisance, the first thing to note is that the law itself has never been at all clearly settled on the distinction between nuisance and trespass. By this I mean not merely that there are disagreements over whether a particular action was a trespass or a nuisance.¹³⁴ Rather, I mean that there has been persistent disagreement at the more abstract level about what considerations could even be relevant to determining whether or not a particular case is a trespass or a nuisance case.¹³⁵ In a helpful article, Thomas Merrill isolates the two most prominent

130. See 1043 Bloor Inc. v. 1714104 Ontario Inc., [2013] ONCA 91, 114 O.R. (3d).

131. *Sturges v. Bridgman*, [1879] 11 Ch. D. 852, 862 (U.K.).

132. *Lawrence v. Fen. Tigers Ltd.* [2014] UKSC 13, para 31., [2014] AC 822, 833. To the same effect, see *Bliss v. Hall* (1838) 4 Bing NC 183; *Thornburg v. Port of Portland*, 233 Or. 178, 183-84, 376 P.2d 100 (1962): “At common law, one could obtain a prescriptive right to impose an unreasonable noise upon one’s neighbor, and hence an easement for a nuisance;” JOHN MURPHY, *THE LAW OF NUISANCE* 105-06 (2010).

133. The connection between nuisance and easements runs the other way, too. An interference with an easement can be a nuisance: MURPHY, *supra* note 132. Why? If we just say, as some do, that nuisance protects rights to land and in connection with land, without spelling out any substantive notion of what such a connection might be (see e.g. Neyers & Diacur, *supra* note 10, at 219-20), we have version of the same problem we had with the physical invasion based view: why think that the normative boundaries of ownership are set in this apparently arbitrary way? Instead, we might search for a coherent explanation of this protection. To show that, we would begin, I think, with the idea that for an easement to be valid it must improve the dominant freehold qua freehold, or in the words of *In Re Ellenborough Park*, [1956] Ch 131, 174 (CA), an easement must relate to the “use of the house as house, namely, as a place in which the householder and his family live and make their home.” In other words, the same sort of interest in normative control that justifies property also justifies the ways in which the rights of ownership can be extended through the use of easements. Given this restriction on what sorts of easements there can be it makes total sense to see that an interference with an easement can constitute a nuisance. If we wanted to say that ownership constitutes an office—which we do! See Essert, *supra* note 12—then the thought here would be that the terms of the office, its normative boundaries, are set by its purpose.

134. Although of course there are those. See *Mann v Saulnier*, (1959) 19 DLR (2d) 130 (NBSC).

135. See MURPHY, *supra* note 132, 17-20, for some discussion; see also Nolan, *supra* note 32, 481-4; P.H. Winfield, *Nuisance as a Tort* [1932] CAMBRIDGE L.J. 189, 202-03; A.H. Hudson, *Trespass or Nuisance* 23 MODERN L. REV. 188, 189 (1960); Thomas Merrill, *Trespass, Nuisance, and the Costs of Determining Property*

accounts of the difference between trespass and nuisance to appear in the case law: on the first, they differ in that trespasses are direct, while nuisances are indirect; on the second, they differ in that trespasses are visible to the naked eye, while nuisances are not.¹³⁶ Merrill's own argument is that the latter is superior to the former on information cost grounds—it is what he called “mechanical,” which means generally cheaper and easier to apply as compared to the directness test.

I have no reason to doubt Merrill's argument on its own terms. But I think we might do a better job of understanding the relationship between trespass and nuisance than his account allows us to. The worry begins by noting that one traditional legal difference between trespass and nuisance is the presence of the reasonability standard in the latter which the former lacks. And this is hard to square with Merrill's test; why would we think that a defendant who emits particles that are 0.06mm in diameter onto a plaintiff's land should be strictly liable in trespass and subject to an injunction to cease the activity where another defendant who emits particles that are 0.03mm in size should be liable only if the particles unreasonably interfere with a plaintiff's use of her land?¹³⁷ We seem to be drawing really, really fine lines here. The visible-to-the-naked-eye standard fails because, in setting a normative standard through an empirical category, it forgets our lesson that property is not physics, and in so doing, adds an unacceptable degree of arbitrariness to the test (why does the 0.03mm defendant get the benefit of a reasonability test that the 0.06mm defendant does not).

Instead we might think that the presence of the reasonability requirement in nuisance is not just an implication of the difference between nuisance and trespass but also explanatory of it. That is, the difference between nuisance and trespass can be understood simply by saying that a nuisance is the kind of activity committed by a defendant which interferes with a plaintiff's normative control with respect to her property and thus infringes her right only if it is unreasonable; a trespass, by contrast, is the kind of activity that always infringes a plaintiff's right. We might say this more quickly, if somewhat imprecisely, by saying that trespasses are always unreasonable, whereas the unreasonability of a nuisance is a matter of the circumstances of the case (as it was put in *Sturges*): how loud? what smell? and so on.¹³⁸ As I said above, both nuisances and trespasses infringe the same right of owners—the right to determine how others act with respect to their land—but that trespasses involve those kinds of actions which always infringe, whereas nuisance involves actions whose infringement is a matter of the reasonability analysis. If we understand this right to be justified, as I argue we should, by owner's normative interest in being in control

Rights 14 J. LEGAL STUD. 13, 27-30 (1985).

136. Merrill, *supra* note 135, at 27-30. Merrill actually locates four distinctions, but rejects two others as implausible and does not discuss them in detail; one holds that trespasses take place on plaintiff's land while nuisances take place on defendant's land, but this was abandoned with the assize of nuisance's replacement by the action on the case; the other holds that a trespass is like a nuisance serious enough to rise to the level of dispossession, but this is hard to square with the law in that trespass does not even remotely require anything like dispossession.

137. Apparently, a human with good vision can discern particles that are about 0.04mm in diameter. Yan Wong, *How small can the naked eye see?* SCIENCE FOCUS, <http://www.sciencefocus.com/qa/how-small-can-naked-eye-see>.

138. Putting basically this point conversely, James Penner, suggests, I think correctly, that very severe nuisances—“poisoning the atmosphere so that the occupier is faced with the alternatives of death or flight”—amount to something similar to what is usually actionable in trespass (or ejection). See Penner, *supra* note 81, at 20.

of others in order to have some property as a normative refuge, this makes sense; it is hard to understand how I could be in charge of you with respect to some land if you could enter it without my permission, but me being in charge of you with respect to the land must be part of a rightful system, and so, it extends to giving me a right over other actions of yours (in particular those that you commit on your own land; more on this in a moment) only when they generate an unreasonable interference.

This understanding of the nuisance-trespass divide also explains the historically most prominent line of division between the torts, namely the direct vs. indirect test (which Merrill rejects as too unclear).¹³⁹ It still is plausibly said to be the line of division in England and Canada. The leading commonwealth case is *Mann v. Saulnier*,¹⁴⁰ a case about a fence on a defendant's land which over time began to lean over a plaintiff's land. The court held that the defendant could not be liable in trespass, since the leaning of the fence was not a result of any direct action by the defendant.¹⁴¹ This distinction between trespass and nuisance in terms of the difference between direct and indirect invasions 'accords with an orthodox understanding of both torts',¹⁴² and, as Winfield notes, is consistent with the historical division between them.¹⁴³

The thought here is that to act in a way that *directly* interferes with a plaintiff's interpersonal normative control with respect to her land—to enter her land without her permission—is inconsistent with her normative interest in controlling others' actions with respect to the land, and so, it infringes her right in the land regardless of any effects. In other words, trespass. But to act in a way which indirectly or consequentially interferes—to commit something like a nuisance—might not be inconsistent with plaintiff's normative interest, especially when we keep in mind that this interest must be realized through a

139. Incidentally, it also explains Merrill's own preferred test: smaller particles will tend not to interfere with plaintiff's normative control over others' actions with respect to her land in the way that larger ones will. (If there is a house-sized rock on my land then I cannot put a house there, but if there is a lot of dust—i.e. a lot of really really small rocks—I still can.) Given this plausible idea, we might draw some lines at, e.g., visibility to the naked eye, but clearly the work is being done by the normative idea of reasonability for which the empirical category is merely an imperfect proxy which has no normative significance of its own. Notably, Merrill, *supra*, at 33, considers and rejects a test of 'substantiality' for size of particular emissions. This test seems preferable in that it allows the empirical category to better track the underlying normative concern, but Merrill rejects it for its information costliness.

140. *Mann v. Saulnier*, (1959) 19 DLR (2d) 130 (NBSC). See also the discussion in MURPHY, *supra* note 132, at 17-20.

141. The court relied on a well-known passage from Salmond: "It is a trespass, and therefore actionable per se, directly to place material objects upon another's land; it is not a trespass, but at the most a nuisance or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbor's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance." SALMOND ON TORTS 160-1 (12th ed.) cited in *Mann v. Saulnier*, 19 DLR (2d) at para 8. Of course, this is a blurry line, and the law is consistent with this blurriness: the court in *Mann*, having said that the fence's overhanging could not be a trespass because it was indirect (or unintentional), went on to find that defendant was not liable in nuisance, either, since the overhanging fence caused no harm to plaintiff. But a contemporary comment criticized this second part of the decision on the grounds that 'when artificial projections have been treated as nuisances the courts have been ready to presume damages.' See Hudson, *supra* note 135, at 189. Surely, this must be correct. A permanent incursion of a tangible physical object onto an owner's land deprives the owner of the kind of control that the law of property says they should have: it is not clear what it would mean for me to own land if I had no right to prevent permanent incursions onto it. Such a presumption of damage, of course, means that such nuisances end up being treated a lot like trespasses (i.e. they are pretty much actionable *per se*). On the analysis offered here, that makes perfect sense.

142. MURPHY, *supra* note 132, at 19.

143. Winfield, *supra* note 135, at 202-03.

system of ownership rights. Thus, only when these indirect effects are *unreasonable*, is plaintiff's right violated. In other words, nuisance.¹⁴⁴

B. *The Objective Standard*

On the account I offer here, it is easy to see why there can be no liability in nuisance for harms which arise only because of some peculiar sensitivity of the plaintiff or her land. Start with the latter case. The law is that it would "be wrong to say that the doing something not in itself noxious is a nuisance, because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life."¹⁴⁵ It is easy to see why: terms of interaction which allowed one owner to control the conduct of others, because it interfered with his use of his own land even though it would not interfere with anyone else's use of their land would give that particular owner a kind of control over others that could not be systematically realized. In spelling out a kind of a parallel argument in negligence law, Weinrib brings out the central abstract point:¹⁴⁶ namely that what matters is that the terms of interaction between plaintiff and defendant must be set in a way that fully captures the role of each party in the interaction rather than depending on any feature of one or the other of them. The present point is that the objective standard in nuisance is a standard on which liability depends on features of a plaintiff and a defendant conceived of as doer and sufferer of the same (potential) wrong. In other words, in the basic case, each owner must have the same kind of rights against others as any other, and the mere fact that some individual owner chooses to use her property for some peculiar or particular purpose cannot give her additional claims (for non-interference) over others above and beyond those that any other owner has. Once this is accepted, it is easy to see that the same thing should be true for particularities, not just of the land or the use of the land, but also the owner herself. This idea is well-captured in the famous English case, *Walter v. Selfe*, where the court limited liability to "inconveniences materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and

144. This last point helps to see why some have thought that nuisance "regulates conflicts between owners of real property:" WEINRIB, *supra* note 21, at 191. The core doctrine of reasonability arises out of the recognition that property in land must be part of a system of rights which as a whole realizes the normative interest in control. While trespass can be committed by anyone (whether or not they own property), the activities that tend indirectly to interfere with owners' control regarding their land must be activities which take place on someone else's land. Thus, nuisances tend to be committed by other owners, and so nuisance can seem like it is fundamentally about relations between owners. But if a nuisance is just an unreasonable interference with the use and enjoyment of land, it seems plausible to suppose that a nuisance could be committed by a non-owner defendant (for example a food-truck owner who parks on a public highway and emits sufficient noise or smells or smoke to substantially interfere with the homes located at the side of the road). This is a minor point, though. The crucial point is that, if we insist, we can distinguish trespass and nuisance doctrinally while maintaining, as we must, that they both protect the same core right of ownership.

145. *Robinson v. Kilvert*, [1888] 41 Ch. D. 88, 94. The point also extends to barring liability for damage resulting in some particular sensitivity of the land itself, as in *Cremidas v. Fenton*, 111 N.E. 855 (Mass. 1916), where vibrations which struck a very old building were not held to be a nuisance.

146. See WEINRIB, *supra* note 21, at 152 (showing how strict liability for accidental losses makes recovery turn on features of the plaintiff only whereas a subjective standard for such losses makes recovery turn on features of the defendant only, and how only the reasonability standard of negligence can adequately ground recovery on considerations common to both parties).

habits of living, but according to plain and sober and simple notions among the English people.”¹⁴⁷

The classic illustration of this is *Rogers v. Elliot*.¹⁴⁸ In that case, plaintiff suffered from a medical condition which caused seizures whenever defendant’s church’s bells rang. The court denied recovery, holding that the reasonable standard for noise is set by its effect “upon people generally” rather than those with particularly low or high tolerances for noise. Again, the thought here is that a system of property rights must set the normative boundaries of ownership by reference to objective characteristics of the rights and the system itself, rather than the particular features of any individual person. Obviously in a case like *Rogers*, this seems like a harsh result, but the grounds for this harshness—that the plaintiff here suffers from a disability whose effects defendant’s activity might be thought to worsen—are, to put it starkly, outside the realm of nuisance law, as plaintiff’s sensitivity is not something which defendant has any duty to see to, at least as a matter of nuisance law’s correlative structure.¹⁴⁹

C. Localities

Let us turn again to *Sturges*. Here, Lord Justice Thesiger famously laid out the idea that the standard for nuisance liability might depend on where the land in question is physically located by contrasting two neighborhoods in London: “what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*.”¹⁵⁰ A bit of background might give us reason to worry about this idea. Wikipedia tells me that Belgrave Square (and its surrounding neighborhood Belgravia) is still one of the fancier parts of London (apparently “many embassies are based in the square.”).¹⁵¹ At the time of *Sturges*, Bermondsey was an industrial district so, presumably, smellier, noisier, smokier, *etc.*, than Belgravia. Today, however, it is apparently a cool place to live. According to the Guardian Newspaper, for instance, it is “quite the foodie mecca, with fancy lofts to match . . .”¹⁵² But before this gentrification happened, the distinction drawn in *Sturges* might be taken to have unacceptable socio-economic dimensions. Could nuisance law really allow that the rights of the rich are better than those of the poor?¹⁵³

Surely not. And in fact, it is easy to see why on the account I offer here. We begin with the basic idea that the tort protects against unreasonable interferences with the normative control that is distinctive of ownership, and then keep in mind the more abstract point made in *Sturges*, that “whether anything is a nuisance or not is a question to be determined, not merely by abstract consideration of the thing itself, but in reference to its

147. *Walter v. Selfe*, [1851] E.R. 335 (U.K.).

148. *Rogers v. Elliot*, 15 N.E. 768, 771 (Mass. 1888).

149. Perhaps defendant had a moral duty to do something, as the court put it, “upon considerations of humanity.” But this kind of duty is not a nuisance duty; plaintiff’s right is not a property right. See BEEVER, *supra* note 73, at 33-39, for more on this point and the objective standard in general.

150. *Sturges v. Bridgman*, [1879] 11 Ch. D. 852, 865 (U.K.).

151. See *Belgrave Square*, WIKIPEDIA, http://en.wikipedia.org/wiki/Belgrave_Square.

152. Tom Dyckhoff, *Let’s move to: Bermondsey, London SE1*, GUARDIAN, <http://www.theguardian.com/money/2012/jan/13/bermondsey-london-se1-property-review>.

153. Cf. BEEVER, *supra* note 73, at 31.

circumstances.”¹⁵⁴ We can helpfully distinguish two types of “circumstances” that matter here.

First, we need to keep in mind that nuisance liability is correlatively structured. Thus, plaintiff’s claim is and must always be that *defendant’s* activity created an unreasonable interference and infringed her right. Yet, some core classes of nuisance are constituted by physical activities whose effects are cumulative. In an industrial area, therefore, a plaintiff might be subjected to a very significant degree of (say) smoke, because each of her neighbors emits a small (that is, reasonable) amount of smoke, but all this smoke together adds up to an amount of smoke which we might otherwise think plaintiff ought not reasonably need to put up with. Plaintiff’s problem here—that is, the reason she can’t succeed in nuisance—is that the claim must be that some individual defendant caused this unreasonable interference, since, again, liability is correlative and plaintiff cannot succeed in nuisance based on an argument entirely about her suffering, however significant. That is why, first, the court in *Sturges* says, “where a locality is devoted to a particular trade or manufacture carried on . . . [in a manner] not constituting a public nuisance,” the trade itself might not be a nuisance;¹⁵⁵ but, second, other courts have reminded us that this principle has limits and that, even in a noisy neighborhood, “fresh noise” might nevertheless constitute a nuisance.¹⁵⁶

The other kind of circumstance that is relevant is the actual physical features of the properties in question. Here again, the correlativity point is relevant: remember that the reasonability standard in nuisance requires that courts set terms of interaction between a plaintiff and a defendant that are reasonable and fair as between them, given all the circumstances of the case. When Lord Halsbury said that, “A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings,”¹⁵⁷ we can understand him to mean something like the following. If plaintiff and defendant live very close to each other, then the amount of (say) noise that defendant needs to make on his property to cause plaintiff to *hear* the noise at level L is less than the amount of noise that defendant would need to make on his property for plaintiff to hear the noise at that same level were defendant and plaintiff to live, as Lord Halsbury put it, “in the county, and distant from” each other.¹⁵⁸ The actual physical circumstances here have an impact on the way in which defendant’s activities affect plaintiff.

154. *Sturges*, 11 Ch. D. at 865.

155. *Id.*

156. See *Rushmer v. Polsue & Alfieri Ltd.*, [1906] 1 Ch. 234, 250-51 (“It was strenuously contended . . . that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it . . . But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant’s works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant’s machinery is of first-class character.”).

157. *Colls v. Home Colonial Stores Ltd.*, [1904] A.C. 179, 185.

158. See BEEVER, *supra* note 73, at 31-32.

Plaintiff cannot demand, though, that defendant bear the burden of these changed circumstances (and thus, keep her noise down to ensure plaintiff only hears what she would hear if they lived further apart) as that would not be fair terms of interaction between plaintiff and defendant; of course, neither can defendant demand that, notwithstanding how close she lives to plaintiff, she be allowed to make noise at the same level as would cause plaintiff to hear noise at level L were they to live in much farther apart. That is just what it means to say that what is reasonable as between plaintiff and defendant must take into account all of the circumstances.

Noise might be an easy case. More difficult and contentious applications of this idea would involve a broader investigation into the physical circumstances of the land in question. One example might be rules involving surface water. As is well-known, there are several different kinds of rules for nuisance liability arising from events involving surface water. The suggestion—which I do not have the space to develop here—would be that the kind of normative control over one’s land that nuisance protects might have different implications in different localities depending on their physical circumstances involving water; in some places surface water is deemed a common enemy and owners are allowed to redirect it as they wish,¹⁵⁹ whereas in others, it must be allowed to flow freely through natural paths of drainage.¹⁶⁰ A few jurisdictions even apply the common enemy rule in urban settings and the civil law rule in rural ones.¹⁶¹

D. *Coming to a Nuisance*

A final aspect of *Sturges v. Bridgman*, beyond those I have already mentioned, is the question of priority in time: how can a plaintiff stop a defendant’s confectioneering when a defendant has been carrying this activity on for such a long time? The court holds that a defendant’s historical use simply does not matter in establishing nuisance liability. If we are to understand a defendant’s activity as the kind of thing that a plaintiff has a right that a defendant cease, it simply cannot matter that a defendant has been doing this activity already.¹⁶² The fact that you have been battering me does not even plausibly seem to give you a right to continue battering me. If anything it gives me a right that you make up for the battering you have already done.¹⁶³ This is sometimes thought to be unjust, on the grounds that it seems to allow a plaintiff to move in next to some unpleasant activity that

159. A modified version of the common enemy rule is still used in Indiana: *Crowel v. Marshall Cnty. Drainage Bd.*, 971 N.E. 2d 638 (Ind. 2012); see *Argyelan v. Haviland*, 435 N.E. 2d 973 (Ind. 1982), for a more lengthy analysis discussing the common enemy and civil law rules; see also *Kurpiel v. Hicks*, 731 S.E. 2d 921 (Va. 2012), for a watered-down version of the common enemy rule that adds a reasonableness standard.

160. This doctrine is called the ‘civil law rule’. It is applied in Alberta: *Makowecki v. Yachimyc*, [1917] 34 D.L.R. 130 (Can. Alta. S.C.). In Illinois, the civil law rule is still applied but with exceptions for husbandry. See *Victor Township Drainage Dist. 1 v. Lundeen Family Farm P’ship*, 19 N.E. 3d 652 (Ill. App. Ct. 2014); see also Jennifer S. Graham, *The Reasonable Use Rule in Surface Water Law*, 57 MO. L. REV. 223, 232 (1992), for an overview of American jurisdictions that follow the common law and civil law rules.

161. In Alabama, the civil law rule governs surface waters in rural settings, whereas the ‘common enemy’ rule is used in cities, towns and village lots: *Dekle v. Vann*, 182 So. 2d 885 (Ala. 1966). In Kansas, the common enemy rule is applied within the incorporated limits of a city, whilst the civil law rule is applied outside of cities. See *Goering v. Schrag*, 207 P. 2d 391 (Kan. 1949).

162. Subject of course to the possibility that defendant has been doing it long enough to get an easement, as discussed in *supra*, Part 3.A

163. See Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & M. L. REV. 1857 (2007).

he knows about and then bring an action to stop it. But as the court noted in *Sturges*, potential defendants in cases, such as these, have an option to prevent results such as this; discussing an imagined case of “a blacksmith’s forge built away from all habitations, but to which, in the course of time, habitations approach,” the court tells us that the blacksmith “might protect himself by taking sufficient curtilage to ensure what he does from being at any time any annoyance to his neighbor”¹⁶⁴ If the blacksmith failed to do this, it seems as though it would be fair to ask him why he expects the law to do it for him.¹⁶⁵

E. Remedies

Historically, the remedy for a nuisance is an injunction.¹⁶⁶ This remedy squares best with the theory of nuisance offered here: if a nuisance is an action that an owner has the right that others not perform, then the remedy most consistent with that is an injunction to stop the activity and uphold the original right. Nuisance is fundamentally a matter of boundary-crossing, just like trespass, except that the boundary crossed is a normative one. We are far from the law of negligence here where damages are the most obvious remedy since, *e.g.*, spilled milk cannot be drunk. It is no surprise that injunctive relief has historically been relatively easy for successful plaintiffs to obtain.

That all changed, though, with the decision in *Boomer v. Atlantic Cement Co.* In that case, the court famously held that a nuisance could be compensated by “permanent damages to plaintiffs which would compensate them for the total economic loss to their property . . . ,”¹⁶⁷ on the grounds that such damages would “be a reasonable effective spur to research for improved techniques to minimize nuisance.”¹⁶⁸ This, of course, ignores the central correlativity of nuisance liability and conditions the remedy entirely on the status of defendants. Moreover, the dissent, in rejecting this result, depicts its central flaw in a way that is perfectly consistent with the argument offered here. According to the dissent, the damage award amounts to “licensing a continuing wrong.”¹⁶⁹ If, as I am arguing, nuisance is a crossing of a normative boundary, allowing a damage award for a nuisance is equivalent to allowing defendants to force plaintiffs to allow trespasses upon payment of some fee or, more tendentiously, allowing defendants to force plaintiffs to allow batteries upon payment of some fee.¹⁷⁰ The traditional injunctive approach is to be preferred. (This is not to say that damages for past loss should be unavailable.) However much some economists think this is all a matter of efficiency that is worked out on a spreadsheet,¹⁷¹ it should be clear that to allow for damage awards in nuisance cases simply makes a mockery

164. *Sturges v. Bridgman*, [1879] 11 Ch. D. 852, 865 (U.K.).

165. See *Victoria Park Racing & Recreation Grounds Co. Inc. v. Taylor*, (1937), 58 CLR 479 (Austl.) (“In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide.”). See also Chapter 6 of BEEVER, *supra* note 73, for a detailed discussion of coming to nuisance.

166. *Shelfer v. City of London Electric Lighting*, [1895], 1 Ch. 287 (U.K.).

167. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225 (1970). As an aside, note that the court treated the damages as the price to purchase an easement on plaintiffs’ land, confirming the suggestions made at the start of *supra* Part 3.A.

168. *Id.* at 226.

169. *Id.* at 230.

170. For an attempt to defend *Boomer* on rights-based grounds, see Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4(3) J. TORT L. ARTICLE 2. As he must, Keating attempts to draw a sharp line between trespass and nuisance. See *id.* at 6 n.13, 8-9 n.19.

171. Of course, I am thinking about Calabresi and Melamed.

of the idea that owners are *owners*, that is, that they have a right that others not act in certain ways with respect to their property.

V. CONCLUSION

Nuisance, as a tort against land, is distinctively tied to the justification of property in land: a plaintiff owner who suffers a nuisance has suffered an infringement of rights that she has distinctively in her capacity as owner. Ownership is justified because the kind of interpersonal normative control that defines ownership is itself valuable: it is a good thing that we are able to have rights-based relationships with one another. Nuisances are wrongs because to suffer a nuisance is to suffer an infringement of this valuable right. But the nature of the value does not fully determine what counts as an infringement (as a nuisance) *a priori*. Rather the practice of the law of nuisance—the application of practical judgment by actual judges deciding actual cases—determines what counts as a wrong and so partially constitutes the nature of the right. Thus, nuisance sets the normative boundaries of ownership.

One element of the account I have offered here which I have not had a chance to discuss is this: it provides us with a framework to think about the potential to expand nuisance in various different directions. Once we see that what nuisance is about is protecting the rights of owners and, at the same time, partially constituting those rights, we can see that, first, we might gain insight into controversial and difficult nuisance cases from the idea that property rights (and thus nuisance) are about protecting owners' normative refuge. Nuisance is a tort that is, increasingly, being looked at as a potential private law remedy for certain kinds of environmental wrongs.¹⁷² Second, we might gain insight into the nature of ownership and property rights from asking what kinds of situations of nuisance might count as infringing such rights. Does the account of ownership that nuisance law seems to reveal tell us anything about the relationship between ownership and zoning controls?¹⁷³ What about the normative boundaries of ownership in a democratic society? Could owners prevent political canvassers from approaching them? What amount of distance from other owners can we insist on in a democratic state? These questions and others are not answered by the account I have offered here. But that account does provide us with a framework to think about them, by seeing how there are problems about nuisance and (what is the same thing) about ownership. The point can be generalized.

In his important recent treatment of nuisance, Allan Beever denies that understanding nuisance requires a theory of property and ownership.¹⁷⁴ Given that nuisance is a tort against land, that the right protected by nuisance is the core right of ownership, and that the law of nuisance partially constitutes that right by setting its normative boundaries, Beever gets things precisely backwards. Understanding property requires understanding

172. See George P. Smith II & David M. Steenburg, *Environmental Hedonism or, Securing the Environment Through the Common Law*, 40 WM. & MARY ENVTL. L. & POL'Y REV. 65 (2015); Kaoru Suzuki, *The Role of Nuisance Law in the Developing Common Law of Hydraulic Fracturing*, 41 B.C. ENVTL. AFF. L. REV. 265 (2014).

173. On which the classic treatment, although located within the law and economics framework that I have insisted must be rejected, is Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 683 (1973).

174. BEEVER, *supra* note 73, at 24.

nuisance, and understanding nuisance requires understanding property. Hopefully, the foregoing has, to some small degree, advanced us on these tasks.