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Moral Nuisances

John C. Nagle
Notre Dame Law School, jnagle1@nd.edu

MORAL NUISANCES

*John Copeland Nagle**

The law tells us that a private nuisance is a substantial interference with the use and enjoyment of one's land. What it fails to explain is what kinds of interferences, and what uses and enjoyment, are protected by nuisance law. The twentieth century cases that are familiar to most of us today suggest that polluting smokestacks, corroded tanks leaking hazardous wastes into the groundwater, barking dogs, noisy trains, and smelly hog farms represent the kinds of activities that can be targeted by neighboring landowners as a nuisance.[1] The cases most frequently excerpted in the property and torts casebooks that address nuisance law follow a similar pattern.[2] In other words, there are environmental nuisances and sensory nuisances.

That was general wisdom when Teri Powers and Glen Mark, a married couple, purchased a house along the Columbia River about fifteen miles outside of Portland, Oregon in 1990.[3] The property chosen by the married couple was bordered on all sides by the Sauvie Island Wildlife Area, a state

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* Associate Professor, Notre Dame Law School. J.D., University of Michigan Law School (1986); B.A., Indiana University (1982). Nicole Garnett, Rick Garnett, and Marc Poirier provided invaluable comments on an earlier draft of this Article. I am also grateful for the assistance of research librarian Patty Ogden, and for the efforts of research assistants Lisa Hudson, Babu Kaza, Michael Occhuizzio, and Chris Schultz. I am also thankful to my colleague A.J. Bellia for inspiring me to write this Article.

[1] *See, e.g.*, Rushing v. Kansas City So. Ry., 185 F.3d 496 (5th Cir. 1999) (holding that federal law did not preempt a nuisance claim against the noises and vibrations caused by a nearby railroad); Parks Hiway Enters., LLC. v. CEM Leasing, Inc., 995 P.2d 657 (Alaska 2000) (holding that a gasoline supplier was not responsible for a nuisance involving a gas station's leaking storage tanks); Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (finding that a cattle feedlot constituted a nuisance but ordering the residential neighbors to pay the costs necessary to move the feedlot elsewhere); Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (awarding permanent damages to residents living near a cement plant); Zang v. Engle, No. 00AP-290, 2000 Ohio App. LEXIS 4222 (Sept. 19, 2000) (holding that a neighbor's barking dogs constituted a nuisance).

[2] *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 741-48 (4th ed. 1998) (reprinting *Boomer* and *Spur Industries*, *supra* note 1, and cases involving a noisy air conditioner and a polluting oil refinery); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 298-305, 311-15 (1998) (reprinting *Boomer* and a case involving fumes from a coal operation); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS (10th ed. 2000) (reprinting *Boomer*, *Spur Industries*, and cases involving a factory contaminating the groundwater, an oil refinery polluting the air, and a grocery store located in a residential neighborhood).

[3] Details about Mark and Powers' dispute can be found in Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716, 718 (Or. Ct. App. 1999).

refuge that attracted numerous species of wildlife. It also attracted thousands of nude sunbathers who enjoyed the beach immediately adjacent to the property owned by Powers and Mark. The couple was displeased. They were embarrassed to entertain friends or family in the presence of those using the adjacent nude beach. They were repulsed by the sight of public sexual activity. They were harassed by nudists who chided them for remaining clothed. They worried that the value of their property had declined. So Power and Mark complained to the state wildlife agency that was responsible for the property used by the public as a nude beach. Unsatisfied by the agency's response, the couple sued. They claimed that the activities associated with the nude beach constituted a nuisance.[4]

The deployment of nuisance law to combat immoral activities evokes images of nineteenth century cases involving brothels, saloons, gambling parlors, and other unsavory venues. The leading nineteenth century treatise on nuisances is filled with descriptions of such cases.[5] To be sure, the standard definition of a nuisance still refers to moral harms. But commentators have assumed that immoral conduct can no longer serve as the basis for a nuisance claim.[6] The prostitutes, saloon keepers, and other bad actors who starred in the moral nuisance cases seem like they belong to a bygone era.

The plight of Teri Powers and Glen Mark demonstrates that reports of the death of moral nuisances are greatly exaggerated, however. The district court dismissed their case against the presence of the neighboring nude beach for failure to state a claim, but the Oregon Court of Appeals reversed.[7] As the appellate court explained, "[u]ndesired exposure to sexual activity . . . is one of the traditional grounds for finding either a public or a private nuisance."[8]

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[4] *See id* at 718.

[5] *See* 1 HORACE G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 49-85 (3d ed. 1893) (describing cases involving houses of ill-fame, disorderly houses, houses of assignation, billiard rooms, gaming houses, theaters used for low and vicious plays, common scolds, eavesdroppers, indecent exposure, and selling obscene pictures and books).

[6] *See, e.g.*, DUKEMINIER & KRIER, *supra* note 2, at 741-78 (describing the law of nuisance without mentioning moral nuisances); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89 (1998) (describing the history and current use of nuisance law without noting the existence of moral nuisances).

[7] *Mark*, 974 P.2d at 716.

[8] *Id.* at 719.

Nudity itself, even absent sexual activity, could also constitute a nuisance in certain circumstances.[9]

Mark v. Oregon State Department of Fish and Wildlife is one of a number of recent moral nuisance cases. Crack houses have been targeted as nuisances because of their impact on the moral fiber of urban communities.[10] A St. Louis hotel has been targeted as a nuisance because of its relationship to prostitution in the neighborhood.[11] The Arkansas Supreme Court has enjoined a church bingo game as a nuisance.[12] Adult entertainment facilities have been challenged in a variety of cases.[13] Many of these cases involve governmental actions to abate public nuisances, but the reasoning would support nuisance actions brought by neighbors affected by such immoral conduct as well. The nineteenth century cases could reappear just as we enter the twenty-first century.

But a few things changed during the intervening twentieth century. States enacted statutes regulating public nuisances, such as the display of obscene movies, rather than leaving such questions to the common law.[14] Constitutional law now presents substantial obstacles to the enforcement of nuisance statutes and common law nuisance claims alike.[15] Societal attitudes toward morality have also changed significantly over the course of the twentieth century. The law often reflected such changes. In 1915, an unmarried man and woman who were living together qualified as a public

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[9] *See id.* at 720. The court reversed the district court's dismissal of the complaint, but the appeals court did not actually find that the use of the wildlife area for a nude beach constituted a private or public nuisance. Rather, the court noted that the determination of whether a nuisance existed depended upon an factual analysis of a number of factors to be conducted by the district court in the first instance. *See id.* at 720. The court also considered whether the state was liable for a nuisance because of its failure to control the activities of the private individuals who used the wildlife area as a nude beach. The majority concluded that an Oregon statute permitted the state to be held liable for damages but not injunctive relief, *see id.* at 722-24, while a dissenting judge would have held that the state could have been liable for both remedies. *See id.* at 725-27 (Edmonds, J., dissenting).

[10] *See* Omar Saleem, *Killing the Proverbial Two Birds with One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685, 708-28 (1996) (analyzing the use of nuisance actions to halt illegal drug activities).

[11] *See* City of St. Louis v. Varahi, Inc., No. ED77802, 2001 WL 204796 (Mo. App. Feb. 28, 2001) (opinion not released for publication pending possible rehearing, transfer, or modification).

[12] *See* Masterson v. State *ex rel.* Bryant, 949 S.W.2d 63 (Ark. 1997).

[13] *See* City of Chicago v. Geraci, 332 N.E.2d 487 (Ill. App. 1975) (enjoining a massage parlor as a common law public nuisance); Michigan *ex rel.* Wayne County Prosecuting Att'y v. Dizzy Duck, 535 N.W.2d 178 (Mich. 1995) (remanding for determination of whether a club in which lap dancing and assignation for prostitution occurred should be padlocked).

[14] See *infra* text accompanying note 57.

[15] See *infra* text accompanying notes 230-41.

nuisance.[16] By the end of the century, civil rights laws would make it difficult for a landlord to keep such a couple from her own rental property.[17]

Today, a cause of action that enables a landowner to seek relief from the unwanted effects of a neighbor's purportedly immoral activities rests on several controversial premises. It presumes that the conduct of one's neighbor can be judged immoral, that such conduct causes real harms, and that those harms can be remedied by the law. It presumes that what one does on one's own land can be limited by the moral sensibilities of one's neighbor. It presumes that the courts are properly positioned to render such judgments rather than relying on zoning laws and other land use regulations.

This Article examines the questions raised by the phenomenon of moral nuisances as we enter the twenty-first century. Part I provides a general overview of nuisance law. Part II explains that many, though not all, of the injuries suffered by a landowner subjected to a neighbor's immoral activity fit comfortably within the kinds of injuries that the law routinely acknowledges as supporting nuisance claims. Nuisance law also provides a mechanism for ensuring that any moral objections are commonly held in the community, and not just the idiosyncratic beliefs of a particular individual. Part III considers the defendant's perspective. It concludes that the combination of the traditional test for determining what constitutes a nuisance and the applicable constitutional and statutory protections provide sufficient assurances that individuals will not be subjected to the whims of individual landowners or overzealous communities. Part III also explains that nuisance actions brought by private individuals can be the appropriate legal response to injuries that governmental officials are unwilling or unable to address. Moral nuisance claims, in other words, can perform the same function as citizen suits used to respond to air and water pollution under federal environmental laws.

My theory of moral nuisances evolves from the discussion in Parts II and III. A moral nuisance exists where (1) a substantial and legally cognizable interference with a landowner's use or enjoyment of his or her land is caused by (2) an action that is regarded as immoral by a reasonable person within the community (3) whose harm outweighs the benefit of the offending conduct,

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[16] *See* Adams v. Commonwealth, 171 S.W. 1006 (Ky. 1915).

[17] *See, e.g.*, Smith v. Fair Employment & Housing Comm'n, 913 P.2d 909 (Cal. 1996) (holding that a widow who believed that sex outside of marriage is sinful violated the state housing law by refusing to rent to an unmarried couple). The application of fair housing laws to landlords who have a moral or religious objection to the presence of a particular tenant remains controversial. *See generally* Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 669 nn. 192-93 (2001) (citing cases).

and (4) which is not protected by the law. A moral nuisance claim is even stronger when (5) the activity is not only immoral, but illegal as well. The first criterion focuses on the kinds of injuries suffered by someone else's immoral activities. The second criterion emphasizes that the judgment about the morality of the activity must be grounded in the community's norms. Here the question is not just whether the community regards the defendant's activity as immoral, but whether the community finds the activity to be suficiently objectionable that it need not be tolerated. It also affords an opportunity to consider the purported benefits of the allegedly objectionable activity. The third criterion incorporates the balancing test that was originally designed to determine whether injunctive relief is appropriate in nuisance cases, but which is now often employed to judge whether a nuisance exists at all. The fourth criterion recognizes that many activities that the law once regulated as a matter of course are now protected by the First Amendment, substantive due process, and other constitutional doctrines. The criterion also recognizes, though, that other activities that are commonly regarded as immoral remain beyond the protections of the Constitution. The fifth criterion gives private individuals a direct means of seeking legal protection from conduct that is prohibited by law.

I describe how these factors would apply to the nude beach and public sexual activity challenged in *Mark* throughout Parts II and III. Mark and Powers suffered harms of the kind that have long been recognized by nuisance law. Thus the trial court held on remand that "a private nuisance exists as to regular intrusive nudity which is visible from plaintiff's property," and "as to the numerous episodes of illegal sexual conduct occurring on defendant's property which is observable from plaintiff's property."[18] But my test for moral nuisances extends beyond claims involving public nudity. In Part IV, I consider several purportedly immoral activities that can be challenged via nuisance claims. I explain that a variety of conduct endemic to low income neighborhoods and certain animal rights claims can support moral nuisance cases, but objections to a house of worship because of its teachings cannot.

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[18] Letter from Ted E. Grove, Circuit Court Judge, to Teri L. Powers, Robert A. Peterson, and Angela M. Stewart 2 (Mar. 30, 2001) (on file with author) ("Letter from Judge Grove"). The trial court announced its decision in an unpublished letter issued just before this Article was published, so that decision is discussed only briefly here. For media reports and responses to the trial held on remand, see Robert Blacksmith, *Nudists Shun Rude Behavior*, THE OEGONIAN, Mar. 17, 2001, at B8 (letter to the editor denying that harassment or sexual activity occurs at the nude beach); Jonathan Nelson, *Island's Nude Sunbathers Pose Nuisance and Threat, Homeowner Tells Judge*, THE OREGONIAN, Mar. 8, 2001, at C1; Jonathan Nelson, *Judge Rules Some Nude Sunbathers Create a Nuisance*, THE OREGONIAN, Apr. 3, 2001, at A1; Jonathan Nelson, *Sauvie Island Homeowners Want State Cover-Up at Nude Beach*, THE OREGONIAN, Mar. 7, 2001; Christopher Webster, *Lawsuit Over Bare Essentials*, THE OREGONIAN, Mar. 13, 2001, at B6.

I. NUISANCE LAW AT THE DAWN OF THE TWENTY-FIRST CENTURY

Nuisance law is generally ignored by academics. Nearly thirty years ago, Robert Ellickson complained that nuisance law is "suffering from neglect," it received "little attention in modern casebooks on torts and property," and "[s]cholarly analysis of nuisance problems has been minimal."[19] The intervening decades have not witnessed a revival in academic attention to nuisance law, save for a number of rather focused articles occasioned by the Supreme Court's holding that a fifth amendment taking cannot exist if the regulated conduct constituted a nuisance anyway.[20]

Nuisance law also has a reputation for being hopelessly confusing. As William Prosser put it, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[21] The general understanding that private nuisance law involves harms related to land—a qualification that Prosser insisted was necessary to maintain any coherence at all for nuisance law[22]—is belied by continuing efforts to characterize conduct not involving land as a nuisance.[23] The account of nuisance law contained in

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[19] Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 719-20; *accord* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 617 (5th ed. 1984) ("PROSSER & KEETON") (commenting that "there has been a rather astonishing lack of any full consideration of 'nuisance' on the part of legal writers"); Halper, *supra* note 6, at 91 (noting that nuisance law has been "little studied").

[20] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (indicating that a governmental regulation that effectively takes someone's property triggers the Fifth Amendment's compensation requirement, unless the regulation targets a harm that would be regarded as a nuisance under state common law); *see generally* Halper, *supra* note 6, at 91 (suggesting that takings law has "restored" nuisance law "to the agenda of regulators, legislators, and planners").

[21] PROSSER & KEETON, *supra* note 19, at 616; *accord Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting) (opining that "one searches in vain . . . for anything resembling a principle in the common law of nuisance"); Ellickson, *supra* note 19, at 720 (concluding that "the confusions and efficiencies in the law of nuisance are considerably more serious than in most other areas of the law"); Halper, *supra* note 5, at 90 (acknowledging that "[n]uisance doctrine is notoriously contingent and unsummarizable," and quoting additional complaints about the confusion surrounding nuisance law); 1 WOOD, *supra* note 5, at iii (insisting in 1875 that "it must be remembered that I was a pioneer in this 'wilderness' of the law, with no compass to guide me, but left to find my way through the entangled mass as best I might"). *But see* RICHARD A. EPSTEIN, TORTS 356 (1999) (insisting that the "core meanings" of nuisance "have proved quite durable over time").

[22] *See* PROSSER & KEETON, *supra* note 19, at 618-19 (contending that "[i]f 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or with any public right, as mere aberration"); *see also* RESTATEMENT (SECOND) TORTS at 84 (asserting that private nuisance "is always a tort against land, and the plaintiff's action must always be founded upon his interest in the land").

[23] *See, e.g.*, Mahogany Run Condominium Ass'n v. ICG Realty Mgmt. Corp., 40 V.I. 404, 406-7 (1999) (rejecting the claim that the failure to endorse a check constituted a private nuisance).

the *Restatement of Torts*—a source of innumerable citations for basic nuisance principles—itself was plagued by "great controversy and division" that included a threshold debate about whether to treat nuisance law in the *Restatement of Torts* or the *Restatement of Property*.[24] And the nuisance law described in Prosser's leading tort law treatise often conflicts with both the *Restatement* and the views of Prosser himself.[25]

This combination of neglect and confusion prompt me to briefly sketch the contours of nuisance law before turning to moral nuisances in particular. Nuisance law is divided into private nuisances and public nuisances. Private nuisances exist when there has been a substantial interference with the use or enjoyment of someone's land.[26] If the defendant's invasion of the plaintiff's interest in her land is intentional—*i.e.*, if the defendant either knows that the activity is likely to interfere with a neighbor's use and enjoyment of her land, or if the defendant actually intends such an interference—then the activity constitutes a nuisance if the invasion is unreasonable.[27] In the less frequent circumstance that the invasion is unintentional, then the activity can still be a nuisance if it is negligent, reckless, or abnormally dangerous.[28] In most instances, the determination of whether an activity constitutes a nuisance depends upon the circumstances of the case, but there are a small number of activities which are nuisances in any setting, and thus are described as nuisances per se.[29]

There are several ways of judging whether the defendant's invasion of the plaintiff's interest in land is unreasonable. Perhaps the most common approach balances the gravity of the plaintiff's harm with the utility of the

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[24] Halper, *supra* note 6, at 119.

[25] *See id.* at 127-28 (explaining the history of the conflict between Prosser, the *Restatement*, and later editors of Prosser's treatise).

[26] *See* DWYER & MENELL, *supra* note 2, at 296 (defining a private nuisance as "an activity that substantially interferes with another's use and enjoyment of his land"); *see also* RESTATEMENT (SECOND) TORTS § 821D (defining a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land"). Louise Halper argues that nuisance law involves "not injury *to* rights in property, but injury *from* some use of property." Halper, *supra* note 6, at 97. That distinction is not especially relevant to the thesis that I advance here.

[27] *See* RESTATEMENT (SECOND) TORTS § 822(a) (stating the rule for intentional invasions); *id.* § 825 (defining "intentional" invasions).

[28] *See id.* § 822(b).

[29] *See* Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1121-22 (7th Cir. 1975) (explaining that activities that imminently and dangerously threaten the public health are nuisances per se because they are offensive at all times and at all places); PROSSER & KEETON, *supra* note 19, at 636-37 (discussing such "absolute" nuisances).

defendant's conduct.[30] The gravity of the harm is measured by its extent, its character, its suitability for the location, the social value of the plaintiff's affected use or enjoyment, and the ability of the plaintiff to avoid the harm.[31] The utility of the conduct is measured by its social value, its suitability for the location, and the ability of the defendant to prevent the harm.[32] Another approach to determining whether the invasion is unreasonable asks if the plaintiff's harm is serious and if the defendant could pay compensation and still afford to engage in the activity.[33] Finally, and of particular significance with respect to moral nuisances, an invasion is unreasonable if it causes significant harm and the defendant's conduct is "contrary to common standards of decency."[34]

The prohibited interference with the use or enjoyment of the land can involve environmental contamination; unwanted sounds, lights, sights, and odors; or immoral activities.[35] The list of activities found to be actionable nuisances includes a salt-mining operation that contaminated the groundwater,[36] a factory emitting pollution into the air,[37] a house that interferes with sun shining on a neighbor's property,[38] a theater hosting a Chinese music performance in a residential neighborhood,[39] the lights of a minor league baseball field,[40] and houses of prostitution.[41] Obviously, though, not all unwanted pollution, sound, light, or other activities qualify as a nuisance. "The law does not concern itself with trifles," as the *Restatement of Torts* puts it, so "there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance."[42] In other words, the harm must be substantial. Additionally, injuries suffered only

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30 *See* RESTATEMENT (SECOND) TORTS § 826(a). For particular applications of such balancing, see *id.* §§ 829-31.

31 *See id.* § 827.

32 *See id.* § 828.

33 *See id.* § 826(b).

34 *Id.* § 829(b).

35 *See* PROSSER & KEETON, *supra* note 19, at 619-20 (listing examples of the kinds of harms alleged in nuisance cases); *see also infra* at text accompanying notes 160-86 (analyzing these harms).

36 *See* Miller v. Cudahy Co., 858 F.2d 1449 (10th Cir. 1988).

37 *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

38 *See* Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982).

39 *See* Cluney v. Wai, 10 Haw. 319 (1896).

40 *See* Hansen v. Independent Sch. Dist., 98 P.2d 959 (Idaho 1939).

41 *See infra* text accompanying notes 74-95 (citing cases).

42 RESTATEMENT (SECOND) TORTS § 821F cmt. c; *see also id.* § 822 cmt. g. (acknowledging that "[i]t is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together").

because a plaintiff is especially sensitive to a particular activity are not treated as nuisances.[43]

There are few defenses to nuisance claims. Contributory negligence and assumption of risk can operate to bar a plaintiff from objecting to conduct that otherwise would be characterized as a nuisance,[44] but the actual application of those doctrines is relatively rare. The most interesting, and most common, defense contends that a plaintiff cannot object if he or she came to a nuisance that was already there.[45] The coming-to-the-nuisance doctrine has long been controversial, with some decisions emphatically accepting it and others emphatically rejecting it.[46] The *Restatement* takes the middle position of treating the question of temporal priority as one factor that is not itself dispositive.[47]

Public nuisances are "an unreasonable interference with a right common to the general public."[48] The interference can be to public health, safety, peace, morals, comfort, or convenience.[49] Unlike private nuisances, the interference that amounts to a public nuisance does not always involve the use of land. At common law, the diverse activities found to be public nuisances have included keeping diseased animals, storing explosives, obstructing a public highway, and owning a house of prostitution.[50] There are also many statutes that define certain activities as constituting public nuisances, including uninhabitable housing, infected crops, and itinerant carnivals.[51] While governmental

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[43] *See id.* § 821F, cmt. d (noting that the significance of the harm is judged from the perspective of "normal persons living in the community," so injuries suffered by those who are hypersensitive to a particular activity are not sufficient to establish a nuisance). I discuss the application of the hypersensitivity doctrine to moral nuisances *infra* text accompanying notes 214-23.

[44] *See* RESTATEMENT (SECOND) TORTS § 840B (indicating that the availability of a contributory negligence defense depends upon the nature of the defendant's conduct and whether such a defense is available in negligence actions); *id.* § 840C (providing that assumption of risk "is a defense to the same extent as in other tort actions").

[45] *See* PROSSER & KEETON, *supra* note 19, at 634-36.

[46] *See generally id.* at 634-36 (analyzing cases involving the coming-to-the-nuisance doctrine).

[47] *See* RESTATEMENT (SECOND) TORTS § 840D (stating that "[t]he fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable").

[48] *Id.* § 821B(1).

[49] *See id.* § 821B(2)(a).

[50] *See, e.g.*, PROSSER, *supra* note 19, at 643-44 (citing cases).

[51] *See, e.g.*, ARIZ. REV. STAT. § 3-202 (1995) ("All plants, soil and other things found infested or infected with a crop pest or disease or which are the host or carrier or means of disseminating or propagating a crop pest or disease is declared a public nuisance . . . ."); MINN. STAT. § 145.1621 (1998) (providing that improper disposal of an aborted or miscarried human fetus is a public nuisance); MINN. STAT. § 624.65 (1998) ("Itinerant carnivals . . . are hereby declared to be a public nuisance and are prohibited."); S.C. CODE ANN.

authorities are empowered to bring public nuisance claims, private individuals can also bring such claims if they show a special injury distinct from that suffered by the public at large.[52]

The same activity can be treated as a private nuisance and as a public nuisance. Thus the *Restatement* explains that "[w]hen the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance, as when a bawdy house that interferes with the public morals and constitutes a crime also interferes with the use and enjoyment of land next door."[53] This example is especially helpful because it illustrates that the activities traditionally regarded as moral nuisances are capable of enforcement both by governmental officials and by affected neighbors.

Nuisance law also raises interesting remedial questions. Damages are usually available to a plaintiff who proves a nuisance.[54] Injunctive relief is available only when it is equitable to demand that the defendant stop her conduct.[55] The *Restatement* says that the determination of whether an injunction is appropriate depends upon a balancing of the harm caused by the nuisance with the benefits of the defendant's activity.[56] Increasingly, though, courts use that same test to determine whether a nuisance exists in the first place. That conflation of the remedy and the threshold determination of a nuisance remains controversial,[57] and it complicates efforts to state a precise

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§ 50-25-410 (Law. Co-op. 1992) ("The operation of motorboats upon the waters of Langley Lake in Aiken County with exhausts, mufflers or cutouts open or by any other method or means whereby disturbing, excessive and useless noises are produced by such operation is declared a public nuisance and is hereby forbidden except on legal holidays.").

[52] *See* RESTATEMENT (SECOND) TORTS § 821C(1) (explaining that "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference"). For examples of private actions against public nuisances, see for example, Lewis v. General Elec. Co. 37 F. Supp. 2d 55, 60-61 (D. Mass. 1999) (allowing property owners to bring a public nuisance suit against toxic contamination); Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125 (1991) (authorizing property owners to bring a public nuisance suit against hazardous waste contamination); State v. Deines, 997 P.2d 705 (Kan. 2000) (holding that a private individual could remove wheat growing on a public road because the wheat constituted a public nuisance).

[53] RESTATEMENT (SECOND) TORTS § 821B cmt. h.

[54] *See* PROSSER & KEETON, *supra* note 19, at 637-40 (discussing the availability of damages in nuisance cases).

[55] *See id.* at 640 (discussing the test for injunctive relief against a nuisance).

[56] RESTATEMENT (SECOND) TORTS § 941 cmt. c.

[57] *See* Ellickson, *supra* note 19, at 720-21 (complaining that "most courts applied the [balancing] test to the initial question of whether a nuisance existed at all, incorrectly limiting the availability of damage awards that would internalize the harmful externalities") (footnote omitted). The *Restatement* itself warned that

test for moral nuisances in particular. An activity that could be regarded as a nuisance based solely on its effects on the plaintiff may not be treated as a nuisance if the defendant's perspective and other equitable factors are considered as well.

This overview of nuisance law allows me to limit my consideration in the balance of this Article. My theory of moral nuisances describes the ability of private individuals and organizations to challenge a nearby activity as a nuisance. Many such claims will involve private nuisances, but public nuisance actions are relevant to the extent that an individual can show the kind of special injury needed to bring such an action. Most of my attention is devoted to common law nuisance determinations, though statutes that define certain activities as nuisances are also useful to the extent that they allow private actions. I am not concerned about the appropriate remedy here—usually injunctive relief or damages—though that decision will often be of supreme importance to the neighbors who object to what is happening next door.

II. THE NATURE OF THE PLAINTIFF'S HARM

Virtually anything could constitute a nuisance because virtually anything could interfere with somebody's use and enjoyment of her land. The reported cases alone contain claims that a church,[58] a group home for those suffering from a contagious disease,[59] and the mere presence of an unmarried couple[60] or an African-American family[61] are viewed as a nuisance through the eyes of some neighbors. It is also conceivable that someone would regard the proximity of Republicans or Democrats, gays or fundamentalists, or Mets fans or Yankees fans, as a nuisance.

This is not what nuisance law is about. It is difficult, though, to identify what nuisance law does address. The word "nuisance" derives from the French word for "harm,"[62] and nuisance law has never adequately explained which harms can be remedied and which cannot. The best evidence of the kinds of

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"considerations enter into the determination of the right to an injunction that are inapplicable or have less weight in determining the right to damages." RESTATEMENT (SECOND) TORTS § 822 cmt. d.

58 *See* Murphy v. Cupp, 31 S.W.2d 396 (Ark. 1930).

59 *See infra* text accompanying notes 165-77 (citing cases).

60 *See* Adams v. Commonwealth, 171 S.W. 1006 (Ky. 1915).

61 *See* Faloon v. Schilling, 29 Kan. 292, 297 (1883).

62 *See* RESTATEMENT (SECOND) TORTS at 84.

harms addressed by nuisance law lies in the results of the decided cases, rather than in their reasoning.

Environmental nuisances often present the easiest cases. The injuries there are more tangible and more readily measured. Groundwater contaminated by water pollution causes various physical ailments when people drink it. Air pollution causes neighboring residents to experience respiratory problems, and it damages property exposed to toxic particles. Children playing in soil contaminated by hazardous wastes face numerous threats to their physical and mental development.

Sensory nuisances are more difficult. As detailed below, noises, lights, and odors can interfere with a variety of activities on a neighbor's property.[63] There are, however, few physical injuries or other readily measurable harms resulting from such offenses to the senses. It is even harder to achieve a consensus regarding the unsightliness associated with aesthetic nuisances, which accounts for the judicial uncertainty about the legitimacy of such nuisance claims.

The most difficult cases allege an offense to a claimant's moral sensibilities. Mark and Powers' assertion that the nude beach and public sexual activity occurring opposite their own property constituted a nuisance offers an opportunity to examine the nature of the plaintiff's harm in moral nuisance cases. The following three sections examine this issue. I first outline three lines of cases that involve harms unlike the physical injuries often raised in environmental nuisance cases. Second, I synthesize these cases and describe which harms involved in moral nuisance cases are sufficient to support such a claim, and which harms are not. Third, I consider the community's acceptance of the moral beliefs giving rise to the claim.

A. The Harms Asserted in Nuisance Cases

A number of activities have faced repeated challenges as nuisances. Three groups of activities are of particular relevance in evaluating the harms associated with moral nuisance claims. The first group of challenged activities—houses of prostitution, saloons, and gambling parlors—are often premised on activities that many view as morally objectionable, but which have other harmful consequences, too. The second, and largest, group demonstrates how sensory harms—noises, lights, smells, and aesthetics—have

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[63] *See infra* text accompanying notes 92-111.

effects that can operate as a nuisance even when no physical injuries ensue. A third group of challenged activities—the presence of cemeteries or funeral homes, facilities that care for those with contagious diseases, and the stigma attached to nearby environ-mental contamination that does not cause any physical harms—shows the relevance of fears and emotional discomfort in establishing a nuisance.

1. Old Moral Nuisance Cases

The moral nuisances that were common in the nineteenth and early twentieth centuries involved several kinds of harms to those people who lived adjacent to them. Some of those harms are suffered by the general public, such as the effect of public morality, and can be the subject of private action only when an individual experiences some other special kind of harm. Other harms are unique to moral complaints, such as the embarrassment and discomfort that neighbors experience from living next to something like a house of prostitution. Some harms are also characteristic of environmental and sensory nuisances, such as loud noises and declining property value. These harms are revealed in the objects of the three leading kinds of old moral nuisance cases: houses of prostitution, saloons, and gambling parlors.

a. Prostitution

Brothels, houses of ill fame, bawdy houses, and houses of prostitution appeared in many nineteenth century nuisance cases. Whatever the name, it was agreed that they were a nuisance per se: a nuisance regardless of the time or the place.[64] It was also generally agreed that they could constitute either a public nuisance, a private nuisance, or both.[65]

The city of Portland offers an illustrative case decided exactly one hundred years before the Oregon appeals court ruled on the nuisance claim in *Mark.* In 1890, N.J. Blagen built a four-story brick building in downtown Portland that was rented by a company that made bags, tents, awnings, and sails.[66] Robert Smith owned the land across the street where he built several small wooden buildings that housed a number of Japanese women. Smith claimed that he was simply providing low income housing for needy immigrants, but Blagen insisted that the women were working as prostitutes. Blagen complained that

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[64] *See* Givens v. Van Studdiford, 86 Mo. 149, 156 (1885); 1 WOOD, *supra* note 5, at 49.

[65] *See* Tedescki v. Berger, 43 So. 960, 961 (Ala. 1907).

[66] Blagen v. Smith, 56 P. 292, 293 (Or. 1899).

the activities could be seen from his building, that his employees were being corrupted, and that the value of his property had declined. The Oregon Supreme Court agreed that Smith's use of his property constituted a nuisance.[67] The special injury that entitled Blagen to sue for a public nuisance was not the drop in property value, but rather the "disgusting scenes and sounds" that "shock the sense of those whose property, or the enjoyment thereof, is affected thereby."[68]

Blagen reflects the kinds of harms alleged in other prostitution cases. Houses of prostitution were public nuisances because they were "detrimental to the moral and social welfare of the public."[69] Such houses could constitute a private nuisance, too, but the injury caused by the proximity to prostitution was not often explained. The best indications are provided in the facts recited by the courts in such cases. For example, the sight of the prostitutes or the customers was offensive,[70] as were their sounds.[71] Sometimes the activities prevented neighbors from sleeping.[72] More generally, the objection was simply to "riotous and indecent conduct."[73] These activities caused those living in neighboring properties to be uncomfortable.[74] The impact on families exposed to such activities received special note.[75] The presence of such

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[67] *Id.* at 294-96.

[68] *Id.* at 296.

[69] 1 WOOD, *supra* note 5, at 49 (citing cases).

[70] *See* Farmer v. Behmer, 100 P. 901, 902 (Cal. 1909) (recounting allegations that the "'prostitutes frequently exposed themselves openly and publicly at the windows of defendant's said house, and upon the street, within sight of plaintiff's said dwelling, and in an immoral and indecent manner'"); Givens v. Van Studdiford, 86 Mo. 149, 155 (1885) (noting that "the inmates indecently exposed themselves at the windows next to plaintiff's property"); Crawford v. Tyrrell, 28 N.E. 514, 515 (N.Y. 1891) (reporting that "the persons occupying the rooms . . . indecently exposed their persons at the windows"); Weakley v. Page, 53 S.W. 551, 551-52 (Tenn. 1899) (detailing the testimony of several witnesses about the sight of naked men and women in a house of prostitution); *see also* Dix W. Noel, *Unaesthetic Sights As Nuisances*, 25 CORNELL L.Q. 1, 2 (1939) (citing *Crawford* for the proposition that "[i]t has long been established that sights offensive to a sense of decency may be enjoined").

[71] *See Farmer*, 100 P. at 902 (noting that the prostitutes "indulged in vile and indecent and profane language in a loud and boisterous manner, which was frequently heard by plaintiff" in his nearby residence); *Crawford*, 28 N.E. at 515 (indicating that "the persons occupying the rooms acted in a boisterous and noisy manner"); *Weakley*, 53 S.W. at 551-52 (describing testimony complaining about the noises coming from a house of prostitution).

[72] *See Farmer*, 101 P. at 902 (noting that the sleep of those living near a house of prostitution "was frequently disturbed and interrupted"); *Weakley*, 53 S.W. at 552 (reporting the testimony of a witness who complained "that respectable people cannot sleep and rest in the neighborhood").

[73] Tedescki v. Berger, 43 So. 960, 961 (Ala. 1907).

[74] *See Crawford*, 28 N.E. at 515 (explaining that the plaintiffs "have been interfered with and rendered uncomfortable" and "annoyed and seriously disturbed").

[75] *See Weakley*, 53 S.W. at 552-53 (describing the concerns expressed by several witnesses about the effects of the house of prostitution on their families, including a woman with six children who reported that the

activity harmed the neighborhood. It also caused the value of the adjacent property to decline.[76] It made it impossible to rent the adjacent property.[77]

By contrast, the courts did not regard the mere occurrence of private sexual activity as sufficient to constitute a nuisance. Wood explained that neither "mere solicitation of chastity" nor a woman who "admits one or many persons to her room to have illicit intercourse with" her fit within the common law prohibition on houses of prostitution.[78] The only contrary case has never been followed.[79]

The courts, moreover, encountered concerns about the enforcement of moral objections to houses of prostitution early on. In *Hamilton v. Whittridge*, the Maryland Supreme Court responded to the suggestion that it was inappropriate for the courts to find a nuisance based on "what is offensive to the moral sense"[80] as follows:

> We need not inquire how far this jurisdiction can be founded on grounds of morality, and to preserve the decencies of life from gross violation.... But it would be strange, indeed, if when the court's powers are invoked for the protection and enjoyment of property, and may be rightfully exercised for that purpose, its arm should be paralyzed by the mere circumstance that, in the exercise of this jurisdiction, it might incidentally perform the functions of a moral censor, by suppressing a shocking vice denounced by the law, and amendable to its penalties from the earliest times. And if, as the authorities show, the court may interfere where the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of jurisdiction, the present complainants, presenting, as they do, a case otherwise entitling them to relief, should not be disappointed merely because the effect of the process

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women "are up all night singing, drinking, cursing, fighting, throwing bottles, going undressed, acting indecently with men, and generally debauching the neighborhood"); Marsan v. French, 61 Tex. 173, 175 (1884) (asserting that the presence of a neighboring house of prostitution rendered the plaintiff's house "unfit for a home for himself and his family").

[76] *See* Givens v. Van Studdiford, 86 Mo. 149, 155 (1885) (describing the decline in property value attributable to the presence of the house of prostitution next door).

[77] *See* Givens v. Van Studdiford, 4 Mo. App. 498, 500 (1877) (recounting that the house next to the prostitutes "could be rented to no decent family"), *aff'd*, 72 Mo. 129 (1880); *Weakley*, 53 S.W. at 553 (concluding that the house of prostitution "very materially injures the rental value of property in the neighborhood"); *Marsan*, 61 Tex. at 175 (noting that the plaintiff "alleged his property was diminished in value" because of the adjacent house of prostitution).

[78] 1 WOOD, *supra* note 5, at 56.

[79] *See* Adams v. Commonwealth, 171 S.W. 1006 (Ky. 1915).

[80] Hamilton v. Whittridge, 11 Md. 128, 147 (1857).

> will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity.[81]

b. Saloons

Saloons can be a nuisance. Unlike houses of prostitution, though, saloons are nuisances only if they are located in the wrong place.[82] Again, the injuries associated with proximity to a saloon are not often detailed. The most notable exception occurred when the Louisiana Supreme Court described the injuries resulting from the activities of a concert saloon located next to two expensive new hotels that contended that:

> [T]he female employ'es of the defendant dressed immodestly, enticed the men frequenting the establishment to drink with them, leading to indecent familiarities; that the establishment opened in the evening, remained open at night, devoted to drinking and debauchery of the women and men; that these excesses led to disorderly conduct, frequent arrests at night, occasioning unpleasant scenes at the entrance of the place on the street, annoying to the residents, and interrupting their sleep; that the fascinations of the establishment attracted vicious and disreputable people; that the theatrical performances there were indecent and could be seen from the street; that the women, with their lewd style of dressing, exhibited themselves so as to be seen from the premises of petitioners, or some of them, were forced on their attention . . . .[83]

The most common complaint targeted the economic loss either from the decline in property value or the lesser rents that can be collected from property located near a saloon.[84] Saloons are also objectionable because of the

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[81] *Id.* at 147-48; *see also Weakley*, 53 S.W. at 555.

[82] *See* Swift v. Illinois *ex rel.* Powers, 63 Ill. App. 453, 460 (1896) (rejecting the claim that there is a right to keep a saloon in any part of a city); Commonwealth v. McDonough, 95 Mass. 581, 584 (1866) (distinguishing saloons from houses of prostitution because only the latter were nuisances under all circumstances).

[83] Koehl v. Schoenhausen, 17 So. 809, 809 (La. 1895).

[84] *See* Mayflower Holding Co. v. Warrick, 196 So. 428, 428 (Fla. 1940) (describing business losses experienced by a hotel because of noise from an adjacent night club); Kissel v. Lewis, 59 N.E. 478, 481 (Ind. 1901) (noting the possibile reduction in the value of residential property located near a beer garden); Haggart v. Stehlin, 35 N.E. 997, 998 (Ind. 1893) (describing the loss in property value and rental value resulting from proximity to a saloon located in a residential section of Indianapolis); *Koehl*, 17 So. at 810 (stating that "[t]he depreciation of the property of others arising from the use one makes of his own is another element of nuisance"); Nebraska *ex rel.* Towle v. Eyen, 264 N.W. 901, 901 (Neb. 1936) (noting that a tavern rendered nearby property "valueless").

troublesome people whom they attract.[85] Noises are another problem associated with a saloon.[86] More generally, neighbors have argued that a nearby saloon interfered with their ability to use their own property.[87]

c. Gambling Parlors

The common law treated gambling houses as nuisances per se.[88] Gambling houses disturbed the peace,[89] and had bad effects on the character of those who visited such establishments.[90] These injuries were usually viewed as related to a public nuisance, and private efforts to respond to those harms could fail because plaintiffs had not demonstrated the requisite special injury.[91]

2. Sensory Harms

A long list of cases establishes that sensory harms can support a nuisance claim. Loud noises and offensive smells are frequently characterized as nuisances. Bright lights can cause a nuisance, too, although there are fewer cases involving lights than there are cases involving noises or smells. Aesthetic objections produce the most controversial sensory cases. The idea that a nuisance can result simply because an activity is unsightly in the eyes of

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[85] *See* Taylor v. Alabama *ex rel.* Adams, 155 So. 2d 595, 596 (Ala. 1963) (describing public drunkenness outside a tavern); Steinberg v. Colorado *ex rel.* Keating, 390 P.2d 811, 811 (Colo. 1964) (noting that a tavern had attracted "prostitutes and other undesirables"); Pfingst v. Senn, 23 S.W. 358, 359 (Ky. 1893) (noting that the people who had been hanging around a previous facility had been bothering the neighbors); Sipe v. Dale, 80 P.2d 569, 571 (Okla. 1938) (noting the congregation of drunk people at a beer parlor and dance hall).

[86] *See Taylor*, 155 So.2d at 596 (referring to the noise coming from a beer tavern).

[87] *See* Hunnicut v. Eaton, 191 S.E. 919 (Ga. 1937) (indicating that a bar and dance hall had prevented neighbors from enjoying their homes); Feeney v. Bartoldo, 30 A. 1101, 1101-02 (N.J. Ch. 1895) (noting that a piano played in a saloon late at night had disturbed the sleep of neighboring residents); *Sipe*, 80 P.2d at 571 (describing how a beer parlor and dance hall had interfered with neighbors' sleep and their general enjoyment of their property).

[88] *See* Ehrlick v. Commonwealth, 102 S.W. 289, 290 (Ky. Ct. App. 1907); Commonwealth v. Ciccone, 85 Pa. Super. 316, 319 (1925).

[89] *See* Engle v. State, 90 P.2d 988, 990 (Ariz. 1939) (citing the allegation that a gambling house "was then and there indecent and offensive to public decency"); People v. Lim, 118 P.2d 472, 473 (Cal. 1941) (reciting a complaint's allegation that gambling houses disturbed the public peace).

[90] *See Lim*, 118 P.2d at 473 (noting a complaint's allegations that a gambling house "encourag[ed] idle and dissolute habits" and "corrupt[ed] the public morals"); People *ex rel.* L'Abbe v. District Court of Lake County, 58 P. 604, 604 (Colo. 1899) (describing the allegation made by the president of the Leadville Women's Christian Temperance Union that the more than 40 gambling houses in the town were leading husbands and fathers astray and generally causing "the deterioration of the moral tone" of the community).

[91] *See L'Abbe*, 58 P. at 605 (dismissing a private nuisance action against Leadville's gambling houses because "it was a plain attempt, through the aid of a court of equity, to prevent the violation of the penal statutes of the state").

a neighbor has yet to achieve widespread acceptance, notwithstanding the fact that such aesthetic concerns now usually support zoning decisions.

Obviously, not all sounds, smells, lights, or sights constitute a nuisance. As with other nuisances, a sensory nuisance exists only if the noise, smell, light, or sight occurs at a magnitude, duration, or location that causes a substantial interference with the use and enjoyment of the plaintiff's land. But the precise kinds of interferences caused by such sensory offenses are rarely explained in any detail in the cases or in the academic literature.

a. Noises

Noises are one of the most common kinds of nuisances. Noises from a wide variety of causes have been deemed nuisances, including trucks, industrial facilities, gas stations, barking dogs, music, windmills, and loud voices.[92] Residential homes are the most frequent victims of noisy interferences, but churches and farms have been affected as well.[93]

The harm caused by noises is usually described in terms of the activities that a neighbor cannot perform because of the noise. Loss of sleep is perhaps the most frequent complaint, which demonstrates that the characterization of a noise as a nuisance often depends upon the time of day at which it occurs.[94]

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[92] *See, e.g.*, Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196, 198 (4th Cir. 1952) (concluding that noises from a compressor gas station next to residences and a farm amounted to a nuisance); McQuade v. Tucson Tiller Apartments, Ltd., 543 P.2d 150, 152 (Ariz. Ct. App. 1975) (finding that concerts held at a shopping center constituted a nuisance because of the loud music and large crowds); Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 128-30 (Iowa 1974) (holding that a cement plant constituted a nuisance in part because of noises from jackhammers operated in the morning and the evening); Fox v. Ewers, 75 A.2d 357 (Md. 1950) (holding that the noises from trucks next to a residential home constituted a nuisance); Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982) (holding that the noise from the operation of a windmill was a nuisance); Zang v. Engle, No. 00AP-290, 2000 Ohio App. LEXIS 4222 (Sept. 19, 2000) (holding that a neighbor's barking dogs constituted a nuisance); McPherson v. First Presbyterian Church, 248 P. 561, 563-66 (Okla. 1926) (finding that the noises from cars visiting a gas station constituted a nuisance because they would disturb services at a neighboring church); Kestner v. Homeopathic Med. & Surgical Hosp., 91 A. 659, 661 (Pa. 1914) (finding that the "shrieks and screams" of patients at a hospital were a nuisance); Estancia Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Civ. App. 1973) (holding that noises from an apartment's air conditioning equipment constituted a nuisance).

[93] *See, e.g.*, Baltimore & P.R. Co. v. Fifth Baptist Church, 137 U.S. 568 (1891) (church); *Transcontinental Gas Pipe Line Corp.*, 198 F.2d at 197 (farms and residences); *Fox*, 75 A.2d at 358-61 (residential home).

[94] *See* Thrasher v. City of Atlanta, 173 S.E. 817, 821 (Ga. 1934) (noting that the noises from a nearby airport interfered with the plaintiff's sleep); Redd v. Edna Cotton Mills, 48 S.E. 761, 761-62 (N.C. 1904) (describing an allegation that the blowing of a steam whistle at 4:30 a.m. awakened a neighboring resident); Christensen v. Hilltop Sportsman Club, Inc., 573 N.E.2d 1183, 1186 (Ohio App. 1990) (holding that the noise from a shooting range constituted a qualified nuisance because it occurred early in the morning and late into

Noises also interfere with meals, entertainment, religious services, and other uses.[95] More generally, neighbors have alleged that noises disturb the comfortable enjoyment of their property, especially their homes.[96] There are just a few cases in which it was alleged that noises caused any physical injuries.[97]

Of course, not every noise constitutes a nuisance. The harms described above must be substantial, and many noises have failed to cross that threshold.[98] With few exceptions, though, the debate in noise cases involves the severity of the harm caused by the noise, not whether the particular kind of harm is cognizable under nuisance law.[99]

b. Odors

There have long been cases alleging that certain odors constituted a nuisance. Many of these cases involve smells from farms that are not appreciated by nearby residents, particularly newcomers to the community.[100]

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the night); *Kestner*, 91 A. at 660-61 (noting that residents lost sleep because of "shrieks and screams" from an adjacent hospital); Sherrod v. Dutton, 635 S.W.2d 117, 121 (Tenn. App. 1982) (explaining that noises from a go-cart racetrack constituted a nuisance because a "a certain amount of noise . . . is not only disagreeable, but it also wears upon the nervous system and produces that feeling which we call 'tired'") (quoting Gilbough v. West Side Amusement Co., 53 A. 289, 289 (N.J. Ch. 1902)).

[95] *See Baltimore & P.R. Co.*, 137 U.S. at 568 (noting that noises from an engine house disturbed the congregation in the neighboring church); Anne Arundel County Fish & Game Conservation Ass'n v. Carlucci, 573 A.2d 847, 849 (Md. Ct. Spec. App. 1990) (noting testimony that the noise from a shooting club frightened a child and prevented "sleeping, reading, watching television or any other activity which requires concentration"); *Kestner*, 91 A. at 660 (indicating that the hospital's noises interfered with a neighbor's meals).

[96] *See Transcontinental Gas Pipe Line Corp.*, 198 F.2d at 198 (noting that noises from a compressor gas station interfered with neighbors' enjoyment of their homes); Nair v. Thaw, 242 A.2d 757, 761 (Conn. 1968) (enjoining the operation of an air conditioner during the night because it interfered with a neighbor's use and enjoyment of his home); Town of Stonington v. Galilean Gospel Temple, 722 A.2d 1269, 1272 (Me. 1999) (finding that an allegation that noise from a quarry interfered with the ability of neighboring residents to enjoy their homes stated a nuisance claim).

[97] *See, e.g., Redd*, 48 S.E. at 761-62 (noting the plaintiffs' allegation that the blowing of a steam whistle was "seriously impairing their health").

[98] *See, e.g.*, Layton v. Yankee Caithness Joint Venture, 774 F. Supp. 576, 581 (D. Nev. 1991) (rejecting a nuisance claim against the noises from a geothermal power plant because "[i]nsubstantial problems do not constitute nuisances").

[99] *But see* Crutcher v. Taystee Bread Co., 174 S.W. 2d 801, 805 (Mo. 1943) (holding that the noise created by a large ventilating fan at a bread company was not a nuisance because there was "a total failure of proof of actual physical damage to the [plaintiff's] house").

[100] *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (finding a statutory nuisance where a cattle feedlot was situated near a new retirement community); Michael v. Michael, 461 N.W.2d 334, 334-35 (Iowa 1990) (describing the odors resulting from a hog confinement operation spreading manure slurry a quarter mile upwind from the plaintiff's house).

Odors from sewage treatment plants and industrial facilities are frequent sources of complaints from neighbors as well.[101] The plaintiffs offended by smells from a nearby activity apparently are almost always the residents of nearby homes.

The harm caused by odors is even less capable of a precise description than the harm caused by noises. Occasionally some specific use is affected by the existence of an unwanted smell.[102] Only rarely does an odor result in an actual physical injury to human health.[103] Instead, neighbors object to certain odors because they are unpleasant.[104] These kinds of assertions often fail to establish that the defendant's activity constitutes a nuisance, either because the extent of the unpleasantness is not substantial enough to quality as a nuisance, or because who was there first seems particularly important when judging the offense caused by unpleasant smells.[105]

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[101] *See* Foreign Car Center, Inc. v. Salem Suede, Inc., 660 N.E.2d 687 (Mass. App. Ct. 1996) (determining that emissions and odors from a leather finishing plant were a nuisance); Padilla v. Lawrence, 685 P.2d 964, 967 (N.M. Ct. App. 1984) (finding that a plant that packaged soil conditioner constituted a nuisance because of the "odors, dust, noise, and flies"); Lever v. Wilder Mobile Homes, Inc., 322 S.E.2d 692, 693 (S.C. App. 1984) (holding that the smells caused by improper maintenance of a sewage treatment lagoon were a nuisance).

[102] *See* Baldwin v. McClendon, 288 So. 2d 761, 763 (Ala. 1974) (indicating that odors from a large hog farm "caused loss of appetite and practically ruined all outdoor recreation"); Atlantic Processing Co. v. Brown, 179 S.E.2d 752, 754 (Ga. 1971) (stating that neighbors complained that odors from an animal rendering plant interfered with their sleep, destroyed their appetites, and made them "very irritable, upset and nervous"); Alfred Jacobshagen Co. v. Dockery, 139 So. 2d 632, 633 (Miss. 1962) (noting allegation that odors from an animal rendering plant made it impossible for nearby residents to eat, sleep, or use their homes and yards); *Padilla*, 685 P.2d at 967 (noting testimony that the odor from a soil conditioner packaging plant "prohibited cooking in the summer, prevented use of evaporative cooling, and generally interfered with normal residential activities"); Barnes v. Board of Adjustment of the City of Bartlesville, 987 P.2d 430 (Okla. Ct. App. 1999) (recounting testimony that a resident "is no longer able to enjoy sitting on the front porch to have a morning cup of coffee because of the odor created by" a Vietnamese pot-bellied pig).

[103] *See Baldwin*, 288 So. 2d at 763 (noting that neighbors reported that the odors from a hog farm "sickened them at the stomach"); *Padilla*, 685 P.2d at 967 (recounting a plaintiff's testimony that "the odor and dust [have] caused him to have nosebleeds and fits of choking").

[104] *See, e.g.*, Francisco v. Department of Insts. & Agencies, 180 A. 843, 844 (N.J. Ch. 1935) (describing the "harm, annoyance and great discomfiture" experienced by residents who objected to anesthesia, laundry, and cooking smells from the neighboring hospital); *see generally* 2 WOOD, *supra* note 4, at 59 (indicating that smells can constitute a nuisance simply because they are disagreeable).

[105] *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706-08 (Ariz. 1972) (relying on the coming-to-the-nuisance doctrine in fashioning a remedy for a cattle feedlot that constituted a nuisance to a new retirement community); Thiel v. Cernin, 276 S.W.2d 677, 678 (Ark. 1955) (holding that odors from a broiler house do not result in a nuisance because the broiler house was well constructed and the odors were not bad enough to warrant an injunction); *Francisco*, 180 A. at 844-49 (holding that a private hospital did not constitute a nuisance because the hospital was there first and the plaintiff's injury was not sufficiently severe to warrant an injunction).

c. *Lights*

Bright lights are less frequently a source of complaints in nuisance cases. The relatively few decisions have involved lights from signs and recreational activities.[106] Structures that reflect light have also been targeted.[107] In each instance, the harm caused by the light was its interference with a particular use, most often sleep.[108] There have also been allegations that excessive light reduced the value of a neighbor's property.[109] Again, the success of these claims depends upon the extent of the interference caused by the light, which itself often depends upon the particular location and expectations about reasonable nighttime uses.[110] The cases alleging that bright lights constitute a nuisance are also likely to be accompanied by allegations of other harms, especially noises.[111]

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[106] *See* Osborne v. Power, 890 S.W.2d 570 (Ark. 1994) (enjoining a homeowner's large display of Christmas lights because it generated so much traffic); Akers v. Marsh, 19 App. D.C. 28 (1901) (residents objecting to the small oil torches illuminating a neighbor's midnight croquet games); Hansen v. Independent Sch. Dist. No. 1, 98 P.2d 959 (Idaho 1939) (residential neighbors objecting to the lights from a baseball stadium); Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 216 N.E. 788, 790 (Ill. 1966) (drive-in theater objecting to the lights at a highway oasis); Neiman v. Common Sch. Dist. No. 95, 232 P.2d 422, 424 (Kan. 1951) (residents complaining about lights from a school's softball game); Shelburne, Inc. v. Crossan Corp., 122 A. 749, 749-51 (N.J. Ch. 1923) (hotel guests complaining about an outdoor lighted sign); Edmunds v. Duff, 124 A. 489, 491 (Pa. 1924) (residents concerned about the lights from a proposed amusement park); Maxwell v. Lax, 292 S.W.2d 223 (Tenn. Ct. App. 1954) (residents objecting to light from a large advertising sign).

[107] *See* Shepler v. Kansas Milling Co., 278 P. 757, 757-58 (Kan. 1929) (sunlight reflected from grain tanks that were painted white).

[108] *See Akers*, 19 App. D.C. at 28 (alleging a neighbor's lights interfered with sleep); *Shelburne, Inc.*, 122 A. at 750 (holding an outdoor sign interferes with the comfort of guests in an adjacent hotel); *Edmunds*, 124 A. at 489 (alleging that a proposed amusement park would interfere "with the comfort and enjoyment of their homes by residents of the neighborhood"); *Maxwell*, 292 S.W.2d at 225 (noting that a lighted sign disrupted the ability of neighbors to sleep).

[109] *See Shepler*, 278 P. at 757 (stating homeowners argued that reflected sunlight rendered their house "unsaleable" and "untenantable"); *Shelburne, Inc.*, 122 A. at 750 (stating that the hotel argued that a lighted outdoor sign affects its business).

[110] *See Akers*, 19 App. D.C. at 28 (concluding that the offending lights were no more objectionable than normal streetlights); Bagko Develop. Co. v. Damitz, 640 N.E.2d 67, 72-73 (Ind. Ct. App. 1994) (holding that lights from a Little League practice field were not sufficiently offensive to constitute a nuisance).

[111] *See Akers*, 19 App. D.C. at 28 (objecting to the lights, odors and noises from a neighbor's midnight croquet games); *Hansen*, 98 P.2d at 962 (noting objections to lights, noise, and trespassers attending nighttime baseball games); Parker v. Ashford, 661 So. 2d 213, 215 (Ala. 1995) (residents objecting to the light and noise from a proposed racetrack).

d. Aesthetics

Traditionally, aesthetic complaints were insufficient to establish a nuisance. As Wood explained over a century ago, "the law will not declare a thing a nuisance because it is unpleasant to the eye."[112] The courts repeatedly rejected assertions that aesthetic objections to junk yards, fences, and other unsightly things rendered those activities a nuisance.[113] The basis for those decisions was the reluctance of courts to find that offenses to one's sense of aesthetics constituted an injury that could be remedied by the courts.[114]

The cases rejecting aesthetic nuisances are now in tension with other areas of the law. Aesthetic concerns were once held insufficient to support zoning laws, but the modern trend is to uphold zoning conducted for aesthetic purposes.[115] Other areas of the law now address aesthetic concerns, too.[116] Moreover, several academic commentators have favored the acceptance of aesthetic nuisance cases. For example, Raymond Coletta has argued that "it seems somewhat incongruous to allow individuals redress for offenses to their senses of hearing and smell, but at the same time deny them a remedy for offenses to their sense of sight."[117] Coletta has reconceptualized the harms at issue in aesthetic nuisance cases, explaining that aesthetic nuisances harm landowners by depriving them of the cultural identity of their neighborhood.[118]

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[112] 1 WOOD, *supra* note 5, at 24; *see also* DAN B. DOBBS, THE LAW OF TORTS 1331 (2000) (explaining that "because tastes differ and criteria for aesthetic judgment are deemed unreliable, courts have been reluctant to say that an inappropriate and ugly sight can be a nuisance"); PROSSER & KEETON, *supra* note 19, at 626 & n.3 (indicating that "mere unsightliness" does not constitute a nuisance, but that "[a]esthetic considerations . . . play an important part in determining reasonable use").

[113] *See, e.g.*, Bixby v. Cravens, 156 P. 1184, 1187 (Okla. 1916) (holding that an unsightly fence did not constitute a nuisance because landowners are "not compelled to consult the 'aesthetic taste' of their neighbors" when building a fence); Mathewson v. Primeau, 395 P.2d 183, 189 (Wash. 1964) (holding that the unsightliness of a pig farm did not create a nuisance); State Road Comm'n v. Oakes, 149 S.E.2d 293, 300 (W. Va. 1966) (rejecting a nuisance claim against the storage of rubbish near a road).

[114] *See generally* Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 145-48 (1987) (explaining that courts refused to find a nuisance based on mere unsightliness because of the belief that aesthetic harms are subjective and de minimis).

[115] *See* DWYER & MENELL, *supra* note 2, at 921 (concluding that aesthetic zoning is "now generally recognized as a valid police power").

[116] *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32-33 (1954) (holding that aesthetic concerns can justify a use of the government's eminent domain power); *see generally* Coletta, *supra* note 113, at 159 & n.111 (citing cases illustrating that "many federal and state courts have upheld a wide variety of aesthetically oriented regulations" since *Berman*).

[117] Coletta, *supra* note 114, at 165-66. Coletta adds that "there is no physiological reason for treating visual perceptions any differently from noise or smell." *Id.* at 166.

[118] *See id.* at 153.

He also cites social and psychological studies finding a link between aesthetics and emotional health.[119]

These arguments have resulted in increasing judicial acceptance of aesthetic nuisance claims.[120] The cases also contain novel assertions of the harm caused by unsightly activities on a neighbor's property. One landowner, for example, asserted that the view of wrecked cars on a neighbor's lot made him self-conscious and unwilling to invite friends over for cookouts.[121] Yet the reluctance to rely upon unsightliness as an injury giving rise to a nuisance still endures in some courts.[122]

3. Fears

A third line of cases illustrates the relevance of fears and emotional distress as a basis for a nuisance claim. The fears in these cases differ from the fear of physical injury resulting from contaminated groundwater or polluted air that exists in many environmental nuisance cases. Instead, these fears include the reminder of human mortality caused by the proximity to a cemetery or a funeral home, the fear of illness caused by proximity to a hospital or group home containing people with potentially contagious diseases, and the stigma resulting from the fear of environmental pollution even when that pollution cannot reach the plaintiff's property. Again, these cases often contain allegations of other harms as well, which complicates the determination of precisely which harms suffice in the eyes of the court for establishing a nuisance.

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[119] *See id.* at 159-60. For other academic arguments for judicial recognition of aesthetic nuisances, see J.J. Dukeminier, Jr., *Zoning for Aesthetics Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218 (1955); Noel, *supra* note 70; Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970).

[120] For additional examples, see Allison v. Smith, 695 P.2d 791, 794 (Colo. Ct. App. 1984) (holding that the storage of automobiles, scrap metal, and lots of other materials in a residential area constituted a nuisance); Foley v. Harris, 286 S.E.2d 186, 190-91 (Va. 1982) (insisting that aesthetic concerns can interfere with the use and enjoyment of land and are protected by nuisance law).

[121] *See Foley*, 286 S.E.2d at 188.

[122] *See* Oklejas v. Williams, 302 S.E.2d 110 (Ga. Ct. App. 1983) (rejecting the claim that the unsightliness of a wall constituted a nuisance); Carroll v. Hurst, 431 N.E.2d 1344, 1349 (Ill. App. Ct. 1982) (rejecting the claim that a junkyard and salvage operation constituted a nuisance because "[n]o testimony was given that defendant's use of his land created an unsightly view; indeed, under Illinois law, a landowner does not have a right to a pleasing view of his neighbor's land"); Ness v. Albert, 665 S.W.2d 1, 2 (Mo. Ct. App. 1983) (holding that the presence of several dilapidated appliances and other refuse was not a nuisance because of the subjective nature of aesthetic considerations).

a. Cemeteries and Funeral Homes

During a period from about 1910 to 1960, many landowners alleged that the presence of a cemetery or a funeral home in a residential neighborhood constituted a nuisance.[123] Several different kinds of injuries have been asserted. In the cemetery cases, the objection is sometimes to the possible effects on groundwater from improper burials, a typical kind of environmental harm that need not concern us here.[124] Funeral homes used to give rise to complaints about the odors associated with the embalming process.[125] Likewise, neighbors have objected to cemeteries because of the increased traffic and consequent danger to children that results, a threat that also arises from a host of other unrelated facilities.[126]

The unique harm in the cemetery and funeral home cases involves the emotional injury resulting from the "constant reminder of death."[127] Or, to put it more grandiously, a cemetery serves "as an unwelcome reminder of that 'undiscover'd country from whose no bourn no traveller returns.'"[128] Such

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[123] As late as 1926, one writer confidently predicted that there were no cases in which a cemetery was deemed a nuisance by virtue of its location alone because "[n]o association would think of buying up real estate in a residential district and converting it into a cemetery." D.F.J. Lynch, *Restricting the Location of Undertaking Establishments*, 14 GEO. L.J. 352, 355 (1926). The most recent nuisance case involving a cemetery was decided in 1998. *See* Barrett v. Lambert, No. 97-CA-00055 SCT, 1998 Miss. LEXIS 364, at *6-*8 (July 30, 1998) (holding that a church cemetery is not a nuisance because there was no argument that the cemetery could affect public health).

[124] *See, e.g.*, Hall v. Moffett, 170 S.E. 192, 193 (Ga. 1933) (explaining that "[o]ne of the chief grounds upon which injunction against the establishment of a burial ground has been granted at the instance of owners of adjoining tracts of land is that where either the flow of water from the burying ground may contaminate the water of adjoining premises, or the air may become contaminated"); McCaw v. Harrison, 259 S.W.2d 457, 457-58 (Ky. Ct. App. 1953) (concluding that a proposed cemetery would not contaminate the groundwater used by adjacent dairy farms); Hardin v. Huckabay, 6 La. App. 640, 643 (1927) (indicating that a cemetery constitutes a nuisance if it pollutes the water or the air); Saier v. Joy, 164 N.W. 507 (Mich. 1917) (holding that a funeral home constituted a nuisance in part because noxious gases reached neighboring houses); Jones v. Highland Mem'l Park, 242 S.W.2d 250, 252 (Tex. Civ. App. 1951) (concluding that there was insufficient evidence that a cemetery would contaminate the groundwater).

[125] *See* Mutual Serv. Funeral Homes v. Fehler, 48 So. 2d 26, 27 (Ala. 1950) (describing the foul odors that reach adjacent premises); Rockenbach v. Apostle, 47 N.W.2d 636, 638 (Mich. 1951) (noting allegations "that unpleasant odors and contagious diseases will emanate from the funeral home").

[126] *See Mutual Serv. Funeral Homes*, 48 So. 2d at 27 (noting allegation of increased traffic associated with a funeral home); Young v. St. Martin's Church, 64 A.2d 814, 815 (Pa. 1949) (noting the allegation that a cemetery "will result [in] an increase in the automobile traffic in the neighborhood with consequent danger to children").

[127] Potter v. Bryan Funeral Home, 817 S.W.2d 882, 883 (Ark. 1991); *see also* Howard v. Etchieson, 310 S.W.2d 473, 474 (Ark. 1958); Overby v. Piet, 163 So. 2d 532, 533 (Fla. Dist. Ct. App. 1964); Frederick v. Brown Funeral Homes, 62 So. 2d 100, 101 (La. 1952); *Rockenbach*, 47 N.W.2d at 638, 640.

[128] *Young*, 64 A.2d at 817 (quoting WILLIAM SHAKESPEARE, HAMLET, act III, sc. 1); *see also Hardin*, 6 La. App. at 641 (noting the plaintiffs' allegation that "a cemetery will subject them and their families to the

reminders result in additional consequences. A South Carolina court concluded that proximity to a funeral home resulted in "depression, nervousness, lying awake at night, children made excited, children alarmed and insisting on sleeping with their parents, families changing their sleeping quarters, families ceasing to use their porches as open air dining rooms, [and] ceasing to use their sitting rooms that are directly opposite the undertaking establishment."[129] Similarly, a California couple objected that the sight of a proposed funeral home would have "a dampening effect" on their use of their backyard for picnics and parties "and would in all probability cause their friends to refrain from visiting them."[130]

The ill effects of the sight of a cemetery or a funeral home are not the only harms that such facilities cause. The presence of mourners can elicit similar concerns.[131] A cemetery can be objectionable if it becomes unsightly from lack of maintenance.[132] Cemeteries and funeral homes were both said to cause a decline in property values.[133] Finally, there have been a number of more sensational objections to cemeteries that merit little analysis.[134]

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constant evidences and reminders of their own mortality"); *Young*, 64 A.2d at 815 (reporting the allegation "that the frequent sight of funerals and the knowledge that dead bodies are about to be buried will be a constant irritation to plaintiffs and will likely affect their health"); DeBorde v. St. Michael & All Angels Episcopal Church, 252 S.E.2d 876, 882 (S.C. 1979) (observing that "[e]motions caused by the constant reminder of death may be just as acute in their painfulness as suffering perceived through the senses") (quoting Young v. Brown, 46 S.E.2d 673, 679 (S.C. 1948)); Lynch, *supra* note 122, at 352 (describing the injury as "mental depression suffered by the plaintiffs from the ever present reminder of the mortality of man"). For a bizarre combination of the fear of death and water pollution concerns, see Jones v. Trawick, 75 So. 2d 785, 788 (Fla. 1954) (asserting that "[w]e know of no one who would not object to the thought of drinking water that had been drawn from a surface so near the dead, no matter how pure the health authorities had stated it to be").

[129] Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 580 (S.C. 1942) (quoting the opinion of the common pleas court).

[130] Brown v. Arbuckle, 198 P.2d 550, 551 (Cal. Ct. App. 1948).

[131] *See Young*, 64 A.2d at 815 (observing that "the frequent visits to the site by relatives and friends of those interred therein will be a source off annoyance to" the neighbors). *Brown* explained that:

> There is the passage of the funeral procession with its mourners and the last rites at the grave followed by frequent visits of the bereaved persons, all of which are conducive to depression and sorrow and when constantly recurring in close proximity to a residence may deprive the home of the comfort and repose to which the owner is entitled.

46 S.E.2d at 679; *see also Trawick*, 75 So. 2d at 789 (Thomas, J., dissenting) (noting "the extreme lament of the colored mourners"); *Overby*, 163 So. 2d at 533 (characterizing *Trawick* as a case in which "the noisy lamenting of the Negro mourners was a source of disturbance to at least one plaintiff").

[132] *See* Woodstock Burial Ground Ass'n v. Hagen, 35 A. 431, 432 (Vt. 1896) (describing a cemetery as "unsightly" because of the presence of weeds and the need for grading).

[133] *See Howard*, 310 S.W.2d at 474 (observing "that establishment of the funeral home would lower the value of appellees' properties"); *Trawick*, 75 So. 2d at 788 (taking judicial notice "that a lot in a subdivision

Such claims met a mixed reception in the courts during their heyday in the first half of the twentieth century.[135] There has long been a consensus that a cemetery is not a nuisance per se—largely because of the need for cemeteries—so the conclusion that a particular cemetery constitutes a nuisance depends upon its location and the other facts of the case.[136] The disagreement often reflected contrasting judgments of the force of the concerns about constant reminders of death. The pro-nuisance view accepted such concerns as legitimate and as eligible for redress by the law.[137] The anti-nuisance view denied that the law should enforce such biases.[138] The earliest cases reflected

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near a cemetery would at least not be as readily resaleable as one not adjoining a cemetery"); Rockenbach v. Apostle, 47 N.W.2d 636, 640 (Mich. 1951) (concluding "that property values would be substantially depressed for residential purposes by the proposed establishment of the funeral home"); Jones v. Chapel Hill, 77 N.Y.S.2d 867, 871 (N.Y. 1948) (noting the large depreciation in property values that would be caused by a funeral home); Jones v. Highland Mem'l Park, 242 S.W.2d 250, 253 (Tex. Civ. App. 1951) (holding that a loss of property values cannot support the conclusion that a cemetery is a nuisance).

[134] *See Young*, 64 A.2d at 816 (recounting testimony that a cemetery "might make it difficult 'to keep colored help'" and that "'the type of people who dig the graves might easily be a nuisance as well as a menace to the children walking back and forth'"); *Fraser*, 21 S.E.2d at 579 (reprinting the trial court's determination that a funeral home "has apparently weakened their powers to resist disease" for some of the neighbors).

[135] For cemeteries, *compare* Jones v. Trawick, 75 So. 2d 785, 786-88 (Fla. 1954) (holding that a cemetery was a nuisance), *with* Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 220 (Conn. 1955) (holding that a cemetery was not a nuisance); Young v. St. Martin's Church, 64 A.2d 814, 816-17 (Pa. 1949) (same); DeBorde v. St. Michael & All Angels Episcopal Church, 252 S.E.2d 876, 881-84 (S.C. 1979) (same); Rea v. Tacoma Mausoleum Ass'n, 174 P. 961, 962-63 (Wash. 1918) (same). For funeral homes, *compare Brown*, 198 P. at 551-53 (holding that a funeral home is a nuisance); Travis v. Moore, 377 So. 2d 609, 612 (Miss. 1979) (same); Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 595-94 (S.C. 1942) (same), *with* Devereux v. Grand-Americas Jr. Corp., 85 N.Y.S.2d 783, 786 (N.Y. Sup. Ct. 1949) (holding that a funeral home is not a nuisance); *Fraser*, 21 S.E.2d at 585 (same).

[136] *See, e.g.*, Harper v. City of Nashville, 70 S.E.1102, 1103 (Ga. 1911) (noting that "[c]emeteries are a necessity," so "[c]emeteries are not per se nuisances, and it is only in exceptional cases that their establishment and location would be enjoined by a court of equity").

[137] *See* Brown v. Arbuckle, 198 P.2d 550, 553 (Cal. Ct. App. 1948) (concluding that a funeral home "has a depressing effect upon most people," deprives "a home of the comfort and repose to which its owners are entitled," and can cause mental strain with attendant direct physical manifestations); *Trawick*, 75 So. 2d at 785 (holding that a cemetery constituted a nuisance because "[t]he constant reminders of death, the depression of mind, would . . . deprive the home of that comfort and repose to which its owner is entitled by law").

[138] *See* Frederick v. Brown Funeral Homes, 62 So. 2d 100, 108 (La. 1952) (Le Blanc, J., dissenting) (contending that where "it is only the individual's personal emotions that are involved, they have to yield to the greater rights of a property owner which are [involved]"); Hardin v. Huckabay, 6 La. App. 640, 645 (1927) (asserting that "[m]ere undesirableness by means of social or other prejudice is not sufficient"); Monk v. Packard, 71 Me. 309, 312 (1880) (distinguishing the emotional harm related to cemeteries from other harms that were held to be nuisances because the asserted harm "must injuriously affect the senses or the nerves"); *Devereux*, 85 N.Y.S.2d at 786 (opining that "[t]o restrain the conduct of a business not prohibited by statute at the location in question, the inconvenience of adjoining owners must not be fanciful, or slight, but must be certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person"); *Young*, 64 A.2d at 816 (agreeing that "[i]t may be . . . that all of us have a distaste for cemeteries, but it is a far

the latter view,[139] but many later courts were willing to rely upon such harms.[140] Besides this disagreement, there were several ways in which some cemeteries and funeral homes were distinguished from others. Cemeteries and funeral homes are only held to be a nuisance if they are found in a residential area.[141] Also, where the neighbors cannot actually see the cemetery or the mourners, it is less likely that a nuisance will be found.[142]

b. Facilities for Those Perceived as Dangerous

Several cases decided in the late nineteenth and early twentieth centuries held that a facility for those who had a contagious disease constituted a nuisance when located in a residential neighborhood.[143] A more recent Arkansas decision held that a halfway house for prisoners that was located in a residential neighborhood constituted a nuisance.[144] And an Arizona case held that a church that served meals to indigent transients could be a nuisance.[145]

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cry from what is merely an annoyance . . . to what the law regards and condemns as a nuisance"); Lynch, *supra* note 123, at 353-54, 359 (describing the cases rejecting nuisance claims based on mental harms as having "much the better foundation in legal theory").

[139] *See* 1 WOOD, *supra* note 5, at 7 (advising in 1893 that "[i]t may be stated as a rule reasonably well settled that neither a private nor public tomb, nor cemetery is a nuisance, unless" it results in contamination to the water or the air).

[140] *See supra* note 135.

[141] As one court explained, "[t]he intrusion of a funeral home into an exclusively residential district would ordinarily constitute a nuisance. . . . If, however, transition of the district from residential to business has so far progressed that the value of surrounding property would be enhanced as business property, rather than depreciated as residential property, the establishment of a funeral home would not constitute a nuisance." Mitchell v. Bearden, 503 S.W.2d 904, 905 (Ark. 1974); *see also* Rutledge v. National Funeral Home Ass'n of New Albany, Miss., 203 So. 2d 318, 320 (Miss. 1967) (reversing the trial court's refusal to enjoin the establishment of a funeral home because the trial court failed to recognize that the neighborhood was residential, not commercial).

[142] *See* DeBorde v. St. Michael & All Angels Episcopal Church, 252 S.E.2d 876, 883 (S.C. 1979) (emphasizing that the cemetery and the funeral processions will not be visible from most neighboring properties).

[143] *See* Stotler v. Rochelle, 109 P. 788, 790 (Kan. 1910) (holding that a hospital for cancer patients constituted a nuisance); City of Baltimore v. Fairfield Improvement Co., 39 A. 1081, 1082 (Md. 1898) (deeming a house for "an unfortunate woman afflicted with leprosy" a nuisance); Barth v. Christian Psychopathic Hosp. Ass'n, 163 N.W. 62, 64 (Mich. 1917) (determining that a proposed private insane asylum would be a nuisance); Gilford v. Babies' Hosp., 1 N.Y.S. 448, 449 (N.Y. Sup. Ct. 1888) (holding that a proposed hospital for sick infants would constitute a nuisance); Cherry v. Williams, 61 S.E. 267, 270-71 (N.C. 1908) (holding that a hospital for tuberculosis patients constituted a nuisance); Everett v. Paschall, 111 P. 879, 879 (Wash. 1910) (holding that "a private sanitarium for the treatment and care of persons afflicted with tuberculosis" was a nuisance).

[144] Arkansas Release Guidance Found. v. Needler, 477 S.W.2d 821, 822 (Ark. 1972).

[145] *See* Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 915-23 (Ariz. 1985) (indicating that the church's activities were a public nuisance that could be enjoined in an action brought by a neighborhood association).

The harms in each instance resulted from the fears of those living nearby. These fears prompted concerns about residents' physical health or safety.[146] They led to worries about potential damage to property.[147] They also reduced property values because others were less willing to locate in the neighborhood.[148] The fact that scientists questioned the possibility of any of these harms actually occurring did not deter courts from accepting such fears as sufficient for purposes of nuisance law. As one court explained, "The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real. . . ."[149]

The continuing viability of these cases is doubtful. A 1984 Louisiana decision rejected similar concerns raised in opposition to a group home for five individuals suffering from mental health illnesses.[150] Two courts have expressed their disbelief—albeit in dicta—that the presence of a neighbor infected with AIDS could be deemed a nuisance.[151] More commonly, issues regarding the location of such group homes are resolved under local zoning ordinances that seek to dictate where the facilities can be located.[152] Even

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146 *See Arkansas Release Guidance Found.*, 477 S.W.2d at 822 (noting that "the real . . . apprehension for their safety by the nearby residents" resulted from "the inclusion of a sex offender as a resident" at a nearby halfway house); *Stotler*, 109 P. at 790 (indicating that the neighbors had reasonable ground to fear infection from a nearby hospital for cancer patients); *City of Baltimore*, 39 A. at 1084-85 (describing the possibility that the infection of a leprosy victim could spread to others); *Barth*, 163 N.W. at 63 (noting the allegation that neighbors of an insane asylum would live in fear of infection and of physical assault if the inmates escaped); *Gilford*, 1 N.Y.S. at 449 (suggesting that a hospital for sick infants "brings danger to the youthful members of families living near"); *Cherry*, 61 S.E. at 270 (indicating that a hospital for tuberculosis patients "will be a source of real danger to the lives and health of numbers of people living in that vicinity").

147 *See Armory Park Neighborhood Ass'n*, 712 P.2d at 921 (indicating that indigents visiting church meal service had defaced property in the neighborhood).

148 *See Arkansas Release Guidance Found.*, 477 S.W.2d at 822 (acknowledging the decreased property values associated with proximity to a halfway house); *Stotler*, 109 P. at 790 (noting that the presence of a hospital for cancer patients would reduce property values); *Barth*, 163 N.W. at 63 (reciting the allegation that proximity to an insane asylum would reduce property values).

149 *Everett*, 111 P. at 880. The court added that "[t]he theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally." *Id.* at 881.

150 *See* Vienna Bend Subdivision Homeowners Ass'n v. Manning, 459 So. 2d 1345, 1351-52 (La. App. 1984). The neighbors had claimed that they feared for the safety of their children and their quality of life if the patients lived in the group home, but the court held that antidiscrimination norms and the absence of any evidence of any actual incidents precluded the nuisance claim. *See id.*

151 *See* Mercer v. Rockwell Int'l Corp., 24 F. Supp. 2d 735, 744 (W.D. Ky. 1998) (indicating that "public policy disfavors compensation" where "a group home for the disabled moves into the neighborhood or when someone when AIDS moves next door"); Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 726 (Mich. 1992).

152 *See* DANIEL R. MANDELKER, LAND USE LAW 145 (4th ed. 1997) (observing that "[m]ost municipalities treat group homes for the handicapped as special exceptions and conditional uses, and group home owners may also apply for zoning variances").

then, federal antidiscrimination laws protecting the disabled have often overridden local land use decisions and allowed group homes to be sited where they prefer.[153]

But the application of such antidiscrimination norms to protect the siting of facilities for the disabled does not necessarily establish that the fears expressed by neighbors are outside the contours of modern nuisance law. The *Restatement* even uses such an example as an illustration of the principle that "fears and other mental reactions common to the community are to be taken into account, even though they may be without scientific foundation or other support in fact."[154] In 1972, *Arkansas Release Guidelines Foundation v. Needler*—one of the few decisions finding that such fears supported a finding of a nuisance—raised the standard by insisting that there be substantial reasons for the neighbor's fears.[155] But it remains uncertain whether any such fears will still qualify as a nuisance.

c. Environmental Stigma

A more recent group of cases involves environmental pollution that cannot reach the plaintiff's property, according to scientific experts. This occurs when, for example, hazardous wastes leak into the groundwater, but an impermeable barrier in the aquifer makes it hydrologically impossible for the contamination to spread to the plaintiff's water supply or property.[156] Landowners have argued that they are injured by the stigma that attaches to their property as a result of the nearby contamination. The nature of the injury varies, but it often includes the resulting decline in property values.[157] Most

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[153] *See, e.g.*, City of Edmunds v. Oxford House, Inc., 514 U.S. 725 (1995) (holding that a city's refusal to allow a group home for recovering alcoholics and drug addicts violated the federal Fair Housing Act).

[154] RESTATEMENT (SECOND) TORTS § 821F cmt. f (1979). The example offered in the *Restatement* explains that:

> [T]he presence of a leprosy sanatarium in the vicinity of a group of private residences may seriously interfere with the use and enjoyment of land because of the normal fear that it creates of possible contagion, even though leprosy is in fact so rarely transmitted through normal contacts that there is not practical possibility of communication of the disease.

Id.; *see also* DOBBS, *supra* note 112, at 1333 n.23 (questioning a court's reliance upon the speculative and intangible nature of the fears of a half-way house because "[a]ll fear is intangible, and uncertainty of harm is also commonly the case with fear").

[155] 477 S.W. 2d 821, 822 (Ark. 1972).

[156] *See, e.g.*, Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 718 (Mich. 1992).

[157] *See id.* at 721 (indicating that "[t]he crux of the plaintiffs' complaint is that publicity concerning the contamination of ground water in the area (although concededly not their ground water) caused diminution in the value of the plaintiffs' property"); *see also* Alex Geisinger, Note, *Nothing But Fear Itself: A Social-*

courts have rejected the assertion that an environmental stigma alone provides the requisite interference for purposes of nuisance law,[158] although commentators are divided.[159]

B. The Determination of Which Harms Are Actionable

The injuries considered in these lines of cases help to explain the current validity of moral nuisance actions. The allegations in *Mark v. Oregon State Department of Fish and Wildlife* illustrate how nuisance law can be used to respond to an activity that a neighbor regards as immoral.[160] In *Mark*, the court identified several types of injuries that the presence of a nude beach on the neighboring property could cause:

> The harm to the plaintiffs is that their use of their property and their social life have been restricted by their reluctance to expose themselves, family, friends, and guests to public nudity and open sexual activity, that they are fearful for their safety due to their proximity to the nude beach activities, that they are embarrassed, offended and angered by coming in contact with nude adult behavior, that their right to go for a walk and enjoy the public beaches adjacent to their home has been restricted by harassment from nude sunbathers, and that those things have greatly diminished the value of their property.[161]

Psychological Model of Stigma Harm and Its Legal Implications; 76 NEB. L. REV. 452, 475-96 (1997) (distinguishing the different kinds of environmental stigmas).

158 *See* Wilson v. Amoco Corp., 33 F. Supp. 2d 981, 986 (D. Wyo. 1998) (rejecting an environmental stigma claim against an oil refinery and tank farm, and citing several additional cases holding that environmental stigma alone does not support a cause of action); Lamb v. Martin Marietta Energy System, Inc., 835 F. Supp. 959 (W.D. Ky. 1993) (rejecting an environmental stigma claim against a nearby uranium processing plant); *Adkins*, 487 N.W.2d at 717 (holding five votes to two that landowners cannot bring a nuisance action based solely on the stigma of nearby environmental contamination). *But see* Exxon Corp. v. Yarema, 516 A.2d 990, 1001-05 (Md. Ct. Spec. App. 1986) (permitting a landowner to bring a nuisance action against leaking underground gasoline storage tanks even though no contamination had reached his property); DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 461 (Ohio Ct. App. 1991) (allowing a nuisance action based on environmental stigma alone).

159 *Compare* Michael D. Riseberg, Note, *Exhuming the Funeral Home Cases: Proposing a Private Nuisance Action Based on the Mental Anguish Caused by Pollution*, 21 B.C. ENVTL. AFFAIRS L. REV. 557, 583-86 (1994) (analogizing to the funeral home and prostitution cases to support a nuisance claim for environmental stigma injuries), *with* E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. ENVTL. L. & POL'Y 185 (1996/97) (arguing against recovery for environmental stigma).

160 974 P.2d 716, 718 (Or. Ct. App. 1999).

161 *Id.* at 718; *see also* Appellants' Opening Brief and Abstract of Record at A-1-A-4, Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716 (Or. Ct. App. 1999) (No. CA-A97006) (recounting the allegations of harm in more graphic detail).

By contrast, the plaintiffs did not contend that their mere awareness of the activities on the nude beach supported a nuisance claim, or that a nuisance existed because those activities wrongfully induced them to engage in improper activities.

A closer examination of the injuries alleged in *Mark* and the early cases reveals that some moral injuries may serve as the basis for a nuisance claim, while others may not. In particular, a moral nuisance can be premised on the sight of the offensive activity, the inability to use the property because of the embarrassment caused by the activity, reasonable fears, or any more general interferences—such as excessive noises or physical harassment—with the plaintiff's use of his or her property. The mere awareness of the activity, any improper temptation produced by the activity, and reduced property values are not sufficient to establish a nuisance.

1. Awareness

The simple awareness that a neighbor is engaged in activities that one regards as immoral does not support a nuisance claim. There is undoubtedly a sense in which one can be bothered by the knowledge that your neighbor is living with an unmarried partner, rooting for the Mets, or voting for Ralph Nader. But any offense that one takes from that knowledge is not actionable. As Richard Epstein explains, "the abstract sense of being offended that certain activities are being conducted in one's own neighborhood" is "generally given little weight."[162] Indeed, the very idea of such a claim is offensive. But these claims are rarely made: for example, the plaintiffs in *Mark* did not rely upon their mere awareness of the nude beach next door.[163] When they are raised, such claims are promptly rejected. For example, in 1883, Justice Brewer wrote for the Kansas Supreme Court that the presence of an African-American family living on neighboring property does not constitute a nuisance.[164] The only contrary precedent is a 1915 Kentucky decision holding that the fact that an unmarried couple was cohabiting next door constituted a public nuisance.[165] That is the only case, and it has never been followed.

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[162] EPSTEIN, *supra* note 21, at 357.

[163] 974 P.2d at 717-18.

[164] Faloon v. Schilling, 29 Kan. 292, 297 (1883) (asserting that "equity will not interfere simply because the occupants of such house are by reason of race, color, or habits, disagreeable or offensive"). I discuss Justice Brewer's views in more detail text accompanying *infra* notes 280-85.

[165] Adams v. Commonwealth, 171 S.W. 1006, 1006 (Ky. 1915) (sustaining a public nuisance conviction based on an indictment stating that the man and woman "though not husband and wife, did for several months, and within a year before the finding of the indictment, unlawfully cohabit and live together in adulterous

2. *Moral Temptations*

Public nuisance law long sought to protect the public morals. The injury to be prevented in such instances is the spread of immoral activities caused by the temptation to engage in them.[166] But general concerns about public morals cannot serve as an injury that permits private individuals to bring a nuisance suit because such concerns lie within the exclusive province of the government. As Prosser has explained, an individual cannot bring a nuisance action simply because he or she fears being led into sin.[167] So it is not surprising that Mark and Powers declined to assert that the presence of the nude beach could somehow improperly influence their own conduct.

3. *Offensive Sights*

The annoyance or offense that one experiences from seeing objectionable conduct serves as a cognizable injury in nuisance cases, albeit a controversial one. The nineteenth century moral nuisance cases indicated that the sight of prostitution, gambling, or drinking supported a nuisance claim.[168] Several other cases held that the sight of breeding horses constituted a nuisance.[169] Countless cases confirm that lights, sounds, and odors that do not present any documented health effects nonetheless can qualify as nuisances if they are sufficiently annoying to neighboring landowners.[170] The results in the

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relations in a certain house in the town of Mt. Vernon by sleeping in and occupying the same room and bed in the house and 'acting in a lewd and vulgar manner, to the common public nuisance and scandal, and to the detriment of good morals and religion and to those persons then and there residing in the neighborhood and passing and repassing, and having a right to pass and reside' therein").

166 *See, e.g.*, Douglas v. Kentucky, 168 U.S. 488, 494 (1897) (reciting the defendant's argument that the sale of lottery tickets was "injurious to public morals by tempting the people into the immoral habit of gaming"); Hickey v. State, 53 Ala. 514, 517 (1875) (upholding a public nuisance conviction for operating a disorderly house because "the common injury flows from the evil influence it exerts—from the temptations and opportunities for the commission of crime it affords").

167 *See* PROSSER & KEETON, *supra* note 19, at 652 (insisting that "it cannot be a tort to a person simply because that person was induced to engage in immoral or sinful conduct").

168 *See supra* text accompanying notes 44-69.

169 *See* Williams v. Wolfgang, 132 N.W. 30, 31 (Iowa 1911) (acknowledging "[t]he shock to the sense of decency and the annoyance which must result to residents from the fact of breeding stallions to mares in the immediate vicinity"); Hayden v. Tucker, 37 Mo. 214, 224 (1866) (enjoining the breeding of horses near the plaintiff's home because "social happiness is marred by a disgusting annoyance perpetually bringing the blush of shame to modesty and innocence"); Farrell v. Cook, 20 N.W. 720 (Neb. 1884) (holding that the breeding of horses "in full view" of the plaintiff's home constituted a nuisance); Nolin v. Mayor & Aldermen of Franklin, 12 Tenn. 163 (1833) (concluding that "showing and keeping a stud horse" in town constituted a nuisance); *see also* RESTATEMENT (TORTS) SECOND § 829 cmt d, illus. 2 (1979) (agreeing that the embarrassment of watching breeding livestock is the basis for a nuisance).

170 *See supra* text accompanying notes 70-86.

aesthetic nuisance cases have been more mixed, but there is an increasing trend toward finding that unsightly activities qualify as nuisances.[171]

The sight of public nudity or public sexual activity causes similar offense for many people. The plaintiffs in *Mark* insisted that they were "embarrassed, offended and angered by coming into contact with nude adult behavior."[172] The court characterized their further claim of "[u]ndesired exposure to sexual activity" as "one of the traditional grounds for finding either a public or a private nuisance."[173] The exposure of children to such sights is especially troubling.[174] In each instance, the sight is actionable because it offends and annoys those who are exposed to it. Sights, moreover, are different in kind from mere awareness. The effects of such visual experience are far more striking than a more generalized knowledge of an activity. This is confirmed by the remedy sought by the plaintiffs in *Mark*: to remove the activities from their view, not to eliminate those activities altogether.[175]

4. Embarrassment

Sights can also support a nuisance claim when they are embarrassing. Mark and Powers contended that they could not use their property because they were unwilling to expose themselves or others to the neighboring nude beach.[176] This interference with their use of their property is the very essence of the kinds of injury targeted by private nuisance law. But the interference seems different from the typical nuisance claims against environmental contamination that poisons a well or loud noises that prevent sleep because it depends upon the reaction of the plaintiffs. The inability to entertain guests

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171 See *supra* text accompanying notes 133-41.

172 974 P.2d at 718.

173 *Id.* at 719.

174 *See Mark* Appellants' Brief, *supra* note 161, at 15 (stating that "family members and friends, particularly those with children, are uncomfortable and unwilling to visit plaintiffs' home for fear of run ins with nude adults"); David Callender, *Jensen: GOP Wants to Shut Nude Beach; Calls Mazo Sunbathers Bad Influence on Kids*, THE CAPITAL TIMES (Madison, Wis.), July 28, 1999, at 2A (quoting a state legislator who supported a bill to prohibit nude sunbathing in all state parks and recreational areas because "[w]e're not prudes, but 4-year-old kids should not be seeing adults parading around naked at a state park . . . ."). *But see* John Ritter, *For Some Cities, Going Nude Is Rude*, USA TODAY, Aug. 29, 1999, at 3A (reporting that naturists are challenging a county law prohibiting parents from taking their children to clothing-optional areas).

175 *See* Appellants' Reply Brief and Abstract Record at 15, Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716 (Or. Ct. App. 1999) (No. CA-A97006) (insisting that "plaintiffs have never alleged that a complete ban on nudity in the wildlife area was the only way to prevent the nuisance. . . . All plaintiffs ever requested was that the defendants contain the nude activities somewhere out of view from their residence or from the road leading to their residence.").

176 *Mark*, 974 P.2d at 718.

because of the embarrassment that attends the sight of a nearby activity is only rarely cited as a harm in nuisance cases.[177] Further, the users of the nude beach would likely contend that any neighbors remained able to use their property, and their unwillingness to do so is their own fault.

That argument should fail whenever the plaintiffs act reasonably in not wanting to expose themselves or their guests to public nudity. The inquiry should focus on the interference with the use of the land, not the source of that interference. The requirement that the reaction be reasonable follows from the emphasis on community standards and the hypersensitive plaintiff doctrine discussed below,[178] and it ensures that the interference is real rather than imaginary.

5. *Fears*

Mark and Powers argued that they had been harassed by nude sunbathers and that they feared for their safety.[179] These fears will support a nuisance claim if they are reasonable, and perhaps even if they are not. Fears for personal health form the basis for most environmental nuisance claims.[180] Fears for personal safety have been raised in the old cases involving houses of prostitution and the more recent cases involving the citing of facilities for the sick and for released convicts.[181] Fears of death divided the courts in the cemetery and funeral home cases.[182] All of these cases honor fears that are deemed reasonable, though other factors might preclude a finding of a nuisance. Unreasonable fears are more troubling. While some opinions suggest that a fear can be actionable even if it lacks any evidentiary support,[183] the better view would restrict a neighbor's activities only if the fear that it provokes can be shown to be reasonable.

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177 *See* Brown v. Arbuckle, 198 P.2d 550, 557 (Cal. Ct. App. 1948), 198 P.2d at 551 (describing "the dampening effect" that a proposed funeral home would have on the use of the plaintiff's backyard for picnics and parties); Foley v. Harris, 286 S.E.2d 186, 188-91 (Va. 1982) (upholding an aesthetic nuisance claim where a landowner asserted that the view of wrecked cars on a neighbor's lot made him self-conscious and unwilling to invite friends over for cookouts).

178 *See infra* text accompanying notes 211-23.

179 *Mark*, 974 P.2d at 718; *see also* Nelson, *Island's Nude Sunbathers Pose Nuisance and Threat*, *supra* note 18, at C1 (reporting that Powers testified at trial that nude sunbathers have "threatened to burn down her house" and "warned her that they are 'organized and militant'").

180 See *supra* text accompanying notes 69-70.

181 *See supra* text accompanying notes 77-89, 165-71.

182 *See supra* text accompanying notes 146-64.

183 *See supra* text accompanying note 171.

6. *Loss of Property Value*

A loss of property value alone cannot justify a nuisance claim. Wood's nineteenth century treatise asserted that impacts on property value are insufficient to establish a nuisance.[184] This principle has endured as one of the few fixed rules in nuisance law. Some of the contrary suggestions, though, occurred in the early moral nuisance cases.[185] More recently, the argument that an activity that decreases the value of the plaintiff's property has been raised in the environmental stigma cases, but most courts have rejected such claims.[186] The traditional rule is best because there is no limit to the kind of neighboring activities that can be vilified as a cause of declining property values. But if courts come to accept the assertions of most commentators that a loss in property value is a sufficient injury for nuisance purposes when environmental contamination is at issue, then a loss in property value should also be sufficient when moral injuries are at issue.

C. *The Application of Community Moral Norms*

The fact that someone is embarrassed, offended, afraid, or annoyed by what they regard as their neighbor's immoral conduct does not necessarily make that conduct a nuisance. The law of nuisance has not, does not, and should not recognize every moral objection as the basis for a claim, even if those objections are associated with the kinds of injuries that nuisance law is designed to prevent. A moral objection must be commonly held in the community before the harms that it causes can give rise to a nuisance claim.

The characterization of an activity as a moral nuisance depends on how that activity is viewed in the community in which it occurs. The *Restatement* states the general principle that "[t]he location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it."[187] Likewise, Professor Ellickson

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[184] *See* 1 WOOD, *supra* note 5, at 4-5; *accord* Michael D. Riseberg, *Exhuming the Funeral Home Cases: Proposing a Private Nuisance Action Based on the Mental Anguish Caused By Pollution*, 21 ENVTL. AFF. 557, 566 (1994) (stating that "the courts have long recognized that a depreciation in property value, without other harm, does not constitute an actionable interference with the use and enjoyment of property").

[185] *See, e.g.*, Hamilton v. Whitridge, 11 Md. 128, 143-48 (Md. 1857) (sustaining a court's jurisdiction to entertain a nuisance claim against a "bawdy-house" alleged to have lessened the value of the plaintiff's property); Blagen v. Smith, 56 P. 292, 295 (Or. 1999) (indicating that a loss in property value attributable to proximity to a house of prostitution could support a nuisance action seeking damages but not an injunction).

[186] *See supra* text accompanying note 181.

[187] RESTATEMENT (SECOND) TORTS § 821F cmt. e (1979).

characterizes a nuisance as an activity that is "perceived as unneighborly under contemporary community standards."[188] This reference to community standards also echoes the current test for obscenity, which relies upon the standards of particular communities to determine whether material is obscene and thus outside the protection of the first amendment.[189]

Conversely, nuisance law does not protect the delicate. Once again, Oregon is the source of the leading case stating the hypersensitivity doctrine. In *Amphitheaters, Inc. v. Portland Meadows*, a horse racetrack and a drive-in movie theater were built at nearly the same time on neighboring properties.[190] The lights necessary to accommodate nighttime horse racing made it nearly impossible to view the movies next door. The court rejected the theater's nuisance claim, however, because the lights caused harm only because of the unusual sensitivity of the theater.[191] Other cases follow the same principle. Courts have characterized opposition to cemeteries as based on the unusual sensitivity of the neighbors, while saloons were once described as offensive to more than just sensitive people.[192]

So those who possess unusual moral sensibilities cannot rely upon a nuisance action to protect them. The sights, embarrassment, and fear that arise from moral objections to an activity should be actionable only where there is a consensus that the offending activity is immoral and objectionable. Different communities have different norms of morality. Material that is regarded as obscene in one city may be accepted in another.[193] As Prosser once remarked about nuisance law generally, "What is a nuisance in Palm Springs is not necessarily one in Pittsburgh."[194] Moral sensibilities, moreover, are changing.

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188 Ellickson, *supra* note 19, at 748; *accord* PROSSER & KEETON, *supra* note 19, at 627 (noting that "[i]t has been said that the standard for the determination of significant and unreasonable is the standard of normal persons in a particular locality"); Coletta, *supra* note 114, at 161 (stating that "[t]he average person with ordinary sensibilities is a suitable standard against which to measure aesthetic interferences").

189 *See* Miller v. California, 413 U.S. 15 (1973) (explaining the "contemporary community standards" test for obscenity).

190 *See Amphitheaters*, 198 P.2d 847, 848-50 (Or. 1948). Ellickson discusses *Amphitheaters* and cites several other hyper-extrasensitivity cases that were described by Ronald H. Coase in *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). *See* Ellickson, *supra* note 19, at 753-54 & n.244.

191 *See Amphitheaters*, 198 P.2d at 857-58.

192 *Compare* Young v. St. Martin's Church, 64 A.2d 814, 816-17 (Pa. 1949) (indicating that plaintiffs objecting to cemeteries are sensitive), *with* Haggart v. Stehlin, 35 N.E. 997, 1000 (Ind. 1893) (holding that a saloon is not offensive only to the delicate).

193 *See Miller*, 413 U.S. at 32 (stating that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City").

194 PROSSER & KEETON, *supra* note 19, at 633.

The presence of a hate group or abortion protestors on a neighbor's land is more likely to elicit a moral objection today than a billiard hall or a disorderly house. Moreover, nuisance law requires more than a common belief that an activity is immoral. The community might regard an activity as immoral, but be willing to tolerate those who believe otherwise. A moral nuisance exists only if an activity that most members of the community find immoral actually interferes with their use and enjoyment of their land.

Public nudity offers a useful example. The activities that troubled the plaintiffs in *Mark* would be accepted without incident in those parts of the world where nude beaches are commonplace.[195] Attitudes toward nude beaches are divided in other places.[196] But most communities hold to the traditional discomfort with nude beaches.[197] The *Mark* Court sided with the latter view, concluding that the plaintiffs could not be dismissed as oversensitive for objecting to public nudity, let alone public sexual activity.[198]

The application of these standard nuisance rules still leaves the question of why a landowner should be able to regulate a neighbor's activities based on a contested vision of morality. In one sense, this raises the far broader question of the ability of the law to regulate morality at all, an issue that is well beyond the scope of this Article. Suffice it to say that the law routinely, albeit sometimes controversially, still regulates conduct simply because the community regards it as immoral.[199] In another sense, though, the focus on morality overlooks the fact that the kinds of harm are not unique to moral

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[195] *See, e.g.*, United States v. Biocic, 928 F.2d 112, 118 (4th Cir. 1991) (Murnaghan, J., concurring) (noting that the French do not object to nude beaches).

[196] *See* Naturist Education Foundation, *NEF/Roper Poll 2000: American Attitudes on Skinny-Dipping and Nude Sunbathing* (visited April 3, 2000) <http://nef.oshkosh.net/Projects/NEF-Roper_Poll/nef-roper_poll.html> (reporting the results of a poll indicating that Americans are evenly divided regarding whether "special and secluded areas should be set aside for people who enjoy nude sunbathing"). That poll also indicated much greater support for allowing nude sunbathing "at a beach that is accepted for that purpose." *Id.*

[197] *See Biocic*, 928 F.2d at 115-16 (explaining that "[t]he important governmental interest [in prohibiting public nudity] is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones"); State v. Rocker, 475 P.2d 684, 689 (Haw. 1970) (referring to the "unreasonable belief" of nude sunbathers "that their acts under the circumstances of this case were not likely to offend members of the general public").

[198] 974 P.2d 716, 720 (Or. Ct. App. 1999) (stating that "[a]lthough the question is the effect of the challenged activity on an ordinary person, and although the law does not protect the delicate, plaintiff's allegations would allow finding that the nudity constituted a nuisance") (citation omitted).

[199] *See, e.g.*, Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1527 n.101 (1999) (observing that "[m]any of the environmental laws of the United States, developed in the 1970s and early 1980s, are built on the premise that pollution is immoral and should be entirely stopped").

nuisances. One could equally question why nuisance law provides a remedy where noises, lights, odors, or other physical phenomena provoke a dispute between neighbors. But that simply returns the issue to the kind of injury that the landowner suffers. And, as we have seen, moral nuisances include harms that nuisance law has always recognized.

III. THE NATURE OF THE DEFENDANT'S ACTIVITY

The harm suffered by the plaintiff is only half of the problem in nuisance cases. Even where the plaintiff has experienced a cognizable harm, a nuisance exists only if the defendant's activity lacks legal protection and sufficient social utility in the place in which it occurs. Moral nuisances raise difficult questions in both instances because of the increasingly contested nature of many moral claims and of any legal regulation based on such claims. But, there are answers to many of those questions. A moral nuisance claim should be available when the defendant's activity is unprotected by the law—especially when it is prohibited by the law—and when that activity possesses less value in the community in which it occurs than the harms associated with the moral concerns.

A. The Legality of the Defendant's Activity

The law can take four alternative approaches to a defendant's conduct. It can protect it via a constitutional provision. It can seemingly permit it through a zoning or licensing scheme. It can make it illegal. Or it can say nothing at all. These different approaches yield distinct results for moral nuisance claims.

1. Constitutional Protections

Nuisance law cannot prohibit what the Constitution protects.[200] This obvious principle explains why the regulation of certain activities that were once banned as nuisances, such as theaters showing pornographic movies, is now governed by intricate constitutional rules. Moreover, just as norms of morality are contested, the boundaries of constitutional restrictions on the legal regulation of immoral activities are similarly imprecise.

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[200] *But see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992) (indicating that the protective scope of the Fifth Amendment's Takings Clause depends on whether an activity constitutes a traditional common law nuisance).

In this climate, a nuisance action against any activity based on notions of morality is sure to prompt a constitutional objection. Consider *State ex rel. Montgomery v. Pakrats Motorcycle Club, Inc.*, in which the sponsors of an annual outdoor party featuring public nudity and public sex argued that such conduct was protected by the First Amendment.[201] The sponsors cited *Schad v. Borough of Mt. Ephraim* to support their claim that a "titty contest" was expressive conduct and thus immune from state regulation under the First Amendment.[202] *Schad* invalidated a local zoning ordinance that banned adult theaters from any location in the community.[203] The Ohio Court of Appeals distinguished *Schad* because "[w]hile some contestants did dance on stage, expressive dancing was clearly not the primary focus of the contest. Furthermore, even if the 'titty contest' were protected by the First Amendment, many other public sexual acts engaged in by party attendees were not."[204]

That some would invoke the Constitution's protections for conduct as offensive as that involved in *Pakrats Motorcycle Club* shows that the mere invocation of a constitutional problem should not stifle a moral nuisance claim. Thus the allegations of public sexual activity in *Mark* will not be blocked by any constitutional protections. Nor is it likely that the Constitution would forbid a nuisance action against a nude beach, even without the sexual activity. An eclectic array of constitutional objections have been leveled against government prohibitions on nude beaches: claims of First Amendment expressive rights, equal protection objections to the failure to treat the bodies of women and men identically, privacy, and rights of assorted provenances.[205] With few exceptions, such arguments have failed.

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201 693 N.E.2d 310, 313 (Ohio Ct. App. 1997).

202 452 U.S. 61 (1981).

203 *Id.*

204 *Pakrats Motorcycle Club*, 693 N.E.2d at 313.

205 *See* United States v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) (rejecting an Equal Protection claim and a Ninth Amendment claim against a conviction for going topless on the beach at the Chincoteague National Wildlife Refuge); South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610 (11th Cir. 1984) (rejecting a First Amendment claim); Chapin v. Town of Southampton, 457 F. Supp. 1170, 1173-75 (E.D.N.Y. 1978) (rejecting freedom of expression, right to privacy, and freedom of association claims against the regulation of a nude beach); McGuire v. State, 489 So. 2d 729, 730-31 (Fla. 1986) (rejecting a First Amendment claim); State v. Miller, 501 P.2d 363, 366 (Haw. 1972) (same); State v. Rocker, 475 P.2d 684, 689-90 (Haw. 1970) (rejecting right to privacy claims); People v. Hollman, 500 N.E.2d 297, 300, 302-03 (N.Y. 1986) (rejecting First Amendment and liberty claims). *But see* Williams v. Hathaway, 400 F. Supp. 122, 127 (D. Mass. 1975) (finding a constitutional right to nude sunbathing on a secluded beach that was traditionally held out as a nude beach); People v. Santorelli, 600 N.E.2d 232, 233-34 (N.Y. 1992) (sustaining an equal protection challenge that prohibited only women from going topless); People v. David, 585 N.Y.S.2d 149, 150-51 (N.Y. Co. Ct. 1991) (same); Richard B. Kellam & Teri Scott Lovelace, *To Bare or Not to Bear: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. RICH. L. REV. 589, 598-620 (1986)

All of those cases were decided before the Supreme Court revisited the constitutionality of laws restricting public nudity in *City of Erie v. Pap's A.M.*[206] There the Court held that a city ordinance prohibiting public nudity could constitutionally be applied to nude erotic dancing at a nightclub.[207] The crime and other secondary effects that *Erie* determined were associated with nude dancing provided the requisite government interest to sustain the law.[208] And while the constitutionality of applying the public nudity ordinance to nude dancing divided the Court, none of the Justices suggested that public nudity that lacks an expressive component is entitled to constitutional protection.[209] The constitutional argument against government prohibitions on nude beaches becomes far more difficult since *Erie*.

But the argument for moral nuisances does not depend on the correctness of *Erie* or the decisions holding that nude beaches are not constitutionally protected. The point is that some conduct which many regard as immoral is beyond the scope of the Constitution's protections. Outside of the Constitution's boundaries—wherever they are—the state possesses police power to regulate for the protection of the public morals, just as it protects the public health. So, too, may nuisance actions proceed against the cognizable harms

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(article co-authored by a federal judge summarizing and taking a generally more favorable attitude toward the constitutional arguments against the regulation of nude beaches); Ryan Konotopsky, Jacob et al. v. The Community Standard of Tolerance: *Substantive Equality, Indecency, and Topless Rights for Women*, 63 SASK. L. REV. 215, 216 (2000) (insisting that "there is no justifiable reason to draw the line of nudity and indecency at the waist for men, and not women" under Canadian law). The cases have also included constitutional vagueness and overbreadth challenges against particular ordinances regulating nudity on public beaches, but I need not discuss those issues here because the constitutionality of certain statutory bans on nude beaches does not affect the availability of the common law nuisance claim.

206 120 S. Ct. 1382 (2000).

207 *Id.* at 1384-98.

208 *Id.* at 1393-94. The crime, property value, and quality of life effects are denominated "secondary" to contrast them with the primary effects associated with the content of the speech itself. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 140 (1998) (explaining that "[p]resumably, a secondary effect is a kind of side-effect of speech that happens to be associated with particular types of content, but which could in principle derive from other forms of speech," whereas "the fact that a message offends its audience is not a secondary effect"). Justice Stevens objected that the Court had never before relied upon secondary effects to uphold a complete ban on a type of speech, as opposed to a restriction on the location of that speech. *City of Erie*, 120 S. Ct. at 1406 (Stevens, J., dissenting). The future evaluation of secondary effects could influence the viability of moral nuisance claims because the harms alleged in such cases can include both primary effects (e.g., opposition to prostitution) and secondary effects (e.g., traffic and noise).

209 *See City of Erie*, 120 S. Ct. at 1391 (O'Connor, J., plurality opinion) ("[B]eing 'in a state of nudity' is not an inherently expressive condition."); *id.* at 1401 (Scalia, J., concurring in the judgment) ("Erie had recently been having a public nudity problem not with streakers, sunbathers or hot-dog vendors, but with lap dancers.") (citation omitted).

suffered by those living adjacent to conduct that the community regards as immoral.

2. *Governmental Acceptance of the Permitted Activity*

The absence of any constitutional protection for a contested activity does not necessarily establish the propriety of nuisance actions brought by private individuals. Conduct that neighbors may regard as a nuisance often is allowed either explicitly or implicitly by zoning laws, licensing schemes, and other state and local statutes.

Most contemporary land use determinations are made as a function of zoning laws. Municipal zoning ordinances have become ubiquitous in the United States since the time that the heyday of the judicial decisions involving moral nuisance claims. Zoning law enables courts to make a more comprehensive determination of whether land uses are appropriate considering the overall perspective of the entire community. Zoning is also the result of decisions made by legislators and administrators who are more likely to be chosen through the representative process than the judges who decide nuisance cases.[210] Thus, zoning has assumed the role of addressing land uses that raise moral concerns for many individuals, such as bookstores selling pornographic magazines and theaters showing pornographic movies.[211]

As a formal matter, zoning, licensing, and other apparent methods of approval have long failed to defeat nuisance claims. The fact that municipal zoning does not prohibit a use does not preempt or otherwise forbid a nuisance action against that use.[212] For example, most courts have concluded that a funeral home can be a nuisance, even if it is located in an area zoned for such businesses.[213] Nor does the granting of a specific license to a particular

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[210] Actually, the prevalence of elected state judges makes the difference here smaller than one might initially expect. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995) (reporting that 23 states use elections to select judges, 12 use appointments, and the balance employ some combination of the two procedures).

[211] *See, e.g.*, City of Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986) (upholding a zoning ordinance regulating the location of adult bookstores); Young v. City of Simi Valley, 216 F.3d 807 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 844 (2001) (invalidating an adult business municipal zoning ordinance).

[212] *See, e.g.*, PROSSER & KEETON, *supra* note 19, at 633 (reporting that "[m]ost courts hold that zoning ordinances do not protect the defendant from a claim by a particular plaintiff that the defendant's use is an unreasonable interference with the use and enjoyment by the plaintiff of his property and, therefore, a private nuisance").

[213] *See supra* text accompanying notes 157-63.

activity necessarily protect that activity from a nuisance suit.[214] More generally, the failure to regulate certain conduct, when other related conduct is regulated does not preclude a nuisance suit. The Oregon statute applicable in *Mark* provided that public nudity was illegal only if "it occur[ed] with the intent of arousing the sexual desire of either the actor or another person."[215] Even assuming that the conduct occurring on the nude beach did not violate that statute, the court stated that "an activity that is otherwise legal may still constitute a nuisance."[216] Still, the courts are hesitant to find that an activity constitutes a nuisance if it is authorized by statute or if there is a comprehensive regulatory scheme governing the activity.[217]

Such judicial acceptance of nuisance actions notwithstanding legislative or administrative approval of an activity does not resolve the question of relative institutional competence. This is perhaps especially true with regard to moral nuisances, which involve activities whose locations typically now are addressed through zoning law. Today the bars, gambling casinos, and adult theaters that were the focus of much early nuisance jurisprudence are now regulated by local zoning and licensing decisions. By contrast, Professor Ellickson captured the prevailing view when he observed that "nuisance law is widely viewed as an archaic means of handling land use problems."[218] Professor Epstein explains that zoning law displaced common law nuisance

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[214] *See, e.g.*, Farmer v. Bellmer, 100 P. 901, 903 (Cal. Ct. App. 1909) (agreeing that a house of prostitution constituted a nuisance even though "[t]he trustees of the city put their moral consciousness to sleep" by licensing it); Haggart v. Stehlins, 35 N.E. 997, 1000-01 (Ind. 1893) (holding that a saloon was a nuisance despite being licensed); Koehl v. Schoenhausen, 17 So. 809, 810-11 (La. 1895) (same); Givens v. Van Studdiford, 86 Mo. 149, 156-57 (1885) (holding that a house of prostitution was a nuisance even though it had been licensed). *See also generally* Note, *The Halfway House as Private Nuisance*, 1972 WASH. U. L.Q. 811, 812 (1972) (citing a case holding that a license or other authorization does not bar a nuisance action).

[215] 974 P.2d 716, 720 (Or. Ct. App. 1999) (citing OR. REV. STAT. § 163.465 (1990)).

[216] *Id.* The court explained that a contrary rule would have eliminated the need for statutes barring nuisance claims against farming activities on land zoned for farming. *See id.*

[217] *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (1979) (describing the effect of compliance with statutes and consistency with zoning laws as a factor in determining whether an activity constitutes a nuisance); Note, *supra* note 216, at 812-13 (citing two cases that indicate that legislative authorization establishes a higher standard of proof in nuisance actions).

[218] Ellickson, *supra* note 19, at 720; *see also* Halper, *supra* note 6, at 91 (writing that "[o]nce the only means of adjusting landuse conflicts; nuisance . . . had virtually disappeared from that role by the first quarter of this century, supplanted by tools more suited to large-scale solutions"). Professor Ellickson would not rely upon traditional common law nuisance adjudication even though he is a critic of zoning and prefers private means of resolving land use disputes. *See* Ellickson, *supra* at 706-11, 762. Instead, he advocates special administrative "nuisance boards" that would apply common law nuisance principles to competing land uses, rather than relying upon the courts. *Id.* at 762-71 (describing the proposed structure and hypothetical examples of the functions of nuisance boards).

actions because of "the uncertain and collective nature of the harms" involved in moral nuisances.[219]

This is my greatest concern about moral nuisance actions. It is troubling for courts to override the decisions of legislators or executive officials to permit an activity that should not be permitted. But the institutional concerns are no more troubling in the context of moral nuisances than they are for other kinds of nuisances. A sweeping assertion that only legislative and administrative officials can properly adjudge conflicting land uses would eliminate nuisance law altogether, and that has not occurred. Nuisance law continues to play a role in resolving land use disputes that is modest in scope, but critical as an alternative to exclusive reliance upon governmental action. Environmental nuisance claims continue to be litigated precisely because those individuals who are threatened by contamination are dissatisfied with public environmental enforcement efforts. Nuisance law, in short, serves as a back-up to more common land use procedures, especially zoning. Nuisance law should be more deferential to explicit legislative land use decisions that presumptively reflect the community's judgment. It remains important, though, to provide direct legal remedies to injured landowners.

3. Illegality of the Defendant's Activity

Nuisance actions facilitate, rather than frustrate, state and local laws when the contested activity is illegal. Public nuisances were crimes according to the traditional common law, and today many statutes proscribe certain kinds of criminal conduct deemed to be public nuisances.[220] Private individuals who are concerned about such illegal activities often seek governmental assistance in ridding their neighborhoods of public nuisances. That assistance is the only option for private individuals seeking a criminal prosecution for a public nuisance, because private individuals cannot bring their own criminal actions against those engaged in the offending conduct. The value of nuisance actions available to private parties is that they serve as an alternative mechanism to oppose illegal activities that the authorities are unwilling or unable to stop. Private individuals can seek the different remedies of injunctive relief or

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[219] EPSTEIN, *supra* note 21, at 357; *see also* Halper, *supra* note 6, at 91 (asserting that "nuisance, with its confusions, contingencies and lack of principle, had virtually disappeared from that role in the first quarter of this century, supplanted by tools more suited to large-scale solutions").

[220] *See, e.g.*, PROSSER & KEETON, *supra* note 19, at 645 (explaining that "[a]t common law, a public nuisance was always a crime, and punishable as such. In the United States, all jurisdictions have enacted broad criminal statutes covering such nuisances . . . .") (footnote omitted).

damages in two instances: either where the defendant is engaged in a *private* nuisance, or where the defendant is engaged in a *public* nuisance, and the private plaintiff has suffered a special injury unlike that experienced by the public more generally.[221]

Of course, those choices are available regardless of the legality of the defendant's conduct. The special relevance of a legal prohibition against the defendant's conduct is that it increases the likelihood that the conduct will be regarded as a nuisance—private or public. This enables concerned individuals to rely on governmental enforcement action or bring their own legal action against the defendant. Not surprisingly, the first option appears preferable. Most activities that are objectionable to the residents of a community are addressed by governmental authorities via public nuisance law or other legal prohibitions. Often, the government acts at the specific request of concerned neighbors. The value of nuisance actions available to private parties, then, is an alternative mechanism to oppose illegal activities that the authorities are unwilling or unable to stop.

This dynamic is illustrated by the approach that the law takes to activities that can be regarded as moral nuisances. For example, statutes prohibiting the use of property for prostitution are typically enforced by local officials;[222] nuisance law enables local residents to object to houses of prostitution as well.[223] Likewise, nude beaches have faced charges of illegality as well as immorality. Many state statutes and local ordinances contain general prohibitions against public nudity and public sexual activity.[224] Other statutes specifically target nude beaches.[225] These statutes are often at the behest of

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221 *See supra* text accompanying note 58.

222 *See, e.g.*, CAL. PENAL CODE § 11,225 (West 2000) (prohibiting the use of property for prostitution); State v. Rowan, 859 P.2d 737, 737 (Ariz. 1993) (sustaining a conviction for running a house of prostitution in violation of ARIZ. REV. STAT. § 13-3208(B) (1989)).

223 *See supra* text accompanying notes 70-86.

224 *See, e.g.*, ARIZ. REV. STAT. § 13-1403 (2000) (prohibiting "public sexual indecency"); MICH. STAT. ANN. § 5.2084(8) (Law. Co-op. 2000) (providing that "[w]hether or not so provided in its charter, a city may, by ordinance, regulate or prohibit public nudity within city boundaries").

225 *See, e.g.*, South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 609 (11th Cir. 1984) (quoting a Miami ordinance that makes it unlawful for anyone to "bathe, wash, or swim in any river, lake, pond or pool within the city, naked or insufficiently clothed to prevent improper exposure of his person"); United States v. Hymans, 463 F.2d 615, 616 (10th Cir. 1972) (describing posted signs prohibiting "public nudity" near a river in a national forest); Kellam & Lovelace, *supra* note 205, at 592-93 n.6 (quoting a Virginia Beach ordinance that makes it unlawful "for any person not wearing a bathing suit or other clothing to bathe in any lake, pond or in the Atlantic Ocean or Chesapeake Bay within the City").

neighbors who complain to local officials.[226] But the government often declines to enforce such laws. As one official put it, "'[w]e've got higher priorities in law enforcement" than enforcing public nudity ordinances on state-run beaches.[227]

A nuisance action provides concerned neighbors with a direct means of combating activities that they regard as immoral, and that the law treats as illegal. In this respect, private nuisance claims are analogous to citizen suits in environmental law. Such citizen suits empower any injured private individual or organization to sue anyone who has violated the substantive provisions of the environmental statute.[228] Even if the government makes a purposeful decision not to pursue a polluter, any injured parties can bring suit and obtain injunctive relief against the polluter or penalties to be paid to the federal treasury.[229] These private citizen suits achieve several purposes. They supplement the enforcement capabilities of governmental agencies faced with

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[226] *See* Collins v. State, 288 S.E.2d 43, 44 (Ga. Ct. App. 1981) (describing a twelve-year-old girl who called her parents at work when she saw a neighbor "sunbathing in the nude on his back porch wearing only white socks and black shoes"); State v. Miller, 501 P.2d 363, 365 (Haw. 1972) (indicating that the police visited a beach looking for nude sunbathers in response to a report from a local citizen); State v. Rocker, 475 P.2d 684, 686 (Haw. 1970) (noting that the Maui Police Department received a phone call about nude sunbathers from an anonymous person); People v. Hollman, 500 N.E.2d 297, 299 (N.Y. 1986) (recounting that "[t]he police had received numerous complaints of nudism from local residents, civic associations, elected officials and visitors to the beach").

[227] Ritter, *supra* note 174, at 3A (quoting John Quirk, chief ranger in the San Diego state parks district). The article added that "[u]nder California law, public nudity is a misdemeanor punishable by a fine, but it's not enforced on state-run beaches unless there are complaints, officials say." *Id.* The article further indicated that local prosecutors in Wisconsin refused to heed pressure from the California State Department of Natural Resources to prosecute nude sunbathers who stayed in what was traditionally regarded as the nude part of the beach. *See id.* For other examples, see *South Fla. Free Beaches*, 734 F.2d at 609 (indicating that statutes and ordinances prohibiting nude sunbathing in Miami "were not consistently enforced" until recent times); Kevin Murphy, *Christian Group Backs Suit Over Nude Beach*, MILWAUKEE JOURNAL-SENTINEL, Feb. 14, 2001, at 3B (reporting that a canoe outfitter has brought suit against nude sunbathers because the local district attorney will not prosecute them).

[228] *See, e.g.*, 33 U.S.C. § 1365(a) (providing that "any citizen may commence a civil action on his own behalf . . . against any person . . . who alleged to be in violation of . . . an effluent standard or limitation" imposed by the Clean Water Act or an administrative order regarding such provisions); *see generally* Barton H. Thompson, *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192 (observing that "[e]very major environmental law passed since 1970 now includes a citizen suit provision (with the anomalous exception of the Federal Insecticide, Fungicide, and Rodenticide Act"). Citizen suits are also available for violations of the procedural requirements of environmental statutes, while they are not available for violations of certain substantive provisions. *See id.* at 193. Note, too, that all citizen suit plaintiffs must satisfy judicial standing requirements. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). For a general overview of the mechanics of environmental citizen suits, see JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

[229] *See, e.g.*, 33 U.S.C. § 1365(a) (describing the penalties available in citizen suits under the Clean Water Act).

limited resources.[230] They encourage individuals to identify both harms and legal violations that have gone unnoticed by governmental authorities.[231] They serve to motivate governmental officials to address violations that have been ignored.[232] They further democratic values by giving private individuals a role in the enforcement of the laws.[233] And they enable private individuals to seek an end to illegal conduct themselves, rather than limiting individuals to efforts to persuade the government to take action.[234] The pursuit of these goals has become so important that Professor Barton Thompson recently described "the involvement of citizens in the enforcement of environmental laws" as "[p]erhaps the most pervasive, prominent, and continuing innovation in the modern environmental era."[235] Moral nuisances function in the same manner, especially by providing a private means of enforcing laws that governmental authorities are unwilling to address.

Of course, citizen suits are controversial. Perfect enforcement of the law is not always desirable, especially if it is achieved by intrusive enforcement

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[230] *See, e.g.*, Conservation Law Found. of New England, Inc. v. Browner, 840 F. Supp. 171, 174 (D. Mass. 1993) (noting that the sponsors of the Clean Air Act supported citizen suits because of "the inevitable lack of resources for [federal environmental] agencies to address all statutory violations"); Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 56 (1989) (stating that "[f]ederal agencies may lack the manpower and financial resources to pursue all the enforcement cases that they might desire"); Thompson, *supra* note 228, at 191 (describing "the enforcement wings of both federal and state environmental agencies" as "often woefully understaffed and underfunded").

[231] *See, e.g.*, Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 699-700 (D.C. Cir. 1975) (quoting the legislative history of the Clean Air Act indicating that "[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike"); Thompson, *supra* note 228, at 209-10 (observing that "[g]overnment officials often may have only a very incomplete understanding of the harm, both physical and psychological, to local communities from environmental violations").

[232] *See Conservation Law Found. of New England*, 840 F. Supp. at 174 ("Sponsors of the Clean Air Act were wary of the untrustworthiness or lack of will of federal environmental agencies."); *see also* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 844-45 (1985) (quoting Ralph Nader's complaint in 1970 that air polluters "are openly flouting the laws, and an Administration allegedly dedicated to law and order sits on its duties") (quoting Ralph Nader, *Introduction* to J. ESPOSITO, VANISHING AIR vii (1970)).

[233] *See* Thompson, *supra* note 228, at 188 (describing "the promotion of democratic values" as "[p]ossibly the greatest benefit of citizen participation in enforcement activities" because "[s]imply opening enforcement channels to citizens gives them a voice that is crucial to the stature and power of private citizens in a democratic society").

[234] *See, e.g.*, Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 82-83 (3d Cir. 1990) (affirming an injunction against Clean Water Act permit violations by a tank farm).

[235] Thompson, *supra* note 228, at 185. Note that the analogy between moral nuisance cases brought by concerned neighbors and environmental citizen suits is not exact. Citizen suits are different to the extent that, in many instances, they make "no attempt to define or remedy private wrongs." Boyer & Meidinger, *supra* note 232, at 836. They cannot be used to compensate injured parties for their damages, and they provide "reasonable" attorney's fees to successful plaintiffs. *See* Thompson, *supra* note 228, at 193-94.

measures. As Professor Thompson observes, "one need only imagine the consternation if the government actively encouraged citizens to enforce the laws against highway speeding by rewarding informants, supporting citizen highway patrols, and permitting private citizens to prosecute alleged speeders."[236] But moral nuisance actions contain checks against these concerns about citizen suits. The nature of the harm is decisive here. The legal prohibitions against nude beaches, houses of prostitution, and other public sexual activities rest on a generalized concern about the need to protect the public morals. Efforts by governmental authorities to enforce such legal prohibitions face understandable complaints about intrusive investigative techniques and prosecutorial overzealousness. By contrast, a general concern about the moral standing of the community fails to support a nuisance action—private or public—brought by a private individual or community group. To illustrate: when the leader of the Leadville, Colorado Women's Christian Temperance Union sued to object to the forty local saloons because of the impact that they were having on the morality of men in the community, the court dismissed the case, finding that she did not suffer the kind of injury necessary for a private individual to bring a public nuisance suit.[237] Similarly, moral nuisance actions will not encourage intrusive private snooping into immoral activities on a neighbor's property because activities that are hidden from view are by definition insufficient to produce the kind of harm necessary for a private nuisance suit.

The availability of judicial remedies for moral nuisances also serves as an alternative to extralegal self-help remedies by concerned neighbors. As Wood explained in the context of houses of prostitution over a century ago:

> No nuisance whose effect is merely moral can be abated except by the courts, and by the courts only, by the administration of such punishment as will be likely to cause the parties to desist. It is very laudable on the part of the people . . . and the indignation experienced by them at the presence of such institutions in their midst is just; but they will not be justified in attempting to check the evil by any riotous or unlawful means. The courts are always ready to punish the offense, and individuals will not be justified either in tearing down, assaulting or in any manner injuring the house or demolishing the furniture, or assaulting the inmates thereof, or doing any other unlawful acts.[238]

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[236] Thompson, *supra* note 228, at 188.

[237] People *ex rel.* L'Abbe v. District Court of Lake County, 58 P. 604, 604 (Colo. 1899).

[238] 1 WOOD, *supra* note 5, at 53-54.

Arguments based on the failure of the government to respond to private pressures are always tricky, but in this instance the concern continues to resonate for neighbors confronted with moral nuisances.[239]

One caution remains regarding the legality of the defendant's activity. The government's failure to enforce a prohibition against an activity like public nudity may be the result of a calculated decision, rather than a lack of enforcement resources. Perfect enforcement of such laws may raise the same concerns as perfect enforcement of environmental laws.[240] A tacit compromise, in other words, may exist between the illegality of an activity and official tolerance of it. On that account, the prospect of moral nuisance suits brought by private parties would disrupt that balance. That concern should not itself present a barrier to nuisance claims brought by private parties, but it should influence the disposition of such claims. For example, the failure to engage in government enforcement may signal the kind of community acceptance of an activity that is relevant to the balancing test for the determination of the remedy for a nuisance. Or private actions may provoke an effort to lift the legal prohibition against the activity. But nuisance actions should be available to test the correctness of either assumption, just as environmental laws specifically permit citizen suits to be brought even if the government has made a purposeful decision not to enforce the law in a particular instance.

B. The Appropriateness of the Defendant's Activity

Nuisance law considers the propriety of the defendant's activity as well as the nature of the plaintiff's harm. As the appeals court explained in *Mark*, "Whether a particular activity is a nuisance is primarily a factual question that requires applying well-established criteria."[241] As noted above, the *Restatement* test that is commonly applied to determine whether an activity constitutes a nuisance requires a balancing of the harms caused by the defendant's activity with the benefits of that activity.[242] Three factors in particular are likely to be decisive in moral nuisance cases like *Mark*: the value of the defendant's

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[239] *See, e.g.*, Dawn Turner Trice, *For Neighbors, Lot Is a Load of Trouble*, CHI. TRIB., Oct. 25, 2000, MetroChicago at 1.

[240] *See* Thompson, *supra* note 228, at 190 (explaining that "a perfect compliance rate, of course, is unrealistic and undesirable").

[241] Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716, 720 (Or. Ct. App. 1999) (citing Penland v. Redwood Sanitary Sewer Serv. Dist., 965 P.2d 433 (Or. Ct. App. 1998)).

[242] *See supra* text accompanying note 61.

activity, the location of the defendant's activity, and (as already discussed above) the harm suffered by the plaintiff. The court in *Mark* did not have the occasion to evaluate those factors,[243] but the circumstances of that case illustrate the issues that are likely to arise in other moral nuisance cases.

1. The Value of the Defendant's Activity

The societal importance of the activity challenged as a nuisance often determines the validity of a nuisance claim. That is why fireworks are more likely to be deemed nuisances than hospitals. Cemeteries offer another example. The courts have refused to treat cemeteries as nuisances anywhere outside residential areas because of the need to locate cemeteries somewhere.[244] A similar theme is evidenced in the increased acceptance of group homes for the disabled despite the opposition of neighbors.[245]

Assertions of social utility are lacking in most moral nuisance cases. There is no record of cases defending the value of house of prostitution, gambling parlors, or saloons in the nineteenth century and early twentieth century. But nude beaches like the one at issue in *Mark* enjoy more champions. According to their proponents, nude beaches provide a variety of benefits to physical health, emotional satisfaction, and spirituality.[246] The courts have noted these claims, but there is no indication that the courts have been persuaded by them. The consensus in most communities appears to be that these purported benefits are not valued as highly as residential home ownership and other activities whose importance often outweighs nuisance claims against them.

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[243] 974 P.2d at 718-19, 725 (reversing the trial court's dismissal of the plaintiffs' claims for injunctive relief for failure to state a claim, and remanding for further proceedings).

[244] *See supra* text accompanying notes 144, 158.

[245] *See supra* text accompanying notes 172-75.

[246] *See generally* Kellam & Lovelace, *supra* note 205, at 589-90 (recounting the purported benefits of social nudism). For the assertions of similar benefits by those objecting to laws prohibiting nude beaches, see South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 609 (11th Cir. 1984) (noting that plaintiffs claimed that nude sunbathing was "the practice by which they advocate[d] and communicate[d] their philosophy that the human body is wholesome and that nudity is not indecent"); Pendergrass v. State, 193 So. 2d 126, 128 (Miss. 1966) (reporting testimony that "sunlight and fresh air purify the body and are healthful, not only physically but mentally"); People v. Hollman, 500 N.E.2d 297, 299 (N.Y. 1986) (describing "the Naturist philosophy that open social nudity promotes health, that it permits heightened awareness of human similarity and vulnerability and that it presents an alternative to the repression of puritanism and the degradation of pornography"). *But see* United States v. Biocic, 928 F.2d 112, 113 (4th Cir. 1991) (reporting that the only reason that the defendant gave for going topless was "[t]o get some extra sun").

2. *The Place of the Defendant's Activity*

Nuisance law places great weight on location. In Justice Sutherland's famous words, a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[247] The old moral nuisance cases belied this principle because they involved activities that were treated as nuisances per se—nuisances regardless of where they occurred. More recently, though, zoning law suggests that location is also important for allegedly immoral uses. Adult bookstores, bars, and similar venues are often restricted to a specified distance from schools, churches, and other sensitive uses.[248] Alternatively, such activities are simply relegated to a certain part of town.[249]

Mark raises the question of the propriety of using a public wildlife area as a nude beach. That particular dispute could be resolved easily if the statutory definition of the wildlife area precluded such recreation activities because they were unrelated to wildlife. Indeed, the court hinted at that issue when it described "open public nudity" as "not wildlife-oriented recreation."[250] Many other nude beach cases have turned on the specific characteristics of the location where the dispute occurred. Putting all other criteria aside, public nudity is less troublesome in more remote places and in locations that are screened from the public view.[251] Conversely, the cases sustaining the prosecutions of nude sunbathers have often arisen in areas where the public was or could be present.[252]

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247 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

248 *See, e.g.*, 65 ILL. COMP. STAT. 5/11-5-1.5 (West 1999) ("[I]t is prohibited within a municipality to locate an adult entertainment facility within 1,000 feet of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public housing, and place of religious worship.").

249 *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a municipal ordinance that concentrated the location of adult theaters within the city).

250 Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716, 718 (Or. Ct. App. 1999).

251 *See In re* Smith, 497 P.2d 807, 810 (Cal. 1972) (holding that the act of sunbathing in the nude on an isolated beach, without intent to engage in sexual activity, does not qualify as indecent exposure); Collins v. State, 288 S.E.2d 43, 45 (Ga. Ct. App. 1981) ("There is a distinction with a difference in nude sunbathing on an isolated beach when compared to one's backyard basking in the sun."); State v. Kalama, 8 P.3d 1224, 1225 (Haw. 2000) (overturning an indecent exposure conviction for nude sunbathing in an "isolated and desolate" area); *see also* Ritter, *supra* note 174, at 3A (reporting that "nudity on public beaches usually occurs off the beaten path").

252 *See* People v. Hollman, 500 N.E.2d 297, 299 (N.Y. 1986) (affirming a conviction at a beach where there had been "numerous complaints of nudism from local residents, civic associations, elected officials and visitors to the beach").

The balance may also be affected by who was there first. The coming-to-the-nuisance cases often impose a higher burden on a plaintiff who objects to activities that the defendant conducted on the site well before the plaintiff arrived. Yet, as noted above, the coming-to-the-nuisance doctrine is not always favored, and the most common approach today is to treat temporal priority as one of many factors to be considered in the balancing.[253]

The coming-to-the-nuisance doctrine is even less persuasive in many moral nuisance cases. The fact that your neighbor had been renting his house to prostitutes long before you arrived in the neighborhood is unlikely to be relevant in an ensuing nuisance case. Perhaps this is true of all activities that have been treated as nuisances per se, or even of all illegal activities. Such a claim was raised, though, in *Mark*. The state argued that the wildlife area had been used as a nude beach since the 1970s, well before Mark and Powers bought their adjacent house. The trial court, however, concluded that Mark and Powers "were unaware that they were purchasing property next to a nude beach."[254] Additionally, there are a few other cases in which the court referred to the longevity of a nude beach.[255] If this should become a factor in future moral nuisance claims, it should be outweighed by a statute rendering the conduct illegal or by significant showings with respect to the other factors to be balanced.

IV. THE APPLICATION OF A THEORY OF MORAL NUISANCES

Mark is an unusual case. So unusual, it might be said, that any theory constructed from it is hopelessly narrow. Actually, a variety of possible moral nuisance actions come to mind. I will briefly describe three possibilities here: neighborhood opposition to illegal activities in low income urban areas, challenges to hunting and other alleged violations of animal rights, and concerns about non-traditional houses of worship.

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253 *See supra* text accompanying notes 51-53.

254 Letter from Judge Grove, *supra* note 18, at 2. The state argued that Mark and Powers should have known that the land adjacent to their property had been used as a nude beach since the 1970s. Respondent's Brief at 16-17, Mark v. Oregon State Dep't of Fish and Wildlife, 974 P.2d 716 (Or. Ct. App. 1999) (No. CA-A97066); *see also* Bob Scheer, *In Defense of Nude Bathers*, THE OREGONIAN, Mar. 13, 2001, at B6 (letter to the editor inisisting that if Mark and Powers "had driven 500 feet past their home they would have seen the first of many signs saying, 'Clothing Optional'").

255 *See* United States v. Biocic, 928 F.2d 112, 114 n.1 (4th Cir. 1991) (indicating that a ban on nudity on the beach of a wildlife refuge had been instituted seven years before in response to growing complaints); *Hollman*, 500 N.E.2d at 299 (noting that a beach had become known over the years as "clothing optional").

A. Drug Dealing, Prostitution, and Other Urban Blights

A moral nuisance claim empowers residents of low income communities that face a staggering array of social problems. To begin with, concerns about the use of property for prostitution are not a relic of the nineteenth century. Residents of one Chicago neighborhood recently worked to prevent prostitutes from congregating in their community.[256] Their tactics are instructive. First, the neighbors contacted the local police and encouraged the government to take action, which it did. This fits with my preference for public action as the first choice in moral nuisance cases. But when that failed to solve the problem completely, some neighbors actually chased the prostitutes—and their customers—away from the neighborhood themselves. Such self help actions are precisely the reason why nuisance actions hold promise in this context. Nuisance law provides frustrated residents with a legal tool to prevent activities that they find morally objectionable from occurring in their community.[257]

Nuisance suits brought by concerned residents have already been used to combat illegal drug activities in low income neighborhoods. In the words of one commentator, "illegal drugs destroy communities."[258] In particular, the activities associated with illegal drugs threaten the physical safety and health of local residents—especially children—as dealers and their customers conduct their illicit business and take violent measures to defend their turf. Again, governmental enforcement of criminal laws is the first option in such cases, and rightfully so. But many communities remain virtually unhabitable despite the government's war on drugs. In response, residents of several communities have brought nuisance actions against the owners of property used to facilitate

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[256] *See* Trice, *supra* note 239, at 1. For other recent instances of residents opposing prostitution in their neigborhoods, see Melissa Moore, *Residents Target Prostitution in Neighborhood*, BATON ROUGE ADVOCATE, July 11, 2000, at 2B (describing efforts to eliminate prostitution from a dangerous city neighborhood); Franci Richardson, *Roxbury Neighbors Rally Against Prostitutes*, BOSTON HERALD, Sept. 28, 2000, at 3 (quoting a Massachusetts community organizer who rallied "to send a message to prostitutes that we won't tolerate prostitution in this area"); John Richardson, *Police Target South Portland Business; A Woman Is Arrested on a Charge of Prostitution at a Main Street "Modeling Club" That Has Generated Many Complaints from Neighbors*, PORTLAND PRESS HERALD, Aug. 30, 2000, at 1B (quoting a police official who noted that "[w]e've had complaints from residents for a long, long time" about a house of prostitution).

[257] Note that nuisance law succeeds in this context only if there is an adequate connection between the defendant and the prostitution. *See* City of St. Louis v. Varahi, Inc., No. ED77802, 2001 WL 204796 (Mo. App. Feb. 28, 2001) (opinion not released for publication pending possible rehearing, transfer, or modification) (reversing a determination that a hotel constituted a public nuisance because there was insufficient evidence that the hotel was the proximate cause of prostitution in the neighborhood).

[258] Saleem, *supra* note 10, at 709.

illegal drug transactions.[259] The kinds of harms suffered by those living near illegal drug activities—including fear for one's personal safety, outrage at the sight of conduct that is illegal, and unwillingness to invite friends to visit because of the presence of such conduct—are all cognizable in moral nuisance cases.

Finally, nuisance law may provide a remedy for residents who are offended by the dilapidated condition of nearby property. Complaints about broken windows, junked cars, and other eyesores feature prominently in many descriptions of neglected communities. And such concerns have motivated a number of prominent governmental efforts to improve the condition of certain neighborhoods.[260] Nuisance law provides an additional tool for residents who seek to rid their neighborhoods of such unsightly conditions. The success of any such nuisance claim will mimic the uncertain willingness of the courts to accept aesthetic nuisance claims.[261]

B. Animal Rights and Hunting

The animal rights movement regards many activities that harm animals as immoral. These moral objections have given rise to statutes in every state that prohibit cruelty to animals.[262] There are also numerous other statutory prohibitions against staging fights between animals, abusive animal research,

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[259] *See* Lew v. Superior Court, 25 Cal. Rptr. 2d 42, 43-44 (Ct. App. 1993) (sustaining a nuisance action against an apartment complex where residents feared for their safety due to the drug dealing and prostitution occurring on the premises); Martinez v. Pacific Bell, 275 Cal. Rptr. 878, 880 (Ct. App. 1990) (rejecting a public nuisance complaint brought by a parking lot employee who objected to the presence of a public telephone that was used in illegal drug transactions); Doe v. New Bedford Hous. Auth., 630 N.E.2d 248, 250, 257 (Mass. 1994) (rejecting a nuisance claim based on the noise, litter, and crime associated with drug dealing on the grounds that an apartment tenant cannot sue her ownlandlord for nuisance); *see also* Saleem, *supra* note 10, at 713-14 (describing the use of small claims courts to file nuisance action). There are also statutes that specifically permit such actions; *see also, e.g.*, CAL. HEALTH & SAFETY CODE § 11,570 (West 1991) (authorizing both private and public nuisance actions against property used for the sale of illegal drugs); Suzanne G. Lieberman, Note, *Drug Dealing and Street Gangs—The New Nuisances: Modernizing Old Theories and Bringing Neighbors Together in the War Against Crime*, 50 WASH. U. J. URBAN & CONTEMP. L. 235, 264 (1996) (advocating an administrative system that "would empower the neighboring residents to fight crime in their communities").

[260] *See* Robert C. Ellickson, *New Institutions for Old Neighbors*, 48 DUKE L.J. 75 (1998) (proposing "block improvement districts" to respond to urban quality of life concerns); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407 (2000) (describing community policing efforts in Boston, Chicago, and New York City).

[261] *See supra* text accompanying notes 124-36.

[262] *See* PAMELA D. FRASCH ET AL., ANIMAL LAW 601 (2000) (reporting that "[e]very state has an animal anti-cruelty statute").

and other activities that injure animals.[263] All of these statutes are enforced by governmental authorities. Proposals to facilitate private enforcement through citizen suits or nuisance law have yet to materialize.[264]

There are no reported nuisance cases in which the plaintiff's injury involved a moral objection to harm to animals. Such a case, though, would fall neatly within my theory. Imagine if the sight that Teri Powers and Glen Mark observed in the adjacent wildlife area was the torture of animals living there. The repulsion and embarrassment that they would feel could mirror their reaction to the presence of the nude beach. They could be unwilling to invite friends to their home because of the sights and sounds of the activities on the neighboring land. Their moral sensibilities, moreover, would likely be shared by most people in their community. Furthermore, the torture of animals is illegal. In such an instance, if the governmental authorities were unable or unwilling to act, the private plaintiffs could turn to a moral nuisance action.

Or consider a more controversial example. Suppose that Powers and Mark objected to hunting. And suppose that they had to witness hunters stalking and killing animals just across their property line. Hunting could easily be regarded as a nuisance in suburban areas or any other place where there is a real threat of stray gunshots. It is also illegal there. Whether or not hunting could ever be deemed a nuisance in the countryside is more controversial. The first aspect of that question concerns the nature of the harm suffered by those neighbors opposed to the hunting. Their moral objection should suffice, provided that it is premised on actually witnessing or even hearing the activity, rather than simply being aware that it is occurring. The disputed part of that question involves the prevalence of such a moral objection in the particular community in which it occurs. Moral opposition to hunting likely will be regarded as the idiosyncratic view of hypersensitive plaintiffs in most rural communities. A nuisance action would be appropriate only where the community norms indicate that a reasonable person views hunting as immoral. It is doubtful whether today there is any such rural community that regards all

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263 *See generally* Carole Lynn Nowicki, Note, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443 (1999) (summarizing state and federal statutes addressing various kinds of cruelty to animals).

264 *See* Joshua E. Gardner, Note, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330, 354-57 (2000) (noting proposals to add a citizen suit provision to the federal Animal Welfare Act); Karen L. McDonald, Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 412-32 (1986) (advocating a public nuisance action that could be brought by animal welfare groups).

hunting as immoral. It is more likely, though, that a particular form of hunting—perhaps the use of steel traps—would be viewed as immoral by the community.

Even then, the harm suffered by any plaintiffs would need to be weighed against the values of the particular kind of hunting. Also, any existing statutes and ordinances governing the land in question and hunting in that jurisdiction could prove decisive. If hunting is expressly permitted in an area, then a nuisance claim should fail. But if hunting is expressly prohibited, and the local authorities have not enforced that legal ban, then a nuisance action is entirely appropriate.

C. Houses of Worship and Other Religious Uses

Finally, it is useful to illustrate what would *not* qualify as a moral nuisance under my theory. Civil rights legislation prohibits many harmful actions based on a neighbor's race, ethnicity, or religious beliefs.[265] Nuisance law refused to treat such biases as cognizable harms even before civil rights statutes existed.[266] Yet explicit complaints against a neighbor's race, ethnicity, or religion are rare. Moreover, there are numerous non-biased reasons articulated for objections to the presence of certain people and uses. For instance, while courts have rejected the assertion that mere presence of low income residents constituted "people pollution" requiring an environmental impact statement ("EIS") before a particular housing project could be built, complaints about increased traffic and other environmental consequences of such a project did suffice to require the preparation of an EIS.[267]

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[265] *See, e.g.*, Egan v. Schmock, 93 F. Supp. 2d 1090 (N.D. Cal. 2000) (suggesting that a woman would have violated the federal Fair Housing Act if she had tried to drive a neighbor away because of the neighbor's nationality, but concluding that there was no evidence that the woman intended to do so in this case); Riedel v. Human Rels. Comm'n of Reading, 756 A.2d 142 (Pa. 2000) (holding that a man who made repeated obscene, hostile, and derogatory remarks to a Puerto Rican neighbor and her children violated a local human relations ordinance because the ordinance applied to all discriminatory conduct designed to interfere with the quiet enjoyment of one's residence, not just conduct involving the sale or rental of housing).

[266] *See* Falloon v. Schilling, 29 Kan. 292 (1883) (refusing to enjoin defendant from renting a house to a family of another race, despite his neighbor's objection).

[267] *See* Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973); *see also* Como-Falcon Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 857 n.2 (D. Minn. 1978).

The same phenomenon is evident in the complaints that neighbors bring against churches, other houses of worship, and related religious uses.[268] Increased traffic is a common complaint. Aesthetic concerns are often voiced. And church bells annoy some neighbors. But sometimes opposition to a nearby house of worship is really based on religious prejudice.[269] Zoning law struggles with churches precisely because of the intersection of such concerns, plus the recognized social value of religious activities.

For example, plans to convert a Reformed church into a Muslim mosque sparked a recent controversy in Palos Heights, Illinois.[270] Some residents questioned the noise from calls to prayer.[271] The mosque also drew protests regarding traffic.[272] The fact that the facility would be busiest on Friday rather than Sunday concerned some neighbors.[273] And some members of the community also explicitly objected to the proposed mosque because of its religious teachings.[274]

My moral nuisance theory would permit an action based on the traffic and noise complaints, but so would existing applications of nuisance law. The

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[268] *See, e.g.*, First Baptist Church v. Miami-Dade County, 768 So.2d 1114 (Fla. Ct. App. 2000) (indicating that neighboring residents opposed the expansion of a church school "based on the potential for increased traffic and crime in the neighborhood"); Village Lutheran Church v. City of LaDue, 997 S.W.2d 506, 507 (Mo. Ct. App. 1999) (noting that neighbors objected to a new church gymnasium because it "would have a negative impact on the view from their houses"); SHIM v. Washington Twp. Planning Bd., 689 A.2d 804 (N.J. Sup. Ct. 1997) (recounting traffic concerns raised by neighbors opposing a proposed church expansion); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 759-63 (1999) (suggesting that neighbors object to churches because of lost property tax revenue and general opposition to any development).

[269] *See* Laycock, *supra* note 268, at 760 (explaining that some opposition to neighboring churches exists because "[s]ome are hostile to all religion," and "[p]eople who are religious themselves are often hostile to unfamiliar faiths, to high intensity faiths, and to conservative and evangelical churches").

[270] *See* Darlene Gavron Stevens, *Mosque a Religious, Political Tug of War*, CHI. TRIB., July 27, 2000, at 1.

[271] *See id.* at Back Page.

[272] *See id.*

[273] *See id.*

[274] *See The High Price of Closed Minds*, CHI. TRIB., July 17, 2000, at 10 (noting that one opponent of the mosque described Islam as a "false religion" during a television interview). For reports of similar controversies, see *Ice Skating Arena Closes; Synagogue to Buy Site*, L.A. TIMES, Sept. 1, 2000, at B2 (reporting that objections to the conversion of the Irvine Ice Arena into a synagogue have led to accusations of anti-Semitism); Margaret Ramirez, *Removing Obstacles to Religious Buildings*, L.A. TIMES, Aug. 5, 2000, at B2 (indicating that the building of a mosque was approved in Culver City, California despite complaints about traffic, the Islamic architecture, and glare from the building's marble); *see generally* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (stating that congressional hearings demonstrated that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation").

complaints specifically objecting to the mosque because of the nature of the religion practiced there would not support a moral nuisance claim under my theory. Opposition to the beliefs of a neighbor does not serve as a cognizable harm for purposes of a nuisance action. Moreover, the existence of both constitutional and statutory protections could serve to bar any nuisance claim against the mosque, regardless of the alleged injury. A finding that the sensory objections—to excessive noise and traffic—were pretextual would operate to block a nuisance claim under federal civil rights laws. The most recent such law specifically protects religious uses from land use decisions, including nuisance actions, that seek to deny one's ability to engage in religious activities on his or her property.[275]

V. CONCLUSION

Nuisance law protects against activities that interfere with the use and enjoyment of one's own land. The law has long protected against many different interferences that result in many different harms. The moral concerns that were featured in the nineteenth century cases involving houses of prostitution, saloons, and the like are shared by many today. Accordingly, nuisance law should treat the harms caused by those activities in the same way that it treats other harms. In other words, harms involving offensive sights, the inability to use one's property because of embarrassment associated with a neighboring activity, reasonable fears, and more general concerns about noises or harassment are all sufficient to support a nuisance action.

Zoning ordinances and other regulations can combat such activities. Those approaches are preferable in many respects. But those solutions are not always perfect, and they depend on the interest, energy, and resources of governmental officials. When governmental solutions are not forthcoming, nuisance law provides a vehicle for private individuals to address what troubles them in their communities. Just as the government permits private enforcement of environmental laws, so too should it permit private individuals to bring nuisance actions to enjoin activities that offend not only their moral sensibilities, but also those of the community in which they live.

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[275] *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, § 2 (2000) (imposing a compelling state interest test on land use regulations that impose a substantial burden on the exercise of religion).

Perhaps most importantly, moral nuisance law protects. It is just like other applications of nuisance law that protect against environmental contamination, loud noises, and offensive smells. By contrast, the aim of moral nuisance claims is not to convert the defendant to the moral beliefs of the plaintiff. This distinction is best illustrated by Justice David Brewer, who rejected the most invidious nuisance claim ever reported,[276] but who is best known today for writing the Supreme Court opinion stating that "this is a Christian nation."[277] In 1899—the same year in which the Oregon Supreme Court held that a house of prostitution constituted a nuisance in a case later cited in *Mark*[278]—Brewer lamented that "[m]aking men good by law has become a fad."[279] He added, "Closing the saloon does not destroy the appetite for drink. Driving out the brothel does not destroy lust. Shutting up the gambling house does not eliminate the eager passion for gaming."[280] In other words, the nineteenth century moral nuisance cases were not designed to impose a better morality, as the experience with Prohibition confirmed a few decades letter. Rather, Brewer explained, "the function of the law is simply to protect."[281] It still is today.

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[276] *See* Faloon v. Schilling, 29 Kan. 292, 297 (1883) (holding that the mere presence of African-American neighbors did not constitute a nuisance).

[277] Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892). The "Christian nation" remark has elicited much recent reaction. *See* MICHAEL J. BRODHEAD & DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE 1837-1910, at 110-11 (1994) (discussing *Holy Trinity*); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 523 (2d ed. 1995) (asking "what about the 'Christian nation' stuff" in *Holy Trinity*); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 903-04 n.13 (2000) (describing subsequent judicial and academic treatment of the "Christian nation" assertion); Steven K. Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427, 430 (1999) (concluding that "Brewer would have disagreed with most uses of his declaration, specifically with regard to claims that the law is obliged to support or advance Christian principles"). Justice Brewer himself later demonstrated that he intended the appellation to be descriptive of the United States at that time, while offering several general normative calls for racial harmony and world peace. *See generally* DAVID J. BREWER, THE UNITED STATES A CHRISTIAN NATION (John C. Winston Co., 1905).

[278] *See* Blagen v. Smith, 56 P. 292 (Or. 1899).

[279] DAVID J. BREWER, THE TWENTIETH CENTURY FROM ANOTHER VIEWPOINT 50 (1899).

[280] *Id.* at 52.

[281] *Id.* at 51.