OF TIME AND FEEDLOTS: THE EFFECT OF *SPUR INDUSTRIES* ON NUISANCE LAW

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In 1972, the Arizona Supreme Court handed down a notable decision in *Spur Industries, Inc. v. Del E. Webb Development Co.*,[1] where it was necessary to balance the rights of a long established cattle-feeding operation and a subsequently developed, nearby retirement community. The developer of the community sought to enjoin the feedlot, alleging that it had become a public and private nuisance to residents of the retirement project because of the odors created and the flies that the site attracted.[2] The court "utilized a unique combination of nuisance and indemnification theories"[3] in ruling that the developer was entitled to enjoin the feedlot as a nuisance but would be required, as a condition in obtaining the injunctive relief, to indemnify the feeding operation for the cost of moving or shutting down.[4] This Article will attempt to answer the following questions: From the perspective of two decades, how does this case fit into the general patterns of nuisance law? Is it merely the exercise of long recognized powers in equity

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1. 494 P.2d 700 (Ariz. 1972).

2. *Id.* at 705.

3. Paul N. Cox, Comment, *Plaintiff Required to Indemnify Defendant for Losses Resulting from Permanent Injunction in a Nuisance Case*: Spur Industries Inc. v. Del E. Webb Development Co., 1973 UTAH L. REV. 55, 61.

4. 494 P.2d at 708.

courts, or is it an unprecedented grant of a private power of eminent domain? How has the case been received by other courts and by commentators, and what is its importance in the development of the law regarding conflicts between neighboring landowners?

NUISANCES—PUBLIC AND PRIVATE

Historically, public policy has favored untrammeled use of land with the law imposing restrictions on such use only sparingly and with caution.[5] However, the law has also long recognized that relief should be granted, under the doctrine of nuisance, where a condition or activity on a landowner's property causes an unreasonable and substantial interference with another person's use and enjoyment of his property.[6] If such interference occurs, the plaintiff suing in nuisance is entitled to injunctive relief, damages, or both depending on the seriousness of the nuisance. The reasonableness of the nuisance is determined by weighing such factors as the extent and character of the harm, the suitability of the particular locality, the burden on the plaintiff to avoid the harm, and the value which the law attaches to the type of use or enjoyment invaded.[7]

Modern nuisance law has ancient origins. While trespass has been called the oldest tort action,[8] judicial relief for bothersome but non-trespassory invasions of landowners' use and enjoyment of their premises is nearly as old.[9] The assize of nuisance, a criminal writ, was used in the thirteenth century to force a person to cease activity which, although occurring entirely on his own property, caused direct harm to other property owners.[10] Gradually, a civil action for nuisance also developed. The civil action was easier to institute than the criminal

5. *See, e.g.*, Aldridge v. Saxey, 409 P.2d 184, 186 (Or. 1965) (noting that the rule is that restrictions on land "are construed most strongly against the covenant and will not be enlarged by construction").

6. *See* Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 920-21 (Ariz. 1985) (discussing the requirements of a common law nuisance claim).

7. *See* Mark L. Collins, Comment, *Indemnification of a Nuisance Defendant for Costs Incurred by Complying with an Injunction*, 15 ARIZ. L. REV. 1004, 1006-07 (1973) (discussing private, public and mixed nuisance actions generally).

8. *See* Marcus C. McCarty & Stephen F. Mathews, *Foreclosing Common Law Nuisance for Livestock Feedlots: The Iowa Statute*, 1981 AGRIC. L.J. 186, 189 (citing P.H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 190 (1931)).

9. McCarty & Mathews, *supra* note 8, at 193.

10. *Id. See generally* JOHN G. FLEMING, THE LAW OF TORTS 379 (6th ed. 1983) (tracing the development of the tort of nuisance).

writ and allowed recovery of damages in the action at law, but required resort to a court of equity to obtain injunctive relief.[11] The assize of nuisance and the subsequently developed civil action led to the modern action of private nuisance, which permits recovery for a person's unreasonable and substantial interference with another's use and enjoyment of his real property.[12] During the same time, a related action for public nuisance developed from separate historical roots.[13] The public nuisance action is primarily a criminal action to protect society's rights from unreasonable disturbances.[14] An individual may also use public nuisance as the basis of a civil action for damages or an injunction if the individual can show special damages.[15] To recover special damages, a plaintiff must show his damages were different from those suffered by the general public.[16] Moreover, the special damages do not have to be real property damages but can be merely substantial harm to enjoyment of life.[17]

Public nuisances thus infringe on rights shared by the whole community,[18] whereas private nuisances interfere with individual rights.[19]

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11. McCarty & Mathews, *supra* note 8, at 193. *See generally* William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948) (tracing the historical development of the law of nuisance); F.H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480 (1949) (defining the requirements to state a cause of action for nuisance and available remedies); William H. Wilson, Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47, 54-56 (1970) (describing the development of a cause of action for private nuisance).

12. *See* McCarty & Mathews, *supra* note 8, at 193-94 (discussing the evolution of the private nuisance action).

13. *Id.* at 195. *See also* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-99 (1966) [hereinafter Prosser, *Private Action*] (noting the separate development of public and private nuisance doctrines). *See generally* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV., 399, 410-16 (1942) [hereinafter Prosser, *Nuisance Without Fault*] (calling nuisance a "legal garbage can" and identifying the distinct doctrines of public and private nuisance); John W. Wade, *Environmental Protection, the Common Law of Nuisance, and the Restatement of Torts*, 8 FORUM 165, 165-72 (1972) (discussing the applicability of the private and public nuisance doctrines to recover for pollution injuries).

14. McCarty & Mathews, *supra* note 8, at 195.

15. *Id.*

16. *Id.*

17. *Id. See generally* Osborne M. Reynolds, Jr., *Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318, 332-37 (1978) (discussing the "special injury" requirement).

18. *See* Echave v. City of Grand Junction, 193 P.2d 277, 280 (Colo. 1948) (recognizing a nuisance as doing or failing to do something injuriously affecting the public's safety, health or morals, or substantially annoying, inconveniencing or injuring the pub-

The same activity or conduct may constitute both a public and a private nuisance.[20] For instance, the *Spur Industries* case has been called "an excellent example of a mixed nuisance action."[21] In *Spur*, the feedlot interfered with both the general community's enjoyment of life and the use and enjoyment of their land.[22] In addition, the plaintiff in *Spur*, a developer, could show both harm to the general public and unique harm to himself.[23]

While recovery for a private nuisance is generally limited to damages or injunctive relief, criminal liability is usually considered an essential requirement of a public nuisance.[24] There is a trend toward holding that a criminal violation is not essential to public nuisance liability in tort. Instead, the fact that the activity amounts to a crime is merely one factor to weigh in determining the unreasonableness of defendant's conduct.[25]

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lic); Mandell v. Pivnick, 125 A.2d 175, 176 (Conn. Super. Ct. 1956) (recognizing that a nuisance which violates public rights and produces a common injury constitutes a public nuisance).

19. W.G. Duncan Coal Co. v. Jones, 254 S.W.2d 720, 723 (Ky. Ct. App. 1953) (explaining that public nuisances affect the public at large while private nuisances affect an individual or a limited group of individuals); *see* Adams v. Commissioners of Trappe, 102 A.2d 830, 834 (Md. 1954) (defining public and private nuisances, and distinguishing nuisances *per se* and nuisances in fact).

20. Garfield Box Co. v. Clifton Paper Bd. Co., 17 A.2d 588, 589 (N.J. 1941); *see* McGee v. Yazoo & M.V.R. Co., 19 So. 2d 21, 22 (La. 1944) (holding that a facility polluting the atmosphere may be a public nuisance enjoinable by municipality and also a private nuisance actionable by a neighboring property owner).

21. Collins, *supra* note 7, at 1007.

22. Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706 (Ariz. 1972).

23. *Id.* The *Spur* court reasoned that the plaintiff, "having shown a special injury in the loss of sales, had a [sic] standing to bring suit to enjoin the nuisance." *Id.* (citing Engle v. Clark, 90 P.2d 994 (Ariz. 1939); City of Phoenix v. Johnson, 75 P.2d 30 (Ariz. 1938)).

24. Wilson, *supra* note 11, at 98 (discussing the development of the public nuisance doctrine). *See generally* Marvin A. Catzman, Comment, *Municipal Law—Nuisance—Proposed Festival to Be Held in Local Municipality—By-Law to Regulate and License Holding of Public Entertainments and Festivals—Common Law Remedy an Effective Alternative to Municipal Legislation*, 43 CAN. B. REV. 100, 104-06 (1965) (arguing that a sufficiently large number of private nuisances may constitute a public nuisance); Comment, *Nuisance: Public and Private Nuisance Distinguished*, 74 S. AFR. L.J. 339, 339 (1957) (recognizing that a public nuisance "materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects" (quoting Attorney-General v. P.Y.A. Zuarries, Ltd., 2 W.L.R. 770 (C.A. 1957))).

25. *See* Reynolds, *supra* note 17, at 328 (suggesting that this analysis, if adopted, would recognize that a defendant's actions might constitute a public nuisance in the absence of criminal responsibility).

Apart from the criminal violation and the "special damage" requirements, three other prerequisites to tort liability for public nuisance are often mentioned. There must be: (1) an interference with rights of the public or a considerable number of persons; (2) an interference with the plaintiff's enjoyment of life that is unreasonable and substantial; and (3) a recognized basis for tort liability — intent, negligence, or strict liability.[26]

Tort liability for private, rather than public, nuisance is often much easier to establish since only an unreasonable and substantial interference with the plaintiff's use and enjoyment of real property need be shown. A plaintiff is not required to establish special harm, violation of a criminal law, or interference with the public.[27] Apart from the alleged interference with the real property, the plaintiff only needs to show some basis for tort liability. This could amount to intent, negligence, or strict liability.[28] Despite the simplicity of the private nuisance tort action, public nuisance may be a more advantageous theory for the individual plaintiff because it does not require a showing of interference with real property, but merely interference with enjoyment of life.[29] Moreover, because public nuisances typically involve criminal violations, the statute of limitations does not start to run as long as the public nuisance continues.[30] Ordinarily, however, private nuisance will be the easiest to utilize because a plaintiff alleging public nuisance must show interference with the health, safety or welfare of at least a

26. *Id.* at 320.

27. *Id.* at 319-20.

28. *Id. See also* Wright v. Masonite Corp., 237 F. Supp. 129, 139 (M.D.N.C. 1965) (refusing to hold the defendant liable for private nuisance where his actions were not negligent, reckless, or ultrahazardous), *aff'd*, 368 F.2d 661 (4th Cir. 1966), *cert. denied*, 386 U.S. 934 (1967); Ettl v. Land & Loan Co., 5 A.2d 689, 691 (N.J. 1939) (recognizing a cause of action for private nuisance where the landowner acts wrongfully, negligently, or unskillfully, and injures the adjoining premises unnecessarily). *See generally* G.H.L. Fridman, *Motive in the English Law of Nuisance*, 40 VA. L. REV. 583, 586-88 (1954) (examining the role of the defendant's motive in defining the elements of nuisance).

29. *See* Taylor v. City of Cincinnati, 55 N.E.2d 724, 727 (Ohio 1944) (recognizing that nuisance may involve a "wrongful invasion of the use and enjoyment of property, . . . [or] the wrongful invasion of personal legal rights and privileges generally"). *See generally* Wilfred Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563 (1972) (concluding that the Canadian legal system is unreceptive to private actions for public nuisance); Mark A. Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453, 454-55 (1974) (describing public nuisance as a "catch-all" for "everything that endangers life or health, gives offense to sense, violates the laws of decency, or obstructs reasonable and comfortable use of property").

30. Reynolds, *supra* note 17, at 342.

considerable number of people.[31]

Traditionally, the interference in public nuisance had to involve the disturbance of a right enjoyed by the general public, such as use of a public highway.[32] Public nuisance requirements have been relaxed, however, and a number of states require that the disturbance merely affect a considerable number of people rather than the public in general.[33] Whether the requirement is strict or relaxed, it remains an important distinguishing feature between public and private nuisances.[34]

TRADITIONAL REMEDIES FOR NUISANCE

Remedies for nuisance have gradually changed over the centuries. Under the old writ of assize,[35] the remedy was judicial abatement.[36] With the development of civil actions, damages were allowed. For a time, these remedies were considered adequate to prevent continuation of the nuisance because of the unlikelihood that the defendant would take the risk of incurring further liability.[37] The power of courts of equity to enjoin nuisances was first recognized in a 1720 English case.[38]

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31. *See* Padilla v. Lawrence, 685 P.2d 964, 970 (N.M. Ct. App. 1984) (explaining that a public nuisance must affect the rights of a "considerable amount of people or an entire community or neighborhood"). *See also supra* note 26 and accompanying text explaining the necessary elements of a public nuisance cause of action.

32. *See* Reynolds, *supra* note 17, at 321. *See also* Higgins v. Connecticut Light & Power Co., 30 A.2d 388 (Conn. 1943) (refusing a private party's public nuisance claim where the plaintiff failed to prove a danger to the general public); Smith v. City of Sedalia, 53 S.W. 907, 911 (Mo. 1899) (holding that polluting several landowners' property does not constitute a public nuisance because the pollution does not injure the public generally); People v. Brooklyn & Queens Transit Corp., 15 N.Y.S.2d 295 (N.Y. App. Div. 1939) (holding that noises from a trolley car over a right of way did not constitute a public nuisance because plaintiffs suffered in the private enjoyment of their homes), *aff'd*, 28 N.E.2d 925 (1940); Denis P. Burke, *Common Scents: An Analysis of the Law of Feed Lot Odor Control*, 10 CREIGHTON L. REV. 539, 561 (1977) (citing as an example of a public nuisance State v. Kaster, 35 Iowa 221 (1872), where a feedlot was located near a public street in a populous neighborhood).

33. *See* Reynolds, *supra* note 17, at 321.

34. *See* Note, *"Ill Blows the Wind that Profits Nobody": Control of Odors from Iowa Livestock Confinement Facilities*, 57 IOWA L. REV. 451, 457-58 (1971) (explaining the conditional aspects of both public and private nuisance actions).

35. *See supra* note 10 and accompanying text describing the assize of nuisance.

36. C. HAAR & M. WOLF, LAND-USE PLANNING 124 (4th ed. 1989).

37. 3 WILLIAM BLACKSTONE, COMMENTARIES 222.

38. Bush v. Western, 24 Eng. Rep. 237 (1720). In *Bush*, the plaintiffs sought an injunction to quiet possession. The defendants objected, arguing that if the plaintiff had any remedy, it was at law. The court overruled this objection, recognizing that an equity court could hear plaintiff's claim. *Id.* at 237-38.

Through the eighteenth and nineteenth centuries, the power to enjoin was generally considered a matter of grace on the part of the court.[39] By the dawn of the twentieth century, it was increasingly recognized that the exercise of a chancellor's grace was sometimes a matter of right.[40]

Traditionally, an appropriate case for injunctive relief has been one in which money damages are inadequate, such as where the harm is continuing in nature[41] or where the frequent or constant recurrence of the bothersome activity would require a multiplicity of suits in order to award adequate compensation.[42] Thus, an injunction may be issued, for instance, to halt continuing dissemination of bothersome odors.[43]

A court should frame an injunction to prevent only the troublesome effects. Moreover, courts should always balance the interests of the parties and allow a defendant's basic activity to continue as long as it is conducted without causing unreasonable and substantial annoyance to others.[44] If the activity cannot continue without causing substantial

39. Richard's Appeal, 57 Pa. 105, 112 (1868) (reasoning that in determining whether to enjoin the nuisance, the chancellor should ask whether a greater injury would result from enjoining or refusing to enjoin the nuisance). *But see* Walters v. McElroy, 25 A. 125, 127 (Pa. 1892) (arguing that in the context of cases seeking equitable relief, the phrase "of grace . . . has no rightful place in the jurisprudence of a free commonwealth"). *See generally* Hennessey v. Carmony, 25 A. 374, 379 (N.J. Ch. 1892) (discussing the court's "discretion" in granting equitable relief).

40. Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065, 1071 (Pa. 1904). In *Sullivan*, the court explained that "grace sometimes becomes a matter of right to the suitor in his court . . . [and] when it is clear that the law cannot give protection and relief . . . the chancellor can no more withhold his grace than the law can deny protection and relief if able to give them." *Id.*

41. Padilla v. Lawrence, 685 P.2d 964, 970 (1984) (recognizing that although money damages may be inadequate where the nuisance is continuing, the trial court is not required to grant an injunction in all continuing nuisance cases).

42. *See* Scott v. Jordan, 661 P.2d 59, 64 (N.M. Ct. App. 1983). *See also* Winrock Enters., Inc. v. House of Fabrics, 579 P.2d 787, 790 (1978) (noting that injunctive relief is appropriate when denying the injunction would require a multiplicity of suits).

43. *See* Lyon v. Cascade Commodities Corp., 496 P.2d 951 (Idaho 1972) (reinstating an order temporarily enjoining the operation of a plant allegedly disseminating odors and stenches).

44. *See id.* (allowing defendants to resume operations if they can demonstrate that the new equipment they installed eliminated the nuisance); *see also* Haack v. Lindsay Light & Chem. Co., 66 N.E.2d 391, 394 (Ill. 1946) (allowing the court to consider the essential nature of defendant's actions in determining whether they are reasonable); Powell v. Bentley & Gerwig Furniture Co., 12 S.E. 1085, 1087 (W. Va. 1891) (reasoning that courts should grant injunctions cautiously and only if plaintiff clearly establishes the nuisance); Wood v. Sutcliffe, 61 Eng. Rep. 303, 305 (1851) (denying an injunction because it would seriously injure or ruin the defendant's business).

annoyance, then it should be enjoined altogether, even if the activity is permitted under applicable zoning and land-use laws.[45]

In 1858, Lord Cairns' Act provided that English courts may grant damages either in addition to or in substitution for injunctive relief.[46] Courts in the United States have followed this procedure in nuisance cases and have balanced the interests of the parties and the community in determining whether to allow damages for nuisance.[47] Courts make the same considerations when deciding whether to grant an injunction. Private nuisance, in particular, requires the balancing of the rights of all parties in order to determine whether or not the tort itself exists.[48]

Assuming a nuisance is found to exist, three principal methods of granting relief have developed: (1) the court may issue an injunction requiring the defendant, at his own expense, to terminate the bothersome effects of his activity together, if appropriate, with an award of damages for past harm; (2) the court may deny an injunction but award damages for future and past harm suffered by the plaintiff;[49] or (3) the court may issue an injunction requiring the defendant to terminate the bothersome effects of his activity, but may condition the injunction on the plaintiff paying the cost of the termination.

Given the choice between damages and injunctive relief, most com-

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45. *See* Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 921 (Ariz. 1985) (holding that the defendant's compliance with zoning regulations did not preclude an injunction). *See generally* Timothy C. Lothe, Comment, *"Feed the Hungry, But Not on Our Block"*—Armory Park Neighborhood Association v. Episcopal Community Services in Arizona, 28 ARIZ. L. REV. 121, 126 (1986). The author criticizes *Armory Park* to the extent that it limits social programs. *Id.* at 132.

46. An Act to amend the Course of Procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster, 1958, 21 & 22 Vict., ch. 37 (Eng.). *See* J.A. Jolowicz, *Damages in Equity—A Study of Lord Cairns' Act*, 34 CAMBRIDGE L.J. 224 (1975) (recognizing the availability of this option to courts where a remedy law would be inadequate and an injunction would be inappropriate).

47. *See* Carpenter v. Double R Cattle Co., 701 P.2d 222, 227 (Idaho 1985) (recognizing that in a nuisance action for damages, the court should consider the community's interests).

48. *See* Waschak v. Moffat, 109 A.2d 310, 314 (Pa. 1954) (determining whether an intentional act is a nuisance requiring a balancing of the conduct's harm and its utility). *See generally* Glen E. Clover, Note, *Torts: Trespass, Nuisance and* $E=mc^2$, 19 OKLA. L. REV. 117 (1966) (explaining the weighing process used in determining nuisance liability).

49. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 874-75 (N.Y. 1970) (granting the plaintiff damages for past and future harm).

mentators[50] and courts[51] have preferred damages, although one leading commentator has attacked this reasoning and concluded that neither remedy is more economically efficient than, or otherwise superior to, the other.[52] As to the three aforementioned combinations of possible relief, the third method, sometimes called a "compensated injunction," has generally been ignored by legal commentators.[53] This practice has been praised, however, as discouraging plaintiffs from seeking inefficient injunctive restraints because the costs of the injunction are shifted to the plaintiff.[54]

One method occasionally employed by courts in choosing between damages and injunctive relief involves determining whether the utility of the defendant's conduct outweighs the harm to the plaintiff.[55] There are situations in which an injunction is the only appropriate relief. This often occurs with a "prospective nuisance," which is a nuisance that is merely threatened but not yet carried into effect. It is well established that a court may enjoin this type of nuisance even though no

50. *See* M. Theresa Hupp, Note, *Efficient Land Use and the Internalization of Beneficial Spillovers: An Economic and Legal Analysis*, 31 STAN. L. REV. 457, 465 (1979) (noting the recent trend among courts to award damage remedies); Barton H. Thompson, Jr., Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1566 n.13 (1975) (noting the preference for damages over injunctive relief).

English courts have traditionally preferred injunctive relief to damages, though there may be some change in judicial attitude in recent years. *See* A.I. Ogus & G.M. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 36 CAMBRIDGE L.J. 284, 308-10 (1977) (discussing cases where courts fail to consider economic consequences as well as social effects when deciding whether to award damages or to issue injunctions). On the rationales for injunction, see generally Note, *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1002-04 (1965) (discussing the problems inherent in the damage remedy resulting in injunctive relief awards).

51. *See, e.g.*, Spur Industries v. Del E. Webb Dev. Co., 494 P.2d 700, 705 (Ariz. 1972). The *Spur* court stated that "[w]here the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction." *Id.*

52. A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1111-12 (1980) (stating that a determination of whether injunctive relief or damages will serve as a better remedy depends upon the circumstances).

53. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 738 (1973) (arguing that conflicts among landowners are better resolved by systems other than traditional zoning controls).

54. *Id.* at 739.

55. *See* Wade, *supra* note 13, at 170 (stating factors to consider when analyzing the gravity of the harm and the utility of defendant's conduct).

damage has occurred.[56]

Several miscellaneous remedies occasionally surface in nuisance jurisprudence. One possible remedy is abatement through either judicial action or a plaintiff's exercise of self-help.[57] In the case of public nuisance, there is also the possibility of criminal prosecution.[58] However, damages and injunctive relief are generally regarded as the two important "private" remedies currently available to resolve nuisance disputes.[59]

TRADITIONAL DEFENSES TO NUISANCE

Contributory negligence has been the source of a great deal of confusion in public nuisance cases.[60] However, the basic rule is clear: If the public nuisance action is founded on the defendant's intentional interference with the plaintiff, contributory negligence is not a defense.[61] But if the defendant, in creating or maintaining the nuisance, merely acted negligently toward the plaintiff, contributory negligence is a possible defense.[62] The principal confusion arises in cases in which the defendant has intentionally invaded the public right, but has only acted negligently toward the plaintiff. For example, if the defendant deliber-

56. *See* Village of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981) (holding that a chemical waste disposal site was a nuisance both presently and prospectively). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 89 at 640-41 (5th ed. 1984).

57. *See* Wilson, *supra* note 11, at 75-76 (discussing abatement options for private nuisance).

58. *Id.* at 107-09 (discussing criminal prosecution options for public nuisance).

59. *See* Polinsky, *supra* note 52, at 1075-76 (explaining how courts may use the various remedies to resolve disputes in an economically efficient and equitable manner).

60. Prosser, *Private Action*, *supra* note 13, at 1023. *See generally* Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952) (explaining the nuisance cause of action and the contributory negligence defense).

61. Niagara Oil Co. v. Ogle, 98 N.E. 60, 62 (Ind. 1912) (explaining that because a nuisance action is not negligence, contributory negligence has no application); Hanson v. Hall, 279 N.W. 227, 229-30 (Minn. 1938) (noting that where action is based on an intentional invasion, contributory negligence is no defense); Town of Gilmer v. Pickett, 228 S.W. 347, 348 (Tex. Civ. App. 1921) (same); Higginbotham v. Kearse, 161 S.E. 37, 40 (W. Va. 1931) (same).

62. Terrell v. Alabama Water Serv. Co., 15 So. 2d 727, 731 (Ala. 1943) (explaining that if a defendant acts negligently, contributory negligence may be used as a defense); Denny v. Garavaglia, 52 N.W.2d 521, 528 (Mich. 1952) (same); McFarlane v. City of Niagara Falls, 160 N.E. 391, 393 (N.Y. 1928) (same); Llewellyn v. City of Knoxville, 232 S.W.2d 568, 576 (Tenn. Ct. App. 1950) (same).

ately created an obstruction to a public road, the defendant would have intentionally violated a public right even though there may have been no substantial certainty that the obstruction would interfere with the plaintiff. A majority of jurisdictions appear to have found contributory negligence available as a defense in this situation.[63] Although contributory negligence may not always be available, assumption of risk is generally agreed to be a possible defense to public nuisance.[64]

The basic rules which govern private nuisance defenses are similar. Contributory negligence is not a defense where nuisance liability is based on the defendant's intent, but is available where liability is founded on negligence.[65] Assumption of risk, however, has generally been available regardless of the basis of the action.[66]

Considerable controversy has surrounded the doctrine of "coming to

63. *See* Calder v. City & County of San Francisco, 123 P.2d 897, 898 (Cal. Ct. App. 1942) (explaining that a contributory negligence defense is available when a nuisance and negligence tort coexists); Runnells v. Maine Cent. R.R., 190 A.2d 739, 743-44 (Me. 1963) (same); McKenna v. Andreassi, 197 N.E. 879, 883 (Mass. 1935) (same); Schiro v. Oriental Realty Co., 76 N.W.2d 355, 360 (Wis. 1956) (holding that contributory negligence is available for damages actions for nuisance). *But see* De Lahunta v. City of Waterbury, 59 A.2d 800, 802 (Conn. 1948) (holding that contributory negligence is unavailable when a defendant intentionally creates a nuisance); Delaney v. Philhern Realty Holding Corp., 21 N.E.2d 507, 509 (N.Y. 1939) (explaining that contributory negligence is unavailable in absolute nuisance cases); *cf.* Flaherty v. Great N. Ry., 16 N.W.2d 553, 555 (Minn. 1944) (where an injury is sustained as result of intentional obstruction of highway in violation of statute, contributory negligence is no defense); Baker v. City of Wheeling, 185 S.E. 842 (W. Va. 1936).

64. *See* Beckwith v. Town of Stratford, 29 A.2d 775, 778 (Conn. 1942) (assumption of the risk may be a defense even when absolute nuisance is involved); Hammond v. Monmouth County, 186 A. 452, 455 (N.J. Sup. Ct. 1936) (assumption of the risk is a bar to recovery in a public nuisance action).

65. *See* Comment, *Nuisance or Negligence: A Study in the Tyranny of Labels*, 24 IND. L.J. 402, 406 (1949) (reviewing nuisance authorities). *See generally* Raoul Berger, Comment, *Contributory Negligence as a Defense to Nuisance*, 29 ILL. L. REV. 372 (1934) (discussing the history of contributory negligence generally and as applied in nuisance cases); W. E. Shipley, Annotation, *Contributory Negligence or Assumption of Risk as Defense to Action for Damages for Nuisance—Modern Views*, 73 A.L.R. 2D 1378 (1960).

66. *See* H. Morris Denton, Comment, *Nuisance: Contributory Negligence or Assumption of Risk as Defense*, 28 TENN. L. REV. 561, 568-69 (1961) (explaining contributory negligence availability to nuisance suits); Shipley, *supra* note 65, at 1399. Even in cases based on intentional conduct, such as flooding, courts have sometimes denied plaintiff's relief for harm that could have been averted through exercising due care and little effort or expense. *See* Lisko v. Uhren, 204 S.W. 101, 102 (Ark. 1918) (noting that the plaintiff had a duty to prevent his hay from flooding water due to the defendant); Jenkins v. Stephens, 262 P. 274 (Utah 1927) (plaintiff has a duty to avoid consequences of defendant's flooding his property). *See generally* Seavey, *supra* note 60, at 989.

the nuisance" which, like assumption of risk, is rooted in the ancient maxim *volenti non fit injuria.*[67] This doctrine provides that an individual, although aware of the danger, voluntarily subjecting himself to a risk, is precluded from recovery.[68] This issue is frequently raised when the plaintiff has acquired property in the vicinity of the defendant's premises, knowing of the defendant's possibly bothersome activity.[69] It is widely agreed that the contributory negligence defense is unavailable in public nuisance cases because they traditionally involve criminal conduct. Mere priority in time confers no right to commit a crime.[70] In private nuisance, modern authority generally does not treat "coming to the nuisance" as an automatic bar to plaintiff's relief but instead, as a "circumstance of considerable weight."[71]

Through the years, the "coming to the nuisance" doctrine has become less important.[72] Commentators have criticized the doctrine because it allows an accidental priority in time to determine the future development of an area.[73] Some recent authority appears to ignore priority in time altogether[74] whereas other authority applies priority in time sweepingly. For example, a court applied a city's priority broadly in determining that the priority accrued upon the city's founding. The court concluded that the city's priority applied not only to the area the city then occupied, but also to areas in which the city subsequently

67. *See* Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557, 557 (1980) (analyzing the legal implication of first establishing property rights).

68. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

69. *See* Allison v. Smith, 695 P.2d 791 (Colo. App. 1984) (holding that plaintiff did not "come to the nuisance" when the plaintiff acquired property prior to the defendant's bothersome activity).

70. *See generally* Collins, *supra* note 7, at 1009 (explaining that the mere priority of occupation is one factor in determining whether the defendant's activities are reasonable).

71. *See* Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 699 (Iowa 1961) (giving considerable weight to the fact that the plaintiff occupied an area prior to any industrial activities), Padilla v. Lawrence, 685 P.2d 964, 968 (N.M. Ct. App. 1984) (explaining that priority of occupation is given considerable weight in determining reasonableness).

72. Wittman, *supra* note 67, at 557-58 (explaining that the doctrine "has gradually withered in importance").

73. *See* DANIEL R. MANDELKER, LAND USE LAW § 4.04, at 97 (2d ed. 1988).

74. See Botsch v. Leigh Land Co., 239 N.W.2d 481, 484-87 (Neb. 1976) (ignoring the fact that defendants' property was being used as a feedlot when plaintiffs moved into the area).

expanded.[75]

The "coming to the nuisance" doctrine recognizes that an implied consent to conditions should preclude, under equitable principles, a consenting party from successfully complaining later about those conditions.[76] The *Spur* court commented that "coming to the nuisance" could justifiably preclude relief if the encroaching developer had been the only party injured by the nuisance. If Spur had located its feedlot near a developing city, however, Spur would have had to suffer abatement of its operation.[77]

Some commentators have stated that the majority of courts believes that a plaintiff is not barred from relief in either a public or a private nuisance merely by "coming to the nuisance."[78] However, priority in time is frequently an important factor in private nuisance actions to determine whether a court should grant relief.[79] Some qualifications to the relevance of this factor have been expressed over the years. It has been noted, for instance, that the time when either the plaintiff or defendant acquired ownership of their property should be irrelevant.[80] The relevant factor, if any, is the priority of use between the plaintiff and defendant, or their predecessors in interest.[81] If the allegedly bothersome use of the defendant's property did not constitute a nuisance initially, then this fact should benefit the defendant regardless of whether he owned the property when the use commenced.[82]

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75. City of Lyons v. Betts, 171 N.W.2d 792, 794 (Neb. 1969) (applying "coming to the nuisance" in reverse: since plaintiff (the city) was first in time, it has an absolute right to prevent subsequent activities that annoy city residents).

76. *See* Scott v. Jordan, 661 P.2d 59, 63 (N.M. Ct. App. 1983) (explaining a possible acquiescence defense as applied to nuisance actions). *Cf.* Kellogg v. Village of Viola, 227 N.W.2d 55, 58 (Wis. 1975) (reasoning that the fact that defendant arrived first "does not grant [defendant] a perpetual easement to pollute the air").

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

78. *See* W. PROSSER ET AL., CASES & MATERIALS ON TORTS 846 (8th ed. 1988) (noting the existence of this majority rule). *See also* RESTATEMENT (SECOND) OF TORTS § 840D (1979) (explaining and illustrating the "coming to the nuisance" doctrine). *See generally* Note, *Present Day Rules Reminiscent of the Theory of "Coming to a Nuisance,"* 17 TEMP. L.Q. 449, 449 (1943) (discussing the historical development of nuisance law).

79. *See* East St. Johns Shingle Co. v. City of Portland, 246 P.2d 554, 563 (Or. 1952) (denying plaintiff either an injunction or damages where defendant had already been polluting water when plaintiff purchased its property).

80. *See* Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1322 (1977) (arguing that time of ownership should be irrelevant).

81. *Id.*

82. *See* Ellickson, *supra* note 53, at 759 n.260 (1973) (discussing cases where plain-

Arguably, the weight accorded "coming to the nuisance" should vary according to the plaintiff's knowledge. The equities weigh against the plaintiff if, after having full knowledge of the defendant's activities, the plaintiff developed his own property in such a manner that its use is disturbed by the defendant's activities. With these possible qualifications, it seems that priority in time is usually relevant to the question of whether an activity is unreasonable and therefore a nuisance.[83] There is some authority, however, stating that priority in time, although of consequence in the balancing process necessary to determine whether an injunction shall issue, is irrelevant in a damage action.[84]

Some commentators support the use of the "coming to the nuisance" doctrine on the ground that it induces plaintiffs to mitigate their damages. The doctrine denies recovery for improvements made by plaintiffs after the nuisance is in operation. Some authorities believe that there is simply a strong ethical argument in favor of the first person to settle in an area.[85] Legislators have recognized this ethical argument and statutorily provided that after certain uses have been in existence for a designated time, they cannot be found nuisances based upon interference with subsequently changed conditions in the neighborhood.[86] The trend is clearly toward rejecting "coming to the nuisance"

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tiff has improved land after nuisance); Cassius Kirk, Jr., Note, *Torts: Nuisance: "Coming to the Nuisance" as a Defense*, 41 CAL. L. REV. 148 (1953) (discussing *East St. John's Shingle Co., supra* note 79).

83. *See* Green v. McCloud, 197 S.W.2d 258, 260 (Ky. 1946) ("coming to the nuisance" is one factor in determining the equities of a given case); Hall v. Budde, 169 S.W.2d 33, 33 (Ky. Ct. App. 1943) (same); Ensign v. Walls, 34 N.W.2d 549 (Mich. 1948) (same); Kosich v. Poultrymen's Serv. Corp., 43 A.2d 15, 19 (N.J. Ch. 1945) (same); Frank v. Cossitt Cement Prods., 97 N.Y.S.2d 337, 339 (Sup. Ct. 1950) (same); McCarty v. Natural Carbonic Gas Co., 81 N.E. 549, 550 (N.Y. 1907) (same); Watts v. Pama Mfg. Co., 124 S.E.2d 809, 814 (N.C. 1962) (same); Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 505 P.2d 919, 921 (Or. 1973) (same); Young v. Brown, 46 S.E.2d 673, 678-79 (S.C. 1948) (same); Abdella v. Smith, 149 N.W.2d 537, 541 (Wis. 1967) (same). For a more comprehensive discussion of "coming to the nuisance" as a defense, see generally Thelma M. Chapman, Note, *Torts—Nuisance, "Coming to the Nuisance,"* 32 OR. L. REV. 264 (1953); Ferdinand S. Tinio, Annotation, *"Coming to Nuisance" as a Defense or Estoppel*, 42 A.L.R. 3D 344 (1972).

84. *See* Kellogg v. City of Viola, 227 N.W.2d 55, 58 (Wis. 1975) ("coming to the nuisance" irrelevant in a damage action for nuisance).

85. *See* Alan D. Freeman, *Give and Take: Distributing Local Environmental Control Through Land Use Rejection*, 60 MINN. L. REV. 883, 919-20 (1976) (exploring the question of whether priority in time gives a superior ethical position).

86. *See, e.g.*, IND. CODE ANN. § 34-1-52-4(f) (Burns 1986). The Indiana statute provides:

(f) No agricultural or industrial operation or any of its appurtenances shall be or

as an automatic bar to relief,[87] particularly if a plaintiff is part of a natural wave of growth and development that has gradually approached a defendant's formerly harmless use.[88]

SPUR INDUSTRIES' PLACE IN NUISANCE LAW

Feedlots, such as the one involved in *Spur Industries*, have often been the subject of nuisance suits because of the odors emanating from these operations.[89] A few states, notably Iowa and Nebraska, have adopted special statutes to govern feedlot odor cases.[90] However, the majority of jurisdictions rely on the common law of nuisance to govern these actions. According to the common law, an injured party may be entitled to damages for diminution in property value as well as compensation for interference with personal health and comfort. If monetary damages are inadequate, as where the harm is continuing in nature, courts may award injunctive relief.[91] A New Mexico appellate court allowed injunctive relief when it found that pollution, flies, and noxious odors from a cattle feedlot were oppressive, substantial and continuous in nature.[92] A plaintiff in a feedlot nuisance action may

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become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one year, provided:

(1) There is no significant change in the hours of operation;

(2) There is no significant change in the type of operation; and

(3) The operation would not have been a nuisance at the time the agricultural or industrial operation, as the case may be, began on that locality.

Id.

87. *See* Kirk, *supra* note 82, at 149 (discussing "coming to the nuisance" and its interpretation). *See supra* note 78 and accompanying text for a discussion of this trend.

88. *See generally* ROBERT R. WRIGHT & SUSAN W. WRIGHT, LAND USE IN A NUTSHELL 23 (2d ed. 1985).

89. *See* Paula M. Recker, *Animal Feeding Factories and the Environment: A Summary of Feedlot Pollution, Federal Controls, and Oklahoma Law*, 30 SW. L.J. 556, 557-58 (1976) (describing the putrid odors emanating from feedlots). *See generally* Note, *supra* note 35, at 457 (discussing feedlot odors control problems and nuisance causes of action).

90. *See* IOWA CODE ANN. § 172D (West 1990); NEB. REV. STAT. § 81-1501 (1987). For a comprehensive discussion of the Iowa statute, see generally McCarty & Mathews, *supra* note 8. For a comprehensive discussion of the Nebraska statute and its history, see generally Burke, *supra* note 32.

91. *See* Padilla v. Lawrence, 685 P.2d 964, 970 (N.M. Ct. App. 1984) (recognizing that monetary damages are inadequate where harm is continuing in nature, making injunctive relief proper).

92. Scott v. Jordan, 661 P.2d 59, 64 (N.M. Ct. App. 1983).

also be denied relief on the basis of the "coming to the nuisance" doctrine. This will only occur if the defendant's use clearly constituted a nuisance at the time that the plaintiff arrived.[93]

In *Spur Industries,*[94] the Arizona court recognized traditional nuisance and "coming to the nuisance" doctrines, but varied the traditional analysis in three respects. First, the court addressed the "coming to the nuisance" doctrine, distinguishing between the individual plaintiff and the public. The court found the doctrine inapplicable to the public's nuisance claim, at least where a public nuisance was involved.[95] This doctrinal analysis is not unusual except that it distinguishes between the individual's and the public's "coming to the nuisance."[96] Second, courts have often enjoined a nuisance only after balancing the equities to determine whether damages or injunctive relief would produce less harm.[97] The Arizona court did not engage in this balancing and simply enjoined the feedlot on the basis that it constituted a statutory public nuisance.[98] Again, this is not a radical departure from existing law, given the elements of a public nuisance[99] and the court's finding that a public nuisance existed. Third, the *Spur* court added a new step to the determination of the proper remedy in a nuisance case. The court asked whether a successful plaintiff obtaining an injunction should, in fairness, reimburse the enjoined defendant for all or part of the damage resulting from the injunction.[100]

In *Spur*, the court found the reimbursement a fair and proper requirement in return for the injunctive relief. The court reasoned that the plaintiff-developer should have foreseen the land-use conflict with the feedlot. The defendant, on the other hand, having previously lo-

93. *See* Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 505 P.2d 919 (Or. 1973) (finding that the record did not support an application of the "coming to the nuisance" doctrine where there was a lack of clear evidence as to whether there was a nuisance when plaintiffs purchased their land).

94. 494 P.2d 700 (Ariz. 1972).

95. *See* Collins, *supra* note 7, at 1009.

96. It has long been the law that the "coming to nuisance" defense is unavailable in *public* nuisance situations.

97. *See supra* note 55 and accompanying text discussing the balancing process when determining a nuisance remedy.

98. *See* Collins, *supra* note 7, at 1011-12.

99. *See supra* notes 25 & 26 and accompanying text for a discussion of the necessary requirements for a public nuisance.

100. *Spur*, 494 F.2d at 706-08.

cated in that area, had no reason to foresee such a future problem.[101] The *Spur* remedy drew on the long recognized equitable principle that injunctive relief may be granted subject to reasonable conditions.[102]

It may be argued that the *Spur* court's remedy drew on indemnification principles. Under the theory of indemnification, the liability of one tortfeasor is shifted to another who is regarded as actually, or primarily, at fault.[103] In *Spur*, indemnification became an issue in determining whether individual Sun City residents had sustained damages due to the feedlot operation and, if so, whether the developer should indemnify the feedlot operator for any court-ordered damages paid to the residents.[104]

Spur Industries is often mentioned as the only case granting indemnification rights to a party forced to discontinue an activity constituting a nuisance.[105] Although this proposition is true, the *Spur* remedy builds on ample precedent. *Spur's* specific method of adjusting the equities may be a new approach,[106] but the principles underlying the

101. *See* Collins, *supra* note 7, at 1012 (recognizing that the owner of the nuisance property could have foreseen the land use problem (citing Spur Industries, Inc. v. Del E. Webb Development Co., 494 P.2d 700, 706-07 (Ariz. 1972))).

102. *See* Cox, *supra* note 3, at 63 (outlining the *Spur* court's indemnification analysis). *See also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-93, 1115-24 (1972) (noting the necessity of the reimbursement remedy and the difficulties its application would pose for the courts). *See generally* CURTIS J. BERGER, LAND OWNERSHIP & USE 702 (3d ed. 1983) (discussing the *Spur* decision).

103. *Id.* at 60. *See also* William H. Skelton, Comment, *Contribution and Indemnity Among Joint Tortfeasors*, 33 TENN. L. REV. 184, 185 (1966) (discussing the rationales and development of contribution and indemnification theories). *See generally* Harold A. Meriam & John V. Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U. L. REV. 845 (1950) (discussing the evolution of New York indemnity law).

104. Spur Feeding Co. v. Superior Court of Maricopa County, 505 P.2d 1377, 1378 (Ariz. 1973) (en banc) (holding that because the prior suit concerned only the developer and the feedlot operator, judgment was not res judicata as to a third-party complaint against the developer by the feedlot operator to indemnity for damages suffered by others).

105. Jack W. Shaw, Jr., Annotation, *Nuisance: Right of One Compelled to Discontinue Business or Activity Constituting Nuisance to Indemnity from Successful Plaintiff*, 53 A.L.R. 3D 873, 874 (1973) (discussing the *Spur* case).

106. *See generally* WILLIAM L. PROSSER ET AL., CASES & MATERIALS ON TORTS 847 (8th ed. 1988) (compiling a list of nuisance law studies); Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 775 (1986) (noting that "[t]he past twenty-five years have witnessed an entirely new approach to nuisance law in which land use conflicts are analyzed in economic terms, with an emphasis on the goal of efficiency in resource allocation").

court's nuisance analysis have deep historical roots.

REACTION AND ALTERNATIVES TO SPUR

Some have suggested that at least three theories may support the remedy awarded in the *Spur Industries* case: (1) the theory of unjust enrichment, holding that one who has unjustly enriched another should make restitution to the injured party; (2) the active-passive negligence distinction, under which a party whose liability is attributable to merely passive conduct is entitled to reimbursement from an active wrongdoer who contributed to the same harm; and (3) the doctrine of indemnity, which provides that a party who discharges a duty that is primarily owed by another is entitled to reimbursement from the responsible party.[107] The *Spur* court has been criticized for not having clearly endorsed any of these doctrines,[108] though the opinion apparently relies on indemnification more than any other theory. [109]

Regardless of the court's reasoning, *Spur* has been praised as establishing a desirable precedent requiring the developer to compensate the feedlot in return for its moving or shutting down. This encourages developers to make reasonable attempts to anticipate future problems when they select locations. If the developer did not have to bear the cost of moving the nuisance, the developer would have no incentive to avoid inappropriate areas. Therefore, the *Spur* decision may promote efficient decision-making.[110] The *Spur* solution satisfies both the plaintiff and the defendant; the plaintiff realizes his goal of terminating the nuisance, while the defendant avoids liability and moving expenses.[111]

The type of conditional injunction awarded in *Spur* has ample precedent.[112] However, a court of equity usually will frame conditional re-

107. Collins, *supra* note 7, at 1013-17 (1973) (discussing the three theories that could be employed to support the *Spur* remedy).

108. *See id.* at 1013 (noting the Arizona court "failed to articulate an adequate basis for the novel remedy it created in *Spur*").

109. *Id.* at 1016. The Spur court specifically asked: "Must Del Webb indemnify Spur?" *Spur*, 494 P.2d at 706.

110. *See* Wittman, *supra* note 67, at 566 (arguing that the "courts are encouraging individuals to make efficient decisions by anticipating the future and considering the *whole* stream of costs and benefits").

111. *See* Ellickson, *supra* note 53, at 744-45 (explaining the advantages of a compensated injunction approach).

112. John M. Carnahan, III, Note, *Remedies—Enjoining a Nuisance—Damages to the Defendant as a Condition of Granting the Injunction*, 38 MO. L. REV. 135, 136 (1973). This note observes that injunctive relief will usually be denied provided that

lief in a manner opposite to that used in *Spur*. Courts will, as in *Boomer v. Atlantic Cement Co.*,[113] deny injunctive relief against a nuisance but will condition this denial on the defendant paying permanent damages to the plaintiff.[114] This approach is subject to criticism as granting a kind of power of private eminent domain.[115]

The *Spur* method may similarly be regarded as allowing a private party to condemn a negative easement over defendant's land.[116] If the two methods are considered equal, it is significant that *Spur* at least eliminates or reduces the nuisance.[117] The *Spur* case has been hailed as "a sound development in the law of public nuisance,"[118] particularly the "coming to the nuisance" doctrine,[119] because the Arizona court's remedy balances the equities and protects the rights of both the public and the defendant.[120]

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defendants pay damages. *Id.* In *Spur*, by contrast, the court granted injunctive relief provided that the plaintiff pay damages. *Id.* The author notes that there is only one noted comparable case, New Castle City v. Raney, 6 Pa. C. 87 (1889), *rev'd on other grounds sub nom.* Appeal of McClain, 18 A. 1066 (Pa. 1890), where a city which had brought an action to abate a mill dam was required to remove the dam at its own expense. *See* Cox, *supra* note 3, at 64 n.59 (1973) (noting the possibility that *New Castle City* may be analogous to *Spur*).

113. 257 N.E.2d 870 (N.Y. 1970). *See generally Symposium on Nuisance Law: Twenty Years After* Boomer v. Atlantic Cement Co., 54 ALB. L. REV. 171 (1990) (an in-depth analysis of *Boomer* and nuisance law).

114. *See* Bartman v. Shobe, 353 S.W.2d 550, 556-57 (Ky. Ct. App. 1962) (denying an injunction where a disposal plant causes sewage to drain onto plaintiff's land, but conditioning the denial on the defendant paying damages).

115. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 871, 876 (N.Y. 1970) (Jasen, J., dissenting) (fearing takings as a result of the *Spur* majority holding). *But see* Carnahan, *supra* note 112, at 138 (discussing possible arguments that the taking - if one occurred in such cases as *Boomer* - was a public taking or a private condemnation properly approved by the courts in their exercise of their equity powers). *See generally* Hiley, *Involuntary Sale Damages in Permanent Nuisance Cases: A Bigger Bang from Boomer*, 14 Environmental Affairs 61, 73-76 (1986).

116. *See* Carnahan, *supra* note 112, at 139 (defining a negative easement as "one which precludes the owner of land subject to such easement from doing an act which if no easement existed, he would be entitled to do" (quoting Wilson v. Owen, 262 S.W.2d 19, 24 & n.31 (Mo. 1953))).

117. *See* Haven Tobias, Note, *Land Use and Environmental Policy: Litigation of Nuisances as a Land Use Control: The Spur Industries Case*, 26 OKLA. L. REV. 583, 588 (1973) (noting that the *Spur* doctrine may reduce the peril to landowners locating near noxious industries).

118. Recker, *supra* note 89, at 565.

119. *Id.*

120. *Id.*

This praise may indicate that other courts may apply *Spur's* method of relief in the future. Courts will be restricted, however, in applying the method to nuisance cases in which two factors are present. First, the public is substantially disturbed by the nuisance; and second, there is some colorable argument that the plaintiff has "come to the nuisance."[121] Within the narrow confines imposed by these limitations, the *Spur* court's assessment of costs is supported by sound policy grounds: the substantial fault of the plaintiff-developer and the duty—separate from and arguably greater than that of the defendant feedlot—owed by the developer to the Sun City residents.[122]

The proper question is what advantages are gained through the *Boomer* court's method of conditioning the denial of an injunction on payment of damages to the defendants,[123] and when would that method be preferable to the *Spur* remedy? Both opinions have been cited as examples of courts exercising their "equitable discretion and ingenuity in ordering remedies."[124] The *Boomer* court noted the social and economic importance of allowing defendant's operation to continue in light of the large investment involved, the number of people employed by the plant, and the dire consequences that termination would have on the financial well-being of the area.[125]

It has been observed, however, that to allow the continuation of a polluting factory to prevent unemployment is different from the public benefit present in cases dealing with a public utility or other essential business.[126] In these cases, courts developed the doctrine that no injunction will be issued as a matter of right against a nuisance upon which the public welfare depends.[127]

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121. *See* Collins, *supra* note 7, at 1018-19 (1973) (hailing the *Spur* doctrine as a "versatile tool for the equitable resolution of varied nuisance situations"); Cox, *supra* note 3, at 73-74 (discussing the extent of the applicability of indemnification under *Spur*).

122. *Id.* at 64-69 (examining the classifications of the relative fault of the parties).

123. *See supra* notes 113 & 114 and accompanying text for a discussion of the *Boomer* case.

124. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 n.7 (1982).

125. Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 872-73 (N.Y. 1970).

126. Bruce V. Weitzen, Note, *Nuisance—Permanent Damages Awarded in Lieu of an Injunction Where Resultant Damage from Nuisance Was Substantial*, 20 BUFF. L. REV. 312, 316 (1970) (explaining that a court cannot disregard possible public injury from pollution).

127. *See id.* at 312-13 (noting the reluctance of the courts to grant injunctive relief where the public substantially relies upon the business that creates the nuisance).

If the injunction is denied on the basis of the private benefit of protecting defendant's investment, then the resulting harm to other private interests from continuation of the business should also be weighed.[128] Further, allowing defendants to forever acquire the right to injure the plaintiffs' property presents not only a possible unconstitutional taking of property for private use,[129] but also a forced sale inconsistent with the entire private ownership concept.[130] Thus, while *Boomer* attempts a compromise through balancing the conveniences of the parties,[131] the result is potentially more harmful to the public and likely more susceptible to successful legal challenge than the *Spur* decision.

The assessment of damages also seems easier under *Spur*. In *Spur*, the measure is simply the reasonable cost of moving or terminating the business. Under *Boomer*, damages are based on harm not only to the present use of the plaintiff's property but also for injury to reasonably foreseeable future uses.[132] Moreover, *Boomer* damages must take into account such difficult to assess factors as the value to plaintiff of freedom from dust and other annoyances created by a nearby cement

128. *Id.* at 316.

129. *See* Sadler v. Langham, 34 Ala. 311, 315 (1859) (noting that property may not be taken and sold for individual convenience where the public benefit is too weak).

130. *See* Hiley, *supra* note 118, at 74.

131. *See* C. HAZAR & M. WOLF, LAND USE PLANNING 124 (4th ed. 1989) (noting support for the *Boomer* approach in opinions by two leading jurists: City of Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933) (Brandeis, J.) and Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927) (Learned Hand, Jr.)). *See generally* Michael S. Maram, Comment, *Nuisance Abatement: Use of the Comparative Injury Doctrine*, 1971 URB. L. ANN. 206 (discussing the application of the doctrine of comparative injury in the nuisance context); Note, *Private Nuisance—Abatement and Injunction—Disparity of Economic Consequences*, 22 CASE W. RES. L. REV. 356 (1971) (discussing the *Boomer* decision); Gerald R. Stowers, Note, *Remedies—Private Nuisance—Comparative Injury Doctrine in West Virginia*, 77 W. VA. L. REV. 780 (1975) (discussing factors important in the balancing of conflicting interests under the doctrine of comparative injury). *See also* Note, *Enjoining Private Nuisances: Consideration of the Public Interest*, 43 U. COLO. L. REV. 225, 228 (1971) (criticizing the *Boomer* court's application of the comparative injury doctrine and emphasizing that public interests must also be evaluated under the test).

132. *See* Larry C. Wood, Note, *Nuisance—A Feed Lot Which Will Interfere with a Future Use of Another's Land Will Justify the Recovery of Permanent Damages*, 4 TEX. TECH L. REV. 444, 447 (1973) (noting that Meat Producers Inc. v. McFarland, 476 S.W.2d 406 (Tex. Ct. App. 1972) involved an award of permanent damages for a feedlot nuisance in which testimony indicated that the most desirable use of plaintiff's land in the reasonably foreseeable future would be, but for the feedlot's presence, used as residential homesites).

plant.[133]

On balance, the *Spur* approach would therefore seem to raise fewer objections and offer more advantages than the *Boomer* method. Both methods may still remain in the arsenal of available remedies that courts of equity can use in providing nuisance relief. Assuming the constitutional objections are satisfied, the desirability of one method over the other may vary according to the circumstances of each case. The most important consideration is the need and desirability in specific situations of either terminating the bothersome use or allowing it to continue.

THE FUTURE OF THE *SPUR* CASE

As noted, the *Spur* holding is likely to be limited to situations involving a substantial disturbance to the public and the plaintiff "coming to the nuisance."[134] The *Spur* justices indicated a more severe restriction, stating that the relief granted was limited to the facts actually presented.[135] The court's extreme restriction of limiting the unique remedy to nearly identical fact patterns seems unnecessarily cautious. The unusual nature of the remedy awarded probably inspired the express limitation.[136] A more lasting limitation on the remedy, however, may be the *Spur* court's general indication that the remedy will be employed only where the plaintiff foresaw, or at least should have reasonably foreseen, the impending injury to the defendant. Without the element of foreseeability, it is doubtful that the plaintiff could be charged with negligence and have to pay for the relief obtained.[137]

Some commentators have justified *Spur's* remedy on the bases of unjust enrichment and indemnification even in situations where the plaintiff could not have foreseen the defendant's harm.[138] These theories do not depend on any fault of the plaintiff.[139] Fault on the *defendant's*

133. Tobias, *supra* note 117, at 587 (asking "what value can be assessed in money on a life . . . free from a barrage of dust and other annoying by-products of cement production?").

134. *See supra* note 121 and accompanying text for a discussion of the limited application of *Spur's* remedy.

135. Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972).

136. *See* Collins, *supra* note 7, at 1017 (noting that "[t]his restriction, though possibly unnecessary, is understandable since the *Spur* remedy had never been employed before").

137. *Id.* at 1018.

138. *Id.*

139. *Id.*

part, however, particularly where it involves the defendant "coming" to the plaintiff with the nuisance, is likely to prevent the defendant from receiving the award of costs that the *Spur* feedlot received.[140] These actions will instead result in an unconditional injunction against defendant's bothersome activity.

Much litigation concerning feedlots and similarly annoying land-uses can be avoided through wise legislation. The legislation can range from the specific restrictions on odor intensity now adopted in several states[141] to more general types of zoning laws.[142] These laws, and the use of common sense in selecting a site for a potentially bothersome use, can prevent nuisances from developing most of the time.[143] One author has suggested that courts could benefit from additional legislative guidance creating a particular "substantive law of feedlot odor control which reflects our values and priorities."[144]

No legislation can prevent all nuisances, whether arising from cattle feedlots or other activities. When faced with a true nuisance situation, some commentators urge the courts to allow the defendant, in all but situations of the most outrageous conduct, to "buy his way out of an injunction" by paying plaintiff damages.[145] This was the approach of the *Boomer* court,[146] and it certainly remains a viable option in nuisance cases. The *Boomer* option should be used sparingly, however, and only where the defendant has shown a willingness to make reason-

140. *See* Cox, *supra* note 3, at 74 (arguing that the "danger in expanding indemnification beyond reasonable limits, then, is the extension of the injunctive remedy").

141. *See supra* note 90 and accompanying text for an explanation of these statutes.

142. *See* Recker, *supra* note 89, at 569-70 (explaining that zoning ordinances may become an important factor in regulating feedlot enterprises).

143. *Id.* (noting that site selection is the most important method to avoid nuisance suits).

144. Burke, *supra* note 32, at 591 (1977).

145. *See* Rabin, *supra* note 80, at 1335 (arguing that where a defendant's conduct is so egregious that he deserves punitive treatment, an injunction is warranted). *See generally* Henry L. McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565, 570 (1928) (discussing factors the court should evaluate, including the conduct of the parties, in balancing equities to determine whether to issue an injunction for trespass or nuisance); William F. Walsh, *Equitable Relief Against Nuisance*, 7 N.Y.U. L. REV. 352, 367-74 (discussing what conduct warrants injunctive relief) (1929); Charles R. Schwiddle, Comment, *Remedial Flexibility in Injunctions Against Nuisances—A Product of the Search for Middle Ground*, 7 WILLAMETTE L. J. 279, 279-82 (1971) (discussing factors that courts consider in arriving at a variety of remedies for nuisance, including injunctions).

146. *See supra* notes 113 & 114 and accompanying text for a discussion of the *Boomer* holding.

able efforts to keep the offensiveness of his activity to a minimum.[147] "The threat of an injunction would remain and should be imposed on defendants who have failed to act responsibly."[148] Without this continued threat, the defendant who has "purchased" his right to maintain a nuisance has little incentive to exercise future restraint in the operation of that nuisance. Awards of damages and assessment of fines by public authorities[149] may be adequate if the harm from the nuisance is not too great and is not likely to become greater. Where substantial public harm appears likely to remain as long as the nuisance continues, the *Spur* option of applying a "liability rule" and allowing the "buying out" of the nuisance, rather than the "buying off" of those bothered by it, appears more environmentally sound.

CONCLUSION

Despite the proliferation of land-use legislation, the nuisance action remains an important tool for the protection of individual property owners disturbed in the use of their land.[150] Nuisance law draws on, but is not bound by, zoning and other land-use law in determining what is a reasonable or unreasonable use of property.[151] In this re-

147. *See* Craig Rotherham, *The Allocation of Remedies in Private Nuisance: An Evaluation of the Judicial Approach to Awarding Damages in Lieu of an Injunction*, 4 CANTERBURY L. REV. 185, 200 (1989) (arguing that threatening polluters with an injunction may make them more responsible for controlling emissions).

148. *Id. See generally* A. I. Ogus & G. M. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 36 CAMBRIDGE L.J. 284 (1977) (discussing the remedies available in private nuisance as a means of environmental protection).

149. *See* Ellickson, *supra* note 53, at 761-62 (suggesting fines against pervasive nuisances as an appropriate supplement to the nuisance remedies available to private persons able to show substantial injury from a nuisance).

150. *See* Wilson, *supra* note 11, at 119-20 (concluding that nuisance plays an important role in the system of land-use controls).

151. *See, e.g.*, Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396, 409 (D.R.I. 1959) (holding that town attitudes, as reflected in local zoning laws, could be considered in determining whether oil refining could constitute a nuisance); Lauderdale County Bd. of Educ. v. Alexander, 110 So. 2d 911, 915-16 (Ala. 1959) (holding that the definition of a nuisance is dependent upon location because the act complained of may be considered a nuisance in one area and not in another); Rockenbach v. Apostle, 47 N.W.2d 636, 639 (Mich. 1951) (holding that a zoning ordinance is not controlling but may be admissible as evidence in establishing what constitutes a nuisance); White v. Old York Rd. Country Club, 185 A. 316, 318-19 (Pa. 1936) (same). *Cf.* Sohns v. Jensen, 105 N.W.2d 818, 824 (Wis. 1960) (holding that lawful business may be conducted in such a way as to be a nuisance either because of its location, or because of the effect of the operation). *See generally* Angelo V. Chini, Note, *Torts—Notwithstanding Compliance With Zoning Regulations, Nuisance in Fact Held Enjoined*, 11 SYRACUSE L. REV. 323, 325 (1960)

spect, as in fashioning appropriate relief between conflicting uses, nuisance law has always exhibited great flexibility. In general, the scope of nuisance law has widened and its application has become more liberal.[152] As part of the flexibility and liberalization of that law, it is appropriate that the *Spur* remedy of "conditional injunction" receive consideration in any case in which protection is needed both for innocent members of the public and an innocent but bothersome landowner.

(noting that while a court will not enjoin a business operation which is in compliance with zoning law, the court will enjoin the operation of the business if it becomes an unreasonable nuisance); Robert B. Fiske, Jr., Comment, *Real Property—The Effect of Zoning Ordinances on the Law of Nuisance*, 54 MICH. L. REV. 266, 276 (1955) (stating that zoning ordinances have the effect of upholding conduct which would otherwise constitute a nuisance unless the nuisance is unreasonable and causes substantial injury); John Franklin, Note, *Zoning Ordinances and Common-Law Nuisance*, 16 SYRACUSE L. REV. 860 (1965) (discussing the effect of zoning ordinances on the plaintiff's ability to acquire an injunction against conduct which constitutes a nuisance and the admission of zoning ordinances as evidence of what constitutes a nuisance); Maxine Kurtz, *The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas*, 36 DICTA 414, 414 (1959) (discussing the effect of land-use regulation on the legal and equitable remedies available for nuisance actions); Note, *Nuisance—Zoning Law—Injunction to Restrain Proposed Operation*, 9 FORDHAM L. REV. 437, 437-38 (1940) (suggesting that undertaking a business in compliance with local ordinances cannot be enjoined as a nuisance if properly operated).

152. *See* Comment, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749, 756 (1961) (explaining the liberalization of nuisance law).