Government Defendants in Nuisance Injunction Suits

Poor old nuisance has been the common law's meager response to the crowdedness of society, [and the] doctrine is pathetically inadequate to deal with the social realities of this half-century.[1]

Nuisance has thus emerged as the most effective environmental common law tool in current use . . . . [R]ecent federal environmental statutes and cases have imparted new force and vitality to the doctrine that compensate for the limitations placed upon injunctions for nuisance.[2]

I. Introduction and Scope

Despite its use in diverse circumstances,[3] nuisance law is properly concerned with interferences with use and enjoyment of real property[4] and infringements on rights common to the public.[5] As such, nuisance law expresses important state policies concerning conduct, land use, and public rights. Certain conceptual problems can arise when one complains that a governmental body has created or maintained a nuisance, since governmental activity itself represents state policy which arguably supersedes the one embodied in nuisance law. There may be further questions about remedies, specifically the appropriateness of enjoining the government which ordinarily has the power to condemn interests in property to achieve its goals.

To resolve the conceptual issues raised when government bodies are defendants in nuisance injunction suits, this note approaches the subject from a litigation perspective. That is, it begins by defining the substantive law of public and private nuisance, pro-

1. Wright, "The Federal Courts and the Nature and Quality of State Law," 13 Wayne L. Rev. 317, 331 (1967).

2. Russel, "Common Law Environmental Liability Under Federal Statutes," 11 The Forum 778, 790 (1976).

3. J. Bishop, Non-Contract Law § 411, n.1 (1889).

4. *See* text accompanying notes 15-34 *infra*.

5. *See* text accompanying notes 35-42 *infra*.

ceeds with a discussion of the procedural steps involved in bringing a lawsuit, and finishes with an analysis of the merits of claims that a variety of potential plaintiffs might bring against a variety of governmental defendants. The note concludes first, that there is a limited class of private nuisances for which an injunction is the proper remedy, regardless of the public character of the defendant; second, in most private nuisance cases, the government is obligated to pay damages to the plaintiff, but should not be enjoined from continuing the offending activity; third, the appropriate remedy for a public nuisance, regardless of the public character of the defendant is always an injunction; and fourth, in actions involving elements of both public and private nuisance, a court may protect the public interest with injunctive relief even when the public element is not explicitly in front of it.

This note distinguishes carefully between public and private nuisance and examines the circumstances affecting the appropriateness of different remedies for each. In the section on procedure the note will deal with issues of sovereign immunity, jurisdiction in state and federal court, and standing. Finally, the section on the merits of injunction actions against governmental bodies deals in passing with the interesting issues of the measure of damages and the relationship between a nuisance action for damages and a constitutional "taking" claim. Instead of developing these tangential issues in depth, the section focuses on equitable relief and, in particular, on the ability of private parties to litigate claims of public nuisance against governmental bodies.

II. THE LAW OF NUISANCE

A. *Overview*

This section sets up a framework of analysis for the substantive law of public and private nuisance and outlines the considerations affecting the appropriateness of injunctive relief.[6] Special attention is given to distinguishing how the public character of the defendant affects the two issues of whether a nuisance exists and whether equitable relief is appropriate.

The fundamental organizing principle of the law of nuisance is the distinction of the separate actions of private and public nui-

6. W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971).

sance on the basis of the interests each action protects.[7] Private nuisance actions protect against unreasonable interferences with the use and enjoyment of one's property,[8] while public nuisance actions protect against unreasonable infringements upon general public rights.[9] In answering the question of whether a *private* nuisance exists, the law focuses on the nature of the harm rather than on the party causing it.[10] Consequently, at this initial stage, the public character of a defendant is largely irrelevant. In contrast, in determining whether a public nuisance exists, a court must weigh the equities in the case,[11] that is, the competing claims of public benefit versus public harm. This process of balancing involves considerations that make the public character of a defendant relevant, in that arguably a public defendant, but not a private defendant, acts on behalf of and derives its authority from the public.

The remedy for a private nuisance is damages and/or an injunction. The latter will issue only after a weighing of the equities.[12] A determination to which the public character of the defendant is relevant, again because it bears on the question of where the public interest lies. In contrast, the remedy for a public nuisance may only be an injunction;[13] a damage claim is not a feasible alternative.[14] Consequently, once a plaintiff shows that a public nuisance exists—a process in the course of which the court has inquired into the public interest and the character of the defendant—an injunction will issue regardless of the character of the defendant.

B. *Private Nuisance*

As indicated, an action for private nuisance seeks to protect one's use and enjoyment of real property.[15] The action is based on the principle that one may not use one's land, or otherwise behave in

7. *But cf.* K. PARKER, MODERN JUDICIAL REMEDIES 490 (1975) "[T]he distinction between public and private nuisances is more theoretical than real, since many nuisances are both public and private."

8. *See* W. PROSSER, *supra* note 6, at § 89.

9. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1977).

10. *See* note 20 *infra*.

11. *See* text accompanying notes 42 and 47 *infra*.

12. *See* text accompanying notes 47-53 *infra*.

13. *See* text accompanying notes 52-53 *infra*.

14. *Id.*

15. W. PROSSER, *supra* note 6. Not only ownership, but other interests in land, such as leasehold, give potential plaintiffs standing to sue. *Id.* at 593.

such a way, as to interfere with a neighbor's use of his.[16] The policy considerations underlying private nuisance law rest on frequently conflicting principles: the encouragement of the productive use of land, and contrarily, the protection of property from outside interference.[17] The law recognizes that nearly every use of land in modern society is likely to have some effect on neighboring property. Consequently, private nuisance law does not concern itself with trivial or minor annoyances.[18] Only unreasonable interferences[19] result in private nuisances; the law imposes liability only where the harm to the plaintiff is "greater than (a person) ought to be required to bear under the circumstances, at least without compensation."[20]

Imposing liability only for unreasonable interferences has several important implications. For one, a person has no cause of action if he is unusually sensitive to some annoyance,[21] or similarly, if he has developed his property in such a way as to make it unusually

16. *Sic utere tuo ut alienum non laedas*. 66 C.J.S. *Nuisance* § 8 (1950).

17. The law of nuisance plies between two antithetical extremes: the principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.

Antonik v. Chamberlain, 81 Ohio App. 465, 475, 78 N.E.2d 752, 759 (Ct. App. 1947).

18. *See, e.g.*, Yates v. City of Milwaukee, 77 U.S. 497 (1870) (small pier in river which offers no obstruction to navigation not a nuisance); 58 AM. JUR.2d *Nuisances* § 46 (1971); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109, 81 A.L.R. 1199 (1932) (keeping chickens).

19. RESTATEMENT (SECOND) OF TORTS § 826 (1977).

20. Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.

Id. § 822, comment g.

21. *See, e.g.*, Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888) (church bells not a nuisance although they send a hypersensitive person into convulsions).

susceptible to harm.[22] Further, the basis of a court evaluation of the reasonableness of a defendant's conduct is a judgment on public policy,[23] not on any kind of mental culpability on the defendant's part.[24] Among the factors in this evaluation are: the nature of the locality and the suitability of the uses to which both the defendant and the plaintiff have put their property; the practicality on the part of both parties of preventing the harm; legislative provisions for land use; and the extent of the harm to the plaintiff weighed against the utility of the defendant's conduct.[25]

Within the realm of "unreasonable harm" there are two distinct categories.[26] There is reasonable conduct or use of land on the part of the defendant, causing damage to the plaintiff that is more than minor, *i.e.* unreasonable damage. This is contrasted with a defendant's unreasonable conduct or use of land that causes unnecessary damage.

An example of reasonable use/unreasonable damage would be the operation of a cement plant that pollutes the air and renders surrounding farmland unproductive.[27] While the defendant's use of land is in itself reasonable and socially valuable, the damage it causes is serious and is likely to be more than what in society's view, a neighbor ought to bear without compensation. Consequently, the operation of the cement plant constitutes a private nuisance. Two classic examples of the unreasonable use/unnecessary damage category are nocturnally barking dogs[28] and kitchen

22. *See, e.g.*, Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill.2d 544, 216 N.E.2d 788 (1966) in which the court found that a property owner made his land unusually sensitive to outside light by using it for a drive-in theater; held that there was no nuisance.

23. One element of public policy is that a potential plaintiff must be prepared to "endure some inconvenience rather than curtail the defendant's freedom of action." W. PROSSER, *supra* note 6, § 89 at 596. *See also* Versailles Borough v. McKeesport Coat Coke Co., 83 PITT. LEG. J. 379 (1935). Judge Musmanno wrote that "[w]ithout smoke, Pittsburgh would have remained a very pretty village." *Id.* at 385.

24. *See* 58 AM. JUR. 2d *Nuisances* § 33 (1971).

25. W. PROSSER, *supra* note 6, § 91.

26. *See* Louisville Refining Co. v. Mudd, 339 S.W.2d 181, 187 (Ky. 1960): "The extreme limits are therefore, on the one hand, the reasonable use causing unreasonable damage and, on the other hand, the unreasonable . . . use causing damage that is more unnecessary than severe."

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

28. Adams v. Hamilton Carhartt Overall Co., 293 Ky. 443, 169 S.W.2d 294 (1943); Brill v. Flagler, 23 Wend. 354 (N.Y. 1840).

fumes vented toward a neighbor's window.[29] In these situations the interference with the neighbor's use and enjoyment of his land does constitute a private nuisance for, although the injury is unlikely to be severe, the offending conduct can be corrected with ease and without loss to society.[30] That is, the offending activity is of such minimal social value that *any* harm it causes is more than the victim ought to bear.[31]

Given this framework, on the initial question of whether a private nuisance exists, it makes no difference that the offending actor is a governmental body. In the reasonable use/unreasonable damage category, inquiry as to whether a nuisance exists focuses on the unreasonable injury to a plaintiff. The value of a defendant's conduct goes to the issue of choice of remedy. Extremely valuable activity, by either public[32] or private[33] actors, can still cause more harm than society would require a neighbor to bear without compensation.

In the limited category of unreasonable use/unnecessary damage, the issue of reasonableness focuses on the value of and alternatives to the defendant's conduct. To constitute this kind of private nuisance, the activity must be not valuable and must cause at least some harm. The public character itself of the defendant is again not relevant. If a governmental body can show that its activity is important to the community (*i.e.*, has real value), the analysis should proceed within the framework of reasonable use/unreasonable damage. Otherwise, it should make no difference that the one whose acts cause harm to a protected private interest while conferring only negligible benefit on society is a government agent. Certainly, the government can make mistakes and act irresponsibly; when such conduct amounts to an unreasonable infringement on the property interest of others, courts have the power to proceed against the useless conduct.[34]

29. *Cf.* Medford v. Levy, 31 W.Va. 649, 8 S.E. 302 (1888).

30. *See* W. PROSSER, *supra* note 6, § 89 at 599.

31. *Cf.* Wayman v. Board of Education, 5 Ohio St.2d 248, 215 N.E.2d 394 (1966) in which the dust from an unattended school parking lot blew into a neighbor's house. The court allowed a suit to enjoin the defendant to clean up the lot.

32. *See* Griggs v. County of Allegheny, 369 U.S. 84 (1962), *reh. denied* 369 U.S. 857 (1962) (airport noise).

33. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 247 N.E.2d 870, 309 N.Y.S. 2d 312 (1970) (cement factory with a large workforce).

34. Louisville Refining Co. v. Mudd, 339 S.W.2d 181 (Ky. 1960).

C. *Public Nuisance*

A public nuisance action seeks to prevent unreasonable infringements on rights of the general public.[35] The protected interests are common to the public and are in fact defined by that commonness. (Compare this with the interests protected by private nuisance such as one's interest in real property.) However, not every person in a community need be injured or inconvenienced for an interference to constitute a public nuisance, so long as the interference is with a public right.[36] Traditionally, the interests protected fall within the general categories of public health and safety, and the prevention of substantial inconvenience or annoyance to the citizen.[37]

Most commonly, it is public bodies that seek to enjoin public nuisances, but private parties can have standing under certain circumstances too. When a public nuisance is an offense against the entire community in equal measure, the government is thought to be the appropriate party to seek legal action against the offender.[38] But while, in general, a private plaintiff may have no action against an invasion of purely public right, the private plaintiff does have an action if the nuisance affects him differently from the way it affects the general public.[39] Naturally, difficult questions can arise in

35. RESTATEMENT (SECOND) OF TORTS § 821B (1977).
36. *See* W. PROSSER, *supra* note 6, § 88 at 585.
37. RESTATEMENT (SECOND) OF TORTS § 821B (1977):

(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances which may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

38. 66 C.J.S. *Nuisances* § 77 (1950); 58 AM. JUR. 2d *Nuisances* §§ 106-107 (1971).
39. RESTATEMENT (SECOND) OF TORTS § 821C (1977):

(1) In 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. (2) In order to maintain a proceeding to enjoin to [*sic*] abate a public nuisance, one must (a) have the right to recover damages . . . or (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

See Graceland Corp. v. Consolidated Laundries, 7 A.D.2d 89, 91, 180 N.Y.S.2d 644,

determining whether a private party's injury "differs", either qualitatively or as a matter of degree, from that of the general public.[40]

Courts must look to various expressions of public policy to determine whether a defendant's conduct, claimed to constitute a public nuisance, is reasonable. For example, conduct violating statutes or regulations that protect the public interest is almost always a public nuisance.[41] The more difficult cases are those in which the offending activity is not illegal but is nonetheless arguably "unreasonable." In such a case, the court must balance the injury to public rights against the benefit proceeding from the defendant's conduct; if the injury outweighs the benefit, the conduct is unreasonable.[42]

The public character of a defendant can be relevant to the determination of the reasonableness of the conduct in a public nuisance case. When the conduct involves a violation of law, the character of the defendant should be of no import, since a governmental body is not above the law. However, in a case in which an injury or inconvenience, resulting not from illegal activity, must be weighed against the benefits of the conduct, the government defendant is in a sympathetic posture, since almost by definition it acts in the public interest. The plaintiff then has the burden of showing that conduct undertaken on behalf of the people injures them more than it benefits them.

646 (1st Dept. 1958) (per Breitel): "One who suffers damage or injury, beyond that of the general public at large, may recover for such nuisance in damages or obtain an injunction . . . ." *See also* Arizona Copper Co. v. Gillespe, 230 U.S. 46 (1912), in which a mining company polluted a river, and lower riparian owners had standing to sue despite the public nuisance character of the pollution.

40. *Cf.* Kaje v. Chicago, St. P., M. & O. Ry., 57 Minn. 422, 424, 59 N.W. 493 (1894):

> Where to draw the line between cases where the injury is more general or more equally distributed, and cases where it is not, where, by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is the ground for special damage, and the more remote obstruction or interference which is not.

See also 66 C.J.S. *Nuisances* § 79 (1950).

41. In fact, there was a dispute as to whether anything not criminal could be a nuisance. The present thinking is that public nuisances result from illegal or unreasonable infringements on public rights. *See* Wade, *Common Law of Nuisance and the Restatement of Torts*, 8 THE FORUM 165, 166-69; RESTATEMENT (SECOND) OF TORTS § 821B (1977); 48 ALI PROCEEDINGS 49-65 (1971).

42. *See* note 45. *See also* Annot., 29 A.L.R. FED. 137 (1976) (§ 5: Balancing the equities in actions for injunctions). *Compare* Harrisonville v. W.S. Dickey Clay Mfg. Co., 298 U.S. 334 (1933) *with* American Smelting & Refining Co. v. Godfrey, 158 F. 225 (8th Cir. 1907), *cert. denied* 207 U.S. 597 (1907).

D. *The Nuisance Injunction*

The remedies for private and public nuisance are important substantive elements of nuisance law. Although this note focuses on the special considerations a court must assess when asked to enjoin government activity, it is essential to have an understanding of the background and development of the alternative remedies.

1. Private Nuisance

The remedy for a private nuisance is a damage claim and/or a permanent injunction.[43] The older view was that an injunction against a private nuisance would issue as a matter of course, at least against a private defendant.[44] Courts reasoned that a defendant's unreasonable interference with plaintiff's property constituted the taking of an interest in the property.[45] If not restrained by an injunction, a private defendant in a sense would have a power of eminent domain over a neighbor's property. Courts refused to allow a private defendant the power to take property even with compensation, and issued injunctions more or less automatically once the plaintiff proved that a private nuisance existed.[46]

The modern view is that the criteria for granting injunctions against private nuisances are the same as those for injunctions

43. *See* W. PROSSER, *supra* note 6, at § 90; 58 AM. JUR. 2d *Nuisances* § 100 (1971).

44. *See, e.g.*, Whalen v. Union Bag Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913) (court enjoined the operation of a pulp mill which employed over 400 people because it polluted a farmer's stream).

45. Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither the courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich. It is always to be remembered in such cases that "denying the injunction puts the hardship on the party in whose favor the legal right exists instead of on the wrongdoer." (Pomeroy's Eq. Juris. vol. 5, § 530.) In speaking of the injustice which sometimes results from balancing the injuries to the parties, the learned author from whom we have just quoted, sums up the discussion by saying, "The weight of the authority is against allowing a balancing of injury as a means of determining the propriety of issuing the injunction." To the same effect is the decision in Weston Paper Co. v. Pope (155 Ind. 394): "The fact that appellant has expended a large sum of money in construction of its plant and that it conducts its business in careful manner and without malice can make no difference in its rights to the stream."

Id. at 5.

46. *See* American Smelting & Refining Co. v. Godfrey, 158 F. 225 (8th Cir. 1907), *cert. denied* 207 U.S. 597 (1907), in which the court refused to weigh the equities, holding that the denial of an injunction would be a taking of property.

generally.[47] That is, courts consider private nuisance injunctions to be extraordinary remedies granted only after a showing that damage claims do not provide an adequate remedy and after a weighing of the equities. This balancing of equities proceeds through the determination of several issues: whether the cost of the damage to the plaintiff is greater than the cost of ceasing operation to the defendant; the good faith of the parties; and the public interest in allowing the defendant to continue his activity.[48]

While these factors are similar to those playing a part in the determination of the *existence* of a private nuisance, the analysis is distinct. When a court considers whether a private nuisance exists, the focus is on the extent and reasonableness of the damage, and the outcome is determined without a view to the reasonableness of the cause of the damage. If at the initial step it finds damage greater than a plaintiff ought to bear, then in order to determine the appropriate remedy the court must consider the utility of the defendant's conduct and the relative costs to the plaintiff and defendant.

In private nuisance injunction actions requiring courts to weigh the equities, a public defendant is likely to stand in a better position than a private defendant. One reason for this is that the government has the power to condemn property and easements. Allowing a damage claim for a private nuisance caused by the government is theoretically not much (if at all) different from requiring the government to condemn and pay for an interest in real property. Thus, since the government has the power to condemn, the question arises whether a court should ever enjoin its activity. Another argument is that balancing equities requires a court to determine where the public interest lies, and one might

47. *Cf.* 6 AMERICAN LAW OF PROPERTY § 28.35 (A.J. Casner ed. 1952 & Supp. 1962):

> Equity courts have broad discretionary powers to restrain or give other appropriate relief against existing or threatened public and private nuisance upon application of one who can show that irreparable injuries threaten him, that damages would not adequately compensate him for his threatened losses, and that their recovery in any event would necessitate a multiplicity of suits. . . . Injunctions are commonly denied altogether where the harm-producing activity or structure is temporary or where the harm to the defendant *or to public interests* from injunctive relief would outweigh the benefit it would give to the plaintiff. (emphasis added)

See generally 7 MOORE'S FEDERAL PRACTICE § 65.04 (2d ed. 1979).

48. *See* W. PROSSER, *supra* note 6, § 90 at 604. *See also* 66 C.J.S. *Nuisances* §§ 111-119 (1950).

expect that the governmental body would be acting in the public interest. If it is, injunctive relief would not be appropriate. Below, this note will discuss an exception to this principle.[49]

Consequently, a court faced with the same complaint directed against a public and a private plaintiff could fairly provide different remedies. For example, in private nuisance suits to enjoin expanded use of public airports, courts have found the public's interest in convenient air travel to be great enough to preclude an injunction.[50] In very similar cases involving private airports, courts have enjoined operations on private grounds.[51]

2. Public Nuisance

The appropriate remedy for a public nuisance is an injunction.[52] A damage claim is not appropriate; the annoyance, inconvenience, or threat to public safety that constitutes a public nuisance is not likely to be calculable or quantifiable as damages ought to be, nor is it clear to whom damages ought to be paid. Although the granting of damages (if that were possible) would discourage undesirable activity, society's interest in more complete *relief* would still make injunctions the appropriate remedy. Moreover, the object of public nuisance law is the elimination of activity which harms the public, not compensation to those damaged. More fundamentally, injunction or abatement is proper since the public nuisance action is akin to a criminal enforcement proceeding.[53] Thus, in terms of theory, damages are irrelevant in public nuisance actions.

49. *See* text accompanying notes 108-112.

50. *See, e.g.*, Township of Hanover v. Township of Morristown, 108 N.J. Super. 461, 261 A.2d 692 (1969).

51. *Compare* Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932), in which the court enjoined the operation of a private airport, *with* Loma Portal Civic Club v. American Airlines, 61 Cal.2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) in which the court denied a nuisance injunction against a public airport partly on the ground that there is a great public interest in air travel. *Accord*, Town of East Haven v. Eastern Airlines, 331 F. Supp. 16, 30 (D. Conn. 1971), in which the court denied a request by neighboring landowners for injunctive relief against jet traffic:

> No case has been found in which an injunction has been granted against the operators of a public airport or of a particular type of airplane at that airport, when both the airport and airplanes have been operated in accordance with federal statutes and regulations. . . . The right of the public to travel by air by means of modern airplanes far outweighs the disadvantage to the relatively few persons, such as the plaintiffs, who are adversely affected.

52. *See* W. PROSSER, *supra* note 6, at § 90.

53. *See* note 41 *supra*.

Consequently the public or private character of the perpetrator of a public nuisance is not relevant to the choice of remedies. Whatever significance a court might attach to the public interest in the governmental body's allegedly offensive conduct is relevant only to the threshold issue of whether unreasonable or illegal infringement on public rights exists. In sum, the determination of the public interest is only important to the question of the existence of the public nuisance, not the remedy.

E. *Preemption*

One element of nuisance law is the preemption issue, i.e. whether one body of law supersedes an otherwise applicable law. This can occur when statutes oust the common law or federal law ousts state and local law.[54] This note will examine only a few specific areas of this complicated topic, since issues are not significantly different for public than for private defendants.

Legislation can preempt common law actions in two ways: through a specific intent to preempt, or by thorough occupation of the field. Although in nuisance law a specific intent in statutes to preempt is rare, the continuing question as to whether certain statutory schemes so occupy a field as to preempt nuisance suits is a practical matter.

One such area is zoning. Before the widespread adoption of zoning ordinances, nuisance law provided a kind of land use control.[55] Plaintiffs could seek injunctions against building, arguing that a proposed use of property would constitute a nuisance in the particular neighborhood. Courts were thereby forced to engage in *ad hoc* judicial zoning. Naturally, serious questions arose concerning the functioning of judges as land use policy makers,[56] and as a consequence, zoning ordinances have largely replaced judicial zoning. Legislatures, with their greater fact-finding abilities, ac-

54. For general discussions of preemption, *see* Comment, *Illinois v. City of Milwaukee Revisited: Seventh Circuit Charts Important Role for Federal Common Law of Nuisance*, 9 E.L.R. 10087 (1979); Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).

55. W. PROSSER, *supra* note 6, at § 89.

56. *Cf.* Boomer v. Atlantic Cement Co., 26 N.Y.2d 223, 257 N.E.2d 871, 309 N.Y.S.2d 314 (1970). "A court should not (determine land use policy) on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit."

countability to the citizenry, and policy-oriented approach, are clearly more proper agencies for the making of land use policy.

However, the adoption of zoning has not preempted nuisance actions, as one court explained that compliance with zoning ordinances is persuasive but not controlling on the cause of private nuisance.[57] In other words, compliance with zoning does not necessarily preclude activity from imposing an unreasonable burden, but it does give the court some guidance as to what is reasonable land use in the area. Thus despite compliance with zoning ordinances, a defendant may act in such a manner as to give rise to a nuisance. For example, while an ordinance may allow the keeping of horses on residential property, a plaintiff may successfully argue that the particular way a defendant keeps his horses constitutes an unreasonable interference with plaintiff's property.[58] In short, an authorization of a category of use does not authorize every conceivable manner of use within that category.[59] The continued vitality of nuisance law within the framework of legislative zoning gives society flexible tools to further public policy while protecting private interests.[60]

Congress' passage of federal pollution control legislation has also given rise to complicated preemption problems. For one, courts must distinguish between preemption of state and local law (including common law actions) and preemption of federal common law nuisance (hereinafter "FCLN"). Furthermore, the most vexing problems occur when the potentially conflicting laws concern similar but not identical subject matter and the federal law lacks explicit intent to preempt.

A starting point for cases involving arguably conflicting state and federal laws without explicit federal legislative preemption is an examination of the object of the two sets of laws. Even if the laws

57. Desruisseau v. Isley, 27 Ariz. App. 257, 553 P.2d 1242 (1976).

58. "It is now the generally accepted rule that regardless of compliance with zoning ordinances or regulations, both business and residential uses may be enjoined if they constitute a nuisance to an adjoining property owner or resident." Hobbs v. Smith, 177 Colo. 299, 302, 493 P.2d 1352, 1354 (1972) (citing authority from California, Georgia, Florida, Kentucky, Massachusetts, New Hampshire, New Jersey, and Oklahoma).

59. Indeed, legislative authorization of a use which would otherwise be a nuisance can raise a constitutional issue. *See* 66 C.J.S. *Nuisances* § 17 (1950).

60. Zoning ordinances "now affect the whole problem [of land use and nuisance] . . . and within constitutional limitations may be decisive as to the permissible uses to which particular areas may be put." W. PROSSER, *supra* note 6, at § 89.

overlap functionally, a court is less likely to find preemption when they are directed toward different rather than identical goals.[61] The extent of the potential burden on the federal interest (such as the free flow of interstate commerce) is also relevant. However, what may actually be determinative is the court's own weighing of the importance of the interests served by each set of laws; if the court approved of the state policy, or can point to another federal interest which the state laws can be said to serve, it is less likely to find preemption.[62]

A survey of airport regulation cases—a classic area of preemption problems within the federal system—reveals that insofar as there is a pattern, courts are much more likely to find federal preemption of state and local statutes than of common law actions. Usually, the statutes attempt to control aspects of flight that the federal government specifically regulates such as minimum flying heights, curfews, and noise limitations.[63] In justifying preemption, courts have weighed the greater federal expertise in these matters and the potential for serious disruption of interstate commerce against the exercise of the police power by the states to protect important local interests.[64] The greater flexibility with which the common law of

61. *Cf.* Huron Cement Co. v. Detroit, 362 U.S. 440 (1960), in which municipal criminal penalties for the discharge of excessive smoke from defendant's boilers were upheld despite prior federal inspection and approval of the boilers. The object of the local regulation was pollution control, while the object of the federal regulation was safety.

62. *Cf. id. See* Loma Portal Civil Club v. American Airlines, 61 Cal. 2d 582, 591-92, 394 P.2d 548, 554, 39 Cal. Rptr. 708, 714 (1964). "Preemption is, of course, a matter of legislative intent. . . . The definition and adjustment of property rights and the protection of health and welfare are matters primarily of state law, and only a strong federal interest, as determined by Congress, will necessitate infringement upon state created rights in these areas. Only a compelling federal interest . . . justifies our implying an intent on the part of Congress to nullify common law rights normally in the state sphere." Courts in Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978) and Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972) required specific Congressional intent to preempt common law action. The courts did not find such intent, except for jet emissions in *Virginians for Dulles*.

63. *See, e.g.* Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1972); Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956); All American Airways v. Village of Cedarhurst, 201 F.2d 273 (2d Cir. 1953); Aaron v. Los Angeles, 40 Cal.3d 471, 115 Cal. Rptr. 162, *cert. denied*, 419 U.S. 1122 (1970).

64. *Cf.* Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 478, 261 A.2d 692, 700 (1969), in which the court rejected a federal preemption argument in a nuisance action against an airport:

[I]n each cited case the municipality intruded upon an area in which F.A.A. is

nuisance may be applied apparently accounts for the unwillingness of courts to find it preempted.[65]

> expert, namely altitudes, flight patterns, take-offs and landings. With safety to the aircraft, passengers and the land-bound public below as a prime goal, this court agrees that a court's conventional experience and decision-making power cannot and must not supplant the exercise of administrative discretion. . . . Where there is a clash between state and federal authority in this regard, the supremacy of the federal is recognized. Where there is no conflict, and certainly where there is state action consistent with the avowed second purpose of F.A.A., the suppression of noise, a state court may act.
>
> . . . .
>
> Although the ships in *Huron* could have met the municipal standard only by effecting structural alterations, the court evidently found this burden insufficient to creat a conflict. A means of compliance not violative of the Federal Safety Standards was available. If it is possible for aircraft to be made sufficiently quiet to meet local noise standards without jeopardizing the network of Federal Air Safety Regulations, a municipal noise level ordinance would probably create no conflict within the meaning of *Huron*. Since *Huron* also rejected an argument that preemption flowed from the fact that the ship was federally licensed, the fact that the planes are licensed and operating within a zone defined by Congress as "navigable airspace" should not immunize them from regulations evincing a valid local interest in maintaining community peace or protecting property rights.

Id. at 478-79, 261 A.2d at 700-01. *Accord*, Williams v. Superior Court In and For the County of Prima, 108 Ariz. 154, 494 P.2d 26 (1972) (compliance with F.A.A. regulations by Air National Guard does not preempt a school district's public nuisance action).

65. *See* Annot., 60 A.L.R.3d 665 (1974) for an extensive discussion of nuisance and exhaustion of administrative remedies:

> [M]ost of the courts which have considered the issue of exclusive jurisdiction [of administrative agencies] have held that the mere creation of an administrative body to control pollution, without any further evidence that the legislature intended to abolish the courts' common-law jurisdiction in nuisance, does not preclude the courts from exercising that common-law jurisdiction by permitting suits to enjoin pollution as a public nuisance.

Id. at 669.

> It seems clear that a defense [in a nuisance action] based on asserting the exclusive jurisdiction of an administrative agency has no chance of success, where the statute creating the agency expressly preserves common-law remedies. . . . Even where statutory language expressly preserving common-law remedies was not a factor, courts have seemed reluctant to find exclusive jurisdiction residing in an administrative agency. Defenses based on alleged failure to exhaust administrative remedies, or on conformity with administrative orders or permits, also have met with little favor in the courts. In regard to application of the primary jurisdiction doctrine, however, courts have been more evenly divided. At least where the administrative agency seems to be making a bona fide effort to abate the pollution which is the subject matter of the suit, courts seem willing to permit it to retain primary jurisdiction over the matter.

Id. at 671. The annotation does suggest that if the alleged nuisance is also clearly a violation of the Federal Water Pollution Control Act or Clean Air Act, the complainant should bring his action under the citizen suit provisions of those acts. The advantage of this is that the violation can be enjoined without weighing the equities.

In the seminal opinion on FCLN,[66] the Supreme Court left open the possibility that new federal statutes might preempt FCLN.[67] However, the statutes passed subsequent to that decision have generally included savings clauses which specifically disclaim any intent to supersede common law actions.[68] While a few courts have nonetheless stated that the statutes preempt FCLN,[69] most courts have ruled against preemption.[70]

In sum, the nuisance actions in federal and state law have generally survived broad preemption arguments. The flexibility of the action allows courts to employ them in such a way as to supplement, rather than conflict with, statutory regulation.

III. PROCEDURAL OBSTACLES

This section of the note examines certain procedural obstacles that a plaintiff must surmount before he can get an injunction on the merits in a nuisance action. Particular defenses which a plaintiff must overcome include: lack of jurisdiction, including sovereign immunity and subject matter jurisdiction in different courts; standing, and failure to state a claim for relief on the ground that statutes preempt the common law nuisance action.

A. *Personal Jurisdiction*

For many years sovereign immunity barred nuisance actions against governmental bodies.[71] Today, broad waivers of immunity, enacted by Congress and state legislatures, have largely eliminated this traditional obstacle.

66. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

67. *Id.* at 107.

68. *See*, Clean Air Act, 42 U.S.C. § 1857-2(e) (1976): "Nothing in this section shall restrict any right which any person (or class of persons) may have under . . . common law to seek . . . relief." Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1365(e) (1976) (same language), Federal Noise Pollution Control Act, 42 U.S.C. § 4911 (1976) (same language).

69. Massachusetts v. Veterans Administration, 541 F.2d 119 (1st Cir. 1976) (dictum), Committee for Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976).

70. Illinois v. City of Milwaukee, 599 F.2d 151, 162-63 (7th Cir. 1979); California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181, 193 (9th Cir. 1979), *cert. denied* 444 U.S. 864 (1979); Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1214-15 (D. N.J. 1978); United States v. U.S. Steel Corp., 356 F. Supp. 556, 559 (N.D.Ill. 1973).

71. *See generally*, Davis, ADMINISTRATIVE LAW § 27 (3d ed. 1972); Jafee, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 213 (1965); Gellhorn and Schenk, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

On the federal level, the government is no longer protected by sovereign immunity in nuisance injunction actions. Congress recently passed legislation permitting plaintiffs to name the United States as a defendant in actions seeking equitable relief.[72] This enactment eliminated enormous problems encountered in previous case law.[73] As a noted scholar has commented: "Sovereign immunity in suits for relief other than damages is gone."[74]

One limitation on the sovereign immunity of states is the provision in the Constitution that states may sue each other in the Supreme Court.[75] And although the Eleventh Amendment grants states immunity in federal courts from suits brought by citizens of other states, a recent Supreme Court decision[76] admits an exception to this immunity for suits seeking injunctive relief. In addition, by means of statutes all states have now waived to some degree sovereign immunity in their own courts,[77] and to the extent that a private nuisance claim against a state body can be characterized as a taking of property, the Fourteenth Amendment and 42 U.S.C. § 1983 allow suits against state officials.[78]

Unlike states, municipalities were never considered sovereign and autonomous by courts, and whatever immunity they possessed derived from state immunity.[79] At one time courts would draw fine distinctions for sovereign immunity purposes between municipal torts committed in the exercise of proprietary or governmental authority.[80] The statutes waiving sovereign immunity have eliminated such distinctions in most jurisdictions.[81]

72. 5 U.S.C. §§ 702-703 (1976) (amended §§ 702-703 (1966)).

73. Davis, ADMINISTRATIVE LAW IN THE SEVENTIES § 27 (1976).

74. *Id.* § 327 (July 1977 Supp.).

75. U.S. CONST. art. III, § 2.

76. Edelman v. Jordan, 415 U.S. 651 (1974).

77. W. PROSSER, *supra* note 6, § 131 at 975.

78. *Cf. id.*: "Until recent years, the chief breach in the immunity of the state arose out of constitutional provisions forbidding the taking, or sometimes also the damaging, of private property without compensation. These provisions usually have been held to be self-executing."

79. *See* Town of Amherst v. Niagara Frontier Authority, 19 A.D.2d 107, 241 N.Y.S.2d 247 (4th Dept. 1963); 56 AM. JUR. 2d *Municipal Corporations* § 643 (1971).

80. Miller v. Town of Irondequoit, 243 A.D. 240, 241, 276 N.Y.S. 497 (1935). *See* Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1937).

81. *See* 57 AM. JUR. 2d *Municipal, Etc., Tort Liability* § 293 (1971); 63 C.J.S. *Municipal Corporations* § 770b (1950): "Where a municipal corporation creates, maintains, or permits a nuisance, it is liable for damages to any person suffering special

B. *Subject Matter Jurisdiction: State or Federal Law*

Assuming that a plaintiff can get personal jurisdiction over a government defendant (*i.e.*, overcome sovereign immunity defenses), there are not likely to be problems finding a state court which has subject matter jurisdiction over nuisance claims. But there are circumstances in which two factors, the locale of the alleged harm and the character of the parties, might make the application of state common law inappropriate and require the use of federal common law. Such would be the case when the offending activity arises in one state and has effects in another.[82] A court in such a case would confront a dilemma as to which state's nuisance law to apply. "The law of the state whose citizens were subject to the injuries by interstate pollution ought not to govern the conduct of citizens and municipalities in another state, while to apply the law of the offending state would be the utilization of the laws of a state whose selfish interest was in the protection of offenders, herself, her political subdivisions or her citizens."[83]

The Supreme Court addressed this problem of choice of law by inviting the development of a substantive body of federal common law to apply to disputes concerning interstate or navigable waters and, in general, activities of pollution with an interstate element.[84] The Court said that "[w]hen we deal with air and water in their ambient or interstate aspect, there is a federal common law."[85] The Court further ruled that a federal common law nuisance claim raises a federal question under 28 U.S.C. § 1331.

Although some courts have seized on the notion that some peculiarity in the character of the parties[86] (*e.g.*, that they be of diverse citizenship or that the plaintiff must be a governmental body) is necessary to invoke FCLN, the better rule is that the interstate character of the harm itself is enough to raise a federal question,

injury therefrom, irrespective of negligence and notwithstanding the municipality is exercising governmental powers of function; and it may be enjoined from maintaining, or be required to abate, the nuisance." *See also* Illinois v. City of Milwaukee, 406 U.S. 91 (1972), in which the Court specifically allowed suits against municipalities under federal common law nuisance.

82. *E.g.*, Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), where pesticides used in New Mexico entered and contaminated Texas drinking water.

83. Sewage System v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976).

84. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

85. *Id.* at 103.

86. *E.g.*, Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976).

cognizable in federal court.[87] The substance of FCLN claims most often is a familiar public nuisance, usually having to do with water (*e.g.*, oil spills[88] and municipal[89] and industrial[90] pollution of rivers).

There are two additional ways that a nuisance case can be heard in federal court: removal and pendant jurisdiction. If a plaintiff sues the federal government in state court, the defendant can[91] exercise its power to remove the case to federal court. The federal court's exercise of pendant jurisdiction is more complicated. When hearing a federal claim for relief, a federal court has discretion to take jurisdiction over a state law claim arising out of the same facts.[92] Thus, if some governmental activity allegedly hurts a plaintiff's property, he might sue for a taking of his property in federal court and ask the court to take pendant jurisdiction over a state common law nuisance claim which arises out of the same activity.[93]

C. *Standing*

Anyone with an interest in the affected real property has standing to sue under a private nuisance claim.[94] It is more difficult to establish for a private plaintiff standing to challenge a public nui-

87. *See, e.g.*, Byram River v. Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) (in which a river is a named plaintiff together with several private parties). *Cf.* Illinois v. City of Milwaukee, 406 F.2d 91 (1972). "Thus, it is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105, n.6.

88. United States v. Ira S. Bushey Sons, Inc., 363 F. Supp. 110 (D. Ver. 1973).

89. Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973).

90. Stream Pollution Control Board of Indiana v. U.S. Steel Corp., 512 F.2d 1036 (7th Cir. 1975).

91. 28 U.S.C. § 1442 (1948).

92. *Cf.* Moor v. County of Alameda, 411 U.S. 693, *reh. denied* 412 U.S. 963 (1973); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

93. *See, e.g.*, Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91 (1st Cir. 1977) (municipal dump polluting a neighbor's land); *compare* Mosher v. City of Boulder, 225 F. Supp. 32 (D. Colo. 1964) in which the court dismissed a taking claim based on nuisance from a municipal dump. The court suggested a state court nuisance action.

94. *See, e.g.*, 58 AM. JUR. 2d *Nuisances* §§ 102-103 (1971), 66 C.J.S. *Nuisances* §§ 80-82 (1950).

sance. The public character of such suits was underscored by the now abandoned doctrine that only criminal offenses could be public nuisances.[95] And of course a private party has never had standing to prosecute a criminal offense. The modern view of public nuisance as an unreasonable infringement on *public* rights continues to emphasize the public nature of the injury. This in turn suggests that only the public's representatives should be parties with standing to sue to abate such a nuisance.

However, there are at least two situations in which a private plaintiff can have standing.[96] One is the case in which the private plaintiff is affected differently from the general public. Traditionally the courts have accepted private standing in that circumstance. The other is the case in which the private plaintiff sues in a class action on behalf of the affected public as the plaintiff class.

IV. ADJUDICATING THE MERITS—WHEN TO ENJOIN THE GOVERNMENT

Reiterating some conclusions reached earlier in this note, the public character of the defendant has a different effect in public and private nuisance litigation. As a matter of theory, the public character of a defendant should not matter in determining whether a *private nuisance exists* and cannot matter in defining the *proper remedy for a public nuisance*. On the other hand, the public character of a defendant is relevant to the issues of remedy in a private nuisance action and of liability in a public nuisance action because a determination of where the public interest lies is of the essence in these issues.

Furthermore, there is the limited class of private nuisance cases, referred to as unreasonable use/unnecessary damage nuisances, for which an injunction is the proper remedy. This is so because the offending conduct has little or no value, and society loses little or nothing by enjoining that conduct. Put another way, there would be no point in making the payment of private damages the "price" for continuing conduct that is without value. Thus, it makes no difference whether a private or a public defendant carries on such conduct; there is no need or justification for a different result. Thus with the exception of the unreasonable use/unnecessary damage class of private nuisances, a court should usually not subject a gov-

95. *See* note 41.
96. *See* text accompanying notes 39-40.

ernment defendant to an injunction in a usual private nuisance case,[97] given a government defendant's power to condemn land or pay nuisance damages, which under these circumstances are essentially the same transactions. The exception for unreasonable use/unnecessary damage is obvious, since the injunction remedy eliminates harmful and otherwise valueless conduct. It will be argued below that in some private nuisance cases an injunction would be appropriate because there is an implicit public nuisance element to the case. But before analyzing this group of cases, it is helpful to examine the difficulties plaintiffs might encounter in persuading courts that government defendants can create or maintain enjoinable public nuisances.

A. *Private Plaintiffs in Public Nuisance Cases*

Naturally enough, a private plaintiff bringing an action against the government faces the difficult problem of proving the existence of a public nuisance. It is true that courts recognize (or should recognize) that violation of a statute protecting public rights is clearly a public nuisance,[98] irrespective of the character of the defendant. The plaintiff has a harder task when he asserts that the nuisance arises from an "unreasonable" rather than "criminal" interference with public rights. The plaintiff puts the court in the position of having to decide that a public defendant—"the government"—is acting contrary to the public interest.

This need for a court (often guided only by vague standards) to rule against a government body on public policy constitutes the central problem in public nuisance law. The degree to which the

97. *Cf.* Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1933), (The Court denied an injunction against operation of a municipal sewage plant which polluted plaintiff's stream. "Where substantial redress can be afforded by payment of money and issuance of an injunction would subject the plaintiff to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. . . . Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.") *But cf.* Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 30 S.W. 971 (1895) (a successful suit to enjoin a state institution from polluting a stream).

98. *See* N.Y. Penal Law § 240.45 (McKinney 1980): "A person is guilty of criminal nuisance when: 1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or 2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct. Criminal nuisance is a class B misdemeanor."

alleged public nuisance is authorized by those accountable to the people reflects the constraints on a court in its determination of public will and policy. A public plaintiff seems to be in a better position than a private one when asking the court to rule against a public body. One obvious explanation for this difference is that, when engaged in public nuisance litigation, neither one of two public parties can claim to be the government's (or the "people's") only representative to make the crucial arguments as to whether the offending conduct is reasonable in light of the public interest. Furthermore, the usual plaintiff in a suit to protect public rights is a governmental body. This tradition is reflected not only in the usual difficulty private plaintiffs have had in gaining standing to litigate public nuisance actions, but also in the higher burden apparently placed on private plaintiffs. Not only are public instrumentalities more familiar to courts in the role of plaintiff, they may also represent a *different* public from that ostensibly represented by the public defendant. Most commonly, this is a geographic difference, that is, public officials of one locality or state suing officials of another locality or state. The court is then ruling on a dispute between two different public constituencies, not on a dispute between an individual or small group (the private plaintiff) and "the public."

When faced with the need to decide if certain governmental activity is an unreasonable interference with public rights, courts sometimes employ principles with analogues in administrative law: they use as tests of reasonableness the limits of governmental discretion and the extent of the authority delegated to a governmental body. The first principle emphasizes a court's inability or unwillingness to scrutinize closely and substitute its own judgment for governmental decisions.[99] Courts explain their position on this issue by citing their lack of intimate knowledge of alternatives and constraints. To illustrate, plaintiff injured by periodic flooding of streets sued to enjoin the city to improve its sewer system.[100] The court declined to issue an injunction for the reason stated above. Significantly though, the court added that it would reexamine the case if the defendant city did not, at some point, exercise its duty

99. Courts generally find no tort liability for the failure to provide services. *E.g.* Jenning v. United States, 291 F.2d 880 (4th Cir. 1961) (failure to remove snow from highway). *See* 57 AM. JUR. 2d *Municipal, Etc. Tort Liability* §§ 303-305 (1971).

to correct the problem.[101] Thus, a court may defer to the public defendant's discretion in handling public affairs. But it will also recognize that there are limits on that discretion and may enjoin the public defendant if it abuses its discretion, to continue the analogy to administrative law.

A court's other mode of analysis revolves around the relationship of the acting government agency and the legislature, that is, the nature of the authority delegated to the agency. Simply put, courts are often willing to find that acts of certain governmental bodies are *ultra vires*, not properly within the delegation made by the legislative bodies. Such a finding makes it possible for courts not to identify the government defendant as the embodiment of the people's will.

It has been said that the legislature can authorize a public nuisance,[102] but there is contrary authority[103] stemming from the principle that even the king cannot sanction a nuisance.[104] Clearly courts construe strictly legislation authorizing what would otherwise be public nuisance.[105] For example, a legislature may authorize the construction of a dump and leave the details of the project to some agency or official.[106] While the "people" may be said to have authorized the creation of a dump, the exact location and the care with which the dump is maintained would then involve decisions made by other non-legislative officials. The court may find that such officials are not acting within their authority when they create a condition amounting to a public nuisance.[107]

Although courts seize on this rationale and apply it without ap-

100. Barney's Furniture Warehouse v. Newark, 62 N.J. 456, 303 A.2d 76 (1973).

101. "An injunction would constitute a direct entry into a significant discretionary decision in the municipal fiscal area. However the city should be aware that a point could well be reached when continued inattention to serious and progressive injury to private interests might have to be adjudged such an arbitrary failure to act as to compel judicial relief." *Id.* at 470-71, 303 A.2d at 84.

102. 58 AM. JUR. 2d *Nuisance* §§ 228-229 (1971).

103. *Id.* § 229: It is "extremely doubtful whether the legislature has the power to authorize the doing of a thing which in its nature would tend to destroy or materially impair the morals, health or safety of the people."

104. Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850).

105. 42 N.Y. JUR. *Nuisance* §§ 21, 44 (1965).

106. *See generally* Annot. 59 A.L.R.3d 1244 (1974).

107. *Cf.* Bloss v. Canastota, 35 Misc.2d 829, 322 N.Y.S.2d 166 (1962) (careless and negligent operation); Proulx v. Keene, 102 N.H. 427, 158 A.2d 455 (1960) (negligent to allow substantially annoying smoke and smells).

parent jurisprudential rigor, there is a certain theoretical legitimacy to it. To repeat, the problem with accusing a government defendant of creating a public nuisance is that the activity in question can be a public nuisance only when a court finds, after weighing the equities, that the activity is not in the public interest. When a legislature authorizes activity, the court is put in the position of claiming to have better knowledge of the public interest and of public policy than elected representatives. This may not always be an unfounded claim, but it clearly makes courts uncomfortable. However, when it is not the people through their elected representatives but an official, removed from the legislature, that authorizes it, the offender is no longer necessarily expressing the popular will, even in theory. Consequently, a reviewing court would be substituting its judgment on the public interest for an administrative or bureaucratic judgment, not for a democratic or popular one. Viewed in this light, it makes some sense for a court to say that an official or administrative body, ordering or engaging in activity inimical (in the court's judgment) to the public interest, is acting outside its delegated authority.

In sum, courts recognize and respond to the problem of determining public policy by drawing on principles of other bodies of law. A survey of the cases involving public defendants indicates that courts are clearly more willing to find against a public defendant when a public plaintiff champions the public interest. The obviously greater burden courts impose on private plaintiffs in such public nuisance cases reflects the tribunals' understandable reluctance to pass judgment on (and thereby make) public policy absent a public plaintiff urging them to do so.

B. *The Mixed Action of Private and Public Nuisance and Equitable Relief*

As argued earlier, in the normal private nuisance action against a public defendant, the plaintiff is entitled to compensation but not to equitable relief, since the defendant retains the power of eminent domain. This last section will argue that there are private nuisance situations beside unreasonable use/unnecessary damage in which equitable relief against the government would be appropriate. When the private nuisance is also in fact a public nuisance,[108]

108. *See* note 104. *Accord* Urie v. Franconia Paper Corp., 107 N.H. 131, 218 A.2d 360 (1966).

even though the public element is not explicity before the court, such a private nuisance situation is present.

A plaintiff could sue on a nuisance which is simultaneously private and public as either (1) a private landowner suffering unreasonable damage, or (2) as a member of the public specially damaged by an infringement of a public right. The issue then would be whether the public interest is adequately represented and protected by a private nuisance action. The answer would seem to be that the court must recognize an exception to the rule stated above, *i.e.*, no injunctions against government defendants in private nuisance cases, in order to protect an unrepresented public interest.

Ortega Cabrera v. Municipality of Bayamon[109] provides a prototype for this discussion. In that case, a municipality constructed a landfill which attracted vermin, gave off noxious odors, and polluted a river running through plaintiff's land and supplying drinking water downstream.[110] The downstream effect of the pollution constituted the public nuisance in the case. Unfortunately, it is not clear from the report of the case whether the public nuisance action was before the court. The defendant municipality, which under other circumstances would be the logical party to sue to enjoin the public nuisance, was not an aggressive plaintiff because of its inevitable conflict of interest.[111] Under these facts, there would be no representative of the public interest in court. Therefore, unless the court itself recognized the public element of the harm it would apply traditional private nuisance remedies and leave the public unprotected. That is, the private plaintiff could be made whole with recovery for permanent damages while the government could go on polluting to the detriment of the public.[112]

109. 562 F.2d 91 (1st Cir. 1977).

110. "The site . . . could scarcely have been worse." *Id.* at 94. The court enjoined the municipality to reconstruct the landfill.

111. It is not hard to imagine that those downstream might not be aware of the seriousness of the hazard or might not be specially damaged in such a way that would allow them standing as private parties.

112. *See* Knox Hill Tenant Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971), in which tenants in certain public housing sued the District of Columbia to maintain and repair their buildings. The court took the general claim for relief and decided the case on what seemed to be principles of public nuisance (although the court also referred to some general language in the housing enabling legislation). While the particular plaintiffs might have been made whole with monetary compensation—perhaps a rent abatement—the court sought to protect the community with an injunction.

In short, the government defendant is often the party that would otherwise be the plaintiff in a public nuisance action. In such a case the court should have discretion to exercise equitable powers on behalf of the plaintiff (and the public) even though the case may formally be only a private nuisance case. Prudential considerations in favor of the government in the weighing of equities in a private nuisance case when public health is actually threatened should give way as they would in any public nuisance case. Examined even in the context of private nuisance remedies, the crucial question of where the public interest lies can no longer be foreclosed by a reference to the government's condemnation power. An independent determination of the public interest is required. And of course, from the perspective of public nuisance, an injunction even against the government is the appropriate remedy.

V. CONCLUSION

As the procedural and jurisdictional barriers to nuisance suits against governmental bodies fall, courts must face squarely the issue of whether the nature and policies of public and private nuisance law make injunction actions against the state appropriate. This note has argued that the fundamental policy of public nuisance law—to protect public health, safety and convenience—requires injunctive relief against those, regardless of their public character, who infringe on public rights. The underlying policy of private nuisance—protection of those with an interest in land from unreasonable damage—requires, in a limited category of cases, injunctive relief to end unnecessary harm, and in the broader range of cases, imposes a requirement that the government compensate those on whom it imposes an unreasonable interference with property rights. (One might note that requiring the government to compensate may as a practical matter have the effect of an injunction, *i.e.*, convince the government defendant to cease the activity.)

Lastly, many cases may in fact be simultaneously public and private nuisance actions, if the offending activity both unreasonably damages property and infringes on public rights. When the government is the source of the offending activity, it is unlikely that it will prosecute itself (unless the prosecutor has a different geographic constituency than the offender). Consequently, only private parties may be left to assert claims for relief. Even if private plain-

tiffs litigate such claims as private nuisance actions, courts should be prepared to exercise equitable jurisdiction to remedy the public nuisance implicit in the case. To do less would allow the contending parties to satisfy each other, while ignoring what is an important, if not the primary consideration in any nuisance case: the public interest.

Jim Griffith