

Re-validating the Doctrine of Anticipatory Nuisance

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INTRODUCTION

The law of nuisance has long been seen as the heart of real property law—this because of its distributive and re-distributive force in land use.¹ Put simply, nuisance law controls the manner in which people use their property. It does this through the use of a deceptively simple balancing test wherein the gravity of harm resulting to one party as a consequence of another's use of his property is weighed against the social utility arising from the original use.² It is through use of this construct that a determination is made when a use of land is so unreasonable as to cause injury to others.³ In its present form, while often *ad hoc* in application,⁴ a nuisance is defined generally as merely some interference with the “use and enjoyment of the land.”⁵ As will be seen, the most common remedy to

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1. See generally George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658 (1995) (using nuisance law as a paradigm to consider the development of the principle of reasonableness). Indeed, both the Fifth and Fourteenth Amendments to the United States Constitution place property rights on the same level of centrality to American society as life and liberty. U.S. CONST. amends. V, XIV, § 1 (stating that no person shall “be deprived of life, liberty, or property, without due process of law”).

2. RESTATEMENT (SECOND) OF TORTS §§ 827, 828 (1979). Those factors to be weighed or balanced in assessing the gravity of the offending harm to the plaintiff versus the utility of the offender's conduct consist of:

- (a) [t]he extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.

Id. § 827. In assessing “the social value that the law attaches to the primary purpose of the conduct[,]” not only will “the suitability of the conduct to the character of the locality” be considered, but also “the impracticability of preventing or avoiding the invasion.” *Id.* § 828; see *infra* notes 60–69 and accompanying text (analyzing the Restatement's balancing test in more depth).

3. See Jack W. Shaw, Jr., Annotation, *Public Swimming Pool as Nuisance*, 49 A.L.R. 3d 652, 654–55 (1973) (defining nuisance and describing how a swimming pool can rise to the level of a nuisance).

4. See John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 18–32 (observing that many nuisance decisions are fact sensitive and, thus, defy efforts to seek a cohesiveness in nuisance law).

5. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979). Richard A. Epstein asserts that only an actual physical invasion of protected interests gives rise to a prima facie case of tort liability. Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 57 (1979). For him, the identification of an invasion has far greater import than selecting a proper remedy to redress the invasion itself. *Id.* at 101; Richard A. Epstein, *Causation and Corrective Justice*:

abate a nuisance is injunctive relief in equity.⁶ Yet, judicial creativity has been seen through the use of such remedies as awards of permanent damages⁷ and the compensated injunction.⁸

The doctrine of anticipatory nuisance is brought into focus normally when a moving party is seeking to prevent commencement of what is alleged *will* become a nuisance.⁹ While recognized in both state and federal common law for many years,¹⁰ it is under-utilized because of the high burden of proof (e.g., reasonable certainty or high probability)¹¹ normally set legislatively¹² or through judicial interpretation and practice.¹³

In order to re-validate the doctrine of anticipatory nuisance and “contemporize” its inherent value to modern lawmaking¹⁴—and particularly to environmental management¹⁵—the thesis of this article is simple and

A Reply to Two Critics, 8 J. LEGAL STUD. 477, 480 (1979).

6. *See, e.g.*, *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913) (enjoining the owners of a pulp mill from operating their plant, in which they had invested more than one million dollars, because it was a nuisance).

7. *See* *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (ordering the defendant cement company to compensate the injured landowners with permanent damages in return for the landowners’ agreement not to sue in the future over the dust the plant created); *see also* Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235, 252 (1995) (arguing damages should be preferred to equitable relief because an award of damages forces parties to reveal private information).

8. *E.g.*, *Spur Indus., Inc. v. Del Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). In *Spur*, the court ordered a compensated injunction. *Id.* at 708. This meant that while the court recognized that the plant was a nuisance to the residents of Sun City, it determined that because Sun City, in part, came to the nuisance, it should indemnify the feed plant’s owners for the cost of moving the plant. *Id.* While a unique form of relief, it is inherently a fair one and should be used more frequently. “Money damages are the superior remedy when the nuisance creates anger and hard feelings . . .” Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2010 (2001). When emotions, however, are unlikely to interfere with bargaining, injunctions should be regarded as preferred. *Id.* *But see* Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 261 (2002) (suggesting enmity between parties should be disregarded totally by the law and seen, rather, as a complex vector of economical and ethical forces created by the parties themselves to be dealt with by them).

9. *See generally* Charles J. Doane, Comment, *Beyond Fear: Articulating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENVTL. AFF. L. REV. 441, 443 (1990) (noting that “[i]n some instances, a court may go so far as to enjoin as an anticipatory or prospective nuisance activity that has not yet caused harm, but threatens to do so”).

10. *See generally* Andrew H. Sharp, Comment, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENVTL. AFF. L. REV. 627 (1988) (presenting a historical look at the doctrine’s use in state and federal courts).

11. *See* Sharp, *supra* note 10, at 644–45 (noting that plaintiffs are turned off by the fact that courts applying the doctrine often require nuisance *per se*).

12. *Id.* at 645–48 (referring to the statutes of Alabama and Georgia—the only two states acting legislatively in this area); *see infra* Part II.C.

13. *E.g.*, *Fink v. Bd. of Trs.*, 218 N.E.2d 240, 244 (Ill. App. Ct. 1966), *quoted in* *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824, 836 (Ill. 1981).

14. *See generally* Doane, *supra* note 9 (arguing that the doctrine must be changed as a result of modern technology).

15. *See* Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL’Y REV. 223, 224, 239 (1995) (discussing the viability of anticipatory nuisance as a way for “plaintiffs to prevent the siting of waste facilities in their communities”).

direct: by greater judicial care and insight in applying the traditional balancing test to include a weighing of *both* the probability *and* the magnitude of an injury, equitably nuanced and practical decisionmaking will occur.¹⁶ Similarly, with legislative foresight, efforts should be made to define and clarify with greater specificity what evidentiary proofs must be submitted in order to establish, for example, a reasonable certainty of harm¹⁷ necessary to trigger injunctive relief. As will be seen, however, these two suggestions for re-validation are fraught with historical rigidities and a judicial and legislative reluctance to stray from the status quo. Given this situation, re-education will be slow, but will certainly occur over time.

I. HISTORICAL UNDERPINNINGS

Although the origins of nuisance law date back to thirteenth-century England when it was known as the assize of nuisance,¹⁸ it was not until 1611, with the introduction and acceptance of the maxim *sic utere tuo ut alienum non laedas* (so use your own property so as not to injure your neighbors)—elevated to the status of a fundamental principle over time—that a right of dominion over property was recognized. With this new right came a recognition that “each owner had a right to prevent neighbors from using land in a manner that would interfere with the owner’s quiet enjoyment.”¹⁹ This development, in turn, allowed the common law of nuisance early on to begin shaping what today is seen as the contemporary law of nuisance.²⁰

16. See Sharp, *supra* note 10, at 645 (“For plaintiffs to view anticipatory nuisance as a feasible and predictable doctrine, courts and legislatures must adopt a more coherent approach to its use.”).

17. See *Vill. of Wilsonville*, 426 N.E.2d at 842 (Ryan, J., concurring) (proposing an alternative balancing test which would allow “the court to consider a wider range of factors”).

18. Daniel R. Coquillette, *Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 765–72 (1979); WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS 617–18 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER & KEETON]. The assize of nuisance was recognized during the thirteenth century and covered invasions of the plaintiff’s land caused by conduct on the defendant’s land. *Id.* at 617. This was a criminal action that provided for civil relief. *Id.*; see also WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 2 (1987) (describing the first cause of action in tort that arose in the twelfth century as the intentional tort, which allowed damages to be recovered through the writ of trespass *vi et armis* in cases of battery).

19. James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 ENVTL. L. REP. 10231, 10231 (1994).

20. Early nuisance actions were allowed originally only for freehold estates but, by around 1500, this action was allowed for nonfreeholds as well. Coquillette, *supra* note 18, at 765–75. Additionally, the remedy of a nuisance action was solely a criminal one until the sixteenth century when it became possible for an individual to bring a civil action in tort. PROSSER & KEETON, *supra* note 18, at 618.

Sic utere was introduced specifically into the common law of England in *Aldred's Case* in 1611.²¹ There, the court found that the social utility of a pig sty was not sufficient to justify the maintenance of the nuisance it created to a neighboring property owner and ordered the sty removed.²² Following the letter and spirit of the maxim of *sic utere*, this holding protected the offended property owner from external harm (e.g., the sight and smell of the sty). Thus, the offending landowner was not allowed to use his property in a way injurious to another's property interest.²³ It is here that the first attempt of a judicial balancing of interests or harms or utilities was undertaken. It is also here where the undergirding centrality and the flexibility of the maxim are found: reasonableness.²⁴

In America, in 1884, the same principle of reasonableness was validated when it was recognized that "every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself."²⁵ Seventeenth-century courts protected the right of landowners to be free from "foul smells, uncomfortable

21. *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1611). In this case, the plaintiff brought an action to end the operation of a pig sty near his home, claiming that it polluted the air and blocked sunlight from his windows. *Id.* at 817; *see also* Coquilllette, *supra* note 18, at 773–75 (noting that the defendant "claimed social utility as a defense to a nuisance action" for the first time in *Aldred's Case*); Smith, *supra* note 1, at 683–86 (discussing at length the holding in *Aldred's Case*).

22. *Aldred's Case*, 77 Eng. Rep. at 817, 822; *see also* Coquilllette, *supra* note 18, at 775 (discussing the social utility defense in *Aldred's Case*). The defendant tried to use a social utility defense, stating "the building of the house for hogs was necessary for the sustenance of man." *Aldred's Case*, 77 Eng. Rep. at 817. The court did not accept this defense, saying that the neighbor's use was not sufficient justification for the nuisance. *Id.* at 821–22. *But see* Tal S. Grinblat, *Offenses to the Olfactory Senses and the Law of Nuisance*, 21 LEGAL MED. Q. 1 (1997) (expounding upon the modern view of pig sties).

23. The court did limit future application of this doctrine by saying that only matters of "necessity" are actionable. *Aldred's Case*, 77 Eng. Rep. at 821. The court distinguished between matters of "necessity" and "delight." *Id.*

24. *See* *Meeks v. Wood*, 118 N.E. 591 (Ind. App. 1918) (implying that the reasonableness of the alleged nuisance should be considered); PROSSER & KEETON, *supra* note 18, at 174–75. A satirical synopsis of the reasonable man standard is as follows: "[the reasonable man] will inform himself of the history and habits of a dog before administering a caress . . . [and] never drives his ball until those in front of him have definitely vacated the putting-green which is his own objective In all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman." *Id.*; *see also* Smith, *supra* note 1, at 663 (drawing the conclusion that reasonableness incorporates the concept of economic efficiency, equitable balancing, and the *sic utere* maxim).

25. *Woodruff v. N. Bloomfield Gravel Mining Co.* 18 F. 753, 807 (Cal. Dist. Ct. App. 1884). The court continued by observing:

If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipency.

Id.

temperatures, [and] excessive noise” if the questioned activity was judged to be of sufficient magnitude to constitute a nuisance.²⁶ In evaluating the facts of each case, courts were generally disposed to consider the costs imposed on neighboring property owners more intensely than the social utility of the challenged activity.²⁷

During the formative period, the courts also considered issues of future harm. Lord Chancellor Brougham, confronted with claims of potential future injuries—or anticipatory nuisance—in *Ripon v. Hobart*, utilized a “practical and rational view” to arrive at a test requiring a judicial weighing of the “magnitude of the evil against the chances of its occurrence” when considering relief here.²⁸

Interestingly, the courts of that day did not employ the Brougham test—perhaps, no doubt, choosing to defer to what were considered to be greater economic interests. Rather, they chose to focus on the uncertainty of any resulting harm.²⁹ Because of this positioning, and the heavy emphasis on actual harm, most claims to enjoin prospective nuisances were rejected.³⁰

A. *The Industrial Revolution*

Despite the early precedent of *Ripon v. Hobart*, torts “remained a neglected and undeveloped backwater until well into the nineteenth century.”³¹ The advent of the Industrial Revolution and its technological advances created a surge in tort litigation and an evolution of the law of nuisance.³² The “inherently conservative view of property . . . limited intensive and innovative uses of land [that] by the early 19th century, conflicted with the needs of a developing U.S. economy.”³³ As a result, a judicial modification of the common law doctrines of property, such as *sic*

26. Coquillette, *supra* note 18, at 770–71.

27. *Id.* at 820–21. The court in *Aldred’s Case*, however, did consider social utility. See Smith *supra* note 1, at 684–86 (noting that the defendant raised a claim of social utility as a defense).

28. Earl of Ripon v. Hobart, 40 Eng. Rep. 65, 68 (1834).

29. Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 625–26 (1976).

30. *Id.* at 624; PROSSER & KEETON, *supra* note 18, § 1.

31. Doane, *supra* note 9, at 444. In the middle of the nineteenth century, within a few decades, a great deal of literature was published on torts. See, e.g., OLIVER WENDELL HOLMES, JR., THE COMMON LAW chs. 3–4 (1881) (detailing the tort claims of trespass and nuisance).

32. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409 (1973); LANDES & POSNER, *supra* note 18, at 2–3; see also Larry D. Silver, *The Common Law of Environmental Risk and Some Recent Applications*, 10 HARV. ENVTL. L. REV. 61, 74 (1986) (describing the change of the focus of the common law of nuisance from *sic utere* to a utilitarian balancing approach).

33. McElfish, *supra* note 19, at 10231.

utere was effected in order “to keep pace with evolving expectations about reasonable property use.”³⁴

An equitable action to abate a nuisance can be brought against either a private or public wrong.³⁵ “[A] private nuisance is a civil wrong based [upon a] disturbance of rights in land while a public nuisance is . . . an interference with the rights of the community at large.”³⁶ Governmental agencies generally protect the rights of the public at large under the public nuisance doctrine and environmental statutes. Private nuisance, on the other hand, is the mechanism by which individuals protect their personal use and enjoyment of their land.³⁷

One of the first industrial-era private nuisance cases was *St. Helen’s Smelting Co. v. Tipping*.³⁸ Following the doctrine of *sic utere*, the court articulated a reasonable-point-of-view standard for determining whether there was a visible diminution of the plaintiff’s property value.³⁹ The defendant argued that the court should consider whether the defendant’s activities would add more than a minimal nuisance in light of existing industrial activities in the same locale.⁴⁰ The jury found, despite the presence of several other factories, that the defendant’s smelting company had visibly diminished the value of the plaintiff’s property and, although the company was not enjoined from its activity, dramatic damages were levied against the smelting company.⁴¹

34. *Id.*

35. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (mentioning both private and public causes of action based upon nuisance while discussing a state’s ability to impose confiscatory regulations or exactions). When *Lucas* is combined with *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987)—and especially *Dolan v. City of Tigard*, 512 U.S. 374 (1994)—a template emerges for structuring an objective standard for testing (or, largely solving) the contentious takings puzzle. In *Dolan*, the Supreme Court acknowledged that the property-police power balance is to be found within the common law of each state by and through application of the law of nuisance. *Dolan*, 512 U.S. at 390; see Douglas W. Kmiec, *At Last, The Supreme Court Solves The Takings Puzzle*, 19 HARV. J.L. & PUB. POL’Y 147, 147 (1995) (suggesting that the *Dolan* court “solved the takings puzzle . . . [by] calibrat[ing] the property-police power balance”); Smith, *supra* note 1, at 695 n.258 (citing cases and secondary materials that illustrate diverging views between the government and property owners regarding the reasonable use of property).

36. *Venuto v. Owens-Corning Fiberglass Corp.*, 99 Cal. Rptr. 350, 355 (Ct. App. 1971) (citing WILLIAM L. PROSSER, PROSSER ON TORTS 594 (3d ed. 1964)).

37. PROSSER & KEETON, *supra* note 18, at 619.

38. *St. Helen’s Smelting Co. v. Tipping*, 11 Eng. Rep. 1483 (1865); see Smith, *supra* note 1, at 686–88 (describing at length the decision in the *St. Helen’s* case); Coquilllette, *supra* note 18, at 782–91 (describing the balancing of utilities doctrine in conjunction with the *St. Helen’s* case).

39. *St. Helen’s Smelting*, 11 Eng. Rep. at 1487.

40. *Id.*

41. *Id.* at 1484. Although the jury found that the smelting company was operating in an ordinary and proper manner, the jury held that the company was not operating in a proper area and therefore made the company pay Tipping £361 in damages. *Id.*

Further defining an action in private nuisance, the court introduced the concept of economic balancing in the case of *Richard's Appeal*.⁴² In that case, the Supreme Court of Pennsylvania considered enjoining the operation of an iron works that was located in a residential neighborhood.⁴³ The court, in evaluating the capital investment in the iron works and the employment opportunities created by it, found that granting injunctive relief could cause more injury than a refusal.⁴⁴ It held that the injury caused to one landowner did not justify injunctive relief when enjoining the disputed activity would cause severe economic hardship. This economic balancing in turn "redefined the character of 19th century nuisance law [and] 'represented the thinking of courts into the 20th century.'"⁴⁵ Describing the critical components of a nuisance action, yet another nineteenth-century court established that a nuisance action for an injunction could not succeed if the offending activity was legal, reasonable, and carried on in an appropriate place.⁴⁶ All of these cases, taken together, reflect an adoption of a reasonableness standard and the concurrently emerging economic analysis that emphasizes balancing the utilities and reasonableness.⁴⁷

Although the balancing of the utilities doctrine, or balancing the equities,⁴⁸ originated in England, it found favor and took root only in the United States.⁴⁹ The balancing doctrine looks at both the reasonableness and utility of the defendant's activities and is commonly articulated as whether "a reasonable person would conclude that the amount of the harm done outweighs the benefits served by the conduct."⁵⁰ A persistent underlying theme in the balancing is an economic analysis that is represented by the discussion of the utility of the activities or the equity of enjoining the activities.⁵¹

B. Balancing: A Judicial Mechanism for Implementing Social Policy

During the nineteenth century, nuisance became a tool for adjusting the rights of industrial and residential landowners as their respective uses of

42. *Richard's Appeal*, 57 Pa. 105 (1868); see Smith, *supra* note 1, at 690 (discussing, in detail, the economic analysis used by the court in *Richard's Appeal*).

43. *Richard's Appeal*, 57 Pa. at 113–14.

44. *Id.*

45. Smith, *supra* note 1, at 690 (quoting Kurtz, *supra* note 29, at 658).

46. *Hole v. Barlow*, 140 Eng. Rep. 1113, 1118 (C.P. 1858).

47. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 28 (1992); Kurtz, *supra* note 29, at 658.

48. PROSSER & KEETON, *supra* note 18, at 631.

49. Kurtz, *supra* note 29, at 670.

50. PROSSER & KEETON, *supra* note 18, at 630.

51. Kurtz, *supra* note 29, at 658; see also Smith, *supra* note 1, at 690–91 (discussing the economic analysis employed by courts after the *Richard's Appeal* case).

property increasingly conflicted with one another.⁵² There was an imperative of economic development and this “provoke[d] political and social pressures that result[ed] in efforts to restrict or alter property relationships in the name of the public interest or a more democratic conception of economic liberty.”⁵³ As Richard A. Posner suggests, the common law of torts is best explained in terms of positivistic economic theory.⁵⁴ As a result, the courts, in the process of balancing, were solicitous of economic progress by applying nuisance law carefully in a manner to avoid retarding industrial and technological development.⁵⁵ This shift of the reasonableness standard—from a strict *sic utere* approach to balancing the utilities—created a judicial subsidy for developing industries by allowing them to impose the cost of their by-products on society in general.⁵⁶

Although the anticipatory nuisance doctrine and nuisance law did not generally go through any significant change during the nineteenth century,⁵⁷ scholarly thought on the subject changed greatly. The Restatement of Torts essentially adopted Lord Chancellor Brougham’s practical and rational approach that weighs the potential harm and the certainty of the harm to evaluate nuisance actions for future harms.⁵⁸ The Restatement considers imminence and seriousness of harm separately

52. See Barry R. Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1439 (1983) (“The industrial revolution spawned nuisance litigation by farmers and homeowners on the troubled frontier of new technologies against textile mills, blast furnaces, hydraulic mines, and cement plants.”). Today, “[t]he majority of nuisance cases concern complaints of discomfort or inconvenience caused by noise or smell.” R.A. BUCKLEY, *THE LAW OF NUISANCE* 23 (2d ed. 1996).

53. Herman Belz, *Property and Liberty Reconsidered*, 45 VAND. L. REV. 1015, 1018 (1992) (reviewing JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992)).

54. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (4th ed. 1992); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981). “These texts together serve as a touchstone for what is known as the Law and Economics movement. The movement’s main tenet is that many legal issues can and ought to be decided so that social benefits outweigh social costs.” Richard H. Seeburger, Book Review, 50 U. PITT. L. REV. 1091, 1091 (1989) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)).

55. Furrow, *supra* note 52, at 1441–42 nn.171–72. Different standards of care were used for factories and railroads than were used for individual property owners. *Id.*

56. See generally Smith, *supra* note 1 (discussing the evolution of the reasonableness standard and the reasonable man).

57. Fear of risk of harm became a cognizable nuisance action in this period. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 577 (4th ed. 1971). However, following the turn of the century, a claim of fear of future harms became much more difficult to support. *Id.* Courts began considering the location of the nuisance, whether the fear was reasonable, and uncertain risks. See *Bd. of Health v. N. Am. Home*, 78 A. 677, 678 (N.J. Ch. 1910) (discussing the location of the facility); *Hays v. Hartfield L-P Gas*, 306 N.E.2d 373, 376 (Ind. Ct. App. 1974) (holding that fear a propane tank will explode and injure neighbors is insufficient to establish a nuisance).

58. See RESTATEMENT OF TORTS § 933 cmt. b (1939) (clarifying that “seriousness and imminence . . . must be considered together”); RESTATEMENT (SECOND) OF TORTS § 933 cmt. b (1979) (restating verbatim from the 1939 edition); *Ripon v. Hobart*, 40 Eng. Rep. 65, 68 (1834).

stating that both must be considered but that a high degree of one of the elements could justify a grant for injunction.⁵⁹

C. The Restatement's Balancing Test: Defining Reasonableness

Today, a court deciding a nuisance case undertakes a balancing test whereby it examines two major considerations.⁶⁰ First, it will consider whether there is proof of substantial harm to the land; in other words, whether a tort has been committed on the land.⁶¹ Second, a court will undertake a balancing test based on the Restatement of Torts sections 827 and 828.⁶² This balancing test, which has developed into the heart of nuisance law,⁶³ entails balancing the gravity of the harm that the activity sought to be enjoined has caused, or will cause,⁶⁴ against the utility of the good in allowing the activity to continue.⁶⁵

In assessing the gravity of the harm, the Restatement seeks to evaluate factors such as “[t]he extent of the harm”; “the character of the harm”; the social value attached to the type of use in question; the suitability of the particular use to the locality; and the burden on the harmed individual to avoid the harm.⁶⁶ On the other side of the balancing scale, a court considers factors such as “the social value that the law attaches to the

59. RESTATEMENT (SECOND) OF TORTS § 933 cmt. b (1979) (“The seriousness and imminence of the threat are in a sense independent of each other . . .”).

60. Smith, *supra* note 1, at 688–94 (detailing the history of the balancing approach and contemporary practice). The author asserts “that balancing does in fact occur throughout the whole decisional process of analysis in determining whether a set of actions are reasonable or unreasonable.” *Id.* at 692 (emphasis omitted).

61. Charles L. Hellerich, Note, *Imminent Irreparable Injury: A Need for Reform*, 45 S. CAL. L. REV. 1025, 1030 (1972); see also PROSSER & KEETON, *supra* note 18, at 618 (observing that “a private nuisance is a civil wrong, based on a disturbance of rights in land”).

62. In addition to these two requirements, courts also require the plaintiff to establish that an action in equity for nuisance is necessary because an action at law will not provide adequate relief. Doane, *supra* note 9, at 451.

63. See George P. Smith, II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 60–61 (1991) (discussing the origins of the balancing of hardships analysis as seen in *Richard's Appeal*, 57 Pa. 105 (1868)). Because of its inextricable relationship to negligence as well as its dependence upon the standard of reasonableness, which is uncertain and unpredictable, private nuisance is seen as “a vulnerable tort.” Maria Lee, *What is Private Nuisance?*, 119 LAW Q. REV. 298, 325 (2003).

64. RESTATEMENT (SECOND) OF TORTS § 827 (1979) (discussing the “Gravity of Harm—Factors Involved”).

65. *Id.* § 828 (describing “Utility of Conduct—Factors Involved”); see also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 35 (2000) (“[C]ourts are interested in two kinds of factors [when determining nuisance issues]: a utilitarian calculus of the relative social value of the conflicting activities and a justice-oriented consideration of what constitutes a fair distribution of the benefits and burdens of land ownership.”).

66. RESTATEMENT (SECOND) OF TORTS § 827 (1979).

primary purpose of the conduct”; the suitability of the conduct in its present locality; and “the impracticability of preventing or avoiding the invasion.”⁶⁷

If a court determines that a specific use of land is unreasonable or that the gravity of the harm outweighs the utility of the good, then it will find the activity to be a nuisance.⁶⁸ If and when an activity is found to be a nuisance, the court will mandate an appropriate remedy. As stated earlier, there are a variety of possible remedies, the most common of which is enjoining the unreasonable use of the land and restoring to the plaintiff the enjoyment of his land.⁶⁹

II. THE DOCTRINE OF ANTICIPATORY NUISANCE

As the phrase implies and has been seen, anticipatory nuisance is simply a nuisance action which is brought before the unreasonable use has occurred. While seemingly a useful and resources-saving doctrine,⁷⁰ anticipatory nuisance is really a relatively seldom used common law cause of action.⁷¹ In essence, the doctrine gives courts “[t]he power to interfere by injunction to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor.”⁷²

67. *Id.* § 828.

68. Williams, *supra* note 15, at 240 (stating that “[a]n interference is ‘unreasonable’ when the gravity of the harm outweighs the utility of the actor’s conduct”). It is argued that because the test of reasonableness is ambiguous and misleading, the courts are—in nuisance actions—determining whether it is proper to apply a standard of strict liability. Indeed, private nuisance may well become absorbed by a “new” reformulated tort of strict liability. Lee, *supra* note 63, at 325.

69. See *Mahoney v. Walter*, 205 S.E.2d 692, 700 (W. Va. 1974) (upholding the trial court’s order permanently enjoining the defendant from utilizing his property as a salvage yard because the property was in a residential area and constituted a nuisance); see also *Hulbert v. Cal. Portland Cement Co.*, 118 P. 928 (Cal. 1911). In *Hulbert*, the Supreme Court of California affirmed an injunction that ordered defendant’s cement plant to cease operations. *Id.* at 930. The court, while recognizing that “petitioner’s business is a very important enterprise” and closing it would be a hardship, nonetheless ruled that the injunction was appropriate because the cement plant’s operation was destroying plaintiff’s citrus trees. *Id.* at 930, 932. But see *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). In a case that was similar factually to *Hulbert*, the New York Court of Appeals, instead of closing defendants cement plant outright, ordered the defendant to compensate the plaintiff with “permanent damages” based on the diminution in value of plaintiff’s land. *Id.* at 873, 875. The court, after balancing the equities, concluded that this was the most equitable result as the defendant was able to continue to reap return on his investment and the plaintiff was compensated for the damage. *Id.*

70. See *infra* notes 179–84 and accompanying text.

71. See, e.g., *Adams v. Michael*, 38 Md. 123, 129 (1873) (recognizing the doctrine); *Olsen v. City of Baton Rouge*, 247 So. 2d 889, 894 (La. Ct. App. 1971), *application denied*, 252 So. 2d 454 (La. 1971) (emphasizing that “[t]he general rule is that courts will not grant injunctions of anticipatory nuisances”); *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 185, 200 (N.M. 1994) (stating that “[t]he general rule is that anticipatory nuisance is a valid cause of action”); see also Sharp, *supra* note 10, at 627–28 (stating that while seldom used, the doctrine is recognized in the common law of most states).

72. *Adams*, 38 Md. at 125.

The judicial disdain underlying anticipatory nuisance is that the plaintiff is asking a court to rule that a proposed use of land is unreasonable *before* the use actually occurs. This has been referred to as the “despotism” of the anticipatory nuisance concept.⁷³ This despotism, because it prevents landowners from doing with their land as they please or deem reasonable, makes most courts hesitant to enjoin a proposed action without the plaintiff first meeting a very high burden of proof.⁷⁴ In *Holke v. Herman*, the Missouri Court of Appeals, in deciding whether the plaintiff could enjoin his neighbor from digging a pond on his property that the plaintiff feared would fill with polluted, noxious drainage,⁷⁵ summarized the judicial disdain for anticipatory injunctions when it stated:

In most instances the disposition is to wait until the dread is justified by the event. Experience has demonstrated that a meddlesome, interfering policy represses the spontaneous energy and many-sided activity, which arises naturally from self-interest and differences of taste and inclination among men and constitute the true springs of progress. The spirit of our laws is chary about regulating conduct or restricting action.⁷⁶

Even after making this pronouncement, the court did go on to recognize that plaintiffs may have a right to avoid an anticipated harm. The court stated that “the call for protection against an apprehended injury, reasonably certain to befall,⁷⁷ is as imperative as that for relief from one now felt.”⁷⁸

The crux of anticipatory nuisance actions, like regular nuisance action, is a balancing test “plus.” By this it is meant that, as with a regular nuisance action, a court faced with an anticipatory nuisance action should balance the plaintiffs’ rights to protect themselves from apparent threats of injury (the gravity of the harm) against the defendants’ rights to use their property as they wish (the utility of the good).⁷⁹ The “plus” is that in

73. Doane, *supra* note 9, at 452.

74. *See id.* (“Citing the ‘despotism’ inherent to preventing landowners from using their property as they please, courts traditionally are reluctant to enjoin threatening activity before it causes injury.”); *see, e.g., City of Albuquerque*, 889 P.2d at 200 (stating “that the anticipated nuisance must be proven so as to make any argument that it is not a nuisance highly improbable”); *Cherokee Hills Util. Dist. v. Stanley*, 1989 Tenn. App. LEXIS 429, at *19 (Tenn. Ct. App. June 9, 1989) (noting that an “[a]nticipatory nuisance will only be enjoined when [it is shown that] the injury is imminent and certain to occur”) (quoting *Wallace v. Andersonville Docks Inc.*, 489 S.W.2d 532, 535 (Tenn. Ct. App. 1972)).

75. *Holke v. Herman*, 87 Mo. App. 125, 133–34 (Mo. Ct. App. 1901).

76. *Id.* at 135.

77. *See supra* notes 52–68 and accompanying text (discussing the balancing test that courts consider in an anticipatory nuisance action, which can be equated to requiring a high standard of proof).

78. *Holke*, 87 Mo. App. at 142.

79. *See Doane, supra* note 9, at 453 (discussing the weighing that a court will undertake).

addition to the nuisance balancing test⁸⁰ a court faced with an anticipatory nuisance case must decide what standard of imminence and severity the plaintiff must establish *before* an injunction will issue.⁸¹ This is a standard on which courts have not reached a consensus,⁸² but have reached some guiding principles that this Article will now undertake to examine.

The practical and rational approach to assessing anticipatory nuisances, created in 1834 by Lord Chancellor Brougham,⁸³ was replaced by a variety of standards ranging from a reasonable certainty of harm standard to a *per se* nuisance requirement.⁸⁴ The success of an anticipatory nuisance claim depends largely, as observed, on the imminence and certainty of harm to the plaintiff, and the standard courts employ reflects their level of need for both of those elements.⁸⁵ However, the judiciary has failed to articulate a single standard describing how imminently and with how much certainty a defendant's conduct must threaten injury to the plaintiff before it may be enjoined.⁸⁶ The finding of imminent and certain harm has to overcome "[t]he uncertainty of future events, the frequency of groundless alarms and the despotism of needlessly preventing a citizen from using his property in . . . his interest."⁸⁷

80. In referring to the nuisance balancing test, I am referring to the test that is laid out in the RESTATEMENT (SECOND) OF TORTS §§ 827–28 (1979). See *supra* notes 62–67 and accompanying text (discussing the factors utilized in applying this balancing).

81. Sharp, *supra* note 10, at 631–32.

82. See, e.g., *Adams v. Michael*, 38 Md. 123, 128–29 (1873) (requiring a showing of material harm in one of the most oft cited anticipatory nuisance cases); *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 185, 200 (N.M. 1994) (requiring high probability); *Cherokee Hills Util. Dist. v. Stanley*, 1989 Tenn. App. LEXIS 429, at *20–21 (Tenn. Ct. App. June 9, 1989) (requiring imminence and certainty, a standard which the plaintiffs did not meet); *Duff v. Morgantown Energy Assoc.*, 421 S.E.2d 253, 260 (W. Va. 1992) (requiring proof “beyond all ground of fair questioning”); see also *Doane*, *supra* note 9, at 453 (“Courts have failed . . . to arrive at a single, clearly articulated definition of how imminently a defendant’s conduct must threaten injury to a plaintiff before it can be enjoined.”).

83. *Ripon v. Hobart*, 40 Eng. Rep. 65 (1834). Modernly in England, Section 80(1) of The Environmental Protection Act of 1990 provides for the issuance of an abatement notice “where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur” in its area. The Environmental Protection Act, 1990, c. 43, § 80 (Eng.). The Act continues by listing those actions considered to be statutory nuisances which present a condition “prejudicial to health” (e.g., smoke emitted, fumes of gas, dust, and steam). *Id.* § 79(1).

84. *Hellerich*, *supra* note 61, at 1030–37. Indeed, one prominent commentator takes the view that an anticipatory nuisance will not be enjoined unless it is first shown to be a nuisance *per se*. DANIEL R. MANDELKER, *LAND USE LAW* § 4.03 (2003).

85. *Holke v. Herman*, 87 Mo. App. 125, 142 (Mo. Ct. App. 1901).

86. Sharp, *supra* note 10, at 630–32.

87. *Holke*, 87 Mo. App. at 134.

A. *Nuisance Per Se v. Nuisance Per Accidens: Applying the Correct Standard*

Similar to the way that a nuisance can be either public or private,⁸⁸ a nuisance also can be either per se or per accidens.⁸⁹ A nuisance per se, or at law, “is a nuisance at all times and [sic] under any circumstances, regardless of location or surroundings.”⁹⁰ Courts over the years have declared a number of activities to be nuisances per se—generally, those activities that are immoral, extra hazardous, and violate state statutes are nuisances per se.⁹¹

A nuisance per accidens, or in fact, is an action, activity, or use of land that becomes a nuisance because of the nature of the surrounding circumstances.⁹² For example, there are numerous oil refineries and storage facilities that line the northern stretch of the New Jersey Turnpike. These facilities are not nuisances per se and are not considered nuisances per accidens because they are located in industrial areas, near shipyards, ports, other refineries, and factories. But, if the oil companies attempted to move their refineries and storage facilities twenty miles south, to the “Jersey Shore,” there is little question that the landowners would file, and likely prevail, in a suit to enjoin the refineries’ new locations. In this example, the refineries exemplify a nuisance per accidens. They are only a nuisance in certain situations, and a determination of such instances is bound to be fact intensive.

88. See *supra* notes 36–37 and accompanying text.

89. The Supreme Court of Tennessee noted the difference between these two types of nuisance when it stated: “the difference between a nuisance per se, and a nuisance per accidens is that in the former, injury in some form is certain to be inflicted, while in the latter, the injury is uncertain or contingent until it actually occurs.” Tennessee *ex rel.* Cunningham v. Fezell, 400 S.W.2d 716, 719 (Tenn. 1966) (citing Pierce v. Gibson County, 64 S.W. 33 (Tenn. 1901)); see also Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (“A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.”).

90. Harless v. Workman, 114 S.E.2d 548, 552 (W. Va. 1960); Sharp v. 251st St. Landfill, 810 P.2d 1270, 1276 n.6 (Okla. 1991), *overruled on other grounds by* DuLaney v. Okla. State Dep’t of Health, 868 P.2d 676, 683 (Okla. 1993); 58 AM. JUR. 2D Nuisances § 16 (2002); see also Sharp, *supra* note 10, at 630 (defining nuisance per se as “an act that is a nuisance ‘at all times and under any circumstances’”) (quoting Marshall v. Consumers’ Power Co., 237 N.W.2d 266, 283 (Mich. Ct. App. 1975)). See generally ROSALIND MALCOLM & JOHN POINTING, STATUTORY NUISANCE: LAW AND PRACTICE (2002) (quoting the aim of the book “to provide a comprehensive and definitive account of the various types of statutory nuisance [laws]” from the preface).

91. ROBERT R. WRIGHT & MORTON GITELMAN, CASES AND MATERIALS ON LAW USE 47 (4th ed. 1991).

92. Duff v. Morgantown Energy Assoc., 421 S.E.2d 253, 257–58 n.8 (W. Va. 1992).

B. Inconsistent State Law Decisions: What Standard to Require?

Many courts, especially those at the state level,⁹³ have not acted on anticipatory nuisance actions in a consistent manner. It has been theorized that the inconsistency, particularly with respect to the level of proof required of a plaintiff, is one reason anticipatory nuisance is underutilized.⁹⁴ Not only is there inconsistency between the states, but also within each state as judges decide anticipatory nuisance actions based on the particular facts.⁹⁵ This Article will not focus extensively on the rather limited federal case law.⁹⁶ Rather, primary emphasis will be placed upon a critical analysis of the treatment of this problem area by the state courts. That said, the Article now evaluates the three discernible judicial trends emerging from what may have been seen as a heavy fog of penumbras and inconsistencies.

1. The Requirement of a Nuisance Per Se

The first apparent trend is that some courts will only consider the anticipatory enjoining of an activity if that activity constitutes a nuisance per se.⁹⁷ In *Wallace v. Andersonville Docks, Inc.*, the Tennessee Court of Appeals heard an appeal of the trial court's decision to enjoin the operation

93. State courts hear the majority of nuisance and anticipatory nuisance actions. See Sharp, *supra* note 10, at 632–45 (noting that federal courts have addressed anticipatory nuisance cases only three times since 1900, and describing numerous instances where state courts have addressed the issue). Further research has uncovered that, in fact, federal courts have dealt with this issue more than three times. See, e.g., *Commerce Oil Refining Corp. v. Miner*, 281 F.2d 465 (1st Cir. 1960). The First Circuit, although it set aside the verdict, noted that the United States District Court for the District of Rhode Island found that a refinery, if operated, would pollute the air with noxious gases. *Id.* at 471.

94. Sharp, *supra* note 10, at 632–33.

95. *Id.* at 633. The New Mexico Supreme Court held that an activity can be enjoined only “upon a showing that the nuisance is inevitable from the proposed use or operation of the premises.” *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 185, 201 (N.M. 1994) (quoting 18 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.59.40, at 487 (3d ed. 2003)). In this opinion, the court expressed, in a slightly more convoluted fashion, the rule in New Mexico that an “anticipated nuisance must be proven so as to make any argument that it is not a nuisance highly improbable.” *Id.* at 200.

96. A perusal of the federal cases shows that the federal courts have developed a federal common law of anticipatory nuisance and, in the rare instances when they are called on to resolve this cause of action, have done so more consistently than state courts. See, e.g., *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 567 (1892) (upholding injunction prohibiting the mining of phosphate from the Coosaw river). The three cases that are discussed at length in Sharp, *supra* note 10, at 633–36, are *Missouri v. Illinois*, 180 U.S. 208, 248–49 (1901) (overruling defendant's demurrers to complainant's bill while noting “that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence”); *Texas v. Pankey*, 441 F.2d 236, 237 (10th Cir. 1971) (enjoining the anticipated nuisance of spraying toxaphene, a pesticide, without actually discussing the doctrine); and *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir. 1979) (adopting the determinate and satisfactory standard).

97. Sharp, *supra* note 10, at 638 n.77.

of a racetrack.⁹⁸ The plaintiffs argued that the operation of the racetrack should not be permitted because of the loud noise that the motorcycles and other racing machines would produce.⁹⁹ The appeals court reversed the trial court and stated that “the thing complained of is a nuisance per accidens, [not a nuisance per se] . . . [and] such [a] nuisance will not be enjoined anticipatory to its going into operation.”¹⁰⁰

Similarly, in *Cherokee Hills Utility District v. Stanley*, a Tennessee Court of Appeals examined the plaintiff’s claim that defendant’s building violated an implied restrictive covenant on the land.¹⁰¹ The court, applying a de novo standard of review, first highlighted the Chancellor’s finding that Stanley’s proposed use violated the express provision that defendant’s lot not be used in a way that “might or could create a nuisance.”¹⁰² The court then undertook to examine the Chancellor’s reasoning. First, the court found that Stanley’s white-water rafting business had not yet begun and that there was no factual basis to determine whether, if commenced, it would constitute a nuisance.¹⁰³ The court added “[a] mere possibility or fear of future injury from a . . . business which is not a nuisance per se is not ground for injunction, and equity will not interfere where the apprehended injury is doubtful or speculative.”¹⁰⁴ In even more restrictive language, it stated: “[A]nticipatory nuisance will only be enjoined when the injury is imminent and certain to occur. Injunctive relief will be granted only in those cases where it is shown that the proposed establishment is a nuisance per se.”¹⁰⁵

98. *Wallace v. Andersonville Docks, Inc.*, 489 S.W.2d 532, 533 (Tenn. Ct. App. 1972).

99. *Id.* at 533–34. The court found that it is common knowledge that the motorcycles would make “considerable” noise. *Id.*

100. *Id.* at 535.

101. *Cherokee Hills Util. Dist. v. Stanley*, 1989 Tenn. App. LEXIS 429, at *1 (Tenn. Ct. App. June 9, 1989). In this complicated case, land went through numerous transactions before ending up in defendant Stanley’s ownership. *Id.* at *1–7. The land began as employee housing of the Tennessee Copper Company where employees could buy a lot for \$100 and the land was subject to a residential only requirement. *Id.* at *1–2.

102. *Id.* at *6, *8–10. The Chancellor issued a permanent injunction prohibiting Stanley’s proposed use. *Id.* at *9–10.

103. *Id.* at *19.

104. *Id.* at *19 (alteration in original) (emphasis added) (omission in original) (quoting *State ex rel. v. Feezell*, 400 S.W.2d 716, 719 (Tenn. 1966)).

105. *Id.* at *20 (alteration in original) (quoting *Wallace v. Andersonville Docks Inc.*, 489 S.W.2d 532, 535 (Tenn. Ct. App. 1972); see *Fink v. Bd. of Trs.*, 218 N.E.2d 240, 244 (Ill. App. Ct. 1966) (holding that “a court of equity may enjoin a threatened or anticipated nuisance, where it clearly appears that a nuisance will necessarily result from the contemplated act”); *Koeber v. Apex-Albuq Phoenix Express*, 380 P.2d 14, 16 (N.M. 1963) (holding that the construction and operation of a truck terminal was an enjoynable nuisance because it was “manifest” that it would necessarily become a nuisance); *Phillips v. Allingham*, 33 P.2d 910, 915 (N.M. 1934) (holding that a gasoline storage site was not a nuisance per se nor would necessarily result in one).

2. Irreparable Injury

A second theme that some courts have utilized in deciding cases on this issue is to consider carefully the gravity of the harm. These decisions focus accordingly on whether the irreparable harm the plaintiff is contending will occur.¹⁰⁶ This is true particularly in environmental pollution cases.¹⁰⁷ In *Sharp v. 251st Street Landfill Inc.*, the Supreme Court of Oklahoma heard a case that nearby landowners brought to enjoin a proposed landfill.¹⁰⁸ The plaintiffs did not argue, and the court did not find, that the landfill would be a nuisance *per se*;¹⁰⁹ rather, the residents argued that the site would pollute the area's groundwater.¹¹⁰ After lengthy discussion of the site's safety, and a battle of experts,¹¹¹ the court held that an injunction was proper because once groundwater is contaminated it is almost impossible to clean up.¹¹² In reaching this decision, it undertook to "balance the equities."¹¹³ In so doing, the court found that the gravity of the potential harm, namely irreparable groundwater contamination, outweighed the utility of the good, the construction of a sanitary landfill.¹¹⁴

3. The Dual Standard

A third approach that some courts have applied arises out of a dual standard. Under the dual standard, these courts will enjoin activities that are either nuisances *per se* or will necessarily become a nuisance.¹¹⁵ Thus, in *Seidner v. Ralston Purina Co.*, the rule in Rhode Island was already

106. Sharp, *supra* note 10, at 638; Williams, *supra* note 15, at 241.

107. Williams, *supra* note 15, at 241.

108. Sharp v. 251st St. Landfill Inc., 810 P.2d 1270, 1272 (Okla. 1991), *overruled on other grounds* by *Dulaney v. Okla. State Dep't of Health*, 868 P.2d 676, 683 (Okla. 1993). The landowners formed a group known as the Okmulgee County Toxic Waste Information Group Inc. to fight the proposed landfill and the permits that the state issued allowing its construction. *Id.*

109. *Id.* at 1276 n.6 (stating that it is "generally accepted that sanitary landfills are not nuisances *per se*") (citing *Horn v. Cmty. Refuse Disposal, Inc.*, 180 N.W. 691, 693 (Neb. 1970)).

110. *Id.* at 1279.

111. *Id.* at 1279–80; *see infra* Part II.E.1.

112. Sharp, 810 P.2d at 1281.

113. *Id.*; *see supra* text accompanying notes 62–67 (discussing the Restatement of Torts' balancing of equities).

114. Sharp, 810 P.2d at 1281. The court stated:

We also believe the balance of equities here favors Appellees due to the potential long-term effects contamination may have to their water sources and granting the injunction was not adverse to the public interest. At most, Appellant has a financial stake in constructing and operating its landfill. Although this Court recognizes the need for landfills, this record does not conclusively indicate a particular need for the involved one at the designated location.

Id.

115. *See* Sharp, *supra* note 10, at 640–41 (noting that New Mexico courts adhere to this dual standard).

established “that where a proposed structure, or the use of it, is not a nuisance per se,” the court will not grant an injunction unless the alleged nuisance will “necessar[ily] result”¹¹⁶ It has been suggested that the dual standard is in fact redundant because “nuisances per se are included within the set of actions that would ‘necessarily result’ in a nuisance.”¹¹⁷

C. Surveying Georgia and Alabama: An Analysis of the Two States that Have Anticipatory Nuisance Statutes

Currently, two states have statutory enactments that cover the issue of anticipatory nuisance. Those two states, Georgia and Alabama, have nearly identical statutory language but, as is generally the case with this cause of action, courts have given each statute varying interpretations. The following section compares the judicial decisions that these two statutes have brought about and will try to develop a template for resolving the numerous problems the doctrine presents.

1. Georgia

Georgia Code section 41-2-4 states, “Where the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed.”¹¹⁸

Although Georgia case law on this topic is nonetheless relatively dated, it is quite instructive. For example, in *Powell v. Garmany*, the defendant appealed the trial court’s granting of an injunction that restrained him from building a dog and cat hospital on his property.¹¹⁹ The plaintiffs, nearby homeowners, claimed that the animal hospital would cause incessant noise at all hours, would invite fleas, flies, as well as odors, and generally would make “the plaintiff’s property almost uninhabitable, and seriously interfere with the comfort, peace, and quiet of her home and family.”¹²⁰ On appeal, the court reversed the injunction and allowed the defendant to pursue his

116. *Otto Seidner, Inc. v. Ralston Purina Co.*, 24 A.2d 902, 909 (R.I. 1942) (quoting *City of Lynchburg v. Peter*, 133 S.E. 674, 682 (Va. 1926)). The *Lynchburg* court added that it would not simply enjoin a proposed activity because it may become a nuisance, rather it would “await the actual results.” *Id.*

117. Sharp, *supra* note 10, at 640.

118. GA. CODE ANN. § 41-2-4 (1991). See note 83, *supra*, for the contemporary legislative response to this issue in England through implementation of The Environmental Protection Act of 1990.

119. *Powell v. Garmany*, 67 S.E.2d 781, 782 (Ga. 1951).

120. *Id.* The defendant’s proposed hospital was to be located 400 feet to the south of plaintiff’s home and was to house a large number of sick animals. *Id.*

venture.¹²¹ In so doing, the court looked to the state statute and to prior case law to find that the plaintiff's allegations of noise, odor, and the like were merely "speculative and contingent conclusions of the pleader" and, therefore, they did not provide grounds for relief because they did not meet the statutory requirement of a reasonable degree of certainty.¹²²

Similarly, in *Chevron Oil Co. v. Frazier*, the appellate court affirmed the trial court's refusal to enjoin construction of the defendant's bulk oil and gas storage facility in a residential neighborhood.¹²³ The court stated first that the vending and bulk storage of gasoline and oil did not, of itself, constitute a nuisance.¹²⁴ After citing *Powell* and *Elder*, it stated that "'mere apprehension of injury'" is insufficient and that "it cannot be presumed in advance of its erection and operation that the [proposed] facility . . . will be operated in an improper manner."¹²⁵

In *Isley v. Little*, the residents of an area near a proposed drag-racing strip brought suit to enjoin its construction due to loud noise, intoxicated visitors, and various other problems that the track would bring to the area.¹²⁶ The Supreme Court of Georgia held that the plaintiffs' averments of excessive noise,¹²⁷ dust,¹²⁸ and smells¹²⁹ were to a reasonable degree certain and that, therefore, the plaintiffs' action for anticipatory injunction could prevail.¹³⁰ It held further that the drag strip would "continuously and irreparably damage the petitioners' health and property and prevent the full enjoyment of their properties."¹³¹

It appears that one of the major foundations underlying the rule that there must be certainty before a court of equity will enjoin an alleged

121. *Id.* at 783.

122. *Id.* The court also cited prior case law in reaching its conclusion. The ruling stated that in Georgia, "[a] court of equity will only . . . restrain the erection of a building . . . on the ground that the operation of such business will constitute a nuisance, where it is . . . reasonab[ly] certain[] that such operation necessarily constitutes a nuisance, the consequences of which will be irreparable damages." *Id.*; see also *Elder v. City of Winder*, 40 S.E.2d 659 (Ga. 1946) (requiring a reasonable degree of certainty to enjoin).

123. *Chevron Oil Co. v. Frazier*, 185 S.E.2d 379, 381 (Ga. 1971).

124. *Id.* at 380.

125. *Id.* at 380-81 (quoting *Powell v. Garmany*, 67 S.E.2d 781, 783 (Ga. 1951)).

126. *Isley v. Little*, 124 S.E.2d 80, 81 (Ga. 1962).

127. The court characterized the noise as follows: the cars will "create loud and damaging noises by the roaring of motors; attain speeds of 90 to 150 miles per hour . . . crying of tires and concomitant noises arising therefrom and the necessity of . . . stopping said vehicles, . . . with the stopping and starting operation causing the crying from spinning and skidding tires to be heard clearly a distance of two miles." *Id.*

128. The plaintiffs also alleged that "clouds of dust and smoke" would emanate from the track. *Id.*

129. With regard to odors, the complaint discussed the smell of burnt rubber and engine fires. *Id.*

130. *Id.*

131. *Id.*

nuisance is that the plaintiffs will have an adequate remedy at law *even if* the contemplated use is begun.¹³² Courts in Georgia, when deciding an anticipatory nuisance action, must look to the two-part test of the statute and find both irreparable damage¹³³ *and* a high degree of certainty that such damage will occur before enjoining a proposed land use. This means that there is less fact-sensitive balancing¹³⁴ than under the common law approach and that, in reality, it is extraordinarily difficult for a plaintiff to prevail in an anticipatory nuisance suit.¹³⁵

2. Alabama

The Alabama statute is strikingly similar to Georgia's. It states that, "Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a court may interfere to arrest a nuisance before it is completed."¹³⁶ As with the Georgia statute, the language of the Alabama statute leaves large gaps open for interpretation—such as what constitutes a reasonable degree of certainty and when will damages be irreparable.¹³⁷ Alabama courts have attempted to answer these questions but often have fallen prey to the same inconsistent approaches that continue to hinder the common law doctrine.¹³⁸

132. *Columbus v. Diaz-Verson*, 373 S.E.2d 208, 210 (Ga. 1988). While this was not a true anticipatory nuisance action, rather an action to block a building permit, the Supreme Court of Georgia cited various anticipatory nuisance cases to support its decision to allow the permit. *Id.* at 209–10. The court stated that because the plaintiffs had mere allegations of speculative injuries "with nothing to show that they will in fact happen" the permit could be allowed. *Id.* at 210. The court was not concerned with this result as it next noted "that the appellees have adequate remedies at law . . . for any future damages." *Id.*

133. This is not to imply that irreparable injury is impossible to find. *See, e.g., Camp v. Warrington*, 182 S.E.2d 419, 420 (Ga. 1971) (enjoining construction of an airport that would cause planes to fly within 50–100 feet of plaintiffs' homes); *Isley*, 124 S.E.2d at 81 (holding that a petition seeking to enjoin a drag strip based on nuisance as a cause of action could proceed).

134. *See Camp*, 182 S.E.2d at 420 (detailing the facts regarding the construction of an airport). *But see Isley*, 124 S.E.2d at 81 (detailing the harms that construction of a drag strip would bring about and balancing that against the plaintiffs' right to use their land).

135. It seems logical that there have been very few anticipatory nuisance cases in Georgia in the last thirty years—this being in no small part due to the very difficult burden that the statute demands. Plaintiffs have come to learn that they are unlikely to prevail in such a suit and instead they simply wait until the building causes what they consider is an unreasonable interference with their land before filing a suit.

136. ALA. CODE § 6-5-125 (1975).

137. *See Sharp*, *supra* note 10, at 647 (discussing the fact that the statutory enactment offers no clear guidelines or standards).

138. *See id.* at 646 (noting that "Alabama courts have disagreed as to the degree of certainty required by the statute").

a. Irreparable Damage

The first requirement of the Alabama statute that a plaintiff must establish is that the proposed land use will cause irreparable damage.¹³⁹ In the early case of *Clifton Iron Co. v. Dye*, the Supreme Court of Alabama denied a plaintiff an injunction, in part, because the damage to his property that the alleged nuisance would cause was not sufficient.¹⁴⁰ The case involved the construction of an iron ore plant and the washers that were used to clean the ores. These washers caused sediment to flow downstream and to accumulate on plaintiff's land and pollute the river abutting his property.¹⁴¹ In assessing the injury, the court adopted a balancing test, when it held that, "[i]n determining [the injury], the court should weigh the injury that may accrue to the one or the other party, and also to the public, by granting or refusing the injunction."¹⁴²

In a more recent case, the degree of injury again became an issue. In *Shell Oil Co. v. Edwards*, local residents filed suit to stop the construction of a filling station.¹⁴³ The appellate court refused to enjoin the construction even though the location would "work hurt" on "three hundred very expensive and highly restricted residences."¹⁴⁴ Rather, it found that the decreases in property value were not "irreparable damages."¹⁴⁵

It has been observed that "some Alabama courts interpret the state's anticipatory nuisance statute to account for the extent of injury."¹⁴⁶ This implies, in turn, that Alabama courts should not look at the extent of the injury when interpreting an anticipatory nuisance statute.¹⁴⁷ The statute demands that the extent of the injury be examined; for it, as Georgia's, is really a two-part test—irreparable injury and a reasonable degree of certainty.¹⁴⁸ Consequently, the courts are required to examine the extent of the injury to ascertain whether it will be irreparable.

139. ALA. CODE § 6-5-125.

140. *Clifton Iron Co. v. Dye*, 6 So. 192, 193 (Ala. 1889).

141. *Id.* Although the court was clear that the plant did pollute the river, making it impossible to use as drinking or bathing water, the court did not feel the injury was sufficient because the plaintiff had other means of obtaining drinking water on his property. *Id.*

142. *Id.*

143. *Shell Oil Co. v. Edwards*, 81 So. 2d 535, 537 (Ala. 1955).

144. *Id.* at 539. The proposed station, for which there did not appear to be a need, would be located very close to these prestigious homes. *Id.*

145. *See id.* at 540-41.

146. Sharp, *supra* note 10, at 646. It has also been observed that "Alabama courts exhibit inconsistency with respect to whether the Alabama statute requires a nuisance per se." *Id.* at 637.

147. *See id.* at 646-47.

148. ALA. CODE § 6-5-125 (1975).

b. Reasonable Degree of Certainty

The next step an Alabama court must take is to determine whether an irreparable injury is reasonably certain to occur. A series of older Alabama decisions summarize the general treatment of this issue.¹⁴⁹ In 1838, the Alabama Supreme Court laid the groundwork for anticipatory nuisance in the case of *Rosser v. Randolph*.¹⁵⁰ The case involved the proposed construction of a sawmill. The plaintiff filed a bill to abate it as a nuisance, but the court denied the bill, holding that the injury resulting from the sawmill was uncertain and not irreparable.¹⁵¹ In yet another case concerning the enjoinder of an anticipated nuisance, it was held that “there must be such a clear, precise statement of facts, that there can be no reasonable doubt, if the acts threatened are completed, grievous injury will result.”¹⁵² Similarly, in *Bellview Cemetery Co. v. McEvers*, the Supreme Court of Alabama refused to enjoin the construction of a cemetery because the injury was “dubious” and “apprehended,” as well as not proven.¹⁵³

More recently, most Alabama courts have continued to follow early precedent in issuing anticipatory injunctions very sparingly.¹⁵⁴ In one instance, it was stated that “[i]t is a general rule that an injunction will be denied in advance of the creation of an alleged nuisance, when the act complained of may or may not become a nuisance, according to circumstances, or when the injury apprehended is doubtful, contingent or merely problematical.”¹⁵⁵

Most recently, in 1989, the Alabama Supreme Court heard a case where residential landowners sought to enjoin their neighbor from constructing a lumber treatment facility that would use a tar-cresote solution to treat the lumber.¹⁵⁶ The plaintiffs alleged that the plant would

149. Sharp, *supra* note 10, at 646.

150. *Rosser v. Randolph*, 7 Port. 238 (Ala. 1838).

151. *Id.* at 244, 248. The court found that one option for the plaintiff to avoid having his spring contaminated was to dig a ditch around it, therefore decreasing the likelihood of injury. *Id.*

152. *Rouse v. Martin*, 75 Ala. 510, 513 (1883) (quoting *Kingsbury v. Flowers*, 65 Ala. 479 (1880)).

153. *Bellview Cemetery Co. v. McEvers*, 53 So. 272, 274 (Ala. 1910). The case involved the proposed use of land as a cemetery and the proposed closing of a road. The court had trouble with the fact that if this cemetery were enjoined simply because of the possibility of groundwater contamination, then what type of slippery slope would they be starting down? *Id.* at 275.

154. *Johnson v. Bryant*, 350 So. 2d 433, 436 (Ala. 1977). *Johnson* involved a suit by beachfront landowners to stop their neighbor from constructing a boat pier with a bathroom located on the end. *Id.* at 434. The plaintiff's complained that the pier was a nuisance in that it extended into the navigable channel and that the number of boats docked there created a sanitation risk. *Id.*

155. *Parker v. City of Mountain Brook*, 238 So. 2d 868, 873 (Ala. 1970) (quoting *Brammer v. Hous. Auth.*, 195 So. 256, 258 (Ala. 1940)). *Parker* involved a citizen's suit to enjoin the use and operation of a dump heap and to stop construction of a municipal garbage facility. *Id.* at 868.

156. *McCord v. Green*, 555 So. 2d 743, 743–44 (Ala. 1989).

render their homes uninhabitable and would cause them physical discomfort, but the court rejected their complaint and refused the injunction.¹⁵⁷ In so doing, the court acknowledged Section 6-5-125 of the Alabama Code and the “extraordinary power[]” it gives.¹⁵⁸ Yet, it held that anticipatory “injunctions should be denied unless the plaintiff shows to a reasonable degree of certainty that the anticipated act or structure will, in fact, constitute a nuisance.”¹⁵⁹

While the above cases at first glance appear consistent, and in reality the decisions all deny injunctions, the real problem is that in reaching these conclusions, the facts of each case control. A court can look simply at the facts and determine if an injury is reasonably certain and therefore deserving of an injunction. This fact-sensitive approach does little but hinder the potential use of the anticipatory nuisance doctrine. Even though statutes exist in both Georgia and Alabama, they are not thorough enough in their terminology to resolve the inconsistent, fact-intensive, anticipatory nuisance claims. For statutes such as Georgia’s and Alabama’s to aid in consistent decisionmaking on this issue, the state legislatures would need to define the standards in greater detail than the current “reasonable certainty” standard. Any state that might consider enacting an anticipatory nuisance statute must analyze carefully the problems with the common law doctrine and try to resolve some of its inconsistencies through specific legislative language. Additionally, because anticipatory nuisance is an equitable doctrine, it is surprising that neither statute requires a balancing of the public and the private interests. Without articulating a purpose for the statutes, the judiciary—by default—is forced to create and implement the social policy behind the application of this doctrine.¹⁶⁰

D. Anticipatory Nuisance Actions to Obtain Qualified Injunctions

A notable trend in the area of anticipatory nuisance is the use of a qualified or partial injunction.¹⁶¹ A qualified injunction is a flexible

157. *Id.* at 744, 746.

158. *Id.* at 745.

159. *Id.* Not all of the cases in Alabama have applied the same criteria. For example, in *Gilmore v. City of Monroeville*, 384 So. 2d 1080 (Ala. 1980), the Supreme Court of Alabama, in a decision contrary to over one hundred years of precedent, and one that was seemingly not followed, stated that before they would enjoin the construction of a public works shop the plaintiffs had to show that it would be a nuisance per se. *Id.* at 1081. Nowhere in the Alabama Code or prior case law does this limitation on enjoining anticipatory nuisances appear except in this one anomalous case.

160. See Sharp, *supra* note 10, at 647 (observing that this situation “is inevitable because the statutory language offers no clear standards or guidelines”).

161. See *Vill. of Wilsonville v. SCA Servs.*, 426 N.E.2d 824, 841 (Ill. 1981) (ordering the defendant to exhume and move wastes deposited and enjoining the defendant’s further use of the site in such a manner); *Salter v. B.W.S. Corp.*, 290 So. 2d 821, 825 (La. 1974) (requiring compliance with

solution that allows courts to take into account both the benefit to society of the activity at issue as well as the severity of the potential harm by creating an equitable remedy that “mandate[s] certain changes in . . . design or operation in order to . . . minimize the nuisance.”¹⁶² A court can issue a qualified injunction contingent upon the defendant’s actions, often requiring the defendant to increase safety features or remedy a defect in planning.¹⁶³

In *Salter v. B.W.S. Corporation*, the court issued a qualified injunction stopping the defendants from burying industrial waste.¹⁶⁴ Although the defendants were in compliance with applicable statutes, the court held that the defendants could only bury the wastes according to a disposal scheme that adhered to heightened safety standards endorsed by the expert witnesses.¹⁶⁵ In choosing this course the court considered, specifically and appropriately, the negative consequences of a failure to contain these poisonous industrial wastes.¹⁶⁶

The utility of a qualified injunction “is that it recognizes both the potential severity of the prospective relief and the severe ramifications of . . . environmental harm.”¹⁶⁷ This intermediate approach also offers significant flexibility in that “[i]t allows defendants the opportunity to conform their plans with state of the art safety standards” and can require defendants to do so despite the fact that their original plans were legal.¹⁶⁸ The benefit and advantage of qualified injunctions is that “anticipatory nuisance actions do not have to stifle industrial growth in order to ensure necessary public health safeguards.”¹⁶⁹

specific standards in lieu of enjoining complete operations); *Cardwell v. Austin*, 168 S.W. 385, 387 (Tex. Civ. App. 1914) (agreeing with the lower court that an injunction against construction and operation of the tank was appropriate, but refusing to permanently enjoin the construction of a more properly sized tank); see also Smith, *supra* note 1, at 703 (“A discernible trend in contemporary case law . . . [is the] partial or experimental injunction . . .”).

162. Smith, *supra* note 1, at 703.

163. See, e.g., *Cardwell*, 168 S.W. at 387 (suggesting that a septic concentration tank be of proper dimension and construction so as to not give off foul odors or create a nuisance).

164. *Salter*, 290 So. 2d at 824, 825.

165. *Id.* at 821, 823. The defendant originally planned to bury the industrial waste in trenches that would be covered with ten feet of clay. *Id.* The Louisiana court held that the disposal site could be operated safely if the defendant lined the trenches with impermeable material, as recommended by the defendant’s own experts. *Id.* at 824–25.

166. *Id.* at 825.

167. Sharp, *supra* note 10, at 650.

168. *Id.*

169. *Id.*

E. Problems with the Current State of the Anticipatory Nuisance Doctrine

1. Battle of the Experts

The plaintiff's high burden of proof, in conjunction with the general judicial skepticism regarding any anticipatory nuisance case that is maintained, is almost bound to end up embroiled in a battle of experts. This is a topic that few commentators have discussed at length, but one that has come up in case law. Anticipatory nuisance cases are generally brought against proposed industry, and usually against large-scale operations such as oil refineries, landfills, trucking terminals, and the like. It is the rare anticipatory nuisance case that is a private nuisance action. With that being the case, at trial a battle often occurs that pits the defendant's expert against the plaintiff's. The plaintiff's expert obviously tries to establish to a high degree of likelihood that the proposed activity will constitute a nuisance and the defendant's expert attempts to refute this evidence.¹⁷⁰ In essence, what this confrontation does is make land use activities a battle over who can get the more compelling expert.¹⁷¹

For instance, in *Commerce Oil Refining Corp., v. Miner*, the United States Court of Appeals for the First Circuit sifted through the expert testimony of multiple witnesses.¹⁷² The court tried to decipher the expert testimony regarding sulfur particles being emitted from smoke stacks and causing harm to nearby property owners.¹⁷³ Ultimately it determined that it would not enjoin the proposed refinery because the "relatively even balance of the sharply conflicting expert testimony" led the court to take a wait-and-see approach.¹⁷⁴ Although they did not appear to like the decision, the *Seidner* precedent forced this conclusion on the court.¹⁷⁵ The *Seidner* court, although it found that coal dust might escape into the plaintiff's mayonnaise

170. In *Otto Seidner, Inc. v. Ralston Purina Co.*, 24 A.2d 902 (R.I. 1942), the plaintiff, an operator of a mayonnaise factory, sued to enjoin the defendant's use of adjacent property as a coal-loading depot where coal would be loaded into freight trains. *Id.* at 903. The plaintiff's expert, a long-time coal industry employee, testified that the dust would get into the mayonnaise factory thereby ruining the product. *Id.* at 907. The defendant's expert testified that tarps would prevent most of the dust from escaping and floating the seventy-five feet into plaintiff's plant. *Id.* at 906.

171. In addition, this battle also results in lengthy and often expensive litigation, including depositions of, and fees paid to, technical experts. *See, e.g., Commerce Oil Ref. v. Miner*, 281 F.2d 465, 466 (1st Cir. 1960) (noting that the forty-day trial produced thousands of pages of testimony, much of which was highly technical).

172. *Id.* at 472.

173. *Id.* at 471.

174. *Id.* at 475.

175. *See id.* (stating that the court felt "constrained to hold that the court below erred in enjoining erection of the plaintiff's refinery as a prospective nuisance").

factory, refused to enjoin prospectively the defendant's coal loading operation.¹⁷⁶ It stated that although the dust would cause the plaintiff's business increased costs, a "dilemma where it could not hope successfully to cope with competition," it nonetheless refused to enjoin the coal business prospectively.¹⁷⁷

As these two cases indicate, a battle of experts may indeed be futile considering the presumption that the defendant carries. By engaging in such a battle, even if the expert testimony is even or favors the plaintiff slightly, a court is not likely to enjoin an activity prospectively.¹⁷⁸ What can be done to resolve this problem is a more difficult question, as will be seen in the next section. Anticipatory nuisance offers numerous advantages and should be used more frequently than it is presently used. In order to accomplish this goal, however, the courts will have to adopt a standard that makes it easier for a plaintiff to prevail, especially when, as in *Seidner*, the plaintiff brings forward compelling expert testimony.

2. Under-Utilization of the Doctrine Leads to Economic Waste

The doctrine of anticipatory nuisance has been scorned because it has the potential to prevent economic growth through the premature cessation of a potential industry.¹⁷⁹ While this argument has merit, there is an oft-ignored benefit that anticipatory nuisance can offer; namely, the prevention of economic waste. Under nuisance law, an unreasonable use of land can be enjoined so as to stop the damage that the use is causing.¹⁸⁰ The problem, and one that has long troubled courts, is that often many millions of dollars in investment and employment are tied up in industries that become a nuisance and must be closed.¹⁸¹ Courts presented with this problem try not to throw all of that investment away by enjoining an

176. *Otto Seidner, Inc. v. Raltson Purina Co.*, 24 A.2d 902, 907 (R.I. 1942).

177. *Id.* at 907. From an economic point of view, this decision is baffling. The court was willing to risk closing one profitable industry in order to allow another unproven industry to begin. From an economic efficiency point of view this seems bizarre. The only possible explanation may lie in the year of the decision, 1942, when coal might have been considered a better industry than food-product manufacturing, especially in light of war-time production schedules.

178. *See id.* (refusing to grant a prospective injunction after hearing conflicting expert testimony).

179. *See supra* notes 73–76 and accompanying text (discussing the disdain for the doctrine).

180. *See, e.g., Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913) (enjoining a pulp mill that injured the rights of a lower riparian land owner); *see also* Smith, *supra* note 1, at 696 n.262 (defining the doctrine of waste).

181. *See, e.g., Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970); *see also Whalen*, 101 N.E. at 806. The court stated that "[o]ne of the troublesome phases of this kind of litigation is the difficulty of deciding when an injunction shall issue . . . where the . . . actual injury . . . will be small as compared with the great loss which will be caused by the issuance of the injunction." *Id.* at 805–06.

industry, but at times they must, and have.¹⁸² The anticipatory nuisance doctrine can help resolve this dilemma.

A plaintiff brings an anticipatory nuisance action *before* a contemplated use commences. This allows a court to look carefully at the proposed use and determine whether it will become a nuisance, and, if so, the court can enjoin the construction of the facility or the proposed use before large amounts of money are expended on the project.¹⁸³ If an anticipatory action is not brought or is rejected by the courts, and the defendant spends millions of dollars on a project, there is some likelihood that the enterprise will be closed and millions of dollars will have been wasted.¹⁸⁴ If courts or legislatures could reach a more consistent solution to the anticipatory nuisance dilemma, the problem of the defendant's economic waste could largely be eliminated.

III. THE RYAN BALANCING TEST

The best example of how courts can apply the anticipatory nuisance doctrine with some degree of consistency is found in *Village of Wilsonville v. SCA Services, Inc.*¹⁸⁵ Residents of Wilsonville brought a nuisance action to enjoin the operation of a hazardous waste landfill.¹⁸⁶ The proposed location of the landfill was over an abandoned coal mine site adjacent to the village.¹⁸⁷ The proposed landfill received approval by the Illinois Environmental Protection Agency, which issued a license and permitted the disposal of toxic waste.¹⁸⁸ The landfill was designed to have a clay liner to prevent spillage and contamination of ground water.¹⁸⁹

182. See, e.g., *Whalen*, 101 N.E. at 805–06.

183. See Sharp, *supra* note 10, at 630 (providing a cursory look at this problem).

184. *Whalen*, 101 N.E. at 806. In *Whalen*, the New York Court of Appeals upheld an injunction that ordered a pulp mill to close because it spilled effluents into a nearby creek, thereby injuring downstream landowners. *Id.* at 806. The reality of the situation was that the plant, which was built shortly before 1910, cost over one million dollars and employed between 400–500 men. *Id.* at 805. *But see* *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 666–67 (Tenn. 1904) (refusing to issue an injunction that would have closed down the area's most important industry even though the smoke and gases clearly constituted a nuisance). See also *York v. Stallings*, 341 P.2d 529 (Or. 1959). The *York* court rejected that hard and fast rule that an injunction must issue when a use of land is unreasonable. Instead, the Supreme Court of Oregon followed the lead of other courts in adopting the Restatement of Torts Section 941 and balanced the relative hardship likely to result to the defendant if the injunction was granted and to the plaintiff if it was denied. *Id.* at 534.

185. *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981).

186. *Id.* at 826–27. Compare with the facts in *Village of Goodfield*, where the proposed waste-pit/landfill was to contain only non-hazardous hog waste. *Vill. of Goodfield v. Jamison*, 544 N.E.2d 1229, 1230 (Ill. 1980).

187. *Vill. of Wilsonville*, 426 N.E.2d at 827.

188. *Id.* at 828. A new permit would have to be issued each time the landfill would receive additional toxic waste. *Id.*

189. *Id.* at 827.

The plaintiffs argued that there was a substantial risk to the residents of Wilsonville. Evidence demonstrated that exposure to toxic waste would cause brain damage, cancer, and birth defects.¹⁹⁰ In addition to contaminating groundwater, the plaintiffs argued that the proposed storage of toxic waste was a danger to the community—incompatible toxic chemicals stored side by side in the landfill could result in an explosion.¹⁹¹ An explosion would certainly emit toxic fumes into the air and threaten the health of Wilsonville Village.¹⁹² The Illinois Supreme Court granted injunctive relief finding there was a high probability that operating a toxic waste landfill would create a nuisance and necessarily result in substantial injury to the residents of Wilsonville.¹⁹³

While concurring in the majority opinion, Justice Howard C. Ryan stated that the court established too high a threshold for a plaintiff to overcome. He suggested that by lowering the standard, the public at large would not be subjected to activity that necessarily results in irreparable harm.¹⁹⁴ He argued that the balancing test should weigh *both* the probability and magnitude of an injury.¹⁹⁵ If the harm that may result is severe, a lesser possibility of its occurring should be required to support injunctive relief. The Ryan balancing test recognizes that it is easy to determine whether an activity will produce harm. The challenge often in anticipatory nuisance cases is determining *when* catastrophic harm will occur. The Ryan balancing test also will not permit fear or speculation to be a controlling factor. Rather than requiring a plaintiff to establish that there is a high probability of harm, the Ryan test focuses on whether there is a reasonable connection between the proposed act and the disputed harm. Conversely, if the potential harm is less severe, the plaintiff will have to justifiably overcome a heightened level of scrutiny that there is a high probability of sustaining an injury.¹⁹⁶

190. *Id.* at 828.

191. *Id.* at 829–30.

192. *Id.* at 830.

193. *Id.* at 836–37, 841.

194. *Id.* at 842 (Ryan, J., concurring).

195. *Id.* Justice Ryan proposed an inverse balancing test—as the magnitude of the harm increases, the lesser the probability required for an injunction to issue. *Id.*

196. *Id.* This position has shadings of the doctrine of comparative nuisance where the focus is placed on the extent of the responsibility of the parties, not the utility of their actions—this, in an effort to determine the ultimate entitlement for the plaintiff and the defendant. *See generally* Jeff L. Lewin, *Comparative Nuisance*, 50 U. PITT. L. REV. 1009 (1989) (comprehensively discussing the doctrine of comparative nuisance).

IV. MERGING LAW AND ECONOMIC EFFICIENCY

Economics affects virtually every decision in one's life.¹⁹⁷ The law and those who practice the discipline are not immune from the "power" that economics has in decisionmaking. In 1970, along with the *Boomer* decision, the law and economics "movement" began.¹⁹⁸ Prior to 1970, economic principles were being applied to traditional economic practice areas such as antitrust, corporations, securities, and taxation.¹⁹⁹ The law and economics movement originated when economic principles were being tested on subjects not analyzed previously in economic terms, such as the law of torts. "[T]he hallmark of the 'new' law and economics—the law and economics that is new within the last 30 years—is the application of economics to the legal system across the board"²⁰⁰ The law and economics movement attempted to apply neo-classical economics to a legal conflict—arguing that legal disputes regarding property could be resolved through economic efficiency.²⁰¹ Nuisance law after the *Boomer* decision, and the law and economics movement itself, "rejects the traditional emphasis on injunctive relief, asserting that this remedy often impedes the *efficient* resolution of land use conflicts."²⁰² Many scholars in the law and economics movement favor compensatory damages without injunctive relief as an economically efficient remedy.²⁰³ There are an equal number of scholars in the law and economics movement who contend that injunctive relief, in one form or another, is an economically efficient remedial device.²⁰⁴ It should be understood that economic analysis is designed to complement legal analysis, not act as a substitute.²⁰⁵ Thus, achieving economic efficiency in any legal issue will require balancing.²⁰⁶

197. See *The Use and Abuse of Economics*, THE ECONOMIST, Nov. 25, 1995, at 17. ("For all its imperfections, economics has turned itself into the superpower of the social sciences, one that exercises a powerful influence on the lives of ordinary people.") (emphasis added).

198. Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990).

199. Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 236 (1990) [hereinafter Lewin, *Boomer and the American Law of Nuisance*].

200. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 21 (4th ed. 1992).

201. See generally *id.* at 21–27. But see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1 (1986) ("The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics.").

202. Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 776 (1986) (emphasis added) [hereinafter Lewin, *Compensated Injunctions*].

203. See *id.* at 776 (asserting that "[m]onetary damage compensation, not injunctive relief, is the preferred remedy of most recent commentators").

204. See, e.g., *id.* at 776 n.7.

205. Jonathan R. Macey, *The Pervasive Influence of Economic Analysis on Legal Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 107, 108 (1994).

206. The balancing test used in the determination of whether an injunction will be granted is

A. *The Coase Theorem*

The law and economics movement originated with the writing of Ronald Coase.²⁰⁷ The Coase Theorem reduces balancing to a level of bargaining between interests.²⁰⁸ Coase contends in *The Problem of Social Cost* that parties will bargain freely to resolve legal disputes based on economic efficiency.²⁰⁹ The Coase Theorem, however, does not follow the idea that economics should compliment law—rather economics *is* the law.²¹⁰ According to Coase, parties in a nuisance dispute will always undertake to resolve such a conflict in the most economically efficient way possible.²¹¹ In other words, when there is a conflict between parties, each side is willing to do whatever is required economically in order to satisfy their objective. The following describes how the Coase Theorem would operate in a set of facts similar to *Boomer v. Atlantic Cement Co.*:

Suppose that Boomer suffers \$2000 harm from the pollution. If Atlantic is liable for damage to Boomer, Atlantic won't pollute unless it profits from the pollution to the tune of \$2000 or more. If its profits are any lower, it will actually lose money by polluting after it pays damages to Boomer. But if the profits are higher than \$2000, Atlantic will choose to pollute, pay damages, and still come out ahead.

. . . Suppose there is no tort liability, and that Atlantic's profits are less than Boomer's \$2000 in damages. At first blush it looks like Atlantic will choose to pollute and make its profit, even though a complete cost-benefit analysis would come out negative. After all, what does Atlantic care about Boomer's harm if it doesn't have to pay damages? . . . [I]f Atlantic's profits are \$1000 and Boomer's harm is \$2000, Boomer could offer Atlantic \$1500 not to pollute. This is a winning deal for both sides—each is \$500 better off than in the situation where Atlantic pollutes.²¹²

Under the Coase Theorem, a “winning deal” may be struck at the expense of the environment. In a post-*Boomer* world where pollution can cause irreparable harm to the environment, economically efficient solutions

similar to the balancing test used in the determination of whether a nuisance will be established. See Smith, *supra* note 1. See generally Lewin, *Compensated Injunctions*, *supra* note 202, at 775.

207. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

208. D.A.F., *The Coase Theorem and the Eleventh Amendment*, 13 CONST. COMMENT. 141, 142 (1996).

209. Coase, *supra* note 207, at 1.

210. See D.A.F., *supra* note 208, at 142 (“Bargaining washes away legal rules . . .”).

211. Coase, *supra* note 207.

212. D.A.F., *supra* note 208, at 141–42.

without legal analysis and balancing will produce disastrous results. The long-term results of a Coasean solution, without the benefit of legal reasoning, would be economically inefficient if a nuisance activity were to produce high environmental clean-up costs.

B. *The Calabresi and Melamed Analysis*

Judge Guido Calabresi, following the Coase Theorem, argues that unconditional injunctive relief might be inefficient, provided each party was charged with the full costs of the damages it caused to others.²¹³ Calabresi does not completely rule out nuisance injunctions as such, stating that a balance of costs and benefits is required to prevent economically inefficient injunctive relief.²¹⁴

The law and economics movement received a major push in 1972 from Guido Calabresi and A. Douglas Melamed.²¹⁵ The significance of the Calabresi and Melamed analysis is its recognition that economics must complement the law of torts. When determining whether a nuisance exists under Calabresi and Melamed's law and economic analysis, two issues must be addressed: who has an "entitlement" and what "remedy" is given to the party with the entitlement.²¹⁶ Entitlement determines "which of the conflicting parties will be entitled to prevail."²¹⁷ Applying the facts of *Boomer*, for example, in a nuisance lawsuit between a polluting factory and its neighbors, "the law must either grant [the Atlantic Cement Company] an entitlement to pollute or grant [Mr. Boomer] an entitlement to clean air."²¹⁸ After the court has made a finding of law assigning an entitlement, a remedy must be given to protect that entitlement.²¹⁹

Calabresi and Melamed divide the allocation of remedies into three categories—"property rules," "liability rules," and "inalienability rules."²²⁰

213. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 534–40 (1961) (discussing resource allocation in the context of nuisance cases).

214. *Id.* at 534–36. For example, injunctive relief would be efficient if damages were dispersed widely and one party or enterprise is not liable for all the damage caused. Lewin, *Boomer and the American Law of Nuisance*, *supra* note 199, at 242.

215. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (announcing an approach that integrates law and economics through "a concept of 'entitlements'").

216. *Id.* at 1090, 1092.

217. *Id.* at 1090.

218. Lewin, *Boomer and the American Law of Nuisance*, *supra* note 199, at 245; see also Lewin, *Compensated Injunctions*, *supra* note 202, at 788.

219. Calabresi & Melamed, *supra* note 215, at 1092.

220. *Id.* In the third remedial category Calabresi and Melamed identify "rules of inalienability." *Id.* at 1111. The authors decided to discuss inalienability rules separately from property and liability rules as the latter are linked in their application to the law of torts. *Id.* at 1106; see also Lewin, *Boomer and the American Law of Nuisance*, *supra* note 199, at 245–246 (describing Calabresi and Melamed's

Accordingly, if Mr. Boomer is protected by a property rule entitlement to clean air, an injunction against the Atlantic Cement Company can be obtained.²²¹ If Mr. Boomer is protected by a liability rule entitlement to clean air, Atlantic Cement Company may continue its operation, but the plaintiff can obtain compensatory damages.²²²

The liability rule is an “empty” entitlement similar to the *Boomer* scenario discussed in the Coase Theorem.²²³ For example, Atlantic Cement Company was found liable of creating a nuisance and had to pay damages. Mr. Boomer was awarded an empty entitlement because the Atlantic Cement Co. continues to pollute Mr. Boomer’s property and make a profit.²²⁴ The Calabresi and Melamed liability rule allows a tortfeasor to destroy a plaintiff’s entitlement to clean air simply by paying a reasonable amount in damages.²²⁵ The plaintiff’s entitlement, his *right*, is being withheld because economics prevails over legal reasoning or “justice.” In a post-*Boomer* world, the liability rule would permit defendants to pollute the environment and cause potentially irreparable damage. Calabresi and Melamed suggest that damages should be calculated based on an “objectively determined value.”²²⁶ The dilemma in awarding damages is how one quantifies an irreversible and permanent loss to the environment.

Having defined the entitlement and remedy components, Calabresi and Melamed identify four possible outcomes when resolving a nuisance dispute: (1) no nuisance is found;²²⁷ (2) plaintiff enjoins defendant’s nuisance;²²⁸ (3) plaintiff obtains compensatory damages from defendant;²²⁹ or (4) plaintiff enjoins defendant’s nuisance but must pay for the abated activity through compensated injunction.²³⁰

distinction between the two types of rules). It has been suggested that property and liability rules regarding nuisance lie on a continuum. “[U]nder property rules, a person’s entitlement is guaranteed, whereas under the liability rule, the injurer is permitted to harm the victim so long as he pays damages equal to harm.” Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 756 (1996).

221. Kaplow & Shavell, *supra* note 220, at 756.

222. *Id.*

223. See Coase, *supra* note 207, at 1 (“The standard example is that of a factory the smoke from which has harmful effects on those occupying neighbouring properties.”).

224. See *supra* Part IV.A (discussing the Coase Theorem in context with *Boomer*).

225. See Calabresi & Melamed, *supra* note 215, at 1092.

226. *Id.*

227. See *id.* at 1115–16 (noting a total victory for the defendant); see also Lewin, *Compensated Injunctions*, *supra* note 202, at 789 (noting that the defendant has an entitlement to pollute “and is, in effect, protected by a property rule: the defendant has the right to continue the offending activity and cannot be compelled to relinquish that right except in a voluntary transaction”).

228. See Calabresi & Melamed, *supra* note 215, at 1115–16 (indicating a total victory for the plaintiff and that the plaintiff has an entitlement to clean air and is protected by a property rule).

229. See *id.* (noting a partial victory for the plaintiff and that the plaintiff has an entitlement to clean air, but is protected by a liability rule).

230. *Id.* This last outcome would result in a partial victory for the defendant. See *Spur Indus.*,

The Calabresi and Melamed analysis appropriately recognizes that resolving nuisance actions in a post-*Boomer* world must contain both “entitlement” and “remedy” components. With the exception of granting an entitlement, which is protected by a liability rule, each possible outcome has merit in a post-*Boomer* world. As observed previously, when there is a threat of irreparable harm to the environment, permitting a tortfeasor to continue polluting is unreasonable and economically inefficient. Whenever nuisance activity may have a serious effect on the environment, the balance should be in favor of environmental protection using injunctive relief.

C. To Enjoin or Not To Enjoin, That Is the Question

Building on the law and economics foundation established by Coase and Calabresi and Melamed, Robert Ellickson and Edward Rabin have presented the idea that “unconditional” injunctive relief in nuisance cases should be eliminated completely.²³¹ Ellickson and Rabin contended that a victim’s remedy options should be limited to compensatory damages and conditional injunctions.²³² Although Ellickson and Rabin reached the same conclusion, their analytical approaches were slightly different. Both approaches were rooted, however, in principles of economic efficiency, fairness, and balancing.

Ellickson states that the use of injunctive relief is economically inefficient where a defendant’s cost to abate nuisance activity exceeds the damages inflicted on the plaintiff.²³³ Efficient use of resources requires minimizing the sum of nuisance costs and assigning the liability to the least-cost-avoider of a conflict.²³⁴ Limiting a plaintiff’s remedy options, Ellickson contends, would reduce the need by courts to balance the facts, which often creates inconsistency and uncertainty.²³⁵

In many instances courts avoided finding actionable nuisances by applying a type of balancing test; the social utility

Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972) (enjoining a cattle ranch from operating, but ordering the plaintiff to pay damages).

231. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 685 (1973) (“One option for handling [nuisances] is to adopt a laissez faire [approach], . . . and rely entirely upon informal social [as well as economic] forces rather than governmental action to control land use decisions.”); see also Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1300 (1977) (proposing “that the prevailing judicial response to nuisance problems, a response that heavily utilizes unconditional injunctions, is too inflexible” and that conditional injunctions should be used instead).

232. Ellickson, *supra* note 231, at 738; Rabin, *supra* note 231, at 1347.

233. Ellickson, *supra* note 231, at 720.

234. *Id.* at 724.

235. *Id.* at 739.

of the actor's conduct was compared to the total amount of harm caused. This test is proper for deciding whether to grant injunctive relief. Unfortunately most courts applied the test to the initial question of whether a nuisance existed at all, incorrectly limiting the availability of damage awards that would internalize the harmful externalities.²³⁶

Edward Rabin attempts to bring the balancing test into the awarding of damages, as well as applying it to the finding of nuisance.²³⁷ Rabin's balancing test for awarding damages pursues the joint goals of fairness and efficiency.²³⁸ Achieving fairness and efficiency in economic terms means ultimately that a plaintiff will not be able to obtain both damages and injunctive relief in every nuisance lawsuit. For example, if the plaintiff prevails in his nuisance action, the defendant has the option of abating the activity when it is in his economic best interest. Consequently, abating a nuisance is only efficient for the defendant when the cost of abatement is less than paying damages.

Rabin also contends that compensated injunctions are economically efficient remedies, particularly for non-prevailing plaintiffs.²³⁹ The compensated injunction, according to Rabin, provides some relief to the plaintiff in that he does not have to undergo lengthy negotiations with a tortfeasor to abate a nuisance. Compensated injunctions force the defendant to abate, thus "reduc[ing] the transaction costs of strategic behavior during negotiations because both sides would be aware that the plaintiff could resort to the judicial remedy whenever the defendant tried to hold out for an *unreasonably* high price."²⁴⁰ The law and economics position against injunctive relief has some merit in that it eliminates inefficient unconditional injunctions and reduces the amount of wasteful transaction costs incurred through abatement negotiations.

236. *Id.* at 720–21 (footnote omitted).

237. Rabin, *supra* note 231, at 1309. A balancing of the gravity of the harm against the utility of good is performed when determining whether a nuisance exists. *See supra* notes 2, 60–68 and accompanying text.

238. *See id.* at 1309. "The first step would be to determine who is morally more blameworthy for the existence of the conflict. . . . The second step in the proposed procedure would be to determine how the conflict can be resolved with least expense." *Id.*

239. *Id.* at 1343. Although the use of compensated injunctions could theoretically be applied to plaintiffs prevailing in a nuisance action, Rabin limits his consideration of the remedy to non-prevailing plaintiffs. *Id.*; *see also* Lewin, *Boomer and the American Law of Nuisance*, *supra* note 199, at 256 (noting that compensated injunctions would be possible in a prevailing plaintiff scenario when there is dissatisfaction with the amount of court-awarded compensatory damages).

240. Lewin, *Compensated Injunctions*, *supra* note 202, at 801 (emphasis added); Rabin, *supra* note 231, at 1344–45.

Conversely, denying injunctive relief often leads to under-compensatory damages.²⁴¹ A. Mitchell Polinsky and Gregory Travalio have been critical of the no-injunctive-relief theory posited by Coase, Calabresi and Melamed, as well as Ellickson and Rabin. Polinsky asserts that a balancing test *can* be applied to the granting of injunctive relief.²⁴² For example, through balancing the gravity of the harm against the utility of the good, a form of “cooperative bargaining” could produce an equitable and efficient use of injunctive relief.²⁴³ Cooperative bargaining can be considered an intermediate level of granting injunctive relief between permanent injunction and no injunction. A plaintiff would be entitled to *reasonably* clean air and the defendant would be entitled to pollute *partially*. For example, once again, Atlantic Cement Company would be allowed to pollute up to a certain amount of dust, and Mr. Boomer would be allowed the reasonable enjoyment of his property, “free of any pollution in excess of that limit.”²⁴⁴

In a post-*Boomer* world, such a compromise on injunctive relief may produce effective and efficient results in which each party has obtained a remedy that can be tolerated. Mr. Boomer will have to endure some pollution, reserving the right to abate any interference in the enjoyment of his property that causes a greater environmental annoyance. In addition, Atlantic Cement Company will have to reduce its cement producing operation, reserving the right to an increase in pollution if the nuisance complaint is unreasonable. In the event that reduced pollution continues to create an unreasonable interference or that reduced productivity produces unprofitability, either party will have the opportunity to seek compensatory damages or compensated injunction, respectively. Environmental impact studies would be beneficial in a cooperative bargaining approach in that such reports determine how much pollution the environment could naturally “tolerate” without creating irreparable damage.

241. A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1110–11 (1980); see also Gregory Travalio, *Pay Up or Shut Down: Some Cautionary Remarks on the Use of Conditional Entitlements in Private Nuisance Cases*, 38 U. FLA. L. REV. 209, 211–12 (1986) (questioning the superiority of the damage remedy and the conditional injunction in nuisance cases).

242. Polinsky, *supra* note 241, at 1112. *But see* Ellickson, *supra* note 231, at 738–39 (advocating the application of a balancing test for the granting of compensatory damages and compensated injunctions).

243. Polinsky, *supra* note 241, at 1087.

244. Lewin, *Boomer and the American Law of Nuisance*, *supra* note 199, at 259.

V. ANTICIPATORY NUISANCE IN THE POST-*BOOMER* WORLD

The use of anticipatory nuisances has an important role to play in a post-*Boomer* world. Applying the Ryan balancing test in *Wilsonville* to anticipatory nuisance cases will provide the most flexibility and fairness to both parties in that a plaintiff must prove that a proposed activity will necessarily result in an injury. However, the necessary-result application under the Ryan construct does not require the plaintiff to establish that there is a high probability that such activity will exist *if* there is no injunctive relief.

The doctrine of anticipatory nuisance is very inconsistent and unpredictable. Pinpointing the outcome of an anticipatory nuisance action in the post-*Boomer* world is highly speculative. At first glance, creating a predictable and consistent application of the doctrine would be logical. However, any attempt at restricting a court's fluidity and flexibility in anticipatory nuisance cases is contrary to the entire balancing concept. In order for fairness and reasonableness to prevail, predictability and consistency must be sacrificed.

The use of law and economics in anticipatory nuisance cases should complement rather than compete with each other. By balancing each principle equally, victims and tortfeasors are somewhat "guaranteed" that their interests will be protected. With the exception of protecting liability rule entitlements, as suggested by Coase, Calabresi and Melamed, a court should entertain every possible remedy option—including injunctive relief. Unconditional injunctive relief is economically inefficient in a post-*Boomer* world. For example, if a permanent injunction were to have been granted in *Boomer v. Atlantic Cement Company*, some three hundred jobs would have been terminated by the company.²⁴⁵ Furthermore, the company itself would have had to liquidate. The forty-five million dollars invested in the cement plant would have been forfeited as well.²⁴⁶ Obviously, the greater-Albany community would have been placed under economic stress if the plant had closed.

In a post-*Boomer* world where pollution is more substantial than rather simple dust and intermittent noise, enjoining activity that may produce irreparable harm cannot be overlooked. Because there are more opportunities to create such irreversible environmental damage, anticipatory

245. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970).

246. *Id.* In an interesting environmentally conscious dissent, Justice Matthew J. Jasen disavowed the majority's use of assessing permanent damages in lieu of an injunction and urged the company be enjoined from continuing to discharge dust particles unless, within an eighteen-month period, it were to be successful in abating the nuisance to the plaintiffs. *Id.* at 877 (Jasen, J., dissenting).

nuisance, applied with both law and economic principles, is needed now more than ever.

VI. THE FEDERAL COURTS' APPLICATION OF THE ANTICIPATORY NUISANCE DOCTRINE

Federal courts, unlike state courts, have established a relatively consistent federal common law to address anticipatory nuisance. In *Mugler v. Kansas*, the U.S. Supreme Court held that a court of equity could act prospectively to provide a more complete and appropriate remedy (e.g., injunctive relief) than was available at law.²⁴⁷ The same Court said that only through prospective injunction could the Court protect future public interests.²⁴⁸ Since 1900, the U.S. Supreme Court has addressed the anticipatory nuisance issue only once.²⁴⁹ In *Missouri v. Illinois*, Missouri sought to enjoin Illinois from building a sewage channel that would empty 1,500 tons of untreated sewage a day into tributaries of the Mississippi River.²⁵⁰ The court held “that damage and irreparable injury will naturally and necessarily be occasioned by [these] acts.”²⁵¹ It went on to establish a “determinate and satisfactory evidence” test to determine if a prospective nuisance could be enjoined, and required that the facts must show “real and immediate” danger.²⁵² It then concluded that, if the defendant’s acts would naturally and necessarily cause damage and irreparable injury, a prospective injunction is an appropriate remedy.²⁵³

In *Texas v. Pankey*, the Tenth Circuit addressed another environmental anticipatory nuisance action.²⁵⁴ Here, the court recognized that a federal common law nuisance action could enjoin a threatened use of a pesticide on lands that drained into a river flowing into Texas.²⁵⁵ However, by the time the Tenth Circuit’s opinion was issued, actual spraying had occurred and, to avoid the mootness issue, the court characterized the action as one to enjoin further spraying.²⁵⁶

247. *Mugler v. Kansas*, 123 U.S. 623, 673 (1887). This was the first time that a federal court had recognized the doctrine of anticipatory nuisance. *Id.*

248. *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 567 (1892).

249. *Missouri v. Illinois*, 180 U.S. 208 (1901). Two circuit courts did address this issue: *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181 (9th Cir. 1979); and *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

250. *Missouri*, 180 U.S. at 209, 213.

251. *Id.* at 248.

252. *Id.*

253. *Id.*

254. *Pankey*, 441 F.2d at 236.

255. *Id.* at 238, 240.

256. *Id.* at 240, 242.

One of the few other federal courts to address the anticipatory nuisance issue was the Ninth Circuit in *California Tahoe Regional Planning Agency v. Jennings*.²⁵⁷ In *Jennings*, California sought to enjoin the construction of four hotel-casinos claiming that the added vehicle and human traffic would create a nuisance and “harm the environment of the region.”²⁵⁸ Distinguishing *Jennings* from *Missouri v. Illinois* and *Pankey*, the Ninth Circuit disregarded California’s claim that the high-rise hotels would harm the environment and refused to equate high-rise hotels with the untreated sewage, noxious gases, and poisonous pesticides present in *Missouri v. Illinois* and *Pankey*.²⁵⁹ The court, perhaps responding to the more certain environmental consequences of the previous federal anticipatory nuisance cases, stated that, in *Jennings*, there was not the direct and immediate connection between the controversial activity and the harm caused that had existed in *Missouri v. Illinois* and *Pankey*.²⁶⁰ Applying the “determinate and satisfactory evidence” test, the court found that California had failed to establish that the danger of nuisance was “real and immediate,” but the court did affirm the anticipatory nuisance doctrine.²⁶¹

While this precedent is not well established, it does imply that a federal anticipatory nuisance claim can succeed by showing that a nuisance will “necessarily” result from an activity and is thereby “real and immediate.”²⁶² More importantly, the federal cases do not require that the nuisance meet the per se standard that many states employ that effectively eliminates the equitable remedy of prospective injunctive relief.²⁶³

257. *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 181 (9th Cir. 1979); *see also* *United States v. District of Columbia*, 654 F.2d 802 (1981) (granting injunctive relief as an equitable remedy to enjoin a sewage treatment plant). *But cf.* *Commerce Oil Ref. Corp. v. Miner*, 281 F.2d 465, 475 (1st Cir. 1960) (denying injunction for the operation of a refinery, even in the face of conflicting expert testimony, and adopting a wait-and-see approach).

258. *Jennings*, 594 F.2d at 184, 194. *Jennings* represents several cases that were combined for appeal. *Id.* at 184.

259. *Id.* at 194.

260. *Id.*

261. *Id.* at 193–94.

262. *Missouri v. Illinois*, 180 U.S. 208, 248 (1901).

263. *See id.* (focusing on whether a nuisance would necessarily result from the offending activity, the Court did not raise the requirement of nuisance per se); *Jennings*, 594 F.2d at 193–94 (denying injunctive relief because the future harm complained of was too uncertain and not sufficiently severe); *see also* Molly McDonough, *Growing Use of Nuisance*, 89 A.B.A. J. 16 (Aug. 2003) (noting the use of anticipatory nuisance as a legal theory for suing the producers of genetically modified seeds—alleging that using such seeds in corn crops can contaminate the crops of other farmers and create a public nuisance in that the food supply is thus contaminated) (citing *In re StarLink Corn Prod. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. 2002)).

VII. THE EVOLVING SOCIAL VALUES AND ENVIRONMENTAL AWARENESS

The economic values developed during the industrial revolution continue to linger and increase the complexity of the environmental problems faced today.²⁶⁴ “These values include the exploitation of natural resources in pursuit of profit with profit deemed an adequate proxy for social good.”²⁶⁵ However undervalued these resources currently are, there has been increasing legislative and judicial awareness that these resources are finite and easily damaged.²⁶⁶

A. *The Age of Environmental Enlightenment*

In the late 1960s, during a generation of protests and intergenerational conflicts, the concept of irreparable environmental harm was recognized. *The New York Times* wrote that “[t]he most dangerous . . . enem[y] is man’s own undirected technology” and explained that “radioactive poisons,” “runoff into rivers of nitrogen fertilizers,” “smog from automobiles,” “and the destruction of topsoil . . . are examples of the failure to foresee and control the untoward consequences of modern technology.”²⁶⁷ Perhaps in concert with these sentiments, Congress enacted several statutes in the next two decades to protect the environment: the Clean Air Act;²⁶⁸ the Occupational Safety and Health Act;²⁶⁹ the National Environmental Policy Act;²⁷⁰ the Clean Water Act;²⁷¹ the Toxic Substances Control Act;²⁷² the Resource Conservation and Recovery Act;²⁷³ and the Comprehensive Environmental Response, Compensation, and Liability Act.²⁷⁴

264. Robin Morris Collin & Robert William Collin, *Where Did All the Blue Skies Go? Sustainability and Equity: The New Paradigm*, 9 J. ENVTL. L. & LITIG. 399, 408 (1994).

265. *Id.*; see Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 119–27 (1979) (discussing wealth maximization as an ethical concept).

266. See, e.g., *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981). “[I]t is preferable to have chemical-waste-disposal sites than to have illegal dumping in rivers, streams, and deserted areas.” *Id.* at 838. After balancing the equities, the court upheld the injunction against the disposal site and even required the defendant to excavate the site and haul the materials elsewhere. *Id.* at 841.

267. Editorial, *By Land, Sea and Air*, N.Y. TIMES, May 3, 1969, at 34.

268. Clean Air Act of 1977, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C. (2000)).

269. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 5, 15, 18, 29, 42, and 49 U.S.C. (2000)).

270. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2000).

271. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C. (2000)).

272. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2692 (2000).

273. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2000).

274. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 and in scattered sections

Many states are enacting environmental legislation to prevent pollution by public regulation rather than by providing damages to injured persons, shifting the emphasis from compensation to prevention.²⁷⁵ The California legislature, exercising laudable foresight, has recognized an equitable public property right in water,²⁷⁶ and its courts have held that “[p]ollution of the ground and river waters is damage to public property, as well as a direct injury to public welfare.”²⁷⁷ In addition, the U.S. Supreme Court has stated that there is a significant public interest in conserving and protecting wild animals as well as other natural resources.²⁷⁸

Other judicial decisions also began to reflect this awareness of environmental risk.²⁷⁹ In *Reserve Mining Company v. E.P.A.*, the Environmental Protection Agency brought an action under the Federal Water Pollution Control Act’s injunctive provisions against a mining plant to abate a discharge of carcinogenic mine tailings.²⁸⁰ The statute required that the pollution source be “presenting an imminent and substantial endangerment to the health . . . or to the welfare of persons.”²⁸¹ The court interpreted this to mean that a threat of harm, but not actual harm, was sufficient to justify injunctive relief even though studies had shown inconclusive results.²⁸² This holding is indicative of a larger trend in legal attitudes whereby, unlike their nineteenth-century counterparts, the courts were now willing to interfere in situations where the environmental consequences were uncertain.²⁸³ Courts often wrestle with environmental issues. In *Harrison v. Indiana Auto Shredders Co.*, the court dissolved a permanent injunction against a junkyard even though the court admitted that the yard created air and sound pollution.²⁸⁴ In discussing the

of 26, 33, and 49 U.S.C. (2000)).

275. See 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.03[3][c], at 4A-216 (2004). “The recent growth of federal and state environmental pollution laws has been designed to prevent pollution by public regulation rather than provide damages to persons injured. The compensation of victims of environmental pollution has been incidental to the accomplishment of the primary purpose.” *Id.*

276. CALIFORNIA WATER CODE § 102 (West 1971).

277. *Aerojet-General Corp. v. San Mateo County Super. Ct.*, 257 Cal. Rptr. 621, 629 (Cal. Ct. App. 1989); see also *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1193–94 (9th Cir. 1986) (stating that all water in Oregon belongs to the state and the discharge of oil into such water is a cause of action from which damages may be collected).

278. *Hughes v. Oklahoma*, 441 U.S. 322, 334–35 (1979).

279. For a good discussion of this judicial trend, see Silver, *supra* note 32, at 88–89.

280. *Reserve Mining Co. v. Env’tl. Prot. Agency*, 514 F.2d 492, 501 (8th Cir. 1975).

281. Federal Water Pollution Control Act, 33 U.S.C. § 1364(a) (2000); see also MANATT ET AL., STATUTORY AND COMMON LAW LIABILITY FOR INJURY AND DAMAGE CAUSED BY RELEASES OF HAZARDOUS WASTE 18–20 (1983) (discussing this provision of the Clean Water Act).

282. *Reserve Mining Co.*, 514 F.2d at 514–16, 520, 528. The court, in fact, gave the plant a “reasonable time” to stop the discharge because of the cost to the plant and to the public. *Id.* at 538.

283. Silver, *supra* note 32, at 89.

284. *Harrison v. Ind. Auto Shredders Co.*, 528 F.2d 1107, 1126 (7th Cir. 1976). “This case

environmental impact, the court recognized that junked automobiles are “one of this country’s major solid waste disposal problems” and that this junkyard served a valuable purpose in recycling used metals.²⁸⁵ Even state legislatures attempt to balance economic development and environmental quality. The Maryland legislature has stated that “[e]ach person has a fundamental and inalienable right to a healthful environment.”²⁸⁶

B. *The Role of Technology*

At common law, one of the greatest difficulties for environmental plaintiffs is proving the required element of causation between an action and the harm.²⁸⁷ While a body of scientific knowledge concerning environmental effects is evolving, the causation requirement can create an insurmountable hurdle for environmental claims because courts may find the harm too uncertain or difficult to ascertain.²⁸⁸

The inherent vagueness of anticipatory nuisance and the unpredictability of the standards of proof, as seen, “require plaintiffs to shoulder the enormous burden of proving that a defendant’s conduct will very probably, or almost certainly, injure them.”²⁸⁹ Many courts deny relief in anticipatory nuisance actions because the harm is uncertain and, if the threatened harm does occur, the plaintiff still has a remedy by bringing a

presents the very difficult question of how to balance the legitimate demands of an urban neighborhood for clean air and a comfortable environment against the utility and economic enterprise of a beneficial, but polluting, industry.” *Id.* at 1109.

285. *Id.* at 1110.

286. Maryland Environmental Policy Act, MD. CODE ANN., NAT. RES. I § 1-302(d) (2000). The statute continues by stating that “[t]he determination of an optimum balance between economic development and environmental quality requires the most thoughtful consideration of ecological, economic, developmental, recreational, historic, architectural, aesthetic, and other values.” *Id.* at § 1-302(f); cf. Jamee Jordan Patterson, *California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 UCLA J. ENVTL. L. & POL’Y 175 (1993) (describing in depth the nuisance law in respect to environmental resources in California).

287. See GRAD, *supra* note 275, § 4A.03[3][b], at 4A-215 (stating proof of causation is “the most difficult burden that a plaintiff carries in a toxic tort case”); JOHN E. BONINE & THOMAS O. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION* 622-23 n.8 (2d ed. 1992) (commenting that the difficulty in establishing causation, especially with chronic as opposed to acute toxicity, has led some plaintiffs to use, with mixed success, theories of emotional distress or “cancerphobia”); Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1226-37 (1987) (discussing the causation problem in the context of exposure to toxic chemicals); Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 681-86 (1989) (describing, in depth, the causation problems an environmental plaintiff might face).

288. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1203-10 (6th Cir. 1988) (rejecting the plaintiffs’ claims of causation because experts were not able to express reasonable medical certainty).

289. Doane, *supra* note 9, at 455; see also *Commerce Oil Ref. Corp. v. Miner*, 281 F.2d 465, 474 (1st Cir. 1960) (“[T]o secure an injunction against a neighbor’s prospective use of his property, more must be shown than the mere possibility or even probability of harm resulting from that use.”).

claim for an actual nuisance.²⁹⁰ Because attaining this level of proof is so costly and difficult, technologically intensive uses of land will often be allowed despite the potential harm involved.²⁹¹ “[F]ormal technology assessment laws, such as the National Environmental Policy Act [and the] Clean Air Act,” can aid courts in assessing potential threats of harm from heavy industry.²⁹²

“In the United States, [there is] a complex environmental paradigm where job creation, energy development and growth control clash with critical concerns of biodiversity, wilderness protection and open space preservation.”²⁹³ In an unusual display of confidence in modern science, the Rhode Island Supreme Court, in *Wood v. Picillo*, held that a hazardous waste dump site could contaminate a neighbor’s water supply.²⁹⁴ In doing so, the court reversed its 1934 decision in *Rose v. Socony-Vacuum Corp.*,²⁹⁵ concluding that

the courses of subterranean waters are no longer obscure and mysterious. . . . [D]ecades of unrestricted emptying of industrial effluent into the earth’s atmosphere and waterways has rendered oceans, lakes, and rivers unfit for swimming and fishing, rain acidic, and air unhealthy. Concern for the preservation of an often precarious ecological balance . . . has today reached a zenith of intense significance.²⁹⁶

The *Wood* court found that “the scientific and policy considerations that

290. See *McQuade v. Tucson Tiller Apartments, Ltd.*, 543 P.2d 150, 153 (Ariz. Ct. App. 1975) (refusing to enjoin use of easement for the hauling of sand and gravel because the activity may never take place); *Wood v. Town of Wilton*, 240 A.2d 904, 908 (Conn. 1968) (holding that plaintiffs may petition for an injunction if a dump later creates a nuisance); *Larsen v. Vill. of Lava Hot Springs*, 396 P.2d 471, 476 (Idaho 1964) (refusing to enjoin proposed sewage lagoon at the behest of motel owner); *Hays v. Hartfield L-P Gas*, 306 N.E.2d 373, 377 (Ind. Ct. App. 1974) (mentioning that plaintiffs can try to enjoin the use of a propane tank if it later creates a nuisance); *Turner v. City of Spokane*, 235 P.2d 300, 303 (Wash. 1951) (concluding that plaintiffs may enjoin the plant if it actually becomes a nuisance).

291. See generally *Hays*, 306 N.E.2d at 377 (denying an injunction against a 30,000 gallon propane tank to be built within 300 feet of plaintiff’s home); *Turner*, 235 P.2d at 303 (disallowing an injunction against a rock crushing plant to be built within a residential neighborhood); *Purcell v. Davis*, 50 P.2d 255, 259 (Mont. 1935) (refusing to issue an injunction against the construction of an oil refinery within 273 yards of plaintiff’s home).

292. 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.5(C), at 57 (1986). These statutes cover industries such as “power plants, chemical plants, and pulp mills” requiring stringent standards for industry compliance. *Id.* However, the technology assessment is not as well developed for other subjects of anticipatory nuisance claims such as “bus depots, dry cleaning establishments, [and] shooting ranges.” *Id.*

293. Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 495 (1992) (footnote omitted).

294. *Wood v. Picillo*, 443 A.2d 1244, 1249 (R.I. 1982).

295. *Rose v. Socony-Vacuum Corp.*, 173 A. 627 (R.I. 1934).

296. *Wood*, 443 A.2d at 1249.

impelled” a different result in the nearly identical *Rose* case were “no longer valid.”²⁹⁷ As technology becomes more sophisticated and more is learned about the impact of certain activities on the environment, the threats of harm that cannot be addressed adequately after the fact will become more apparent.²⁹⁸

VIII. ELIMINATING UNCONSIDERED ENVIRONMENTAL EXTERNALITIES

An equitable injunction has been recognized as a means for enforcing public policy and, as a result, this field has expanded to provide protection not only for public and social interests but property interests as well.²⁹⁹ This incorporation of equity into judicial decisionmaking is not novel.³⁰⁰ The court’s role in evaluating anticipatory nuisance claims is one of interpretation and application of public policy. Although it is primarily the legislature’s role to define public policy, the judiciary “should continue to be translators of economic principles” to achieve economic fairness and efficiency.³⁰¹ The application of a correct balancing test and the flexibility offered by conditional injunctions allows courts to achieve economic fairness and efficiency by eliminating unconsidered environmental externalities.

A. *Environmental Externalities Today*

Individuals and corporations both tend to act in their own self-interest. Industry and other productive uses of land that are beneficial economically to the owners have been favored by the legislatures and courts, and this allows landowners to create environmental externalities.³⁰² The landowner

297. *Id.*

298. See Chris G. Whipple, *Fundamentals of Risk Assessment*, 16 ENVTL. L. REP. 10190, 10195 (1986) (discussing the rapidly evolving field of risk assessment and how its application to environmental health risks has resulted in more explicit analyses). See generally Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83, 86–89 (discussing the issues involved with identifying the causes of latent injuries).

299. See *People v. Lim*, 118 P.2d 472, 474–75 (Cal. 1941) (discussing the changing use of “equity injunctions”).

300. See FREDERIC O. SARGENT ET AL., *RURAL ENVIRONMENTAL PLANNING FOR SUSTAINABLE COMMUNITIES* 148–61 (1991) (discussing how to evaluate equitable issues in land-use planning); Harvey M. Jacobs, *Social Equity in Agricultural Land Protection*, 17 LANDSCAPE & URB. PLAN. 21 (1989) (developing a framework for social equity).

301. Smith, *supra* note 1, at 740; see also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 891 (1988) (“But often two or more outcomes will be reasonable, and the choice among reasonable outcomes is an open one, though not, [as] argued, precisely a legislative one.”).

302. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (describing the impact of the industrial revolution on application of tort theory); Belz, *supra* note 53, at 1018 (discussing how the imperative for economic development altered property relationships in the name of economic liberty).

will use his property in the most economically productive fashion—often to the detriment of the environment. Consequently, the landowner is gaining a benefit but not paying for the repercussions and damage to the environment; this is an externality.³⁰³ Society absorbs these costs through increased medical expenses due to an escalating incidence of respiratory disease and increased risk of cancer due to air pollution; reductions of property values due to the presence of polluting industries; and the loss of wetlands, forests, and biodiversity through development.³⁰⁴

B. The Unique Advantages of Anticipatory Nuisance Actions to Avoiding Environmental Externalities

Although the federal and state legislatures have enacted statutes that provide for environmental causes of action, the common law of nuisance provides “the ‘oldest and perhaps most useful legal theory’ for environmental plaintiffs.”³⁰⁵ Many of the statutory actions provided in environmental legislation are not really useful for the average plaintiff because there is often a large imbalance of resources between an individual plaintiff and the typical corporate defendant.³⁰⁶ A nuisance suit does not require compliance with the complex procedures and the scientific evidence that are often necessary in actions under statutory environmental claims.³⁰⁷ Additionally, a plaintiff can maintain a common law nuisance action even if the offending activity is legal.³⁰⁸ In a nuisance action, a plaintiff can simply

303. See *Of Bees and Lighthouses*, THE ECONOMIST, Feb. 23, 1991, at 72 (describing and defining environmental externalities).

304. See Joseph J. Romm & Christine A. Ervin, *How Energy Policies Affect Public Health*, 111 PUB. HEALTH REP. 390, 394 (1996) (discussing the economic impact of pollution on the population’s respiratory health, allergies, and the ozone layer—saying that “[d]eaths from asthma have increased more than 90% since 1979”); Scott Lehigh, *STOP THE NOISE! Longing for the Sounds of Silence in a Polluted World*, BOSTON GLOBE, June 2, 1996, at 71 (discussing the effects of noise as a pollutant); Frederick M. Muir, *Running on Fumes—Those Who Want to Exercise Face a Dilemma: Brave the Smog and Possibly Face Health Problems, or Become a Couch Potato*, L.A. TIMES, July 28, 1995, at 2B (observing that “[t]he mercury is rising, the sun is shining and the blue sky is, well, it’s turning kind of a grayish shade of brown”).

305. Rychlak, *supra* note 287, at 661 (quoting Peter F. Langrock, *Class Action Litigation*, 25 TRIAL 46, 47–48, (Oct. 1989)). See generally Michael D. Riseberg, Comment, *Exhuming The Funeral Home Cases: Proposing A Private Nuisance Action Based on the Mental Anguish Caused by Pollution*, 21 B.C. ENVTL. AFF. L. REV. 557, 559 (1994) (utilizing the private nuisance doctrine when physical invasion is lacking).

306. Rychlak, *supra* note 287, at 661.

307. See, e.g., 42 U.S.C. § 6972(b)(1) (2000) (Solid Waste Disposal Act’s sixty-day notice requirement); 42 U.S.C. § 7604(b)(1)(A) (2000) (Clean Air Act’s sixty-day notice requirement); *Hallstrom v. Tillamook*, 493 U.S. 20, 26, 31 (1989) (holding that the sixty-day notice requirement in the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2000), is to be strictly construed).

308. See, e.g., *Town of Mt. Pleasant v. Van Tassell*, 166 N.Y.S.2d 458, 463–62 (N.Y. Sup. Ct. 1957) (holding that operation of a piggery was a public nuisance despite legality of the operation); *Heinl v. Pecher*, 198 A. 797, 800 (Pa. 1938) (stating that a permit or compliance with regulations, will not

allege “that the pollution . . . ‘looks bad, smells bad, and does bad things’ to the plaintiff[]—without getting mired in the scientific underpinnings.”³⁰⁹ “The beauty of the simple nuisance . . . case is that it reduces the case to terms a layperson can understand: ‘You dumped it, it hurt me or my property, and you should pay.’”³¹⁰

C. *The Traditional Balancing Test and Changing Public Policy*

The traditional balancing test considers the harm to the plaintiff and the benefits to society. It undervalues natural resources.³¹¹ Resources, renewable and non-renewable, are treated as free goods—valueless until they are transformed into products and services.³¹² In response to this, many environmental economists have suggested that the economic value of natural resources is their “true” value or replacement cost.³¹³ Additionally, other parties have suggested that the potential severity of harm to the environment should be considered³¹⁴ when determining the relief available to anticipatory nuisance plaintiffs.³¹⁵ Anticipatory nuisance actions can provide a flexible remedy in that courts can apply a balancing test that

shield the defendant from an action for a private nuisance). See generally Grinblat, *supra* note 22 (explaining the use and limitations of nuisance as a response to large scale hog operations).

309. Langrock, *supra* note 305, at 47. But see GRAD, *supra* note 275, § 4A.03[3][a], at 4A-200.2 (stating that compliance with regulations may be a defense to a public nuisance suit).

310. Langrock, *supra* note 305, at 48. Langrock was plaintiff’s counsel in two significant environmental class action cases: Zahn v. Int’l Paper Co., 414 U.S. 291 (1973) and Int’l Paper Co. v. Ouellette, 479 U.S. 481 (1987).

311. PAUL HAWKEN, THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY 2 (1993).

The least-price economy rewards you for what you don’t do It gives incentives to manufacture products at the lowest price and to avoid paying for the downstream, intergenerational effects of your activity. Those costs are considered a societal problem, not a commercial one

That is industrialism.

Alan H. Badiner, *Natural Capitalism*, YOGA J., Sept.–Oct. 1994, at 64, 67 (interviewing Paul Hawken, author of THE ECOLOGY OF COMMERCE).

312. *Id.*

313. See James P. Karp, *Sustainable Development: Toward a New Vision*, 13 VA. ENVTL. L.J. 239, 248 (1994) (explaining that until recently American industry did not consider environmental costs); ROBERT REPETTO, *WORLD ENOUGH AND TIME* 32–35 (1986) (discussing proper resource pricing in various economic sectors); William D. Ruckelshaus, *Toward a Sustainable World*, 261 SCI. AM., 166, 169 (Sept. 1989) (suggesting that “[t]he way to avoid the tragedy of the commons—to make people pay the full cost of a resource use—is to close the loops in economic systems”).

314. See generally CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? 9 (William Kaufmann, Inc. 1974) (1972) (“I am quite seriously proposing that we give legal rights to forests, oceans, rivers, and other so-called ‘natural objects’ in the environment—indeed, to the natural environment as a whole.”); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989) (arguing that “[t]he public trust is a fundamental doctrine in American property law and should be recognized much more widely than it is today”).

315. See generally Sharp, *supra* note 10 (discussing anticipatory nuisance as a means of addressing environmental harms); Williams, *supra* note 15 (discussing the same).

reflects appropriately the true costs, risks, and benefits to society and may issue a permanent or temporary injunction to ensure economic efficiency. By adding the true cost of environmental harm and the potential severity of the harm to the balancing test, which already considers other social costs and benefits, a standard is created that reduces environmental externalities and is truly economically efficient and thereby reasonable.

CONCLUSION

For the past century, society has accepted environmental externalities as the price of technological advancement. However, there has been a shift away from the traditional societal-legislative-judicial subsidy of industry to a more enlightened stance by those institutions that recognize the value of environmental resources. This enlightened perspective should be reflected in judicial application of nuisance law. Both the federal and state courts should employ the anticipatory nuisance doctrine in a way that reflects the reasonableness of today's society. An appropriate determination of what land uses are reasonable and economically beneficial to society would account for environmental damage. An adjusted balancing test, which considers environmental costs and potential severity of harm, and an increased use of temporary injunctions, would allow courts to force users of land to internalize all of their costs. Only when the economic evaluation of new land uses considers all the actual costs and potential consequences of an activity will the environmental externalities be eliminated and a truly reasonable approach to anticipatory nuisance be established.

By recalibrating the time-honored balancing test as Justice Howard C. Ryan of the Illinois Supreme Court did in *Wilsonville*,³¹⁶ a great judicial opportunity is opened for testing the validity of a claim for relief under anticipatory nuisance. Under the Ryan test, a court, in deciding an action for anticipatory nuisance, will weigh merely the degree of potential harm and then proceed to analyze the likelihood that the specific injury will occur.³¹⁷ The more severe the potential harm, the less certain it must be to occur in order to issue injunctive relief.³¹⁸ And, contrariwise, if the harm is not very severe, then a much higher likelihood of occurrence should be required before an injunction will lie.³¹⁹

316. *See supra* Part III.

317. *Vill. of Wilsonville v. SCA Servs.*, 426 N.E.2d 824, 842 (Ill. 1981) (Ryan, J., concurring). Judge Ryan observed that under the more restrictive standard, "a person engaged in an ultrahazardous activity with potentially catastrophic results would be allowed to continue until he has driven an entire community to the brink of certain disaster." *Id.*

318. *Id.*

319. *Id.*

This balancing standard offers, if not a sound resolution to the problems that anticipatory nuisance poses, at least a template for fair-minded judicial decisionmaking. Judge Ryan's balancing test places the proper emphasis on the gravity of the harm in resolving these claims. In addition, while Ryan does not mention this, under his balancing test a court could look to the factors laid out in Restatement of Torts Section 827 to help decipher the gravity of the harm.³²⁰

The Ryan construct would allow courts to have more solid foundations upon which to base their decisions. It will lead to more predictability in decisions and, in the long run, will encourage plaintiffs to pursue anticipatory nuisance causes of action when the action is most appropriate—namely, when the potential harm is the greatest.

Heretofore, the current burden of proof for a plaintiff to meet under a claim for anticipatory nuisance has been set so unrealistically high by the courts and the two states (Georgia and Alabama) legislating in this area, that it acts as a disincentive, and dissuades suits from being maintained. The doctrine of anticipatory nuisance, as clarified and rehabilitated herein, has the real potential to serve as a significant and valuable tool to not only prevent waste and environmental degradation, but also, consistent with the early common law principle of *sic utere tuo ut alienum non laedas*, to assure the reasonable use of land.³²¹

320. See *supra* note 66 and accompanying text.

321. See generally Smith, *supra* note 1, at 688 (stating that the maxim of *sic utere tuo* was followed in nuisance law in post-colonial America and in nineteenth-century America).