# The Nuisance Standard Revisited

Michael A. Westbrook
Boston University School of Law

## I. INTRODUCTION

Nuisance law has largely been neglected since its inception. This may be in part to its many theoretical difficulties. In despite of such difficulties, the Restatement (Second) of Torts sought to codify some of the core principles created by the common law as well as some additional considerations judges may take into account when deciding whether to grant injunctive relief. However, while the Restatement (Second) of Torts was relatively successful in codifying the common law principles of nuisance, it arguably codified along with the principles, the doctrine's flaws. In adding the concept of 'enjoyment' for consideration of whether to grant injunctive relief, the Restatement (Second) of Torts further complicated matters. Ultimately, courts adopted the standard of interference and enjoyment without guidance with respect to what exactly one's enjoyment of property entails. As I aim to demonstrate, by incorporating enjoyment as consideration, courts have effectively equated enjoyment with potential harm suffered. Essentially this has rendered inquiry into enjoyment meaningless or as a "catch-all" for borderline cases. But nuisance law can be reformed with simple changes. The ultimate aim of the paper is to demonstrate that the proposed nuisance standard can reconcile the critiques of contemporary nuisance law and still yield a relatively easy mechanism that judges can use to decide cases. I aim to demonstrate this overarching goal by first surveying the history of nuisance law. This will demonstrate that courts have generally considered nuisance a balancing of interests – which is unique as compared to the rest of tort law. Then I will critique the contemporary standard for nuisance, using functional definitions and a hypothetical, and demonstrate that the current standard is flawed in that it departs from broad principles of tort law and general jurisprudence. Then I will put forth the proposed revised nuisance standard and demonstrate that it is able to deal with contemporary problems of nuisance law, namely isolated

nuisances, and aesthetic nuisances. Lastly, I will revisit the hypothetical, originally used to critique the contemporary standard of nuisance, and apply the revised standard.

## II. THE HISTORY OF NUISANCE

Historically, "a precise definition of private nuisance eluded nineteenth and early twentieth century jurists."[1] But when courts did decide whether to grant or deny injunctions in nuisance cases – most courts utilized a balancing test. As George Smith notes, there were three common tests. The 'balancing of equities' test focused on determining whether the defendant's conduct was "willful or otherwise wrongful."[2] The 'comparative hardship' test weighted "the injury that may accrue to the one or other party."[3] Lastly, the 'relative hardship' test considered "whether an injunction would not do greater injury than that which would result from refusing it."[4] Essentially three factors were considered: the character of the conduct of the parties, the relative economic costs to the parties, and the impact on the community.[5] Notably, however, is during some period the courts "identified private nuisance with disputes involving the use and enjoyment of land."[6] The combination of prior tests with the addition of 'enjoyment' can be summed up as:

> Anything which annoys or disturbs the free use of one's property, or which one's property, or which renders its ordinary use or physical occupation uncomfortable. . . . A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort. . . . A condition is



[1] Robert G. Boone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. Cal. L. Rev. 1101, 1115 (1986).
[2] George P. Smith, *Nuisance Law: The Morphogenesis of a Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEBRASKA L. REV. 658, 690 (1995).
[3] *Id*. at 91.
[4] Smith, *supra* note 2, at 690.
[5] *Id*.
[6] Boone, *supra* note 1, at 1115.

> a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby.[7]

Or more succinctly stated, by the Restatement (Second) of Torts ("Second Restatement"), which has been adopted by most jurisdictions, is:

> One is subject to liability for a private nuisance if, but only if, his conduct is *a* legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is intentional and unreasonable.[8]

Differently stated, a private nuisance is "a substantial and unreasonable interference with the private use and enjoyment of one's land."[9] As noted earlier, while courts retained the core three considerations of whether to grant an injunction for nuisance, enjoyment was also added. Furthermore, as distinguished from the earlier formulations of nuisance – the courts and the Second Restatement additionally consider interference whereas it was previously assumed. But these additions to the historical considerations of nuisance "have been the subject of very little



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[7] Hendricks v. Stalnaker, 380 S.E.2d 198 (Sup. Ct. W.V. 1989).

[8] RESTATEMENT (SECOND) OF TORTS § 825 (1979)

The Restatement (Second) of Torts § 822 (1979) requires a consideration of unreasonableness as part of the determination of liability.

> One is subject to liability for private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land; and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules

The Restatement (Second) of Torts §827 (1979) lists the following 'gravity of harm' factors:

> (a) the 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 avoiding the harm.

[9] Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVT'L L. J. 1, 2 (2002).

analysis."[10] Therefore, in the next section, I will consider the theoretical considerations of 'interference' and 'enjoyment.'

## III. Theoretical Critique

In this section I will first attempt to provide functional definitions of the terms 'interference' and 'enjoyment.' Ultimately, I will utilize the definitions from Black's Dictionary and academic literature because while the courts have held certain conduct as interfering and causing lack of enjoyment, they have yet to provide functional definitions or standards which apply uniformly. After establishing the functional definitions, I will put forth a hypothetical. The aim of the hypothetical is to make apparent two troubling consequences of the contemporary standard of nuisance. The first being that courts equate interference and harm with loss of enjoyment. However, the prior does not necessitate the latter. Second, by making conduct actionable by only being *a* cause as opposed to *the* cause of loss of enjoyment by the claimant is to engage in an impossible qualitative assessment.

### A. *Definitions on Interference and Enjoyment*

In exploring the theoretical conceptions of nuisance – it is important to establish the pre-existing definitions of the term's 'interference' and 'enjoyment.' However, this proves difficult as courts have been reluctant to define either concept but instead declare the actions that constitute interference and lack of enjoyment. The Second Restatement merely qualifies interference as intentional or unintentional, as if there is another option.[11] However, this is not a



[10] Donal Nolan, *The Essence of Private Nuisance*, 10 MOD. STUD. IN PROP. L. 71, 73 (2019); *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 UNI. OF CHI. L. REV. 681, 719 (1973).

[11] For the purpose of this paper, invasion and interference will be treated as synonymous as the definitions are similar; *See Invasion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defined as "forcible encroachment on the rights of another).

definition but merely a qualification. Therefore, an alternative source must be considered. Black's Law Dictionary defines interference as "the act or process of obstructing normal operations" or as "an obstruction or hindrance."[12] Enjoyment has been defined as the right "to have, possess, and use something with satisfaction"[13] or otherwise stated "to occupy or have the benefit of the property."[14] Having established the definition of the terms, I will now again briefly put forth the elements necessary to prove nuisance. According to the Second Restatement, there are two elements needed to prove nuisance: (1) intentional or unintentional interference; and (2) lack of enjoyment. Interference is deemed intentional "when the actor knows or should know that the conduct is causing a substantial and unreasonable interference."[15] Intentional interference is then deemed to be unreasonable, "if by balancing the landowner's interest, the gravity of the harm outweighs the social value of the activity alleged to cause the harm."[16] But whereas there is a test for determining intentional and unintentional interference, such does not exist for 'enjoyment.' Thus, while the definition and elements of nuisance have provided courts with a functional standard by which to issue decisions – there remains theoretical complications. The hypothetical will provide the basis for the next section of the paper.

**B.** ***Theoretical Complications with the Contemporary Nuisance Standard***

Imagine the hypothetical below was a case that you were deciding. Would you intuitively rule *X*'s conduct as a nuisance with respect to *Y* and with respect to *Z*?



[12] *Interference*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[13] *Enjoyment*, BLACK'S LAW DICTIONARY (11th ed. 2019)
[14] *Enjoy*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[15] RESTATEMENT (SECOND) OF TORTS § 825 (1979).
[16] *See id*.

> In a small quiet residential neighborhood, neighbor *X* decides to conduct chemical experiments in the backyard. The fumes from the chemical experiment are equivalent to that of the most noxious odor known to man. But the odor can only be smelled outside the home. *X* conducts these experiments every day, except for Sundays. *X*'s neighbor, *Y*, never leaves his home, except for Sundays and thus does not smell the fumes. However, *X*'s neighbor, *Z*, goes outside every day to garden, including Sundays. But upon *X*'s starting chemical experiments, *Z* has been constructively faced with the choice to either remain inside the home, except for Sundays, or to go outside to garden and endure such odor.

In applying the courts' standards – there seems to be differing conclusions that *may* be reached. There seems to be little reason for doubt that *X* should know that conducting chemical experiments on his property is reckless or negligent,[17] which is the standard for unintentional nuisance. For if *X* conducts such experiment every day – then *X* should be aware of noxious odors. Moreover, *X* should also know that fumes conducted in the open area of his property can and likely do spread. Thus, there seems to be no challenge regarding the intentionality of *X*'s act. Subsequently, if *X*'s experiment is one of pure joy – then there is little doubt that the harm caused by *X*'s intentional interference is outweighed by the social value. Moreover, as stated earlier, *X*'s property is in a residential neighborhood. Thus, one may easily conclude *X*'s property is hardly suitable for the character of the land.[18] Having established such elements, there is arguably a distinction with regards to *Y*'s and *Z*'s 'enjoyment' claim.



[17] This is the standard for unintentionality under the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 825 (1979).
[18] Weighing the 'gravity of harm factors as set out in footnote 5.

If analyzed under the Second Restatement's framework, *Y*, should not be successful on the nuisance claim. Simply put, his enjoyment of his property has not been affected by *X*'s conduct. *X* does not conduct his experiment on Sundays when *Y* leaves his home. Thus, *Y* never experiences the odor from *X*'s conduct. However, I stipulate that regardless of whether *Y*'s enjoyment was affected by *X*'s conduct, most courts would still intuitively hold *X*'s conduct constitutes a nuisance. This is evidenced by the Supreme Court's decision *Lucas v. S.C. Coastal Council*. The Court stated, "private nuisance law is simply a determination whether a particular use causes harm."[19] Otherwise stated, if an abstract 'harm' has occurred, then such may be sufficient for a nuisance claim. But what this view fails to consider is that harm can occur without the loss of enjoyment.[20] Simply put, *Y* experienced the harm of having his property rights violated because odors from *X*'s experiment crossed *Y*'s boundaries line. However, because Y has not been affected by the odor – *Y* has not experienced a loss of enjoyment from his property. Additionally, it is likely that courts would conclude that *X*'s behavior constitutes a nuisance because of the current underlying interpretational approach of the Court's statement. The current inquiry into whether conduct constitutes a nuisance, though not explicit, is whether "interference occurred with the *capacity* of the land in question to be used and enjoyed."[21] Alternatively put, whether the claimant's "land is capable of being used and enjoyed"[22] as opposed to whether the plaintiff is using and enjoying their land per se.[23] This interpretation, however, is not proscribed by the Second Restatement. Rather, it is if certain conduct does in fact cause a loss of enjoyment. Thus, the provision of enjoyment has been expanded beyond its textual meaning.



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[19] Lucas v. S.C. Costal Council, 505 U.S. 1003 (1992).
[20] Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55, 81 (1982).
[21] Nolan, *supra* note 10, at 74.
[22] Nolan, *supra* note 10, at 75; *See also* Oliver v. AT&T Wireless Services, 76 Cal. App. 521 (4th Cir.) (1999) (stating "a private nuisance is a civil wring based on disturbance of rights in land).
[23] Nolan, *supra* note 10, at 74.

In contrast to *Y*, *Z* may easily establish the contemporary elements of a nuisance claim. Whereas *Y* arguably did not lose the enjoyment of his property, in fact, *Z*'s actual enjoyment of the property has been affected. In short, *Z* must either endure the most noxious odor when gardening or stay within the confines of his home, excluding Sundays. However, if the facts are altered slightly, the problematic aspect of the 'enjoyment' consideration becomes more prominent. Say *Z* experiences a pre-existing cause which started at some unknown time, *T*, to his unenjoyment of the property. Some unspecified time later, $T^{+k}$, *X* began conducting his experiments. *X*'s conduct arguably contributed to *Z*'s unenjoyment of his property. Under the current nuisance law, *Z* would have a viable claim for nuisance even though Z already did not enjoy his property for some prior cause. Thus, *X* would have to cease his conduct even though there would be no transformation, with respect to Z. Ultimately then, a plaintiff could bring a successful nuisance claim against a defendant resulting in no material benefit to the plaintiff. Furthermore, it would be easier for Z to demonstrate his unhappiness because is the unspecified prior thing resulted in *Z* from going outside – then *Z* could more readily establish his loss of enjoyment of gardening.

Arguably, the current nuisance formulation collapses the 'harm' factors into the enjoyment prong. By merely looking at the harm that has occurred,[24] one does not make the necessary distinction between harm and loss of enjoyment. Rather, the contemporary nuisance standard enables courts to make the unfounded assumption that if harm has occurred then loss of enjoyment *must* have occurred as well. As in the case of *Y*, while it is true that *Y* did in fact suffer a harm, *Y* did not suffer loss of enjoyment. Thus, a distinction must be made to overcome this theoretical complication. Furthermore, the addition of 'enjoyment' in nuisance considerations

[24] *See* Lucas v. S.C. Costal Council, 505 U.S. 1003 (1992)

may allow a plaintiff to be successful if the alleged nuisance is one of many causes of the plaintiff's unenjoyment of their property. Consequently, a claimant has an easier burden of establishing loss of enjoyment, even though they may not necessarily have the evidence sufficient to demonstrate that other's conduct is in fact the cause of their loss of enjoyment.

This then begs the question, does the addition of 'enjoyment' in nuisance considerations cause more harm than good? As I believe the critiques demonstrate that enjoyment has been effectively ignored and if not – yields no material benefit, I believe an alternate standard can be adopted. In the next section, I will but forth an alternate theory that I believe better encapsulates the purpose of nuisance.

## IV. ALTERNATE PRIVATE NUISANCE STANDARD

In this section, I will put forth an alternate nuisance standard that the courts should adopt. Namely, *an activity constitutes a nuisance if an injury occurs to owners or occupants of adjacent land whereby discernable effects have diminished regularly conducted uses of the property*. I will demonstrate the viability of this standard by reconciling my proposed approach with traditional criticism of the contemporary nuisance standard. Then I will demonstrate that the revised nuisance standard can be reconciled with the most pressing concern of nuisance law, namely 'aesthetic' nuisance claims.

### A. *Are Isolated Nuisances Actionable*

As Richard Epstein points out, "many actions are brought on nuisance theories for isolated injuries."[25] However, courts have been reluctant to acknowledge isolated nuisances

[25] Richard A. Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 8 Uni. Chi. Press 49, 66 (1979).

because such must be continuing and/or recurring.[26] But such reasoning is flawed in that it fails to reconcile with the purpose of tort law, of which nuisance is subsumed. In the nineteenth century, the purpose of tort law was viewed as admonishing blameworthy parties.[27] This would ultimately shift to the now accepted purpose being "to secure the efficient and fair compensation of injuries."[28] Thus, the overall purpose of tort law is to compensate those who have sustained injuries by another. To hold that such injuries must repeatedly occur is to further ignore the rest of tort law where a single action may amount to liability.[29] The shift that occurred did not alter the core principle. Namely, the purpose of a tort action is to for the injured party to have redress against the person responsible for injury. By explicitly utilizing the word 'injury', singular, in the standard of nuisance, it signals that only one injury needs to occur. Furthermore, it places nuisance law in tandem with other varying actions subsumed into tort law thereby bringing it into accordance with tort law's overarching principles. Moreover, 'injury' is more easily identifiable, definitionally, as compared to terms like 'interference' or 'enjoyment.'[30] Thus enabling judges to consult the law when determining if one's legal right has been violated.[31] This discussion then necessitates broader discussion regarding the current standard's acknowledgement of harm.

Current nuisance law weighs the respective gravity of harm to the plaintiff and defendant if the injunction is granted. Such procedure is troublesome in that it acknowledges that the



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[26] *See* K-R Bldg. Corp. v. Morales, 2018 NYLJ LEXIS 2441 (2018) (holding "two isolated nuisance incidents plus one vague allegation of continuous nuisance was deemed insufficient to rise to the level of 'recurring and continuous').
[27] G. Edward White, Tort Law in America: An Intellectual History 152 (1980).
[28] *Id*.
[29] *See* Epstein, supra note 25, at 67.
[30] *Compare Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("the violation of another's legal right, for which the law provides a remedy") *with Enjoy,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("to have, possess, and use (something) with satisfaction").
[31] *See Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019)

injured party has been harmed in some way. Again, in most areas of tort law – if it has been proved that one party has harmed another, then the consideration of the extent of the harm is considered in damages, not whether the plaintiff is liable. Additionally, if it is taken into consideration the "social value that the law attach[es] to the primary purpose of the conduct,"[32] as proscribed by the Second Restatement, then effectively the injuries by the offending party act as an excuse or justification of the injuries caused.[33] Put in a crude and rather simple way, if A had a series of extremely loud and strong vibrations go off within an hour which inadvertently shattered both B and C's windows, and A could assert, upon factual demonstration, that the formula he created cured all cancer – then A would likely not be liable for nuisance. Thus, while we acknowledged the harm caused by A's action, it is justifiable that B and C have no recourse because of the degree of A's achievement. Once more, this is the anti-thesis of tort law, under which nuisance resides. Therefore, the proposed standard allows an injured party to recover for a single injury as well as avoiding the 'weighing of harms.'

The discernable effects prong of the revised standard does practically little in way of alternating the contemporary conception of nuisance. But it does narrow the conception of enjoyment. Loss of enjoyment, as stated earlier, has not been explicitly defined by courts. Rather, the courts decide the 'loss of enjoyment' on an ad hoc basis. Otherwise put, courts have identified particular conduct as indicative of loss of enjoyment – but have not formulated a standard by which any certain conduct necessarily constitutes loss of enjoyment. By transitioning to a discernable effects standard, this would provide courts a uniform rule by which to document some injury. The claimant must show an injury occurred. Such standard, importantly, is in conformance with the rest of tort law, which is important because the purpose of said law is to



[32] Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 828 (1979
[33] *See* Epstein, *supra* note 25, at 68.

remedy injuries. Additionally, by incorporating discernable effects into the standard, it allows courts to easily deal with the some of the problems posed by the contemporary nuisance standard. Namely, the discernable effects element deals with radio waves. One must concede that "we are all bombarded by radio waves that cross our properties without our knowledge or consent."[34] But such waves "cannot be detected by man's senses."[35] Therefore, one may not be able to discern the effects of radio waves thereby barring the claim.[36] However, this does not necessarily mean that said waves cannot cause injury. Here it is important to note the functional definition used for injury. As cited earlier, injury is *the violation of another's legal right, for which the law provides a remedy*.[37] One may retort that 'trespass' is an injury and it has occurred if there is a violation of property boundary, as in the case of radio waves. But this would be to misunderstand the conception of trespass. Trespass occurs when "there is physical entry that is a direct interference with the possession of land, which usually must be accomplished by a tangible mass."[38] In other words, trespass deals *only* with the physical intrusion and taking up of space on another property which thereby renders said space of the property unusable to the owner of said property. Simply, it deals with the "interference of exclusive possession."[39] Such is not the case with respect to radio waves. While one could rightly assert that the waves are in fact tangible in some abstract sense, the waves do not occupy the same sense of space whereby the



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[34] Rothbard, *supra* note 20, at 81.
[35] *Id*.
[36] But as Rothbard notes "suppose it is later discovered that radio waves are harmful, that they cause cancer or some other illness." Rothbard, *supra* note 20, at 81. Then it would be the case that radio waves would be considered a nuisance. As will be elaborate later in the paper, all of the criteria for the proposed nuisance would be met. The injury that would be committed is recognized by law, namely causing of illness of another. The injury would have a discernable effect is it was established that the radio waves were in fact the cause of the illness. And – it may interfere with one's regularly conducted uses of the property if their capacity to engage in regularly uses of the property have somehow been diminished as a result of the injury sustained.
[37] *Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019)
[38] Rothbard, *supra* note 20, at 79-80.
[39] Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. of Legal Stud. 13, 29 (1985).

owner's space is unusable. Thus, trespass is not a viable injury to be claimed and which discernment is therefore irrelevant.

Moreover, the distinction between trespass and nuisance is of even more importance when discussing regular conducted uses of the property. As stated earlier, trespass is viewed as a violation of one the of the core bundle of rights in property law. Namely, the right to exclude others. Such intrusion has "no exception for de minimis harm" rather "a rule of strict liability applies."[40] However, nuisance law, while acknowledging such interest is important must deal with "other" matters that constitute some sort of vague violation of the right to exclusion but would otherwise not categorically fit into the traditional model of trespass. Thus, nuisance can be summed up to address those interferences which preclude the beneficial nature of one's property. But as evidenced earlier, there are theoretical problems when framed that way. Ultimately, such framing is too broad thereby, implicating cases of 'injury' when such does not exist. Further, as discussed earlier, balancing harms precludes rights as barrier. Thus, as the proposed nuisance standard requires, nuisance must entail strict liability.

**B.** ***Aesthetic Nuisances***

Next, I will address the viability of the proposed theory, by addressing the most challenging nuisance cases, aesthetic nuisances. Aesthetic nuisances have been defined as "substantial and unreasonable interference with the use and enjoyment of one's land resulting from unsightly object or structures on another's land."[41] This may include but is not limited to, trash piles, junky yards, and "oddly constructed homes out of conformity with the surrounding



[40] *Id*. at 13.
[41] Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. Envt'l L. J. 1, 2 (2002).

neighborhoods."[42] As Richard Dodson notes, courts have been "reluctant to recognize an aesthetic nuisance cause of action for two basic reasons."[43] The first is that courts have "indicated that unsightly or unaesthetic land uses cannot produce substantial interference with the use and enjoyment of another's land."[44] The second reason courts have been reluctant is because "while perhaps distasteful" such unsightly issues are not "unreasonable" and to have judges making such determinations "will place judges in the positive of making subjective judgments about beauty."[45] However, while courts are correct in not recognizing aesthetic nuisance claims, the reasons identified are based on a faulty standard. First, it is again evidenced that the enjoyment element adopted is collapsed into the interference/harm element. One could relatively imagine a situation that while there is no interference *per se*, the aesthetic of another property did in fact affect the enjoyment of another. One such example is if one neighbor had painted his house 'camo' and the complaining neighbor was a war veteran with Post-Traumatic Stress Disorder ("PTSD"). The sheer sight of the camo house sent the afflicted individual into an episode. Thus, to avoid this trigger, the PTSD individual did not leave his home or, less severely, could not engage in the necessary lawn care of the front yard. Secondly, judges recognize that "one man's pleasure may be another man's perturbation, and vice versa."[46] Ultimately, "beauty is in the eye of the beholder" and to recognize aesthetic considerations "fraught with subjectivity" would place the judiciary into a "nebulous area" resulting in chaos.[47] But this reasoning overestimates judicial objectivity. Under the current approach, judges are asked to weigh the reasonableness of the defendant's actions against the harms that have occurred to the plaintiff



[42] *Id*.
[43] *Id*.
[44] *Id*.at 3.
[45] *Id*. at 3.
[46] Ness v. Albert, 665 S.W.2d 1 (1983).
[47] *Id*.

and might occur to the defendant. Arguably, this is 'fraught with subjectivity.' What one judge may consider a harm worth enduring another may not and 'vice versa.' Thus, to merely assert objectivity is not enough since judges routinely engage in subjective assessment.

However, Dodson recognizes another reason to disregard the "subjectivity rationale" proffered by judges, though in advancement for recognizing aesthetic nuisance claims. Dodson argues that the correct 'reasonableness' assessment, in the preexisting framework, should be "whether the land use in question is in conformity with the surrounding land use in the neighborhood or community."[48] But what Dodson fails to take into consideration is the intersection between one's right to use their property as they see fit and the purpose of zoning laws and other restrictive covenants, like those adopted by homeowner associations. The right to property and to do with one's property as one pleases has permeated American law since its inception.[49] Anyone arguing that aesthetics can constitute a nuisance when one has not voluntarily entered into an agreement restricting said actions will thus face an uphill battle and rightfully so. It has been recognized that natural rights endow one to tend to their property the way they see fit – so long as another's equivalent right is not violated. Additionally, it must be considered whether an individual voluntarily abrogated or limited their right. Arguably, this is the case when individuals decide to live in communities with homeowner associations ("HOAs"). Traditionally, some of the reasons for moving to a community with an HOA have been a sense of community, the permanence of the development, and services.[50] Otherwise stated, some individuals forego what they may do with their property deeming more beneficial the consideration previously listed. To them a sense of community may be more important or



[48] Dodson, supra note 9, at 3.
[49] *See generally* Luigi M. Bassani, *Life, Liberty . . .: Jefferson on Property Rights*, 18 J. of Libertarian Stud. 31 (2004).
[50] Marygold S. Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389 (1953).

advantageous as compared to being limited to what color they may paint their house. Moreover, as with common interest communities, individuals may find the amenities such as clubhouses, pools, and stables more advantageous than the restrictions imposed. But what distinguishes an aesthetic nuisance claims in this context is consent. When one joins a community with an HOA they are agreeing to the restrictive covenants imposed, even if said covenants are broad and vague. Thus, the individual consented to conforming actions that might have otherwise taken with respect to their property and conforming them to their contractual obligation.[51] However, if a nuisance claim is to arise and there is no sweeping provision regarding the aesthetics – then said individual shall not be subject to an aesthetic nuisance claim under the proposed standard.

Furthermore, in attempting to argue that aesthetic nuisance claims should be viable, Dodson argues that the plaintiff suffered a diminution in value of his property as a result of the defendant's land use."[52] This is indicative of substantial interference.[53] However, such argument fails even under the contemporary conception of nuisance. As Rothbard aptly pointed out, "no one has the right to protect the value of his property."[54] The value of some unspecified property "is purely the reflection of what people are willing to pay for it" and that willingness "solely depends on how they decide to use their money."[55] In effect, by recognizing diminution of property value as indicative of interference is to grant a "right to someone else's money."[56] Additionally, landowners buy property with the expectation that the value of said property will



[51] This is an example of a restrictive covenant concerning the character of my neighborhood. "Declarant wishes to ensure the *attractiveness* of the individual Home Sites and community facilities within Old Stone Crossing at Caldwell Creek and to prevent any impairment thereof; to prevent nuisances; to preserve, protect and enhance the values and amenities of the Property and to provide for the maintenance and upkeep of the Common Areas, Common Open Spaces, Landscape." Charlotte, N.C., Old Stone Crossing Declaration of Covenants, Conditions & Restrictions (2003).
[52] Dodson, *supra* note 9, at 6.
[53] *Id*.
[54] Rothbard, *supra* note, at 62.
[55] *Id*.
[56] *Id*.

be in constant flux due to factors beyond their control. Thus, they are aware that in buying property – one is not guaranteed climbing value or even stagnant value. It is the property owner's hope that the property value will climb but it is far from certain. Lastly, the reason the proposed reformulation does not recognize aesthetic nuisance claims is because the theory of diminution of value relies on some unset time in the future where the claimant *might* sell their property. In effect, one would be barred from exercising a fundamental right because the claimant might, at some unspecified time, in the future decide to sell their property. This conception of 'unspecified time' has hardly garnered support for the current jurisprudence and rightfully so. To predicate another's right on an action that may or may not occur is to render such right in effect useless.

Ultimately, the proposed revised ?nuisance standard better reconciles isolated nuisances and aesthetic nuisances with overall tort principles and current jurisprudential principles. By allowing an individual to bring an isolated nuisance claim – the revised nuisance principle acknowledges the need for each harm the claimant experiences to be redressed. It further outperforms the contemporary nuisance principle in the case of aesthetics claims because it takes into account the larger jurisprudential concern of respective rights. In short, aesthetic 'nuisances' are barred because a right has not been recognized that injury can occur from unsightly homes and some distant possibility that home value is the reason one could not move.

## V. HYPOTHETICAL REVISITED

In this section, I will apply the proposed revised nuisance formulation to the above hypothetical.[57] By applying the revised standard – I aim to demonstrate that it has truly

[57] The hypothetical for ease of reference: *In a small quiet residential neighborhood, neighbor X decides to conduct chemical experiments in the backyard. The fumes from the chemical experiment are equivalent to that of the most noxious odor known to man. But the odor can only be smelled outside the home. X conducts these experiments every day, except for Sundays. X's neighbor, Y, never leaves his home, except for Sundays and thus does not smell the fumes. However, X's neighbor, Z, goes outside every day to garden, including Sundays. But upon X's starting*

reconciled the theoretical critiques levied against the contemporary standard and that its application, though differing in one respect will yield the same intuitive result.

If the revised standard is applied to X and Y – X would not be liable for a nuisance. While X did commit an 'injury', namely, that his fumes passed over the boundary of his property, as discussed earlier, this does not constitute an injury as definitionally adopted by the revised nuisance standard. If one were to assert injury – one could *only* assert trespass, which is as mentioned before is not theoretical equivalent of nuisance. Additionally, Y could not prevail on the revised nuisance standard because there were no discernable effects diminishing his regularly conducted uses of the property. As Y never left his home, except for Sundays, in which X was not conducting experiments, Y's regular uses of his property were not diminished or altered in any material way. Y was still able to leave the home on Sundays without being exposed to noxious fumes. But more interestingly – is the case of Z and the alternative hypothetical. In short, if the revised nuisance standard was applied to X and Z – X would be liable for nuisance. Akin to X and Y, Z suffered an injury in that X's conduct resulted in a violation of Z's property boundaries. Additionally, contingent upon proving the causality of X's conduct being the cause of Z's hesitance to garden, Z would prevail in a nuisance suit. This is because as with all law Z must be able to demonstrate that X's conduct was in fact *the* cause of his diminution of regular use. This principle holds true with respect to the alternate hypothetical posed as well, though without the difficulties of assessing 'enjoyment' considerations.[58] For Z to be successful on his claim for nuisance Z must demonstrate that X's conduct diminished his



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*chemical experiments, Z has been constructively faced with the choice to either remain inside the home, except for Sundays, or to go outside to garden and endure such odor.*

[58] The alternate facts of the hypothetical for ease of reference: *Say Z experiences a pre-existing cause which started at some unknown time, T, to his unenjoyment of the property. Some unspecified time later, $T^{+k}$, X began conducting his experiments. X's conduct arguably contributed to Z's unenjoyment of his property.*

regular property uses. This assessment is more practical in that it does not require X or Z to prove the level of enjoyment Z had with the prior 'unenjoyable' cause. Rather, the revised standard allows for Z to point to one or more specific activities that he engaged in and prove that X's conduct thereby prevented or restricted in him from engaging in said uses. Arguably, this standard may result in the same outcome as the contemporary standard but is different in the sense that it does not entail the vagueness and ambiguity the 'enjoyment' analysis requires.

Alternatively, because the revised standard is broad enough to allow for an isolated nuisance to be actionable Z may be successful in a nuisance suit against X. The qualification of regularly is narrow enough to preclude boarder line cases but broad enough that it can incorporate a small range of outer limits, as deemed appropriate by each jurisdiction. However, one may critique the qualification on two grounds. The first being that by only satisfying a nuisance claim upon proving that one regularly uses the premises in a specified manner is akin to this issue the contemporary nuisance standard face – mainly that it weighs the 'gravity of the harm.' However, I contend such criticism is misplaced. Nuisance as a theory must recognize that some injury has occur, but the injury is somehow different than that of trespass. Thus, whereas the contemporary nuisance formulation weighs the harms, thereby ultimately assigning one as more substantial, the revised formulation only requires the conduct to diminish a regularly conducted use. Therefore, qualitatively speaking, the injury may be substantial or minute and still be actionable. Moreover, nuisance law generally is not concerned that an abstract harm occurred. Rather, it is concerned with whether a particular individual's conduct is enough to cause alteration in another's use of property.[59]



[59] *See generally* Nolan, *supra* note 10.

The second criticism likely to be advanced in allowing for isolated nuisance cases is judicial efficiency. Some would likely argue that if isolated nuisance cases were permitted then the judicial system would be overwhelmed with cases because while some may be genuine others may be the result of petty squabbling between neighbors. However, as the Court made clear in Frontiero v. Richardson, there are "higher values than speed and efficiency."[60] Thus, while judicial economy is necessary to keep in mind – so are the protection of property rights violated by isolated nuisances. Additionally, administrative costs may act as a barrier from all litigants experiencing an isolated incident. It may prove impractical for many to bring a suit regarding one isolated incident. However, said individuals should not be constructively barred by law from bringing said claims.

## VI. CONCLUSION

The aim of this paper is to demonstrate that the contemporary nuisance standards used by courts pose more theoretical and practical problems than it solves. Moreover, it is treated differently from other branches of tort law, with little justification, and departs from tort law principles. In an attempt to incorporate nuisance law with the larger jurisprudential principles and tort law principles, I put forth a revised standard. Arguably, this standard better addresses the critiques levied against the contemporary nuisance standard as well as adequately resolves some of the outstanding issues contemporary nuisance law has yet to reconcile. While the standard proposed may yield the same outcome in certain cases, the main difference is that it does not suffer from the theoretical collapse and does not employ overly ambiguous and vague language. Rather, it serves as a model that injuries are abstractly equivalent and the only weighing that should occur is when damages are assessed.



[60] *See* Frontiero v. Richardson, 411 U.S. 677 (1973).