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THE PRICE OF BEAUTY: AN ECONOMIC APPROACH TO AESTHETIC NUISANCE

George P. Smith II*
Griffin W. Fernandez**

One man’s justice is another’s injustice; one man’s beauty, another’s ugliness; one man’s wisdom, another’s folly; as one beholds the same objects from a higher point.¹

Beauty is no quality in things themselves: it exists merely in the mind which contemplates them; and each mind perceives a different beauty. One person may even perceive deformity, where another is sensible of beauty; and every individual ought to acquiesce in his own sentiment, without pretending to regulate those of others. To seek the real beauty, or real deformity, is as fruitless an inquiry, as to pretend to ascertain the real sweet or real bitter.²

I. INTRODUCTION

Scholars have characterized the history of nuisance as the articulation and valuation of a “bundle of rights” pertaining to the enjoyment of real property.³ The articulation and valuation of particular rights in the context of land use conflicts often depends upon the economic exigencies of society.⁴ Thus, when the econ-

** J.D. 1990, The Catholic University of America; A.B. 1987, College of William and Mary.
² D. Hume, Of the Standard of Taste, in Of the Standard of Taste and Other Essays 3, 6 (J. Lenz ed. 1965).
⁴ See infra notes 19–72 and accompanying text.

One commentator has suggested that property is no longer “a central category of legal and political thought;” no longer is it about “real-thing ownership” or “absolute and exclusive” and “fixed and concrete.” Grey, supra note 3, at 74, 82 (1980). Rather, scholars today define property as a bundle of rights, with fragmentations producing profound cultural and political consequences. See, e.g., Krier, The (Unlikely) Death of Property, 13 Harv. J.L. & Pub. Pol’y 75, 76, 79, 81 (1990).
nomic conditions driving a legal perspective change, the law must adapt in order to better reflect societal values.

A conspicuous relationship exists between economic development and American nuisance law. For example, nineteenth-century courts involved in nuisance disputes between entrepreneurs and individual landowners employed a balancing test to determine the propriety of granting injunctions against the industrial defendants. While contrary to traditional nuisance principles, which mandated issuance of an injunction upon a finding of interference with a landowner’s enjoyment of his or her property, this novel method of decisionmaking favored entrepreneurs, thereby promoting the country’s economic development.

Overall, nuisance law continues to exhibit sensitivity to the economic realities and social context of modern American society. However, courts have not adapted nuisance law to contemporary economic and social contexts. In particular, courts continue to deny relief for injury to the aesthetic interests of residential landowners.

The bases upon which courts continue to withhold recognition of aesthetic nuisance actions lack both economic justification and

6. See infra notes 19–72 and accompanying text.
7. Id.
8. Id.
10. In this Article, injury to “aesthetic interests” will be defined as injury suffered due to the visual environment. No distinction will be made between “obstruction of view” and “unreasonable appearance.” But cf. Michelman, Toward a Practical Standard for Aesthetic Regulation, 15 PRAC. L. 36, 37 (1969).
12. See sources cited infra note 73; see also Note, Emerging Cause of Action, supra note 11. In refusing to recognize actions for aesthetic nuisance, courts have argued that liability for unaesthetic conditions would substantially impede land development and, therefore, economic growth. Id. at 1075 n.4. However, this argument in favor of unhindered economic development does not enjoy universal acceptance. See, e.g., Comment, Obstruction of Sunlight as a Private Nuisance, 65 CALIF. L. REV. 94, 110 (1977) [hereinafter Comment, Obstruction of Sunlight] ("The promotion of full development of land was
legal coherence. The traditional distinction of visual versus aural and olfactory interferences with the enjoyment of property lacks sufficient justification. Instead, courts should resolve conflicts emanating from unaesthetic uses of land through a balancing test which incorporates the same "objective" standard courts use in cases involving allegedly unreasonable sounds and smells, that is, what the surrounding community considers reasonable. This objective standard, combined with an analysis of the economic consequences of the injury suffered and the relief sought, provides a sound basis for the adjudication of aesthetic nuisance cases.

Use of a balancing test requires consideration of whether or not the visual environment is in fact economically significant. Nuisance law's disregard for aesthetics contradicts the serious value zoning law attaches to the visual environment. Moreover, while the law of nuisance considers that visual phenomena cannot be repugnant or pleasing to people in the same way that smells or sounds can be, common sense, as well as the practice of the real estate industry, shows that people value the visual appearance of appropriate to a growing country with an expanding frontier. It is, however, an increasingly questionable policy to pursue in America today. See generally Task Force on Land Use and Urban Growth, The Use of Land: A Citizens' Policy Guide to Urban Growth (1973); Hutchinson, Bringing Resource Conservation into the Mainstream of American Thought, 9 Nat. Resources J. 518 (1969); Reilly, New Directions in Federal Land Use Legislation, 1973 Urb. L. Ann. 29 (1973). Reilly describes the emergence of new thinking regarding economic progress:

In recent years a new attitude toward urban growth has become evident in the United States. This attitude does not accept traditional processes of relatively unconstrained, piecemeal urbanization as entirely desirable or inevitable. The new mood appears to be part of a rising emphasis on human values, on the preservation of natural and cultural characteristics that give distinctiveness, charm and desirability to a place as a humanly satisfying environment.

Id. at 56.
13. See infra notes 103-104 and accompanying text.
14. Id.
15. See infra notes 105-108 and accompanying text.
16. This Article will inquire into two areas of the law besides nuisance that deal directly with aesthetics. Zoning will be discussed in order to show the social value of aesthetics. Eminent domain cases involving the question of just compensation for aesthetic takings will demonstrate judicial recognition of the value of aesthetics.

their community.\textsuperscript{17} Finally, decisions awarding damages for purely aesthetic injury resulting from the exercise of the eminent domain power support consideration of the aesthetic environment by courts construing nuisance law.\textsuperscript{18}

This Article maintains that, contrary to the majority of legal opinion, the right to enjoy property should include the right to be free from aesthetic or visual nuisances. Part I will examine the nineteenth-century transformation of nuisance law in response to the United States’ movement towards industrialization. This part will discuss nuisance law’s adaptability and flexibility, and will highlight the development of a balancing test in nuisance decisions. Finally, Part I will demonstrate that courts may utilize nuisance law to adjudicate conflicts over the aesthetic environment. Part II will consider use of an objective standard in aesthetic nuisance disputes. This part criticizes the common judicial view that objective standards cannot determine disputes over the aesthetic environment. Part II will also consider the standards used in aural and olfactory nuisance disputes. Part III will discuss the problem of aesthetic value. First, this part will show the practice of aesthetic zoning as evidence of the social value of aesthetics. Second, Part III examines modern real estate appraisal methods and will show that economic terms can express aesthetic value. Finally, this part will present evidence of judicial support for economic valuation of aesthetics through examination of eminent domain cases awarding just compensation for purely aesthetic injury. Part IV discusses the practical application of the classical balancing test in disputes involving the aesthetic environment.

II. THE EVOLUTION OF BALANCING IN NUISANCE LAW

An examination of the development of nuisance law reveals a relationship between transformations within that body of law and the transition of the American economy from agriculture to
industry. From the colonial period into the early part of the nineteenth century, American nuisance law followed the traditional English Common Law rule of property sic utere tuo ut alienum non laedas, which translates as “use your own property so as not to injure others.” This maxim made an actor strictly liable for any of that actor’s interference with another person’s enjoyment of his or her real property.

From the middle to late 1800’s, industry and manufacturing quickly developed throughout the nation. In an implicit attempt to protect the country’s economic growth, courts turned from the sic utere principle. Instead, courts began following the traditional tort concept of fault, requiring that the nuisance-causing activity be “unreasonable” before liability would result. In deciding whether to grant injunctions, courts began to consider the “public convenience” as a factor. This led to the emergence of an implicit reasonableness standard.

In the 1842 case of Barnes v. Calhoun, an individual landowner sued the owner of adjacent property in order to enjoin the construction of a mill on the latter’s land. The plaintiff contended that the mill construction would cause a pond on the defendant’s

19. See Kurtz, supra note 5. See also Hodas, Private Actions for Public Nuisance: Common Law Citizen Suits For Relief From Environmental Harm, 16 ECOLOGY L.Q. 883 (1989).

20. Strictly applied, the rule requires the abatement of any activity sufficient to be termed a nuisance. See Kurtz, supra note 5, at 623.

21. 2 W. BLACKSTONE, COMMENTARIES *2. Some regard the maxim to be mere verbiage—this is because the application of various balancing tests often leaves the plaintiff to bear a loss as damnum absque injuria. Smith, Reasonable Use of One’s Own Property as a Justification for Damage to a Neighbor, 17 COLUM. L. REV. 383, 386-90 (1917); Manson, A Reexamination of Nuisance Law, 8 HARV. J.L. & PUB. POL’Y 185, 188 (1985). See also Lewin, Compensated Injunctions and The Evolution of Nuisance Law, 71 IOWA L. REV. 775 n.1 (1986).

However, the sic utere maxim shapes the perimeters of the fundamental inquiry into whether a particular set of facts qualify as a nuisance. As one commentator states, the maxim tests when a defendant’s conduct is unreasonable or invasive of a plaintiff’s rights, “not when it fails a social cost benefit test.” Thus, the balancing test emphasizes analysis of behavior—both reasonable and unreasonable—and not on pursuit of “a particular outcome pattern.” White, Economics and Nuisance Law: Comment on Manson, 8 HARV. J.L. & PUB. POL’Y 213, 214 (1985).

22. See Kurtz, supra note 5, at 622-23.


25. 37 N.C. (2 Ired. Eq.) 199 (1842).
land to overflow onto the plaintiff’s land, rendering it unfit for
cultivation. The defendant admitted that such overflow would oc-
cur, but took issue with the extent of the damage that would result.
In addition, the defendant asked the court to consider the degree
to which the mill would serve the “wants of the community.”

Apparently sympathetic to community interests, the Supreme
Court of North Carolina denied equitable relief for the plaintiff.
The court held that when considering whether to grant a nuisance
injunction, a court should “be particularly cautious thus to inter-
fere, where the apprehended mischief is to follow from such es-
tablishments and erections, as have a tendency to promote the
public convenience.”

The 1844 case of Bradsher v. Lea involved another nuisance
suit over the erection of a mill. In this case, neither the mill pond
nor the creek feeding it threatened to overflow onto the plaintiff’s
land. Nevertheless, the plaintiff claimed that the pond presented
a health hazard to him and his family. In denying the injunction,
the court wrote:

[W]hen the use [the defendants] make of [their land] is to the
public convenience, and the injurious effect confined to a pri-
ivate individual, the interest of the latter must give way to that
of the many, unless he can make it manifestly appear, that so
great a difference exists between his injury and the public
convenience, as bears no comparison, and that the erection
will be followed by irreparable mischief, in which case the court
will interfere by injunction.

Bradsher and Barnes show the emergence of an implicit reason-
ableness standard amounting to a rough balancing test based on
public policy considerations.

In the 1839 case of Lexington & Ohio Railroad v. Applegate, the
court not only referred to the public convenience of the offen-
sive activity, but also took into account the economic changes
throughout the nation. In Lexington, a group of forty-three home
and shop owners sought to enjoin the operation of a new railroad
that ran adjacent to their properties, and caused the owners “some

26. Id. at 199.
27. Id. at 201.
28. 38 N.C. (3 Ired. Eq.) 301 (1844).
29. Id. at 305.
30. 38 Ky. (8 Dana) 289 (1839); see Kurtz, supra note 5, at 645–46.
inconvenience, and even loss." 31 The court may have been impressed by the fact that the railroad carried 550 passengers per day at a low cost. But beyond the public convenience of efficient transportation, the court indicated that a new standard of nuisance would have to evolve in order to keep pace with industrialization. 32 It thus denied the request for an injunction:

[T]he onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them . . . [R]ailroads and locomotive steam cars . . . should not, in themselves, be considered as nuisances, although in ages that are gone they might have been so held . . . . 33

Lexington, as well as Bradsher and Barnes, supports the proposition that in mid-nineteenth-century nuisance suits "the entrepreneur could depend on unarticulated favorable treatment [because] . . . [m]ost courts, believing that industrialization was either a positive social good or an inevitable force, would consider the defendant’s status as an entrepreneur." 34 While already exhibiting flexibility in the face of social and economic transitions, these crude balancing techniques only foreshadowed more refined tests that emerged in the latter part of the nineteenth and early twentieth centuries. 35

From roughly 1860 to 1900, the American economy experienced the largest growth in its history. 36 By the turn of the century, the United States had become the most economically powerful nation in the world. 37 During this period, courts considering injunctive relief in nuisance actions began to develop more sophisticated balancing tests that focused less on the convenience of the public and more on the relative hardships that the parties would suffer if the remedy were granted or denied.

31. 38 Ky. (8 Dana) at 301.
32. Id.
33. Id.
34. Kurtz, supra note 5, at 649.
35. See, e.g., infra text accompanying note 38.
The first case to explicitly balance the hardships of the parties to a nuisance dispute was Richard's Appeal, decided by the Supreme Court of Pennsylvania in 1868.\textsuperscript{38} The plaintiff, a homeowner, claimed to suffer a great amount of air and noise pollution at the hands of a neighboring iron works. Without authority to support its reasoning,\textsuperscript{39} the court introduced an analysis which would “consider whether [an injunction] would not do a greater injury . . . than [that which] would result from refusing [it].”\textsuperscript{40} The relevant factors in the case included a capital investment of $500,000 in the factory and its employment of over 800 men. Because of the great economic hardship that a factory closing would inflict on the defendant and the community, the court found the homeowner’s injury insufficient under this new standard to sustain an injunction.\textsuperscript{41}

The doctrinal innovations of Richard's Appeal enjoyed wide acceptance in other jurisdictions.\textsuperscript{42} The Alabama Supreme Court adopted the reasoning of Richard's Appeal in Clifton Iron Co. v. Dye.\textsuperscript{43} Clifton involved a mining operation in which the process of washing ores not only caused a stream on the plaintiff's land to be polluted, but also caused the stream to overflow and deposit sediment on the plaintiff’s property. The plaintiff used the stream primarily for watering and bathing livestock. The court found the fact that the plaintiff had another source of water on his property to cast doubt on the amount of “material injury” actually suffered.\textsuperscript{44} The court also laid out a simple test to decide whether or not to grant an injunction in nuisance cases: “[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.”\textsuperscript{45} Employing this analysis, the court concluded that when weighed

\textsuperscript{38} 57 Pa. 105 (1868).
\textsuperscript{39} Id. at 113.
\textsuperscript{40} Id.
\textsuperscript{41} Although not explicitly stating so, the court may also have considered the consequence of employment in its decision. One commentator has argued that the “economic analysis” of the Richard's Appeal court not only redefined the character of nineteenth-century nuisance law, but also “represented the thinking of courts into the twentieth century.” See Kurtz, supra note 5, at 658.
\textsuperscript{42} See, e.g., Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192 (1888); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Galveston, H. & S.A. Ry. v. De Groff, 102 Tex. 433, 118 S.W. 134 (1909).
\textsuperscript{43} 87 Ala. 468, 6 So. 192 (1888).
\textsuperscript{44} Id. at 470, 6 So. at 193.
\textsuperscript{45} Id. at 471, 6 So. at 193.
against the injury suffered by the plaintiff, "the great public interests and benefits" flowing from the mining operation required denial of the injunction.46

The Texas Supreme Court in Galveston, Houston & San Antonio Railway Co. v. DeGrooff7 also employed an explicit balancing test. This case concerned a hotel that was located approximately 120 feet from a street used by the defendant railroad. The railroad used a particular portion of the tracks adjacent to the hotel as a switching station for railroad cars. The high concentration and constant manipulation of the locomotives at the station subjected the hotel to heavy vibration and extremely loud noises. Often, such disturbances occurred between 9 p.m. and 5 a.m., making it difficult for the owner and his guests to sleep. Despite the injury to the plaintiff and his business, the court denied the injunction. The court set forth the following balancing test:

The question of issuing an injunction, under such state of facts, depends upon the circumstances, and it is the duty of the court to consider the relative injury to the plaintiffs by a continuance of the nuisance to that which would be inflicted upon the defendant and the public by granting and enforcing an injunction, and, if the injury to the plaintiffs appears to be greatly less in amount in comparison to that which will result to the railroad company and the public, then it is the duty of the court to deny the writ of injunction.48

By adopting balancing tests essentially identical to the one in Richard's Appeal, cases like Galveston and Clifton were able to reach fair and efficient outcomes which preserved the ability of industrial defendants to operate despite the inevitable land use conflicts to be expected in a time of metamorphosis in the American economy.

Notwithstanding wide acceptance of the balancing test that originated in Richard's Appeal,49 some courts did not accept this test. Ironically, the Supreme Court of Pennsylvania, which had decided Richard's Appeal twenty-six years earlier, explicitly overturned that case in Evans v. Reading Chemical & Fertilizing Co.50

46. Id.
47. 102 Tex. 433, 118 S.W. 134 (1909).
48. Id. at 442, 118 S.W. at 138.
49. See, e.g., sources cited supra note 42.
In the process of retreating from its ground-breaking holding, the court wrote: "[Richard's Appeal] can [not] be authority for the proposition that equity, a case for its cognizance otherwise being made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or the public." Pennsylvania ultimately returned to the principles of Richard's Appeal in the 1918 case of Becker v. Lebanon & Myers-town Railway. However, its holding in Evans signaled some judges' discomfort in departing from the traditional Blackstonian idea that once a nuisance is found, the plaintiff has a right to an injunction.

The reasoning in Evans also characterized the law in New York until well into the twentieth century. An examination of the decisions in New York near the turn of the century shows that a variation of the balancing found in Richard's Appeal was being used, but this analysis fell short of accommodating the industrial context in which it was employed. In McCarty v. Natural Carbonic Gas Co., the defendant's manufacturing plant produced smoke which often completely enveloped the plaintiff's house. In upholding an injunction, the Court of Appeals of New York did not resort to a balancing test. Rather, the court merely noted that the determination of whether a nuisance existed depended on the reasonableness of the use in question "under the circumstances."

McCarty and Richard's Appeal differ in that the Richard's Appeal balance occurred at the remedial stage, while McCarty used a balancing test to decide whether a nuisance existed at all. The approach taken by the McCarty court created two important problems. First, it was difficult for the courts to show flexibility in industrial disputes where the injury to the plaintiff was clearly substantial. In other words, if the damage to the plaintiff was severe, the court would have little choice but to find an enjoicable nuisance regardless of the amount of capital invested in the defen-

51. Id. at 223, 28 A. at 709.
52. 188 Pa. 484, 41 A. 612 (1898).
54. 189 N.Y. 40, 81 N.E. 549 (1907); see Kurtz, supra note 5, at 661–65.
55. 189 N.Y. at 40, 81 N.E. at 549.
dant’s operation or the impact that an injunction would have on the economy of a community. Second, if the court did in fact determine that, despite injury to the plaintiff, a nuisance did not exist, then the injured party was unable even to recover damages from the defendant.56

The “balance of utilities” test formally adopted by the American Law Institute in section 826 of the first Restatement of Torts demonstrated the same inflexibility as the New York approach.57 The Restatement provided that “an intentional invasion of another’s interest in the enjoyment of land is unreasonable . . . unless the utility of the actor’s conduct outweighs the gravity of the harm.”58 Again, while this approach evaded the problem of balancing land use rights at the remedial stage and, therefore, left intact the right to an injunction when a substantial invasion of rights existed, it still produced inequities. One commentator stated: “The primary deficiency in the Restatement’s balance of utilities doctrine was that it rendered any activity with sufficient social value absolutely immune from liability for interference with the use and enjoyment of nearby land.”59

Although the majority of courts in the twentieth century employed the sharply contrasting remedial balancing of “conve-

56. See, e.g., Gulf, Colorado & Santa Fe Ry. v. Oakes, 94 Tex. 155, 58 S.W. 999 (1900).
57. See RESTATEMENT OF TORTS § 826 (1939).
58. Id.
59. Lewin, supra note 21, at 780–81. Synthesizing the work of Coase, Calabresi and Melamed, Ellickson, and Rabin, Lewin delineates his understanding of what emerges primarily as an Ellickson-Rabin “modern” scheme of nuisance. This scheme: (1) separates the assignment of entitlements from the choice of remedies; (2) assigns entitlements primarily on the basis of fairness, imposing liability under standards of “unneighborly” conduct or for “moral fault”; (3) creates a general presumption that prevailing plaintiffs are to be denied unconditional injunctive relief; and (4) permits a plaintiff to obtain a compensated injunctive remedy in which the court will grant injunctive relief only if the plaintiff pays the defendant an amount of money determined by the court. Id. at 802–03. Lewin then suggests a reformulation of the modern scheme. Whenever efficiency is important, Lewin would require that courts apply a “public interest” test prior to enjoining a nuisance. He further urges that courts evaluate questions of entitlement and remedy separately. Id. at 827–32.

nience" test, it was not until the 1970's that both the New York Court of Appeals and the American Law Institute ("A.L.I.") abandoned the balancing of utilities test. With the adoption of the Restatement (Second) of Torts in 1977, the A.L.I. incorporated the essentials of the most popular types of balancing tests. The Restatement (Second) thereby increased courts' flexibility in both the determination of and the remedy for a nuisance. The test has been summarized as follows:

[A]n intentional nontrespassory invasion will result in nuisance liability (1) if the harm resulting from the invasion is severe and greater than the plaintiff should be required to bear without compensation; (2) if the gravity of the harm outweighs the utility of the defendant's conduct, the plaintiff will be entitled to either an injunction or damages; (3) if the gravity of the harm does not outweigh the utility of the defendant's conduct, the plaintiff will not be entitled to an injunction, but only to damages, and he will not even be entitled to damages if the financial burden to the defendant of compensating the plaintiff and others similarly situated would have the same effect as an injunction.  


61. See infra notes 63–64.


63. Lewin, supra note 21, at 784.

The first balancing test weighs the interests of the individuals to determine whether a nuisance exists. The second balancing test determines the appropriateness of the remedy. Only in the second test are courts to apply economic considerations to the property rights being challenged. See Manson, supra note 21, at 189–91.

It has been argued, however, that in a fast-paced society where "technology and social patterns are rapidly changing," a foreseeability test is the more appropriate means to adjudicate nuisance claims. Under this approach, the trier of fact determines whether the parties would reasonably expect the alleged nuisance to impose liability. Id. at 198–202.

Under the foreseeability test, no effort is made to determine initial sets of property rights. Indeed, this test "acknowledges that current rights are well-defined, but asserts that the duration of those well-defined rights extends only to the foreseeable future." Id. at 198–99. To use foreseeability as such a normative theory, however, is to ignore the fundamental principle of Anglo-American law that enshrines property as a right and recognizes land tenure as perpetual. White, supra note 21, at 220. Accordingly, "[o]wnership and occupancy rights in legitimately acquired land are uncompromised by arrival (or foreseeability of arrival) of another person who wishes to own and occupy the land, even if that person can use the land more profitably, and justly so." Id. at 220–21.

64. RESTATEMENT (SECOND) OF TORTS §§ 822, 826(a), 829A, 826(b) (1977); see Ellickson, supra note 59, at 738–48 (arguing that the balancing process creates not only uncertainty, but also excessive administrative expense in nuisance litigation). See generally McFadden, The Balancing Test, 29 B.C.L. REV. 585 (1988); Rodgers, Benefits, Costs and Risks in Health and Environmental Decisionmaking, 4 HARV. ENVTL. L. REV. 191 (1980).
Boomer v. Atlantic Cement Co. likely influenced the A.L.I. in its decision to adopt a test essentially the same as the balance of convenience. In Boomer, the New York Court of Appeals finally rejected the reasoning of McCarty and, in doing so, provided the law of nuisance with perhaps its most important innovation of the twentieth century. The defendant in Boomer was a large cement factory which represented a $45 million investment and employed over 300 people. The plaintiff sued to enjoin both the emission of large quantities of particulate matter and heavy vibrations caused by the plant. Although the court expressed its concern for the effects of air pollution on the health and welfare of the community, it nonetheless recognized that the "judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution." Even though the court found a nuisance, it rejected the state's long-standing rule that any nuisance could be enjoined. However, to enable the plaintiff to avoid repeated suits for continuous injury to his property, the court fashioned an innovative rule. It allowed the plaintiff to recover "permanent" damages, calculated as the reduction in the property's market value.

New York's rejection of the balance of utilities doctrine and its creation of the rule of permanent damages in Boomer illustrates that almost one hundred years after the decision in Richard's Appeal the common law of nuisance remained adaptable to the economic realities of society and yet retained a fair method of compensating those who suffered inconvenience and injury at the hands of industrial defendants. Boomer was not, however, the only example of the flexibility and adaptability of nuisance law in the latter part of the twentieth century.

66. Id. at 223, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.
67. Id. at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316–17.
68. See infra note 69 and accompanying text.

Traditionally, nuisance disputes have three possible outcomes. The court might find that no nuisance exists. If the court does find a nuisance to exist, it may grant either damages or an injunction. Calabresi & Melamed, supra note 59, at 1115–16. A fourth possible outcome is the compensated injunction, whereby a prevailing plaintiff would obtain an injunction only by paying the defendant "damages" for the destruction of the defendant's entitlement. Id. Presently, a deserving plaintiff may only receive injunctive relief if the damages he seeks exceed the costs of abatement for the defendant. Lewin, supra note 21, at 806.
The Arizona decision of *Spur Industries, Inc. v. Del E. Webb Development Co.* provided further innovation in nuisance law. In *Spur*, a developer created a residential neighborhood adjacent to a cattle feedlot and then sought to enjoin the operation because it produced noxious odors. The Supreme Court of Arizona first noted that if the developer were "the only party injured, [the court] would feel justified in holding that the doctrine of 'coming to the nuisance' would have been a bar to the relief asked by [the plaintiff]." However, the court held that "a proper and legitimate regard of the courts for the rights and interests of the public" required relocation of the operation. Although the court respected the rights of the homeowners, it nonetheless compensated the innocent feedlot operators by requiring the developer to indemnify the business for the costs of shut-down and relocation. *Spur* once again demonstrates the flexibility of the balancing approach to nuisance law. More notably, in this instance the balancing test favored the residential landowners.

Part I has shown that the efficient and fair solutions characteristic of modern nuisance cases result from a highly flexible and adaptable balancing doctrine that has steadily evolved since the early nineteenth century. Part II will focus on the specific problems associated with aesthetic nuisances. Part III will address the problem of social, economic and legal value of aesthetics. Part IV will, however, return to the role of balancing and its importance for the practical application of aesthetic nuisance standards.

### III. Aesthetic Nuisance: Defining the Problem

Throughout the evolution of nuisance law, courts have almost unanimously refused to recognize actions for aesthetic nuisance.

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70. Id. at 185, 494 P.2d at 707.
71. Id. at 186, 494 P.2d at 708. *Spur* is the only reported decision in which a court granted a compensated injunction in civil litigation. The court did not explain the basis for its holding and seems to have found this remedy inadvertently. Interestingly, none of the residents of Del Webb's Sun City development were parties to the lawsuit to enjoin *Spur*'s activities, although many of them filed separate claims for damages. Lewin, *supra* note 21, at 792 n.73, 793.
73. See, e.g., Salt River Valley Water Users' Ass'n v. Arthur, 51 Ariz. 101, 74 P.2d 582 (1937); Whitmore v. Brown, 102 Me. 47, 65 A. 516 (1906); Perry Mount Park Cemetery...
Many judges are reluctant to entertain these actions because they cannot define a standard sufficiently objective to adjudicate disputes consistently. Yet a number of courts have recognized the right of a landowner to be free from unaesthetic conditions. Courts recognizing the legitimacy of an aesthetic injury have had little difficulty in defining appropriate standards upon which to base their decisions. In fact, these courts apply standards very similar to well-established standards for aural and olfactory nuisances. The unique character of aesthetic phenomena, however, requires that courts refine such standards to ensure complete objectivity.

The problem of aesthetic nuisance often arises in the context of residential landowners adjacent to or near another property owner who uses his or her property to store "junk." The Missouri case of Ness v. Albert illustrates the prevailing judicial attitude toward aesthetic nuisances. Ness justified its holding that the storage of rusted appliances and a partially burned mobile home (among other things) was not a nuisance by noting that unsightli-
Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice-versa. What is aesthetically pleasing to one may totally displease another—"beauty is in the eye of the beholder." Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty.  

The equation of aesthetics and "beauty" which is found in the opinion, and which is characteristic of other opinions rejecting aesthetic nuisance actions, has been criticized as an "imprisonment of the courts in their own linguistic web." Rather than formulating the problem at hand as one of interpreting objective aesthetic standards, judges have erroneously seen their task as enforcing their own sense of the beautiful and the ugly. This misunderstanding, rather than the nature of the aesthetic, prompts judges to...
shun aesthetic nuisance actions. To reject the right to be free from a purely aesthetic but injurious use of land on the assumption that a judge must decide an aesthetic nuisance case solely on the basis of her own aesthetic sensibilities is clearly flawed reasoning. A proper characterization of the judicial role in aesthetic nuisance disputes can eliminate the problem of subjectivity in the decision-making process.

It has been observed that "the rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether [property rights] should be permitted to plague the dominant human sensibilities, may well be pondered." An appropriate understanding of the role of the judge in an aesthetic nuisance action reveals that an adjudicatory method which appeals to the "dominant human sensibilities," not to an "ultra-aesthetic taste," is possible. The search for such a method should begin with the case law supporting the aesthetic nuisance action.

Among the cases most often cited to support the doctrine of aesthetic nuisance is the 1937 West Virginia decision of Parkersburg Builders Material Co. v. Barrack. In Barrack, residential landowners sought to enjoin the defendant from using his land to store wrecked automobiles. The lower court ruled this unsightly use of land a nuisance, and consequently granted an injunction. The Supreme Court of Appeals of West Virginia reversed, on the ground that the area had not been clearly established as exclusively residential. Despite its holding, the court’s language offered strong support for the viability of claims based on aesthetic nuisance. Writing for the majority, Judge Maxwell declared that unaesthetic uses of land "may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society."

88. Id. at 608, 191 S.E. at 368.
89. Id. at 613, 191 S.E. at 371.
90. Id. at 612-13, 191 S.E. at 370-71.
91. Id.
The West Virginia Supreme Court of Appeals next addressed the issue of aesthetic nuisance in *Martin v. Williams*. The plaintiff sought to enjoin the operation of a used car lot in a residential neighborhood. The lower court granted an injunction, and the higher court affirmed. The appellate court rested its decision primarily on the finding that the bright lights and noise arising from the business constituted a nuisance, but reiterated the view of the *Barrack* majority. According to the court, in considering claims for aesthetic injury judges “should not be aroused to action merely on the basis of the fastidiousness of taste of complainants . . ., [but] should act only where there is presented a situation which is offensive to the view of average persons of the community.”

Together, *Martin* and *Barrack* stand for the proposition that courts need not shy away from cases involving aesthetic injury because they fear dictating standards of taste and beauty. Again, the judge’s role is not to decide what is beautiful or ugly, but only to ascertain the relevant community standards through an examination of the evidence. The court first should establish the character of the community in question, and then proceed to consider whether the land use in question is reasonable under the circumstances. As the Oregon court in *Hay v. Stevens* concluded, judges should “begin with the assumption that in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities. The difficulty, however, is in determining whether the interference complained of is of such gravity as to warrant relief.”

Two recent cases found an aesthetic interference to be of sufficient gravity to warrant relief. *Foley v. Harris* and *Allison v. Smith* have received much attention from other commentators. *Foley* was a suit by residential property owners to enjoin the defendant from using his lot to store wrecked automobiles. The trial court granted an injunction because the automobiles were

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92. 141 W. Va. 595, 93 S.E.2d 835 (1956).
93. Id. at 595, 93 S.E.2d at 835.
94. 271 Or. 16, 530 P.2d 37 (1975).
96. 223 Va. 20, 286 S.E.2d 186 (1982).
98. See, e.g., Coletta, *supra* note 11, at 149–51.
unsightly and therefore constituted a nuisance. In affirming the trial court's decree, the Supreme Court of Virginia held that the wrecked automobiles "definitely obstruct[ed] the reasonable and comfortable use of the [neighbors'] property," and therefore the defendant was properly enjoined. Similarly, the plaintiffs in Allison sued for damages and an injunction to prevent the defendant from continuing to keep junk automobiles, scrap metal and rubbish on his property. Finding for the plaintiffs, the Colorado Court of Appeals held that "legitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors, particularly when it is located in a residential district."

As these decisions illustrate, and as Justice Sutherland aptly observed in Village of Euclid v. Ambler Realty, "[a] nuisance may be merely a right thing in a wrong place,—like a pig in the parlor instead of the barnyard." Certainly, the common law should recognize that some unaesthetic uses of land are like "a pig in the parlor" and should be treated appropriately. Recognizing the validity of actions for aesthetic nuisance logically extends the protection which nuisance law affords individuals from aural and olfactory interferences with the use and enjoyment of land.

The allegation that aesthetic considerations are too subjective to be the basis for judicial determination is undermined by the historical recognition of both aural and olfactory nuisances. Indeed, standards of aural and olfactory reasonableness seem capable of no greater objectification than standards of aesthetics. Yet, courts have had no difficulty in enforcing what they deem to be sufficient standards for determining the reasonableness of an invasion. As judges deciding aural or olfactory nuisance cases are not asked to be arbiters of taste, neither are judges who entertain claims for aesthetic nuisance. As one judge in an aural nuisance suit declared: "[While] I [cannot] say how many popular

100. Id.
101. Allison, 615 P.2d at 794, quoted in Coletta, supra note 11, at 150.
102. 272 U.S. 365, 388 (1926).
104. Id.
105. Noel, supra note 11, at 5.
songs may be sung in a private residence of an evening or how much music or what kind may be produced there, or whether those songs must be rendered in English or Yiddish. . . . I do not mean to intimate that excessive noise . . . could not be restrained by the court."

General recognition of the action of aesthetic nuisance would require judges to carry out analyses no more difficult than those required in aural and olfactory nuisance cases. The controlling issue would always be whether "normal persons living in the area or community would regard the defendant's land use as a substantial interference with their use and enjoyment of land . . . . The objective standard is, therefore, provided by the 'objective, normal individual.'" Mere philosophical clarification of the nature of the aesthetic as a cultural and community-bound construct, however, is not going to convince most judges to recognize aesthetic nuisance actions. As Professor William Rodgers observes: "Judges need some sort of community preference poll . . . to support a judgment that the [aesthetic] injury complained of is 'substantial' in a legal sense."

Courts may have been reticent to decide aesthetic nuisance cases precisely because of the difficulty of polling the community. However, an empirically accurate and practical method to measure the value of the aesthetic character of real property might make courts more receptive to aesthetic nuisance actions. Aesthetic zoning demonstrates the significant societal value of aesthetics. More importantly, since modern real estate appraisal techniques attach economic value to aesthetic considerations, community preferences can be accurately measured by fluctuations in the free market. Indeed, the law of eminent domain has long recognized this empirical economic approach to aesthetic valuation in real property law.

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106. Id. (quoting Miller v. Jersey Coast Resorts, 98 N.J. Eq. 289, 299, 130 A. 824, 828 (N.J. Ch. 1925)).
107. Coletta, supra note 11, at 161. See Yokley, supra note 95.
110. See infra notes 129–131 and accompanying text.
111. See infra notes 136–153 and accompanying text.
IV. THE QUESTION OF AESTHETIC VALUE

A. The Police Power: Aesthetic Zoning

Societal endorsement of zoning ordinances supports judicial consideration of aesthetic considerations in nuisance cases. Although closely related to the state's power to zone, nuisance law lags far behind zoning law's acceptance of aesthetic considerations as a basis for decisions.

Historically, the police power's ability to regulate the visual environment paralleled the common law's ability to deal with aesthetic interferences. In the beginning of the twentieth century, courts regularly struck down zoning ordinances that regulated only aesthetic considerations. *Bryan v. City of Chester* illustrates this point. In *Bryan*, the court considered the validity of a Chester city ordinance which declared that billboards were nuisances per se, and which prohibited future erection of such structures within the city limits. The court unambiguously invalidated the ordinance:

>This is a gross attempt at interference with the lawful use of private property . . . . All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation without reason or necessity cannot be enforced.\(^{114}\)


Today, through the use of zoning or sign ordinances, a significant number of state municipalities control the siting of signs as well as billboards. N. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 7.01 (1988). In 1965, the Federal government entered the field of sign regulation with the enactment of the Highway Beautification Act, 23 U.S.C. §§ 131, 136, 139 (1965). Even with the 1978 amendments to the Act mandating compensation for the removal of certain signs, the federal presence has not been a total success. *Id.*

Regulating roadside aesthetics involves an essential legislative balancing of four competing interests:

>[T]he interests of persons seeking preservation of the natural beauty of a particular setting; the interests of a governmental body in maintaining roads and highways free from unsafe and often unsightly obstructions in the form of signs and billboards; the interests of the real estate owner in enjoying the economic benefits of frontage on a road and, finally, the interests of those in the advertising business to conduct a legitimate commercial enterprise.

*Id.* § 7.02.
In 1926, the Supreme Court's decision in *Village of Euclid v. Ambler Realty*\(^{115}\) dealt a severe blow to this perspective on zoning. The ordinance at issue in *Euclid* divided the city of Euclid, Ohio into districts classified by use, height of buildings and minimum lot areas. Upholding the ordinance in question, the Court held that "the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue to the limit of the police power]. And the law of nuisances, likewise, may be consulted . . . in the process of ascertaining the scope of the [police] power."\(^{116}\) Since this decision, the law of zoning has developed much further than the common law of nuisance in the area of aesthetics.\(^{117}\) Today, contrary to what the Supreme Court indicated in *Euclid*, the common law of nuisance might take some instruction from zoning law.

Contemporary cases interpreting zoning ordinances have given wide latitude to municipalities by broadly construing the idea of the health and welfare of the community.\(^{118}\) Some courts have upheld ordinances regulating residential housing design for the purpose of preventing depreciation in property values. In *State ex rel. Stoyanoff v. Berkeley*, the Supreme Court of Missouri upheld a city zoning ordinance which set architectural standards for residential houses.\(^{119}\) The language of the *Berkeley* opinion makes clear the significance of the aesthetic:

> If by the term "aesthetic considerations" is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe

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115. 272 U.S. 365 (1926).
117. See generally sources cited supra note 109.
119. State *ex rel.* Stoyanoff v. Berkeley, 458 S.W. 305, 306 (Mo. 1970). The ordinance in *Berkeley* contained in its preamble a general statement requiring that buildings and structures meet minimum architectural standards of appearance and similarity to surrounding structures, that "unsightly, grotesque and unsuitable structures" which harmed "the stability of value and the welfare of surrounding property, structures and residents," as well as "the general welfare and happiness of the community," be avoided, and that "appropriate standards of beauty and conformity be fostered and encouraged."

*Id.* at 306–07.
any substantial reason for saying that such a consideration is not a matter of general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood. 

This judicial recognition of broad regulation shows the social value and legal relevance of the aesthetic aspects of real property. However, elected officials, not judges, draft the zoning provisions that regulate aesthetics. If judges are to feel confident in their authority to make decisions regarding interferences to aesthetic sensibilities, they must have some method to gauge community values accurately.

B. The Market as an Objective Indicator of Aesthetic Value

In Euclid, Justice Sutherland noted the close affinity between nuisance law and the police power. If the protection of property values validates enactment of an aesthetic zoning provision, then by analogy nuisance law should recognize the aesthetic. In fact, if an accurate method were formulated for measuring the effect on the value of neighboring property caused by an obstruction of view or an unsightly use of land, judicial non-recognition of the aesthetic nuisance action would be difficult to justify.

The real estate appraisal industry demonstrates the existence of a reliable valuation method that judges and juries can consult in the adjudication of aesthetic nuisance actions. In the field of real estate appraisal, three generally accepted methods are used

120. Id. at 310 (quoting State ex rel. Civello v. City of New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923)).
121. 272 U.S. at 387-88 (1926).
122. See supra notes 112-120 and accompanying text.
123. Michelman, supra note 10. Professor Michelman describes two different kinds of aesthetic nuisances: "There is to begin with, the possibility of an assault on the aesthetic sense, pure and simple—the sight of something that, in its own self-contained isolation, is ugly, in bad taste, or poor in style, design, or form . . . . [T]he sight obstructs the view of a preexisting sight that was beautiful in some purer sense (a building that blocks the view of a mountain)." Id. at 36-37.

See also Annotation, Eminent Domain: Compensibility of Loss of View from Owner's Property-State Cases, 25 A.L.R.4TH 671 (1983); Annotation, Unsightliness of Powerline or Other Wire, or Related Structure, as Element of Damages in Easement Condemnation Proceeding, 97 A.L.R.3d 587 (1980).
to value a parcel of property: the "sales comparison approach," the "income approach," and the "cost approach."124 Because the latter two approaches are usually reserved for commercial real estate or rental property, this Article will consider only the sales comparison approach.125 This approach to valuation "is based on the economic principle that a prudent purchaser will not pay more for a property than the price of an equally desirable substitute property would bring in the open market at that approximate point in time."126 By closely analyzing such factors as recent sales, current listings and offers to purchase, appraisers can gauge market attitudes relevant to the property being considered.127 Most importantly for purposes of this Article, however, the appraisal expert can isolate one particular characteristic from a parcel of property and value it separately from the overall appraisal of the parcel.128

When considering the aesthetic enjoyment characteristic of a particular parcel of property, appraisers may consider the effects on market value of both obstructions of view and noxious or unaesthetic uses of land.129 According to one expert: "[There is] no lack of data for making adjustments based on aesthetic factors. View and proximity to a noxious use are just other variables in the marketplace the measurement of which is no more subjective than many other factors commonly valued."130 Moreover, valuation methods remain the same regardless of the legal context in which they are employed.131 Therefore, an appraiser could value view or unsightliness equally well in valuation of a taking by eminent domain or an aesthetic nuisance.

126. H. ALBRITTON, supra note 124, at 51.
127. Id. at 52.
130. Tesh interview, supra note 128.
131. Id.
Most discussions of eminent domain and aesthetics focus on the law's general acceptance of aesthetics as a valid purpose for a taking. For example, in the leading case of *Berman v. Parker*, the Supreme Court held that the government could take land for the purpose of making the community more beautiful. While *Berman* speaks to the appreciation of aesthetic value in other areas of the law, it does not demonstrate how courts have utilized the economic valuation of view and unsightliness. For this purpose, a discussion of some of the many eminent domain cases holding that the value of aesthetic factors must be included in the calculation of just compensation for a taking.

The most recent and perhaps best support for allowing compensation for aesthetic injury resulting from a taking can be found in *La Plata Electric Association v. Cummins*. In *La Plata*, the Supreme Court of Colorado considered whether owners of real property "are entitled to compensation for the reduction in the value of the remainder of property [taken] resulting from aesthetic...

The concept of the public welfare is broad and inclusive . . ., the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . .. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.* at 33.


*Id.* at 33.
damage and loss of view." The trial court had admitted evidence showing the loss of aesthetic value and view and had allowed compensation for these damages. The Colorado Court of Appeals upheld this ruling, and the Supreme Court of Colorado affirmed.

The homeowners in La Plata owned a parcel of property across which the La Plata Electric Association obtained a fifty-foot-wide easement for the construction of powerlines. The easement cut across the plaintiff’s nineteen-acre parcel, which commanded a view of the city of Durango and of the mountains beyond it. At trial, the utility presented evidence that the best use of the land was “investment property to be held for future development” and that “there was no damage to the remainder of the property.” On the other hand, despite agreeing with the utility’s witness that the best use of the property was for future investment, two expert appraisers testifying for the homeowners found that the remainder of the parcel suffered damage due to the unsightliness of the power lines and the concomitant loss of view. The aesthetic damage was valued at $5,000.

Voicing the majority’s support for the approach taken by the district court, Colorado Supreme Court Justice Lohr held that “a property owner should be compensated for all damages that are the natural, necessary and reasonable result of [a] taking.” The court’s approval of the use of appraisers to decide the issue of aesthetic damage indicates confidence in the opinion of those who measure the market value of aesthetics through methods like the comparative sales approach. Similarly, La Plata demonstrates a workable standard for determining aesthetic nuisance based on expert appraisal and traditional nuisance balancing.

Another eminent domain case, Kamo Electric Cooperative, Inc. v. Cushard, also allowed compensation for damages to

137. Id. at 696 (emphasis added).
138. Id. at 697.
139. Id.
140. Id.
141. Id.
142. Id. at 700 (emphasis added).
143. But see Allen, Wrong Numbers: Appraisers, Culprits in S&L Crisis, Are Now Key to S&L Recovery, Wall St. J., Jan. 24, 1990, at A1, col. 6. (explaining that in disposing of the real assets of Texas savings institutions, the federal government’s Resolution Trust Corporation will place primary reliance upon the state’s real estate appraisers’ estimation of the values of the various properties).
144. 416 S.W.2d 646 (Mo. Ct. App. 1967).
aesthetic sensibilities after the erection of electric powerlines on a homeowner's land. In *Cushard*, the electric cooperative condemned a 100-foot-wide, 2800-foot-long strip of land across the defendant's 220-acre farm for the construction of transmission lines. Testimony was given by three real estate salespeople who said that the unsightliness of the powerlines would diminish the market value of the farm.\footnote{145} Holding that the trial court did not err in refusing to give instructions that would have removed the aesthetic consideration as an element of damages, the Missouri Court of Appeals said that a reasonable person would consider the lines an eyesore and, therefore, the structures impaired the marketability of the farm.\footnote{146}

In *Central Louisiana Electric Co. v. Mire*, a Louisiana court found aesthetic factors relevant in a condemnation proceeding involving powerlines.\footnote{147} In that case, the wires and poles being constructed on the defendant's property were located entirely in a section of swampland. The court noted that the swampland had little value except that it was "a beautiful picturesque sight to look at."\footnote{148} While it held that aesthetic damage could not be an element of compensation unless diminution of market value could be shown, the court found the testimony of real estate experts on diminution of value to satisfy that requirement.\footnote{149}

Finally, a New York court provided an excellent statement of the position that aesthetic injury is compensable in the context of eminent domain in *Keinz v. State*.\footnote{150} The claimants in *Keinz* owned property that fronted Irondequoit Bay in New York. When the state took part of the land to build a highway, the landowners lost not only their access to the bay, but also their view of the water, which was completely blocked by the embankment upon which the road was built.\footnote{151} In holding that the landowners must be compensated for their loss of view, the court said:

We believe that reductions in value due to impairment of view must be considered . . . . Two properties might be physically

\footnotesize{145. Id. at 649.}
\footnotesize{146. Id. at 655.}
\footnotesize{147. 140 So.2d 467 (La. Ct. App. 1962).}
\footnotesize{148. Id. at 475.}
\footnotesize{149. Id. at 477.}
\footnotesize{150. 2 A.D.2d 415, 156 N.Y.S.2d 505 (N.Y. App. Div. 1956).}
\footnotesize{151. Id. at 415, 156 N.Y.S.2d at 506.}
identical, yet their value markedly different because of the surroundings . . . . The “view” might be a mountainside or a valley as well as a lake. In either event, the view augments the value of the premises, and if a portion thereof is taken and the view is spoiled, the market value of the premises remaining is reduced. The extent of the reduction is no more speculative than many other factors affecting value. It may be a matter of judgment but it is also a matter of dollars and cents, and the constitutional policy requires that such reduction in value not be borne by the owner whose property is taken for a public purpose without his consent.152

Review of these eminent domain cases indicates not only that courts measure the value of the aesthetic environment of real property with a degree of empirical accuracy, but also that courts rely on these determinations to fix the amount of just compensation in instances of aesthetic injury.153 Coupling this economic valuation of aesthetics with the modern tests for determining the existence of, and proper remedy for, nuisances would create a clear, cogent and practical method for deciding aesthetic nuisances.

V. AESTHETIC NUISANCE: PRACTICAL APPLICATION

This Article has shown that society places a great deal of value on aesthetic interests, as reflected in the practice of aesthetic zoning and its acceptance by the common law. Furthermore, review of the law of eminent domain, as it pertains to just compensation for aesthetic takings, indicates that the law has been, and can be, confident in modern methods of aesthetic valuation. However, the law of eminent domain has limited applicability to the problem of aesthetic nuisance because the law in the latter need not be concerned with the interests of the state. The goal is to be sure that the private citizen is given just compensation under the law.

152. Id. at 417, 156 N.Y.S.2d at 507.
Nuisance law brings the more difficult task of balancing the rights of individuals against each other in order to determine whether a nuisance exists, and what kind of remedy should be granted. A method to ascertain the economic value of aesthetic considerations allows monetary values to be plugged into the modern balancing tests that pervade the law of nuisance.

Courts can apply aesthetic nuisance principles to land use disputes in areas that are primarily residential but still not zoned or zoned only minimally. Residential landowners in such fringe areas deserve to have the character of the locality protected from land uses that are patently unreasonable under community standards. For instance, a court could apply a balancing test to fairly and efficiently resolve disputes involving a property owner who keeps a junkyard in a residential area by applying a balancing test. The court could consider several factors, including the character of the locale, the utility of the junkyard, and the degree of harm suffered by the plaintiff. The court could measure the utility of the junkyard by the public convenience served by it and the amount of income produced if it were operated as a business. The gravity of the harm, however, might not only include the individual depreciation in property value suffered by the plaintiff, but an aggregate depreciation of property values in the area due to the offensive use. Valuation of aggregate depreciation would entail concerted action on the part of the neighbors.

Upon determining that the plaintiff was and is suffering substantial harm, the court could fashion one of several remedies available under contemporary nuisance standards. Assuming the damage to land values was enough to constitute a nuisance, a court could simply grant an injunction directing the defendant to remove any junk from his property or to pay damages to the plaintiff(s).\(^\text{154}\)

One may envision situations similar to the facts of *Spur Industries*.\(^\text{155}\) For example, assume that a developer creates a neighborhood in a scenic valley with a lake between two mountains. The first residents who move into the area might decide that the small-scale strip-mining operation on one mountainside is an annoyance, but consider the operation far enough away to be toler-

\(^{154}\) See Lewin, *supra* note 21.
\(^{155}\) For a discussion of *Spur Industries*, see *supra* notes 69–72 and accompanying text.
able. Further assume that more and more people move into the area and that a marina is established on the lake. This would attract an even more affluent crowd, since water is scarce in this part of the country and proximity to water is highly valued. The mining operation is a constant subject of conversation as everyone in this hypothetical would agree that it is an eyesore. Finally, the residents determine that if the valley could be rid of the aesthetic irritant, property values would soar. The citizens then ban together and sue to enjoin the operation.

Because the law does not recognize aesthetic nuisances, the citizens would be without a remedy. However, if aesthetic injuries were recognized, the court could provide a remedy such as the one in Spur Industries. The mining business could be enjoined, but the citizens of the valley, by now an affluent residential neighborhood, would have to indemnify the company.

In addition to situations involving disputes between residential and commercial land uses, aesthetic nuisance could resolve disputes between neighboring residential landowners. For instance, assume one homeowner in the valley referred to above decides to build a fifty-foot observation tower next to his house so that he and his wife can watch migratory birds landing in the lake. The only problem is that the observation deck will obstruct the view from his neighbor’s bay window which overlooks the lake. The neighbor sues to enjoin the building of the observation deck.

At trial, the neighbor produces four witnesses, all real estate appraisers, who testify that his property value will drop $2,500 if his view of the lake is obstructed by the tower. It is further shown that the first homeowners can see most of the lake just as well from their back patio as they will be able to from the new deck, and that birds are visible on all parts of the lake surface. Despite these facts, the neighbor has no remedy under current nuisance law. If, however, the law recognized aesthetic injuries, the situation could be plugged into the Restatement (Second) balancing test. In this situation the gravity of harm suffered by the plaintiff ($2,500) seems to clearly outweigh the utility of the conduct since the people are already able to see most of the lake from their patio. If the latter were not true, however, the homeowners would have a more legitimate case and thus might be able to escape an injunction. Instead, the homeowners would need to pay damages to the neighbor for the right to build the deck.
The situations presented here are only a few of the possible circumstances in which the right to be free from aesthetic nuisances should exist. Rather than take the position that no real injury can be caused by the aesthetic environment, the judiciary should recognize the possibility of aesthetically unreasonable uses of land causing legal injury and should then subject such claims to the balancing test in order to determine if a remedy is warranted.

VI. Conclusion

Recognition of nuisance actions based on aesthetic considerations would contribute to the efficient and equitable solution of situations that are currently not remedied. Determination of aesthetic nuisance actions is not any more subjective than the current task of courts in the context of aural and olfactory nuisance disputes. The popularity of aesthetic zoning in many municipalities demonstrates the societal value of aesthetics. Furthermore, judicial recognition of the exercise of such police powers contradicts the common law's reluctance to confront aesthetics in the realm of nuisance. Finally, tools currently exist for the common law to change its view of aesthetic nuisance. Modern real estate appraisal methods make it possible to express community aesthetic preferences in monetary terms. In turn, such expressions allow for the resolution of aesthetic disputes within the framework of modern nuisance balancing tests. It only remains for courts to recognize the new economic and social realities.