Self-Help: A Viable Remedy for Nuisance? A Guide For the Common Man's Lawyer

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At common law, self-help was an accepted alternative to the formal legal process aimed at enjoining a nuisance.[1] A person affected by a nuisance could, under the proper circumstances, take the law into his own hands and abate the nuisance. The question posed here is whether self-help has any place in the contemporary arsenal of nuisance abatement techniques.

This Note will first explore the concept of nuisance and explain the traditional public/private nuisance dichotomy. Next, the little known and evidently much feared doctrine of self-help will be discussed and analyzed. Finally, self-help will be hypothetically applied to environmental nuisances to examine the doctrine's possible application to this common type of contemporary nuisance.

I. NUISANCE

A. *Public vs. Private*

Nuisance is a French word for harm.[2] The concept of nuisance is broad[3] and many states have simply codified the common law definition.[4] Traditionally, nuisance is divided into two categories: public and private.[5] Private nuisance has been generally defined as an unreasonable distur-

1. *E.g.*, McLaurine v. Birmingham, 247 Ala. 414, 417, 24 So.2d 755, 758 (1946); Herman v. Cardon, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976); McLean v. Fort Smith, 185 Ark. 582, 586, 48 S.W.2d 228, 230 (1937); 3 BLACKSTONE'S COMMENTARIES ch. 1, § 10, at 1497 (Jones ed. 1916); W. PROSSER, THE LAW OF TORTS § 90, at 605 (4th ed. 1971).

2. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966).

3. *See* ARIZ. REV. STAT. ANN. § 13-2917(A)(1978):

> Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, or as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway, is a public nuisance. . . .

4. *See, e.g.*, ALA. STAT. ANN. § 6-5-120 (1977); CAL. CIV. CODE § 3479 (West 1970); GA. CODE § 72-101 (1973); RESTATEMENT (SECOND) OF TORTS, §§ 821B(2)(a) & 821D (1979). *See also* Culwell v. Abbott Constr. Co., Inc., 211 Kan. 359, 363, 506 P.2d 1191, 1195 (1973); Marron v. Compere, 44 N.M. 414, 422, 103 P.2d 273, 278 (1940); State v. Franzone, 243 Or. 597, 602, 415 P.2d 16, 20 (1966).

5. Prosser, *supra* note 2, at 999.

bance of an individual's interest in the use and enjoyment of his or her land,[6] while a public nuisance has been defined as an unreasonable interference with a public interest, such as health, safety, morality, convenience, or peace.[7]

A nuisance is considered public when those who come in contact with it do so while exercising a public right.[8] It is clear, however, that any unreasonable condition or activity that substantially invades the private rights of a large number of citizens will also interfere with some public interest.[9] Public nuisances are considered criminal offenses.[10] In addition, civil liability for public or private nuisance can be predicated upon either an intentional or a negligent invasion of a person's interest,[11] or upon conduct that is so dangerous to life or property or so abnormal or out of place in its surroundings as to fall within the principal of strict tort liability.[12]

B. *Civil Causes of Action*

A civil cause of action for a private nuisance is dependent upon the plaintiff's ownership of an interest in land.[13] Once it has been established that the plaintiff has some possessory interest in the affected land, the defendant's interference with the land must be shown to be unreasonable.[14] To show unreasonableness, the plaintiff must prove that the interference is substantial and offensive to the ordinary person.[15] To determine whether the defendant's conduct was actually unreasonable, a court must balance the utility of the defendant's conduct against the gravity of harm to the

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6. *See* Herman v. Cardon, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976); Allen v. Ogden, 210 Kan. 136, 139-40, 499 P.2d 527, 531 (1972); Lied v. Clark County, 94 Nev. 275, 278, 579 P.2d 171, 173 (1978); RESTATEMENT (SECOND) OF TORTS § 821D (1979); D. DOBBS, REMEDIES § 5.3, at 332 (1973).

7. Prosser, *supra* note 2, at 1000. Examples of public nuisances can be found in Spur Industries, Inc. v. Del Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972) (feedlots); State v. Rocker, 52 Hawaii 336, 475 P.2d 684 (1970) (nude sunbathing); Clayton v. Mayfield, 82 N.M. 596, 485 P.2d 352 (1971) (junkyard); State v. Gedarro, 19 Wash. App. 826, 579 P.2d 949 (1978) (gambling); *see* RESTATEMENT (SECOND) OF TORTS § 821B(1), (2)(a)(1979).

8. Prosser, *supra* note 2, at 1001-02; *see* Maier v. Kethikan, 403 P.2d 34, 38 (Alaska 1965); Phillips v. Altman, 412 P.2d 199, 201 (Okla. 1966); Smejkal v. Sunset Empire Inc., 274 Or. 571, 574, 547 P.2d 1363, 1365 (1976). Public rights include rights to reasonable health, safety, morality, convenience, peace, etc. See text & notes 7 *supra* & 24 *infra*.

9. Prosser, *supra* note 2, at 1002.

10. *Id.* at 997; *see* Rodgers v. Ray, 10 Ariz. App. 119, 122-23, 457 P.2d 281, 284-85 (1969); State v. Miller, 54 Hawaii 1, 3, 501 P.2d 363, 365 (1972); State v. Franzone, 243 Or. 597, 602, 415 P.2d 16, 17-19 (1966); text & notes 38, 42, 70, 74, 81, & 84 *infra*. Arizona treats a knowing commission of a public nuisance as a class 2 misdemeanor. ARIZ. REV. STAT. ANN. § 13-2917(C) (1978).

11. *See* text & notes 13, 14 & 17 *infra*.

12. Baughman v. Cosler, 169 Colo. 534, 543-44, 459 P.2d 294, 299 (1969); Durrance v. Sanders, 329 So.2d 26, 29 (Fla. App. 1976); Timmons v. Reed, 569 P.2d 112, 123 (Wyo. 1977); W. PROSSER, *supra* note 1, § 87, at 574, 576-77.

13. *See* text & note 6 *supra*; J. FLEMING, THE LAW OF TORTS 186 (1949).

14. Miller v. Carnation Co., 33 Colo. App. 62, 67, 516 P.2d 661, 664 (1973); Jellison v. Glenson, 77 N.M. 445, 448, 423 P.2d 876, 877 (1967); Jewett v. Deerhorn Enterprises, Inc., 281 Or. 469, 473, 575 P.2d 164, 166 (1978).

15. McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312, 314, 543 P.2d 150, 152 (1975); W. PROSSER, *supra* note 1, § 87, at 580-82; Shuck, *Air Pollution as a Public Nuisance*, 3 NAT. RESOURCES L. 475, 478-79 (1970).

plaintiff.[16]

By contrast, a private cause of action for public nuisance does not rely on any possessory interest in land, but does require that the plaintiff suffer substantial[17] particular damage.[18] Damage to the individual must be particular because it is feared that if every citizen had the right to sue for a violation of a public right, the courts would be clogged and unjust results would occur.[19] It should be noted, however, that this fear has not been realized in states that allow citizen suits against environmental nuisances.[20]

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16. *E.g.*, McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312, 314, 543 P.2d 150, 152 (1975); Koeber v. Apex-Albuq Phoenix Express, 72 N.M. 4, 5, 380 P.2d 14, 15-16 (1963); Jewett v. Deerhorn Enterprises, Inc., 281 Or. 469, 473, 575 P.2d 164, 166-68 (1978); D. DOBBS, *supra* note 6, § 5.7, at 357.

New York formerly rejected the balancing test and ignored any disparity in economic consequences, instead issuing an injunction for any "substantial" nuisance. For example, in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 4-6, 101 N.E. 805, 805-06 (1913), a lower riparian owner was injured by an upstream paper pulp mill which had cost over a million dollars. The lower riparian's damage was approximately $100. *Id.* at 4, 101 N.E. at 806. Nevertheless, the court held that the great economic disparity was an insufficient reason for refusing to issue an injunction. *Id.* at 5, 101 N.E. at 805. Thus, the New York court followed the rule that an unconditional injunction would issue whenever the plaintiff proved a substantial nuisance. *Id.; see* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 224, 257 N.E.2d 870, 872, 309 N.Y.S.2d 312, 315 (1970). Substantial nuisance was defined as anything resulting in damages in excess of $100. Whalen v. Union Bag & Paper Co., 208 N.Y. at 4, 101 N.E. at 806; Boomer v. Atlantic Cement Co., 26 N.Y.2d at 224, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

The court in *Boomer* decided to stray from the substantial nuisance rule because the polluter employed over 300 people and represented an investment of over $45,000,000, while the plaintiff's damages totalled $185,000. *Id.* at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316. The court ruled that the cement plant must pay permanent damages for injury to plaintiff's property. *Id.* at 226, 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. Thus, New York appears to have applied a balancing test in accord with other jurisdictions.

17. Prosser, *supra* note 2, at 1007. Substantial damage must be non-trivial, *id.*, and "particular." *Id.* at 1011. *But cf.* Amoskeag Mfg. Co. v. Goodale, 46 N.H. 53, 54 (1865) (self help is available for "nominal damage").

18. Case law often refers to "special" damages in nuisance actions. This Note, however, will utilize the "particular" damage nomenclature recommended by Prosser. *See* Prosser, *supra* note 2, at 1011. State statutes may also authorize an individual to sue on public nuisance grounds. *E.g.*, CAL. CIV. CODE § 3493 (West 1970); GA. CODE ANN. § 72-202 (1981); OKLA. STAT. tit. 50, § 10 (1962).

These statutes grant a private cause of action for public nuisance only if the prospective plaintiff suffers particular damage. The statutes therefore merely codify the common law requirement. An argument can be made for allowing a private action even in the absence of enabling legislation. First, regulatory agencies often lose their effectiveness by becoming bureaucratic and unresponsive. Second, regulatory permits granted to polluters may become elevated in the agency's eyes to the status of vested right. Third, agencies may fail to strongly enforce legislation for policy reasons, through inertia or out of fear of generating political heat. In short, the government "watch dogs" may not watch and therefore, in order to effect a change, private individuals must act. Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 BRIT. COLUM. L. REV. 167, 185-86 (1971).

19. W. PROSSER, *supra* note 1, § 88, at 587. Prosser notes that the defendant is relieved of multiple actions by the prohibition against suit by every citizen injured by a public nuisance. *Id.; see* Rose v. Miles, 105 Eng. Rep. 773, 773 (K.B. 1815); *cf.* Raymond v. Southern Pac. Co., 259 Or. 629, 634, 488 P.2d 460, 463 (1971).

20. *See* Scanwell Laboratories Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970) (court can use judicial discretion to avoid frivolous lawsuits in review of agency actions under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976)). In 1970, the Michigan legislature promulgated an environmental protection act that allowed individuals to maintain an action for declaratory or equitable relief for the protection of the environment against other persons, corporations, or governmental agencies. MICH. COMP. LAWS ANN. § 691-1202 (1973). The act has not resulted in a flood of litigation, as many feared it would. Comment, *Public Nuisance: Standing to Sue Without Showing "Special Injury,"* 26 U. FLA. L. REV. 360, 362 (1974). Attorneys who have litigated under the act revealed that the cost, including expert witnesses and accrual of technical data,

A long standing controversy surrounds the definition of particular damage. The dispute centers on whether particular damage must be only greater in degree than that suffered by the general public or actually different in kind.[21] A majority of courts has held that a difference in degree is not sufficient and that a difference in kind is required.[22] Particular damage does not mean, however, damage suffered exclusively or uniquely by the plaintiff.[23] A plaintiff may recover even if other people suffer the same sort of damage and even if others suffer greater harm.[24]

A classic example of particular damage is injury resulting from an obstructed public highway.[25] In such a case, the presence of pecuniary loss alone has been held to fulfill the particular damage requirement.[26] Courts therefore often consider loss of time resulting in financial loss as particular damage.[27] Interference with business activities also has been held to be actionable particular damage as long as the damage is not so widespread as to include the entire community or industry or even a very large part of it.[28]

Pecuniary loss is not required, however, as damage may be considered substantial and particular without economic injury.[29] For example, physical harm to the plaintiff's health has been considered particular damage,[30] as has mental distress caused by obscene words spoken in public but directed at the plaintiff.[31]

In summary, substantial interference with the use and enjoyment of

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averaged $10,000 for a full trial. The prohibitively high cost of a private lawsuit may be a factor in the lack of inundating litigation. Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1098-1100 (1972). *See also* W. PROSSER, *supra* note 1, § 88, at 587 n.68.

21. Prosser, *supra* note 2, at 1008-09.

22. W. PROSSER, *supra* note 1, § 88, at 586-87; *see, e.g.*, Swain v. Chicago Burlington & Quincy R.R., 252 Ill. 622, 626, 97 N.E. 247, 248 (1912); Smejkal v. Empire Lite-Rock, Inc., 274 Or. 571, 574, 547 P.2d 1363, 1365 (1976); Raymond v. Southern Pac. Co., 259 Or. 629, 634, 488 P.2d 460, 462 (1971). *Contra*, Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 575, *appeal dismissed*, 286 So. 2d 205 (Fla. 1973).

23. Prosser, *supra* note 2, at 1008.

24. *See, e.g.*, Sullivan v. American Mfg. Co., 33 F.2d 690, 693 (4th Cir. 1929) (public nuisance—damage to plaintiff's health and property was actionable even though plaintiff was not the only one affected); Strickland v. Lamber, 268 Ala. 580, 584, 109 So. 2d 664, 667 (1959) (public nuisance—flies and odors from chicken farm); Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 241, 117 N.W.2d 322, 327 (1962) (public nuisance—dust).

25. *See* Liller v. State Highway Admin., 25 Md. App. 276, 278, 333 A.2d 644, 646 (1975); Stroda v. State Highway Comm'n, 22 Or. App. 403, 407, 539 P.2d 1147, 1150 (1975); Pilgrim Plywood Corp. v. Melendy, 110 Vt. 12, 17, 1 A.2d 700, 703 (1938).

26. Prosser, *supra* note 2, at 1008, 1013-15.

27. Inconvenience and delay in travel on a public highway is insufficient for particular damage unless the plaintiff can prove that he or she was put to some expense of a different kind than that of the ordinary public. *E.g.*, Patterson v. Detroit, Lansing & N. R.R., 56 Mich. 172, 174, 22 N.W. 260, 261 (1885); Rose v. Miles, 105 Eng. Rep. 773, 773-74 (K.B. 1915); Hart v. Bassett, 84 Eng. Rep. 1194, 1195 (K.B. 1681).

28. W. PROSSER, *supra* note 1, § 88, at 590-91; Swain v. Chicago, Burlington & Quincy R.R., 252 Ill. 622, 627-28, 97 N.E. 247, 248 (1912); Smedburg v. Moxie Dam Co., 148 Me. 302, 306, 92 A.2d 606, 610 (1952); Hickey v. Electric Reduction Co., 21 D.L.R.3d 368, 372 (1972).

29. Prosser, *supra* note 2, at 1008, 1013-15.

30. Code v. Jones, 54 Ont. L. Rep. 425, 429 (1923); W. PROSSER, *supra* note 1, § 88, at 588.

31. Commonwealth v. Oaks, 113 Mass. 8, 9 (1873); Wilson v. Parent, 228 Or. 354, 368, 365 P.2d 72, 78 (1961).

the plaintiff's rights in land can be considered a public nuisance.[32] That type of interference is also a private nuisance and a cause of action can be maintained on either or both theories.[33] This Note will go on to consider the application of self-help to situations involving a nuisance.

II. SELF-HELP

The right to self-help abatement of a public or private nuisance is an established principle of common law.[34] As stated by one court, "Where a party can maintain an action for nuisance, he may enter and abate it . . . even though it caused but nominal damage to him. . . ."[35] The right to self-help has not been abrogated by constitutional provisions protecting property even though self-help may result in the destruction of property.[36] Self-help, however, is not appropriate in every nuisance situation. Consequently, an analysis of relevant case law is necessary in order to determine when self-help exists as a legally viable remedy.

A. *Judicial Acceptance of the Self-Help Remedy*

In *Herman v. Cardon*,[37] the Arizona Supreme Court held that a person whose private property interests were damaged by unauthorized government action could summarily abate the nuisance.[38] The Cardons owned three adjoining lots abutting the intersection of State Highway 87 and Aero Drive in Payson, Arizona.[39] The State Highway Department constructed a curb and gutter along Highway 87 and extended it around

32. Tedescki v. Berger, 150 Ala. 649, 652, 43 So. 960, 961 (1907); Adams v. Toledo, 163 Or. 185, 192, 96 P.2d 1078, 1081 (1939); State v. Ringold, 102 Or. 401, 404, 202 P. 734, 735 (1921).

33. Colwell v. Abbott Constr. Co., Inc., 211 Kan. 359, 364, 506 P.2d 1191, 1196 (1973); Adams v. Toledo, 163 Or. 185, 192, 96 P.2d 1078, 1081 (1939); State v. Ringold, 102 Or. 401, 404, 202 P. 734, 735 (1921).

34. *E.g.*, Upton v. Felton, 4 F. Supp. 585, 588 (D. Neb. 1932); Hislop v. Rogers, 54 Ariz. 101, 115-16, 92 P.2d 527, 534 (1939); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 917 (1940); authority cited in note 1 *supra*.

Only 7 states have statutes expressly authorizing the self-help remedy. *See* CAL. CIV. CODE §§ 3495 (public nuisance), 3502 (private nuisance) (West 1970); IDAHO CODE §§ 52-206 (public nuisance), 52-302 (private nuisance) (1979); MONT. REV. CODES ANN. §§ 27-30-302 (private nuisance), 27-30-204 (public nuisance) (1979); N.D. CENT. CODE §§ 42-01-04 (private nuisance), 42-01-10 (public nuisance) (1968); OKLA. STAT. ANN. tit. 50, § 14 (private nuisance), § 12 (public nuisance) (West 1962); S.D. COMPILED LAWS ANN. § 21-10-6 (both) (Supp. 1981); WASH. REV. CODE § 7.48.230 (public nuisance) (1961). The California statute is representative: "A person injured by a private nuisance may abate it by removing, or if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury." CAL. CIV. CODE § 3502 (West 1970). The other authorizing statutes are remarkably consistent, either using the same or very similar terminology. These statutes codify the general common law rules. The other 43 states have no statutes either authorizing or forbidding self-help.

35. Amoskeag Mfg. Co. v. Goodale, 46 N.H. 53, 56 (1865).

36. U.S. CONST. amend 14, § 1 states that "no state" shall deprive any person of property without due process of law. Self-help abatement is not abridged by that provision because in the case of a private abater, no state action is involved. In the case of an official abatement, state action is involved but exists as a valid exercise of police power. Ajamian v. Township of N. Bergen, 103 N.J. Super, 61, 73-75, 246 A.2d 521, 527-28 (1968); Miller v. Foster, 244 Wis. 99, 102, 11 N.W.2d 674, 676 (1943). *See also* Health Dep't. v. Trinity Church, 145 N.Y. 32, 39, 39 N.E. 833, 835 (Ct. App. 1895).

37. 112 Ariz. 548, 544 P.2d 657 (1976).

38. *Id.* at 551, 544 P.2d at 660.

39. *Id.* at 549, 544 P.2d at 658.

the corner for 60 feet along Aero Drive.[40] The Cardos destroyed 29.5 feet of the curb along Aero Drive so automobiles could enter and exit their property.[41] The court found that the applicable statutes did not authorize the expenditure of public monies for the construction of the curb and gutter system on Aero Drive because it was not a public highway.[42] Because the curb and gutter interfered with the Cardons' right of access and its construction was unauthorized, the court held that the destruction of the curbing was justified.[43] The court noted that nuisances "which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow process of the ordinary forms of justice," can be summarily abated.[44]

The court's decision was clearly correct. The curb and gutter system was a private nuisance—an unreasonable interference with the use and enjoyment of the Cardons' possessory interest in land.[45] Because the nuisance was felt every day, an immediate remedy was in order.[46] Filing a lawsuit would have been costly in both time and money. Meanwhile, the nuisance would continue to exist. The situation was tailor-made for self-help and the landowners lawfully exercised their right to summary abatement.

Lack of an effective judicial remedy is an additional factor supporting the use of self-help.[47] In several cases involving unsafe housing, cities had repeatedly cited, threatened, and sued building owners, to no avail.[48] Finally, the cities moved in and abated the nuisances by forcibly evicting all the tenants and closing the buildings.[49] The courts found that the summary abatement was justified because further delay would have only compounded the evil and thus precluded the desired benefit.[50]

The benefits sought in the unsafe housing cases were immediate sani-

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40. *Id.*

41. *Id.*

42. *Id.* at 550-51, 544 P.2d at 659-60. ARIZ. REV. STAT. ANN. § 18-201 (1981) authorizes the county board of supervisors to establish, alter, or abandon highways and to expend public monies to do so. ARIZ. REV. STAT. ANN. § 18-207(A) (1981) authorizes the expenditure of public monies for maintenance of public roads other than highways, but § 18-207(B) expressly excludes expenditure for the laying down of cement or petroleum products on such roads. The court found that the construction of the curb and gutter was the laying down of cement product and hence not legally authorized. 112 Ariz. at 550-51, 544 P.2d at 659-60.

43. 112 Ariz. at 551, 544 P.2d at 660.

44. *Id., quoting* W. PROSSER, *supra* note 1, § 90, at 605; 3 BLACKSTONE'S COMMENTARIES, *supra* note 1, § 10, at 1497.

45. 112 Ariz. at 551, 544 P.2d at 660; *see* text & notes 7, 13-16 *supra*.

46. 112 Ariz. at 551, 544 P.2d at 660; text & note 48 *supra*.

47. Ajamian v. Township of N. Bergen, 103 N.J. Super. 61, 80, 246 A.2d 521, 532 (1968) (the lack of a balancing test in *Amoskeag* is reminiscent of the test in Whalen v. Union Paper Bag Co., see text & note 17 *supra*); Miller v. Foster, 244 Wis. 99, 102, 11 N.W.2d 674, 675 (1943). The cases dealt with public nuisances. *See also* Gaskins v. People, 84 Colo. 582, 588, 272 P. 662, 664 (1928) (owner of property not amenable to process; tenant maintained public nuisance).

48. Ajamian v. Township of N. Bergen, 103 N.J. Super. 61, 67, 246 A.2d 521, 524 (1968); Miller v. Foster, 244 Wis. 99, 101, 11 N.W.2d 674, 675 (1943). By these actions, the governmental authorities, as abators, gave ample notice to the maintainers. See text & note 111 *infra*.

49. Ajamian v. Township of N. Bergen, 103 N.J. Super. 61, 70, 246 A.2d 521, 523 (1968); Miller v. Foster, 244 Wis. 99, 101, 11 N.W.2d 674, 675 (1943).

50. Ajamian v. Township of N. Bergen. 103 N.J. Super, 61, 81, 246 A.2d 521, 531-32 (1968); Miller v. Foster, 244 Wis. 99, 102, 11 N.W.2d 674, 675 (1943).

tary and safe living quarters for residents. A judicial proceeding, with its attendant delays and appeals, was not the best remedy because during that time the apartment dwellers would have continued to live in squalor.[51] Although the self-help remedy was fully available on these facts, self-help is subject to certain additional qualifications.

B. *Potential Limitations—Use of Force*

A Maryland case, *Maddran v. Mullendore*,[52] like *Herman v. Cardon*,[53] supported self-help as a viable nuisance abatement technique. The defendant Maddran, a grocer, owned the right of way through a narrow alley adjoining the plaintiff's house.[54] The defendant had continuously used the alley for thirty-six years as a supply route, while the plaintiff had lived next door for fifty years.[55] The defendant began to bring quarters of beef through the alley.[56] The plaintiff complained to the defendant that blood dripped onto the alley from the meat.[57] When the defendant did nothing to remedy the situation, the plaintiff changed the lock on the alleyway gate, depriving the defendant of his use of the alley.[58] The plaintiff thus created a private nuisance by blocking the alleyway and preventing the defendant's privileged use.[59] The plaintiff was present in the alleyway when the defendant discovered the lock and requested that the lock be removed.[60] When the plaintiff refused, the defendant's employee tore the

51. Ajamian v. Township of N. Bergen, 103 N.J. Super, 61, 81, 246 A.2d 521, 531-32 (1968); Miller v. Foster, 244 Wis. 99, 102, 21 N.W.2d 674, 675 (1943). Two other cases presented a similar problem. In Herman v. Cardon, 112 Ariz. 548, 544 P.2d 657 (1976), discussed at text & notes 37-46 *supra*, the court noted that the nuisance caused immediate and daily annoyance and injury and thus summary abatement was appropriate. 112 Ariz. at 548, 544 P.2d at 660; *see* text & note 44 *supra*. In Hummel v. State, 690 Okla. Crim. 38, 99 P.2d 913 (1940), discussed at text & notes 68-78 *infra*, the court found that immediate and irreparable harm would have been done the defendants had they not acted immediately. 69 Okla. Crim. at —, 99 P.2d at 918; *see* Holleman v. Tulsa, 79 Okla. Crim. 387, —, 155 P.2d 254, 256 (1945).

52. 206 Md. 291, 111 A.2d 608 (1955).

53. 112 Ariz. 548, 544 P.2d 657 (1976); *see* text & notes 37-46 *supra*.

54. 206 Md. at 296, 111 A.2d at 609.

55. *Id.* at 296, 111 A.2d at 610. Because both parties had property rights and had held them for a long period of time, it seems that the parties were on somewhat equal footing. *See* text & note 90 *infra*.

56. 206 Md. at 296, 111 A.2d at 610.

57. *Id.* It is interesting to note that the dripping blood may have been a private nuisance perpetrated against the plaintiff by the defendant. The plaintiff had a possessory interest in the land and the defendant's action interfered with the use and enjoyment of that land. Those factors constitute a private nuisance. See text & notes 6, 13-16 *supra*. The plaintiff's action—locking the gate—could be considered self-help. The court failed to recognize that self-help was used by both parties here, as evidently did the plaintiff's counsel. Conceivably, the plaintiff could have alleged nuisance on the defendant's part, thus presenting the court with the question of "who's right?" The plaintiff seems to have one more equity on her side than does the defendant. She notified the defendant of the nuisance before her exercise of self-help. 206 Md. at 298, 111 A.2d at 610. The court, however, invalidated plaintiff's exercise of self-help since it determined that the defendant had caused no nuisance. *Id.* at 298, 111 A.2d at 611. The defendant also notified the plaintiff only seconds before of his intent to abate the nuisance. *Id.* at 296, 111 A.2d at 610. Compare the notification in this situation with that in *Holleman* at text & note 87 *infra*. Notification of abatement seems necessary only when the nuisance is not on the abator's property and the nuisance is caused by omission. See note 87 *infra*.

58. 206 Md. at 296, 111 A.2d at 610; *see* text & note 57 *supra*.

59. 206 Md. at 298, 111 A.2d at 610; see text & notes 45, 57 *supra*.

60. 206 Md. at 296, 111 A.2d at 610. Thus, the defendant fulfilled the notice requirement.

lock off the gate and carried a quarter of beef toward the store.[61] The plaintiff sat down in the alley, and as the defendant walked by, was brushed by the beef.[62]

Plaintiff brought suit for assault and battery.[63] The court did not hold the defendant liable, however, ruling that use of reasonable force to abate a nuisance was privileged under the self-help doctrine.[64] In deciding whether the defendant used excessive force in the abatement, the court applied and adopted the approach taken by the Restatement of Torts.[65] Under the Restatement test, the fundamental question of whether the force used was excessive depends on the circumstances of any given case.[66] The court found that the defendant had not used excessive force and had therefore acted within his rights in abating the nuisance.[67]

In *Hummel v. State*[68] an Oklahoma court also upheld the use of force to abate a public nuisance. There, the defendants owned herds of thoroughbred cattle that grazed on the open range.[69] The plaintiff owned a "mongrel" bull that he allowed to run free among the purebred herds in violation of a state statute.[70] The defendants captured the marauding bull

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61. *Id.*

62. *Id.*

63. *Id.* at 295, 111 A.2d at 609.

64. *Id.* at 297-98, 111 A.2d at 613. The defendant's use of force was privileged by self-help and the right of a landlord to forcefully eject an occupant. *Id.* at 298-302, 111 A.2d 611-12. "[W]hatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it." 3 BLACKSTONE'S COMMENTARIES, *supra* note 1, ch. 1, § 10, at 1497.

65. 206 Md. at 300, 111 A.2d at 612. RESTATEMENT OF TORTS § 77 (1934) provides:

> The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended to cause death or serious bodily harm is privileged for the purpose of preventing or terminating another's intrusion upon the actor's land or chattels, if
>
> (a) the other's intrusion (i) is not privileged, . . . , and
>
> (b) the actor reasonably believes that the other's intrusion can be prevented or terminated only by the immediate infliction of . . . bodily harm, and
>
> (c) the means which the actor uses to prevent or terminate the intrusion are reasonable, and
>
> (d) the actor has first requested the other to desist from the intrusion and the other has disregarded the request, or the actor reasonably believes that (i) a request will be useless, or (ii) it will be dangerous . . . to make a request, or (iii) substantial harm will be done to the . . . land or chattel before a request can effectively be made.

See also RESTATEMENT (SECOND) OF TORTS § 77 (1965). Those principles differ from those of common law self-help abatement in that at common law, the abator is liable even though he reasonably believed that a nuisance existed if in fact a nuisance did not exist. Hislop v. Rogers, 54 Ariz. 101, 116, 92 P.2d 527, 534 (1939); State v. Brown, 191 N.C. 419, 421, 132 S.E. 5, 6 (1926); W. PROSSER, *supra* note 1, § 90, at 605.

66. 206 Md. at 301-02, 111 A.2d at 612; see discussion at note 65 *supra*.

67. 206 Md. at 302, 111 A.2d at 613. The court stated that the question of whether excessive force was used was a question of fact except where it is "clear and unmistakable" that the force used was not excessive. *Id.* at 300-01, 111 A.2d at 612. The court decided as a matter of law, however, that the force used was not excessive because no one had actually struck the plaintiff or even threatened to do so and she was not injured in the altercation. *Id.* at 302, 111 A.2d at 613.

68. 69 Okla. Crim. 38, 99 P.2d 913 (1940); *see* text & notes 7-10, 17-32 *supra* for discussion and definition of "public nuisance."

69. 69 Okla. Crim. at —, 99 P.2d at 915.

70. *Id.* The nuisance involved here presents the classic case. The bull was a nuisance in its surroundings—the open range. Penned up, it would not have endangered the defendants' breeding stock, and thus would not have constituted a nuisance. As in Herman v. Cardon, 112 Ariz. 548, 544 P.2d 657 (1976), text & notes 37-46 *supra*, Holleman v. Tulsa, 79 Okla. Crim. 387, 155

and castrated it, thereby abating the nuisance.[71]

The defendants were charged with malicious mischief.[72] They were acquitted, however, because the state had a strong policy favoring purebred cattle.[73] The plaintiff's conduct violated that policy,[74] and the defendants had acted in good faith, without malice, and according to their belief in the law.[75] Further, the defendants acted openly[76] and did not cause unnecessary damage[77] or breach the peace[78] in the abatement.

The *Maddran* and *Hummel* cases suggest potential limitations to abatement of nuisances by use of force. *Maddran* demonstrates that only reasonable force may be used in an abatement attempt. Likewise, *Hummel* showed that, although the nuisance can be eliminated by the abator, unnecessary destruction will not be condoned. The next section will consider other limits actually imposed by courts upon the self-help remedy.

C. *Actual Limitations—Notice and Breach of the Peace*

While the *Hummel* case upheld the right of self-help, the Oklahoma Court of Criminal Appeals, in *Holleman v. Tulsa*,[79] decided that self-help was an abomination to civilized society. In *Holleman*, the defendant, an attorney, was prosecuted for malicious mischief.[80] He owned a home in a residential area which was zoned to forbid all advertising signs, including those advertising rooms for rent.[81] The complaining witness lived in a

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P.2d 254 (1945), text & notes 79-100 *supra*, and Maddran v. Mullendore, 206 Md. 291, 111 A.2d 608 (1955), text & notes 52-67 *supra*, the nuisance maintainer in *Hummel* broke the law in maintaining the nuisance. 69 Okla. Crim. at —, 99 P.2d at 915.

71. 69 Okla. Crim. at —, 99 P.2d at 915.

72. *Id.*

73. *Id.* at —, 99 P.2d at 916.

74. *Id.*

75. *Id.* at —, 99 P.2d at 918. The defendants in both *Hummel* and Holleman v. Tulsa, 79 Okla. Crim. 387, 155 P.2d 254 (1945), text & notes 79-100 *infra*, acted "according to their belief in the law." 69 Okla. Crim. at —, 99 P.2d at 918; 79 Okla. Crim. at —, 155 P.2d at 256. In *Hummel*, that belief was correct, while in *Holleman* it was not. *See* 69 Okla. Crim. at —, 99 P.2d at 916; 79 Okla. Crim. at —, 155 P.2d at 257. *Hummel* has a different result than *Holleman* because in *Hummel* the defendants acted without malice, the state favored the policy of purebred cattle, the parties seemed to be of equal strength, and the defendants did not enter onto the plaintiff's land without notice. 69 Okla. Crim. at —, 99 P.2d at 915-16. In contrast, the defendant in *Holleman* acted with malice. *See* 79 Okla. Crim. at —, 155 P.2d at 256. The state officially favored elimination of the signs but, as the court noted, the plaintiff housed "servicemen and their wives," surely a patriotic and popular calling during the Second World War. *See id.* at —, 155 P.2d at 255. The defendant was an aggressive male attorney with knowledge of the law, while the plaintiffs were elderly women. *Id.* at —, 155 P.2d at 255-56. And the defendant entered the plaintiffs' land without notice, in violation of statute. *Id.* Those differences caused the *Holleman* court to convict the abator of malicious mischief. See text & notes 87-93 *infra*.

76. 69 Okla. Crim. at —, 99 P.2d at 918. The defendants acted in broad daylight and removed the bull from a public range. *Id.*

77. *Id.* The defendants merely castrated the bull. They did not kill or cripple it or, in the court's estimation, lower its value. *Id.* at 916. In *Holleman*, discussed at text & notes 79-100 *infra*, the defendant caused unnecessary damage—he tore the sign into little pieces. 79 Okla. Crim. at —, 155 P.2d at 255.

78. 69 Okla. Crim. at —, 99 P.2d at 918. The defendant in *Holleman*, by contrast, did breach the peace—he raised his voice "such as to be heard by the neighbors." 79 Okla. Crim. at —, 155 P.2d at 255.

79. 79 Okla. Crim. 387, 155 P.2d 254 (1945).

80. *Id.*

81. *Id.* at —, 155 P.2d at 255.

house across the street from the defendant.[82] She rented rooms in the house and displayed a sign advertising that fact on the house front.[83] The sign was recognized as illegal by the court.[84] Holleman crossed the street, entered the witness's front yard, and tore up the sign.[85]

The defendant's conviction for malicious mischief was upheld by the court in spite of an Oklahoma statutory policy recognizing self-help.[86] The court's rationale may be distilled into two main themes. First, under the Oklahoma statutes an abator must notify a nuisance maintainer before entering onto the maintainer's land.[87] In *Holleman*, however, the defendant gave no notice.[88] Second, the defendant acted in what the court perceived to be a malicious manner by aggressively taking the law into his own hands.[89] The court was outraged that a male attorney[90] would trespass on the property of two elderly women[91] in order to destroy property, even if the property constituted a nuisance.[92] The court inferred malicious intent from the defendant's aggressive conduct.[93] The court accordingly thought it unwise to encourage one to take the law into his or her own hands without appealing to police officers to enforce the law or notifying the maintainer of the imminent abatement attempt.[94] The court also noted

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82. *Id.*

83. *Id.*

84. *Id.* at —, 155 P.2d at 256. Illegality is one factor that may indicate the existence of a public nuisance. *See* Prosser, *supra* note 2, at 997; note 10 *supra*.

85. 79 Okla. Crim. at —, 155 P.2d at 255.

86. *Id.* at —, 155 P.2d at 257. This policy recognizing self-help is evidenced by the state's codification of the basic self-help principles. *See* OKLA. STAT. ANN. tit. 50, §§ 13-15 (West 1941).

87. OKLA. STAT. ANN. tit. 50, § 15 (West 1941) states, "Where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it."

88. 79 Okla. Crim. at —, 155 P.2d at 256; *see* W. PROSSER, *supra* note 1, § 90, at 606.

89. 79 Okla. Crim. at —, 155 P.2d at 256-57.

90. The fact that the defendant was charged with knowledge of the law as an attorney and the fact that the plaintiff was ignorant of the law weighed heavily in the court's decision. *Id.* A closely related factor weighed by the court was the "relative strength" of the parties. The court felt that the attorney, the stronger of the two, had taken advantage of the elderly female plaintiff. This "relative strength" factor was ignored in Maddran v. Mullendore, 206 Md. 291, 111 A.2d 608 (1954), another case involving self-help taken against an elderly woman. In *Maddran*, the court supported the use of self-help. *Id.* at 302, 111 A.2d at 612.

91. 79 Okla. Crim. at —, 155 P.2d at 256. The court also felt it was important that the women were unaware of causing a nuisance. *Id.* It should be recalled that an abator is required to notify a nuisance maintainer of the nuisance and of his or her intention to abate before the privileged entry occurs. See text & notes 87-88 *supra*.

92. See text & note 91 *supra*. *See generally* 79 Okla. Crim. at —, 155 P.2d at 256.

93. 79 Okla. Crim. at —. 155 P.2d at 257. Holleman was convicted of malicious mischief, a petty crime under a Tulsa city ordinance. *Id.* at —, 155 P.2d at 254-55. The ordinance states: "[M]alicious mischief is hereby defined as an injury or destruction done to the property of another in a wanton and malicious manner." *Id.; cf.* ARIZ. REV. STAT. ANN. § 13-1602 (1978) (criminal damage statute).

In applying the malicious mischief statute, the *Holleman* court noted that whether the defendant acted maliciously was a question of fact. 79 Okla. Crim. at —, 155 P.2d at 256. In *Holleman*, the defendant raised his voice when addressing the plaintiffs and tore the sign into little pieces. *Id.* at —, 155 P.2d at 255. It is arguable that this conduct constituted a breach of the peace and use of excessive force, two acts that will end the conditional self-help privilege. *Cf.* text & notes 64-67, 77 *supra*, 109, 111 *infra*. The privilege enveloping a properly executed abatement, however, may preclude criminal liability for conduct associated with the abatement. *See* ARIZ. REV. STAT. ANN. § 13-1502 (A)(1) (1978) ("enter or remain unlawfully" means to enter or remain when the intent for so doing is not "licensed, authorized or otherwise *privileged*) (emphasis added).

94. 79 Okla. Crim. at —, 155 P.2d at 257. The defendant claimed that he requested the police

that the defendant had a cause of action in court and should have instituted judicial proceedings.[95]

What the *Holleman* court failed to realize, however, is that while a judicial remedy existed, so did self-help.[96] It may be argued that self-help was the superior alternative on the *Holleman* facts. A private nuisance existed[97] and judicial proceedings might not have been worth the cost in time or money.[98] Moreover, according to the defendant the police were unreceptive to the idea of enforcing the law.[99] Considering the uncooperative attitude of the authorities and the expense of a private lawsuit, self-help should have been recognized as a reasonable remedy.[100]

The lesson to be learned from *Holleman* is that an abator may be subject to criminal prosecution if he fails to follow the strict conditions precedent to self-help.[101] Furthermore, it is more likely that an abator will be prosecuted when there is an apparent inequity between the parties, as in instances when the abator seems like a "bully."[102] The fact that the private nuisance also constitutes a statutory violation does not in itself justify the application of self-help.[103] One should therefore carefully examine

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to remove the sign and that his complaint was ignored. *Id.* at —, 155 P.2d at 255. This is an excellent illustration of the necessity of self-help when other remedies are not available. *But see* text & note 95 *infra*. The court thought self-help an archaic doctrine that should not be exercised in civilized society. 79 Okla. Crim. at —, 155 P.2d at 257. The author has discovered no other cases echoing that view.

95. 79 Okla. Crim. at —, 155 P.2d at 257. The court thought that a judicial remedy was superior to self-help in this situation for two reasons. First, the court questioned whether a legal remedy was available at all. Second, the nuisance, if it existed, caused no great or imminent harm to the defendant. *Id.* at —, 155 P.2d at 256. *See also* Herman v. Cardon, 112 Ariz. 548, 544 P.2d 651 (1976). In *Cardon*, the Arizona Supreme Court held that summary abatement was appropriate when an injury was caused by obstruction or annoyance of things of "daily convenience or use." *Id.* at 551, 544 P.2d at 660; text & note 44 *supra*. In *Holleman*, it is clear that the nuisance was a daily annoyance, viewable whenever the defendant looked out his front window or was in front of his home. *See* 79 Okla. Crim. at —, 155 P.2d at 255; text & note 35 *supra*.

96. See text & note 116 *infra*. Another Oklahoma case, Hummel v. State, 69 Okla. Crim. 38, 99 P.2d 913 (1940), upheld the right of summary abatement. *Id.* at —, 99 P.2d at 915; *see* text & notes 68-78 *supra*. That case differed from the *Holleman* case principally because the court recognized that damage would have resulted to the defendant's herd had immediate action not been taken. 69 Okla. Crim. at —, 99 P.2d at 916. The court in *Holleman* perceived no such immediate threat of injury to the defendant. 79 Okla. Crim. at —, 155 P.2d at 256-57; *cf.* Amoskeag Mfg. Co. v. Goodale, 46 N.H. 53 (1865) (self-help upheld—nominal damages).

97. 79 Okla. Crim. at —, 155 P.2d at 256; *see* text & notes 45 *supra* & 103 *infra*.

98. This situation was ideal for self-help abatement because the judicial remedy was not worth the time or expense. Even the fine eventually levied on the abator ($18 plus $2 costs) proved to be less expensive than a civil court action. 79 Okla. Crim. at —, 155 P.2d at 254.

Self-help is appropriate when a judicial proceeding would defeat the sought after benefit. Ajamian v. Township of N. Bergen, 103 N.J. Super. 61, 81, 246 A.2d 521, 531-32 (1968); see text & notes 109-15 *infra*. Here the sought after benefit, immediate removal of the illegal placard, would have been lost because the lawsuit would have taken time to come to trial. In the meantime, the sign would remain a constant annoyance.

99. 79 Okla. Crim. at —, 155 P.2d at 255; see text & note 94 *supra*.

100. See note 94, text & note 96 *supra*.

101. 79 Okla. Crim. at —, 155 P.2d at 254-55. Criminal prosecution for malicious mischief or criminal damage is more likely to result when the would-be abator fails to give adequate notice of intended abatement, breaches the peace, uses unnecessary force, or causes unnecessary property damage during the attempt. See text & notes 87, 88, 93 *supra*.

102. See text & notes 90, 91 *supra*.

103. The illegality of nuisance is one factor to be considered, but it must be balanced with common sense and the amount of damage caused by the nuisance. *Compare* Holleman v. Tulsa, 79 Okla. Crim. 387, 155 P.2d 254 (1945) (abatement denied, injury slight) *with* Hummel v. State,

any given situation and the available alternatives before resorting to self-help.[104]

D. *Principles of Self-Help*

Several principles can be extracted from the cases outlined above. The general rule is that whenever a person has a bona-fide cause of action for nuisance, he or she has a right to summary abatement.[105] An individual may abate either a private nuisance or a public nuisance if particular damage is caused to the abator.[106] An abator acts at his or her own peril and may be subject to criminal prosecution[107] or civil liability,[108] however, if what was abated was not legally a nuisance or if unnecessary damage was caused by the abatement.[109] In addition, the legality of self-help may be conditioned on the lack of an effective judicial remedy, such as when a trial would defeat the benefits sought to be obtained.[110] Further, before self-help is resorted to, notice and an opportunity to abate the nuisance must be provided the nuisance maintainer.[111]

If a nuisance is found to exist and adequate notice is given, entrance upon the premises of another to abate it will not constitute actionable trespass.[112] Use of that amount of force necessary to abate the nuisance is similarly privileged.[113] Even destruction of property is justified if actually necessary for abatement.[114] Nevertheless, the abatement must occur in a manner causing the least amount of breach of the peace and disruption to the premises of the nuisance maintainer.[115]

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69 Okla. Crim. 38, 99 P.2d 913 (1940) (abatement allowed, injury substantial) *and* Herman v. Cardon, 112 Ariz. 548, 544 P.2d 657 (1976) (abatement allowed, injury substantial).

104. The most obvious alternative here was asking the ladies to remove the sign.

105. *See, e.g.*, Herman v. Cardon, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976); Corentin v. Columbia, 29 Conn. Supp. 499, 502-05, 294 A.2d 80, 83 (C.P. 1972); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 917 (1940); see text & note 35 *supra*.

106. *E.g.*, Ajamian v. Township of N. Bergen, 103 N.J. Super, 61, 80, 246 A.2d 521, 532 (1968) (particular damage-substandard housing); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 917 (1940) (particular damage-destruction of cattle herd); Miller v. Foster, 244 Wis. 99, 102, 11 N.W.2d 674, 675 (1943) (same).

107. *E.g.*, Amoskeag Mfg. Co. v. Goodale, 46 N.H. 53, 56 (1865); Holleman v. Tulsa, 79 Okla. Crim. 387, —, 155 P.2d 254, 255 (1945); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 915 (1940).

108. *E.g.*, Corentin v. Columbia, 29 Conn. Supp. 499, 500, 294 A.2d 80, 82 (C.P. 1972); Maddran v. Mullendore, 206 Md. 291, 297-98, 111 A.2d 608, 611 (1955); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 917 (1940).

109. Maddran v. Mullendore, 206 Md. 291, 298, 111 A.2d 608, 611 (1955); Ajamian v. Township of N. Bergen, 103 N.J. Super, 61, 80, 246 A.2d 521, 532 (1968); Miller v. Foster, 244 Wis. 99, 103, 11 N.W.2d 674, 675 (1943).

110. See authority cited in note 109 *supra*.

111. *E.g.*, Corentin v. Columbia, 29 Conn. Supp. 499, 502, 294 A.2d 80, 83 (C.P. 1972); 300 W. 154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 543, 260 N.E.2d 534, 536, 311 N.Y.S.2d 899, 902 (1970); State v. Brown, 191 N.C. 419, 421, 132 S.E. 5, 6 (1926).

112. Corentin v. Columbia, 29 Conn. Supp. 499, 502, 294 A.2d 80, 83 (C.P. 1972); Amoskeag Mfg. v. Goodale, 46 N.H. 53, 56 (1865); Holleman v. Tulsa, 79 Okla. Crim. 387, —, 155 P.2d 254, 257 (1945).

113. Maddran v. Mullendore, 206 Md. 291, 300, 111 A.2d 608, 611 (1955); Graves v. Shattuck, 35 N.H. 257, 269 (1857).

114. Herman v. Cardon, 112 Ariz. 548, 551, 544 P.2d 656, 660 (1976); Amoskeag Mfg. Co. v. Goodale, 46 N.H. 53, 57 (1865); Hummel v. State, 69 Okla. Crim. 38, —, 99 P.2d 913, 917 (1940).

115. *E.g.*, Maddran v. Mullendore, 206 Md. 291, 297-300, 111 A.2d 608, 611 (1955); 300 W.

III. SELF-HELP AND ENVIRONMENTAL NUISANCES

In recent years, environmental nuisances have become more commonplace[116] and have received much judicial and popular attention.[117] Is self-help a viable remedy for large-scale environmental nuisances? To illustrate the possible application of the self-help remedy, three representative environmental nuisance cases will be analyzed.

In *Boomer v. Atlantic Cement Co.*,[118] a cement manufacturing plant worth approximately $45,000,000 created both a private and a public nuisance.[119] Vibration and cement dust caused by the defendant deprived the plaintiff of the use and enjoyment of his land.[120] Because a right of self-help arises whenever a cause of action for nuisance exists, the plaintiff could theoretically exercise that right to abate the nuisance.[121] In *Boomer*, however, self-help would have entailed a shut-down of the plant's operations. The *Boomer* court did not shut down the plant but instead created a more equitable remedy—the cement plant was required to pay the plaintiff "permanent damages."[122]

It is clear that a nuisance existed.[123] The economic balance, however, leaned in favor of the defendant.[124] Since judicial abatement was not deemed reasonable by the court, self-help abatement would probably have been deemed equally unreasonable. Several factors in *Boomer* presage this result. First, the relative strength of the parties is a very important

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154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 543, 260 N.E.2d 534, 536, 311 N.Y.S.2d 899, 902 (1970).

116. The increase in the number of environmental nuisances can be attributed to the increasing population and industrialization occuring in the United States since World War II. Population centers have spread outward, encroaching on previuosly established industrial areas. Industrial operations have also moved to population centers. The pollution caused by the plants has in the contested areas caused nuisances to spring into existence.

117. Increased popular attention is evidenced by the growing number of articles published concerning environmental control and environmental law. Environmental control did not exist as a category in the Index to Legal Periodicals until the 1967-1970 volume. In that volume, the citation category covered approximately one-half of a page. In the 1976-1979 volume, two and one-half pages were necessary to list the articles published during that period. In addition, the listed citations in another category, environmental law, covered two and one-half pages.

118. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); *see* note 16 *supra*.

119. 26 N.Y.2d at 223, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

120. *Id.* at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314; see text & notes 32, 33 *supra. Boomer* is representative of environmental cases involving tangible pollution-caused public and private nuisances. In each case, the nuisance is a by-product of a very large scale industrial plant rendering raw materials into useful form. *E.g.*, Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1974) (taconite plant representing capital investment of over $350,000,000, employing over 3,300 employees with an annual payroll of over $30,000,000, and producing 12% of United States iron ore caused common law nuisances by discharging 67,000 tons of asbestos fibers per day into Lake Superior); Reynolds Metal Co. v. Yturbide, 258 F.2d 321 (9th Cir.) (aluminum smelter discharged fluorine gas, causing damage to plaintiff's health and property), *cert. denied*, 358 U.S. 840 (1958); Renken v Harvey Aluminum, Inc., 226 F.Supp. 169 (D. Or. 1963) (fluorine gas from aluminum plant involving capital investment of over $40,000,000 caused damage to plaintiff's crops).

121. See text & note 105 *supra*.

122. 26 N.Y.2d at 225-28, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. Permanent damages consisted of $185,000. *Id.*

123. *See* text & notes 6-9, 119 *supra*.

124. The defendant's plant was valued at roughly $45,000,000, while the plaintiff's home was valued at $185,000. 26 N.Y.2d at 225-28, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

factor in self-help abatement of large scale environmental nuisances.[125] As is evidenced by the result in *Boomer*, a court would not likely abate a nuisance by shutting down a factory worth hundreds of times more than the injured party's losses unless no alternative exists.

It is probably accurate to state that most public environmental nuisances are caused by large industrial plants. Those plants will almost always be worth much more than any single abator's property. In that situation, a *Boomer*-like result would probably occur and self-help would be an inappropriate remedy.

In addition to the economic balance, a second closely allied factor is the prohibition against causing unnecessary damage in the abatement attempt. To shut down a factory worth hundreds of millions of dollars to abate a nuisance causing only a few hundred thousand dollars worth of damage would cause millions of dollars in excessive damages. If those excessive damages cannot be avoided, the right to self-help evaporates.[126]

Finally, another important factor is that self-help can be lawfully exercised only if no breach of the peace results from the abatement.[127] Self-help abatement of a nuisance caused by a large industrial plant is probably not possible without breach of the peace, given practical realities. Most plants are operated 24 hours a day and are protected by guards. Since breach of peace is probably inevitable under these circumstances, the right to use self-help would fail on this ground.

Self-help also would have been an inappropraite remedy in the Arizona case of *Spur Industries v. Del Webb Co.*[128] In *Spur*, the Arizona Supreme Court found that a stockyard owned by the defendant, Spur Industries, was both a private and a public nuisance and ordered that its operation be permanently enjoined.[129] The court went on, however, to note that equitable principles demanded that the plaintiff pay to the defendant reasonable moving and closing down expenses.[130] The court characterized the case as a "coming to the nuisance"[131] situation in which the plaintiff contributed to the creation of the nuisance by moving into the area.[132] The plaintiff therefore was not blameless and was required to compensate the defendant for the damage that the plaintiff caused.[133]

It is clear that self-help abatement would have been inappropriate in the *Spur* situation. Self-help on Del Webb's part, although seemingly jus-

125. As in other situations, equity will not favor abatement by a strong, overbearing party against a weak party. *See* Holleman v. Tulsa, 79 Okla. Crim. 387, 155 P.2d 254 (1945).

126. See text & note 109 *supra*.

127. See text & note 115 *supra*.

128. 108 Ariz. 178, 494 P.2d 700 (1972).

129. *Id.* at 184, 494 P.2d at 706.

130. *Id.* at 186, 494 P.2d at 708.

131. *Id.* at 184-85, 494 P.2d at 706-07; *see* Pendoley v. Ferreira, 345 Mass. 309, 314, 187 N.E.2d 142, 146 (1968) (suburbs surrounded existing hog farm); Peck v. Newburgh Light, Heat & Power Co., 132 App. Div. 82, 84, 116 N.Y.S. 433, 434 (1909) (plaintiff moved to industrial area).

132. 108 Ariz. at 185-86, 494 P.2d at 706-07. *Spur* is representative of nuisance cases involving parties of relatively equal strength. Both plaintiff and defendant were corporate entities and both had a legal right to be in business. *Id.* at 186, 494 P.2d at 707.

133. *Id.* at 186, 494 P.2d at 708.

tified because a cause of action for nuisance existed against Spur,[134] would have been inequitable because Del Webb was instrumental in the creation of the nuisance. In addition, self-help would have been inappropriate here because, as in *Boomer*, the self-help most probably could not be carried out without a breach of the peace or unnecessary damage. A breach of the peace would have been unavoidable because Spur's stockyard, like most industrial concerns, would be manned around the clock. Spur's owners and employees would hardly have allowed Del Webb to remove the cattle from the premises, at least not without a struggle. Such a breach of the peace would likely cause unnecessary damage.[135]

Finally, in the Arizona case of *McQuade v. Tucson Tiller Apartments*,[136] the defendant held loud outdoor rock concerts that interfered with the plaintiff's use and enjoyment of his property.[137] The court found that the loud noise and large crowds constituted a nuisance and ordered them enjoined.[138] The court reasoned that the defendant's rights would not be unduly restricted by the prohibition and that the plaintiff's right of use and enjoyment would be enhanced.[139] The court discounted the fact that this case, like *Spur*, was a "coming to the nuisance" case,[140] and did not require that the plaintiff compensate the defendant.[141]

Self-help would intuitively seem to be appropriate in this case as a substitute for judicial abatement of the nuisance.[142] Because a nuisance clearly existed, the right of self-help existed.[143] The loud noise caused by the concerts could have been stopped simply by pulling the plug on the electrical equipment. Applying the self-help principles to this aural nuisance shows, however, that self-help is at best a marginal remedy in this situation. Again, it is doubtful whether the self-help method suggested here—unplugging the electrical system—could be accomplished without a breach of the peace, although unnecessary damage probably could be avoided. In addition, it is doubtful that merely unplugging the electrical equipment would truly abate the nuisance. The equipment could simply be plugged in again, thereby resurrecting the nuisance.

The *Boomer*, *Spur*, and *McQuade* cases indicate the difficulty of ap-

134. See text & note 105 *supra*.

135. One alternative, non-confrontational self-help method might have been to continually fumigate the entire area with deodorant and pesticides. Absent that, however, it is hard to imagine how self-help abatement could be successful.

136. 25 Ariz. App. 312, 543 P.2d 150 (1975).

137. *Id.* at 313-14, 543 P.2d at 151-52. *McQuade* is representative of environmental nuisance cases that do not involve large disparities in the strength of the parties and also do not cause a great deal of physical damage. Self-help abatement seems most amenable to this type of case. *See also* Herman v. Cardon, 112 Ariz. 548, 544 P.2d 657 (1976); Hay v. Stevens, 271 Or. 16, 530 P.2d 37 (1975).

138. 25 Ariz. App. at 314-15, 543 P.2d at 152.

139. *Id.* The court employed a balancing test and found that the defendant's musical events were not of great utility to the community. *Id.*

140. *Id.* at 315, 543 P.2d at 153; see text & notes 131-33 *supra*.

141. Compensation would have been inappropriate here because, unlike in *Spur*, the defendant was not materially injured by the injunction. 25 Ariz. App. at 314, 543 P.2d at 152. The court found that the defendant used the concerts merely for promoting business at its shopping center. *Id.*

142. *Id.* at 315, 543 P.2d at 152.

143. See text & notes 1 & 34 *supra*.

plying the self-help remedy in the area of environmental nuisance. The prohibitions against breach of peace and unnecessary damage appear to be the most limiting factors. In all probability, self-help therefore could not be used against environmental nuisances that, like those outlined in the cases above, involve many people and large-scale operations. The principle of self-help as a potential remedy remains, however, thus leaving open the possibility of its application, given the right facts and circumstances, in an environmental nuisance situation.

IV. CONCLUSION

Self-help abatement of nuisance is an established principle of common law. A variety of factors can be distilled from case law that help determine whether self-help is an appropriate remedy for a particular nuisance. A rough check-list of relevant factors would include:

1) Does a nuisance clearly exist?
2) Does the nuisance regularly manifest itself?
3) Does the nuisance reasonably require an immediate remedy?
4) Would the benefit to be gained from abatement of the nuisance be lost by waiting for judicial action?
5) Can the nuisance be abated without a breach of peace or unnecessary damage?

If all of these factors exist in a given nuisance situation, it is almost certain that self-help will be upheld.

Limits on the doctrine do exist, however, and criminal and civil penalties may result to those who run afoul of them. Basic limits are:

1) A breach of peace or unnecessary damage cannot occur during the abatement attempt.
2) The abator may not trespass on the maintainer's land to abate the nuisance unless notice is first given.

While theoretically self-help applies equally well to large scale environmental nuisances, the doctrine is practicably of little benefit. Self-help is unlikely to lead to inexpensive and certain abatement without causing unnecessary damage and breach of peace. Nevertheless, self-help abatement, within the guidelines of reasonableness, remains a viable, contemporary remedy for ordinary nuisance.