

PROPERTY

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CLASS 22: NUISANCE

Class Outline

1. Approaches to the law of neighbors
2. Nuisance v. trespass
3. Approaches to nuisance

Quick Review

- Absolute right to exclude (trespass)
- Exceptions (de minimus, mistaken improver, accession, adverse possession, public trust, antidiscrimination & FHA, abandonment, destruction, etc.)
- Original acquisition/root title (first possession, norms and customs, commons, discovery, creation)
- Personhood and personhood property
- Remedies (civil, criminal, self-help – no violence)
- Interests we can grant in our property (non-possessory interests: licenses; possessory interest less than property ownership: bailment).
- Estates/interests in property: Present possessory & future interests; conservation of estates; numerus clausus; RAP
- Other things we can do with property (lease; co-own; trusts; liens & mortgages; recording acts)
- Today → more things we can (and can't) do with our property

Approaches to the Law of Neighbors

- Tort (nuisance)
- Modification of property rights (easements)
- Contracts running with the land (covenants)
- Regulation (zoning)

Nuisance



Nuisance

(The Restatement Approach)

- Nuisance is a substantial, nontrespasory interference with use and enjoyment of land that is caused either by
 - Negligent, reckless, or ultrahazardous activities, OR
 - Intentional and unreasonable activities
- Where intentional here is either (i) acting for the purpose of causing the invasion, (ii) knowing (or reasonably being supposed to know) that the invasion is the result, or (iii) knowing (or reasonably expected to know) that it is substantially certain to result.

Trespass v. Nuisance: Four Approaches

1. Traditionalist: Trespass may apply where there is a personal entry by the defendant (the oldest test).
2. Trespass is reserved for “direct” injuries to land as opposed to more indirect ones (from the old distinction between trespass and trespass on the case).
3. Trespass is based on whether invading objects are visible to the naked eye, such as shotgun pellets (as opposed to smoke, odors, or (possibly) aesthetic blight, which would be nuisance).
4. Modernist (conflation): Trespass is reserved for situations of substantial harm that constructively deny possession to the plaintiff (the “modern” approach).

Property Rules v. Liability Rules (Calabresi & Melamed)

- Property Rule: An entitlement cannot be taken/used without the owner's consent.
 - Pros: simplicity, bright-line rule, autonomy, full compensation
 - Cons: problem of holdout
- Liability Rule: An entitlement can be taken/used as long as officially determined damages are paid (like private eminent domain).
 - Pros: prevents holdout
 - Cons: risk of undercompensation, high measurement cost, loses benefits of delegation/deference to owners.
- Inalienability Rule: Transfer (or some kinds of transfer) forbidden.

Property Rules v. Liability Rules

Low Transaction Costs	→ Property Rule
High Transaction Costs	→ Liability Rule

Boomer : The Cement Plant Today



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