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## Land Use Priorities and the Law of Nuisance

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REVIEW ESSAY

**LAND USE PRIORITIES AND THE  
LAW OF NUISANCE**

***THE LAW OF PRIVATE NUISANCE***  
**BY ALLAN BEEVER (HART PUBLISHING, 2013).**  
**PRICE: £38.00. ISBN: 9781849465069**

DAN PRIEL\*

*Rights-based approaches to tort law have been prominent in recent years in theoretical discussions of tort law. Much of this work has been either highly abstract or focused on a small number of torts like negligence or trespass. Allan Beever's The Law of Private Nuisance attempts to extend this approach to the tort of private nuisance. Central to his account is the view that the law of nuisance is concerned with prioritising land uses, and that what the law calls 'nuisance' is really a case of one land use conflicting with another, higher-ranked one. This essay argues that despite claims to being internal to the law, this approach does not match the law. Furthermore, assessed on its own, it suffers from serious problems that make it difficult to implement in addressing the kind of real-world problems that nuisance law is meant to solve.*

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## I INTRODUCTION

Some 30 years ago Ernest Weinrib embarked on a highly ambitious research program. Weinrib's provocative contention was that all of 'private law'<sup>1</sup> could be explained in terms of a single normative idea: corrective justice. Though his abstract arguments claimed to be internal to the law, it was mostly based on readings (contentious, I think) of the works of Aristotle and Immanuel Kant, neither a philosopher until then thought to have had much influence on the development of the common law. And though Weinrib claimed to have captured the idea of private law as a whole, he focused almost exclusively on tort law, and within tort law almost exclusively on negligence. Weinrib explained that 'liability for negligence poses a particularly severe challenge' for his formalist conception of corrective justice. Therefore, '[i]f formalism illuminates negligence law, it presumably illuminates less problematic bases of [private law] liability as well'.<sup>2</sup> Despite this assurance, Weinrib's limited focus left him open to two kinds of challenge. One was that even if providing an adequate explanation of negligence, he was wrong to claim that corrective justice provides a unifying principle for all of private law. The second challenge was that even with regard to negligence his account could retain whatever plausibility it had only by remaining at Olympian heights of abstraction, but could not adequately explain many more fine-grained features of the law.

<sup>1</sup> The term private law is potentially misleading. If used simply as shorthand for contract, tort, restitution, and property, it is fairly innocuous; if taken to indicate that these areas of law form a certain domain of law that is somehow different from the rest of the law, it is potentially misleading. See below Part IV.

<sup>2</sup> Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, revised ed, 2012) 20. There is a short discussion of restitution and contract: at 136–42.

Much of Weinrib's work in subsequent years has been dedicated to restating and substantiating his views, as well as extending them to other areas of private law.<sup>3</sup> In a series of writings, Allan Beever, probably Weinrib's most committed disciple,<sup>4</sup> has attempted to do the same. Echoing Weinrib, Beever stated in his first book that in his view 'at least almost all of the law of tort, and the private law more generally, is based on corrective justice.'<sup>5</sup> He has since attempted to make true of this claim. Thus, a recent book, *Forgotten Justice*,<sup>6</sup> is in part an attempt to bolster the idea that all parts of private law, including property law,<sup>7</sup> can be grounded in commutative justice.<sup>8</sup> In other writings, Beever has attempted to show that what Weinrib considered at the highest level of abstraction is in fact confirmed when one zooms in and examines legal doctrine (slightly) more closely. After dealing with negligence in an earlier book,<sup>9</sup> Beever has now turned his attention to other torts. His book *The Law of Private Nuisance*<sup>10</sup> should be understood as part of that latter effort.

<sup>3</sup> Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) contains essays extending the analysis to restitution and property rights. See especially at chs 4–6, 8.

<sup>4</sup> See Allan Beever, 'Formalism in Music and Law' (2011) 61 *University of Toronto Law Journal* 213, 213–14. This is not the place to comment on Beever's thoughts on law and music beyond the remark that because of the vast differences between them analogies from one to the other can be taken almost anywhere one wishes. For two variations on the theme of law and music, different from each other and different from Beever's, see Jerome Frank, 'Say It with Music' (1948) 61 *Harvard Law Review* 921; Gerald J Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 *Ratio Juris* 203.

<sup>5</sup> Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) 71.

<sup>6</sup> Allan Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013).

<sup>7</sup> *Ibid* 146, 279–80. Beever's and others' efforts to show that commutative justice alone is sufficient to explain property rights have not met with much approval. See, eg, Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471, 475–6; Stephen A Smith, 'The Rights of Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 113, 122–9; Dan Priel, 'Private Law: Commutative or Distributive?' (2014) 77 *Modern Law Review* 308, 320–1.

<sup>8</sup> Beever now prefers to speak of 'commutative justice' instead of 'corrective justice' to indicate that in his view this form of justice covers both 'primary rights' and 'secondary rights' of rectification. Although Weinrib has stuck to 'corrective justice', he has made it clear that his notion of corrective justice covers all of private law and extends beyond rectification: see Weinrib, *Corrective Justice*, above n 3, 335.

<sup>9</sup> Beever, *Rediscovering the Law of Negligence*, above n 5.

<sup>10</sup> Allan Beever, *The Law of Private Nuisance* (Hart Publishing, 2013).

I do not think that Weinrib's research program has much to commend it and have found Beaver's earlier efforts to defend it largely unsuccessful.<sup>11</sup> It is therefore perhaps unsurprising that I was similarly unpersuaded by his suggestions on how to 'start again' with the law of private nuisance.<sup>12</sup> The rest of this essay seeks to explain why. I start by examining Beaver's methodology. Beaver aligns himself with a popular approach to thinking about legal doctrine, according to which an adequate account of legal doctrine must be 'internal' to the law. I argue that despite insisting on the importance of internal explanations, Beaver is unclear about what he means by it. I consider one likely candidate for this internality — that the explanation fit legal doctrine — and show that Beaver's views are very different from legal doctrine. I then try to identify a possible different account of internality at play in Beaver's work, but argue that to the extent that one can tease out such an account from his works, it is so broad that *all* explanations of law could count as internal in that sense. I argue instead that on a plausible understanding of what counts as an internal explanation of law, Beaver's account is completely external. In Part II, I turn to consider the substance of Beaver's views. I argue that there are many difficulties with his views that render his position impossible to apply in practice. In Part III, I add that in any case his account is largely irrelevant to understanding or improving nuisance law today because Beaver's approach leads him to confine his discussion to the law of nuisance in isolation of its normative surroundings. I contend that these days it is impossible to understand the role of nuisance law without taking into account the extensive normative framework surrounding it. Because Beaver does not, he bases his account on unrealistic examples of nuisance cases, which are of very little relevance to the real world today. This leads me, in the final Part of the essay, to add some remarks on the role of legal academics. I suggest that one possible source of the problems in Beaver's account is that his conception of the university is more than a century out of date. Instead, I suggest legal academics try to model their work on the university of our times.

<sup>11</sup> Priel, 'Commutative or Distributive?', above n 7; Dan Priel, 'The Justice in Unjust Enrichment' (2014) 51 *Osgoode Hall Law Journal* 813, 823–37.

<sup>12</sup> Beaver, *The Law of Private Nuisance*, above n 10, 13.

## II BEEVER'S METHODOLOGICAL COMMITMENTS

Right at the outset of his book Beever says that in understanding the law 'we are looking for an explanation of the law that takes seriously the law's own demand that its decisions be justified and be justified in terms of the legal materials'.<sup>13</sup> In saying this Beever is in line with many contemporary writers who have stressed that any valid explanation of the law must adopt the law's 'self-understanding' or its 'internal point of view'.<sup>14</sup> Despite their prevalence, such claims are more often asserted rather than explained and are often left obscure. What, for example, does it mean to take seriously an inanimate institution's 'own demand'? More prosaically, how are we to determine what makes a certain explanation internal and another external? Beever, for example, seems to think that ideas found in the work of Kant are immanent in the law, even though they are rarely mentioned in common law legal materials; on the other hand, despite countless references to it in the cases, he thinks that policy is extrinsic to the law. What is his basis for these judgements?

Part of the problem is that for the distinction between internal and external explanations of law to make any sense it must be clear what an explanation should be internal *to* or external *of*. This is rarely clearly specified. As I will attempt to show, when we try to answer this question in relation to Beever's book, his claims become difficult to sustain. Though this Part focuses on Beever's work, I hope it will prove to be of broader significance. Precisely because of the centrality accorded to explaining the law from the internal point of view, and especially because Beever follows here in the footsteps of Weinrib's very influential account, there is value in addressing this matter. For I believe the methodological problems I identify in Beever's work are indicative of broader problems with 'internalist' accounts of law.<sup>15</sup>

<sup>13</sup> Ibid 5.

<sup>14</sup> See, eg, Weinrib, *The Idea of Private Law*, above n 2, 18; Stephen A Smith, 'Taking Law Seriously' (2000) 50 *University of Toronto Law Journal* 241, 250; John C P Goldberg and Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1575 quoting H L A Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994) 89.

<sup>15</sup> For a critical discussion on the place of the internal point of view in law see Charles L Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 *Virginia Law Review* 1203.

### A What Makes an Explanation Internal?

Though I will consider Beever's views in detail later, at the moment it will suffice to present the essence of his account, which is that the law of nuisance is concerned with 'the prioritising of property rights'.<sup>16</sup> In a slightly longer formulation, Beever's central argument is that 'nuisance is concerned with prioritising property rights. A nuisance occurs when the defendant uses land in a way that interferes with the more fundamental use of the claimant's. The issue is not whether the claimant is personally bothered by any of this'.<sup>17</sup>

Beever begins the book by informing his readers that there is a view of private nuisance, he calls it 'the conventional view', that 'the overwhelming majority of lawyers adhere generally to'.<sup>18</sup> Despite its prevalence, Beever thinks it is a 'collapsing building' and whatever remains of it must be completely torn down. In its stead he suggests a new beginning 'with new foundations'.<sup>19</sup> Is this failed conventional explanation limited to commentators who do not understand what they see in the cases? Not according to Beever. He summarises the conventional view as described in one textbook, and says: 'The [textbook] author's task is to depict the law as it is presented in the cases. *The author succeeds*. But what he succeeds in depicting is a failure'.<sup>20</sup> With characteristic modesty<sup>21</sup> Beever then proceeds to present an account that, apparently for the first time, will make sense of the law: 'The problem is not that the law does the wrong thing. The problem is that it does not understand what it is doing'.<sup>22</sup> When translated to less mysterious language, what Beever claims is that the account he offers has escaped all lawyers, all commentators, and even all judges. Beever's new beginning, then, aims to capture what the law actually is and to abide by the constraint that 'the justification [of the law] must be in terms of the law itself, at least in the sense that the reasons that justify a

<sup>16</sup> Beever, *The Law of Private Nuisance*, above n 10, 2.

<sup>17</sup> *Ibid* 120.

<sup>18</sup> *Ibid* 5.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* 9 (emphasis added).

<sup>21</sup> In an earlier book Beever assured his readers that 'though the theory [advanced in the book] will of course require improvement — it would be surprising if the theory were on the wrong track. Instead, it must represent a leap forward in our understanding of the law': Beever, *Rediscovering the Law of Negligence*, above n 5, 32.

<sup>22</sup> Beever, *The Law of Private Nuisance*, above n 10, 9.

decision ought to be found in the judgment itself,<sup>23</sup> despite the fact that the law on this matter does not understand itself.

How is this to be done? Beever acknowledges that for his view to be internal to the law ‘what must be clear is that the principle [that the law of nuisance prioritises property rights so that more fundamental uses of land trump less fundamental uses] ... must be reflected in the law somewhere’.<sup>24</sup> And yet, Beever does not provide a *single* quotation from a single case to directly support his claims about what nuisance law is about. At most, Beever can claim that it explains the *outcomes* of the cases.<sup>25</sup> Even here, however, the claim must be qualified. On the (many) occasions that his views do not match the outcomes of the cases, Beever has no hesitation in declaring those cases wrong and in arguing that existing doctrine should give way to his ideas.

Beever’s account thus seeks to achieve the improbable feat of being internal to the law despite not being based on what is actually found in legal materials. It is worth comparing Beever’s approach to the one considered by many (Beever included)<sup>26</sup> to be the epitome of ‘external’ theorising about law: economic analysis of law. When Richard Posner first argued that negligence law reflected economic rationality, he purportedly based his argument on what he found in dozens of late 19<sup>th</sup> century cases.<sup>27</sup> And yet, this economic account was considered ‘external’ because it, at most, only fit the outcomes of the cases, but found relatively little support in the rationales or concepts found in those cases.<sup>28</sup> Now Beever claims his account is internal to the law, despite the fact that his account suffers from the same problem. In fact, it is arguable that Beever’s account fares even worse. Legal economists have addressed the problem of the divergence between their proposed economic rationales and the language of the cases. Richard Posner, for example, has

<sup>23</sup> Ibid 6.

<sup>24</sup> Ibid 105–6.

<sup>25</sup> See *ibid* 70.

<sup>26</sup> See Beever, *Rediscovering the Law of Negligence*, above n 5, 34.

<sup>27</sup> Richard Posner’s views about the efficiency of the common law of negligence were based on his reading of all published American accident cases decided in the first quarter of 1875, 1885, 1895, and 1905: Richard A Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29, 34. I should note, however, that Posner’s claim to have found support for his interpretation in the cases has been challenged. See Richard W Wright, ‘Hand, Posner, and the Myth of the “Hand Formula”’ (2003) 4 *Theoretical Inquiries in Law* 145.

<sup>28</sup> See Weinrib, *The Idea of Private Law*, above n 2, 16, 47–8; cf Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 132.



argued that for the explanatory value of economic analysis of law it is enough that we 'assum[e] counter-factually' that judges are concerned with maximising efficiency, so long as the economic arguments offer testable hypotheses that yield successful predictions of case outcomes.<sup>29</sup> Others have suggested invisible hand arguments purporting to show how the common law can become more efficient over time even if judges do not aim at efficiency.<sup>30</sup> Whether or not these arguments are successful, legal economists acknowledged and addressed the problem of the divergence between the content of legal cases and the economic explanation of those cases. Beever, by contrast, never considers the fact that his ideas are not reflected in judicial statements a reason for doubting that his account is found 'in the law'.

A further constraint for an argument claiming to be internal to the law is that it must present a refutable hypothesis, or else the claim to internality is nothing but an empty assertion. This could mean, for example, showing that most cases, or at least a strong current in the central cases, are in line with one's view. When this is the case, a few recalcitrant cases can be dismissed as 'outliers', as 'wrongly decided', as 'inconsistent with the weight of authority' or with the 'underlying principle behind the cases'. By the same token, when this is not shown, when the reader is given no assurance that the few cases discussed reflect the dominant view in the courts, then the discussion of a small number of cases can at best serve as garnish. If a case relied upon to demonstrate a point is not in fact representative of the general drift of the law, then it is only valuable for the persuasive power of its content, not for its evidentiary value in reflecting 'the law'. In these circumstances discussing the case does not add anything to the force of the argument, which must be shown to have merit on its own. One may, of course, rely on arguments found in cases just as one may rely on arguments taken from any other source, but such references cannot then be used to show that the view presented is 'internal' to the law.

<sup>29</sup> See Richard A Posner, *Law and Legal Theory in England and America* (Clarendon Press, 1996) 60. This aligns Posner closely with Milton Friedman's view: Milton Friedman, *Essays in Positive Economics* (University of Chicago Press, 1953) 3–43.

<sup>30</sup> For a survey of this literature see Paul H Rubin, 'Why Was the Common Law Efficient?' in Francesco Parisi and Charles K Rowley (eds), *The Origins of Law and Economics: Essays by the Founding Fathers* (Edward Elgar, 2005) 383, 384–8. Rubin admits: 'It is fair to say that the models failed ...': at 384.

In addition to the *number* of cases supporting a view, another important factor for showing that one's argument is internal to the law is their *age*. As the number of cases cited in Beever's book is fairly small, it was not difficult to calculate their average age. In 2013, the book's year of publication, it was 72 years (the median is somewhat lower, but at 59.5 is still very high).<sup>31</sup> To make things worse, not only does Beever cite predominantly older cases, but generally speaking, the younger the case is, the less likely it is that Beever will think it right.<sup>32</sup> This might have been less of a concern if Beever thought that nuisance had some eternal, unchanging nature, but at least judging by this book, he does not. In response to a claim about the nature of nuisance made on the basis of historical cases, Beever replies:

The claim that, historically, a nuisance had to be continuous is well made. But the conclusion that continuation belongs to the 'essential nature' of the tort does not follow from it. This argument commits a genetic fallacy. ... Legal history is of great importance, but the nature of our *modern* actions is not chained to it.<sup>33</sup>

If that is the case, if Beever is after the nature of 'our modern actions', then a book that focuses on the case law as it stood three generations ago is *prima facie* useless, for we have no way of knowing to what extent the law remained the same in the years since.

This is not merely an 'academic' concern. The last 70 years have seen significant changes to the relevant law. In the period in question the relationship between private and public law has dramatically changed with the advent of the regulatory state. As a result, environmental law, an area of law that barely existed 70 years ago, is now a major part of the law, and one that addresses many of the problems previously governed by nuisance law. Even Beever

<sup>31</sup> The statistics for the age of cases by country, derived from Beever, *The Law of Private Nuisance*, above n 10, xi–xiv, are as follows. Australia: average 45, median 34.5; Canada: average 50, median 31.5; New Zealand: average 39, median 38; United Kingdom: average 76, median 63; United States: average 107, median 105.

<sup>32</sup> Examples of his disagreement with recent cases are found in *ibid* 76–9, 105, 124 n 30, 134–6, 143–4, 148–9.

<sup>33</sup> *Ibid* 40 (emphasis added). Elsewhere Beever argues that the task of the academic lawyer 'is to illuminate the law's fundamental and *enduring* structure': Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320, 329 (emphasis added). That assumes that the law *has* such an enduring structure, which is hard to reconcile with the position quoted in the text.

admits that ‘the social importance of the law of private nuisance has shrunk’<sup>34</sup> in recent years, because of the dominance of regulation; and yet he confines himself purely to private nuisance.<sup>35</sup> He thus completely ignores the possibility that the changed normative landscape surrounding the tort of nuisance has changed nuisance law as well. I will return to this point below.

In addition to volume and age, a third important consideration for showing that an account is adequately internal to the law is the *accuracy* in the description of the cases discussed. Beaver seeks to show that the cases reflect a philosophy that is very different from the one currently accepted by most commentators. To that end he discusses a few cases arguing that they reflect a rights-based, non-instrumental conception of nuisance liability. The problem is that his presentation of these cases is often unreliable.<sup>36</sup> Consider, for example, the way Beaver discusses the well-known American case of *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc* (*Fontainebleau*).<sup>37</sup> This case involved a dispute between two adjacent hotels on Miami Beach. The owners of the Fontainebleau hotel sought to build additional floors to it; the owners of the Eden Roc worried that this would put their hotel’s swimming pool in the shade for much of the day. The latter sued in nuisance, but failed. To show us that the courts favour rights-based, and reject policy-based, arguments, Beaver quotes from the case as follows:

This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbour ... It means only that one must use his property so as not to injure the lawful *rights* of another ...<sup>38</sup>

<sup>34</sup> Beaver, *The Law of Private Nuisance*, above n 10, 1.

<sup>35</sup> *Ibid* 4.

<sup>36</sup> This is not the first time I have found this. For extensive documentation see Priel, ‘Commutative or Distributive?’, above n 7. See especially the appendix to the online version of the essay, Dan Priel, ‘Private Law: Commutative or Distributive’, (Osgoode CLPE Research Paper No 56/2013, 26 November 2013) 34–64 <<http://ssrn.com/abstract=2318587>>.

<sup>37</sup> 114 So 2d 357 (Fla Ct App, 1959). I would be remiss if I did not mention that Beaver discusses in his book exactly four American cases (the most recent of which is from 1959), all of them apparently taken from a Canadian student casebook edited by Weinrib: Ernest J Weinrib, *Tort Law: Cases and Materials* (Emond Montgomery, 4<sup>th</sup> ed, 2014) 4, 7, 11, 126. The same cases are found in earlier editions of this book.

<sup>38</sup> Beaver, *The Law of Private Nuisance*, above n 10, 49, quoting *Fontainebleau* 114 So 2d 357, 359 (Fla Ct App, 1959).

Based on this Beever declares triumphantly that ‘the law of nuisance is concerned with the parties’ property rights’ and that the court rejects the view that ‘causing the claimant significant economic loss’ amounts to a nuisance.<sup>39</sup> (Who ever thought that?) Positively, Beever declares, the court decided that there is no right to sunlight.

The problem with this claim is that showing that courts employ the language of rights does not show that they endorse Beever’s rights-based view of tort law. Courts can use the language of rights as conclusions of arguments that are themselves wholly based on policy. That this is what the courts in fact do is not a novel idea. It was suggested already in the late 19<sup>th</sup> century by Oliver Wendell Holmes. The particular example Holmes used to illustrate this point is striking for its relevance for our discussion:

whether, and how far, a privilege [ie, right] shall be allowed is a question of policy. ... Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning ...<sup>40</sup>

These hollow deductions, said Holmes, are then put forward

as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.<sup>41</sup>

On the view Beever advances, it is pure reflection on the nature of property that reveals its contours and scope; it is on the basis of such reflection that he concludes that individuals do not have a right to sunlight. This is one of the reasons he thinks policy has no place within private law.<sup>42</sup> Therefore, to show that courts adopt his view, Beever needs to show that when courts talk of rights they do the same. A second aspect of his view is that these rights are ‘trumps’ over social utility. The two points are obviously related: if courts are to ignore considerations of social utility (‘policy’), they will not be able to

<sup>39</sup> Ibid 49.

<sup>40</sup> Oliver Wendell Holmes, Jr, ‘Privilege, Malice, and Intent’ (1894) 8 *Harvard Law Review* 1, 3.

<sup>41</sup> Ibid. See also O W Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 466–7.

<sup>42</sup> See Beever, *Rediscovering the Law of Negligence*, above n 5, 513: ‘the standard of care should be set to achieve justice between the parties.’

know the social implications of their decisions and whether protecting ‘rights’ will hamper social welfare. In the alternative picture presented by Holmes, the scope of rights is determined by changing social needs and circumstances, and therefore judges do (and should) look into ‘policy’. Which of these possibilities is better reflected in *Fontainebleau*? Here is what the Court says:

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.<sup>43</sup>

The Court clearly repudiates the second of Beaver’s contentions. Rights are not trumps over utility, they are subject to it: there is no cause of action ‘where a structure serves a useful ... purpose’. What about the first one, the determination of the content of the right? In support of the interpersonal, a priori, reading, Beaver quotes again from the case: ‘No American decision has been cited, and independent research has revealed none, in which it has been held that ... a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.’<sup>44</sup> What Beaver omits is what comes shortly afterwards: ‘the English doctrine of “ancient lights” has been unanimously repudiated in this country’<sup>45</sup> So the case does not stand for the proposition that there is an a priori, universal prioritisation of land uses. It stands for a local idea, one that in England (whose case law Beaver otherwise focuses on) might have been decided differently. Since Beaver claims that his task is not that of a ‘journalis[t]’<sup>46</sup> who merely reports what the courts say but provides an explanation, one is entitled to ask: why did American and English courts

<sup>43</sup> *Fontainebleau*, 114 So 2d 357, 359 (Fla Ct App, 1959).

<sup>44</sup> *Ibid* quoted in Beaver, *The Law of Private Nuisance*, above n 10, 49–50.

<sup>45</sup> *Ibid*. Incidentally, a report of a 1569 case on the doctrine of ancient lights shows the parties relied on wide-ranging social considerations and did not confine themselves to the interpersonal relations between parties: See ‘Hales’s Case (1569)’, in Sir John Baker, *Baker and Milson Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2<sup>nd</sup> ed, 2010) 652.

<sup>46</sup> Beaver, *The Law of Private Nuisance*, above n 10, 2.

reach different conclusions on this matter? One possible answer might be that the different views reflect the fact that sunlight is a much scarcer commodity in England than in Florida (and perhaps most of the United States); or that the different needs for development, or social attitudes toward it, may have been reflected in different rules about the right to sunlight. That, of course, is not the answer Beever would want to hear. This answer suggests that the determination of what rights we have depends, at least in part, on contingent, local factors that do not relate exclusively to the relationship between the two parties, and which can only be ascertained by empirical investigation.

Interestingly, though the Court in *Fontainebleau* stated that it could not find any American cases that found a right to light, there are later cases that have affirmed exactly such a right, in part on the basis of its beneficial social value as an alternative source of energy.<sup>47</sup> And once such environmental considerations (the amount of available sunlight, the population density, the value attached to property development, the perceived value of sustainable energy) are deemed relevant to the determination of the existence and contents of rights, it is hard to see a principled reason for excluding any other considerations about the consequences of the decision. To do this is, of course, to reintroduce the scourge of ‘policy’ that Beever so detests back into private law. To avert this problem, in Beever’s version of *Fontainebleau*, these aspects of the decision are silently ignored.

Here is another example of the difference between what appears in a case and the way Beever presents it. Beever discusses Bramwell B’s famous decision in *Bamford v Turnley* (*‘Bamford’*),<sup>48</sup> a case involving a neighbour dispute between a doctor and a confectioner. Beever quotes an excerpt from the decision, and then says ‘[t]he reference to convenience, advantage and the like

<sup>47</sup> See, eg, *Prah v Maretti*, 321 NW 2d 182, 190 (Abrahamson J) (Wis SC, 1982), where the Court states:

Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners’ disputes about property development in the 1980’s than is a rigid rule which does not recognize a landowner’s interest in access to sunlight.

Cf *Ough v King* [1967] 1 WLR 1547, 1552–3 (Lord Denning MR). While the determination is dependent on the particular facts and normative situation in different US states — see, eg, *Sher v Leiderman*, 226 Cal App 3d 867 (Ct App, 1986) and *Collinson v John L Scott Inc*, 778 P 2d 534 (Wash Ct App, 1989), for decisions going the other way — there is never a suggestion the difference in outcomes is the product of abstract prioritisations of different land uses.

<sup>48</sup> (1862) 3 B & S 66; 122 ER 27.

has led many to the conclusion that Bramwell B was thinking of utilitarian concerns. Perhaps he was. But, in fact, Bramwell B's appeal is to fairness between the parties'.<sup>49</sup> This may sound convincing to anyone who only reads the small portion of the decision that Beaver quotes. But there is a reason why many have argued that Bramwell B's decision in *Bamford* reflects utilitarian reasoning. It is the following passage, which appears on the very same page from which Beaver quoted:

The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case, — whenever a thing is for the public benefit, properly understood, — the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expences [sic].<sup>50</sup>

Bramwell B then states that he considers the law to be 'defective' if in the case of a loss that could be fully compensated, the plaintiff could insist on an injunction which 'might put a stop to works of great value, and much more than enough to compensate him'.<sup>51</sup> As several commentators have noted,<sup>52</sup> Bramwell B offers here the basic ingredients of an economic analysis of nuisance, but you will never know this if you read Beaver's book.

<sup>49</sup> Beaver, *The Law of Private Nuisance*, above n 10, 29.

<sup>50</sup> *Bamford* (1862) 3 B & S 66, 84–5; 122 ER 27, 33. As is well known, Bramwell B did not keep his views on politics and economics secret, even during his tenure as a judge: see M W Taylor, 'Bramwell, George William Wilshire, Baron Bramwell (1808–1892)' in Brian Harrison (ed), *Oxford Dictionary of National Biography* (2004) vol 7.

<sup>51</sup> *Bamford* (1862) 3 B & S 66, 85–6; 122 ER 27, 33. That is precisely the opposite of Beaver's approach.

<sup>52</sup> P S Atiyah, 'Liability for Railway Nuisance in the English Common Law: A Historical Footnote' (1980) 23 *Journal of Law and Economics* 191; Richard A Epstein, 'For a Bramwell Revival' (1994) 38 *American Journal of Legal History* 246, 276–7; Cento G Veljanovski, *Economic Principles of Law* (Cambridge University Press, 2007) 78.

### B *The Externality of Beever's Approach*

I could provide additional illustrations of the difference between the way Beever describes cases and what is found in them, but I believe the point is clear. How can Beever still claim that his alternative to the 'conventional view' really reflects 'the law's approach'? Though he does not provide an answer to the question in the book, in a recent article Beever has suggested that in addition to positive law, there is something else, natural law or higher law. The declaratory theory of law according to which judges find the law and not make it, he says, refers to this natural law, not the positive law.<sup>53</sup> Positing the existence of this law can solve other problems for Beever. That judicial opinions offer conflicting explanations in no way shows that the law is a mess.<sup>54</sup> All one needs to do is assert the existence of natural law, and one can then be assured that *that* law 'is well ordered and undergoes at least *relatively* little change'.<sup>55</sup> In similar fashion, the view he favours can be seen as internal to natural law, even if it differs from positive law.

Beever's view is thus completely independent of, and completely external to, the law as found in legal materials. This is not a speculation. In an earlier essay, ironically an essay dedicated to vindicating the internalist credentials of his approach, Beever was quite explicit about this:

*it is a fact about the world, not merely about the law, that an event is a consent, a wrong, an unjust enrichment, or an 'other event'. Accordingly ... [this] division of the law is premised on distinctions that cannot — cannot as a matter of logic — be disproved by legal history. Again, and not surprisingly, this is widely recognised in disciplines outside law. Political history does not determine the truth about theoretical understandings of politics, nor, in our view, can or does legal history determine the truth about legal categories.*<sup>56</sup>

If the true categories of law are a matter of fact about the world that cannot be disproved by legal history, they similarly cannot be disproved by present-day legal doctrine. They are not human creations and their existence is completely *outside* of human institutions. This is the approach of an out-and-

<sup>53</sup> Allan Beever, 'The Declaratory Theory of Law' (2013) 33 *Oxford Journal of Legal Studies* 421, 425.

<sup>54</sup> Beever, *The Law of Private Nuisance*, above n 10, 2–3.

<sup>55</sup> Beever, 'Formalism in Music and Law', above n 4, 229 (emphasis in original).

<sup>56</sup> Beever and Rickett, above n 33, 330 (emphasis added).



out rationalist, someone who thinks that moral philosophy is largely an exercise in a priori reflection, and that these exercises in pure practical reason reveal the content of natural law. Beaver combines this belief with the normative demand that courts adopt this natural law as positive law. As he put it: 'Fulfilling the law is a matter of making the positive law more accurately reflect [the] abstract and enduring law'.<sup>57</sup> This is as clear a statement as one could find that Beaver is a pure externalist about law. He thinks lawyers and philosophers should aim to discover the content of the 'abstract and enduring law', whose content remains (roughly) the same across time and place.

The only way this approach could be deemed as internal to the law is by having a view of what the law *should be*, calling it 'natural law', declaring that it exists, and then proclaiming that one's desired approach is internal to that law. Since the content of natural law is entirely unspecified, this view renders Beaver's claims to the internality of his own account completely immune to refutation. But by that standard even a proponent of the economic approach could call his ideal for what the law should be 'natural law' thereby rendering his own account 'internal'. After all, there were those who treated the fundamentals of classical economics as laws of nature.<sup>58</sup>

To claim that one's favoured approach is 'internal' to natural law thus adds nothing to one's argument. It is a rhetorical device that enables one to turn what one thinks ought to be the case into what is the case. Beaver employs something like this technique in his discussion of *Rogers v Elliott*.<sup>59</sup> To Beaver's chagrin, the case considered various policy considerations in support of its conclusions. Beaver acknowledges this fact; he even says that the policy arguments found in the case are a 'familiar type' of policy argument found in many other cases.<sup>60</sup> He then goes on to offer an alternative explanation, one not found in the case and which purportedly does not rely on policy. Based on this explanation he then declares: 'we see that *the law's approach* to the sensitivity of the claimant is not to be understood as some policy-based

<sup>57</sup> Beaver, 'The Declaratory Theory of Law', above n 53, 429.

<sup>58</sup> See, eg, Henry Wood, *The Political Economy of Natural Law* (Lee and Shepard Publishers, 1894). For explorations of the history of these ideas see O H Taylor, 'Economics and the Idea of Natural Laws' (1929) 44 *Quarterly Journal of Economics* 1, see especially at 25–7; cf Alfred F Chalk, 'Natural Law and the Rise of Economic Individualism in England' (1951) 59 *Journal of Political Economy* 332.

<sup>59</sup> 15 NE 768 (Mass, 1888).

<sup>60</sup> Beaver, *The Law of Private Nuisance*, above n 10, 34.

exception to a general approach. On the contrary, it is mandated by a proper understanding of that approach'.<sup>61</sup> Now, if talking about the law as found in the cases, then the fact that this and hundreds of others cases make reference to policy, renders Beever's claim absurd. If we designate what we wish the law to be 'natural law', then anything can reflect this 'law's approach'.

In other words, there is a price to pay for this line of argument. If it is the *natural* law that Beever is trying to explicate, then there is no room for citing and discussing cases in the way he does. For the legal materials that make up positive law are external to natural law (and vice versa). Beever would have to admit that his account is not based on what the law is — that it is external to legal materials — but that it represents what he thinks the law should be. What Beever does instead is to rely selectively on legal materials. When Beever finds aspects of legal decisions that fit his view of what the law should be, he quotes them as evidence that his approach really is reflected in the law. When the decisions do not fit his approach, he dismisses decisions as 'unacceptable' because they are 'not a legal analysis',<sup>62</sup> or by saying that 'the basis of liability in the tort [of nuisance] ... has been so misunderstood' by the 'conventional' view accepted by courts.<sup>63</sup> In short, heads, I win; tails, you lose.

There is not just a methodological flaw in Beever's approach, but a more fundamental, philosophical, one. Even assuming natural law exists as Beever imagines it, and assuming further that it is knowable (a matter on which we must simply take Beever on faith, as he provides no argument to support it), and assuming also that Beever got the content of natural law exactly right, it remains to be shown that judges explicating positive law are trying to match this natural law. And while such questions are not easy to answer, we have many reasons to believe that the answer to this question is negative. For one, Beever himself says so. It is his claim that all judges, lawyers and commentators have misunderstood that law. One way of interpreting this claim is that all judges have been trying to identify natural law but somehow failing miserably. A far more plausible explanation is that lawyers are not trying to match the law to some abstract entity that exists outside of time and space, but rather

<sup>61</sup> Ibid 37 (emphasis added).

<sup>62</sup> Beever, *The Law of Private Nuisance*, above n 10, 144. The object of this charge is La Forest J's opinion in *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181, 1200–1. As it happens the Supreme Court of Canada has recently unanimously endorsed it in *Antrim Truck Centre Ltd v Ontario (Transportation)* [2013] 1 SCR 594, 614 [38]–[39] (Cromwell J for the Court).

<sup>63</sup> Beever, *The Law of Private Nuisance*, above n 10, 69.

have been trying to craft solutions to changing problems based on the changing values of their day.

This reveals Beever's blindness to a significant theoretical strand within common law thinking. Beever recently wrote that '[w]hen asked a difficult legal question, the common lawyer, if she is a modern, thinks either of cases or statutes and, if she is a traditionalist, ponders principles and ideas.'<sup>64</sup> While his labels are misleading (what Beever calls the 'traditional' view has never been a dominant view in common law thinking), what he calls the 'modern' approach reflects a powerful strand within the philosophy of the common law.<sup>65</sup> Nowhere is this point clearer than when Beever says that 'there is no doubt that historical explanations are enlightening ... [but] they cannot provide justification.'<sup>66</sup> For if there is one central idea to much common law thinking it is precisely that history, not pure reason, *is* a form of justification.

Such statements reveal how little understanding (or little regard) Beever has for the common law as a theory of authority. This view posits a constructive methodology in which the answers to legal questions are slowly *constituted* in a piecemeal fashion, not in a manner that seeks to discover some eternal principles that are external to the law, but by an identification of the slowly-changing principles that are embedded in the practice. Within this view history is the basis for the law's authority and its justification.<sup>67</sup> It is a view that

<sup>64</sup> Beever, *Forgotten Justice*, above n 6, 206.

<sup>65</sup> I should stress that this is by no means the only philosophical approach underlying the common law. See Dan Priel, 'Conceptions of Authority and the Anglo-American Common Law Divide' (unpublished manuscript); Dan Priel, 'Philosophies of the Common Law and their Implications' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, forthcoming 2015).

<sup>66</sup> Beever, *The Law of Private Nuisance*, above n 10, 6.

<sup>67</sup> Contrast Beever's claim — that '[h]istory is important, but it is not justification': *ibid* 95 — with Pocock's description of Burke's understanding of the common law: 'Rights are not justified by abstract reason, but as an inheritance under positive laws': J G A Pocock, 'Burke and the Ancient Constitution — A Problem in the History of Ideas' (1960) 3 *Historical Journal* 125, 128. Of course, Burke's view is not necessarily correct, but in fact it has deep roots in common law thinking: at 129–30. See also David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge University Press, 1989) 40–5; A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 373–5.

emphasises the normative force of the particular historical path that the law has taken in identifying right answers to legal questions.<sup>68</sup>

It is because Beever does not understand (or, more charitably, rejects without argument) this historicist theory of authority, that he dismisses the work of academics who expound what is found in the cases as ‘a form of journalism: a reporting of what has been expounded elsewhere’.<sup>69</sup> Within the common law theory of authority, this ‘journalistic’ explication of the cases is how legal truths, normativity, and criticism are made possible — *not as an attempt to match some abstract higher law*, but as the careful working out from the myriad of cases, of the general principles that are implicit in them.

One may, of course, reject this entire approach and its underlying theory of authority (for the record, I have serious doubts about it); but then one should admit that the right approach to finding what the law should be bears no relation to (is external of) what the law is, and that whatever similarities are found between one’s desired approach and what is found in the law are nothing more than happy coincidences. That is Beever’s actual view. Court decisions *as such* have absolutely no authority in his account. They have merit for him if, and only if, they fit his views about what the law should be, views he arrived at completely independently of those decisions. To put it more strongly, even if the highest courts all over the common law world were to declare unequivocally that they rejected Beever’s views on nuisance, there is little doubt that *in itself* that would in no way lead Beever to change his mind about the nature of nuisance law.

There is one exception to Beever’s generally dismissive view of the courts’ work. Recall that in his view the law of nuisance is not really concerned with what laypeople would call a ‘nuisance’, but with the determination of land use priorities. Beever thinks the determination of these priorities is often so obvious that it does not require argument, but he admits that on closer calls judges will have to rely on ‘judgement’.<sup>70</sup> It is on this matter, and seemingly

<sup>68</sup> Beever claims that many features of the common law, for example the claim that the law is discovered, that cases are ‘wrongly decided’ and others, can *only* be explained if we assume the existence of this other kind of law. This is a mistake, which is the result of his failure to consider history as a source of authority. I consider the difference between the philosophy underlying Beever’s thinking and that found in the common law in more detail in Priel, ‘Conceptions of Authority and the Anglo-American Common Law Divide’, above n 65.

<sup>69</sup> Beever, *The Law of Private Nuisance*, above n 10, 2.

<sup>70</sup> *Ibid* 45–8.

this matter alone, that ‘past cases are a record of the judgements made by judges over the law’s history’.<sup>71</sup> But the appeal to courts here looks rather odd. After all, the book is premised on the view that the courts’ *entire* approach to the law of nuisance has been a ‘failure’; what basis do we have, then, for trusting their ‘judgement’? Furthermore, even if we tried, it is unclear what it is that we could rely on. Despite the fact that in one form or another the tort of nuisance has been around for hundreds of years, courts have never gotten around to offering even a tentative list of land use priorities which we could use as a guide. (If they did, presumably Beever would have reproduced it for us.) So on what must be the most practically significant aspect of this view of the law of nuisance, Beever’s book is silent.

### III EVALUATING BEEVER’S VIEWS ON THEIR OWN

As already mentioned, I do not see any fault in adopting a completely external account of what the law should be. However, when one adopts this approach, the weight on the argument is on its persuasive power. An external account thus forces its proponent to show that their proposals are normatively superior to others. The aim of this Part is to show that Beever’s approach fails this test. Some of the difficulties I point out are limited to the particulars of Beever’s account, but I believe others are illustrations of more fundamental problems with the idea that a priori moral reflection should be the basis for legal rules. Plainly, this broader issue is beyond the scope of this essay, but I hope some of my remarks will help cast doubt on this approach to thinking about the law.

Though Beever’s official view is that ‘[t]he law of nuisance ... prioritise[s] *property rights* ... by insisting that the exercise of more fundamental *rights* trumps the exercise of less fundamental *rights*’,<sup>72</sup> his concrete examples all talk about the prioritisation of *land uses*. At times Beever slides within a single sentence from one formulation to the other: ‘The law of nuisance prioritises *property rights* so that more fundamental *uses* of land trump less fundamental *uses*’.<sup>73</sup> The two, however, are quite different.

<sup>71</sup> Ibid 48.

<sup>72</sup> Ibid 125 (emphasis added).

<sup>73</sup> Ibid 105.

If there is one thing Beever does *not* discuss in his book, it is priority among property rights. He never discusses the question of whether there is any priority among ownership, leasehold, mortgage, easement (and other property rights) and its potential relevance for nuisance law. Quite the contrary: Beever says that legal occupiers of property should be entitled to sue in nuisance, even if they do not have property rights in them,<sup>74</sup> and it seems he would not give a bank that has a mortgage the right to sue in nuisance, even though a mortgage *is* a property right.<sup>75</sup> This implies that, contrary to Beever's 'official' story, property rights (and their priority) are neither necessary nor sufficient for nuisance. What he does discuss is priority between *uses* of property. To accommodate the two views one has to hold that different property rights are involved in reading, sleeping, playing music, cooking, playing video games, manufacturing computers, providing legal services, and the endless number of other things people do in properties they occupy.

If we focus on land uses instead of property rights, Beever's view seems to be that if a certain land use is deemed more fundamental than another and the less fundamental interferes with the more fundamental one, then the former must stop, regardless of considerations like economic costs. In the remainder of this Part, I attempt to show there are serious difficulties with this suggestion.

#### A Describing the Relevant Activity

Beever admits that the same activity can be described in different ways<sup>76</sup> and that therefore 'the appropriate description ... is the one that most accurately captures their dispute'.<sup>77</sup> He never explains what that means or gives any hints as to how we are to identify a description as more or less accurate. The result is a thoroughly unstable and very easily manipulable test. Consider the case of *Christie v Davey* ('*Christie*'),<sup>78</sup> which Beever discusses. The plaintiffs in this case gave music lessons in their home. The defendant was a disgruntled neighbour who disliked the playing emanating from his neighbour's home

<sup>74</sup> Ibid 124.

<sup>75</sup> Cf *ibid* 125.

<sup>76</sup> Ibid 43.

<sup>77</sup> Ibid 45.

<sup>78</sup> [1893] 1 Ch 316.

and reacted to it by ‘knocking on the party-wall, beating on trays, whistling, shrieking, and imitating what was being played in the Plaintiff’s house’.<sup>79</sup> The Court accepted the plaintiffs’ claim that this amounted to a nuisance and enjoined the neighbour from continuing with these behaviours.<sup>80</sup> The ‘conventional view’ according to Beever is that ‘because the defendant was motivated by malice, his activity was illegal’.<sup>81</sup> It is not. The conventional explanation of the case is what the Court actually says: ‘the noises which were made in the Defendant’s house were not of a legitimate kind. They were what, to use the language of Lord Selborne in *Gaunt v Fynney*, “ought to be regarded as excessive and unreasonable”’.<sup>82</sup>

Unreasonable interference with the plaintiff’s enjoyment of their property does not fit Beever’s account, who insists that nuisance is a strict liability tort, so he ignores this statement.<sup>83</sup> His alternative explanation is that the plaintiffs were successful because their land use was more fundamental: ‘The claimants’ activity was playing music. The defendant’s activity was banging on the walls etc in order to disrupt the claimants’ playing music. It must be clear that the former is more fundamental than the latter’.<sup>84</sup> It is not clear to me. First, the defendant claimed that his sounds accorded with his musical taste.<sup>85</sup> He was only half serious; but what if he had been an avant-garde musician? Beever insists elsewhere in the book that he does not judge music by its style, that for the purposes of his prioritisation view Rachmaninoff is as good as rap.<sup>86</sup> If that is the case, then Schubert must be as good as Stockhausen, in which case the defendant’s noises would count as music (and as such as a more funda-

<sup>79</sup> Ibid 318 (North J).

<sup>80</sup> Ibid 328.

<sup>81</sup> Beever, *The Law of Private Nuisance*, above n 10, 53.

<sup>82</sup> *Christie* [1893] 1 Ch 316, 326 (North J). Incidentally, malice is not problematic per se, but it is epistemically significant, for malice suggests that an activity is welfare-reducing. It is also often a mark for a unilateral action instead of conciliatory peaceful negotiation, which courts try to discourage. When there is reason to believe the ‘malicious’ activity is nevertheless socially useful, malice will not block the activity. Cf Michael Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford University Press, 2002) 72–3. Something like this view is also expressed in *Fontainebleau*, 114 So 2d 357, 359 (Fla Ct App, 1959).

<sup>83</sup> Beever, *The Law of Private Nuisance*, above n 10, 83–4.

<sup>84</sup> Ibid 54.

<sup>85</sup> *Christie* [1893] 1 Ch 316, 319 (North J).

<sup>86</sup> Beever, *The Law of Private Nuisance*, above n 10, 31.

mental land use) based on his internal attitudes towards the activity. By contrast, elsewhere in the book Beever thinks that a plaintiff's sensitivity should be ignored and that the existence of a nuisance must be assessed by an 'objective approach'.<sup>87</sup> Beever does not explain why the *plaintiff's* subjective sensitivity should be ignored but the *defendant's* subjective definition of their land use should be decisive.

More importantly, here is another description of both parties' activities: they were both using their homes for running small businesses. The second-named plaintiff was in the music instruction business, as she admitted when she wrote in her first communication with the defendant that his noises caused her 'pecuniary loss'.<sup>88</sup> And so was the defendant, who maintained that the music playing interfered with his wood-engraving business which required 'great thought and the most delicate treatment'.<sup>89</sup> Thus, it is not true that the plaintiffs were engaged in 'playing music', as Beever describes the case; nor is it plausible to suggest that the most appropriate description of what the defendant was doing was banging on walls. They both used their homes for a profit-making activity. And if these two profit-making activities (both artistic, as it happens) are not deemed equal enough, there is another activity that the defendant used his house for: he occupied it as his home. The defendant reported on his difficulty in 'read[ing] a book or convers[ing] with friends', and probably also of trouble with going to sleep ('this atrocious hubbub drowns all efforts to hear, and is continued on to midnight and after, and often commences a little after 8am').<sup>90</sup> Beever says at one point that 'being able to live on one's land — and in particular being able to sleep at night on it — is more fundamental than running an oil depot'.<sup>91</sup> He also adds that it

<sup>87</sup> Ibid 35. Beever says that the objective test for sensitivity is the nuisance equivalent of *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490. But the thin skull rule is part of negligence, and this rule is inconsistent with this reading. Beever would abolish this rule in the name of coherence: Beever, *Rediscovering the Law of Negligence*, above n 5, 162–6. He seems not to notice that doing that would require limiting full compensation to rich plaintiffs to the level of the average plaintiff. Being rich (and so having very high lost wages due to the injury) is no different from being more susceptible to serious injury (and so suffering greater losses upon injury). Both are pre-existing conditions that are equally (un)foreseeable.

<sup>88</sup> *Christie* [1893] 1 Ch 316, 318 (North J).

<sup>89</sup> Ibid 320.

<sup>90</sup> Ibid. The Court was not entirely convinced by these factual claims, which may be why the case was decided the way it was: at 327–8.

<sup>91</sup> Beever, *The Law of Private Nuisance*, above n 10, 26.



‘must be clear’ that ‘the use of ... machinery’ is less fundamental than ‘the normal occupation of a room.’<sup>92</sup> If that is the case, then the normal occupation of a home, one’s ability to live and sleep in one’s property, must be more fundamental than *any* business, whether it is giving music lessons or running an oil depot. (If rap and Rachmaninoff are to be treated as equal, presumably the same must be true of all businesses. If not, then Beever would have to provide us not only with a prioritisation of land uses, but also with a ranking of businesses.) Beever gets sidetracked by the fact that the defendant *reacted* to the interference from his neighbours by shrieks and whistles. *But he could always stop*, thus moving him up the ladder of land use priorities. (He certainly would have done that if he had had any reason to think that the land use priority view reflected the law.) Thus, an odd implication of Beever’s view is that a change in the *defendant’s* activity could *immediately* change the *plaintiff’s* activity from a non-nuisance into a nuisance, even though that activity has not changed one bit. In fact, if we were to follow Beever’s reasoning that is precisely what happened the second the defendant complied with the Court’s injunction. At that moment, his land use changed from ‘banging on walls’ to ‘normal occupation’, at which moment he could enjoin his neighbours from engaging in the lower-ranked activity of running a business that interfered with his higher-ranked activity.

This example illustrates a larger issue, which is that throughout the book Beever constantly shifts between broad descriptions (being able to live on one’s land, normal occupation of a room) and very narrow descriptions (sunbathing, banging on walls) of land uses. Part of the problem with the possibility of describing the same activity in different ways is that what counts as an activity to be prioritised depends on an account of an individuation of activities, one that is crucial for Beever’s view, but which he never provides. If one individuates the different activities to be prioritised very broadly, then Beever’s account is bound to lead to implausible outcomes. It is also bound to lead to many irresolvable ties between land uses of equal priority: a steel factory and a watchmaker are both businesses; as are two land owners, one shooting rabbits to sell their meat, another raising foxes for their fur. If land uses are individuated narrowly, such that, say, a particular factory in a particular place is deemed a different activity than the same factory in a different location, then Beever’s approach can only be understood as a more

<sup>92</sup> Ibid 44.

cumbersome way of getting to what the courts have been doing all along: an assessment of the reasonableness of respective activities based on a host of considerations (locale, intensity of environment, the seriousness of the nuisance, and so on), including, of course, the relative value of the competing activities. What makes no sense, but what Beever often does, is to adopt a broad description of one land use and a narrow description of another.

### B *Internal Incoherence*

As we have seen, Beever's account is not really about the prioritisation of property rights. But there is a reason why Beever presents it as if it is. In other writings he has insisted that tort law is concerned with a violation of rights. He reiterates this view in *The Law of Private Nuisance*,<sup>93</sup> but he has a hard time squaring it with the view presented in the book. As a result, at times it seems Beever has two different accounts going on — one based on breaches of rights, the other based on land use priority — and though he tries to show they are completely consistent with each other, they are not. Rather, it seems that he brings in the rights perspective in cases where the land use priority account does not yield the outcome he wants.

For an example, recall the dispute between the two hotels in *Fontainebleau*. The Court described the right in the following terms: 'adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations).'<sup>94</sup> This is inconsistent with the priority of land use view, because access to sunlight is not a land use. To overcome this difficulty, Beever reads the case as if it is concerned with the question whether one has a 'right to sunbathe.'<sup>95</sup> He does that despite the fact that this right is nowhere mentioned in the case, and is not at all the right that the land owner in the case is interested in. Limited liability companies being incorporeal entities have little interest in lying 'exposed before the elements on loungers.'<sup>96</sup> What the plaintiff in this case was interested in was to use nuisance law as a way of hampering a commercial competitor, and, unsurprisingly, the Court

<sup>93</sup> Ibid 48–51.

<sup>94</sup> *Fontainebleau*, 114 So 2d 357, 360 (Horton CJ for the Court) (Fla Ct App, 1959).

<sup>95</sup> Beever, *The Law of Private Nuisance*, above n 10, 49.

<sup>96</sup> Ibid.

refused to play along. It is less than helpful to present it as a dispute over the existence of a 'right to sunbathe'.

In any event, though Beever presents his view as consistent with a rights-based understanding of tort law, when he comes to considering actual cases, Beever's discussion looks different. To justify the conclusion in *Fontainebleau*, he says that 'the desire [to expose oneself to the sun] is itself irrelevant as the claimant had no right that [this desire] be fulfilled'.<sup>97</sup> So according to Beever, the reason why the plaintiff lost is *not* because sunbathing is a less fundamental land use than another, unspecified, land use, but because the plaintiff does not have a right to *access* to sunlight.

Whether true or not, this claim is not about land use priority; it is nonetheless worth examining. If I engage in a more fundamental land use than my neighbour — say, if I engage in the 'normal' activities of a household (which presumably include lounging in my backyard) and my neighbour is using their property to make a profit — then according to Beever my activity is more fundamental.<sup>98</sup> Now, if my activity is more fundamental, then why do I not have a right to access the natural resources necessary for making this activity possible? Or, presented differently, why can the person engaged in the less fundamental activity do something in pursuit of that activity if they *thereby* hamper my ability to engage in my more fundamental land use? Why does the right of the person engaged in the more fundamental land use not extend that far? Beever apparently thinks the answer is obvious, as he does not address it; but to paraphrase Holmes, the very thing to be found out is whether there is a right or not, and if not, why not.<sup>99</sup>

To see that this is a serious problem and not mere nitpicking, compare *Fontainebleau* with *Christie*. In the latter case, as presented by Beever, the plaintiffs wanted to play music on their property, something which they are entitled to do *and which the defendant in no way stopped them from doing*. They further desired *access* to a peaceful environment that enabled them to play music properly, but if we follow Beever's reading of *Fontainebleau*, we

<sup>97</sup> Ibid.

<sup>98</sup> Ibid 26.

<sup>99</sup> Holmes, 'Privilege', above n 40. Rights theorists of tort law assume an answer to this question is unproblematic. It is not. See, eg, Peter Cane, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 35, 52–6; Tom Cornford, 'Public Authority Liability and the Heteronomy of Tort Law' (2013) 21 *Torts Law Journal* 16, 24–7; Dan Priel, 'That Can't Be Rights' (2011) 2 *Jurisprudence* 227, 232–3.

should say that they did not have a right that that desire be fulfilled. In both cases it was the engagement in the less fundamental activity (running a hotel business, banging on walls) that made it more difficult for the plaintiff to engage in a more fundamental activity by depriving *access* to a necessary environmental condition (sunlight, silence). Yet for no apparent reason, Beever employs the rights-based account only when discussing *Fontainebleau*. In short, rather than these cases supporting Beever's view, they show that Beever has two inconsistent accounts.

### C *The Problem of Presentation*

Whatever force Beever's approach seems to have depends on his *presentation* of the cases, not in anything about the cases themselves. This point can be illustrated by another famous case Beever discusses, *Hollywood Silver Fox Farm Ltd v Emmett*.<sup>100</sup> The plaintiff company was in the business of breeding silver foxes. The defendant, following a dispute with the plaintiff, fired guns on his property thereby causing vixens not to mate or miscarry. The plaintiff successfully sued in nuisance to enjoin the defendant from doing so. Trying to fit this case within his land use priority perspective, Beever says:

If the defendant's son shot rabbits [in order to maintain their land] ... then the appropriate description of that activity would have been, not simply shooting, but shooting in order to maintain the integrity of the land. In that case, the defendant's use would have been more fundamental than the claimant's.<sup>101</sup>

Beever's claim here is problematic on his own account. He describes protective measures presumably undertaken in order to *enable* a certain land use as the land use itself. If the land is used as a factory, then *that* is what the land is used for; if guards have to fire a gun to scare off potential vandals who try to damage the factory, that does not change the 'most accurat[e]' description of the land use in question.<sup>102</sup> It clearly does not become, at the moment of shooting, 'maintaining the integrity of the land' and change into something else a moment later. The shooting in this context is ancillary to the land use itself, and presumably should be assessed in relation to it. (The shooting can

<sup>100</sup> [1936] 2 KB 468. For more on the place of malice in nuisance, see above n 82.

<sup>101</sup> Beever, *The Law of Private Nuisance*, above n 10, 56.

<sup>102</sup> *Ibid* 45.

only be deemed as the most accurate description of the land use if the land was used as a shooting range or hunting ground.) If the ‘integrity of the land’ is maintained in order to allow for a non-fundamental land use, it is hard to see maintaining of land as itself a valuable land *use*.

Thus, even on Beaver’s own terms, his explanation of this case fails. Beaver’s argument is nonetheless revealing: to the extent that his conclusion has any appeal it is due to the way he set up the example in a manner that incorporates factors that have no place in his ‘official’ account. The obvious reason why we feel differently about the two scenarios is because shooting for the sole reason of damaging a neighbour’s business is a socially useless (or positively harmful) activity; protecting land from going to waste is socially valuable and therefore deserving of protection.

#### *D Implausible Outcomes*

In a 1629 nuisance case one of the judges stated that ‘each case would be governed by the local circumstances.’<sup>103</sup> Ever since, courts have insisted that the finding of a nuisance is a contextual, fact-rich, determination dependent on a long list of considerations: the time of the alleged nuisance, its length, its intensity, the neighbourhood in which it takes place, the number of people affected, the respective benefits of the competing activities, and so on. Though these factors can be stated in the abstract, they manifest themselves very differently in different cases and so taking them into account rails against any attempt to conclusively prioritise certain activities as more fundamental than others. Society must have both private households and industry, and it is close to meaningless to speak in the abstract of one activity being more fundamental than another. What the law should seek to do is make sure that both can co-exist, attempting to minimise potential conflicts between them.

One might object to the point just made that it is all very well to try and minimise conflicts between land uses, but nuisance law is necessary precisely where such efforts fail. At that point the law must determine which activity is more fundamental, and at that moment it is obvious that ‘normal occupation’ is more fundamental than business. Though superficially appealing, the following example illustrates why this is not the case. Property being cheap near heavy industry, I buy a building in an industrial zone, planning to turn it

<sup>103</sup> ‘Jones v Powell (1629)’ in Baker, above n 45, 660, 664.

into a sizable mansion. The only thing getting in my way of enjoying my new abode is the noise and bad odours emanating from the surrounding factories. Fortunately, I come across *The Law of Private Nuisance* and see a way out of my predicament: as already mentioned, Beever states that '[i]t must be clear that [the normal occupation of a room] is more fundamental to property than the [use of machinery]',<sup>104</sup> and further argues that coming to the nuisance is no defence.<sup>105</sup> Reading this, I go to court asking for an injunction against the operation of all factories in the area surrounding my new home. It is clear that such a claim will fail. According to the 'conventional view' this is because the defendants' use of their land is reasonable for its neighbourhood (while mine is possibly unreasonable). Since for Beever this is an irrelevant factor, and since my land use is more fundamental than that of my neighbours, he has a problem.<sup>106</sup> The closest Beever gets to addressing this problem is his suggestion that a defendant could claim an easement by prescription to noise and pollution.<sup>107</sup> In my example, it would mean claiming the right to an easement that would allow the nuisance, because of the existence of a nuisance against previous owners.

Unfortunately, this solution is unlikely to work. For an easement by prescription to be created, it has to be shown (among other things) that the land use in question was adverse to the property rights of neighbours, that the land use constituted 'a wrong against the owner or occupier of the putative servient land — normally trespassing'.<sup>108</sup> Thus, consent to the nuisance vitiates the creation of the easement, and mutual consent to some level of pollution and noise is presumably what happens in an industrial zone. The same conclusion is reached within Beever's own account: since all previous land uses were equally fundamental (all were factories), there was no nuisance before and therefore no basis for the creation of easement by prescription. Even overcoming this hurdle, no easement could be prescribed if the industrial area existed for less than the minimum required time for creating such a property right (typically, 20 years). Thus, this scenario poses an obvious, and seemingly devastating, problem for Beever's approach. Beever could, of course, admit

<sup>104</sup> Beever, *The Law of Private Nuisance*, above n 10, 44.

<sup>105</sup> *Ibid* 65–7.

<sup>106</sup> Cf *ibid* 66.

<sup>107</sup> *Ibid* 68.

<sup>108</sup> *Lawrence v Fen Tigers Ltd* [2014] AC 822, 839 [46] (Lord Neuberger PSC).

that nuisance law and the law of easements cannot deal with such a case, and that such a scenario shows why zoning laws are required. But such a response would amount to an admission that commutative justice and private law alone are inadequate for governing interpersonal relations between individuals, contrary to the rallying cry in all of Beever's writings on private law. If, on the other hand, Beever accepted the necessity of (public) zoning laws to address such problems with his account, he would have to explain how nuisance law meshes with them, as well as with all other regulatory schemes that exist in the modern state.

### *E Implausible Theory*

Though Beever never formulates it in this way, if one wanted to reconcile his land use priority view with a rights perspective it would look something like this: *A has a right that B not use B's land in a less fundamental way than A's own use, if doing so interferes with A's (more fundamental) use.* A different way of understanding this view is that embedded within the concept of a property right is a list of land use priorities. I am not familiar with any text, legal or philosophical, that discusses nuisance in such a way, and though Beever claims that in his other work he claimed to be reviving 'forgotten' thinking,<sup>109</sup> I am not familiar with, and Beever definitely does not provide, any evidence to show that anything like this idea has ever been part of the common law.

There are very good reasons why. Essentially, Beever has a trespassory view of nuisance. It is part of the concept of property (he would say) that it includes the right to exclude. This right is violated whenever someone physically enters into another's property; but since land use priority is part of the concept of property, a land owner's rights are similarly violated whenever someone engages in a conflicting, lower-ranked land use. 'Trespass' is on this view what we call a violation of one's property rights by physical entry; 'nuisance' is what we call a violation of one's property rights by notional entry.

Beever never explicitly says that he seeks to turn nuisance into a variant of trespass to land, but there are several clear indications that this is the gist of his view. He says that nuisance is better understood as belonging to the law of

<sup>109</sup> See, eg, Beever, *Forgotten Justice*, above n 6; Beever, *Rediscovering the Law of Negligence*, above n 5, 32.

property,<sup>110</sup> and insists (contrary to the case law in nuisance, but like the tort of trespass) that liability for nuisance must be strict. But there is a reason why the law treats trespass and nuisance differently and why the latter includes certain reasonableness requirements that are not found in the former. Physical intrusions are usually easy to detect and relatively easy to protect against; the law thus deals with them with ‘prioritisation’ of sorts: the property right holder’s decision on who to let in is typically given absolute priority over those of others. Nuisance law deals with an almost endless myriad of uses to which lands can be put. For this reason, the law does not seek to specify in advance how all such interactions should be resolved. It urges individuals to adjust their behaviours to the circumstances through mutual accommodation (‘live and let live’), and leaves determination of unresolved disputes to a court evaluation that takes the particular facts of the case into account.<sup>111</sup> The distinction between trespass and nuisance thus acknowledges that an a priori determination of land use priorities — effectively the turning of nuisance into a species of trespass — is likely to weaken property rights.

This may seem paradoxical at first. By turning nuisance into a kind of trespass to land, Beever’s approach seems to strengthen individuals’ property rights, for under his approach land uses will no longer be the subject to any reasonableness tests. The rigid a priori ranking of land uses seems at first to provide a degree of clarity that nuisance law lacks. But unless his proposals are accompanied by zoning laws, Beever’s approach would make the ensuing property regime a nightmare for individuals living in modern society. That is because every individual who is protected by nuisance from intrusions is also a potential source of nuisance to others. Under the prevailing understanding, one can avoid creating a nuisance by behaving in a ‘reasonable’ way in a particular neighbourhood. By contrast, with its strict prioritisation, Beever’s approach will require individuals to master a complex and rigid list of land use priorities; in addition, and far more seriously, it will require them to be familiar with the land uses of all their neighbours and be ready to alter their land use if one of their neighbours shifts to a higher-ranked land use. The effect of this approach will be to subject a person’s permissible land uses to changes in their neighbours’ land uses. In a densely populated modern

<sup>110</sup> Beever, *The Law of Private Nuisance*, above n 10, 15.

<sup>111</sup> Cf Thomas W Merrill, ‘Trespass, Nuisance, and the Costs of Determining Property Rights’ (1985) 14 *Journal of Legal Studies* 13, 25–6.



environment the only way to prevent this approach from turning into a nightmare would be by adopting zoning laws that would keep different land uses to different locations. Once again, then, we see that Beever's view of nuisance can only be sustained if accompanied by regulation. The following Part expands on this point.

#### IV NUISANCE LAW FOR THE AGE OF STATUTES

In his perceptive review of Charles Fried's *Contract as Promise*,<sup>112</sup> Patrick Atiyah complained that Fried's examples involve 'situation[s] in which two individuals are face to face and make a bargain of the very simplest character — my cow Rose for your \$80'.<sup>113</sup> This, as Atiyah pointed out, is not what many real-world contracts look like. The same can be said of Beever's book: his examples suggest that nuisance law deals with the kind of neighbour disputes found in cases like *Christie* or *Sturges v Bridgman*.<sup>114</sup> In such cases, Beever says, all that the judge has to do is identify the more fundamental land use and rule accordingly.

Such cases may lend themselves to an approach that ignores broader social considerations, but courts have long recognised that the kind of disputes they have to deal with are often more complex. It was accepted in the 1629 case mentioned earlier that a judge could say that 'what is necessary for the common wealth shall never be called a nuisance to any private person' and that '[i]n every nuisance we ought principally to pay regard to the public good'.<sup>115</sup> This statement reflects what may be the underlying rationale for nuisance law, namely the coordination of two beneficial but conflicting activities.<sup>116</sup> The rules with regard to locale, famously captured by the slogan that 'what would be a nuisance in Belgrave Square would not necessarily be so

<sup>112</sup> Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

<sup>113</sup> P S Atiyah, Book Review (1981) 95 *Harvard Law Review* 509, 516.

<sup>114</sup> (1879) 11 Ch D 852.

<sup>115</sup> Baker, above n 45, 661. Not all judges on the panel agreed with this judge on the outcome of the case, but none dissented from his general observations.

<sup>116</sup> Cf R H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, 2.

in *Bermondsey*,<sup>117</sup> can be understood as an early attempt to do just that, to establish different zoning areas by means of nuisance law.<sup>118</sup>

Unfortunately, like the rest of the common law, nuisance is a rather primitive regulatory tool, and what was true in 1629 is of far greater significance today. The limitations of the common law method in dealing with the kind of problems previously addressed by nuisance law have led legislatures all over the world to adopt a new approach. Technological and social developments have made modern life far more complex (much higher population density, industrialisation, a larger number of encounters with strangers); on the other hand, they have also improved our understanding of the effects of pollution, and have created better means for dealing with old problems. As a result the focus has shifted from tinkering with the law of nuisance and in favour of addressing the problem by means of 'regulation'. Instead of an *ex post*, case-by-case treatment of conflicts using vague standards, legislatures have opted to create enforceable prescriptions that seek to minimise problems arising in the first place. In the context of nuisance, all common law countries have supplemented their nuisance law with more precise measurements of levels of pollution (noise, smells, particles, and so on) based on scientific data and subject to governmental inspections. With rare exceptions, common law countries have also used regulation to designate different geographical areas for different land uses.

This is important for understanding the place and role of private nuisance today. Beaver claims his book to be a guide for thinking about nuisance law for our times, even though we live '[i]n an era of regulation'.<sup>119</sup> But to understand what a law is one needs to understand what it is for; and to understand that, one needs to know more about what may be called its 'normative neighbourhood'. In other words, what nuisance law *is* depends in part on the available alternatives to it. Therefore, to discuss 19<sup>th</sup> century nuisance cases, before the advent of the modern regulatory state, and to seek to learn from them what nuisance law is today, is bound to lead to an inaccurate picture of present-day law.

<sup>117</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 865 (Thesiger LJ).

<sup>118</sup> See Joel Franklin Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Journal of Legal Studies* 403, 406, 414–15.

<sup>119</sup> Beaver, *The Law of Private Nuisance*, above n 10, 1.

It is the normative neighbourhood that surrounds nuisance law today that explains why when one looks at the cases of nuisance that make it to the courts these days, one finds them dealing with very different matters than the neighbour disputes which Beever's land use prioritisation approach envisages. What one finds is litigation involving many people (sometimes hundreds) regarding the use of wind farms,<sup>120</sup> mass pollution created by factories,<sup>121</sup> the effects of adding a runway to an international airport,<sup>122</sup> and so on. Such disputes have several features that make it almost impossible to apply Beever's approach to them, even if we wanted to. First, it is considerably more difficult to apply the land use prioritisation view to these cases, in part precisely because of their novelty or rarity. Where, for example, does a wind farm figure in the list of land use priorities? And how are we to describe it: do we think of it as protecting the environment or as the operation of machinery? If it is privately owned, is it to be ranked like other profit-making activities? And where does a flight path rank in the list that prioritises land uses? Second, a central facet of many presently-litigated cases is that they require the evaluation of the relationships between the common law tort of private nuisance and statutory norms regarding permissible levels of pollution, planning and zoning laws, permits issued by planning authorities, and so on. Beever's approach says little about how these considerations are to figure in his land use prioritisation view. Third, Beever's focus on disputes between two neighbours means he does not address the special difficulties that arise in situations involving many plaintiffs or defendants. Is it enough that a single person living under the flight path to a new runway can show he is engaged in a more fundamental land use (even if hundreds of others cannot) for the competing activity to be enjoined? In addition to this problem, such cases typically involve collective action problems that Beever's focus on one-on-one scenarios does not address.

<sup>120</sup> See, eg, Stephen Harland Butler, 'Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States' (2009) 97 *California Law Review* 1337; William Norris, 'Wind Farm Noise and Private Nuisance: Issues Arising in *Davis v Tinsley*' [2012] *Journal of Planning and Environment Law* 230; cf Senate Community Affairs References Committee, Parliament of Australia, *The Social and Economic Impact of Rural Wind Farms* (June 2011) 5–28.

<sup>121</sup> *Smith v Inco Ltd* [2011] 107 OR (3d) 321.

<sup>122</sup> *Sutherland v Vancouver International Airport Authority* (2002) 215 DLR (4<sup>th</sup>) 1 (British Columbia Court of Appeal).

These specific questions pertaining to Beever's views are facets of a more general question: what is the role of nuisance in the age of regulation? The existence of statute changes the common law by 'freeing' it from a need to serve as the main tool for dealing with the problem of conflicting land uses. When someone violates clear noise level regulations, it would be far more difficult (and therefore pointless) for her neighbour to prove a nuisance. The other side of the coin is that typically compliance with a regulation will also exonerate a defendant from a nuisance claim.

Does this render nuisance law redundant? I believe the best way to understand the contemporary role of nuisance law is as a means for dealing with those cases that fall between the cracks of regulation. As such, it has a largely residual, but not insignificant, role. Regulation will be inadequate when new technologies outpace regulators,<sup>123</sup> when new discoveries reveal new risks from existing technologies that call for swift action,<sup>124</sup> or as an *ex post* response to attempts to circumvent regulations by exploiting loopholes found in them. In addition, courts may also use nuisance to impose higher standards than those set by statute or by-law, if an adequate regulation is poorly enforced. More controversially, courts may use nuisance to set higher standards than those found in regulation if they have reason to suspect that regulatory capture has resulted in the adoption of excessively low standards. It is such scenarios that explain the point of maintaining a common law (*ex post*) form of regulation in an age dominated by the 'regulatory' (*ex ante*) form of regulation.

Beever may think all this is wrong — he may think that even in present times nuisance should be understood completely independently of regulation; or he may be highly suspicious (as some of his work suggests)<sup>125</sup> of government regulation and think that a better understanding of common law rules could better address many of the problems nowadays dealt with by regulation. Be all that as it may, it is still the case that to the extent he wishes to provide a useful account for nuisance law for our times, he has to take into account the realities of our present-day world. Without it, Beever's book will be difficult to apply to problems in the real world.

<sup>123</sup> See, eg, *Motherwell v Motherwell* (1976) 1 AR 47, in which nuisance was used to address harassment by constant phone calls.

<sup>124</sup> Cf *Baker v Quantum Clothing Group Ltd* [2011] 1 WLR 1003. This is a negligence case, but the idea seems equally applicable to nuisance.

<sup>125</sup> See Priel, 'Commutative or Distributive?', above n 7, 328–30.

## V ON THE ROLE OF LEGAL ACADEMICS

Cases tend to focus on the particular with relatively little information about the broader social context of the decision, so it is natural to think of them, especially those that deal with common law areas of law, as less sophisticated versions of the kind of exercises in a priori reflection that moral philosophers engage in when dealing with the morality governing the interactions between individuals. When one adopts this view, it is tempting to think that courts' appeals to policy are a failure of nerve, a departure from what they should be doing. Beever's *The Law of Private Nuisance* is premised on precisely this view, a view that in turn informs Beever's views on what legal academics should be doing. Their 'primary function', he says, 'is not simply to learn the decided cases but to make sense out of what they find. In that way, the legal academy performs the same function — aiding understanding — as the rest of the university and appropriately serves the rest of the legal community'.<sup>126</sup>

This is a far too narrow and old fashioned (19<sup>th</sup> century?) conception of the university. Among the most vibrant and important departments in today's university are engineering departments, and those who study and teach there will be puzzled by Beever's claims, because they will not recognise in them what they do. I would not want to restrict academic work to a single approach, but I think looking at what engineers do allows us to see what is, at the very least, a viable alternative to the role Beever assigns to legal academics, and one that I think can prove immensely illuminating.<sup>127</sup> I have already implicitly used an engineering perspective when I suggested that in thinking about what nuisance law is we should think about what it does, and that in thinking about what it does, we should think about nuisance in relation (and in contrast to) other available normative tools. More generally, my critique of Beever's approach can be described as an attempt to solve modern-day problems using ancient technology.

Adopting the engineering perspective can sometimes be used in support of a simpler standard that is easier to implement, rather than a complex one that is difficult for the courts to apply, even if the former is less accurate. One might therefore attempt to salvage Beever's approach by suggesting that it has the virtue of offering a simple rule, one that is easier to apply than any attempt

<sup>126</sup> Beever, *The Law of Private Nuisance*, above n 10, 2.

<sup>127</sup> See, eg, David Howarth, *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, 2013).

at evaluating the respective costs and benefits of conflicting activities. This is a familiar, 'engineering' argument against judicial appeal to 'policy', one that, ironically enough, often comes from those who would altogether dismiss the engineering analogy.<sup>128</sup>

While it sometimes makes sense to adopt a simple legal prescription even if it is a less accurate one (to prefer, in familiar terminology, a 'rule' over a 'standard'), such a choice has obvious downsides. The rule that a plaintiff loses if his last name starts with an earlier letter in the alphabet than the defendant's is clearly easy to apply, but it is not a good one. So the fact that questions of social welfare are more complex to decide than the question Beever wants judges to consider is not immediately a reason to prefer the latter. One should prefer a simpler decision rule if the costs of using it are smaller than the benefits of doing so. This is quite clearly not the case with Beever's proposals. First, by imitating trespass, the prioritisation view has the appearance of simplicity, but it is a misleading appearance. As we have seen, because of the difference in the kinds of intrusion involved in the two torts, the prioritisation interpretation of nuisance will make property ownership a far more complicated matter. Second, the claim that judges lack training or expertise in making policy decisions may sound convincing until one realises that judges also lack training and expertise in deciding in the abstract about land use priorities. I, for one, cannot think of anything in my legal education (or the time spent in law schools ever since) to help me answer this question. Third, it is not just that right now legal training does not cover the matter; the problem is that Beever is opaque on what judges *could* base their decisions on the matter on. Some easy cases, he says, are 'obvious', in others judges will have to rely on their 'judgement'. As we have seen, this results in an easily manipulable test.

<sup>128</sup> Beever argues that in deciding cases on the basis of policy 'courts involve themselves with concerns that lie beyond their institutional competence': Beever, *Rediscovering the Law of Negligence*, above n 5, 172. For someone who thinks courts have no training and evidence for making policy decisions, it is remarkable that Beever feels no compunctions about making his own policy judgments: 'it cannot be claimed that judicial law-making must be preferred because it is more efficient than the alternatives. It is not': Beever, *Forgotten Justice*, above n 6, 300. Beever provides not a shred of empirical evidence for this statement, and his argument in support of this view (premise 1: 'In many areas of life, rule in accordance with law ... has been replaced by rule in accordance with the commands of administrative bodies'; premise 2: 'This has been done primarily for reasons of efficiency') clearly does not support his conclusion: Beever, *Forgotten Justice*, above n 6, 300.

In comparison with 'policy' this approach fares worse. When judges rely on 'policy' they often (though not always) refer to facts about the likely effects of the decision, on the parties themselves and on others. At least in this sense, it is hard to see any principled reason why such facts should be excluded from the legal decision-making process. To the extent that appellate court decisions constitute general rules it would be perverse to ask courts to ignore the possible effects of their decisions. True, estimates of the effects of legal rules are often known with less than perfect certainty, but the same is true of most facts that courts determine when deciding cases. Moreover, unlike the obscure 'judgements' Beever wants judges to employ, such assessments are evidence-based, with recognised experts on which legislatures and courts can rely.

The more serious objection to the inclusion of these facts in judges' decision-making processes is institutional, namely that the judicial process is not well-designed to provide such facts reliably: parties' self-interest may encourage them to provide partial, self-serving data; in addition, the interests of those not part of the proceedings (but potentially affected by the decision) may be inadequately presented to the court. Courts around the world have recognised this problem and have partially addressed it by allowing 'friends of the court' to add their voice to judicial proceedings. That, however, is only a limited solution, and it is here that academics can prove particularly helpful to courts. Academics are being less than helpful when they encourage courts to ignore relevant information, especially when they do so by appealing to what the law used to be in the past (when living conditions were very different and information available to courts today was not available). The right lesson is that courts making general rules should be provided with better information and academics should think much more seriously about how to make sure the judges have that information in accessible form. It is here, not in a priori speculations, that legal academics can prove particularly useful to courts and to society.