

## Can Public Nuisance Law Protect Your Neighborhood from Big Banks?

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### I. INTRODUCTION

This article considers how the law of public nuisance might be applied to protect neighborhoods from the destructive forces of the mortgage crisis.<sup>2</sup> For more than thirty years I have been a close observer and a participant in community development at the neighborhood level in Cleveland, Ohio.<sup>3</sup> I now supervise a law school clinical practice that provides legal counsel to an array of nonprofit community development corporations that, for more than thirty-five years, have been renewing housing and neighborhood sustainability in a city going through major social and economic change.<sup>4</sup>

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2. The term “foreclosure crisis” is frequently used to describe the phenomenon that I refer to as the “mortgage crisis.” The difference between the two terms is significant. The increase in foreclosure actions has produced stresses on, and demonstrated inadequacies in, the various procedures for foreclosing the right of redemption held by borrowers, as well as the procedures for selling property that is subject to mortgage or judgment liens. The flood of foreclosures is only a symptom of a broader, more complicated set of problems that starts with bad lending and borrowing practices and is exacerbated by the pooling and servicing of mortgages for securitization of various investment products. This problem is further exacerbated by borrowers’ and lenders’ abandonment of care of the collateral, and results in the contamination of whole neighborhoods by the spread of abandoned, blighted houses. Foreclosure is but one part of this larger crisis.

3. The history of community development in Cleveland has been documented in numerous articles, lectures, and classes by my colleagues Professors Norman Krumholz and Dennis Keating. *See generally* REBUILDING URBAN NEIGHBORHOODS: ACHIEVEMENTS, OPPORTUNITIES, AND LIMITS (W. Dennis Keating & Norman Krumholz eds., 1999); Norman Krumholz & W. Dennis Keating et al., *The Long-Term Impact of CDCs on Urban Neighborhoods: Case Studies of Cleveland’s Broadway-Slavic Village and Tremont Neighborhoods*, COMMUNITY DEV., Dec. 2006, at 33; *see also*, Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland’s Neighborhoods*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237 (2008).

4. The Urban Development Law Clinic is an integral part of the academic program at Cleveland State University’s Cleveland-Marshall College of Law. Serving as a teaching law practice, the Urban Development Law Clinic provides advanced law students with supervised experience advising nonprofit community development organizations whose mission involves housing and community development. Students enrolled in the Urban Development Law Clinic have opportunities to: (a) engage in real estate, transactional, and corporate governance matters with small nonprofit community developers; (b) work on the development and enactment of public policies and programs designed to advance and protect the community development

No city has mounted a more determined effort to restore its housing stock and sustain neighborhood vitality than Cleveland.<sup>5</sup> This effort has included the investment of hundreds of millions of dollars in public funds and private donations, including resources provided by some of the banks whose business practices undercut the value and benefit of their investments.<sup>6</sup> It is within the context of that struggle that I look to the law of public nuisance as a tool to remedy the physical condition of real property standing in violation of local and state laws and, in addition, as a tool to stop the business practices of commercial property owners that perpetuate the harmful conditions prohibited by state and local nuisance abatement laws.

The profession of law involves engaged, informed, and skilled thinking coupled with disciplined action on matters critical to the welfare of human kind. The critical societal problems of each epoch set the agenda for the study and practice of law. With the advent of the mortgage crisis in the 1990s, the practice of community development law in Cleveland came to include, then to focus on, protecting neighborhood residents from the impact of abusive home financing schemes.<sup>7</sup> Representing both public and private clients, community

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investments of our clients; and (c) litigate nuisance abatement actions against absentee owners of abandoned and blighted buildings. See Cleveland-Marshall Coll. of Law, *Urban Development Law Clinic*, CLEV. ST. U., <http://www.law.csuohio.edu/academics/curriculum/clinics/urban.html> (last visited Jan. 12, 2011).

5. Since 2006, the City of Cleveland and Cuyahoga County have allocated resources aimed at restoring the housing stock in Cleveland, sustaining the vitality of local neighborhoods, and containing the contamination caused by public nuisance properties. In 2009, the Cuyahoga County Land Reutilization Corporation (CCLRC), colloquially known as the “Land Bank,” began operating in Cleveland as a strategic response to the mortgage crisis. Working with cities, federal, state, and local governments, mortgage lenders, and individual property owners, the CCLRC seeks to acquire troubled real estate and transition this property to productive use. In its first year, the CCLRC acquired title to more than 200 vacant properties, and through arrangements with the United States Department of Housing and Urban Development and the Federal National Mortgage Association, the CCLRC is expected to acquire an additional 700 to 1,000 properties in its second year of operation. See generally Cuyahoga Cnty. Land Reutilization Corp., CUYAHOGA LAND BANK, <http://www.cuyahogalandbank.org> (last visited Jan. 12, 2011).

6. Officials at Neighborhood Progress, Inc., reported to me that, since 1989, public, public interest, and for-profit entities have invested more than \$750 million in neighborhood development. Nuisance abatement efforts since 2005 have, to a large extent, been aimed at protecting their investment in better housing and residential neighborhoods. See generally NEIGHBORHOOD PROGRESS, INC., CELEBRATING 20 YEARS (2009), [http://www.neighborhoodprogress.org/uploaded\\_pics/NPI\\_Report\\_June\\_2009\\_file\\_1249651518.pdf](http://www.neighborhoodprogress.org/uploaded_pics/NPI_Report_June_2009_file_1249651518.pdf).

7. Although the first symptoms of the mortgage crisis—the exponential increase in real estate prices over a short period of time, the increased use of exotic and nontraditional mortgage products, and the prevalent business practice of originating “no-documentation mortgages” or “no-down-payment mortgages”—were observed in many housing markets during the early part of the twenty-first century, their original catalyst stems, in part, from the Federal Housing Enterprises Financial Safety and Soundness Act (FHEFSSA), passed by Congress in 1992. See Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012 (codified as amended at 12 U.S.C. §§ 4501-4642 (2000)). Most notably, FHEFSSA established low and moderate-income housing goals for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, colloquially known as Fannie Mae and Freddie Mac, respectively. See *id.* § 1302 (codified at 12 U.S.C. § 4501(7)). Although there are many consequences of establishing these housing goals, FHEFSSA largely facilitated the creation of a liquid secondary market for mortgage loans originated to low-income and moderate-income borrowers. It thereby confirmed the plausibility of a secondary market for mortgages of all types, including mortgages

development lawyers in Cleveland were tasked with protecting decades of housing and community renewal from the rising tide of vacant and abandoned houses, which threatened the health, safety, and welfare of residents and the public. That effort led to new state and local public policies and to creative use of both criminal and civil litigation using public nuisance abatement doctrine. More generally, the task raised the question of whether, and in what capacity, nuisance law can effectively abate nuisance conditions and the business practices that destroy stable neighborhoods. This article attempts to illustrate the view that knowledge of and practical experience with public nuisance law is critical to the discussion of the topic.

The article begins by surveying the litigation experience in Cleveland and Cincinnati, Ohio, over the past twelve years—a period during which nuisance abatement by traditional housing code enforcement to remedy serious residential nuisances became obsolete and insufficient. The second part looks at the development of the doctrine of public nuisance and its current status in both scholarly and judicial writing. The third part applies a test for public nuisance litigation advocated by opponents of public nuisance litigation against producers of products and byproducts that do harm. The question is whether bank business practices of owning and maintaining nuisance real estate would be actionable under this test intended to limit the application of public nuisance doctrine. The final part offers an assessment of the possibility of using public nuisance law to protect neighborhoods that are being threatened by large scale bank-owned housing.

## II. TWELVE YEARS OF NUISANCE ABATEMENT LITIGATION IN THE MORTGAGE CRISIS

### A. *The Insufficiency of Traditional Housing Code Enforcement*<sup>8</sup>

The prevailing legal process for abating public nuisances starts with inspection of dwellings and issuance of notices of violations to the parties responsible along with an order to comply with the statute or ordinance prohibiting the nuisance. Failure to comply or to successfully appeal the order results in a summons to an administrative or judicial hearing on the issue of the failure to comply with the administrative order.<sup>9</sup> This exercise of the police

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secured by commercial and residential properties and mortgages issued to both prime and subprime borrowers. By the late 1990s, many cases involving binge-buying investors in distressed houses purchased with inflated loans were showing up in multiple cases on the foreclosure and housing code violation dockets in Cleveland.

8. I have benefited greatly from a decade of collegial collaboration with Joe Schilling; he wrote an essential work on code enforcement. See generally Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101 (2009).

9. The charge is failure to comply with the order to abate nuisance conditions as required by law.

power to protect the public health, safety, and welfare imposes criminal penalties for failing to comply with the requirements of specific codes as well as failing to comply with a police order. The court in such proceedings has jurisdiction over the individual or individuals responsible for the property condition and for the failure to comply, but lacks jurisdiction over the property itself. The court may sentence a person for the offense—to a fine and sometimes jail time—but the nuisance conditions are not abated.

Criminal enforcement of housing, zoning, health, and safety codes has certain limitations. The purposes of criminal prosecution for noncompliance with housing codes are punishment and behavior modification. Prosecution may elicit remedial compliance by a defendant who wants to avoid or mitigate a sentence.<sup>10</sup> That assumption generally works well in circumstances where homeowners live or work in the property where code violations are cited and have the means to comply. In fact, the rate of voluntary compliance with housing and building code citations has traditionally been very high. However, neither that assumption nor the reliability of voluntary compliance is the norm in neighborhoods with a high degree of mortgage failures, absentee owners, and vacant houses. Indeed, the possibility of achieving any meaningful compliance with the traditional policing methods for housing, health, and safety codes diminishes where owners are not present or are not financially able to maintain their houses.<sup>11</sup>

Traditional code enforcement methods designed for maintenance of owner-occupied housing are essentially obsolete in the neighborhoods most affected by mortgage failures. Vast numbers of houses serving as mortgage collateral are chronically vacant and the repair of dwellings falls on owners who may lack the means or the will to keep a house from becoming dangerously harmful.<sup>12</sup> Abandoned, vacant houses in the process of foreclosure are a

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10. See *City of Cleveland v. Franklin Inn, Ltd.*, No. 2000 CRB 54786, slip op. at 1 (Ohio Cleveland Mun. Ct. Housing Div. 2003), *aff'd* 2005–Ohio–508 (Ct. App.).

The primary goal of most sentences imposed in the Housing Court is to encourage owners to bring their properties into compliance with city codes despite the fact that the owners failed to do so within the time the city set for compliance in a violation notice issued to the owner. Therefore, when sentencing a defendant, the court first considers whether the defendant has brought the property up to code. If not, the court generally imposes a sentence it believes sufficient to motivate the owner to make the needed repairs.

*Id.* This statement of judicial policy is restated in numerous judgment entries of the housing court over the past seven years.

11. See Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 198 (2008); see also James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210, 214 (2004).

12. See RANDELL MCSHEPARD & FRAN STEWART, POLICYBRIDGE, *REBUILDING BLOCKS: EFFORTS TO REVIVE CLEVELAND MUST START BY TREATING WHAT AILS NEIGHBORHOODS* 6 (2009), <http://www.policy->

communicable disease that diminishes the benefit to neighbors of keeping up or restoring their own houses.<sup>13</sup> Furthermore, although judges generally prefer compliance rather than punishment in housing code enforcement cases, many are frustrated with the limited punishments available to force abatement of serious and expensive nuisance conditions. Finally, the volume and the increased level of work required to inspect dwellings, cite owners, and bring a criminal prosecution is a growing financial burden on municipalities.<sup>14</sup> Effective code enforcement to require compliance with nuisance abatement codes in any large American city is a very rare thing. The spreading scourge of abandoned vacant housing is overwhelming the archaic and arthritic methods of traditional code enforcement. In the face of this crisis, new housing code enforcement methods and strategies are required.

### B. Ohio's Civil Residential Nuisance Abatement Statute

An alternative to criminal prosecution of serious nuisance conditions is the civil action. In civil cases, statutes or the common law provide injunctive relief whereby the court directs compliance with its order to abate a nuisance condition.<sup>15</sup> Civil liability for public nuisances does not focus on punishment; rather, civil actions expand the available tools that a court may use to directly deal with the conduct causing nuisance conditions and to remedy the offending conditions. Permanent injunctions by a court eliminate the necessity of multiple prosecutions for repeated offenses. Additionally, because a court in a civil action has jurisdiction over property and persons, it has a sure way of permanently abating nuisance conditions. It is an action available to both municipal prosecutors and private persons. Many states and municipalities have codified laws that grant private persons the right to bring suit individually or as a private attorney general for an injunction to abate conditions the statute declares to be public nuisances.<sup>16</sup>

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bridge.org/uploaded\_files/NeighborhoodReport\_10\_05\_09\_file\_1255630039.pdf (concluding up to 20% of residential properties in Cleveland's inner-city neighborhoods vacant and abandoned).

13. One recent study assessed the impact of foreclosures on neighboring residential property values in Cuyahoga County. See generally Timothy F. Kobie, Residential Foreclosures' Impact on Nearby Single-Family Residential Properties: A New Approach to the Spatial and Temporal Dimensions (July 28, 2009) (unpublished Ph.D. dissertation, Levin College of Urban Affairs, Cleveland State University), <http://etd.ohiolink.edu/send-pdf.cgi/Kobie%20Timothy%20F.pdf?csu1268073662>. Utilizing a hedonic pricing model, the study evaluated this relationship in ninety-day increments beginning in 2005. See *id.* at 39, 68-69. The study revealed that for properties valued at \$140,000, a surrounding foreclosure will erode property values by an average of \$2400 over a one-year period, or 1.66%, while a corresponding sheriff's sale will erode property values, on average, by \$4000, or 2.89%. See *id.* at 108 tbl.X.

14. Alan C. Weinstein, *Current and Future Challenges to Local Government Posed by the Housing and Credit Crisis*, 2 ALB. GOV'T L. REV. 259, 267-68 (2009).

15. See, e.g., OHIO REV. CODE ANN. § 3767.41(C)(1) (West 2010) (granting court power to abate nuisance); *Ypsilanti Charter Twp. v. Kircher*, 761 N.W.2d 761, 775 (Mich. Ct. App. 2008) (discussing court's legitimate power to abate public nuisance).

16. See, e.g., OHIO REV. CODE ANN. § 3767.41 (authorizing private cause of action for nuisance under

Ohio's residential nuisance abatement statute is an example of a state statute authorizing civil nuisance abatement actions.<sup>17</sup> Not only does the statute authorize civil actions to abate public nuisance conditions, it authorizes non-governmental persons to be plaintiffs in the action along with the municipal government.<sup>18</sup> This is a clear departure from the traditional notion that only the sovereign may vindicate rights belonging to the public. Unlike the enforcement of building and housing codes in criminal actions against owners, a nuisance abatement action initiated pursuant to the Ohio statute is a civil action whereby the court—either following the plaintiff's motion or *sua sponte*—can issue an injunction requiring the property owner to abate any adjudicated nuisance conditions or issue any order necessary or appropriate to cause the abatement of the public nuisance.<sup>19</sup> Additionally, either in response to a plaintiff's motion or through its own action, the court may offer to all parties having an interest in the property an opportunity to undertake the work and furnish the materials necessary to abate the public nuisance conditions or appoint a receiver to take control of the nuisance property and implement a court-approved abatement plan.<sup>20</sup>

Key provisions of the statute start with definitions that narrow its application to residential buildings<sup>21</sup> not occupied by the owner primarily as a residence and that are in a nuisance condition<sup>22</sup> making them harmful to the public and

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state code); SAN LUIS OBISPO, CAL., MUNICIPAL CODE § 8.24.190 (2010) (authorizing private cause of action for nuisance under city code).

17. OHIO REV. CODE ANN. § 3767.41.

18. *See id.* § 3767.41(C)(1). Additionally, either in response to a plaintiff's motion, or through the court's own action, the court may offer to all parties having an interest in the property an opportunity to undertake the work and furnish the materials necessary to abate the public nuisance conditions or appoint a receiver to take control of the nuisance property and implement a court approved abatement plan. *Id.* § 3767.41(C)(2).

19. *See id.* § 3767.03.

20. *Id.* § 3767.41(C)(2).

21. OHIO REV. CODE ANN. § 3767.41(A)(1) (West 2010) (defining "building").

"Building" means, except as otherwise provided in this division, any building or structure that is used or intended to be used for residential purposes. "Building" includes, but is not limited to, a building or structure in which any floor is used for retail stores, shops, salesrooms, markets, or similar commercial uses, or for offices, banks, civic administration activities, professional services, or similar business or civic uses, and in which the other floors are used, or designed and intended to be used, for residential purposes. "Building" does not include any building or structure that is occupied by its owner and that contains three or fewer residential units.

*Id.* I suggested amending the statute to expand and augment this definition to include other types of buildings and vacant lots, but the legislative proposals to which the amendment was attached did not survive committee hearings.

22. *See id.* § 3767.41(A)(2) (defining "public nuisance" in two contexts and distinguishing public nuisance as it applies to subsidized housing).

"Public nuisance" means a building that is a menace to the public health, welfare, or safety; that is structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire

unfit for habitation. The statute does not apply to ordinary wear and tear acceptable to a reasonable homeowner in his or her residence. The statute defines abatement to mean either a complete rehabilitation or demolition of a building found to be a public nuisance.<sup>23</sup> Its definition of “neighbor” recognizes as neighbors only owners of property within 500 feet of the property subject to the nuisance allegation.<sup>24</sup> A neighboring tenant is not recognized and cannot be a plaintiff in the action. However, residential tenants in the nuisance building, municipalities or townships, and nonprofit corporations having a goal of improvement of housing conditions in the county or municipality where the building is located are all authorized to sue.<sup>25</sup> The specific inclusion of private persons is a significant departure from the traditional notion that only the sovereign could vindicate the rights of the public. Giving private persons, especially nonprofit developers, the power to be plaintiffs is a critical provision of the statute.

A court upholds the due process rights of others with a legal interest in the property because the notice required by the statute is given in accordance with the standards the U.S. Supreme Court mandated by its 1983 decision in *Mennonite Board of Missions v. Adams*<sup>26</sup> and the case’s progeny.<sup>27</sup> This is

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hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable; or that, in relation to its existing use, constitutes a hazard to the public health, welfare, or safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment.

*Id.* § 3767.41(A)(2)(a) (defining “public nuisance” outside of subsidized housing context).

23. *See id.* § 3767.41(A)(3) (defining “abatement”).

“Abate” or “abatement” in connection with any building means the removal or correction of any conditions that constitute a public nuisance and the making of any other improvements that are needed to effect a rehabilitation of the building that is consistent with maintaining safe and habitable conditions over its remaining useful life. “Abatement” does not include the closing or boarding up of any building that is found to be a public nuisance.

*Id.*

24. *See id.* § 3767.41(A)(5).

25. *See id.* § 3767.41(B)(1)(a) (conveying standing to neighbors, tenants, municipalities, and nonprofits).

In any civil action to enforce any local building, housing . . . or safety code . . . by a municipal corporation or township in which the building involved is located, by any neighbor, tenant, or by a nonprofit corporation that is duly organized and has as one of its goals the improvement of housing conditions in the county or municipal corporation in which the building involved is located, if a building is alleged to be a public nuisance, the municipal corporation, township, neighbor, tenant, or nonprofit corporation may apply in its complaint for an injunction or . . . the appointment of a receiver . . . or for both . . . .

*Id.*

26. 462 U.S. 791 (1983).

27. *See generally id.* The *Mennonite Board* decision confirmed that in order to satisfy the Due Process Clause of the Fourteenth Amendment, only reasonably identifiable mortgagees are entitled to receive more than constructive notice of a pending foreclosure sale. *Id.* at 798. In particular, the Supreme Court confirmed that providing or attempting to provide actual notice is a precondition to satisfying a mortgagee’s due process

important for the remedy phase of the public nuisance abatement action because owners—and later, lien holders—have an opportunity to abate the public nuisance. The owner's failure to answer the complaint or unwillingness to comply with court-ordered abatement gives rise to the truly significant feature of this statute. If no one with a legal interest in the property is willing or able to abate the nuisance conditions, the court can then appoint a receiver to undertake that task at the owner's expense.<sup>28</sup> The statute entitles a receiver who completes the court-approved rehabilitation but is not paid to a judgment lien for all the costs of rehabilitation, plus a fee.<sup>29</sup> That judgment lien has priority over all other liens, including all mortgages as well as taxes and judgments of any state or local government.<sup>30</sup>

The provision of financing from a source other than a party with a legal interest in the property is made possible by granting a first-priority lien on the property in return. Without this provision, the statute would be ineffective and, as a result, the taxpayers would be stuck with the costs of abatement and the public and neighbors subjected to continued harm. When the court grants a receiver a judgment lien, the receiver becomes a judgment creditor and may execute on the judgment by foreclosure and sale or by a judicial sale under the nuisance abatement statute's provisions.<sup>31</sup> Thus, the procedure required for nuisance abatement directs that, after receiving notice, the abandonment of financial responsibility for the nuisance by those with a legal interest be placed on the record. The result of this abandonment, after due notice, is a reordering, by operation of the statute, of the priority of interests in favor of the external source of financing of the nuisance abatement.

### C. Early Cases

Nonprofit development corporations in Cleveland participating in the Cleveland Housing Receivership Project filed the earliest cases brought under *Ohio Revised Code* section 3767.41 in the late 1980s. The Cleveland Housing Receivership Project was a pilot program established to demonstrate the effectiveness of the new statute. The nonprofit corporation that brought the suit targeted vacant houses in a nuisance condition as candidates for rehabilitation. Grants and borrowed funds initially advanced the legal costs and the

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rights. *Id.* at 799-800; *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (affirming due process requires notice reasonably calculated to inform interested parties and opportunity to object).

28. *See* OHIO REV. CODE ANN. § 3767.41(C)(2) (West 2010) (authorizing appointment of receiver). The statute identifies eligibility requirements for becoming a receiver, specifies the receiver's powers and duties, and provides receivers with immunity from personal liability except if they engage in misfeasance, malfeasance, or nonfeasance in the performance of their duties. *See id.* § 3767.41(C)-(G). The statute also specifies the contents of the financial and construction plan prior to the receiver's appointment. *See id.*

29. *See id.* § 3767.41(H)(2).

30. *Id.*

31. *See id.* § 3767.41(I) (authorizing court-supervised sale and distribution of proceeds); *see also id.* § 3767.03.



rehabilitation expenses incurred by the plaintiff-receivers. The nonprofit receiver then acquired the property by way of a foreclosure auction using its receiver's lien as the credit bid at the sheriff's sale.<sup>32</sup> After obtaining title to the rehabilitated houses, the nonprofit receiver's goal was to sell them to moderate-income buyers committed to occupying the house.

These initial cases proved successful as a means of converting an abandoned, vacant nuisance into an asset occupied and maintained by a family with limited income. The targeted houses were chosen for their potential rehabilitation and resale. Owners of the targeted houses were either unable or unwilling to abate their nuisances and did not contest the litigation by the nonprofit developers. Nor did mortgagees assert any defenses or cross-claims. As implied by its name, Cleveland Housing Receivership Project, the presumption was that these cases would all result in court-ordered receivership. The key factor for the plaintiffs and those financing the rehabilitation of properties in these cases is the receiver's acquisition of control of vacant, abandoned properties in order to obtain a clear title to convey to a new homeowner.

Lawyers and laypeople alike often refer to the nuisance abatement statute as "the receivership statute" and to nuisance abatement cases as "receivership cases." The question is frequently posed to me, "Can we do a receivership on this house?" There is a tendency to ignore the role of nuisance abatement and code enforcement as a legal prerequisite to the plaintiff's primary goal of controlling and rehabilitating the targeted property. The power exercised by a court to seize control of the property and reorder the lien priority to compensate for the expense of nuisance abatement is an exercise of the police power to protect public health, safety, and welfare. In that regard, it is distinct from other types of receiverships established to preserve an asset during a dispute between parties or during a crisis. It is also distinct from a taking. The receivership is a means to nuisance abatement, not an end in itself.

These initial cases were brought in the Housing Court Division of the Cleveland Municipal Court.<sup>33</sup> Without exception, the court found the subject

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32. The process is analogous to how a bank would bid its mortgage lien at a foreclosure sale, in that the nonprofit organization would institute a bid at the foreclosure sale in an amount equal to the value of its receivership lien.

33. The *Ohio Revised Code* provides that the housing court division of a municipal court is afforded exclusive jurisdiction to hear public nuisance abatement actions. There are currently only two cities in Ohio—Cleveland and Toledo—that have established a housing court division within their respective municipal court systems. See OHIO REV. CODE ANN. § 1901.181(A)(1); see also *State ex rel. Davet v. Pianka*, No. 76337, 1999 WL 754511, at \*4 (Ohio Ct. App. Sept. 16, 1999) (interpreting section 1901.181(A)(1) and establishing the jurisdictional boundaries of the Housing Court Division of the Cleveland Municipal Court). See generally, Robert Jaquay, *Cleveland's Housing Court*, SHELTERFORCE, May/June 2005, <http://www.nhi.org/online/issues/141/housingcourt.html> (describing housing court's role in spurring rehabilitation of one-time nuisance properties). In pertinent part, section 1901.181(A)(1) provides that the housing division of a municipal court "has exclusive jurisdiction . . . in any civil action as described in division (B)(1) of section 3767.41 of the Revised Code that relates to a public nuisance." OHIO REV. CODE ANN. § 1901.181(A)(1).

houses to be public nuisances and, because no owner or lien holder appeared in the cases, appointed the plaintiff nonprofit development corporation to be the receiver with orders to abate the nuisance conditions by rehabilitating the properties in accordance with a court-approved construction and financing plan.<sup>34</sup> Because the provisions of section 3767.41, dealing with judicial sales of property at the request of the receiver holding a judgment lien, do not provide the purchaser in the judicial sale with a title clear of mortgages, it was necessary in these early cases to transfer the receiver's judgment to the common pleas court and commence a separate foreclosure action during the pendency of the nuisance abatement case in the Housing Division of the Cleveland Municipal Court.<sup>35</sup> Until the receiver's costs and fees were paid, the nuisance abatement case could not be closed. The lack of a title-clearing sale under the section 3767.41 procedures meant there had to be two cases in which two different courts simultaneously had jurisdiction over the same property. The awkwardness of this situation was partially mitigated by the fact that all persons with a legal interest in the property had abandoned that interest and defaulted—first in the nuisance abatement case and then again in the foreclosure case. However, the additional legal costs had to be absorbed by the receiver in order to acquire complete title to the property.<sup>36</sup>

The nuisance abatement cases, litigated with the support of the Cleveland Housing Receivership Project, demonstrate that when dealing with individual properties needing substantial rehabilitation, the requisite financing usually exceeds the fair market value of the house when the abatement is finished. Without the subsidy provided by the Cleveland Housing Receivership Project, the nuisance conditions would not have been replaced by sustainable owner-occupied houses. This limitation became clear when, after the funding for the receivership project ended, nonprofit development corporations wanting to use the procedure for acquisition of dilapidated housing were unable to finance the legal and construction costs necessary to do the job. Few cases were filed in the 1990s.

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34. A party's obligation to absorb substantial legal fees and costs prior to being appointed a receiver is a deterrent to bringing cases where the facts of nuisance conditions would be disputed. I am not aware of any section 3767.41 case in Ohio where the facts of nuisance conditions were disputed.

35. Ohio's residential nuisance abatement statute provides that in a judicial sale, the purchaser of a property that was previously controlled by a receiver assumes title to the property free and clear of all liens owed to the state that are not satisfied by the judicial sale. *See* OHIO REV. CODE ANN. § 3767.41(K) (West 2010). Comparatively, the Ohio statute also provides that "[a]ll other liens and encumbrances with respect to the building and the property shall survive the [judicial] sale." *Id.*

36. This situation changed when the housing court determined that Ohio legislatively granted the Cleveland Municipal Court, and only that municipal court, exclusive jurisdiction in foreclosure cases within its geographic jurisdiction. It issued a local rule to guide foreclosure procedures and proceeded to hear foreclosure cases in addition to the judicial sales permitted by section 3767.41. The housing court is not used for mortgage foreclosures, however, probably because the court's foreclosure case management involves more work and costs to plaintiffs than is the case in the common pleas court.

*D. Post-1999 Cases*

In September 1999, Slavic Village Development Corporation, a neighborhood-based organization in Cleveland, asked our law school clinic to help with a more complicated nuisance situation. This situation involved an owner who invested in thirteen residential properties, varying from one-family dwellings to four-family dwellings. The owner was simultaneously a party to criminal code enforcement proceedings in the Cleveland Municipal Housing Court, foreclosure proceedings in the common pleas court, and bankruptcy proceedings in bankruptcy court. Each of these thirteen houses was in a dilapidated condition, with some occupied by squatters. Each blighted house was mortgaged well beyond its fair market value, even if it had been in good condition.<sup>37</sup> Moreover, each of these properties had been encumbered with a loan greater than the inflated purchase price of the houses so that there was no equity at all.<sup>38</sup> The trustee in bankruptcy abandoned the houses to the mortgagees. The property owner, desperate to rid himself of these liabilities, offered to give the thirteen properties to Slavic Village Development Corporation. That was impossible, however, because of the outstanding mortgages encumbering the titles.

The proposed solution was for Slavic Village Development Corporation to file a nuisance abatement action against the owner on all thirteen properties.<sup>39</sup> The owner appeared in housing court for an expedited hearing on a preliminary injunction and confirmed for the record that all of his properties were in a nuisance condition as defined in the Ohio residential nuisance abatement statute and that he had no means to abate the nuisance condition. The court then issued an emergency order giving the plaintiff control of each of the houses while the various mortgagees completed foreclosures. Because these properties were either subject to other courts' jurisdiction in foreclosure proceedings, or soon would be, the housing court did not order rehabilitation, but it did supervise the securing and maintenance of the houses to protect the neighbors. While the houses were subject to foreclosure proceedings controlled by creditors, they were checked, re-boarded when necessary, and otherwise kept free of trash, graffiti, and criminal activity by the development corporation's

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37. Records indicate that some of the mortgages were granted after the borrower had already stopped payment on earlier loans. Only one or two payments were made on some of the loans.

38. Fraudulent mortgaging schemes involving "investors" were rampant in Cleveland by this time, but those of us who saw it did not know then how extensive it was, nor did we find much help from law enforcement agencies at that time. Gradually, we learned that this property flipping and mortgage fraud was perpetuated by a ring of affiliated individuals who would repeatedly buy and sell a specific home, or group of cheap houses, to jack up the price until it could be mortgaged by a duped buyer with credit, or by falsifying loan documents, for an inflated value with proceeds of the loan benefiting everyone in the group.

39. I was counsel of record for the plaintiff in this case with the clinic students providing assistance. One of those students, Heather Veljkovic, was hired by the housing court upon her graduation and is now, a decade later, a magistrate.

staff. The court granted the receiver a judgment for most of its cash expenditures up to a \$500 limit. Within three years, all the nuisance conditions were abated. Eventually, the city demolished most of the houses, which left the lots vacant of any buildings. Three houses were sold at sheriff's sales and rehabilitated. A few of the titles to vacant lots currently remain in the owner's name because the mortgagees abandoned their interest without releasing the lien.<sup>40</sup>

This case revealed to the plaintiff and its counsel the enormity and complexity of predatory business operations in the mortgage financing industry and the connection of those business operations to the spread of blight in low-income neighborhoods. We saw investors, borrowers, appraisers, and mortgage brokers defrauding lenders who did not seem very concerned about being robbed. Unscrupulous mortgage brokers peddled bad loans to naïve and deluded buyers often motivated by seminars, television infomercials, and internet sites, which extolled the ease of making money fast in the real estate market. Lenders were willing to loan money without regard to the condition of the collateral and without attention to the buyers' inability or lack of intention to repay the loan. The new system of packaging bundles of loans as securities left a void between the mortgaged property and the mortgagee, except for the purpose of allowing the mortgagee to collect on loan guarantees or insurance after the borrower's default.<sup>41</sup>

Soon after 2005, Slavic Village in Cleveland was internationally regarded as the epicenter of the mortgage crisis.<sup>42</sup> A rising tide of abandoned, vacant houses undermined the development corporation's successes in rehabilitating old houses and stimulating new, market-rate construction. Whole streets were

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40. This is a condition I call a "toxic title." No one can obtain a financial benefit from any transaction or legal action. Abandoned real estate eventually becomes property tax delinquent, which leads to a tax foreclosure within two to three years. Problems of service on various obscure, remote, or nonexistent debt collectors, who ended up with the mortgage, delay title-clearing tax foreclosures on abandoned property.

41. There are numerous recent books and articles that explain, after the fact, how America's mortgage market came to be such a disaster. *See generally, e.g.,* DAN IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET (2009) (containing excellent description and analysis of mortgage crisis); James Charles Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 433, 436-37 (2010) (noting distance between mortgage creditors and their collateral limits likelihood of scrutiny of both borrower and collateral). Kurt Eggert, Professor of Law at Chapman University, after more than a decade of research on the subject, concludes that "[a] central element of the subprime lending model in the age of securitization is that many subprime lenders were designed so that they could profitably fail, at least profitably for the individuals who operated the subprime lending institutions." Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1263 (2009).

42. *See* CLEVELAND VS. WALL STREET (Saga-Productions et al. 2010); *see also* Lind, *supra* note 3; Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES, Mar. 4, 2009, <http://www.nytimes.com/2009/03/08/magazine/08Foreclosure-t.html>. *Cleveland vs. Wall Street*, by Swiss director Jean-Stephane Bron, was shot documentary-style during several trips to Cleveland and spotlights foreclosures and evictions in Cleveland's Slavic Village neighborhood. *See* CLEVELAND VS. WALL STREET, *supra*. The film was entered in the Cannes International Film Festival in April, 2010.

vacant. Many owners who had the means to do so fled and either abandoned their houses or sold them to speculators to use for fast-money business schemes. Bank debt collectors purchased and repossessed houses at sheriff's sales for resale to a new type of speculator: out-of-town investors who, in some cases, live on the other side of the planet. In 2005, the housing data that could be gathered showed a grim picture of mounting nuisance conditions—abandoned, vacant houses stripped of fixtures, plumbing, siding, or anything else portable. Predatory and subprime lending, skyrocketing foreclosure filings, and systematic failure to comply with local health, safety, and housing codes essential to stable neighborhoods pervaded the inner city. By that year, this phenomenon was a major force, not just in Cleveland but also in virtually every major midwestern city and older suburb. Cleveland's nonprofit development leadership recognized this force and its threat to three decades of their neighborhood stabilization and rebuilding efforts. Control and abatement of nuisance conditions required a strategic approach with substantial resources just to protect the progress made in rebuilding neighborhoods.

*E. The Rising Tide of Abandoned, Vacant Bank Real Estate Owned (REO) Housing*

For neighborhoods and cities trying to cope with abandoned housing, the most frustrating part of the mortgage crisis is when banks as debt collectors take title to the residence at the foreclosure sale. The property then goes into a state of legal limbo in which its condition is not regarded as anyone's responsibility. In order to grasp the nature of the problem regarding houses owned by banks, one must start with the "pooling and servicing agreement" (PSA) and the role of servicers.<sup>43</sup> Each pool of mortgage loans is managed or serviced in accord with a master agreement. The agreement provides for one or more servicers to exercise authority on behalf of, and for the benefit of, a trustee for the loan pool and the investors who purchased fractional interests in the entire pool. The PSA delegates to servicers the responsibility to collect payments, escrow taxes, and insurance, and to handle loss mitigation, foreclosure, and REO administration—all in the best interest of the investment pool members, none of whom have an interest in a specific loan or its collateral. The servicer may, in the event of default, acquire the property in the name of the trustee of the loan pool. The huge surge of foreclosures in the

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43. See generally Stergios Theologides, *Servicing REO Properties: The Servicer's Role and Incentives*, in FED. RESERVE BANKS OF BOS. & CLEVELAND & THE FED. RESERVE BD., *REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION* 77 (2010) [hereinafter *REO & VACANT PROPERTIES*], available at [http://www.clevelandfed.org/Community\\_Development/publications/REO/REO\\_WEB.pdf](http://www.clevelandfed.org/Community_Development/publications/REO/REO_WEB.pdf). Theologides is senior vice president and general counsel for CoreLogic, a provider of consumer, financial, and property information, analytics, and services to business and government. *Id.* at 84. He previously was general counsel for financial institutions making and holding subprime and securitized loans. *Id.*

mortgage crisis has resulted in significant growth in the number of properties that banks repossess at the end of foreclosure proceedings. The weakened housing market has too few buyers of used houses at this time. Moreover, servicers are frequently finding that repossessed houses need significant repair due to borrowers' failure to maintain them or the natural deterioration of chronically empty buildings.

When servicers of REO properties find their contractual responsibility for the banks' properties involves the expenditure of significant amounts for repairs in order to comply with local housing codes, they protect their profit and that of the banks by abandoning their responsibility to comply with housing codes.<sup>44</sup> As a leading expert points out,

This is an important area in which the interests of local governments and nonprofits diverge from the contractual obligations of servicers. If a servicer reasonably believes future repairs, maintenance, and improvements would be "nonrecoverable" advances, it would arguably be breaching its PSA obligations if it were to incur those expenses rather than execute a rapid "as is" sale or even avoid taking title.<sup>45</sup>

Maintaining seriously defective property in a nuisance condition for months waiting for sheriffs' deeds to be issued and for buyers to record their deeds of purchase means that servicers are in violation of state and local laws against maintaining housing in a nuisance condition. Frank Ford, a senior vice president of a Cleveland nonprofit community developer with millions of dollars invested in inner-city housing and neighborhood renewal says, "What we now have taking place in Cleveland is an 'REO Race', i.e. can financial institutions 'unload' or 'dump' their liability before the local municipal code enforcement officials catch up with them?"<sup>46</sup> Research on the growth and the disposition of bank REO in Cleveland has documented that banks buy and own thousands of houses appraised for sale at \$10,000 or less and then sell them in bulk sales in "as is" condition for extremely distressed prices.<sup>47</sup> This phenomenon, occurring in economically and demographically weak markets, results in a large growth in the number of houses owned by banks and maintained unlawfully in a public nuisance condition until sold so that investors in mortgage-backed securities will make more money. For local code enforcement agencies and nonprofit developers investing in neighborhood

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44. *Id.* at 79-80.

45. *Id.* at 84-85 n.15.

46. Frank Ford, *Cleaning Up After the Foreclosure Tsunami: Tackling Bank Walk-Aways and Vulture Investors*, SHELTERFORCE, Fall/Winter 2009, [http://www.shelterforce.org/article/1864/cleaning\\_up\\_after\\_the\\_foreclosure\\_tsunami\\_tackling\\_bank\\_walk-aways\\_and\\_vult](http://www.shelterforce.org/article/1864/cleaning_up_after_the_foreclosure_tsunami_tackling_bank_walk-aways_and_vult).

47. See Claudia Coulton et al., *REO and Beyond: The Aftermath of the Foreclosure Crisis in Cuyahoga County, Ohio*, in *REO & VACANT PROPERTIES*, *supra* note 43, at 47, 50.

renewal, the profit financial institutions make by illegally compromising the public's legal right to health, safety, and welfare becomes a forced subsidy by taxpayers, who are stuck with nuisance abatement costs, and by neighbors, whose houses lose value by being near abandoned, vacant houses titled to banks.<sup>48</sup>

*F. Neighborhood Progress, Inc., and Land Assembly for Neighborhood Renewal*

In 2004, Neighborhood Progress, Inc. (NPI), a Cleveland-based nonprofit community development financial and technical assistance intermediary, developed what it calls the Land Assembly Program.<sup>49</sup> It is essentially a multidisciplinary program that provides detailed property information, financial assistance, and legal services to a set of high-performing, neighborhood-based nonprofit development corporations. The program deploys technical assistance to help those neighborhood developers to systematically acquire and assemble vacant, abandoned, tax-delinquent properties needed to complete major housing developments already underway or to remove blight that interferes with marketing rehabilitated or newly constructed housing. Acquisition methods vary depending on the circumstances of individual properties. A key feature of this program is the assembly and analysis of all available records about the property and those persons with a legal interest in it. Hundreds of individual houses or lots in seven different neighborhoods were painstakingly researched. Armed with information, NPI and its affiliates can execute a number of options to deal with distressed houses. Willing and able homeowners or landlords on designated streets are offered help with repairs and improvements. Absentee owners are approached with offers, financed with grants or loans, to buy their homes.<sup>50</sup> Assistance is provided to the city's code enforcement officials in support of requests for inspection and citation of vacant, abandoned houses.<sup>51</sup>

A significant component of the Land Assembly Program is the use of the Ohio residential nuisance abatement statute where vacant houses or apartments buildings are totally abandoned and unmarketable. Between 2005 and 2008, more than forty suits were filed. In nearly all of the cases, the building was

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48. Ford, *supra* note 46. Alex Kotlowitz further described the impact of this business practice at the neighborhood level in a *New York Times* article entitled "All Boarded Up," published in the *New York Times Sunday Magazine* on March 4, 2009. See Kotlowitz, *supra* note 42. Kotlowitz focused attention on the personal stories of people battling the big banks' business practices. See *id.*

49. Kermit J. Lind, A New Program to Help CDCs Acquire and Assemble Vacant, Abandoned, and Tax Delinquent Properties for Redevelopment (2005) (paper presented at the ABA Forum on Affordable Housing and Community Development) (on file with author).

50. Village Capital Corporation, Inc., a wholly-owned subsidiary of NPI and an organization actively involved in this process, is a community development financial institution. See *Village Capital Corporation, NEIGHBORHOOD PROGRESS*, <http://www.neighborhoodprogress.org/vcc.php> (last visited Jan. 12, 2011).

51. The inspection system is generally complaint-driven, which requires strategic filing of complaints to achieve results.

declared a public nuisance and the housing court ordered abatement by demolition because it was not feasible to rehabilitate and market the house. In a few cases, the city demolished houses before the court ordered it. In most cases, NPI used grant funds for demolitions. The receiver's total cost to demolish a single-family or two-family house is indicated in the receiver's judgments, which were generally between \$12,000 and \$20,000. In the few cases involving apartment buildings, the cost was more than \$50,000. And one building requiring asbestos abatement ran up a bill in excess of \$110,000. The vacant lots, the only source of cost recovery for the receiver, were rarely worth more than \$5,000.

This disparity between what it costs to abate nuisance conditions in vacant, abandoned houses and apartments and the recovery of the costs of doing so is exacerbated by weak market conditions, which are characteristic of neighborhoods with older and low-value housing. The demolition and abatement costs shown in these forty cases of civil nuisance abatement under section 3767.41, however, are miniscule when compared with the public costs of municipalities stuck with thousands of abandoned dwellings for which there is only a speculative market—which extends the nuisance conditions—or no market at all. Taxpayers in cities like Cleveland, Buffalo, Flint, Detroit, St. Louis, Pittsburgh, and Cincinnati spend millions every year demolishing unusable housing stock, and so far, the pace of abandonment is running ahead of the pace of demolition. The Land Assembly Program experience demonstrates that the legal proceedings for nuisance abatement litigation are very expensive and that the program could only be applied to deal with abatement by demolition when external financing for both the abatement and the legal costs are available. NPI and its partners use every means possible to control or abate nuisances before filing suit, and they turn down many more cases than are filed. This experience demonstrates that private nuisance abatement litigation is viable only in limited circumstances and for very strategic purposes.

One result of these cases led us to a different approach. Our easiest successes and fastest settlements occurred when suit was filed against a bank as owner of vacant, abandoned houses purchased with credit liens at foreclosure sales. The title was at that point uncluttered. There was typically only one party to serve and that party was likely to answer and engage in the process. When local attorneys for banks were apprised of the facts of the case, they were, in several instances, able to get title to the property delivered directly to the plaintiff in advance of a hearing and judgment by the court. The attorneys for the banks were the same attorneys who represent mortgagees in foreclosure cases. We found it possible to discuss bank REO properties with some of these attorneys before filing suit and occasionally they were able to persuade their client to either donate the property or sell it for a minimal price. Recognizing that bank REO portfolios were increasing at a drastic rate and that the bank



REO properties in inner-city neighborhoods were being sold by the banks in bulk to absentee investors for a pittance, we developed a new litigation strategy that would be more efficient in getting vacant, abandoned houses demolished at the owner's expense.

### G. *The Wells Fargo Case*

On December 15, 2008, a nonprofit subsidiary of NPI, Cleveland Housing Renewal Project, Inc. (CHRP), filed two lawsuits<sup>52</sup> in the Cleveland Municipal Court's Housing Division against the two big banks that owned the greatest number of residential dwellings in Cleveland: Wells Fargo Bank and Deutsche Bank National Trust Company.<sup>53</sup> The claims against the banks in each of the two suits were essentially identical.

First, a number of specifically identified vacant, abandoned houses in seriously defective condition were alleged to be public nuisances as defined by section 3767.41.<sup>54</sup> The complaints asked the housing court to declare them public nuisances and to order the respective defendants in each case to abate the nuisance conditions in accord with the statute's requirements. Further, the complaints described each defendant's business practices as owners of the houses at sheriff's sales. The complaints alleged that the practice of ignoring housing codes and maintaining houses in dangerous conditions while mortgage-servicing agents attempted to market and sell the homes was a public nuisance. The complaints characterized this business practice as the practice of (1) owning dangerously defective housing in violation of the laws of Ohio and the City of Cleveland for (2) the commercial purpose of dumping the houses, which were liabilities, onto third-party owners before the nuisance conditions could be identified and liability could attach, as would be determined by municipal code enforcement procedures.<sup>55</sup> In support of this claim, the plaintiff

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52. See generally Plaintiff's Verified Complaint for Abatement of Public Nuisance, Injunction, & Receivership (R.C. 3767.41) & for Declaration of Business Practices as Public Nuisance, & for Equitable Relief Therefrom, Cleveland Hous. Renewal Project v. Wells Fargo Bank, No. 08-CVH-31391 (Ohio Cleveland Mun. Ct. Housing Div. Dec. 15, 2008) [hereinafter Wells Fargo Complaint]; Plaintiff's Verified Complaint for Abatement of Public Nuisance, Injunction, & Receivership (R.C. 3767.41) & for Declaration of Business Practices as Public Nuisance, & for Equitable Relief Therefrom, Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co., No. 08-CVH-31389 (Ohio Cleveland Mun. Ct. Housing Div. Dec. 15, 2008) [hereinafter Deutsche Bank Complaint].

53. The City of Cleveland was also named as a defendant in each case because certain provisions of Ohio's residential nuisance abatement statute require that notice be provided to any person with an interest in the property. See OHIO REV. CODE ANN. § 3767.41(B) (West 2010). In virtually all nuisance abatement cases we file, the City of Cleveland either has unrecorded claims against the nuisance property for unpaid assessments and water bills or will incur nuisance abatement costs during the pendency of the case. Thus, in virtually every case, the city is named as a defendant, thereby requiring the city assert its right to liens on the titles of these properties.

54. See Wells Fargo Complaint, *supra* note 52, Exhibit A; Deutsche Bank Complaint, *supra* note 52, Exhibit A.

55. See Ford, *supra* note 46 (describing these practices).

relied on the Supreme Court of Ohio's adoption of the *Restatement (Second) of Torts* section 821(B) as the common law of Ohio. The *Restatement* provides that unreasonable use of property interfering with the public right to health, safety, and welfare constitutes a public nuisance.<sup>56</sup> Finally, the plaintiff in each case sought injunctive relief—namely, relief from the business practice of noncompliance with laws requiring maintenance of houses in a condition free from public nuisances.<sup>57</sup>

The complaints continue to describe the business practice of each defendant after their houses were purchased at sheriff's sale.<sup>58</sup> The plaintiff alleged public nuisance claims because the practice of ignoring housing codes created dangerous conditions on the defendants' properties for an indefinite period of time. The complaints described this business practice as using dangerously defective housing in violation of the laws of Ohio and the City of Cleveland for the commercial purpose of dumping the liability on other owners before municipal code enforcement procedures and the city's police power could hold the owners accountable for nuisance conditions created by their unlawful business practice. The complaints further cited the Ohio Supreme Court's adoption of the *Restatement* making the unreasonable use of property to interfere with the public right to health, safety, and welfare a public nuisance.<sup>59</sup> The plaintiff sought to enjoin the business practice of noncompliance with those laws requiring maintenance of houses in a condition free of public nuisances.

An important procedural part of the plaintiff's action in both of the cases was to request from the housing court an immediate order restraining the sale of the specifically identified properties in their unlawful condition. This was necessary because the defendants' servicers could escape the litigation's law enforcement effort by transferring title to one or more of their regular buyers, putting ownership in a state of limbo for a period of time but allowing the defendants to claim to the court that they no longer owned the nuisances. The court issued the requested order.

Another important procedural event at the commencement of the cases was each defendant's immediate removal of their respective cases to the federal district court. In addition, they disputed the status of the city as a codefendant, claiming it was named merely to provide a pretext for the plaintiff to avoid federal jurisdiction. The removals commenced separate battles over jurisdiction with different results in each case. In *Cleveland Housing Renewal Project v. Wells Fargo Bank, N.A.*,<sup>60</sup> Federal District Court Judge Ann Aldrich

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56. See *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 4 (1965)).

57. See Wells Fargo Complaint, *supra* note 52, at 8; Deutsche Bank Complaint, *supra* note 52, at 8.

58. See Wells Fargo Complaint, *supra* note 52, at 2-3; Deutsche Bank Complaint, *supra* note 52, at 3-4.

59. See *Beretta U.S.A. Corp.*, 768 N.E.2d at 1142 (citing RESTATEMENT (SECOND) OF TORTS § 4 (1965)).

60. *Cleveland Hous. Renewal Project v. Wells Fargo Bank, N.A.*, No. 1:08-cv-03011-AA (N.D. Ohio Jan.

remanded the case back to the housing court because “Wells Fargo relied solely on CHRP’s prior standing in state court without showing how CHRP has met the federal requirements of injury, causation, and redressability” and therefore “has failed to meet its burden.”<sup>61</sup> Her judgment did not allow for an appeal.

While waiting for the federal judge’s decision, CHRP and Wells Fargo conducted discovery and began settlement negotiations. CHRP’s counsel expected that direct discussions with Wells Fargo would be productive in much the same manner that discussions with opposing counsel in the public nuisance abatement cases had been. This turned out to be a mistake. CHRP’s suit sought only injunctive relief without any monetary claims for damages. The injunctive request essentially sought an order declaring Wells Fargo’s conduct—maintaining specific houses in an unlawful condition and maintaining a business practice of noncompliance with nuisance abatement laws—to be unlawful, and ordering the bank to comply with the law.

CHRP indicated from the outset that it wanted to explore with Wells Fargo and Deutsche Bank the use of a newly formed land bank that the state legislature authorized the county government to establish. By seeking to force the banks to comply with the law as its remedy, CHRP left itself no room to accept a settlement that would permit some degree of noncompliance with laws the City of Cleveland. Wells Fargo was a captive of multiple pooling and servicing agreements, and it believed these agreements denied it any legal right to change the business plan that involuntarily brought it title to nuisance housing. Thus, Wells Fargo had nothing to offer to satisfy the limited but essential goal of law-abiding property ownership. Without disclosing the substance of statements, proposals, and communication between the parties, it can be said that no common ground could be found between compliance with state and local public nuisance law and adherence to a business practice engraved in unalterable pooling and servicing contracts.

During the first six months of 2009, while discovery and negotiations were ongoing, CHRP’s legal team kept track of transactions involving approximately seventy properties that Wells Fargo purchased at sheriff’s auctions. Sheriff’s appraisers valued all these properties at \$10,000 or less. The plaintiff asked the court to issue a preliminary injunction to prevent Wells Fargo from maintaining these houses in dangerously defective condition and to prevent them from selling houses at less than \$40,000 without demonstrating that the house being sold was in sufficient compliance with housing codes that it could be lawfully used, or that it would be rehabilitated as a result of the sale. After a contentious hearing lasting several days, the court issued its preliminary injunction, which required a minimal level of compliance with housing codes to a standard of

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27, 2009)

61. *Id.* slip op. at 4.

safe, secure, and graffiti-free.<sup>62</sup> Nevertheless, the injunction was immediately stayed pending Wells Fargo's prompt appeal of the court's preliminary injunction.

Three arguments were raised in the appeal to Ohio's Eighth District Court of Appeals.<sup>63</sup> They were: (1) the housing court lacked authority to hear the common law public nuisance claim because it lacked subject matter jurisdiction and because CHRP lacked standing to sue on this claim; (2) the housing court erred in its findings and reasons for granting the injunction; and (3) the terms of the preliminary injunction were improper. On these issues the court of appeals ruled that "[while] the housing court had subject-matter jurisdiction to hear CHRP's common-law public-nuisance claim, the preliminary injunction granted with respect to this claim was improvidently granted."<sup>64</sup> The housing court's preliminary injunction was based solely on CHRP's common-law public nuisance claim after CHRP had successfully argued in federal court that it lacked standing to pursue such a claim.<sup>65</sup> As such, the appellate court concluded that CHRP was judicially estopped from arguing that it had standing to pursue a common-law public nuisance claim, and that the trial court abused its discretion in granting the preliminary injunction. With this decision, and with the abatement of the specific nuisances named in the suit having been accomplished, the parties agreed to a dismissal.

#### H. *The Deutsche Bank Case*

While the suit against Wells Fargo made its way back from the federal court

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62. Cleveland Hous. Renewal Project v. Wells Fargo Bank, No. 08-CVH-31391 (Ohio Cleveland Mun. Ct. Housing Div. June 18, 2009) (unpublished order).

63. See generally Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A., 934 N.E.2d 372 (Ohio Ct. App. 2010). CHRP filed a motion to dismiss the appeal because it was not a final, appealable order as defined by statute. *Id.* at 376. That issue was separately briefed but incorporated into the oral argument on appeal. The court denied the motion and allowed the appeal to be heard. *Id.*

64. *Id.* at 381. The court noted that section 3767.41 of the *Ohio Revised Code* grants housing courts incidental jurisdiction over all subject matters brought in conjunction with a claim that is properly before the court and grants them the same authority as a common pleas court to fully adjudicate those matters. *Id.* at 379 n.9. Thus, CHRP's claims under section 3767.41 opened the door for the other claims to be heard in the housing court. *Id.* at 379.

65. *Id.* at 380. The court stated:

In its memorandum in support of its motion to remand, CHRP argued to the federal court that "CHRP, as a non-profit community development corporation, does not claim to have a *direct injury in fact* under federal (Article III) standing principles. Nor does Plaintiff CHRP meet the causation and redressibility [sic] requirements that are part of the constitutional core of Article III standing. The injury suffered by Plaintiff CHRP is *not distinct from the injury to the public at large*." The federal court relied on CHRP's argument that it suffered no personal injury in remanding this matter to the housing court.

*Id.* The court's reasoning here seems to ignore the difference between federal Article III standing and state court standing, forcing litigants to make the same standing argument in two different situations.

to the housing court, the case against Deutsche Bank did not follow the same course. That case was removed to a different federal judge, James Gwinn, and its management proceeded at a slower pace. The narrow legal issues related to Article III standing were briefed, the court heard arguments, and on March 26, 2009, Judge Gwinn issued his decision remanding the case back to the Cleveland Housing Court.<sup>66</sup> The grounds on which he did so, however, were not the same as those on which Judge Aldrich based her remand order in the Wells Fargo case. The remand in *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.*<sup>67</sup> was based on abstention and was appealable.<sup>68</sup> Deutsche Bank promptly appealed to the Sixth Circuit. Oral argument was conducted April 30, 2010, to determine which court would adjudicate the *Deutsche Bank* case.

After more than eighteen months of litigation, the Court of Appeals for the Sixth Circuit issued its judgment on September 20, 2010, blocking remand of the case to the Cleveland Housing Court and the Ohio court system.<sup>69</sup> The court of appeals said the district court was mistaken in its abstention from federal jurisdiction because it had minimized the “strong federal interest” in affording Deutsche Bank a neutral forum for adjudicating CHRP’s state law claims.<sup>70</sup> In the court’s opinion, the case belonged in federal court because “the state law claims (a) are of intense local concern, (b) are asserted against not just citizens of different states, but affiliates of manifestly “foreign” (i.e., German) corporations, and (c) would otherwise be adjudicated by a locally-elected municipal judge.”<sup>71</sup> In addition to overturning the district court’s remand, the court of appeals upheld the lower court’s realignment of the parties that made the City of Cleveland a plaintiff along with CHRP.<sup>72</sup> With this decision, the

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66. *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 606 F. Supp. 2d 698 (N.D. Ohio 2009), *vacated*, 621 F.3d 554 (6th Cir. 2010).

67. 606 F. Supp. 2d 698 (N.D. Ohio 2009), *vacated*, 621 F.3d 554 (6th Cir. 2010).

68. *See id.* at 716. Judge Gwinn remanded the case to the housing court relying on the *Burford* doctrine of abstention. *See generally* *Burfurd v. Sun Oil Co.*, 319 U.S. 315 (1943). The *Burford* abstention doctrine is a discretionary doctrine, founded on principles of comity and federalism, and recognizing that there are certain exceptional instances when denying a federal forum would “clearly serve an important countervailing interest.” *See* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). In particular, *Burford* abstention is appropriate in those cases involving difficult and important questions of state law that bear on policy problems of substantial public import and whose impact extends beyond the immediate case. *See id.* at 728. Historically, these questions have often involved questions of land use and zoning. Similarly, *Burford* abstention is equally appropriate when there is a state interest in uniform regulation that outweighs any immediate federal interest and federal adjudication would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public import. *See* *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989); *see also* *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). In either instance, a federal court may only rely on *Burford* abstention if the court is sitting in equity and timely and adequate state court review is alternatively available. *See Council of New Orleans*, 491 U.S. at 361.

69. *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 567 (6th Cir. 2010).

70. *Id.* at 568.

71. *Id.* at 563-64.

72. *Id.* at 560.

common law nuisance claim that the business practice of refusing to comply with local nuisance laws applicable to residential property will be tried in the federal court system.<sup>73</sup>

### I. *The Cincinnati Cases*

While a nonprofit development corporation in Cleveland brought suits against Wells Fargo and Deutsche Bank, the City of Cincinnati sued the same two banks.<sup>74</sup> Shortly thereafter, Price Hill Will, a neighborhood nonprofit development corporation, sued them as well.<sup>75</sup> The neighborhood corporation and the City of Cincinnati each named the two banks in their respective complaints along with the Hamilton County treasurer. Price Hill Will also named the City of Cincinnati as a defendant in its complaint. Each plaintiff identified a specific set of houses to be declared a public nuisance for abatement under section 3767.41. Each plaintiff stated a common law public nuisance claim against the business practice of maintaining houses in an unlawful condition. Each asked for injunctive relief against both individual nuisances and against the business practice of violating housing codes. In addition, the City of Cincinnati asked that the banks be enjoined from filing new foreclosure actions until all nuisance conditions were abated at their currently owned houses.<sup>76</sup> The Cincinnati plaintiffs, however, asked for more than injunctive relief; they, like cross-claimant City of Cleveland, asked for monetary damages to compensate for the expenses the public incurred taking care of the banks' properties. Finally, the city asked for punitive damages for the deliberate and knowing defiance of violation notices and court summonses.<sup>77</sup>

The distinctive feature in the public nuisance litigation described above is that the claims directly arose from harmful conditions on the defendants' real property that interfered with rights common to the public. The conduct complained of was the unlawful maintenance of nuisance conditions in

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73. The court of appeals discussed issues related to the section 3767.41 claims. *See Deutsche Bank Trust*, 621 F.3d at 567. As of December 2010, litigation of this case continues in the trial court.

74. Amended Verified Complaint for Injunctive Relief, Declaratory Relief & Damages, City of Cincinnati v. Deutsche Bank Nat'l Trust Co., No. A0811824 (Ohio Ct. Com. Pl. Hamilton Cnty. Mar. 9, 2009) [hereinafter *Cincinnati Complaint*] (suing banks for failure to maintain abandoned, foreclosed properties).

75. Complaint, Price Hill Will v. Deutsche Bank Nat'l Trust Co., No. A0811905 (Ohio Ct. Com. Pl. Hamilton Cnty. Dec. 24, 2008). Given the similarity of the Cleveland and Cincinnati public nuisance suits against the same banks, one could reasonably assume they were part of a coordinated plan; however, that is not the case. It is true, though, that the plaintiffs and their counsel had attended conferences and CLE courses and exchanged materials dealing with public nuisance litigation for several years prior to 2008. It is also true that neighborhood and housing advocates in both Cleveland and Cincinnati closely studied the published data showing the growth, led by Deutsche Bank and Wells Fargo, of bank ownership of nuisance properties. These two banks' defiance of municipal housing codes and code enforcement created a common basis for taking action against them. Nevertheless, the timing of the lawsuits was a surprise to counsel for all the plaintiffs.

76. *See Cincinnati Complaint*, *supra* note 74, at 27 ¶ K.

77. *Id.* at 25-26.

residential property—conduct proscribed by local police power and state law. The complaints also asked for relief, not only with respect to reckless ownership of individual properties, but also with respect to the persistent nuisance conduct of unlawfully neglecting repair and maintenance of residential premises by those with title and in control of the largest inventory.<sup>78</sup>

#### J. Cleveland v. Ameriquest

In sharp contrast to these public nuisance cases, which are based on the violation of specific local and state housing codes and the resulting nuisance conditions, is the case of *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*<sup>79</sup> In *Ameriquest Mortgage*, the city sued twenty-one financial institutions and alleged that the defendants' financing, purchasing, and pooling of vast amounts of these loans to create mortgage-backed securities for sale to their customers constituted a public nuisance.<sup>80</sup> In its complaint, the city asserted that the financial institutions, which it collectively identified as "Wall Street," were responsible for conducting financial transactions of various sorts, including servicing and debt collecting, in a manner that resulted in harm to the rights of people living in Cleveland. This public nuisance claim against the financial transactions related to lending, creating derivative financial instruments, collecting debts, and foreclosing on defaulting borrowers was soundly rejected in the Federal District Court for the Northern District of Ohio<sup>81</sup> and the Court of Appeals for the Sixth Circuit.<sup>82</sup> The district court dismissed the case because: (1) an Ohio statute governing regulation of loans and credit preempts public nuisance claims based on banking practices; (2) the economic loss rule applied; (3) subprime mortgage lending that was permitted, and even encouraged, by government regulation could not constitute qualified public nuisance; (4) facilitating lawful conduct by financing it could not be qualified public nuisance; and (5) the nuisance claim lacked the requisite proximate causation.<sup>83</sup> In the appeal, the Sixth Circuit limited its analysis to

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78. It could be added that this business practice undermines the banks' own business of collecting mortgage payments. Among the effects of sustained refusal to comply with housing codes is the loss of mortgage payments from neighboring borrowers whose loss of home equity, safety, and security discourages them from maintaining their property, paying on their mortgage loans, or even staying in the mortgaged house. This begs the question of why lenders who hold prime mortgages put at risk by the nuisance conduct of big banks do not seek relief. It also begs the question of why financial institution regulators do not challenge this multiplication of financial risk to mortgagees. The cost of banks and others making money from trafficking in illegally uninhabitable dwellings who unlawfully neglect home ownership code compliance may be incalculable, and those responsible for it are too big to fail.

79. 615 F.3d 496 (6th Cir. 2010).

80. *Id.* at 498-99.

81. *City of Cleveland v. Ameriquest Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 536 (N.D. Ohio 2009).

82. *Ameriquest Mortgage*, 615 F.3d at 507.

83. *Ameriquest Mortgage*, 621 F. Supp. 2d at 536.

proximate cause and upheld the dismissal on that ground alone.<sup>84</sup> The City of Buffalo, New York, attempted to bring a public nuisance action against thirty-six banks whose foreclosures led to the city bearing nuisance abatement costs averaging \$16,000 per building.<sup>85</sup> Buffalo petitioned the court to find that this conduct constituted a public nuisance and to hold the defendants jointly and severally liable for the costs of abating the nuisances. These municipal attempts and others seeking to hold financial institutions liable for harmful lending and debt collecting practices are likely to be successfully resisted.<sup>86</sup>

The attempted invocation of nuisance theory in *Ameriquest Mortgage*, however, is different than that in the Cincinnati and CHRP cases. In the Cincinnati and Cleveland cases, the alleged nuisance is not just a fragmented array of fraud-laden bank lending practices but is also the ownership and misuse of residential real estate in violation of established law applicable to all owners of residential real property. A close examination of public nuisance law illuminates the significance of that difference. When properly understood, the doctrine of public nuisance can be used in litigation and in legislation against nuisance conditions resulting from the mortgage crisis.

### III. THE DOCTRINE OF PUBLIC NUISANCE LAW

#### A. Property Rights and Nuisance Law

To understand the law of public nuisance, one starts by noting its connection to the law of real property rights—the ownership and use of land and the immovable structures attached to it. Court decisions and scholarship on this subject since the middle of the 20th century reveal that notions about the rights of ownership in land are not firmly settled. Narratives attempting to explain the nature and origins of private property differ.<sup>87</sup> Was all property given in the

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84. *Ameriquest Mortgage*, 615 F.3d at 507.

85. See generally Complaint, City of Buffalo v. ABN AMRO Mortgage Grp., Inc., Index No. 2200-2008 (N.Y. Sup. Ct. Feb. 20, 2008) available at [http://www.hppinc.org/\\_uls/resources/Buffalo\\_Lawsuit.pdf](http://www.hppinc.org/_uls/resources/Buffalo_Lawsuit.pdf); see also *WebCivil Supreme*, N.Y. ST. UNIFIED CT. SYS., <http://iapps.courts.state.ny.us/webcivil/FCASMain> (follow “Index Search” hyperlink; then enter index number 2200-2008 and Erie County in search fields and follow “Find Case(s)” hyperlink) (last visited Jan. 12, 2011) (indicating case on trial as of October 21, 2010).

86. See, e.g., John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 295 (2001) (explaining public nuisance actions generally brought in equity and likelihood of damage recovery unclear); Richard E. Gottlieb & Andrew J. McGuinness, *Subprime Lending as a Public Nuisance: Casting Blame Mortgage on Lenders and Wall Street for Inner City Blight*, 62 CONSUMER FIN. L. Q. REP. 4, 4 (2008) (arguing courts should resist these novel claims as matter of public policy); Matthew Saunig, Note, *Rebranding Public Nuisance: City of Cleveland v. Ameriquest Mortgage Securities, Inc. as a Failed Response to Economic Crisis*, 59 CATH. U. L. REV. 911, 929 (2010) (commending *Ameriquest Mortgage* court’s proper refusal to subvert public nuisance doctrine).

87. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 13 (1985) (arguing private property ownership, free of state infringement, save limited instances, entrenched within governmental structure); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1341 (1993)



beginning to a single owner to dominate and distribute arbitrarily? Or was all property provided to all humans to be used for the common good either by individuals or groups? Which comes first in importance—individual property rights or the well-being of society? In our own time, there are sharp differences among those calling for significant change in the accepted idea of property ownership and rights in response to the social and ecological changes of this age.<sup>88</sup> Other than summarizing concepts key to understanding nuisance law, the subject of property rights exceeds the scope of this article.

The metaphor of a collection or bundle of sticks is generally used to describe the elements or aspects of property ownership.<sup>89</sup> Ownership of property consists of a bundle of distinct rights, which can be perceived as separable and can be either acquired or alienated as a whole bundle or as separate, individual parts in the same way sticks can be handled individually or as a bundle. The sticks are not uniform in size, nature, or importance. Ownership may be claimed by or attributed to a person holding less than the full bundle of rights.<sup>90</sup> Control of one right, such as a security interest for the value of the property, may control the exercise of other rights, such as the conveyance of other interests. This metaphor applies regardless of the thing or object concerned and whether the object is big or little, material or immaterial. It applies to dwellings as well as to shares of stock in a corporation that buys, owns, and sells dwellings. This understanding of ownership has largely replaced the one made prevalent by the English commentator, William Blackstone, who, in the 18th century, defined property ownership as a sole and despotic relationship between a person and a thing that gives freedom and dominion over the thing, limited only by the obligation to do no harm to others in the exercise of those rights.

While the theory of property ownership and rights in land has changed in the historical record, of which twenty-first century America is a part, one principle has been present for a millennium—namely, that the use of property in a

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(crediting transition to individual property ownership to economic hedge, not political necessity or Lockean right); Gerald Friedman, *The Sanctity of Property Rights in American History* 3-7 (Univ. Mass. Amherst Political Econ. Research Inst., Working Paper No. 14, 2001) (discussing evolution of states' police power and its inhibition on property rights in early America), available at [http://www.peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_1-50/WP14.pdf](http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP14.pdf).

88. See generally, e.g., Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75 (2010); Glen O. Robinson, *The Property Rights of Despots* (Univ. of Va. Law School John M. Olin Program in Law & Econ. Working Paper Series No. 39, 2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1116&context=uvalwps>.

89. See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007) (describing one modern legal understanding of property ownership).

90. See *id.* at 253 (quoting A.M. Honore). Johnson identifies eleven rights in the bundle that reflect certain incidents of property ownership common to all mature legal systems. These eleven rights are: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income; (5) the right to capital; (6) the right to security; (7) the power of transmissibility; (8) the absence of term; (9) the prohibition of harmful use; (10) liability to execution; and (11) residuary character. *Id.* at 253.

manner that does harm to others is prohibited. Most discussions of the rights of land ownership invoke the ancient phrase *sic utere tuo ut alienum non laedas*, the do-no-harm principle limiting the rights inherent in land ownership so as to prevent interference with the exercise of property rights of other owners. Preventing or punishing the exercise of property rights resulting in harm invokes the law of nuisance. The question is this: are there legal constraints on owners' maintenance and use of their residential properties in a nuisance condition that interferes with the exercise of the rights of other persons?

### *B. Historical Development of Public Nuisance Law*

The legal meaning of the word "nuisance" is derived from an ancient French word meaning harm.<sup>91</sup> It is found in the English legal vocabulary in documents dating before the sixteenth century in disputes between neighboring landholders.<sup>92</sup> A nuisance was initially considered an "interference with the use or enjoyment of land, or with a right of easement or servitude over the land."<sup>93</sup> This type of interference did not involve dispossession or trespass; it was an interference that came from actions outside the land where the harm occurred. Although the original remedy available to the successful plaintiff bringing a nuisance action was a criminal writ granting civil relief, the modern common law action of private nuisance developed from this historical understanding into the civil tort we recognize today.

The work of Dean William Prosser, the great torts teacher of the twentieth century, was foundational in the resurgence of the doctrine of nuisance. Noting in a 1942 article that virtually nothing of consequence had been written about the doctrine that occupied such a prominent place in the law of torts, he famously wrote: "'Nuisance,' unhappily, has been a sort of legal garbage can. The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie."<sup>94</sup>

Prosser highlighted an earlier historical use of the term nuisance different from the notion of a nontrespassory interference by one private property owner with the rights of another. He focused on the interference with rights claimed by the sovereign. This separate principle, infringement of the rights of the crown or of the general public rights protected by the crown, preceded the law of private property rights in land.

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91. See J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 56 (1989) (examining whether to abolish or legislatively limit crime of public nuisance); see also William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966).

92. See Prosser, *supra* note 91, at 997 n.3 (referring to nuisance in Statute of Bridges in 1530).

93. *Id.* at 997.

94. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). This one article contains the seeds for decades of study and analysis.

Beginning with . . . encroachments on the royal domain or the public highway, and extending later to such offenses as interference with a market, smoke from a lime-pit and diversion of water from a stream, a “public” or “common” nuisance came to be recognized as species of catch-all low-grade criminal offense, covering “. . . any act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty’s subjects.”<sup>95</sup>

Interference with the rights held by the sovereign for her realm was treated as a crime against the rights common to all the monarch’s subjects. Along with the advancement of royal authority into the ordinary lives of the sovereign’s subjects came the ordering and regulation of their conduct and uses of property in the interests of the realm. We recognize this today as the exercise of police power by the state—the sovereign’s power to protect the health, safety, and welfare of the public, whatever the status of the persons who comprise the public, through enactment and enforcement of law.<sup>96</sup> Thus, Prosser’s research led him to conclude that a public nuisance is always a crime; it may be a tort, in addition, but it is always a crime.<sup>97</sup>

Although different in nature from the nuisance claims by one private landowner against another, the same term was also used in cases where the invasion of property interest compromised the common or public rights protected by the government’s police power. The use of the term nuisance in both types of cases creates confusion about the precise legal meaning of nuisance.<sup>98</sup> This, according to Prosser, led to diverse and confusing use of the same term for two entirely different legal matters:

There are, then, two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. . . . Because of the common name, a good many of the substantive rules of law applicable to private nuisance have been carried over to the public crime.<sup>99</sup>

Confusion of the principles of private and public nuisance theory continues today, and this confusion appeared in the debate over the language in the

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95. *Id.* at 411; *see also* Prosser, *supra* note 91, at 998 (expanding on distinction between uses of term nuisance for interferences with private and public rights).

96. *See generally* Friedman, *supra* note 87.

97. Prosser, *supra* note 91, at 997.

98. *Id.* at 998-99 (highlighting history of two separate definitions of nuisance at law); *see also* Spencer, *supra* note 91, at 58-59 (discussing links between private and public nuisance).

99. Prosser, *supra* note 91, at 999, 1002.

*Restatement (Second) of Torts*.<sup>100</sup>

Invasions of rights that simultaneously harm the public and specific private persons aggravate this confusion over principles of nuisance law. The operation of an enterprise in a manner that violates laws requiring owners to avoid nuisance conduct and abate nuisance conditions may constitute an invasion of the right of the public to be free of such conditions and, at the same time, a harm to the closest neighbors of the enterprise by particularly affecting their right to enjoy and use their property. It gives rise to the question of whether and when private persons may bring an action to enjoin nuisance conduct and abate a public nuisance condition created by that conduct.

Professor Denise Antolini explores this question in an excellent study, which challenges the conventional interpretation of the historic English view generally barring private litigants from bringing public nuisance actions.<sup>101</sup> Her article appeared in 2001 as the Bush Administration withdrew enforcement of environmental laws, which prompted advocates of environmental law enforcement to look for new means of enforcement. Those who attempted to use common-law public nuisance to prevent harm to people and the environment ran into a barrier at the courthouse: the “special injury rule” and its “difference-in-kind” test.<sup>102</sup> The paradox of the rule is that, “the broader the injury to the community and the more the plaintiff’s injury resembles an injury also suffered by other members of the public, the *less* likely that the plaintiff can bring a *public* nuisance lawsuit.”<sup>103</sup> Antolini’s research into the sixteenth-century roots of this rule raised serious questions about its traditionally narrow interpretation by courts. In proposing a new “community injury rule,” where litigants need to show an injury shared with the community, her article proposes to bridge the chasm between the scholarly analysis of public nuisance law and contemporary jurisprudence that fails to properly apply public nuisance

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100. See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 360-61 (1990) (describing evolution of nuisance law in modern jurisprudence). The authors wrote:

Some writers have stated that a distinguishing characteristic of public nuisance is that it is a crime. Even the Restatement (Second) of Torts, in Tentative Draft No. 16, proposed to perpetuate this oft-repeated definition. Public nuisance, however, is frequently brought as a civil action, either pursuant to the common law or to statute; to the extent that public nuisance is still a crime, it is codified by statute and does not exist in the common law.

*Id.* at 365.

101. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 867-73 (2001) (explaining traditional rule and arguing for reform consistent with “new public law” concepts).

102. *Id.* at 757-61. “Only those who can first prove some injury that is ‘special,’ ‘particular,’ or ‘peculiar,’ defined as ‘different-in-kind’ and not just ‘different-in-degree’ from the general public who might also be affected by the nuisance, be it a house of prostitution or a polluting factory, may bring an action.” *Id.* at 761.

103. *Id.* at 761.

doctrine.<sup>104</sup> Antolini and other environmental lawyers sought a jurisprudence anchored in the purpose of nuisance law—that is, to protect public rights rather than drifting in tune with current ideology supporting exploitive dominion of water, land, and air. Specifically, she wanted judges to adopt the *Restatement (Second) of Torts* section 821(C)(2)(c) in order to open the courthouse door to litigants vindicating the community’s rights.<sup>105</sup>

### C. Public Nuisance Law in the Restatement of Torts

The *Restatement (Second) of Torts* is perhaps the most convenient guide to current public nuisance law. It is interesting that initially, only the *Restatement of Property* addressed nuisance law, and only private nuisance law at that. Public nuisance first entered the *Restatement of Torts* rather than the *Restatement of Property*.<sup>106</sup> In the 1979 edition of the *Restatement (Second) of Torts*, the chapter on nuisance is found in the restatement of tort law and it deals with public nuisance. The venerable torts scholar Dean Prosser chaired the committee that drafted the *Restatement (Second) of Torts*’s chapter on nuisance.<sup>107</sup> Prosser said a public nuisance was always a crime and sometimes might be a tort. He traced its origins back to the thirteenth century and to a French word meaning “harm.”<sup>108</sup> The common law action of private nuisance emerged from this ancient root as the tort we recognize today.

According to Prosser, the term nuisance was also used in connection with a different type of action, one involving an interference with the property rights of the Crown.<sup>109</sup> As such, those interferences—typically, obstruction of the king’s highway—were deemed crimes and were exclusively prosecuted by the king’s officers. Over time, any interference with the rights common to all persons came to be regarded as a type of nuisance that could result in criminal sanctions. Activities such as disruption of public markets, emission of noxious smoke or foul odors, diversion of water for a mill, unlicensed plays, and keeping diseased animals were treated as nuisance offenses against the rights common to the public.<sup>110</sup> In these instances, the interference with the public right was so clearly unreasonable that it was often codified as a crime by statute

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104. *Id.* at 867.

105. Antolini, *supra* note 101, at 892.

106. RESTATEMENT (SECOND) OF TORTS § 821A reporter’s note (1979) (noting first *Restatement of Torts* did not include public nuisance law); *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 546 (2006).

107. *See* Schwartz & Goldberg, *supra* note 106, at 546. *See generally* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851 (1986) (discussing Prosser’s invaluable contributions to the *Restatement*); John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255 (1972) (recounting Prosser’s unwavering devotion to law of torts).

108. *See supra* note 91 and accompanying text.

109. *See* Prosser, *supra* note 91, at 998.

110. *Id.*

or ordinance.<sup>111</sup> Even in states that no longer recognize common law crimes and regard the criminal law as entirely statutory, the common-law tort of public nuisance still exists, as does its traditional definition.

This, according to Prosser, led to diverse and confusing use of the same term for two entirely different legal matters.<sup>112</sup> That confusion of the principles of private and public nuisance theory continued to the present and was debated in the drafting of the second *Restatement*.<sup>113</sup>

The *Restatement (Second) of Torts* section 821 is widely regarded as an authoritative current understanding of nuisance law, but today it is also a matter of controversy. Its adoption in 1971 summed up nearly four decades of scholarship on the origins and theory of what most writers, such as Prosser, found to be confusing, impenetrable, and misunderstood. The drafting of the *Restatement (Second) of Torts* occurred at a time when defenders of the environment were beginning to use common-law public nuisance theory to litigate the abatement of air, water, and soil pollution, and when legislatures were enacting statutes to mitigate harm to the environment caused by various uses of real property. Their influence on the drafting of the *Restatement* led to fierce scholarly and litigation battles. Since the early 1970s, plaintiffs have used public nuisance law in attempts to abate and obtain compensation for the harm attributed to the manufacture and distribution of lead paint, poisons and toxins, guns, and climate-changing activities. The decisions in these cases have not followed a coherent or consistent doctrine. Today, the law of nuisance, especially the law of public nuisance, is not well-settled.

The term “nuisance” is widely used, and its technical legal meaning is not always adhered to in discourse on the legal theory. In the commentary to section 821A, the popular meaning of the word is distinguished from the legal meaning, which, in turn, is used in three different ways.<sup>114</sup> The popular use of the word connotes harm, annoyance, inconvenience, or offensiveness, even when trivial in degree. In legal language, the word can appear to signify three things. First, it refers to human *conduct* or an existing physical *condition* that is harmful or annoying to others, such as a pile of rubbish, a smoking fire, or indecent conduct. This is nuisance in a causal or affecting sense. If I use my land as a dump, operate a smoke-belching furnace on it, or have a business showing movies of children being sexually abused, I am actively engaging in making or maintaining nuisances.

Second, it refers to the *harm resulting from conduct* or a physical condition. This is nuisance in the resulting or effective sense. Using the illustration above, this would refer to the effect on other persons or their property of my

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111. *Id.* at 999.

112. *See supra* text accompanying note 99.

113. *See supra* note 100 and accompanying text.

114. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979).

making or maintaining nuisances. The nuisance is the harm done to them or borne by them.

Third, the term nuisance may refer to the first two meanings combined with legal *liability* for the nuisance conduct or condition because the conduct or condition is per se harmful, or because permitted conduct or a permitted condition is done or maintained in a harmful manner. My making and maintaining nuisances and the damage it causes is inherently harmful. It cannot be done or allowed without resulting in harm. The underlying actions or conditions—the disposal of refuse, the manufacturing of steel, or the business of selling sexually explicit entertainment—may be permitted, but only if done in accordance with standards set by regulation to mitigate the risk of harm. When permitted things are done in a negligent or harmful manner, the responsible party may be liable for both stopping the impermissible disposition and compensation for the harm done to others. For instance, when a licensed waste treatment plant is improperly operated in violation of regulations and emits foul, sickening odors, neighboring owners may seek an injunction to stop the improper operation of the plant and money damages for loss of property value and the use of their residence.<sup>115</sup>

Nuisance can also be defined as a use or condition of real property that interferes with the full enjoyment and use by another of that person's real property where the interference does not involve trespass or dispossession. This definition protects private property rights against another owner's interfering land use. Private nuisance is distinct from public nuisances of the type this article addresses.

The *Restatement (Second) of Torts* states that a common-law public nuisance is an unreasonable interference with a public right.<sup>116</sup> It lists three types of conduct that would result in a public nuisance: (1) conduct significantly interfering with the public health, the public safety, the public peace, the public comfort, or the public convenience; (2) conduct proscribed by a statute, ordinance, or administrative regulation; or (3) conduct of a continuing nature or with a long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>117</sup>

There was debate during the drafting of the second *Restatement* about whether to relax the strict boundaries of public nuisance law and the exclusive enforcement by criminal prosecution.<sup>118</sup> Dean Prosser believed public nuisances to be crimes, albeit low-level ones, and that only the government could prosecute those responsible.<sup>119</sup> He cited the scholarship that found public nuisance actions in ancient England were exclusively brought by the Crown

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115. *Brown v. Cnty. Comm'rs of Scioto Cnty.*, 622 N.E.2d 1153, 1158-61 (Ohio Ct. App. 1993).

116. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

117. *Id.* § 821B(b).

118. See Schwartz & Goldberg, *supra* note 106, at 547.

119. See Prosser, *supra* note 91, at 999.

until a case in 1536 suggested that a private action might be possible to recover damages for the harm specific to an individual resulting from a public nuisance.<sup>120</sup> Others, however, opposed Prosser's narrow view, arguing that a public nuisance may involve legally permitted activities conducted in an unreasonable way, resulting in interference with a public right.<sup>121</sup> Lawyers for environmentalist causes were leading advocates of broadening the definition of public nuisance. Just before Prosser's proposed statement of the law was to be adopted, there was a revolt in his committee against his conservative definition of public nuisance as a crime and resulting restriction of enforcement actions to the government. Prosser's proposed language was rejected and he resigned as the reporter for the American Law Institute's restatement of tort law.<sup>122</sup> When the second *Restatement* was adopted in 1971, the wording of section 821(B) reflected a compromise. The doctrine was not defined as criminal conduct but was expressed as an "unreasonable interference" with a public right.<sup>123</sup>

At the same time scholars were drafting the *Restatement (Second) of Torts*, environmentalists were beginning to use nuisance theory in litigation to abate conduct that related to polluted land, air, and water.<sup>124</sup> Where legislatures were either slow to enact laws to protect the public health, safety, and welfare from harm by industrial enterprises, or where there was ineffective enforcement of laws, private parties came into court alleging as public nuisances the types of unreasonable interferences indicated by the *Restatement*.<sup>125</sup> Decisions in these cases made it clear that nuisance law was not being coherently understood or applied in a consistent manner. Prosser's early scholarship in the 1940s demonstrated the fact that nuisance law had a long history of doctrinal uncertainty. His pejorative description of the law of public nuisance is still echoed in practically all articles on the subject. Prosser's early work was a critical factor in launching what has become more than a half-century of research and writing to develop a coherent common law of nuisance.<sup>126</sup> The case of *Connecticut v. American Electric Power Co.*,<sup>127</sup> now being heard in the U.S. Supreme Court, illustrates the importance of public nuisance litigation by governments and public interest groups combating environmental

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120. See Antolini, *supra* note 101, at 767; David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 884 (1989).

121. See *RESTATEMENT (SECOND) OF TORTS* § 821B (1979); Schwartz & Goldberg, *supra* note 106, at 542.

122. This entire affair is reported in vivid detail in Antolini, *supra* note 101, at 805-57.

123. See *RESTATEMENT (SECOND) OF TORTS* § 821B (1979).

124. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 195 (2000) (holding plaintiff had standing in nuisance case involving water pollution); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1037 (2d Cir. 1985) (upholding permanent injunction based on nuisance law in case involving polluted land); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (upholding injunction in case involving nuisance law based on water pollution).

125. These private parties may have been following Prosser's advice. See Prosser, *supra* note 94, at 426.

126. In 1942, Prosser criticized the dearth of scholarship on the subject. See *id.* at 410.

127. 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 6, 2010) (No. 10-174).



degradation.<sup>128</sup> Earlier attacks before the turn of the century by environmentalists against land-based industrial operations were followed by broader public nuisance claims attempting to hold manufacturers and sellers of dangerous products like lead-based paint, asbestos, tobacco, and guns liable for the harm and the costs resulting from the use of their products.<sup>129</sup> While some of the environmental cases involve the abuse of property rights, the nuisance cases seeking the abatement of harm attached to the manufacture and distribution of dangerous products focus on tortious conduct and harmful results without a connection to real property or its misuse. Similarly, the defense against predatory mortgage lending practices is based on the legal protection provided to financial institutions and their agents to make and sell dangerous financial products. Ultimately, the common law of nuisance is no more protection against the harm of peddling bad loans than it is against peddling assault weapons at one-day gun shows.

The reaction of the defense bar in these cases is on display in its publications aimed at preventing the expanding use of nuisance law.<sup>130</sup> Even more potent is the reaction by corporate defendants in nuisance cases to attempt to preempt local and state governments' exercise of police power through legislation regulating commercial activity. Corporate commercial interests' command of federal and state lawmakers and the judiciary is documented in studies of lobbying and judicial elections. It is vital, however, to note that in attacking the use of public nuisance law against the manufacture and distribution of dangerous products, the corporate defenders do not deny that the abuse of real property to the detriment of property rights and public rights is at the heart of nuisance law doctrine. This principle feature of the doctrine is the basis for the exercise of municipal police power in regulating land use to protect the public health, safety, morals, and well-being. It undergirds zoning, building construction codes, housing maintenance codes, occupancy standards, fire codes, and sanitation codes—the array of regulations that make civilization possible. Even the severest critics of the attempts to apply nuisance law to emerging hazards of contemporary life still hold that the use of land in a

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128. See generally *id.*

129. See, e.g., *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (asbestos abatement); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco-related illness); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986) (asbestos); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002) (firearms); *State v. Lead Indus., Ass'n*, 951 A.2d 428 (R.I. 2008) (lead-based paint).

130. See Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 944 (discussing “emerging” public nuisance controversies); Schwartz & Goldberg, *supra* note 106, at 542-43 (expressing concern over expansion of nuisance theory). See generally NUISANCE LAW, <http://www.nuisancelaw.com> (last visited Jan. 12, 2011). At this website, attorneys from several firms opposing efforts by local and state governments or environmental advocates to use nuisance law post information and practice aids. *Id.* In addition, the site campaigns against the use of expert counsel hired on a contingent fee basis by public agencies in opposing corporate defendants. *Id.*

manner that interferes with the rights of others is prohibited by the law of public nuisance.<sup>131</sup>

In their 2006 article, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, Victor Schwartz and Phil Goldberg joined other attorneys in the high profile tort defense bar in seeking to block the expanding use of public nuisance law by governments and public interest advocates against manufacturers and distributors of tobacco, guns, asbestos, fattening food, pesticides, and other toxins.<sup>132</sup> These advocates for corporate interests consider the innovations won by environmental interests in the *Restatement (Second) of Torts* and the theories suggested by the likes of Professor Antolini to be “the greatest threat to the rule of law today.”<sup>133</sup> Their scholarship aims to keep public nuisance law restricted in both its scope and application.

#### IV. APPLYING PUBLIC NUISANCE LAW TO BANK-OWNED HOUSING

To demonstrate a means of containing public nuisance law and litigation within the boundaries they envision, Schwartz and Goldberg propose a four-part test for the validity of a public nuisance case, and apply it hypothetically to litigation then pending in the Federal District Court for the Southern District of New York involving a toxic product, Methyl Tertiary Butyl Ether (MTBE). The required elements are: (1) a common right injury, (2) unreasonable conduct, (3) control, and (4) proximate cause.<sup>134</sup> While I suspect that the Schwartz and Goldberg test was designed to keep the authors’ clients from having to defend against the production and distribution of a dangerous

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131. See Faulk & Gray, *supra* note 130, at 962-64 (noting consensus on illegality of interference with legal rights); see also Antolini, *supra* note 101, at 813 n.282. Antolini discussed the post-Prosser editors of his great torts handbook: “After Prosser’s death, new editors significantly reworked the treatment of public nuisance in the Handbook with a deliberately conservative slant, now providing modern courts and practitioners a truly distorted view of the doctrine that would undoubtedly not please the old master.” *Id.*

132. Schwartz & Goldberg, *supra* note 106. Victor E. Schwartz is chairman of the Public Policy Group in the Washington, D.C., office of the law firm of Shook, Hardy & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz’s Torts*, which published its eleventh edition in 2005. He has served on the Advisory Committees of the American Law Institute’s Restatement of the Law of Torts: Products Liability, Apportionment of Liability, and General Principles projects. Mr. Schwartz received his B.A. summa cum laude from Boston University and his J.D. magna cum laude from Columbia University. Phil Goldberg is an associate in the Public Policy Group in the Washington, D.C., office of Shook, Hardy & Bacon L.L.P. He has served as an aide to several Democratic members of Congress. Mr. Goldberg received his B.A. cum laude from Tufts University and his J.D. from The George Washington University School of Law, where he was a member of the Order of the Coif. These authors, joined by a third member of their law firm, Christopher Appel, also published another article on the subject. See generally Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923 (2009).

133. See Schwartz, Goldberg & Appel, *supra* note 132, at 930-31 (quoting William H. Pryor, Jr., Attorney Gen. of Ala., Address at the Reagan Forum: Fulfilling the Reagan Revolution by Limiting Government Litigation 2 (Nov. 14, 2000)).

134. See *id.*; see also Faulk & Gray, *supra* note 130, at 962-66 (outlining four elements of public nuisance law that resemble elements of Schwartz and Goldberg’s test).

gasoline additive, they offered it as a correction to the boundless application of public nuisance law generally. It is useful, then, to consider the result of applying this four-part test to the nuisance abatement cases brought in Ohio by inner-city nonprofit community developers and municipalities against high-volume owners of abandoned, vacant residential dwellings, Wells Fargo and Deutsche Bank.

#### A. Injury to Common Rights

The allegations were virtually identical in the two cases CHRP brought against Wells Fargo and Deutsche Bank. In each case, the plaintiff charged that a list of specific properties were owned and maintained by the respective defendants in a public nuisance condition, as defined by state and municipal law. Some of those properties were subject to open municipal violation notices, and some were not. All were vacant.

For context, the complaints described in detail the process of mortgage default and foreclosure that led to the defendants' purchase of properties at sheriff's sales and the subsequent issuance of a deed to the defendants.<sup>135</sup> They also described what generally happens to the properties while owned by the defendants and delineated the practice of selling them for a very depressed price, sometimes lower than the value of the land alone, as determined by the tax assessor.<sup>136</sup> The complaints alleged that the identified houses, maintained in their current condition, were a public nuisance, which should subject them to an injunction requiring immediate abatement under section 3767.41 of the *Ohio Revised Code*. The complaints further claimed that the business practice of maintaining purchased houses in a nuisance condition should be enjoined under Ohio law.<sup>137</sup>

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135. This produced unexpected results from both the defendants and other corporate attorneys commenting on the case. They had focused attention on the framing of the complaints and their contextual statements and responded as if the alleged nuisances were about the mortgaging and debt collecting practices of the banks before the purchase of the property at the sheriff's sale. They then attempted to use the contractual right to sell defective houses to justify owning and maintaining them in a nuisance condition prohibited by law. This perception served to evade recognition that the ownership and control of real property as a public nuisance is unlawful conduct, particularly when done as a business practice for profit. See John S. Gray, *A New Approach to the Subprime Public Nuisance*, NUISANCE LAW (Jan. 30, 2009, 4:06 PM), <http://www.nuisancelaw.com/blogs/John-S-Gray/Subprime-Mortgages/New-Approach-Subprime-Public-Nuisance>. Using "subprime" to describe the nuisance demonstrates Gray's understanding of the bank as a mortgagee and his refusal to recognize the bank's status as property titleholder after the mortgage has ceased to exist and the property has been purchased at a public sale. See *id.*

136. See generally CLAUDIA COULTON ET AL., CTR. ON URBAN POVERTY & CMTY. DEV., CASE W. RESERVE UNIV., BEYOND REO: PROPERTY TRANSFERS AT EXTREMELY DISTRESSED PRICES IN CUYAHOGA COUNTY, 2005-2008 (2008), available at [http://blog.case.edu/msass/2008/12/09/20081209\\_beyond\\_reo\\_final.pdf](http://blog.case.edu/msass/2008/12/09/20081209_beyond_reo_final.pdf). This report documented the purchase, ownership, and resale of bank-owned dwellings. See generally *id.* The Center on Poverty, under contract with CHRP's parent developer, NPI, subsequently assisted in research to identify and describe the title history of the properties named in the Cleveland litigation.

137. See generally Wells Fargo Complaint, *supra* note 52; Deutsche Bank Complaint, *supra* note 52; see also OHIO REV. CODE ANN. § 3767.03 (West 2010) (providing cause of action for nuisance abatement).

In *City of Cincinnati v. Beretta U.S.A. Corp.*,<sup>138</sup> the Ohio Supreme Court adopted section 821(B) of the *Restatement (Second) of Torts* as the state's common law of public nuisance.<sup>139</sup> The violation of codified laws that define and prohibit the maintenance of residential property in a public nuisance condition is clearly an interference with rights common to the public. CHRP and the City of Cincinnati's suits against Wells Fargo and Deutsche Bank alleged that statutory law prohibits nuisance conditions on a house-by-house basis. They also sought to have a court declare that, where noncompliance was found to be routine, the business practice of keeping residential property in a nuisance condition should itself be declared a public nuisance and abated by injunction.

The City of Cleveland, as a defendant in these cases, cross-claimed against the banks for payment of nuisance abatement assessments and unpaid water bills that had accrued against houses owned by the banks. In addition, the city asked for injunctions requiring the banks to abate unlawful nuisance conditions at specific houses and to abate the business practice of leaving properties they owned in a nuisance condition in violation of Cleveland's housing and building codes.

Similarly, the City of Cincinnati alleged that specific houses were in a public nuisance condition and that the business practice of noncompliance with housing codes and violation notices is a public nuisance. Cincinnati cited an array of specific notices and hearings related to individual houses that the defendants ignored. It also cited instances of civil fines and assessments that had been levied but not paid.<sup>140</sup> Cincinnati sought a more varied array of remedies than the plaintiffs sought in the two Cleveland cases. Specifically, Cincinnati sought to enjoin the two banks from maintaining their houses in disrepair, from continuing their business practice of avoiding the enforcement procedures of the city, and from filing any foreclosure cases in Hamilton County Court until all their properties were brought into code compliance.<sup>141</sup> In addition, the City of Cincinnati demanded the defendants pay all fines and the costs of various nuisance abatement expenditures made by the city on properties the two banks owned. Finally, Cincinnati asked for punitive damages because of the willful, wanton, and malicious nature of the banks' lawless conduct as property owners.<sup>142</sup>

### *B. Unreasonable Conduct*

The banks' conduct in repeatedly violating state statutes and city ordinances

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138. 768 N.E.2d 1136 (Ohio 2002).

139. *Id.* at 1142.

140. See Cincinnati Complaint, *supra* note 74.

141. *Id.*

142. *Id.*

is obviously unreasonable. None of the statutes or ordinances provides any exceptions or exemptions to the general prohibition against maintaining houses in a nuisance condition. To the contrary, the cities require all owners to abate those conditions with no exceptions for banks.<sup>143</sup> Neither the bank owners nor any other responsible party occupied the hundreds of houses each bank owned. Serious and knowing violation of city and state codes prohibiting the maintenance of nuisance conditions is clearly unreasonable conduct, particularly where the owners had the means to comply.

### C. Control of the Nuisance

It should be noted that in all these cases, the banks claimed they were not the owners and therefore not proper parties.<sup>144</sup> There are, however, a number of problems with that assertion. First, bank agents acting in their principal's name and in their stead at sheriff's sales purchase the properties and identify the name of the owner as grantee on the sheriff's deed. The record of titles in deeds placed in the public record by those who buy houses from the banks list the banks as the owners. If the banks, or agents acting in their name, sign deeds of conveyance as owners of property that they deny owning, that would suggest a fraud with serious legal consequences.<sup>145</sup>

Finally, while attorneys for the servicers appeared at hearings and case management conferences in the CHRP cases, none of them either moved to intervene or otherwise sought to protect any ownership interest besides that of the banks named as defendants. For this reason, one must conclude that the unreasonable conduct of deliberate noncompliance with nuisance abatement laws and violation notices was the responsibility if not the act of the owners of record. Any failure of the owners' agents to keep the owners' properties compliant with the law would be a matter between the principal and the agent.

Control of nuisance property is necessary for compliance with injunctions issued in the case. The deed issued to banks by the sheriff when their purchase

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143. The statute authorizing civil nuisance claims exempts owner-occupied premises from civil litigation only if the owner owns four or fewer dwelling units and lives in one of them. OHIO REV. CODE ANN. § 3767.41 (West 2010).

144. Real property that is acquired and held by banks or other financial institutions is called real estate owned (REO). That is virtually a universal designation in the real estate world. For banks to suddenly argue, upon the filing of litigation targeting them as lawless owners, that properties in their portfolio are not really "real estate owned" is quite a coincidence. Alternative language describing the banks' relationship to the property held in their names has not yet been proffered.

145. One could wonder if that defense by the banks was vetted with their title insurers. Note that in the case of the Cleveland suits, the housing court requires that where a nuisance abatement case is filed asking for a receiver to be appointed, the plaintiff must file a preliminary judicial report, including an abstract of title. The court uses the report to determine if the defendants necessary to an appointment of a receiver are all given proper notice and an opportunity to be heard before their property rights, if any, are altered. Thus, a guarantee of the title record is provided in the case along with the identity of the record owner. If the banks did not want to be named grantee in the sheriff's deed and appear in the public record as the owner, whether for their own benefit or for the benefit of unnamed beneficiaries, they would need to so indicate in the record of title.

is made grants them a complete title including a right of possession.<sup>146</sup> Servicers for bank owners do not own the title; they act only in a custodial function. Holding another's title as a custodial agent of the owner does not make the agent the owner or holder of the possessory interest.

#### D. Proximate Cause

The banks argued that they did not cause the houses in question to be in a harmful condition.<sup>147</sup> The banks acquired them in an already harmful condition or they were later vandalized by criminals. Therefore, the banks reasoned, they as owners were not the proximate cause of the harm.<sup>148</sup> It is apparent that the City of Cleveland cited a number of the specifically named houses as public nuisances before the sheriff's deed was issued to the purchasing bank. A few months before the three lawsuits were filed, a published study indicated that a large number of the bank-purchased properties later sold for less than \$10,000.<sup>149</sup> Evidence presented in the housing court's hearing on the preliminary injunction further indicates large numbers of bank-held houses were in a public nuisance condition for months, if not years, before being owned by Wells Fargo. So it is rather certain that the banks did not actively put those houses into that condition; they bought them and owned them in that condition.

But is the proximate cause test about who caused the harmful condition or about who failed to perform the legal duty to abate the harmful condition? The plain meaning of the language of the municipal housing and building ordinances prohibits the *maintenance* of houses in a public nuisance condition. Liability results from the failure to comply with the law prohibiting the maintenance of a public nuisance regardless of its creation.<sup>150</sup> The nuisance conditions, after all, might have been created by accident—a fire, a broken water pipe—or by the acts of vandals. The maintenance of those harmful

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146. For explanations of how the bank's servicers of REO property operate, see Theologides, *supra* note 43 (acknowledging servicers of REO properties regularly choose compliance with commercial contracts over local housing codes). See generally, Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 17-24 (2004); Dan Immergluck, *From Global Buck to Local Muck: Capital Markets, Public Policy and Neighborhood Wreckage in the U.S.* 17-24 (July 28, 2009) (unpublished manuscript), <http://ssrn.com/abstract=1533820>.

147. It may be useful to note that the issue of proximate cause was a central argument in the case of *City of Cleveland v. Ameriquist Mortgage Securities, Inc.*, where both the district court and the Sixth Circuit made it a major reason for dismissal. See 615 F.3d 496, 502-06 (6th Cir. 2010); *City of Cleveland v. Ameriquist Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 532-33 (N.D. Ohio 2009). The prominence and dismissal of that case seems to cloud the thinking about the more narrow property nuisance claims raised by the City of Cincinnati and CHRP.

148. See Brief of Defendant-Appellant at 6-7, 22-24, *Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A.*, 934 N.E.2d 372 (Ohio Ct. App. 2010) (No. 93502) (arguing proximate cause necessary to liability and alleging multiple other causes of nuisance).

149. See COULTON ET AL., *supra* note 136.

150. OHIO REV. CODE ANN. § 3767.03 (West 2010) (providing cause of action for nuisance abatement).

conditions, however, not their creation, is the violation of law of which the defendants were accused. The plaintiffs alleged common-law nuisance in the form of repeated and regular noncompliance to further commercial interests. The banks' failure to abate nuisance conditions on their property or comply with lawful orders of the cities' code enforcement officers is the proximate cause.

The proximate cause element in the Schwartz and Goldberg test is of doubtful value when it comes to public nuisance conduct involving real property. This element seems designed to fit their campaign against plaintiffs seeking to hold a manufacturer or seller liable for the harm caused by a customer's use of their dangerous products. In the case of the public nuisance claims we are examining here, it is not the builder or the seller who is charged; it is the present owner. Moreover, real property is being used by the owner for a purpose other than its designed purpose as a residence. The liability, therefore, fits the traditionally narrow definition of public nuisance as a use of property that interferes with the rights common to the public. The proximate cause of harm, it may be said, is the unlawful maintenance of real property and the use of property in that condition for purposes inconsistent with its designed use—namely, as a commodity to be acquired, stored, and discarded rather than as a dwelling to be occupied.

Dean Prosser, in his 1942 article, explored the question of whether nuisance liability can occur without fault.<sup>151</sup> He analyzed the ancient cases from which a doctrine emerged, stating that strict or no-fault liability occurs when a special or unnatural use of land imposes dangers that do not occur from natural use.<sup>152</sup> The maintenance of unusable, vacant houses in a dangerous nuisance condition fits Prosser's definition of unnatural use of land imposing uncommon dangers. A natural use, according to Prosser, is one sanctioned by the needs, customs, and laws of the community so that the public is not required to bear the costs of resulting damages.<sup>153</sup> Thus, it would appear that a natural use for a house is one that does not involve public expenditures for nuisance abatement, does not lead to court appearances in criminal or civil litigation over illegal conditions, does not reduce the value or use of other houses, does not increase insurance costs of other owners, and does not impede or interfere with the development of neighboring land for lawful use. It is the ownership and control of the interfering nuisance that imposes the duty to abate, not the act of creating the bad conditions. Prosser, along with Schwartz and Goldberg, agrees that the current owner and user of dangerous things—things that are a nuisance per se—is liable for the harm.<sup>154</sup> Where that harm is prohibited by law, control of

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151. See generally Prosser, *supra* note 94.

152. *Id.* at 406.

153. *Id.* at 407.

154. *Id.*; see also Schwartz & Goldberg, *supra* note 106.

the harm, not its creation, is the cause for liability.

#### V. CAN PUBLIC NUISANCE LAW PROTECT YOUR NEIGHBORHOOD FROM BIG BANKS?

This section explores the critical question of whether the law of public nuisance can effectively protect neighborhoods infected with the poison of abandoned, vacant houses in an unlawful nuisance condition. The question is particularly relevant to those neighborhoods with the most mortgage failure stress.<sup>155</sup> Municipal officials and their constituents in metropolitan areas with high foreclosure rates are trying to defend neighborhoods from rising mortgage default rates, owner abandonment, foreclosures, and bankruptcies. These neighborhoods are saturated with empty dwellings, long-term vacancy, and deteriorating structures owned or controlled by remote financial institutions that have no use for them as residences. The destructive forces in the market are not only creating harmful nuisance conditions but also undermining the economies and tax bases of municipalities while the costs of protecting the public are increasing.<sup>156</sup> As local civic leaders recognize the failure of bank bailout policies and loan modification, they are paying more attention to other methods of mitigating the residue of the mortgage disaster at the neighborhood level.<sup>157</sup>

It must be recognized at the outset that no statute or judicial decision—not even a Supreme Court decision—can, in a single stroke, bring rich and powerful corporations into a just relationship with the neighborhoods, cities, towns, and villages damaged by mortgage disaster. The country's legislative, regulatory, and law-enforcing institutions are too effectively manipulated by the pervasive power of those with the most money. Neither the rule of law nor the right to own property free of interference from others is presently secured from the abuse of massive financial power.<sup>158</sup>

What follows are this observer's comments derived from experience in litigation, development of legislation, and study of public nuisance law. In general, it seems that public nuisance law—within its historic doctrinal

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155. Richard Florida, *Mapping Troubled Housing Markets*, ATLANTIC (Sept. 2, 2010, 11:50 AM), <http://www.theatlantic.com/business/archive/2010/09/mapping-troubled-housing-markets/62420>.

156. See IMMERGLUCK, *supra* note 41, at 149-52.

157. See Ford, *supra* note 46.

158. See Interview by Ray Hanania with Richard Durbin, U.S. Senator, Ill., on *Radio Chicagoland* (WJGG 1530 AM radio broadcast Apr. 27, 2009). Calling the bank lobby the most powerful in Congress, Senator Richard Durbin famously added, "they frankly own the place." *Id.* Many pundits have repeated this statement. See, e.g., Editorial, *After the Fall: Our View—The Economic Meltdown One Year Later, How Much Has Changed?*, ST. LOUIS POST-DISPATCH, Sept. 13, 2009, at A16, available at 2009 WLNR 17985428; Frank Rich, Op-Ed., *Obama's Make-or-Break Summer*, N.Y. TIMES, June 20, 2009, <http://www.nytimes.com/2009/06/21/opinion/21rich.html>; see also JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* (2010), [http://justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf).



constraints—can be applied where real property is being maintained in a manner contrary to law and in defiance of the police power.

*A. One House at a Time*

The prevailing strategy of residential nuisance abatement one dwelling at a time, whether by issuance of administrative orders backed by criminal prosecution or by civil suit for failure to comply, is effective in limited situations. It is most effective where owners occupy their houses and nuisance conditions are not prevalent or severe. That is not the situation, however, in those neighborhoods with low owner occupancy, borrowers with little or no equity or who are upside down, older housing stock, and abandoned, vacant dwellings. Reclaiming nuisance houses one at a time where nuisance conditions and financial distress are both concentrated is a losing proposition. Blight moves faster than litigation. The experience of prosecuting criminal and civil public nuisance cases in cities with high rates of abandoned, vacant houses like Cleveland, Detroit, Flint, Buffalo, Las Vegas, Phoenix, and Cape Coral demonstrates that reality. Before one blighted house can be rehabilitated, several others become blighted with nuisance conditions. The neighborhoods most seriously impacted by the mortgage crisis cannot remain stable or recover one nuisance abatement case at a time.

*B. One Bank Owner or Speculator at a Time*

The prosecutorial effectiveness of the case-by-case strategy increases when one nuisance abatement case seeks the abatement of multiple nuisance properties. CHRP's litigation experience demonstrates the advantage of targeting those banks and speculating investors who own large numbers of abandoned, vacant houses with public nuisance abatement code enforcement actions. Consolidating ten or more blighted houses into a single case against a single defendant before one court, when that defendant has the financial resources to abate nuisance conditions, gets more nuisances abated quicker. Furthermore, the remedy is acquired at the cost of the owner, not the public.

This use of public nuisance actions to obtain a court order for abatement of the nuisance condition, however, needs to anticipate that the owners will attempt to elude the jurisdiction of the court by any means possible to evade the cost of abating the nuisances. There is also the risk that banks will not employ their credit bid to buy properties at sheriff's sales when they are in poor condition. There is some evidence, in fact, that banks are walking away from the loan collateral without taking title to it where houses have low values.<sup>159</sup>

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159. See Theologides, *supra* note 43, at 77, 82. In Cleveland there was a significant decline in the number of sheriff's sales even though the number of foreclosure starts remains high. Bank "walkaways" are thought to be a significant factor in that change.

As a strategy for requiring an owner rather than the public to pay the cost of abating nuisance conditions on the owner's land, civil litigation would significantly increase the scale and scope of recovery from the mortgage crisis. Following Ohio, New Jersey, and some other states, the adoption of nuisance abatement statutes with express injunctive remedies that make the costs of abatement a first lien ahead of taxes is an important use of nuisance law.

*C. Abatement of Housing Code Noncompliance as a Business Practice*

Banks and other institutional owners who own dangerous housing solely for speculation and business operations are loath to spend any money to comply with housing and building codes. They point out, correctly, that there is no explicit prohibition against selling houses out of code compliance in "as is" condition. They then use that contracting right to justify the unlawful practice of owning or controlling houses that are a threat to the public health, safety, and welfare, cited by cities as public nuisances, and even condemned as unfit for habitation.<sup>160</sup> There are few if any housing codes, however, that distinguish between owner-occupants of a single house and homeownership as part of a business operation for making money in commercial transactions involving houses. All owners are covered by the same laws which require maintenance that avoids or abates nuisance conditions. Yet businesses making profits from owning and dealing in dangerous housing presume a right to ignore those laws because complying with the law would cut into their profits.<sup>161</sup>

The question remains whether a course of conduct that ignores laws protecting the public health, safety, and welfare from nuisance conditions of housing is a business practice that can be enjoined in a common-law suit for abatement of a public nuisance. That is the question posed in the cases discussed above, against Deutsche Bank and Wells Fargo. The law relied on for this claim is the *Restatement (Second) of Torts*, section 821B, which was adopted by the Ohio Supreme Court in *Beretta U.S.A. Corp.*<sup>162</sup> While in all three of these cases the banks have complied with court orders, or the threat of court orders, based on Ohio's residential nuisance abatement statute<sup>163</sup> applied to individual properties named in the complaints, the banks' noncompliance with the laws requiring nuisance-free maintenance as a general business practice continues.

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160. See *id.*; see also Brief of Defendant-Appellant, *supra* note 148 (arguing right to sell "as is" means right to maintain without compliance while selling).

161. See *Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A.*, 934 N.E.2d 372, 374-75 (Ohio Ct. App. 2010) (discussing poor condition of vacant, bank-owned homes). The plaintiffs in *Wells Fargo Bank* sought to have eleven properties declared a public nuisance because their collective condition was so deplorable. *Id.*

162. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 4 (1965)).

163. OHIO REV. CODE ANN. § 3767.41(C)(1) (West 2010).

It remains the belief of counsel for plaintiffs in these cases that if a court is presented with evidence of consistent unlawful practices, repeated criminal convictions, and company policies demonstrating willful noncompliance with cities' orders exercising police powers, an injunction against the owner would be necessarily granted. Interdicting the business practice of maintaining vacant houses in a dangerous condition would be far more effective protection of the public than chasing nuisance conditions one house at a time. Applied in this way, nuisance law can be a bulwark against the banks, or any other residential owner, using its real estate in ways that harm the public. The banks' compliance with nuisance abatement laws as a business practice will reduce the threats to the safety and security of life as well as the property rights of homeowners who maintain their property and pay their mortgages.<sup>164</sup>

#### *D. Civil Litigation by Private Persons*

Civil actions to enforce housing codes have the distinct advantage of in rem jurisdiction, which enables courts to exercise control over the nuisance property directly rather than through coercion of persons. This is critical in cases involving abandoned, vacant property because the abandonment is based on either the inability or the unwillingness of an owner to take responsibility for the property's condition. The civil litigation described in the second part of this article is conducted under statutory provisions enabling certain private persons, as well as municipalities, to enforce nuisance abatement laws. Private civil litigation, however, is not a widely used means of abating public nuisances.<sup>165</sup> Statutes permitting it do not make it inviting. It is more of a desperate act of those who are not otherwise protected from harm by the police power of local government. The plaintiff is not compensated for its losses or its legal expenses in bringing the action because the remedy in public nuisance abatement is injunctive relief of the offending condition at the owner's expense. Where, as in the case of Ohio's statute, a receiver may be appointed to carry out the court's order because no owner or other interested person will do so, the receiver's costs are recoverable if and only if the subject property produces income or a sale price in excess of the abatement costs. The cost of private litigation limits its usefulness to those occasions when collateral resources can be applied to support both the litigation and the abatement ordered by

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164. Note that small and regional lenders holding mortgages they made in neighborhoods with high subprime loan default rates are hurt by the mortgage crisis because of the business practices of their global competitors whose size earned them public subsidies to prevent their mistakes with risky mortgages from resulting in their failure. The big banks' debt collection practices propagating blight are undercutting smaller banks' collection of well-made mortgage payments from nearby households.

165. It is unusual that municipalities do not more frequently use Ohio's residential nuisance abatement statute. I note, however, that Richard Pfeiffer, the law director of Columbus, Ohio, who is a personal acquaintance, has used civil litigation in the Franklin County Municipal Court, Environmental Division, based upon local ordinances with great success.

successful litigation.

Civil litigation by private parties under common-law public nuisance theory is made difficult by the standing issue of particular harm. As our experience demonstrates, defendants with unlimited resources will remove a meaningful case to federal court where Article III standing is a battleground involving months, if not years, of preliminary litigation before the inevitable battle over discovery even begins. Standing is a very challenging issue when the underlying litigation is only about getting someone to comply with the law rather than a normal tort action to obtain compensation for an injury. It is made all the more difficult when different court systems employ different standards for standing. While private civil litigation is possible, its financial burdens and its legal complexities limit its usefulness in protecting neighborhoods from the harmful conduct of banks who own houses in severely dangerous condition.

#### *E. Civil Litigation by Local Government*

Municipalities engage in civil litigation mostly as defendants rather than as plaintiffs. While statutes and the common law authorize local governments to initiate civil proceedings for many purposes, including abatement of public nuisances, civil actions in code enforcement are the exception rather than the rule. As plaintiffs in cases involving noncompliance with nuisance abatement laws and law enforcement, municipalities have the advantage of access to the records of property conditions, citations, compliance records, and public costs to clean up private nuisances owned by defendants. They can strategically deploy inspectors and investigators to assemble evidence of maintenance practices by individual, high-volume owners whose current or recent inventory includes harmful housing. Municipalities can implement nuisance abatement enforcement programs to increase the likelihood that the costs of owning and speculating in public nuisances will be borne by commercial owners with deep pockets instead of taxpayers. Judicial jurisdiction over both the owners and their properties, along with the power to issue injunctions, are remedies that can be obtained in civil litigation against large-volume, lawless, absentee owners. These remedies, aimed directly at the nuisance property, are not available in criminal prosecutions.

#### *F. Criminal Prosecution to Enforce Administrative Orders of Abatement*

Criminal prosecution against absentee house owners is common practice for municipal code enforcers and prosecutors. Its effectiveness for getting absentee corporate owners to comply with housing and building codes is not common. Getting owners outside the territorial jurisdiction of the court to appear to answer charges is difficult and, due to the nature of the charges, may be more expensive than the punishment the court is authorized to mete out. Big corporations treat a summons to a municipal court like a parking ticket placed

on a company car. It is not a matter of consequence. One either ignores it or signs a waiver and sends in a stipulated fine. Traffic tickets, along with violations of municipal housing and building codes, are regarded by virtually everyone as a bureaucratic matter in which payment of a fine is less onerous than showing up at court. There is no expectation of corrective action. In the case of housing code violations, however, the violation is occurring continually. Each day is a new violation. In those instances, criminal prosecution against a responsible person can seek to have the defendant do something in addition to its acceptance of punishment. Punishment may contribute to the revenue of the municipality but fail to protect the public rights when it is so inconsequential to the criminal defendant that continued violation of the law is more economically beneficial than compliance.

Where cities do prosecute for compliance, the municipal court must often go to extravagant lengths to get a response from corporations. Corporations can only appear in court by representation of an attorney. Getting a response to a summons issued to a big corporation involves communication among or between corporate departments, divisions, subsidiaries, and affiliates until corporate counsel for a corporate servicing entity with a power of attorney to act for the title holder makes an appearance, often after a warrant has been issued. Initially, remote corporations and their counsel are annoyed at being charged with a misdemeanor criminal violation of law and want to get charges dropped. As they become repeat offenders, they are more accepting of the notion of pleading to the charge and paying a nominal fine. Their obvious goal in doing so is to make the charge disappear by the most convenient means possible. Future compliance or correcting existing conditions giving rise to the charges is not part of the equation. A court that seeks compliance and change of behavior more than punishment in criminal prosecution against businesses, however, challenges that view.

The Housing Division of the Cleveland Municipal Court has demonstrated the difficulty of challenging the prevailing practice of issuing meaningless fines for large-scale commercial homeowners, like banks, who are repeatedly prosecuted for the same violations.<sup>166</sup> Over the past decade, this court has developed a national reputation for innovative sentencing. For big-time offenders, the court is an object of loathing and derision.<sup>167</sup> The court's novel practices have been challenged, sometimes successfully, on appeal. Some of its practices, however, are being applied by other courts. The Cleveland housing court's policy of sentencing for compliance remains the central guiding principal for its innovative programs and practices.<sup>168</sup>

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166. See Ford, *supra* note 46, at 142.

167. See *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 564 (6th Cir. 2010) (noting court "not persuaded" by defendants' claims of bias by housing court judge).

168. *City of Cleveland v. Franklin Inn, Ltd.*, No. 2000 CRB 54786, slip op. at 1 (Ohio Cleveland Mun. Ct. Housing Div. 2003), *aff'd* 2005–Ohio–508 (Ct. App.) (outlining primary goal of sentencing and considerations

No matter how effective a court's sentencing policies and practices may be, they are applied only to the extent prosecution is also effective. The volume of potential cases and the resources to prosecute are not well-matched in most jurisdictions. Prosecution of housing code violations is rarely a high priority for municipal law departments. Whether hired or elected, municipal prosecutors rarely present themselves as housing code enforcers. Prosecutors who want a reputation as crime-stoppers target murderers, rapists, thieves, and drug dealers. Those wanting to impress their peers and the voters do not focus energy on innovative or aggressive enforcement of housing and building codes. What is missing in most municipal courts is an appreciation of how vital the prosecution of lawless housing abuse is to the stability of neighborhoods and communities. Unless the prosecutor acts, courts have no opportunity to exercise their authority with compliance-oriented sentencing.

It is ironic that banks and mortgage servicers who are hostile to housing code enforcement and nuisance abatement are among those who stand to benefit from code-compliance efforts. Neighborhoods with houses owned by banks who keep their property in a public nuisance condition are also neighborhoods in which those very same banks and their servicers are trying to collect mortgage payments. The banks' bad housing and bad business practices strip away the equity in surrounding houses with borrowers struggling to make loan payments. By treating loan collateral in a callous and indifferent manner in one instance, banks diminish the likelihood of collecting payments from borrowers living next door. When banks and their servicers ignore compliance with housing and building codes they are sowing the seeds of loan defaults. Their myopic business model is not limited to extracting collateral from those who got fraudulent loans or who made foolish decisions about buying a house with a high-cost loan. It sucks so much equity out of neighborhoods and communities that prime loan borrowers are upside down and cannot see any possibility of paying off their mortgages. A business model that treats houses as a disposable commodity for facilitating debt collection drives the persistent depression in housing markets. All owners, banks and borrowers alike, are subject to the same legal obligation to the public and to each other to maintain their property so as to avoid harm to each other or the public. This theory of public nuisance abatement undergirds the efforts of the housing court in Cleveland and every other jurisdiction where courts take the rule of law seriously.

### *G. Strategic Code Enforcement Policies and Programs*

In order for nuisance abatement of housing conditions to work effectively,

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involved). *See generally* Cleveland Hous. Renewal Project v. Wells Fargo Bank, No. 08-CVH-31391 (Ohio Cleveland Mun. Ct. Housing Div. June 18, 2009) (unpublished order).

there must be municipal policies and programs directed toward prevention and abatement of nuisance conditions. Current housing and building codes that were enacted to ensure the quality of new housing construction are not likely to be effective against abandoned and blighted housing. Most current code enforcement models presuppose compliance from an owner who occupies the premises and has the means to comply. The abandoned, vacant houses cropping up in the wake of the mortgage crisis are not used by owners for shelter; they are held as commodities for non-residential purposes. Perhaps their ultimate buyers are enterprising and skilled craftsmen looking for houses with “good bones” to fix up in a manner consistent with its architectural features for personal occupancy.<sup>169</sup> More likely, however, the buyers will be students of infomercials on TV, internet promotions, and seminars who are convinced of how easy it is to make money buying and selling foreclosed houses at bargain prices.<sup>170</sup> Bank REO property is seen in these markets as a commodity for sale with a clear title, empty of occupants, at a drastically reduced price—lower than the prevailing price in the neighborhood. Vacant houses purchased for rehabilitation by an owner-occupant are now the exception rather than the rule. And many of those would-be rehabbers have neither the experience nor the skill required to do more than minor cosmetic repairs.

The recent changes in housing conditions and markets require modifications in code enforcement policies and methods. Communities with older housing stock have different needs than recently built subdivisions. Housing in different climates will require differences in housing codes. One housing code does not work well in all situations. The changes occurring in housing markets arising from the mortgage crisis are redefining what is normal for localities all over the country. No change is more drastic than the appearance of large numbers of abandoned and chronically vacant houses, which presents a new challenge for code enforcement officials and for the elected legislators who enact the housing codes. The mortgage crisis is prompting consideration of new legislation to protect the health, safety, and welfare of the public in especially distressed neighborhoods from the harm and instability caused by nuisance conditions in vacant houses.

A strategic approach to nuisance prevention and abatement is emerging in some localities. Mandatory registration and licensing of vacant structures by owners is one measure being adopted by municipal legislatures around the

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169. Alexandra Alter, *Artists vs. Blight*, WALL ST. J., Apr. 17, 2009, at W1, available at <http://online.wsj.com/article/SB123992318352327147.html> (describing artists' efforts to buy and renovate foreclosed housing in Cleveland).

170. Vicki Mabrey & Ted Gerstein, *Investor Cashes in on “Cheap, Shabby” Homes*, ABC NEWS NIGHTLINE, Apr. 26, 2007, <http://abcnews.go.com/Nightline/story?id=3084500&page=1> (profiling blighted housing speculator). It almost goes without saying that others' success with this business model can, and does, considerably vary.

country.<sup>171</sup> This type of regulation serves several purposes. It identifies and provides reliable contact information for the person responsible for the condition of vacant properties. It enables more direct communication between municipal officials and those responsible for maintaining vacant properties. It distinguishes between vacant residences that are abandoned and those that are temporarily unoccupied. It informs municipal safety personnel of what is inside a house in an emergency situation. It reduces the public expense for nuisance abatement.

Given how pooling and servicing agreements and the control over both mortgage administration and property maintenance are delegated to a hierarchy of servicing entities, it is expensive for municipalities to make timely contact with remote servicers not identified with the property. The recordkeeping of the ownership and servicing of securitized mortgages and bank REO properties is notoriously complicated and unreliable.<sup>172</sup> The vacant property registration legislation varies from place to place and presents a challenge to servicers and owners whose business model operates on a national platform that disregards local variations in both circumstances and nuisance abatement laws. Local ordinances have a wide variety of provisions, requirements and fee structures. Mortgage holders and servicers strongly resist the proliferation of varied local regulations.

Safeguard Properties, a Cleveland-based national property preservation field servicer managing properties for national mortgage and bank REO servicers, is leading an effort to protect servicers from local legislation. Its effort has focused on development and lobbying for adoption of the private listing of servicers known as the Mortgage Electronic Registration Service (MERS). Safeguard and its MERS-affiliated servicers claim that MERS can provide a substitute for registration and preempt the need of cities to require registration of vacant houses.<sup>173</sup> Code enforcers have not generally found that claim to be verifiable, particularly in those neighborhoods most severely impacted by subprime loans, foreclosures, and older, high-maintenance housing stock. In Cleveland, for example, local governments and nonprofit agencies find that MERS yields mortgage servicer information on less than half of the properties for which they make inquiries using the MERS system. While this effort has brought together some servicers and some vacant property registration advocates for direct dialogue on the issues, there is not sufficient agreement on all sides of the issue to claim the MERS registration system is a satisfactory

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171. See Benton C. Martin, Article, *Vacant Property Registration Ordinances*, 39 REAL EST. L.J. 6, 9 (2010) (describing local governments' enactment of vacant property registration (VPR) ordinances).

172. See generally Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565 (describing difficulty regarding securitized mortgages).

173. See *MERS InvestorID*, SAFEGUARD PROPERTIES (June 15, 2009), <http://www2.safeguardproperties.com/content/view/2397/308> (chronicling public statements extolling values of private registration system).



alternative to mandatory local registration of long-term vacant houses. The presence of someone who exercises legal control and accountability over a vacant house where the house is located is essential to protecting the public and neighbors from nuisance conditions, which can seriously invade the rights public law protects. Registration is a necessary means of bringing the big banks and their hierarchy of agents into direct contact with the real estate collateral they control in the mortgage financing and debt collection business. Local governments' adoption of registration and licensing requirements for vacant houses is one tool for protecting neighborhoods vulnerable to abandonment by owners and mortgagees in the mortgage crisis.

## VI. CONCLUSION

The law of public nuisance correctly and conservatively prohibits actions—most especially, the misuse of property by owners—that interfere with the exercise and enjoyment of rights granted by law to the public. Where statutes and ordinances prohibit maintaining or use of property in a condition harmful to the public health, safety, welfare, and morals, violation of these laws as a regular business practice is an unreasonable interference with the rights of the public. No reasonable, law-abiding person would knowingly and intentionally engage in public nuisance conduct. Leaving houses condemned as unsafe, unsanitary, unusable, and unattended in residential neighborhoods in violation of municipal and state laws puts owners or those in control of the conditions outside the law. One might reasonably expect laws protecting the public from such nuisance conditions to apply to all owners of houses, including those financial institutions that own the most houses. They too, after all, benefit from neighborhoods in which mortgagors are not dissuaded by lawless public nuisance conditions from continuing their loan payments.

The experience in neighborhoods in Cleveland, Ohio, and in others where the mortgage crisis is destabilizing housing markets, suggests that the doctrine of public nuisance is not being applied successfully. If public nuisance law is to be an effective means of protecting neighborhoods from the big banks making billions in the mortgage crisis, it must be used strategically and its use must aim directly at the interference with the rights of the public by lawless property owners. The most ancient and conservative application of public nuisance law is the abatement of real property abuses that interfere with essential rights to health, safety, and welfare, including property rights, which government guarantees through the exercise of the police power.