The Burden Of Proof In California Environmental Nuisance Cases

I. INTRODUCTION

Until recently, environmental protection arose only as the incidental benefit of private actions brought to redress or alleviate interference with property and economic interests.[1] Today numerous federal and state statutes reflect an increased concern for the environment.[2] These statutes are of two types. Some place on the user of a public resource the burden of justifying his use.[3] Others create new agencies, or empower existing agencies to oversee specific aspects of the environment.[4] In some jurisdictions, notably California, these laws touch on nearly every area of environmental quality.

Modern legislation, however, has not removed all the barriers to effective environmental protection. Manpower shortages and inade-

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[1] Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M. Baldwin & J. Page, Jr. eds. 1970) [hereinafter cited as Krier]. For the purposes of this article, "environmental litigation" refers to any actions brought to protect natural resources, wildlife, aesthetic qualities of the air, land, or water, and the health of human beings. In fact, this definition includes both the proprietary and public interest lawsuits discussed in the text. The distinction between the two is important, however, in that the proprietary lawsuit frequently concerns environmental issues only incidentally. Thus in implementing the proposal of this article, it may be necessary to consider whether the environmental issues are raised for the sole purpose of lessening the nuisance plaintiffs burden.

[2] A compilation of federal laws affecting the environment is contained in A COMPILATION OF FEDERAL LAWS RELATING TO CONSERVATION AND DEVELOPMENT OF OUR NATION'S FISH AND WILDLIFE RESOURCES, ENVIRONMENTAL QUALITY, AND OCEANOGRAPHY (1975). A similar compilation of California statutes (over 1300) can be found in LAWS RELATING TO THE PROTECTION OF ENVIRONMENTAL QUALITY (1970).

[3] *See, e.g.*, the National Environmental Policy Act of 1969 [NEPA], 42 U.S.C. §§ 4321-4347 (1971); California Environmental Quality Act of 1970 [CEQA], CAL. PUB. RES. CODE §§ 21000-174 (West Supp. 1976); Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. § 691 .1201-.1207 (Supp. 1975).

[4] *See, e.g.*, CAL. WATER CODE § 13320(a) (West Supp. 1975) [Porter-Cologne Water Quality Act]; CAL. PUB. RES. CODE § 21167 (West Supp. 1976) [CEQA]; *cf.*, CAL. CODE CIV. PROC. § 1094.5 (West 1967) [Administrative Mandamus]. The state of California, perhaps the most prolific creator of administrative agencies outside of the federal government, has at least 16 agencies, departments or offices significantly involved in environmental protection. *See* CALIFORNIA BLUE BOOK (1971).

quate finances often hamper agency fact finding and enforcement.[5] Inadequate remedial and jurisdictional authority also impairs agency effectiveness.[6] To fill jurisdictional voids and supplement agency enforcement, litigants must rely on the common law doctrine of nuisance. Recent environmental statutes recognize the doctrine's continuing role and specifically disclaim any limitation on public or private nuisance suits.[7] Because of its requirements of proof, however, common law nuisance is currently inadequate to deal with many modern environmental issues.

Nuisance law developed at a time when natural resources were considered inexhaustible and public policy placed high priority on the advancement of industrial interests.[8] Public nuisance was often inconsistent with the notion of inexhaustible resources, at least if private property interests were not disrupted.[9] If an alleged nuisance could be readily enjoined, the public policy favoring industrial growth would be frustrated.[10] To avoid this result, the law assigned the plaintiff a heavy burden when proving the existence of a nuisance. Consequently, when evidence of a nuisance was conjectural or inaccessible, the plaintiff in a nuisance case was seldom able to sustain his burden.[11] This remains true today.

The belief that resources are inexhaustible is a myth of the past. Recent legislation and judicial activity reflect the rejection of this traditional belief and represent a new public policy which emphasizes the conservation of resources and protection of the environment.

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[5] Wagoner, *Environmental Protection in California*, 14 SANTA CLARA LAW. 296, 298 (1974). The author argues that existing state agencies lack the authority, manpower, and finances to comprehensively attack the problems of environmental harm. This lack of integration generates gaps in research and enforcement capabilities both within and between the agencies.

[6] These problems arose in a California case presently being litigated under the Porter-Cologne Water Quality Act, CALIFORNIA WATER CODE Sections 13000-998 (West 1972). Vandals caused over one hundred thousand gallons of waste petroleum products to drain into San Francisco Bay. Under Porter-Cologne, the state attorney general could seek to recover clean-up costs and civil penalties. But, although similar spills had previously occurred on the premises, under Porter-Cologne no action could be taken to require safeguards against future spills. The regional water quality board has authority to prevent threatened nuisances, but, under WATER CODE section 13050(m), a regional water quality control board is entitled to act only on those nuisances that occur "during or as the result of the treatment or disposal of wastes." Thus, its authority did not allow it to act on a threatened nuisance caused by the storage of oil. People v. Superior Court of Alameda County, Civil No. 1-37138 (Cal. Sup. Ct., filed July 11, 1975).

[7] *See, e.g.*, CAL. GOV'T. CODE ANN. § 12601 (West Supp. 1976); CAL. WATER CODE § 13002(c),(e) (West 1972).

[8] *See* text accompanying notes 96-105 *infra*.

[9] *Id.*

[10] *See* note 104 *infra*.

[11] The effect of this type of informational limitation is discussed in the text accompanying notes 69-74 *infra*.

This new policy no longer consistently elevates economic over environmental interests.[12] Yet nuisance law remains wedded to the old policy. To gain modern vitality, the doctrine must incorporate the new public policy and discard its inherent preference for economic interests.[13] One way to bring nuisance into step with modern policy is to reallocate the burden of proof. This article proposes a judicial reallocation of that burden under California nuisance law.[14] The article begins with a general discussion of the burden of proof and nuisance law. Following this background material, the article examines the inadequacies of the present law. Next, the article considers policy changes which mandate reallocation of the burden in light of the courts' role as integrators of law and policy. The final section offers a proposal for reallocation and explores its possible impacts on the courts and the economy.

II. BACKGROUND INFORMATION

A. BURDEN OF PROOF

The California Evidence Code defines the burden of proof[15] as "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the

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[12] A major problem confronting environmentalists in a market economy is that environmental resources do not lend themselves to ready valuation. Their worth has been subjectively determined, with environmentalists valuing them greatly, others less so. This problem and its ramifications are discussed in J. KRUTILLA, THE ECONOMICS OF NATURAL ENVIRONMENTS, 19-73 (1975). For a more technical approach, *see* K. MALER, ENVIRONMENTAL ECONOMICS (1974).

[13] Federal Circuit Judge J. Skelly Wright, in urging the federal courts to move away from old notions of federalism, lamented the condition of state nuisance law: "Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half century. . . ." Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967).

[14] Reallocation can be accomplished by either the courts or the legislature. People v. Pay Less Drug Store, 25 Cal. 2d 108, 153 P.2d 9 (1944); McDonald v. Conniff, 99 Cal. 386, 34 P. 71 (1893). The California Legislature has shown a willingness to regulate the environment, but traditionally it has been within the province of the judiciary to continue developing common law doctrines. On this latter point, *see* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). [judicial modification of the common law may continue notwithstanding legislative codification]. Where reform can be accomplished through manipulation of the rules governing the burden of proof, courts have shown a relatively greater willingness to change the law to meet changing social conditions. *See* text accompanying notes 88-95 *infra*.

[15] This burden is also known as the "burden of persuasion" and the "risk of nonpersuasion." *See* E. CLEARY et al., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2486 (3d ed.) [hereinafter cited as 9 WIGMORE (3d ed.)].

court."[16] The "requisite degree of belief" varies with the issue involved. The four standards adopted by California courts are "preponderance of the evidence,"[17] "clear and convincing,"[18] "raising a reasonable doubt"[19] and "beyond a reasonable doubt."[20]

Allocation of the burden of proof is a function of the substantive law. California Evidence Code section 500 states:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.[21]

But how does the court determine the party to whom the fact is essential? Historically the plaintiff has been allocated the burden with regard to most facts.[22] As the party challenging the status quo, he is seen as the proper party to bear the risk of loss upon a failure of proof.[23] But, over time, various factors have been recognized by the courts which mandate the assignment of the burden of proof to the defendant. When a case of first impression arises, or when a traditional allocation is challenged, the following factors may control the allocation of the burden:

(1) The type of allegation. Some allegations, such as fraud, have traditionally been disfavored. Thus, rather than demanding that the plaintiff bear the burden of persuading the jury that he acted honestly, courts will require the defendant to plead and prove the fraud.[24]

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[16] CAL. EVID. CODE § 115 (West 1968).

[17] *Id.*, and CAL. EVID. CODE § 502 (West 1968). To preponderate with his evidence, a party must introduce evidence that, when weighed against that of his opponent, has more convicting force. People v. Miller, 171 Cal. 649, 653, 154 P. 468, 470 (1916); CAL. JURY INSTRUCTIONS CIVIL 2.60 (West, 5th ed. 1969).

[18] Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544 (1899); CAL. EVID. CODE §§ 115, 502 (West 1968); B. WITKIN, CALIFORNIA EVIDENCE § 209 (2d ed. 1966) [hereinafter cited as WITKIN, EVIDENCE]. Proof of a fact by clear and convincing evidence requires a higher probability of its existence than the mere provability required under the preponderance of the evidence standard. *See*, McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 262-63 (1944).

[19] CAL. EVID. CODE §§ 115, 502 (West 1968); B. JEFFERSON, CALIFORNIA EVIDENCE HANDBOOK § 45.1 (1972). When a criminal defendant has the burden of proof on an issue relevant to his guilt or innocence, he may satisfy the burden by introducing evidence which raises a reasonable doubt as to his guilt. *Cf.*, the defense of insanity, which requires proof by a preponderance of the evidence. People v. Daugherty, 40 Cal. 2d 876, 900-1, 256 P.2d 911, 924 (1953); WITKIN, EVIDENCE, *supra* note 18, § 212.

[20] CAL. CODE CIV. P. § 1096 (West 1967); CAL. JURY INSTRUCTIONS CRIMINAL 2.90 (West, 3d ed. 1970). In a criminal case the defendant's presumption of innocence must be overcome by evidence that removes all reasonable doubt of guilt. WITKIN, EVIDENCE, *supra* note 18, § 211; People v. Miller, 171 Cal. 649, 651, 154 P. 468, 469 (1916).

[21] CAL. EVID. CODE § 500 (West 1968).

[22] MCCORMICK (2d ed.), *supra* note 15, § 337 at 785.

[23] *Id.*, at 786.

[24] Krier, *supra* note 1, at 108; C. CLARKE, CODE PLEADING § 48 at 311-13, § 96 at 609 (1947).

(2) The relative knowledge of the parties. One party may be required to prove a particular fact if he is likely to have substantially greater knowledge than the other party.[25]

(3) The availability of the evidence. When evidence is readily available to one party, but unobtainable by the other, considerations of fairness and convenience place the burden of proof on the former party.[26]

(4) The likelihood that the event occurred. Proof of an event which is contrary to the judicial assessment of the probabilities will be required of the party alleging its occurrence. Thus, the burden of proving a gift of services rendered in a business context falls on the party claiming it.[27]

(5) The phrasing of a statute or contract. For example, if a plaintiff brings an action on a contract, he will usually be required to prove those elements of the contract which entitle him to the claim under it.[28] The defendant must plead and prove the existence of facts which release him from liability.[29]

The foregoing factors focus judicial attention on the equities between the parties as they relate to the production of evidence or the gravamen of the complaint. Collectively, they measure the interests of the parties and are distinguishable from a sixth factor, public policy, which is a measure of society's interest in the outcome of certain types of litigation.[30] The public policy considerations which affect the allocation of the burden of proof can be divided into three categories:

(1) The desirability of preserving the rights of an injured plaintiff. For example, the inability to prove which of several defendants caused an injury will not bar a tort plaintiff's action.[31] Neither will the impossibility of apportioning liability among defendants[32] or be-

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[25] For a discussion of the decreasing significance of this factor in light of modern use of discovery techniques, *see* MCCORMICK (2d ed.), *supra* note 15, § 337 at 787 n.19.

[26] CAL. EVID. CODE § 500, Law Rev. Comm'n Comment (West 1968).

[27] MCCORMICK (2d ed.), *supra* note 15, § 337 at 787.

[28] *Id.*

[29] For a discussion of the problems of allocating the bruden of proof in cases of first impression, *see* Stone, *Burden of Proof and the Judicial Process*, 60 L.Q. REV. 262, 270-84 (1944) [hereinafter cited as Stone].

[30] *See* CAL. EVID. CODE § 500, Law Rev. Comm'n Comment (West 1968). For a brief discussion of the concept of public policy, *see* text accompanying notes 76-83 *infra*.

[31] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 434, 218 P.2d 17, 32 (1950); Copley v. Putter, 92 Cal. App. 2d 453, 457, 207 P.2d 876, 878 (2d Dist. 1949).

[32] Cummings v. Kendall, 41 Cal. App. 2d 549, 558-9, 107 P.2d 282, 287 (3d Dist. 1940); Apodaca v. Haworth, 206 Cal. App. 2d 209, 214-15, 23 Cal. Rptr. 461, 464 (3d Dist. 1962).

tween the defendant's negligent act and a non-tortious event.[33]

(2) The need to prevent parties from subverting the purpose of a specific statute. For example, under California law, violation of a statute constitutes negligence per se if the violation results in injury to a person within the class the statute was designed to protect.[34] The California Supreme Court has allocated to the negligent defendant the burden of exonerating himself from liability when a violation also caused the absence of all evidence of the proximate cause of the injury.[35]

(3) The desirability of furthering favored social interests. Many common law allocations operate to promote widely held social values.[36] For example, the presumptions of legitimacy of children stem from the desirability of maintaining stable family relationships.[37] Also where business interests representing competing social values are frequently in conflict, courts have favored one by allocating the burden of proof to the other.[38]

When a case appears to present facts calling for an allocation at variance with the traditional rules, how is reallocation initiated? Frequently the pleadings themselves offer the appropriate vehicle.[39] When mere notice pleading is involved, the pretrial conference is a suitable forum in which to bring special considerations to the judge's

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[33] Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 704-6, 39 Cal. Rptr. 64, 82-3 (1st Dist. 1964).

[34] Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 416, 218 P.2d 17, 21 (1950); Porter v. Montgomery Ward & Co., 48 Cal. 2d 846, 849, 313 P.2d 854, 856 (1957); PROSSER, LAW OF TORTS § 36 (4th ed. 1971) [hereinafter cited as PROSSER (4th ed.)].

[35] Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). The plaintiff in Haft brought a wrongful death action after her son and husband drowned in the defendant's swimming pool. The court found that the defendant, by failing to maintain a lifeguard or post a sign warning of the absence of a lifeguard, was negligent as a matter of law. Due to the absence of an eyewitness, the plaintiff was unable to introduce evidence of the proximate cause of the drownings. The court reasoned that a person's own wrongdoing should not be allowed to protect him from the consequences of his act. Therefore, the defendant was given the burden of proving that his failure to comply with the statute was not the proximate cause of the drownings.

[36] CAL. EVID. CODE § 605 and Law Rev. Comm'n Comment (West 1968).

[37] Two presumptions of legitimacy are codified in the CALIFORNIA EVIDENCE CODE at sections 621 and 661 (West 1968).

[38] For example, during the nineteenth century, courts in the midwest favored water transport over water power by ruling that any obstruction of a major navigable stream without legislative license was a nuisance. But there was no rule that all streams were navigable; the party alleging nuisance had the burden of proving navigability. J. HURST, LAW AND ECONOMIC GROWTH 211 (1964) [hereinafter cited as HURST].

[39] Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 14 (1959) [hereinafter cited as Cleary].

attention.[40] But, although desirable,[41] early apportionment is not necessary. The court need not allocate the burden until it is time for a decision.[42]

B. NUISANCE

Suppose a small scale cement quarry is operating in a residential area. The plant emits dust and odors which cause respiratory difficulties to persons living nearby, creates excessive noise, and increases traffic thereby obstructing access to one of the homes in the area. Thus, the operation of the quarry may cause several types of nuisances.

An alleged nuisance caused by the operation of the plant can be attacked by a criminal action,[43] abatement,[44] or a civil action.[45] If a civil action is brought, the plaintiff must first establish that he has standing to sue. Whether a particular party has standing to bring a civil action for a nuisance depends on the characterization of the nuisance as either public or private. A public nuisance is one that affects the public in general.[46] The possible plaintiffs for a public nuisance are the district attorney, city attorney,[47] attorney general,[48] or a private person if he suffers special injury.[49] A private

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[40] LOW, *Opening Statement*, in CALIFORNIA CONTINUING EDUCATION OF THE BAR: CALIFORNIA CIVIL PROCEDURE DURING TRIAL 8.6 (1969).

[41] Cleary, *supra* note 39 at 14.

[42] Since evidence introduced by either side may satisfy the burden of proof, allocation does not become necessary until the case goes to the jury. *See* Perrotti v. Sampson, 163 Cal. App. 2d 280, 283, 329 P.2d 310, 312 (1958). In nuisance actions, which are typically tried without a jury, the value of "early" allocation is academic. The issue of injunctive relief is decided by the judge, who may develop thoughts about proper allocation during the course of the trial.

[43] For penal provisions *see* CALIFORNIA PENAL CODE sections 370-72 (West 1972).

[44] "A public nuisance may be abated by any public body or officer authorized thereto by law." CAL. CIV. CODE § 3494 (West 1970). Abatement is a self-help remedy by a private person of a nuisance that is specially injurious to him. The object constituting the nuisance may be removed or destroyed without judicial process. CAL. CIV. CODE § 3495 (West 1970), 36 CAL. JUR. 2d, *Nuisance* § 77 (2d ed. 1957).

[45] These methods of attacking a nuisance are available for a public nuisance. CAL. CIV. CODE § 3494 (West 1970). They are also available for a private nuisance with the exception of a criminal action. CAL. CIV. CODE § 3501 (West 1970).

[46] California defines a public nuisance as a nuisance ". . . which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." CAL. CIV. CODE § 3480 (West 1970).

[47] CAL. CODE CIV. P. § 731 (West 1967).

[48] CAL. GOV'T. CODE ANN. § 12600(b) (West Supp. 1976).

[49] CAL. CIV. CODE § 3493 (West 1970), CAL. CODE CIV. P. § 731 (West 1967). California courts have consistently interpreted "special injury" as injury that is different in kind rather than degree from that of the general public. Venuto v. Owen Corning Fiberglas Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1st

nuisance is one that affects the property rights of a private party, thus conferring standing to that party.[50] In the example, the plant's operation could give rise to both public or private nuisance actions. The operation may constitute a public nuisance since the dust, odors, and excessive noise may affect the entire community. It may also constitute a private nuisance since the defendant's activity affects an individual's property rights.

Assuming a plaintiff does have standing to bring suit in either a public or private nuisance action, he has the burden of proof on two major issues. First, he must show that a nuisance does or will exist. Second, he must show that the desired relief should be granted.

To sustain his burden as to the existence or threat of a nuisance, the plaintiff must prove four elements: (1) that the results of the defendant's acts are or will be within the statutory definition of nuisance;[51] (2) that the defendant's activity is or will be unreasonable;[52] (3) that there exists or is an apprehension of a substantial interference[53] or injurious effect to a private party or to the public;[54] and, (4) that the defendant is or will be responsible for the acts constituting the alleged nuisance.[55]

An activity is within the statutory definition of nuisance if it is

> . . . injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway. . . .[56]

In the hypothetical cement quarry, the excessive noise, causation of respiratory difficulties, and obstruction of property place the activity

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Dist. 1971). This is an area of considerable controversy. *See generally*, Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

[50] California defines a private nuisance as every nuisance not included in the definition of public nuisance. CAL. CIV. CODE § 3481 (West 1970). The result is the consistent view that a private nuisance results if, and only if, the property rights of the plaintiff are or will be injured. PROSSER (4th ed.), *supra* note 34, § 89.

[51] People v. Steele, 4 Cal. App. 2d 206, 40 P.2d 959 (1st Dist. 1935).

[52] Stegner v. Bahr and Ledoyen, Inc., 126 Cal. App. 2d 220, 272 P.2d 106 (1st Dist. 1954).

[53] PROSSER (4th ed.), *supra* note 34, § 87.

[54] Harvey v. Chilton, 11 Cal. 114 (1858). The requirement of substantial injury distinguishes nuisance from the closely related tort of trespass. In trespass, any intentional entry onto land violating another's right to exclusive possession will raise a claim for relief. But the defendant's activity will not raise an action for either a private or public nuisance unless it results in substantial injury or interference with the owner's enjoyment of the land or with the rights of the public. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 92 (8th ed. 1974) [hereinafter cited as WITKIN].

[55] Portman v. Clementina Co., 147 Cal. App. 2d 651, 305 P.2d 963 (1st Dist. 1957).

[56] CAL. CIV. CODE § 3479 (West 1970).

within the statutory definition of nuisance.

Proof of the second element, the unreasonableness of the defendant's activity, entails a consideration of the locality and surroundings, the number of people living in the locality, prior use of the area, whether the defendant's use is continued or occasional, and the nature and extent of the injury caused by the defendant's activity.[57] The operation of the cement quarry in a residential area would be unreasonable while the operation of the same plant in an industrialized sector would not.

The third element, substantial injury, may be satisfied by showing that the injury is real and ascertainable rather than fanciful and imaginary.[58] This may be shown by the respiratory difficulties, effects of excessive noise, or obstruction of property.

The final element, causation, must be proved as for any other tort. The issue of causation is simplified in the example since the defendant is operating the only cement quarry in the area. The plaintiff could prove that the defendant's activity caused an obstruction of his property under either the "but for"[59] or "substantial factor"[60] tests. Causation may be more difficult to prove with respect to respiratory difficulties which could be the result of sources other than the quarry. The plaintiff could prove that the defendant's activity caused the respiratory difficulties under the "substantial factor" test but not the "but for" test. The plaintiff will try to show that even if the defendant's activity is not the sole cause of the respiratory difficulties, it nevertheless substantially contributes to the presence of those difficulties.

The plaintiff is entitled to a remedy only if he satisfies his burden of proving all the elements of the nuisance.[61] As in most civil cases, that proof must be by a preponderance of the evidence.[62] The possible remedies for a civil nuisance action are declaratory relief,

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[57] McIntosh v. Brimmer, 68 Cal. App. 770, 230 P. 203 (2d Dist. 1924).

[58] Baldocchi v. Four Fifty Supper Corp., 129 Cal. App. 383, 18 P.2d 682 (1st Dist. 1933).

[59] The "but for" test is usually expressed as follows: "The defendant's conduct is not a cause of the event if the event would have occurred without it." PROSSER (4th ed.), *supra* note 34, § 41 at 239.

[60] The "substantial factor" test is as follows: "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.*, § 41 at 240.

[61] The plaintiff's burden in proving the existence or threat of a nuisance may be lessened by the doctrine of nuisance per se. For example, the blasting of explosives in a populated area will invoke the doctrine; the act alone is deemed a nuisance. Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1st Dist. 1950). On the other hand, California also recognizes that certain activities raise a rebuttable presumption that a nuisance does not exist. One example is the operation of an airport. CAL. CODE CIV. P. § 731(b) (West 1967).

[62] Portman v. Clementina Co., 147 Cal. App. 2d 651, 305 P.2d 963 (1st Dist. 1957).

damages, and injunctive relief.[63] Declaratory relief follows naturally upon proof of the nuisance. If damages are sought, then once the nuisance is proved the plaintiff can recover for ". . . the amount which will compensate for all the detriment proximately caused thereby. . . ."[64] If injunctive relief is sought, the plaintiff must show that no adequate remedy at law exists and that he suffers or will suffer irreparable injury.[65]

Thus, to reach the merits of a nuisance action, the plaintiff must first satisfy the requirements of standing. Once those are satisfied, the plaintiff must sustain his burden of proof both in proving the existence or threat of a nuisance and a claim for relief. If the plaintiff sustains those burdens, then, in the absence of valid defenses,[66] the desired relief can be granted.

III. INADEQUACIES IN THE EXISTING ALLOCATION OF THE BURDEN OF PROOF IN NUISANCE CASES

A nuisance action could be a potent weapon in the environmental lawyer's arsenal supplementing and reinforcing the existing environmental quality statutes. The California statutory definition of common law nuisance is sufficiently broad to encompass almost any form of environmental damage.[67] A nuisance suit can be used to enjoin either an actual or threatened nuisance.[68] It also can provide for

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[63] These remedies may be sought individually or collectively. Katenkamp v. Union Realty Co., 6 Cal. 2d 765, 59 P.2d 473 (1936).

[64] CAL. CIV. CODE § 3333 (West 1970).

[65] The requirement of irreparable harm has been widely criticized. *See generally*, Note, *Imminent Irreparable Injury: A Need for Reform*, 45 U.S.C. L. REV. 1025 (1972). But a recent United States Supreme Court decision upheld the requirement. Rondeau v. Mosinee Paper Corp., 95 S. Ct. 2069 (1975)..

[66] The defenses available to the defendant in a nuisance cause of action are equitable estoppel, McDonald v. Southern Cal. Ry. Co., 101 Cal. 206, 35 P. 643 (1894), unclean hands, Pon v. Wittman, 147 Cal. 280, 81 P. 984 (1905), laches, express statutory authority, zoning regulations, and balancing of conveniences. WITKIN, *supra* note 54, § 105-09.

[67] The statute defines nuisance as "[a]nything which is injurious. . . ." CAL. CIV. CODE § 3479 (West 1970). The definition is limited, however, to four specific categories. *See* text accompanying notes 56-60 *supra*. For a discussion of "environmental damage," *see* text accompanying note 130 *infra*.

[68] California courts generally characterize a nuisance as either "actual" or "threatened." This characterization is based on the time that a nuisance exists. Thus, the operation of a supermarket resulting in increased traffic, injury to private property, and endangering children was characterized as "actual" since it was presently occurring. City and County of San Francisco v. Safeway Stores, Inc., 150 Cal. App. 2d 327, 310 P.2d 68 (1st Dist. 1957). A "threatened" nuisance is one that will occur at some time in the future. Thus, an action to enjoin the construction of a store building in a residential area was characterized as a "threatened" nuisance since the nuisance could exist only in the future upon completion of construction. Smith v. Collison, 119 Cal. App. 180, 6 P.2d 277 (1st Dist. 1931).

both compensatory and injunctive relief.[69] The utility of a nuisance action, however, is minimized by the present allocation of the burden of proof to the plaintiff.

The plaintiff may not be able to sustain the burden of proving the existence or threat of a nuisance either because no nuisance exists or because of inherent limitations on the availability of information concerning the defendant's activity and whether that activity does or will cause injury. But the inability to prove the existence or threat of a nuisance because of a lack of information does not necessarily mean that a nuisance, in fact, does not or will not exist. It merely means that the plaintiff does not have sufficient information to sustain his burden of proof on the issue. The success of a nuisance suit may thus depend on the amount and quality of information available about a particular activity and its effects.

If the information is available it may nevertheless be so inherently indefinite that any analysis must be based on mere probabilities.[70] The resulting statement of probability, however, would be only a prediction of the percent of times that a nuisance would result if the activity were repeated an infinite number of times. It would not be conclusive on the question of whether a nuisance will in fact result from the particular defendant's conduct.[71]

On the other hand, the information about an activity and its effects may be unavailable to the plaintiff in three respects. First, the information may be unavailable but obtainable only if the particular plaintiff has the funds, manpower, and time to acquire that information.[72] Second, the effects of the activity could be so conjectural that the information is neither available nor obtainable to anyone.[73] Third, the information may be unavailable to the plaintiff but available to the defendant.[74]

Suppose that a mining company is operating on the shores of a lake and is discharging excessive amounts of toxic chemicals into the waters. Although the fact and amount of the discharge is well

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[69] *See* text accompanying note 63 *supra*.

[70] Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decision Making*, 48 U.S.C. L. REV. 371, 392-96 (1974) [hereinafter cited as Gelpe & Tarlock].

[71] This can be illustrated by an example using the tossing of a coin. In any given toss of a fair coin the probability of "heads" appearing is fifty percent. The probability is determined by predicting the outcome based on an infinite number of tosses. If one were to toss a coin an infinite number of times, the number of "heads" occurring would tend to be fifty percent. But for any specific toss one would not be able to conclusively predict that the result would be "heads."

[72] Gelpe & Tarlock *supra* note 70.

[73] *Id.*

[74] In this situation, the traditional theories of reallocation may be instituted to place the burden of proof on the defendant. *See* text accompanying note 26 *supra*.

known, injury has not actually occurred and it is uncertain whether it will occur, since the discharge may be diluted to harmless levels by the lake. If a plaintiff brings a nuisance action and satisfies the standing requirements it is unlikely that he will sustain the burden of proving an actual nuisance due to the absence of actual injury. He may also have difficulty sustaining his burden of proving the possibility of future injury, since the information available about the activity and its effects may be indefinite. Even if the information is theoretically available, it may be unavailable in the sense that the plaintiff may not have the resources to obtain it. The likely result of the situation would be a directied verdict for the defendant. The mining operation would continue even though serious questions have been raised about its safety and environmental impacts. Such a resolution, however, is largely a function of information limitations and the present allocation of the burden of proof rather than a determination of whether a nuisance, in fact, does or will exist.

Under the present allocation of the burden of proof, the plaintiff's inability to acquire definite information becomes the basis for denying relief. If the burden of proof were reallocated to the defendant, he would have to disprove the existence or threat of a nuisance. If the defendant failed to sustain that burden, the plaintiff would prevail. But the defendant may share the same limitations on information about the activity and its effects as the plaintiff, and he too might be unable to sustain the reallocated burden merely because of the inability to acquire definite information. The issue then is: Who should cope with the problem of limitations on information and be allotted the burden of proof in a nuisance action? The thesis of the following section is that in an environmental nuisance action[75] in which the plaintiff is seeking injunctive relief, the defendant should bear that burden.

IV. POLICY ARGUMENTS IN FAVOR OF REALLOCATING THE BURDEN OF PROOF

The preceding section concluded that the existing allocation of the burden of proof renders common law nuisance inoperable when information about the nuisance is conjectural or unavailable. The defendant, whose activities are protected by the assumption of propriety, views the traditional allocation as proper, but his is a partisan view. In analyzing whether the allocation is appropriate, the reasons behind the allocation must be examined. The present allocation is based on a nineteenth century social policy which favored unfettered industrial development. Modern public policy no longer sustains the

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[75] For an explanation of "environmental nuisance suit," *see* text accompanying note 130 *infra.*

same nineteenth century biases, however, and the allocation should be altered to reflect this changed perspective.

A. THE ROLE OF THE COURTS IN RESPONDING TO CHANGES IN PUBLIC POLICY

Since its genesis in England in the sixteenth century, the term "public policy" has been given such disparate interpretations that it is often said not to be capable of precise definition.[76] It need not necessarily mean sound policy,[77] although it has been equated with the general public good.[78] California has adopted the view that the "public policy of a state is found in its constitution, acts of the Legislature and decisions of its courts."[79] This does not mean that the courts are forbidden to render opinions which incorporate changes in public policy on issues not covered by statute. When lacking legislative guidance, the court must be careful to follow the "social view generally" and not merely choose its own preferred solution.[80] Courts have been aided in determining the general social view by the practices of government officials or agencies[81] and the customs and conventions of the people.[82] Thus, when seeking to determine public policy, a court must look first to specific legislative expressions, and then to administrative practice. A court also may look to popular opinion to the extent that it is clearly recognizable as the dominant social view.[83]

With this conception of "public policy" in mind, two questions arise: (1) should the courts respond to public policy?, and (2) if so, what form should this response take? Both the case law and the writings of legal scholars recognize that the courts should respond to

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[76] *See*, Safeway Stores, Inc. v. Retail Clerks Intern. Ass'n., 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953); Schnackenberg v. Towle, 4 Ill. 2d 561, 565, 123 N.E. 2d 817, 819 (1955).

[77] Chubbuck v. Holloway, 182 Minn. 225, 227, 234 N.W. 314, 315 (1931); Hanfield v. A. Broido, Inc., 167 Misc. 85, 87, 3 N.Y.S. 2d 463, 465 (1938).

[78] Safeway Stores Inc. v. Retail Clerks Intern. Ass'n., 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953); Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959); Lemper v. City of Dubuque, 237 Iowa 1109, 1119, 24 N.W. 2d 470, 475 (1946).

[79] Safeway Stores, Inc. v. Retail Clerks Intern. Ass'n., 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953); Craemer v. Superior Court, 265 Cal. App. 2d 216, 222, 71 Cal. Rptr. 193, 199 (1st Dist. 1968); Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959).

[80] People *ex rel.* State Board of Medical Examiners v. Pacific Health Corp. Inc., 12 Cal. 2d 156, 161, 82 P.2d 429, 431, 119 A.L.R. 1284 (1938), *cert. denied* 306 U.S. 633 (1939).

[81] U.S. v. Trans-Missouri Freight Ass'n., Kan., 166 U.S. 290, 340 (1896); Groome v. Freyn Engineering Co., 374 Ill. 113, 124, 28 N.E. 2d 274, 279 (1940).

[82] Bartron v. Codington County, 68 S.D. 309, 322, 2 N.W. 2d 337, 344 (1942).

[83] People *ex rel.* State Board of Medical Examiners v. Pacific Health Corp., 12 Cal. 2d 156, 161, 82 P.2d 429, 431, 119 A.L.R. 1284 (1938), *cert. denied* 306 U.S. 633 (1939).

public policy. Since the late nineteenth century, scholars[84] have agreed with Holmes' familiar proposition that:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[85]

Implicit in Holmes' statement is the recognition that when judicial opinions depart too greatly from strongly held social values, they are nothing more than judicial disiderata.[86] This is not to say that the courts should interfere with the legislature's power to establish public policies by statute. Rather, as innumerable cases bear out,[87] it is the judiciary's responsibility to integrate legislative policy judgments with the common law.

When an issue arises upon which public policy should have an impact, the courts may respond in a variety of ways.[88] Altering the burden of proof, however, provides a relatively non-disruptive avenue for adjusting the law to conform to changes in policy.[89] The burden of proof rules merely modify the law.[90] Therefore, their alteration usually lacks the drama of a change in the substantive law.[91] Consequently, a judge can act through these rules with a re-

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[84] In a lecture given at Yale Law School in December, 1923, Benjamin Cardozo said that the nature of the judicial process divided into four distinct shaping forces. They are logic or analogy, history, customs and "the force of justice, morals and social welfare, the mores of the day, with its outlet or expression in the method of sociology." B. CARDOZO, THE GROWTH OF THE LAW 62 (1924). Harlan Stone noted that an objective determination of the "mores of the times" may properly govern the outcome of a case. H. Stone, *Book Review*, 22 COL. L. REV. 382, 384 (1923).

[85] O. W. HOLMES, JR. THE COMMON LAW 1 (1881).

[86] A painfully fresh example of judicial impotency when contravening the will of the people is the experience of the federal district and circuit courts of the 5th Circuit in the aftermath of Brown v. Board of Education, 347 U.S. 483 (1954). *See*, Nicholson, *The Legal Standing of the South's School Resistance Proposals*, 7 SO. CAR. L.Q. 1, (1954); McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956-1957*, 43 VA. L. REV. 1205 (1957).

[87] The extent to which courts recognize the significance of public policy can most readily be discerned by reference to the note and citations on policy in 72 C.J.S. POLICY 108-22 (1951). For a recent example of a policy-spawned change in the common law notwithstanding codification, *see* Li v. Yellow Cab, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[88] Examples of the various means by which the judiciary may incorporate public policy into the common law may be found in Sierra Club v. Morton, 405 U.S. 727, 734 (1974) [recognition of reduced standing requirements for environmental plaintiffs]; Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) [adopting a rule of comparative negligence in California]; Friends of Mammoth v. Mono County, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) [giving an expansive interpretation to California environmental legislation].

[89] Stone, *supra* note 29, at 279; Krier, *supra* note 1, at 108.

[90] Stone, *supra* note 29, at 279.

duced fear of being criticized for straying too far into the legislative domain.[92]

A good example of the use of the burden of proof to conform the law to new public policy is found in the development of the law involving injured employees. At the turn of the last century, some courts required an injured employee to prove that he had not been injured by a co-worker.[93] After the Federal Employers' Liability Act of 1908[94] replaced the common law fellow servant rule, the United States Supreme Court recognized in the statute an implicit shift in public policy. The employer's economic interests were no longer to be elevated above the interests of the injured employee. In a series of cases, the Court reduced the plaintiff's oppressive burden to one of the lowest among all negligence actions brought against a federal employer.[95]

In summary, the courts' role in responding to public policy changes contains both obligatory and discretionary elements. To remain vital, the courts must incorporate prevailing social views in their decisions. But the amorphous nature of "public policy" allows them to interpret and incorporate those views in a manner and to an extent consistent with the exercise of their juridical discretion.

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[91] Krier, *supra* note 1, at 108.

[92] *Id.* Stone points out that judges are frequently reluctant to acknowledge lawmaking activity because of a fear of being criticized in their exercise of power. *Cf.*, CLEARY, *supra* note 39, at 24.

[93] Krier, supra note 1, at 109.

[94] 45 U.S.C. §§ 51-9 (1971).

[95] *Compare* Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933) *with* Wilkerson v. McCarthy, 336 U.S. 53 (1949). For a full discussion of the Supreme Court's response to the plight of the federal employee *see*, Note, *FELA, Negligence and Jury Trials — Speculation Upon a Scintilla.* 11 WEST. RES. L. REV. 123 (1959). Examples of sociologically spawned burden of proof rules can be found in other areas of the common law as well. With regard to the law of contracts, *see* E. GREENHOOD, PUBLIC POLICY IN THE LAW OF CONTRACTS 5 n.2 and cases cited therein (1886); CLARK, CODE PLEADING § 96 at 610 (2d ed. 1947). An interesting example of the impact of public policy on tort law involves the development of the *res ipsa loquitur* doctrine in airplane accident cases. In the early years of aviation, flight was considered inherently unsafe. The law favored the expansion of the plane's use as a passenger-carrier by refusing to allow plaintiffs to rely on *res ipsa loquitur* to prove the airline's negligence. With the advancement of safety technology, the law changed. The case law now uniformly recognizes that aviation's safety record justifies the application of *res ipsa loquitur* to plane crash cases. *See* PROSSER (4th ed.), *supra* note 34, § 39; U.S. v. Kesinger, 190 F.2d 529 (10th Cir. 1951). *Cf.* McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55, 58-69 (1951). The presumption has been a convenient tool for the implementation of public policy in property law cases. Some examples can be found in: Olson v. Olson, 4 Cal. 2d 434, 439, 49 P.2d 827, 829 (1935). CAL. EVID. CODE § 662 (West 1968) [owner of legal title to property presumed to be owner of beneficial title]; Estate of Hughson, 173 Cal. 448, 451, 160 P. 548, 551 (1916), CAL. EVID. CODE § 663 (West 1968) [ceremonial marriage is presumed valid]; *In re* Thompson's Estate, 200 Cal. 410, 414, 253 P. 697, 699 (1927), T. ATKINSON, HANDBOOK OF THE LAW

B. A NEW PUBLIC POLICY TOWARD THE ENVIRONMENT

Recognizing and quantifying a change in public policy is a difficult task. As noted above, it is largely a matter of interpretation. But, in the environmental field, pronounced changes in public values and legislative decision-making evince an unmistakable turning away from prior public policies. As a product of these earlier policies, the traditional allocation of the burden of proof in nuisance cases represents an outmoded concept of the public good.

Private nuisance was a fixture of English jurisprudence by the thirteenth century.[96] In that century, the Assize of Nuisance provided criminal sanctions for interference with another's land.[97] The first public nuisance statute,[98] enacted in 1389, also authorized a criminal writ.[99] Under these laws, the Crown bore the burden of showing that the accused was guilty of creating a nuisance.[100] Through the years, as the remedies for nuisance expanded to encompass civil as well as criminal actions,[101] the courts found no reason to question the traditional allocation of the burden of proof to the aggrieved party.[102] Moreover, the defendant was frequently engaged in economically productive activities,[103] the disruption of which was wholly contrary to the prevailing social preference for economic expansion.[104] Even when the lawsuit did not involve an economic producer, traditional allocation was consistent with the accepted notion that the party challenging the status quo should bear the burden of proof.[105]

The effect of the traditional allocation is to place the defendant in a favored position whenever it is difficult to conclusively prove or disprove the harmful effects of his acitivity.[106] In a society which

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OF WILLS § 55, at 261 (2d ed. 1953) [presumption of undue influence where beneficiary participates in making a will].

[96] PROSSER (4th ed.), *supra* note 34, § 86, at 572.

[97] *Id.*; McCrae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 31 (1948) [hereinafter cited as McCrae].

[98] STATUTE OF 12 RICH. II, c. 13 (1389). The statute forbade the casting of dung "into Ditches, Water, etc. . . ."

[99] McCrae, *supra* note 97, at 35.

[100] *Id.*

[101] By the sixteenth century a private person could maintain an action of tort for damages or injunctive relief. Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165, 166 (1972).

[102] Nuisance provided the private citizen as well as the government with a remedy for interference with economic and property interests. The action was proprietary and proof of the injury seldom hinged on unascertainable evidence. In the early years, the causes of disease and pollution were not well understood. Therefore suits were brought only when there was self-evident physical injury. *See* cases cited in PROSSER (4th ed.) *supra* note 34, §§ 88, 89.

[103] *Id.*

[104] HURST, *supra* note 38, at 213, 772 n. 345.

[105] *See* text accompanying note 22 *supra*.

[106] *See* text accompanying notes 66-75 *supra*.

no longer sustains a preference for industrialization, this built-in assumption of validity fails to reflect the prevailing public policy.[107] Today the scientific community is accutely aware that new technology can disrupt as well as advance the goals of civilization.[108] People no longer blithely assume that the gross national product is the sole indicator of the nation's economic well-being.[109] They recognize that environmental degradation has both immediate and tangible costs that are incompatible with the historic belief in a natural right to pollute.[110] The result is a restructuring of individual and social priorities and the emergence of a new policy toward the environment.[111]

Expressions of this new environmental policy emanate from a variety of sources. The California and federal legislatures have adopted explicit policies favoring the preservation of the environment.[112] They have passed numerous statutory provisions implementing these policies[113] which the courts have consistently up-

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[107]The National Academy of Sciences succinctly described the broad public concern thus:

> The patterns of society are being rapidly rearranged, and new sets of aspirations, new evaluation of what constitutes a resource, and new requirements in both types and quantity of resources are resulting. The effects on man himself of the changes he has wrought are but dimly perceived. . . . If divergent lines of progress are seen to give rise to ever-greater stresses and strains too fast to be resolved after they have risen and been perceived, then obviously the intelligent and rational thing to do is to learn to anticipate those untoward developments before they arise.

NAS-NRC Publications 1000 and 1000A (1962).

[108]Evidence of the harm caused by the careless misuse of scientific knowledge has been set out by a number of writers. *See., e.g.*, Rodgers, *The Persistent Problem of the Persistent Pesticides: A Lesson in Environmental Law*, 70 COL. L. REV. 567 (1970); R. CURTIS & E. HOGAN, PERILS OF THE PEACEFUL ATOM (1969); G. HARDIN, EXPLORING NEW ETHICS FOR SURVIVAL (1972).

[109]Jackson, *Forward: Environmental Quality, the Courts and the Congress*, 68 MICH. L. REV. 1073 (1970) [hereinafter cited as Jackson].

[110]*See*, Senate Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess., A NATIONAL POLICY FOR THE ENVIRONMENT, SPECIAL REPORT TO THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 5-6 (Comm. Print. 1968).

[111]*Id.*; Jackson, *supra* note 109, at 1074.

[112]The preamble of the National Environmental Policy Act of 1969 [NEPA] declares that it is the national policy to

> . . . encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation.

42 U.S.C. § 4321 (1972).

In the California Environmental Quality Act of 1970 [CEQA] state policy is said to include taking "all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic and historic environmental qualities and freedom from excessive noise." CAL. PUB. RES. CODE § 21001(b) (West 1972).

[113]*See* note 2 *supra*. In California a comprehensive scheme of enforcement provi-

held,[114] occasionally relying on the policy provisions to broaden their sweep.[115] This judicial reinforcement has encouraged the legislatures to enact increasingly stringent measures.[116] Even when

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sions in the pollution control laws rebuts any allegation that CEQA establishes a mere paper policy. For example, the Soap and Detergent Association's Water in the News, Sept. 1969 at 3, called the Porter-Cologne Water Quality Act, CAL. WATER CODE §§ 13000-998 (West Supp. 1976), "the toughest water quality control act in the nation." One reason for this characterization is that polluters can face civil penalties of up to $6,000 per day. CAL. WATER CODE § 13350(a) (West Supp. 1976). *See also* CAL. HEALTH AND SAFETY CODE § 39260 (West 1972). On the federal level, the continuing consideration of legislation to control the manufacture and use of toxic substances evidences Congress' adherence to the policies set out seven years ago in NEPA. Two bills, S. 776 (introduced February 20, 1975 by Senator John Tunney, D-Cal.) and H.R. 10318 (introduced October 22, 1975 by Rep. Bob Eckhardt, D-Tex.) would establish stringent premarketing screening requirements to be administered by the Environmental Protection Agency (EPA). The bills would also provide for immediate removal from the market of any substance deemed by the EPA administrator to present an imminent hazard to health or the environment. Under the definition of imminent hazard, the administrator need only determine that there exists an unreasonable threat of harm. He is not required to prove the actual injury or its certain occurance. 121 CONG. REC. S2281 (daily ed. Feb. 20, 1975); 121 CONG. REC. H10201 (daily ed. Oct. 22, 1975); 6 ENV. REP. 1353, 1429, 1471 (1976).

[114] *See, e.g.*, People v. Plywood Mfrs. of California, 137 Cal. App. 2d Supp. 859, 291 P.2d 587, *appeal dismissed* 351 U.S. 929, *rehearing denied* 351 U.S. 990 (1955); People v. International Steel Corp., 102 Cal. App. 2d Supp. 935, 226 P.2d 587 (1951).

[115] In Firends of Mammoth v. Mono Co. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), the California Supreme Court relied heavily on the statements of policy and intent of CEQA in holding that the legislature intended the act to apply to private as well as public projects.

On the federal level, a symbiotic relationship developed between the courts and the Council on Environmental Quality (CEQ), the agency responsible for promulgating guidelines under NEPA. 42 U.S.C. §§ 4332(2)(C),(D). CEQ and the federal bench engaged in expansive reading of each other's opinions that aided them in carrying out the act's environmental mandate. After NEPA's enactment in 1969, CEQ issued a set of interim guidelines describing procedures to be followed in implementing § 102(2)(C) of the act. Over the next three years CEQ revised its proposed guidelines. During this same period NEPA was receiving strong support in the courts. As the case law became more sophisticated in its interpretation of NEPA, CEQ began reading into the act procedural requirements consistent with the court rulings. Notably, CEQ required the agency responsible for preparing an environmental impact statement (EIS) to receive and consider information from the public. CEQ also imposed a draft EIS requirement to facilitate public comment. Later CEQ required that the draft be similar in content to the final EIS and not merely a summary statement. These later guidelines also encourage public hearings whenever possible. *Compare* CEQ INTERIM GUIDELINES, April 30, 1970, 35 FED. REG. 7390 (1970), with CEQ GUIDELINES, April 23, 1971, 36 FED. REG. 7724 (1971), CEQ PROPOSED GUIDELINES, May 2, 1973, 38 FED. REG. 10856 (1973), CEQ GUIDELINES, August 1, 1973, 38 FED. REG. 20550 (1973), 40 C.F.R. 1500 (1975), *and the following cases:* Calvert Cliffs' Coordinating Committee v. United States A.E. Comm'n., 449 F.2d 1109 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170 (D.D.C. 1972).

[116] After the decision in Friends of Mammoth v. Mono Co. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), the California legislature amended CEQA to include the Court's interpretation of "project" and to remove an exemption for municipalities with an environmental element in their

cases are not brought under expansive environmental statutes, the courts have taken unilateral steps to broaden environmental protection. For example, they have become increasingly willing to recognize the litigable nature of aesthetic harm.[117]

The actions and statements of environmental agencies provide another indicium of public policy. As both promulgators and enforcers of pollution regulations,[118] these agencies develop an expertise which is recognized by the courts.[119] Opinions of an agency regarding subject matter within the purview of its authority are accorded great weight.[120] On the issue of reallocation, both the Council on Environmental Quality and the Environmental Protection Agency[121] have taken the position that, at least in health hazard cases, the defendant should bear the burden of proof.[122]

Evidence of changed public policy is also present in private, municipal, and grass-roots acitivities. The media is replete with news and commentary regarding events affecting the environment.[123] Social and commercial enterprises promote their public image in advertise-

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general plan. Cal. Stats, 1972, ch. 1154 § 1 Dec. 5, 1972.

[117] *See, e.g.*, Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U.L. REV. 1075, 1077 (1970). In Sierra Club v. Morton, 405 U.S. 727, 734 (1972), the Supreme Court acknowledged that impairment of the use and enjoyment of a national park could be a proper subject for equitable relief.

[118] *See, e.g.*, Bay Area Pollution Control Board (CAL. HEALTH & SAFETY CODE §§ 24368-68.7 (West 1972)); Regional Water Quality Control Board (CAL. WATER CODE §§ 13241-43, 13263, 13300-5 (West 1972)); Department of Health (CAL. HEALTH & SAFETY CODE § 208 (West 1972)).

[119] Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974); Trafficonte v. Metropolitan Life Ins., 409 U.S. 205, 210 (1972); Udall v. Tallman, 380 U.S. 1 (1965).

[120] Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974).

[121] *See* note 115 *supra*, discussing the role of the Council on Environmental Quality. The Environmental Protection Agency is the primary environmental research and enforcement agency of the federal government.

[122] The Environmental Protection Agency joined CEQ in sponsoring amendment No. 1814 to the proposed Environmental Policy Act of 1974, S.1104, 93d Cong., 2d Sess. 1974. If enacted, the amendment would have placed the burden of persuasion on the defendant in litigation when a health hazard was alleged. 121 CONG. REC. DAILY DIGEST 3. (Jan. 10, 1975). The amendment came in direct response to the stay of a district court injunction prohibiting the dumping of low grade iron ore tailings into Lake Superior. Reserve Mining v. United States, 498 F.2d 1073 (8th Cir. 1974). In that case, the appellate court found that conclusive proof of an immediate health hazard was lacking. 498 F.2d 1083-4. Russell Peterson, chairman of CEQ, viewed the court's decision as a choice to wait for "proof via counting dead bodies." He felt that a court "should not misread lack of knowledge about a potential hazard as proof that the hazard is slight or does not exist." 5 ENV. REP. 429 (1974). A firm which undertakes activities for a profit, he urged, should be required to prove the safety of those activities. The burden should not rest on others to prove the activities unsafe. *Id.*

[123] Newspapers, magazines and television news specials have sharply increased the amount of coverage accorded environmental matters. For example, in 1969, TIME MAGAZINE began its *Environment* section, declaring that year "the year of ecology." TIME, Aug. 15, 1969, at 38.

ments protraying the environmentally beneficial aspects of their product or activity.[124] In 1972 California voters passed a popular initiative which radically diminished the commercial value of the state's undeveloped coastal lands in favor of preserving their scenic and recreational beauty.[125] Cities and towns throughout the nation are adopting planned growth ordinances to restrict the development of outlying areas.[126]

Public policy, however, is not unidimensional. The emergence of a strong environmental policy does not mean that environmental interests have replaced economic interests as the sole concern in public decision-making.[127] Rather it elevates environmental interests to a position of parity with economic interests.

Until recently society elevated economic interests to the extent that environmental interests were often ignored or forgotten. Today the situation has changed.[128] When a decision of broad social significance is required, the decision-maker can no longer disregard the risks of environmental harm. Yet present nuisance law compels such a result under certain circumstances. When the evidence of a nuisance is conjectural or unobtainable, the present allocation requires the court to find that no nuisance exists. Having reached this conclusion, the court is precluded from balancing the competing interests, even though the risk of harm has not been disproved. As a remedy for environmental harm, common law nuisance is out of step with

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[124] *See* Ludlam, *Abatement of Corporate Image Environmental Advertising*, 4 ECOLOGY L.Q. 247, 251-55 (1974).

[125] Under the Coastal Zone Conservation Act, CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1976), persons seeking to develop land within 1000 yards of the ocean must first obtain a permit from the regional coastal conservation permit board. The permits will be denied unless it is shown that the project will have no significant adverse ecological impact. CAL. PUB. RES. CODE § 27402 (West Supp. 1976).

[126] *See, e.g.*, Golden v. Planning Board, 285 N.E. 2d 291, 30 N.Y. 2d 359, 334 N.Y.S. 2d 138 (1972); Steel Hill Development Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Construction Industry of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976).

[127] Recent pollution control laws make it clear that, although a new public environmental policy exists, economic values have not been discarded. Dollars, jobs and the uninterrupted flow of commerce represent pre-existing values against which the newly understood values of environmental protection must be weighed. *See, e.g.*, CAL HEALTH & SAFETY CODE §§ 24291-24302 (West 1967); CAL. CODE CIV. P. § 731(a) (West 1967). For a discussion and criticism of the protection municipal zoning laws afford air polluters, *see*, Note, *California Code of Civil Procedure Section 731(a): Denial of Private Injunctive Relief From Air Pollution*, 22 HAST. L.J. 1401 (1971).

[128] At least one California court has found that the policies of CEQA set environmental values above economic growth in the priorities of agency decision-making criterion. San Francisco Ecology Center v. City and County of San Francisco, 48 Cal. App. 3d 584, 591, 122 Cal. Rptr. 100, 104 (1st Dist. 1975). *Cf.*, Hixon v. County of Los Angeles, 38 Cal. App. 3d 370, 382, 113 Cal. Rptr. 433, 440 (2d Dist. 1974).

modern public policy. To gain vitality, nuisance law must be restructured. By reallocating the burden of proof, the courts can implement a change which encourages thoughtful consideration of both environmental and economic interests.

V. PROPOSED SOLUTION

A. WHEN THE BURDEN OF PROOF SHOULD BE REALLOCATED

Reallocation should go only as far as is justified by public policy.[129] Since the present public policy is a product of society's recognition of the importance of environmental interests, reallocation must be limited to those interests. The burden of proof should be reallocated in environmental nuisance actions in which the plaintiff is seeking injunctive relief. The "environment" is defined in California Public Resources Code section 21060.5 as "the physical condition which exists within the area . . . including land, air, water, minerals, flora, fauna, noise, objects of historic or esthetic significance." So defined, any interference with or impairment of the environment that falls within the scope of common law nuisance would constitute "environmental damage."[130]

A reallocation of the burden of proof will increase the plaintiff's chances of compelling a decision on the merits since he will no longer have to cope with the possible limitations on information. The burden of proof should be reallocated only in those environmental nuisance actions in which the plaintiff is seeking injunctive relief. The granting of injunctive relief lies in the sound discretion of the court.[131] Under its equity jurisdiction, the court is able to balance the conveniences in determining the appropriateness of injunctive relief.[132] Through the balancing process the court can give ample consideration to both environmental and economic interests.[133] If

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[129] *See* text accompanying notes 96-128 *supra*.

[130] CAL. PUB. RES. CODE ANN. § 21060.5 (West 1976). Michigan's environmental protection act similarly calls for the ". . . protection of the air, water and other natural resources and the public trust therein. . . ." MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1975).

[131] Morgan v. Veach, 59 Cal. App. 2d 682, 139 P.2d 976 (2d Dist. 1943).

[132] California law is unsettled as to whether this doctrine is to be applied. If the nuisance was created willfully, or if it involves the preservation of an established right, or if the use of the doctrine would result in a denial of a permanent rather than a preliminary injunction, then the doctrine will not apply. Morgan v. Veach, 59 Cal. App. 2d 682, 139 P.2d 976 (2d Dist. 1943), Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 167 (2d Dist. 1919). But the doctrine remains a viable option to be instituted in the court's discretion.

[133] Balancing of conveniences refers to whether the harm suffered outweighs the utility of the conduct. WITKIN, *supra* note 54, § 109. In balancing the conveniences, the traditional factors that a court will consider are the character and extent of the damage, the good faith efforts of the defendant to avoid the damage,

injunctive relief were awarded without utilizing a balancing process, the result of reallocation would be a preference for environmental over economic interests. But when the balancing process is applied it allows the court the chance to check that favoritism and to weigh environmental and economic interests on the same scale consistent with their value to society.

Reallocation should not be instituted when the plaintiff seeks damages. Again, the result would be the elevation of environmental interests over economic interests. To recover damages under the present law a plaintiff must prove causation and injury. There is no check, however, on the exaltation of environmental values over economic values when a damage remedy is sought since balancing of conveniences is not employed.[134] Thus, if reallocation were adopted in an action in which the plaintiff is seeking damages, the issue of damages would turn solely on the defendant's failure to disprove causation or injury. Damages would be allowed notwithstanding the fact that the plaintiff did not prove the existence of a nuisance.

The purpose of reallocating the burden of proof is to solve the problems presented when the information is available but indefinite, or not available.[135] Reallocation, however, should be instituted in all environmental nuisance actions in which the plaintiff is seeking injunctive relief, including those in which the information is available and definite, for two reasons.[136] First, limiting reallocation to only those situations in which constraints on information exist would require a case by case determination of the availability and quality of information. Such a determination would be extremely difficult to make since the line between information that is available and definite as opposed to information that is available but indefinite or not available is not readily distinguishable. Second, reallocating the burden when the information is available and definite does not harm the defendant. If a nuisance does not, in fact, exist

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the financial investments of the parties, the relative hardships if the injunction is granted, and the interest of the public in continuing the defendant's operation. W. PROSSER & J. WADE, CASES AND MATERIALS ON TORTS, 684 (5th ed. 1971). In addition, the court should also consider the probability that the anticipated harm will result if the injunction is denied along with an allowance for a margin of safety and available alternatives to the defendant's activity. Note, *Imminent Irreparable Injury: A Need for Reform*, 45 U.S.C. L. REV. 1025, 1051 (1972).

[134] Portman v. Clementina Co., 147 Cal. App. 2d 651, 305 P.2d 963 (1st Dist. 1957).

[135] *See* text accompanying notes 70-73 *supra*.

[136] Gelpe & Tarlock, *supra* note 70. In this situation, where the information is available and definite, the plaintiff can readily prove the nuisance if it in fact exists since there are no constraints on information. An example of such a case would be the encroachment of the defendant's building on the plaintiff's land. All the information would be available and definite here since the activity and its effects are certain.

he will be readily able to disprove its existence.

B. HOW TO REALLOCATE THE BURDEN OF PROOF

Under the proposed solution, the plaintiff would still have the initial burden of producing evidence of a prima facie showing that the defendant is likely to cause a nuisance[137] and the appropriateness of injunctive relief.[138] This standard has been effectively employed by Michigan in its environmental protection act.[139] Such a requirement would discourage frivolous suits without denying all relief to plaintiffs with valid claims presently frustrated by information constraints. Further, even if the information is available but indefinite,[140] the plaintiff will be able to utilize the statistical information about the activity and its effects to show the likelihood of harm instead of having to prove the harm. Also, the plaintiff may be better able to acquire information that is not presently available but possibly obtainable.[141] Less of a resource commitment would be necessary to obtain the information since the lower standard of proof requires less information.

Under the proposal, if the plaintiff satisfies his burden of producing evidence that burden would then shift to the defendant.[142] The defendant also has the burden of disproving the existence or threat of a nuisance and the appropriateness of injunctive relief by a preponderance of the evidence. The defendant can satisfy his burden of proof by disproving any element in the prima facie case[143] or by proving a defense to the action.[144]

If the defendant fails to sustain his burden, the court can balance the conveniences to determine whether to allow injunctive relief. If the balance is in favor of the plaintiff and an injunction is granted, the decree must be tailored precisely to halt the injury to the environment.[145] If a balance is struck in favor of the defendant and injunctive relief is not allowed, the plaintiff still might recover money damages for past or existing harm.[146] The plaintiff retains the burden of proof on the issue of damages notwithstanding the possibility

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[137] *See* text accompanying notes 51-55 *supra*.
[138] *See* text accompanying note 65 *supra*.
[139] MICH. COMP. LAWS ANN. § 6901.1203 (Supp. 1975).
[140] *See* text accompanying notes 70-71 *supra*.
[141] *See* text accompanying note 72 *supra*.
[142] The burden of producing evidence may shift from one party to the other during the course of a trial. MCCORMICK (2d ed.), *supra* note 15, § 336.
[143] *See* text accompanying notes 51-55 *supra*.
[144] *See* note 66 *supra*.
[145] Thompson v. Kraft Cheese Co., 210 Cal. 171, 291 P. 204 (1930).
[146] A cause of action for injunctive relief does not affect a cause of action for damages. Katemkamp v. Union Realty Co., 6 Cal. 2d 765, 59 P.2d 473 (1936).

of information constraints.[147] If the plaintiff sustains the burden of proof with respect to damages, compensation will be allowed.

C. THE IMPACT OF THE REALLOCATION OF THE BURDEN OF PROOF

1. IMPACT ON THE JUDICIARY

From a judicial perspective, the foregoing proposal for reallocation is not without its drawbacks. One objection is that the significant restructuring of a controversial branch of the law suggests a judicial usurpation of legislative perogative. This objection consists of two arguments. The first is that in changing a rule of law which has been a part of the codes for over one hundred years, the courts would be infringing on the legislature's law-making powers. Arguably, since the legislature has not in this century addressed the weaknesses of common law nuisance,[148] out of deference the courts should refrain from changing the law. This argument might be convincing if the law in question were originally a product of the legislative process, but it is not. Although codified, nuisance law developed through the common law, and it is the province of the judiciary to ensure the doctrine's continuing vitality.[149] Legislative inaction may imply satisfaction with the existing law, but, with respect to codified common law doctrines, it may also imply that the legislature has left to the courts the task of modifying the law. Therefore, although the argument might be persuasive in another context, it should not prevent the courts from making a much needed change in nuisance law.

The second argument of the usurpation of power objection is that judicial reallocation would improperly engage the courts in the formulation of public policy. The premise of this argument is that the people's elected representatives are better suited to formulate policy than are the courts. Even assuming the validity of this premise, the argument is without merit. It miscomprehends the function of judicial reallocation. Neither the adoption nor the operation of the proposed solution would involve the courts in policy formulation. Rather, as discussed earlier,[150] reallocation would change the law to conform to the policies already articulated by the legislature. The courts would not usurp a legislative function, but rather would implement the legislature's declared policies through the common law.

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[147]The burden of proof ". . . does not shift from party to party during the course of a trial simply because it need not be allocated until it is time for a decision." MCCORMICK (2d ed.), *supra* note 15, § 336, at 784. *See* text accompanying note 42 *supra*.

[148]*See* Cal. Code Am. 1873-74, c. 612, p. 268, § 284.

[149]*See* text accompanying note 83 *supra*.

[150]*See* text accompanying notes 108-117 *supra*.

A separate objection to the proposed reallocation is that it would require judges to make decisions based on highly complex and technical evidence. Present allocation protects the court from highly conjectural issues. Reallocation raises the fear that ill-equipped judges would be required to synthesize and apply information which is not even fully understood by environmental experts. This fear arises from a misunderstanding of the trial judge's role. It is the obligation of the parties to produce experts to clarify the technical evidence adduced at the trial. The trial judge need only be sufficiently competent to weigh and balance the expert testimony. This does not demand the insight and experience of the experts but only the ability to understand and evaluate their explanations. The costs of educating the judge are simply the costs of the expert testimony. These costs are born by the parties, who stand to reap the benefits of their expenditures.

A fear of judicial incompetency further ignores the fact that courts are continually facing and mastering complex technical issues. A survey taken among attorneys litigating cases under the Michigan Environmental Protection Act of 1970[151] asked the question: "Was the judge able to understand and handle the environmental, scientific or technical issues?" Attorneys for the plaintiffs answered "yes" by a 12 to 1 margin. Only ten percent of the respondents thought the judges were less competent to deal with environmental cases than other technical issues.[152]

2. IMPACT ON THE ECONOMY

Another concern of those who oppose reallocation in environmental nuisance cases is its alleged potential to significantly increase inflation and unemployment.[153] Should the environmental plaintiff receive equitable relief upon a reduced showing of nuisance, the number of industrial firms which will have to order work stoppages or install pollution control devices may increase. Thus, the number of available jobs will go down, while the cost of the product produced by the affected industries will rise.

The theory of this argument is beyond dispute. In practice, however, it overlooks some less obvious aspects of a properly administered rule of reallocation. First, present environmental quality controls have not had a significant impact on either unemployment or inflation. Research by the Counsil on Environmental Quality(CEQ)

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[151] MICH. COMP. LAWS ANN. § 691.1201-.1207 (Supp. 1975). *See* discussion of the operation of this act in the text accompanying notes 162-173 *infra*.

[152] Sax & DiMento, *Environmental Citizens Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 52 (1974) [hereinafter cited as Sax & DiMento].

[153] *See* 5 ENV. REP. 1168, 1180 (1974).

has determined that less than .5 percent (or 1/200) of the 17 percent increase in the wholesale price index for the year ending March, 1974, was caused by federal and state environmental programs.[154] Although this data cannot accurately predict the economic impacts of the proposed reallocation, it is useful as a comparative standard. By examining the types of cases which would be affected by the proposal and comparing the probable economic impacts with those arising from all other environmental controls, it is possible to make a qualitative assessment of the scope of reallocation's potential for economic disruption.

As previously noted, nuisance law is principally a secondary remedy for environmental harm.[155] Reallocation would not greatly alter this status. Although plaintiffs could more easily rely on nuisance law to correct conditions which are also the subject of a separate statutory prohibition, the primary enforcement measures would continue to offer a more desirable remedy. For example, an effluent discharge which violates the nuisance standard of unreasonable interference usually violates an air or water quality standard as well.[156] Since, under the statute, a plaintiff need only prove that the standard is violated, the burden of proving all of the elements of a nuisance case can be avoided by suing under the primary provision. Moreover, a discharge which did not exceed a statutory standard probably would not constitute an unreasonable interference with the use and enjoyment of property. Nuisance law provides a person or agency not otherwise empowered to enforce the primary statute with the means to prevent the harm which that statute prohibits. By enhancing the secondary remedy, reallocation would increase the efficiency of the network of statutory controls in a manner consistent with the goals and policies of the specific statutes.

When nuisance law is viewed as an interstitial remedy, two things become apparent. First, in California, where primary enforcement statutes touch nearly every aspect of environmental quality, any increased economic costs generated by reallocation will be for the enhancement of resources which have already been found in need of

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[154] 5 ENV. REP. 845 (1974). A private study, conducted by Chase Econometrics, predicts that the cost in jobs of environmental protection will be "negligible" between 1973 and 1982. *Id.*

[155] *See* text accompanying note 7 *supra*.

[156] For example, the Porter Cologne Water Quality Act authorizes regional water quality control boards to set requirements for proposed or existing discharges which take into consideration "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance" and other water quality objectives. CAL. WATER CODE § 13263 (West 1972). A water quality standard promulgated in accordance with this provision would reflect agency consideration of the highest levels of pollutants an effluent could contain without constituting a nuisance. *See also*, CAL. HEALTH & SAFETY CODE § 24262 (West 1972).

specific statutory protection. Second, assuming that state administrative agencies exercise reasonable diligence in performing their enforcement functions, the effects of reallocation will be felt in relatively few cases. Although the impacts would vary among localities, it appears unlikely that reallocation would cause statewide disruption of California's economy.[157]

Acknowledging that reallocation will result in some increased unemployment or inflation, the question becomes one or priorities. Presuming that the gains from reallocation accrue to the public in the form of a cleaner environment, the limited costs incurred are the higher price paid for a better product. If the costs were not absorbed through economic inconvenience, they would be paid in another form: greater health hazards and lost environmental quality.

Thus, to a large extent the question of whether reallocation should be adopted is a value judgment. However, in making this judgment, several more indirect benefits of reallocation should be considered. First, reallocation would serve a preventative function. One of the most significant realizations of this nation's environmental awakening is the necessity of anticipating the impacts of decisions before they are made.[158] By placing on the defendant the burden of proving that his activity is not a nuisance, reallocation would encourage exploration of the possible impacts of an activity before it starts.[159] Where early research were undertaken, both society and the individual would benefit. If the activity is likely to involve an unreasonable use of natural resources, it could be abandoned, or modified, before large sums of money are expended.[160] If later litigation arises,

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[157] For example, if all existing controls contribute 1/200 of the annual cost of living increase, the additional costs generated by reallocation would be proportionate to the percentage of all environmental enforcement cases in which it has a substantive impact. Hypothetically, if the outcome of ten percent of all environmental enforcement actions are effected by reallocation, the annual cost of living increase could be expected to rise by 1/2000 of the total increase in the absence of reallocation.

[158] *See* NAS-NRC Publications 1000 and 1000A at note 107 *supra*. *Cf.*, CEQA (CAL. PUB. RES. CODE §§ 21000-175 (West 1972)) and NEPA (21 U.S.C. §§ 4321-4347 (1971)) which place the burden of justification on the proponent of a project.

[159] Since 1970, CEQA has furthered this policy where the actions taken met the definition of "project" contained in CALIFORNIA PUBLIC RESOURCES CODE section 21065. But many activities, particularly post-completion modifications, will either not fall within section 21065 or will not be subject to CEQA's requirements for other reasons. Furthermore, in the absence of pressure from public interest groups, CEQA itself has no built-in guarantee that a project's Environmental Impact Report will be either thorough or accurate. Reallocation of the burden of proof would promote diligence on the part of the resource user who foresees the possibility of a subsequent challenge to his activity.

[160] The longer a project is allowed to develop or operate, the greater will be the cost of correcting its unjustifiable impacts. For a discussion of the doctrine of vested rights in environmental cases *see*, San Diego Coast Regional Commission v. See the Sea. Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973);

the defendant would already have information on the effects of his operations. This information could be quickly analyzed and distributed, cutting both the costs and time of litigation.[161]

A second indirect benefit of reallocation which mitigates its potential for economic disruption is the opportunity for the court to tailor the remedy to fit the equities of a given case. An example of the buffering effect of equitable balancing can be found in a case brought under the Michigan Environmental Protection Act (MEPA).[162] In *Irish v. Greene*,[163] a complaint was filed pursuant to the act against the developer of 745 homesites near Lake Michigan. The complaint alleged that, as designed, the project would be likely to cause water pollution, soil erosion and loss of scenic beauty.[164] Under MEPA, a plaintiff need only show that the defendant's activity has or will likely cause pollution or impairment of the state's natural resources.[165] The defendant then bears the risk of an adverse judgment upon failure to rebut the evidence or justify his activity.[166] In *Irish*, the court found that the plaintiff's allegations of harm were likely to occur.[167] Rather than enjoin the entire project, the court temporarily limited the number of units which could be built.[168] These limits would be eased upon the developer's completion of measures designed to mitigate the project's adverse environmental impacts.[169] The remedy preserved the plaintiff's[170] interest in the environment while protecting the developer's one and a half million dollar investment.[171]

Environmental Coalition of Orange County Inc., v. AVCO Com. Dev., Inc., 40 Cal. App. 3d 513, 115 Cal. Rptr. 59 (4th Dist. 1974). *Cf.* Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1st Dist. 1974).

[161] Typically environmental litigation is among the most time consuming classes of lawsuits. Litigation involving *Reserve Mining Co.*, note 122 *supra*, took over six years and five court actions. 514 F.2d 492, 501 (1975).

[162] MICH. COMP. LAWS ANN. § 691.1201-.1207 (Supp. 1975).

[163] 4 E.R.C. 1402 (Mich. Cir. Ct., Emmet Co. 1972).

[164] 4 E.R.C. at 1403.

[165] MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1975). The text provides that the plaintiff "has made a prima facie [case by] showing that the conduct of the defendant has or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein."

[166] MEPA provides that the defendant may justify the challenged activity by showing "that there is no feasible and prudent alternative and that such conduct is consistent with the promotion of the public health and safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." *Id.*

[167] 4 E.R.C. at 1404.

[168] 4 E.R.C. at 1405. Under the act, a court is encouraged to impose conditions on the defendant to protect against pollution or impariment of the environment. MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1975).

[169] 4 E.R.C. at 1405.

[170] The plaintiff, a private citizen, was granted standing by section 3(1) of MEPA, MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1975).

[171] 4 E.R.C. at 1403.

Although the proposed system of reallocation has elements which distinguish it from MEPA,[172] the substantive impact of each is similar. Both allow the court to balance environmental risks and harm against industrial or developmental interests under a reduced standard of proof. As *Irish v. Greene* indicates, under the proposed reallocation courts would continue to recognize economic values and balance them against environmental interests. The early experience of MEPA yields little evidence that it presents a serious threat of disruption to Michigan's economic sector.[173] There is no reason to think that a similar change in California nuisance law would have any greater effect.

VI. CONCLUSION

A change in the law should not be of a greater scope than the policies which compel it. The proposal of this article does not raise environmental values to such heights that they overshadow economic interests. The objective of reallocation is to grant to environmental interests a position of parity in a doctrine which has heretofore sustained an inherent bias in favor of economic interests. The proposal does not mandate relief for the plaintiff in every case in which the defendant is unable to sustain the newly acquired burden. But, unlike the present allocation, the unavailability of concrete proof of a nuisance will not preclude a court from recognizing and balancing environmental risks against the interests of the challenged party. Reallocation will not solve all the problems faced by the environmental nuisance plaintiff.[174] It can, however, move the doctrine a step closer to meeting the demands of public policy and filling its role as an intersticial remedy for environmental degradation.

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[172]The two principle distinctions between MEPA and the proposed reallocation are the requirements for standing and pleading. MEPA provides any citizen standing to file suit under the act. *See* note 170 *supra*. Reallocation would not lessen the standing requirements for a nuisance plaintiff. MEPA also provides a broad mandate for environmental protection. A plaintiff need only show a likelihood of pollution or impairment of natural resources to satisfy his prima facie case. MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1975). Nuisance law would continue to require that a plaintiff make a prima facie showing that each element of a nuisance exists before the burden of proof would shift to the defendant. *See* text accompanying notes 51-55 *supra*.

[173]*See generally*, Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972), *and* Sax & DiMento, *supra* note 152.

[174]The problems of standing and valuating the environmental amenities impose continuing limitations of the usefulness of common law nuisance. *See* notes 12 and 49 *supra*.