If you're a Property teacher, you have probably taught nuisance law. If you are a Land Use teacher, you have probably taught *Lucas v. South Carolina Coastal Council*, which relies on nuisance law to establishing "inherent limitations on title." More specifically, you have probably taught the Restatement standard for nuisance, which states that an activity is a nuisance if 1) the gravity of the harm exceeds the utility of conduct; or 2) the harm is serious and the defendant can abate it without shutting down.

So far, so good. But of course the question then arises: how in the world is a court supposed to measure the "gravity of the harm" and the "utility of the conduct"? Basically, it's sort of a formless grab-bag, involving the extent and character of the harm, the suitability of the activity to the area in question, the ability of the plaintiff to avoid the harm etc. etc. But one aspect of the prongs recently jumped out at me.

Section 827(c) says that we partially measure the gravity of the harm by examining the social value ***that the law attaches*** to the type of use or enjoyment invaded, and Section 828(a) says that we partially measure the utility of the conduct by examining the social value ***that the law attaches*** to the primary purpose of the conduct.

So what's the difference between the "social value" of an activity and the "social value that the law attaches" to an activity? Is there even a difference? For most of my teaching career, I've assumed not, and have told students that they could make an argument for a nuisance defendant by arguing, for example, that it provides a lot of jobs. Certainly that's what the New York Court of Appeals did in *Boomer v. Atlantic Cement* when it refused to enjoin the activities of a cement factory because of the economic impact of a plant shutdown.

But that isn't really the social value *that the law attaches* to the plant. Instead, if we take the Restatement language seriously, we would actually look at how the rest of the law treats the activity. For example, in *Lucas* itself, the plaintiff wanted to build a single-family house, which was a permitted use in the (coastal) zone in question. That would certainly seem to indicate that the law attaches a high social value to it: you don't even need a permit. Conversely, if there is a complex regulatory structure to get something approved — for a liquor license, say — one might say that the law attaches a lot less social value to it. On this scheme, single-family homes would also be less likely to be a nuisance if the zoning was cumulative, for single-family homes are permitted uses in every zone under a

cumulative scheme. One could begin to tease out other ways of determining whether “the law attaches” social value to something. Is it subsidized? Is it taxed?

In the Takings context, this could lead to some circularity, which is why *Lucas* might have misstated the Restatement standard. If we take seriously the notion that a nuisance is concerned with whether “the law attaches” social value to something, in a Takings case we already know that the answer is “no” because usually the plaintiff is challenging a statute or regulation! But one could, I suppose, simply say that in a *Lucas* case, the inquiry focuses on the law *prior* to or apart from the challenged regulation.

Dean Prosser famously described public nuisance law as an “impenetrable jungle, wherein the word ‘nuisance’ means all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.” I’m not sure that my framework here really hacks out much from the jungle (and it is more concerned with private nuisance anyway). But it does give us some concrete examples and method of how to analyze nuisance problems, and does get us away from looking at nuisance as simply a matter of cost-benefit analysis and utilitarian ethics.