the localist papers

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3. The local environment

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Direct Democracy is a group of 38 Conservative MPs, MEPs, MSPs and activists dedicated to the principles of localism and the devolution of power. The Localist Papers are an examination of how these principles might apply to specific fields of policy. They are not manifestoes, and not all our supporters endorse them in full. Rather, they explore some possible ways in which power could be shifted from the bureaucracy of the central state to local communities and individual citizens.

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Centre for Policy Studies, 57 Tufton Street, London SW1P 3QL

Tel: 020 7222 4488, Fax: 020 7222 4388, e-mail: mail.cps.org.uk, website: www.cps.org.uk

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The Local Environment

1 Summary

In the past few decades, environmental protection has increasingly become a justification for intervention by the state at all levels (local, regional, national, international). In nearly all cases, such intervention is not the most effective, efficient or equitable means of addressing environmental problems – and can even be counterproductive.

Most environmental problems are essentially local in nature – and require local solutions. Yet protecting the environment has too often meant more power for central government, and less local responsibility. Policy-makers need to do the precise opposite. There needs to be greater scope of local decision-taking – and less top down control.

- Localist solutions to environmental problems would rely primarily on a combination of **property rights and contracts.**

These could be supplemented by additional mechanisms including:

- **Using reverse auctions** for siting undesirable but necessary facilities such as recycling stations, incinerators, power stations, chemical plants, and mobile phone masts.

- **Decentralising planning decisions** to the local level. For example, planning could come under the auspices of the parish council.

- **Introducing a system of elected planning officers** with the planning functions of a local council being transferred to an elected official with the precise remit of overseeing planning.

While this paper does not attempt to address the wider environmental issues of climate change or biodiversity, it is likely that a localist approach would, in those cases, also provide the most effective and democratic solutions.

2 Some lessons from history

Unpleasant sights, smells and noise have troubled man from his earliest days. Attempts to resolve these problems can be traced back at least to Greek and Roman law, which had provisions protecting property owners against damage caused by neighbours. Indeed, the laws of Solon include land use planning rules, such as "minimum distances between homes, and the permissible interposition of walls, ditches, wells, beehives, and certain trees."[1]

Nuisance Law

In the Common Law of England and Wales, injunctions and damages have been available to those subjected to vile smells and unbearable noise for hundreds of years. In 1608 William Aldred brought an action at the Norfolk Assizes against his neighbour Thomas Benton, who had built a pigsty adjacent to Aldred's house. The judge decided that the resultant stink interfered with Aldred's rights and ordered Benton to move the pigsty.[2]

But not any interference was deemed a nuisance. In his treatise on the Laws of England, Sir Edward Coke used *Aldred's Case* to clarify the rule: property holders have a right to use and enjoy their property free from interference, but the extent of this right is only that of ordinary comfort and necessity, not delicate taste:[3]

> "In a house four things are desired [habitation of man, pleasure of the inhabitant, necessity of light, and cleanliness of air], and for nuisance done to three of them an action lies."

The underlying principle was derived from the Roman maxim "*sic utere tuo ut alienum non laedas*".[4] Among other things, this was interpreted to mean that if a right was deemed to have been breached, "public benefit" was no defence.[5]

The *sic utere* rule was employed in numerous cases and seems to have been applied quite generally. It was affirmed by the great jurist William Blackstone, who wrote in his *Commentaries*:[6]

> "[I]f one erects a smelting house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance…[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act where it will be less offensive."

By clearly delineating the boundaries of acceptable action, the *sic utere* rule provided a framework within which economic activity could take place in such a way as to limit the environmental damage inflicted on others. The rule discouraged activities that led to environmental damage and ensured, at least in principle, that if such damage occurred the perpetrator would be compelled to stop it and to compensate those affected.

Acquiring the Right to Pollute by Prior Appropriation

The *sic utere* rule was strict but not absolute: there were exceptions. In 1791, the Crown

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1 M Stuart Madden, *The Graeco-Roman Antecedents Of Modern Tort Law*, Berkeley Electronic Press Working Paper, October 2005.

2 Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611).

3 Ibid.

4 "Use your own property as not to injure your neighbours".

5 In Aldred's Case, Benton argued in his defence that "the building of the house for hogs was necessary for the sustenance of man, and one ought not to have so delicate a nose, that he cannot bear the smell of hogs." However, this attempt to use a "public benefit" argument failed.

6 W Blackstone, *Commentaries*.

brought a case[7] in public nuisance against one Neville, a "maker of kitchen stuff and other grease" for fouling the air.[8] But Neville had been carrying on his trade for some time without objection from his neighbours and Lord Kenyon advised the jury that "where manufacturers have been borne within a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time."[9] The jury acquitted the defendant. Following this reasoning, a person may acquire a prescriptive right to pollute if nobody brings an action in nuisance within a reasonable time.

The Zoning Function of Nuisance Law

In *R v. Neville,* Lord Kenyon offered the observation that the consent to pollute would not apply to a newcomer who made the air "very disagreeable and uncomfortable."[10] This was taken to imply that a newcomer whose actions made only a marginal difference to air quality would not be liable for their portion of the harm caused to neighbouring properties.[11] In *Sturges v. Bridgeman*,[12] the court granted an injunction to the plaintiff whose ability to carry on his trade as a doctor in Wimpole Street was adversely affected by the very noisy activities of a neighbouring confectioner, the judge remarking:

> "Whether anything is to be considered a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."[13]

In other words, nuisance law could provide a land-use planning, or "zoning", function,[14] describing the boundaries where certain activities may or may not take place.

In *St Helen's Smelting Co. v Tipping*[15] a distinction was made between physical damage to property, which was deemed to be actionable regardless of the location of the property, and interference with the beneficial use of that property, which would only be actionable in areas that were not 'zoned' as industrial. It is important to understand what was going on here: the common law seeks where possible to use objective standards; in 'industrial' areas the objective standard against which a person or company's behaviour may be compared will be different from the objective standard in non-industrial areas. At the time of the case in point (1865), it would not have been possible to prove that the noxious vapours emitted by the St Helen's Smelting Company were injurious to human health. In addition, given that there were several other industrial concerns in the neighbourhood, it was reasonable to suppose that the contribution of the smelter to the general unpleasantness of the air was both difficult to identify and perhaps marginal.[16]

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7 *R v. Neville* 170 Eng. Rep. 102 (1791).

8 Public nuisance is a separate action to private nuisance. It relates to harms to the general public and is primarily enforced by the Crown, although individuals may also argue a case in public nuisance if the extent of harm they suffer is greater than that suffered by other members of the public.

9 170 Eng. Rep. 102 (1791).

10 Ibid.

11 Ibid.

12 11Eng. Rep. 852 (Ch. D. 1879).

13 Ibid.

14 See *Colls v. Home and Colonial Stores*, 1904 A.C. 179: "a dweller in towns cannot be expected to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each case it becomes a matter of degree".

15 11 Eng. Rep. 1483 (H.L. 1865).

16 The judge in the lower court instructed the jury that the law was not concerned with "trifling inconveniences" and that where noxious vapours were

So, the only "objective" harm that could be identified was the direct physical damage to Mr Tipping's property.

By establishing clear and readily enforceable property rights in this way, nuisance law enabled parties to strike the balance between environmental amenities and cost. People buying a property in the West End knew that they had a right to be free from air pollution, noise and other interferences. People buying property in Bermondsey or St Helens knew that they would not be able to take an action against a marginal polluter unless it caused physical damage to their property. The differences in property prices in these districts no doubt reflected the differences in amenities.

Nuisance law also contains an efficiency aspect. In areas where interference with peaceful enjoyment are rare, as in Berkeley Square and Wimpole Street, it is more efficient to grant injunctions against those who cause a nuisance, since the transaction costs of bargaining will be relatively low. By contrast, in areas such as Bermondsey, where there are many parties causing such interferences, the imposition of an injunction against one party seems iniquitous, yet the imposition of an injunction against all would cause great problems. The transaction costs of bargaining would be very high and if, as a result, many firms were to close, the costs to the local people could be great.[17] Moreover, as a neighbourhood becomes less industrial, judges may look more favourably on claims that an individual source of noise or noxious emission constitutes a nuisance. In this context, the English principle that coming to a nuisance is no defence, so clearly propounded in *Sturges v. Bridgeman*, helps those seeking to improve the environmental amenities in an area that was formerly industrial.[18]

Finally, the establishment of property rights through decentralised private nuisance actions, is arguably both more equitable and more efficient than the creation of rights through a system of administrative planning. In the latter system, state administrators decide *a priori* where industry can locate and bargaining cannot take place, because rights created by administrative planning are inalienable.

Nuisance Law as a Means of Preventing Industrial Pollution

It is often claimed that civil liability is not an appropriate remedy in cases where there are multiple sources of pollution or multiple affected parties. In other words, for most instances of what nowadays would be called 'environmental pollution'. However, the nineteenth century cases show that this is not the case.

St Helen's was the site not only of a copper smelter (the St Helen's Smelting Company) but also an Alkali manufacturer. The fact that the Lords saw fit to hold the smelting company liable for the damage done to Tipping's property even though the Alkali works was also causing pollution is *prima facie* evidence that nuisance law can work in multiple-source situations. Moreover, following Mr Tipping's victory, the farmers living around St Helen's were able to obtain compensation from the smelting company; indeed, they did so en masse, through William Rothwell, a land agent and valuer in St

concerned "the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it." (ibid.)

[17] If many firms were faced with injunctions, they would have to bargain with each of the affected parties, which may be time consuming and expensive - and most likely some parties would simply refuse any compensation. In the absence of low-cost abatement technologies, the only alternative for many firms might be to move the plant elsewhere.

[18] Another option for improving the environment in an area "zoned" for industrial use would be for those affected by the pollution to bargain with the companies. However, the co-ordination costs of such an activity might be high. Moreover, the bargaining power of those so affected would probably be weak since the very nature of places that are "zoned" for industrial use implies that the residents are poor.

Helen's, who acted as arbitrator between the St Helen's Smelting Company and numerous farmers who were adversely affected.[19] In 1865, Mr. Tipping won an injunction against the smelting company, which led to the closure of the plant and no doubt put him and his neighbours on a surer footing to bargain with the alkali works.[20]

The implication is that if it could be shown that the emissions from a specific plant were causing objectively verifiable damage to a person's property – which today would reasonably be taken to include harm to the health of the occupants – then the appropriate remedy is an injunction against the owner of that plant. Armed with an injunction, the injured property owner(s) would then be able to choose whether to be free from the nuisance or to negotiate with the polluter – and perhaps accept some compensation in return for permitting the harmful emissions to continue. In situations where there are multiple sources, an injunction against one plant sends a strong signal to owners of other polluting plants that they must at least enter into negotiations with affected property owners. Meanwhile, where there are many affected parties, there would be incentives for agents like Mr Rothwell to act on behalf of all affected parties and thereby protect the community and the environment. The standard of protection would be that desired by the property owner who was least willing to accept harmful emissions – which might be lower than the standard that would be established by government or it might be higher.[21]

Multiple Sources: The Combined Effect Rule and Collective Action

Another argument made in support of environmental regulation over the use of the common law is that the latter is unable to address situations where sources of emissions are only harmful when combined with other sources. This is simply false as the following discussion of riparian rights demonstrates.

Until the mid-nineteenth century, the owners of riparian rights maintained an almost absolute right to the "natural flow" of water.[22] In the 1893 case of *Young and Co v. Bankier Distillery Co.*,[23] Lord McNaghten clarified the rights of riparian owners as follows:[24]

> "A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian owner is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality."

The clarity of riparian rights was utilised in an innovative way by John Eastwood KC, who in 1952 established the Anglers Co-operative

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19 *House of Lords Select Committee on Noxious Vapours*, Parliamentary Papers, 14 (1862), Minutes of Evidence 21 QQ 220-2.

20 *Tipping v. St Helen's* 11 Eng. Rep. 1483 (H.L. 1865).

21 In the mid-nineteenth century a number of organisations were established whose objective was to use the law to reduce air pollution. However, these organisations tended to use the public nuisance action and various clauses in Town Improvement Acts rather than private nuisance. After a time, their main role seems to have been to lobby Parliament to introduce stricter legislation.

22 The rule was *aqua currit, et debet curerer, ut solebat es juie naturae* ("water runs, and it should run, as it is used to run naturally"). See H Marlow Green, "Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future", *Cornell International Law Journal,* 1997.

23 [1893] 69 LT 838.

24 Ibid., at 839.

Association (ACA).[25] The ACA acts on behalf of anglers and other riparian users – taking actions against polluters. This typically involves indemnifying the riparian owners against the costs of taking action.[26] As Roger Bate has shown, the ACA has successfully prosecuted thousands of actions, using money obtained in damages and through bargaining around injunctions to fight subsequent cases.[27]

The ACA offers an example of the role that environmental organisations might play if private law became the primary means of protecting the environment. Instead of lobbying for environmental regulations – and engaging in all manner of publicity stunts to raise public awareness of problems (real and alleged) – they would simply get on with the business of suing polluters by stepping into the shoes of affected parties.

3 Using contracts to improve environmental amenities

While nuisance law offers a potentially powerful means of protecting the environment, it is, as has been observed, suitable only where "objective" harm has been done. Thus, where harm is subjective, alternative mechanisms are needed.

One option is to use contracts: for the party which wishes to achieve a higher level of environmental protection to pay the counterparty not to cause the unwanted environmental harm. For example, if A has a spectacular view that she wishes to protect and her neighbour, B, owns the land immediately in front of her property, then it might be in A's interest to contract with B not to develop B's land.

A good example is the use of contracts to impose constraints on the development of garden squares in towns. In *Tulk v Moxhay*,[28] a covenant was included in the title deed of a parcel of land in Leicester Square sold in 1808, which required the purchaser to keep the square 'uncovered with buildings,' in order that it remain a pleasure ground. The defendant purchased the parcel in full knowledge of the covenant but claimed he was not privy to the contract and so was not bound by it. The Court ruled that the defendant was bound by the covenant because he had been given notice of it. Thus Leicester Square was preserved from the developers. In essence the court had created a way of converting a contract from a right *in personam* to a right *in rem* (a property right).

Many garden squares in England and Wales are protected by such covenants, as are other natural and architectural features. A famous example is the frontage at Llandudno, which since the mid-nineteenth century has been protected by deed covenants.[29]

Contracts also enable protection from fumes that otherwise might not be subject to restraint by the courts. In the nineteenth and early twentieth century, homeowners in the private places of St Louis, Missouri, agreed not to burn more noxious bituminous coal and thereby achieved lower pollution levels than was the case in the places controlled by the municipal government.[30]

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25 The ACA has since changed its name to the Anglers' Conservation Association. Its acronym remains the same.

26 The right to support such an action through indemnity was challenged unsuccessfully (with an allegation of "maintenance") in *Martell and Others v. Consett Iron Co. Ltd*, [1955] 1 All E.R. 481.

27 R Bate, *Saving our Streams*, Institute of Economic Affairs, 2002.

28 (1848) 41 ER 1143.

29 The covenants were introduced by the Mostyn family. See: http://www.mostyn-estates.co.uk/you_and.htm

30 David T. Beito "The Formation of Urban Infrastructure through Non-Governmental Planning: The Private Places of St. Louis, 1869-1920," *Journal of Urban History* 16, 1990, 263-301.

4 Localist solutions to contemporary environmental problems

Historically, liability for nuisance was strict, which is to say that there was no need to show fault on the part of the person causing pollution. However, more recent nuisance cases have tended to permit reasonable care as a defence. In *Cambridge Water v. Eastern Counties Leather,*[31] the plaintiff, a recently-privatised water company, alleged that the defendant, a leather tannery, had during the course of its operations spilled various chemical solvents and that these had seeped into the plaintiff's bore-hole rendering the water unusable. In rejecting the plaintiff's action in nuisance, Lord Goff asserted:[32]

> "Of course, although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be don, if conveniently done, without subjecting those who do them to an action." The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable even though he may have exercised reasonable care and skill to avoid it."

In *Hunter v Canary Wharf Ltd*,[33] a case of alleged personal injury and interference with the beneficial use of property resulting from dust and from the blocking of television reception, Lord Goff repeated the observation in Cambridge Water and then proceeded to claim that negligence had effectively replaced nuisance as the cause of action for harm resulting from smoke:[34]

> "If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment."

In addition, the courts have established that statutory authority is a defence – that is to say, if the party causing pollution had obtained express authority to carry on the polluting activity through regulatory approval, such authority overrides the rights of neighbours to be free from nuisance. In *Allen v. Gulf Oil Refining*,[35] the owner of a house allegedly adversely affected (through noise, smoke and other interferences) by the operation of a nearby oil refinery was denied redress on the grounds that refinery operator had obtained statutory authority to carry on its undertaking. Here is Lord Wilberforce's reasoning: [36]

> "To the extent that the environment has been changed from that of a peaceful unpolluted countryside to an industrial complex (as to which different standards apply – *Sturges v. Bridgman* (1879) 11 Ch D 852) Parliament must be taken to have authorised it. So far, I venture to think, the matter is not open to doubt. But in my opinion the statutory authority extends beyond merely authorising a change in the environment and an alteration of standard. It confers immunity against proceedings for any nuisance which can be shown… to be the inevitable result of erecting a

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31 1 All E.R. 53 (1994).

32 *Cambridge Water Co Ltd v. Eastern Counties Leather, PLC.* 1 All E.R. 53 at 299, (quoting *Bradford v. Turnley,* [1862] 3 B. & S. 62, 83).

33 2 All E.R. 426, (1997).

34 See ibid.,.per Lord Goff.

35 [1981] 1 All E.R. 353.

36 Ibid.,. at 857-858, per Lord Wilberforce.

> refinery on the site, not, I repeat, the existing refinery, but any refinery, however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated. To this extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy."

Thus, if a corporation has obtained, by an Act of Parliament, the authority to carry on a particular operation, that corporation may not be held liable for any nuisance that is the inevitable consequence of carrying on the operation. This is subject to the following qualifications:

1. The statutory powers must be exercised without "negligence" – meaning that the work should be carried out with all reasonable regard and care for the interests of other persons.[37]

2. The statutory powers conferred are not merely permissive, in which case they would have to be carried out in strict conformity with private rights.[38]

3. The powers are conferred directly by parliament, not by an administrative body responsible for implementing legislation. So, for example, neither planning consent nor the granting of a licence necessary for operating certain classes of plant (such as a landfill site) would confer statutory immunity from a suit in nuisance.[39]

Amending Nuisance Law to Address Modern Environmental Problems

If nuisance law is once again to become a major force for protecting the environment, the following amendments seem desirable:[40]

1. Generally the late nineteenth century doctrine should be followed. For an actionable private nuisance case, this would entail establishing:

    a. **Interference with another's right**:

        i. For physical damage to property or harm to the persons occupying that property, this would merely require showing that harm has occurred or is likely to occur in the future (this latter applying especially to harms that take time to develop and have multiple causes, such as cancers[41]). So, if D's emissions can be shown to cause or exacerbate P's asthma, P should be able to avail herself of an action in nuisance for abatement.[42] Combined with better scientific understanding of the causes of these problems and with better monitoring techniques, enabling

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37 *Hesketh v Birmingham Corp* [1924] 1 K.B. 260, (1922).

38 *Asylum District Managers v Hill* [1881] 6 App Cas 193. But c.f. *Manchester Corpn v Farnworth* [1930] AC 171, 183 (the statutory authority to operate a generating station was in general terms and this was deemed sufficient to over-ride private rights: there could be "no action for the making or doing of that thing if the nuisance if the inevitable result of the making or doing so authorised.").

39 *Wheeler v JJ Saunders Ltd,* [1995] 2 All ER 697, planning permission to operate piggery was deemed insufficient to grant immunity to nuisance suit for creating noxious smell. But c.f. *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd*, [1992] 3 All ER 923, in which planning permission to operate a commercial port was deemed to be sufficient to grant immunity to nuisance suit for increased noise, but in that case the planning permission was granted for the reopening of an operation that had previously had direct Parliamentary consent.

40 These are derived from Morris op cit.

41 A good example is mesothelioma, which only occurs among those who have inhaled asbestos fibres but for which genetic susceptibility and the smoking of tobacco products also appear to be cofactors.

42 This proposition is in direct contradiction of the current law: "If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment." *Hunter v. Canary Wharf, Ltd,* [1997] 2 WLR 684, 699 per Lord Goff.

readier and cheaper identification of the sources of pollution, this should offer an effective and objective means of dealing with modern air pollution problems.[43]

ii. For interference with beneficial use of property, this would require showing that the interference was "unreasonable" in the circumstances. Reasonableness in this context would be dependent principally on the extent of the interference, the location of the P, the time the interference occurred, and its duration.

iii. This distinction accords with the common law's general predilection for objectivity. Physical interference – including impacts on the health of occupants – can be objectively determined. By contrast, interference with beneficial use is inherently subjective.

b. **Cause**: that the interference with P's right had in fact resulted from D's actions. However, it should not be necessary to show that the harm resulted uniquely from D's actions, or indeed that D's actions would have resulted in harm but for the actions of another. It should only be necessary to show that D's actions contributed, in the circumstances, to the interference.

c. **Foreseeability and fault**: liability is strict; it is enough that D has done something likely to interfere with another's property. It does not matter that the specific interference itself is unforeseeable. The test is whether a "reasonable man" should have foreseen some potential interference.[44] It does not matter that D took every care to ensure that his operation was conducted in compliance with industry standards.

2. Cases of injury to persons or property that occur in places controlled directly by the state (e.g. public highways, public waterways, and so on) should be governed by separate rules. The reason is simply that the activities in such places are not subject to the same sphere of control that pertains in private spaces. It is, for example, not usually possible to enter into a contract with the state to prevent persons walking past one's building while one is erecting an extension to one's property. Perhaps the solution in such cases is for the state to be liable under the same rules as apply in private nuisance.[45]

3. Constrain or remove the defence of statutory authority. At present this is one of the single most significant barriers to the use of private nuisance for environmental protection.[46] Perhaps the best approach to this is that adumbrated by Lord Denning in the Court of Appeal decision in *Allen v. Gulf Oil*:[47]

> "But I venture to suggest that modern statutes should be construed on a new principle. Wherever private undertakers seek statutory authority to construct and operate an installation which may cause damage to people living in the

[43] Even pollution from vehicles could be dealt with in this way by holding the state liable as maintainer of the highway on which those vehicles traverse.

[44] The rule is *sic utere tuo ut in alienum non laedas,* which means that D should have regard to the effects of his actions on others, so as not to cause harm, and also "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril." *Fletcher v. Ryland* [1866], 1 L. R. Ex. 265, 279.

[45] At the very least this might encourage the state to reconsider the merits of owning such a large proportion of the infrastructure.

[46] *Allen v. Gulf Oil Refining, Ltd*, [1979] 3 All E.R. 1008, 1012, per Lord Denning.

[47] Ibid.

> neighbourhood, it should not be assumed that Parliament intended that damage should be done to innocent people without redress. Just as, in principle, property should not be taken compulsorily except on proper compensation being paid for it, so also, in principle, property should not be damaged compulsorily except on proper compensation being made for the damage done. No matter whether the undertakers use due diligence or not, they ought not to be allowed, for their own profit, to damage innocent people or property without paying compensation. They ought to provide for it as part of the legitimate expenses of their operation, either as initial capital cost or out of the subsequent revenue."

4. Remove the more general defence of public benefit, which compels judges to make impossible calculations (weighing up for example the interests of road users, industrialists, and sunset worshippers against the interests of those adversely affected by emissions). To the extent that "public benefit" is of relevance, it is incorporated into the locality criterion. Moreover, if the benefit of continuing a nuisance is sufficiently great, then in some cases the defendant may be able to buy out the plaintiff(s).[48]

5. In case there is any confusion, the primary remedy for continuing nuisances should be the injunction. Whereas in some cases courts may be able accurately to assess damages for past nuisances, it seems extremely unlikely that they will be able to assess damages for future nuisances, making the injunction a more appropriate remedy from the perspective of protecting the rights of those who are adversely affected.[49] Moreover, in cases where many people are adversely affected, an injunction brought by one party would effectively protect the rights of many and thereby protect the environment as a whole. Such a reformation of nuisance law seems to offer at least a partial solution.

By clearly delineating rights and responsibilities this way, people will be able to choose the kind of environment they want. Meanwhile environmental organisations might follow the ACA model and indemnify parties who seek to sue polluters.[50]

5 Alternatives to central planning

In an ideal world, it would perhaps be possible to rely on nuisance law and contracts to solve all environmental problems. Unfortunately, we do not live in an ideal world – so it makes sense to consider additional means of addressing high-priority concerns.

In the local context, this is likely to include the siting of "locally undesirable land uses" (LULUs),[51] such as waste management facilities (landfills, recycling stations, incinerators, and so on), power stations, chemical plants, and mobile phone masts. All of these facilities have become essential to modern society and look set to remain so for some time. However, they have also elicited considerable concern from the public – as a

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[48] As noted above, there is evidence of such bargaining taking place, however in a recent study Ward Farnsworth found no evidence of bargaining. Ward Farnsworth, "Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral," *University of Chicago Law Review*, 373, 1999.

[49] See S Tromans, "Nuisance - Prevention or Payment," 41 *Cambridge Law Journal,* 87, 1982.

[50] Cf. R Cutting, "One Man's Ceilin' is Another Man's Floor: Property Rights as the Double Edged Sword", 31 *Environmental Law*, 819, 2001. If property rights advocates truly acknowledged the responsibilities and the rights of property owners, the remainder of the body of environmental law as we know it might actually become unnecessary.

[51] See F J Popper "Siting LULUs", *Planning Magazine*, April 1981.

result of real and imagined problems. Pragmatic solutions for siting them are needed.

"An alternative solution involves communities vying with one another to site LULUs through reverse auctions."

At present, the siting of LULUs is governed largely by land use planning regulations; a highly bureaucratic system in which decision-making authority rests ultimately with the Secretary of State for the Environment, Food and Rural Affairs.

An alternative solution more consistent with a decentralised democracy involves communities vying with one another to site LULUs through reverse auctions. Thus, in the classic formulation, representatives of each community that is in principle willing to accept the presence of an LULU submits a sealed bid specifying the minimum amount it would be willing to accept in return for siting the LULU.[52] The auctioneer then chooses the *lowest* bid – as long as it is below the maximum the owner of the proposed facility is willing to pay. The winning community gets the LULU and the amount of compensation it bid – which may be used for example to offset local taxes.

Britain's system of land use planning covers a great deal more than merely LULUs. In fact, it currently covers a very wide range of aesthetic issues, from all but the most minor additions to dwellings, to even the tiniest alteration to a 'listed' building. The planning system has some major failings, not least of which is the essentially arbitrary nature of aesthetic decisions made by officials in planning departments. At a macro level, the planning system has had the consequence of choking off the development of both residential and business premises – with substantial negative consequences for people who live and work in Britain. By reducing the supply of buildings, costs have been driven up, with the result that people spend more of their income to live in smaller dwellings, while businesses have inherently higher costs of operation compared to other countries.[53] On the premise that this system exists at least in part because of legitimate concerns on the part of those who inhabit this island, however, the question is: what are the alternatives?

The first section of this paper described how contracts/covenants could be used to ensure that neighbours were able to protect their aesthetic environment. In principle, such contracts could replace the current system of land-use planning regulations. For example, property owners could be given two years' warning that the government planning system was being eliminated, enabling them to enter into whatever bargains they wanted with their neighbours prior to the ending of the system.

A less extreme alternative to the current highly centralised land-use planning system is to decentralise planning decisions to the local level. For example, planning could come under the auspices of the parish council. Decisions would still be reviewable by the courts, but only to the extent that those decisions contravened the underlying legislation (which would have to be carefully

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52 The original paper suggesting this approach was H Kunreuther, P Kleindorfer, PJ Knez and R Yarsick, "A Compensation Mechanism for Siting Noxious Facilities: Theory and Experimental Design", *Journal of Environmental Economics and Management,* 14, 371-383, 1987. That paper focussed on facilities that are essential to local communities and assumed the costs of the facilities would be met through local taxes. For privately operated facilities, it may be necessary to alter the design, but the basic principle still applies.

53 A W. Evans and O M Hartwich: *The best laid plans: How planning prevents economic growth*, Policy Exchange, 2007; McKinsey Global Institute: *Driving Productivity and Growth in the UK Economy*, 1998.

crafted in order to avoid abuse, bribery and corruption). By decentralising decision-making to such a low level of political authority, constraints on the power of the planners would to some extent come from political competition: with many abutting jurisdictions, local authorities would compete with one another to site great architecture, become hubs of economic activity, and so on.

"Another way to democratise planning would be to initiaite a system of elected planning officers."

Another way to democratise planning would be to initiate a system of elected planning officers. In other words, the planning functions of the local council would be separated out and come under the auspices of an official (a "Chief Planning Officer" or CPO) elected solely to oversee planning. If communities were offered the opportunity to vote specifically on who runs the local planning system, they would immediately feel more empowered and engaged with their local environment. No longer would they feel victims of a faceless system. Of course, it would be necessary to remove all higher levels of centralised control, with the possible exception of judicial oversight limiting the discretion of the planners (again, this should be carefully implemented, though presumably with elected officials rather than bureaucrats operating the system, there is an additional constraint on corruption, etc.).

What to do about Roads?

Like some of the other LULUs discussed above, roads are both a blessing and a curse: they are absolutely essential, but they also result in various forms of nuisance to local residents – mainly in the form of noise, but also air pollution. Meanwhile, roads are for the most part paid for out of taxes and not subject to pricing at the point of use, so they tend to be over-used, leading to congestion, which is a nuisance for all the drivers and also increases the other nuisances (noise, air toxins). One increasingly popular solution is to introduce charges for road use.[54]

Today, the state collects around £30 billion in revenues from road users – mostly in the form of fuel duty – and spends only around £7 billion. But state control has come at a high price. Demand for road use often and in many places exceeds supply, resulting in congestion. In addition, vehicles damage the roads and impose costs on third parties through noise and air pollution.

A well-designed congestion charge would, unlike that introduced in London, be location specific and would charge different prices at different times of day. This could be done with an electronic road pricing system similar to that which was introduced in Singapore in 1998. Such a system could charge more at peak congestion times, more for heavy vehicles that cause greater damage to the roads, and more for vehicles that cause more pollution. In these respects it would be much fairer than the current system for extracting revenues from road users.

Decentralising and defunding the roads – while simultaneously reducing the taxes on fuel and vehicles – would be one way to create a more balanced system.

Regulating emissions

While tort law is in many ways the ideal means of addressing most instances of environmental pollution, there will inevitably be some exceptions. In particular, forms of pollution that are highly mobile and erratic in their choice of victims: an example being low-level ozone, which can travel hundreds of

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[54] This section is based on J Morris, "Take control of your own streets", *The Spectator,* 3 February 2007.

miles and whose direction of travel will be dependent on local air currents. For such forms of pollution, local regulation may be necessary (even in the ideal world described above, homeowners associations may find it in their own interest to impose regulations in order to avoid costly lawsuits from other affected homeowner associations). So, the question is: what kinds of regulation would make most sense in a direct democracy?

In general, regulations that specify a desired environmental outcome and allow people (individuals, homeowners, businesses) to find the best means of achieving it are superior both economically and environmentally to regulations that specify the technology to be used in the hope that it will achieve the desired outcome. For example, if the objective is to reduce by a specific amount the ambient atmospheric concentration of a particular chemical that is emitted primarily by a few stationary sources (such as power stations and steel works), the least-cost method of achieving this is through the allocation and trading of emissions permits. This works as follows. First, set an overall target level of emissions; second, distribute emission permits amongst plants (either by auctioning them or by 'grandfathering' them on the basis of historic emissions); third, allow plants to trade their permits.

Under a uniform emission reduction policy, some firms might be faced with no option but to close down plants with high abatement costs, which is an inefficient use of sunk capital and may have adverse consequences for employment. With tradable permits, however, plants that have lower abatement costs will have an incentive to reduce emissions to below their permitted level and sell some of their permits to plants that have higher abatement costs. This would enable higher-cost firms to continue operating. The prospect of being able to reduce abatement costs and to sell permits also encourages firms to develop innovative ways of reducing emissions. Moreover, in theory, environmental organisations could even purchase and retire some emissions permits, thereby reducing pollution levels further.

Emissions permit trading has been tried in several places. Perhaps the most successful of which has been the scheme in Southern California, which economists have estimated saved billions of dollars on emissions abatement costs.[55]

An obvious advantage of the permit trading system is that it allows more significant improvements in the environment for any particular level of expenditure. In a world of scarce resources, there are limits on the political acceptability of expenditure on environmental improvement, so it is imperative that the resources spent on it are used as efficiently as possible.

Applying the idea to Fisheries

Tradable permits can also be used to conserve species. For example, in New Zealand and Iceland, fish stocks are conserved through the use of Individual Transferable Quotas (ITQ).[56] This system works roughly as follows. A Total Allowable Catch (TAC) of fish is set and then allocated to fishers as ITQs, which may be traded. If a fisher catches too many of any particular species, he buys some ITQs from another fisher, which enables him to land and sell the fish legally, rather than throw it back into the sea or sell it illegally.

Originally, the TACs in both New Zealand and Iceland were set by government, but now TACs of some fish in New Zealand are set by management companies. Because the profits of these management companies are contingent on the long-term health of the

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55 R Schmalensee, P L Joskow, A D Ellerman, J P Montero, E M Bailey "An Interim Evaluation of Sulfur Dioxide Emissions Trading," *The Journal of Economic Perspectives*, Vol. 12, No. 3, 1998, pp. 53-68

56 See M de Alessi, *Fishing for Solutions*, Institute of Economic Affairs, 1998.

fishery, they set catch levels that are more appropriate than those set by bureaucrats who must constantly juggle the interests of many competing groups.

In the 20 years since New Zealand's ITQ system was introduced, stocks of most fish have increased, catches have increased, the industry has become far more profitable, and there are now few disputes over who owns the fish or the size of the TAC. In Iceland, where the TACs of all fish are still set by government, fish stocks have improved and the industry is more profitable, but political disputes over who owns the fish and the size of the TACs continue.[57]

"If a farmer knows that he will reap the benefits of investments in soil conservation, then he is more likely to make that investment. That is why agriculture in the Soviet bloc was such a disaster both economically and ecologically. Subsidies, such as those created under the CAP, also distort the incentives faced by farmers and encourage them to over-use their land. For both environmental and economic reasons, all subsidies to agriculture should be eliminated as soon as possible."

Fishermen in both New Zealand and Iceland have fared significantly better than those in the European Union, where the quota system is far less flexible and where catch levels and regulations are set in such a way as to minimise the short-term impact on politicians and to maximise the subsidies to fishermen. In Europe, many stocks are over-fished, there is constant bickering about who should have the right to fish in particular waters, there is massive over investment in fishing gear, and millions of tons of fish are thrown back into the sea to die.

Agriculture

The example of fisheries illustrates the more general point: that the closer a resource comes to being privately owned, the more care will be taken to conserve it for the future. This is because the owner of a resource knows that he or she will be able to profit from any investment made in it. If a farmer knows that he will reap the benefits of investments in soil conservation, then he is more likely to make that investment. That is why agriculture in the Soviet bloc was such a disaster both economically and ecologically. Subsidies, such as those created under the Common Agricultural Policy, also distort the incentives faced by farmers and encourage them to over-use their land. For both environmental and economic reasons, all subsidies to agriculture should be eliminated as soon as possible.

Water

Agricultural water that is under-priced, either because of regulatory control or because of public supply, has a similar effect to subsidies. Even in the England and Wales, where water was nominally privatised in 1989, price distortions continue, with agricultural water being priced at well below the levels of domestic supplies.

Going only on the basis of reports in the press, one would think that Britain is running out of water, that the water companies are using up reserves and even allowing much of

[57] *Country note on national fisheries management systems – Iceland*, OECD, (undated).

them to leak away, without any regard for posterity. But only about 16% of the renewable water reserves in Britain are in fact licensed for abstraction, and only about half of those (8% of the total) are currently being abstracted. Looking at the national level, there is no water supply problem.

But this view is misleading, since aggregates tell us little of what is going on at the local level. In fact, the past few years have seen several droughts affecting large parts of the country and (licensed) abstractions of water from already dry rivers during these droughts have resulted in serious problems for wildlife. The problem in Britain (as in many parts of the world) is not that there is too little water but that the water is in the wrong place at the wrong time.

The problem with water management in Britain is that in spite of the nominal privatisation, the Environment Agency remains responsible for the management of water resources throughout England and Wales.[58] This is an onerous task. It implicitly requires intimate knowledge of both the demand for and supply of water throughout England and Wales. It also requires detailed knowledge about the consequences of water abstraction, which might include for example damage to wetland habitat and to fish. Balancing these impacts against the competing benefits of abstraction is by no means easy.

The Environment Agency's task is further complicated by the existence of abstraction licences that were granted many years ago and are not readily repealed. Moreover, the price of a licence is set to recover only the costs of the Environment Agency's functions; it does not take account of the user cost of extraction (that is, the cost that is incurred by allowing abstraction now rather than leaving it to later) nor of the external costs (that is, the costs imposed on other water users and environmental amenities).

In deciding whether to grant an abstraction licence the Environment Agency, "must satisfy itself that: the environmental impacts are acceptable; other people's rights are not derogated; and there is a reasonable need for water."[59] Here the Agency faces two problems. First, it faces the problem that value is subjective. Who is to say what constitutes an "acceptable" environmental impact? And what is a "reasonable need" for water? Second, it faces the problem that the effects it seeks to control are contingent on unpredictable factors. The environmental impacts and the extent of derogation of other people's rights will depend in particular on the amount of rainfall in each locality. Thus, if it is drier than expected (as has been the case on several occasions in the recent past), the flow of some streams and rivers may be lower than usual, concentrating the suspended and dissolved chemicals, rendering them more toxic, and reducing the amount of water and oxygen that are available for fish.

The question that needs to be addressed is whether these problems can best be addressed by a bureaucratic agency of the state, or whether they might better be addressed by organisations working at a more local level.

Knowledge of how much water is wanted, where and when, is best obtained by the organisation providing that water, namely the water company. If companies were allowed to discriminate on the basis of price, then water meters could be used to provide accurate estimates of individual demand schedules, enabling the companies to provide water to those people who want it most, when it is most wanted.

As regards the environmental impacts of water use, it seems reasonable to suggest that

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58 See J Sheriff "Meeting Supply: the Role of the Environment Agency," *Economic Affairs,* 1998.

59 Ibid.

the decisions about what constitutes harm should be made by those who are most affected, namely the people who own and/or use the affected amenities. The riparian system described above is very much up to that task and there seems little need for the involvement of any bureaucracy. However, ownership of an abstraction licence might be considered sufficient defence to a claim for compensation, thereby derogating the rights of riparian owners. In this case, the best solution might be for such licences (which, remember, are the creatures of statute) to be compulsorily purchased by the state and retired. Alternatively, the licences could at least be made alienable, so that riparian owners might purchase them.

Ex-post liability for injury to riparian rights is likely to be a superior mechanism for dealing with the problems of over-abstraction than *ex-ante* restrictions on licences for two reasons. First, riparian owners and users (especially anglers) will generally have better, more relevant knowledge of local conditions than the Environment Agency. Anglers monitor the state of the water continuously, relying upon the health of fish, which are particularly good indicators of the health of the aquatic environment. In contrast, the Environment Agency must rely upon sporadic checks of the condition of the water, as indicated by proxy measures such as 'biological oxygen demand'.

Second, riparian owners have stronger incentives to take action against those causing genuine harm to their stream than does the Environment Agency. This is because breaches of a riparian owner's rights are likely materially to affect him, whereas the Environment Agency must base its priorities for action on some bureaucratic definition of harm worthy of consideration. If water companies were allowed to abstract only the water that they own and were held liable for the adverse consequences of abstracting water from rivers, they would have incentives to ensure that they balanced the costs of abstraction with the benefits.

A further problem relates to the regulation of water quality. The primary legislation governing water supplied to the public is the Drinking Water Directive (80/778 EEC), which sets out 62 water quality standards and guidelines, including both maximum allowable concentrations of certain substances and minimum required concentrations of others. There are two problems with such uniform standards. First, they prevent the emergence of competition in the supply of water of varying quality. In most cases, only a small percentage of the water each household consumes is actually drunk; the rest is used for washing and cleaning. Indeed, some people drink only bottled water. Many people might prefer to have cheaper minimally potable or non-potable water piped to their homes, which they can use for washing and cleaning, rather than paying for high-quality potable water that is not drunk.

Second, the standards are the result of political wrangling in Brussels, not on scientific evidence relating to the health effects of drinking the water. Where water companies have private contracts with customers, they are under an obligation to ensure that the water they supply meets whatever specification is stated in the contract. Thus, if a company sells water that is intended for human consumption, it has a legal duty to take reasonable care that its product does not cause any unforeseen harm resulting from this use.[60] Even those who consume products but are not in a direct contractual relationship with the producer are owed a duty of care by the producer, so long as the product has not been interfered with prior to its consumption.[61] Private companies have strong incentives to discover both what kinds of water their customers and potential customers want and to discover the most appropriate means of providing that water.

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60 This would most likely have been the case before the Sale of Goods Act 1893, which codified common law, and is certainly the case now.

61 *M'Alister (or Donoghue) v Stephenson* [1932] AC 562.

Uniform regulations that restrict the kinds of water that can be provided necessarily inhibit this discovery process and inhibit competition, thereby harming not benefiting the consumer.

Tyler Cowen has suggested that private unregulated provision of water would be the most efficient system, providing an eloquent defence of such a system against those who call for lower-priced water.[62] Price controls reduce the efficiency of supply, discourage investment in new capacity, and affect quality. Under a deregulated privatised system, discriminating monopolists would have strong incentives to discover how much each consumer was willing to pay for each unit and therefore to provide more water than would a non-discriminating monopolist and perhaps more than a regulated monopolist. In addition, companies and private individuals might compete for provision of water through resale. Such a system would also stimulate technological innovations. Companies might develop cheaper systems of distribution, or share distribution networks (as telephone companies share their networks and the old private railway companies shared their networks).[63]

6 Conclusions

This paper has sought to outline a localist approach to environmental protection. It has not sought to address some of the totemic environmental issues of our day, such as climate change and the loss of biodiversity, although in principle the approach could be extended to those too. For example, arguably the best approach to concerns about biodiversity loss is to ensure that people who share their land with endangered species have better incentives to conserve those species. In large part this means establishing clearly defined and readily enforceable property rights, so that instead of engaging in extensive slash-and-burn agriculture, people farm intensively; in addition, such property rights enable people better to take advantage of local resources through the sale of hunting and ecotourism rights. (Mainly this applies in poorer, more biodiverse countries).

Meanwhile, a more cost-effective approach to addressing climate change than the currently fashionable plans to cap carbon emissions would be to remove existing barriers to entrepreneurialism and conservation currently represented by the plethora of regulations and subsidies affecting business. Again this mainly applies in poorer countries, but to some extent also in the UK. By so doing, the poor would be better able to adapt to their current circumstances, suffer less disease, be able to build dams, dykes and canals, and generally reduce their vulnerability to problems both now and in the future. In so doing, they would dramatically reduce the impact that any future climate change might have. This would be a real win-win solution for the poor. And it would require no sacrifice on the part of the rich. Indeed, all would benefit as the poor became part of the global village.

The proposals set out in this paper will provide a level of environmental protection which be more consistent with the needs and wants of individuals in British society – and would be less determined by a combination of vested interests and pressure groups. It would, in short, conform to the principles of Direct Democracy.

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62 Penelope Brook Cowen and Tyler Cowen "Deregulated Private Water Supply: A Policy Option for Developing Countries," *Cato Journal,* Vol. 18, No. 1, 1998, pp. 21-41.

63 There are obviously technical problems entailed in network sharing; in particular if water is flowing along a pipe shared by several providers, it is likely to mix, so water companies would probably demand that in any particular network water should be of similar quality – just as trains must be of the same gauge in order to share a track.

In the past few decades, environmental protection has increasingly become a justification for intervention by the state at all levels (local, regional, national, international). In nearly all cases, such intervention is not the most effective, efficient or equitable means of addressing environmental problems – and can even be counterproductive.

Most environmental problems are essentially local in nature – and require local solutions. Yet protecting the environment has too often meant more power for central government, and less local responsibility. Policy-makers need to do the precise opposite. There needs to be greater scope of local decision-taking – and less top down control.

- Localist solutions to environmental problems would rely primarily on a combination of **property rights and contracts.**

These could be supplemented by additional mechanisms including:

- **Using reverse auctions** for siting undesirable but necessary facilities such as recycling stations, incinerators, power stations, chemical plants, and mobile phone masts.
- **Decentralising planning decisions** to the local level. For example, planning could come under the auspices of the parish council.
- **Introducing a system of elected planning officers** with the planning functions of a local council being transferred to an elected official with the precise remit of overseeing planning.

While this paper does not attempt to address the wider environmental issues of climate change or biodiversity, it is likely that a localist approach would, in those cases, also provide the most effective and democratic solutions.

Centre for Policy Sudies
57 Tufton Street
London SW1P 3QL

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