Law and History Review (2023), **41**, 171–191
doi:10.1017/S0738248022000566

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY
CAMBRIDGE UNIVERSITY PRESS

ARTICLES

"No Quixotry in Redress of Grievances": How Community Abatement of Public Nuisances Disappeared from American Law

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Abstract

Before 1859, the right of any member of the public to abate a public nuisance existed unchallenged in American law as a judicially recognized form of popular justice. In that year, the decision in *Brown v. Perkins*, authored by Massachusetts Chief Justice Lemuel Shaw, restricted the right to those who had suffered particular injury. The decision grew out of a suit for damages by the owner of an illegal saloon, which had been sacked by a local mob. Reversing what Shaw himself had said in his charge to the jury in the same suit in the preceding year, it had little grounding in earlier American case law. Shaw's prestige and the apparent demands of public policy, however, helped win courts over to the new doctrine in relatively short order. The change was most enthusiastically promoted by judges and scholars of conservative leanings disturbed by the threat of popular excess and most resisted by those of more radical inclinations. It paralleled American law's broader shift in the same period toward centralized regulation and the constitutionalization of rights and powers.

The right to abate a public nuisance by self-help or direct action, bypassing the courts, has existed in twentieth- and twenty-first-century American law only for those persons who suffer some special and particular injury.[1] The limitation derives largely from a single decision, *Brown v. Perkins*, announced by the Massachusetts Supreme Judicial Court in April, 1859.[2] One of the last cases heard by the court's Chief Justice Lemuel Shaw in his 30 years on the bench, *Brown* grew out of an incident in the town of Rockport on Cape Ann on July 8, 1856.[3] An 1855 Massachusetts law declared that "all intoxicating

[1] William L. Prosser, *Handbook of the Law of Torts* (St. Paul, MN: West Publishing Co., 1941), 591–92.
[2] *Brown v. Perkins*, 78 Mass. (12 Gray) 89 (1861).
[3] Eleanor C. Parsons, *Hannah and the Hatchet Gang: Rockport's Revolt against Rum* (Canaan, NH: Phoenix Publishing, 1975).

beverages kept for sale" could "be treated as common nuisances." Two hundred women armed with hatchets successively entered Rockport's thirteen saloons and smashed open the bottles, jugs, and kegs of liquor that they found inside. One of the saloonkeepers, James Brown, sought to recover damages from the attackers. The trial, held in Salem in May, 1858, turned crucially on a point of law. Were the defendants, Rachel Perkins and her husband Stephen Perkins, who had respectively led and abetted the attack, entitled, simply as members of the community, to abate a public nuisance from which they incurred no especial harm?

To this question, the trial judge—Shaw himself, on circuit duty—had answered "yes" in his instructions to the jury. He and his fellow appellate judges a year later answered "no." Although professing to state the law both as it was and as it always had been, the 1859 decision conflicted not only with Shaw's jury charge of 1858 but with American precedent up to that time. It denied a principle that had enjoyed wide judicial and public acceptance.

What Elizabeth Dale has called "popular justice" has coexisted in many different forms with formal legal processes throughout American history.[4] Among them, nuisance abatement by members of the general public, although operating through what an unsympathetic observer might call "mob law," stands out because of the large degree of recognition that it once enjoyed from the courts themselves. The climate of opinion in which it was seen as legitimate was a distinctive one. In 1996, William Novak challenged the assumption that minimal government is an immemorial American tradition. A dense fabric of regulation, he maintained, most of it at the state and especially at the local level, had enjoyed general acceptance from colonial times until after the Civil War. Grounded in the common-law maxims *Salus populi suprema lex est* and *Sic utere tuo ut alienum non laedas*, and operating in large part through the law of nuisance, it expressed an ideal of a society ordered for the public good. It was only near the end of Reconstruction that this ideal widely gave way to a different model, which emphasized constitutional against common law, individual over community rights, and centralized and formal governance against localized governance.[5] During much of the period that Novak studied, a wide right of public abatement existed in American law, representing, as he observed, a "powerful instrument" among society's regulatory powers.[6] Such direct action posed "a very real threat to violators of antebellum law or community standards and expectations."[7]

If only by implication, Novak depicted both the ideal of the well-governed society and its postbellum abandonment as matters of societal consensus. Yet profound political-ideological divisions existed in the United States during the 1850s, 1860s, and 1870s. To what extent these divisions paralleled and perhaps influenced the evolution of legal doctrine is a question worth asking.

[4] Elizabeth Dale, "The Role of Popular Justice in U.S. History," in *Oxford Handbook of the History of Crime and Criminal Justice*, ed. Paul Knepper and Anja Johansen (Oxford: Oxford University Press, 2016), 539–54.

[5] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

[6] Ibid., 301 n53; see also 59, 141, 155–56, 217, 226–28; 306 n 138.

[7] Ibid., 278 n92.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

Dale's work likewise invites inquiry into whether support for or opposition to popular justice reflected particular partisan and philosophical stances.

Some preliminary answers might be sought in the story of how the American public lost its right to abate public nuisances, a change that accompanied Novak's larger transition and permanently constricted the scope of popular justice. Who effected or advocated this doctrinal shift, who resisted it, and what characteristics united or separated them? Lawrence Kohl's comparison of antebellum Jacksonian Democrats with Whigs suggests two plausible but conflicting hypotheses. Democrats, who did not much reverence or trust formal judicial processes, might have shown more sympathy than their Whig or Whig-turned-Republican contemporaries did for individuals who took law enforcement into their own hands. Yet they might have sympathized much less than most Whigs with the moralistic enforcement of the standards of the community, or of its leading citizens, upon individuals, a particular Jacksonian *bête noire*.[8] Another possibility also requires consideration: that popular justice in this form was favored or opposed not as such, but only according to how an observer regarded the specific activities it targeted.

The Right Acknowledged

Some remarks in Blackstone's *Commentaries on the Laws of England*, authoritative for many nineteenth-century American judges and lawyers, addressed the difference between public or common nuisances and private ones. The former category covered "such inconvenient or troublesome offences, as annoy the whole community in general and not merely some particular person," the latter, "[a]ny thing done to the hurt or annoyance" of particular individuals or their lands. disturbance, or annoyance of the occupation of the land of another ...."[9] A person aggrieved by either—"any of the king's subjects" in the case of a public nuisance, and the person or persons affected by a private one—had the right of "abating it himself, by his own mere act and authority," or of asking the courts either to award damages or to decree the nuisance's removal.[10] Exercising the right of abatement, Blackstone continued, barred a person from also seeking damages through the courts, an option unavailable also where public nuisances were concerned, "except where a private person suffers some extraordinary damage beyond the rest of the community ...."[11] These rules were not without ambiguity, but they seemed to affirm a general public right to abate a public nuisance.[12] That conclusion could be framed in virtually syllogistic form, as it was in the

[8] Lawrence Frederick Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (New York: Oxford University Press, 1989); see also Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979); and John Gerring, *Party Ideologies in America, 1828-1996* (New York: Cambridge University Press, 1998).

[9] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979), 3:216; 4:167.

[10] Ibid., 3:5, 220.

[11] Ibid., 3:219–20.

[12] American courts recognized among distinctively public nuisances ones affecting rights held by all residents, or injuring many: Michael S. McBride, "Critical Legal History and Private Actions against Public Nuisances, 1800-1865," *Columbia Journal of Law and Social Problems* 22 (1989): 307–22.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

brief for the defendants in *Brown*: "A nuisance may be abated by any person suffering injury therefrom. A common nuisance injures everybody and everybody may abate it."[13]

Numerous American state appeals courts before 1858 had stated such a right.[14] They added some important restrictions. Abatement should not involve a breach of the peace, however defined.[15] It could go no farther than necessary to suppress the offending activity; a house of prostitution was a public nuisance, for example, but the nuisance lay only in the way it was used, and the house itself could not be destroyed.[16] Finally, anyone who abated an alleged nuisance in this way did so at the risk that the courts might find that it had not in fact been one and might impose liability for damages.[17]

Thus limited, the right enjoyed general recognition. A United States senator and future president in 1836 observed that "any individual may abate a nuisance"[18]; a member of the New York Legislature in 1848 stated that: "The principle of common law is, that any individual or community may abate a public nuisance." An 1851 decision of the United States Supreme Court held that "[a]ny individual may abate a public nuisance."[19] A state circuit judge instructed a New York City jury in 1846: "It is an old rule that any person has a right to remove a nuisance--the persons in the neighborhood have a right to go and abate it."[20] A legal treatise by a respected commentator summed up American law just prior to *Brown v. Perkins*: "A public nuisance may be abated by any one; a private nuisance, by any one whose property is injured; and entry for such purpose is justifiable ...."[21]

The right was successfully asserted in practice as well as in principle. Mobs attacking anti-slavery newspapers labeled them "public nuisances," which the mobs were exercising their right to abate.[22] From 1840 to 1842, crowds in the

[13] *Brown v. Perkins*, 98.

[14] *Hart v. Mayor of Albany*, 9 Wend. [N.Y.] 571 (1832); *Gates v. Blincoe*, 32 Ky. 158 (1834); *Wetmore v. Tracy*, 14 Wend. [N.Y.] 250 (1835); *Meeker v. Van Rensselaer*, 15 Wend. [N.Y.] 397 (1836); *Burnham v. Hotchkiss*, 14 Conn. 311 (1841); *Renwick v. Morris*, 3 Hill [N.Y.] 621 (1842); *Stump v. McNairy*, 24 Tenn. 363 (1844); *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114 (1846); *Low v. Knowlton*, 26 Me. 128 (1846); *Gunter v. Geary*, 1 Cal 462 (1851); *Brown v. Carpenter,* 26 Vt. 638 (1854); *State v. Dibble*, 49 N.C. 107 (1856); *Graves v. Shattuck,* 35 N.H. 257 (1857); and *Harvey v. DeWoody*, 18 Ark. 255 (1857).

[15] Emphasized in *Day v. Day*, 4 Md. 262, 270 (1853).

[16] Emphasized in *Gray v. Ayres*, 37 Ky. 375, 377-378 (1838); and *Welch v. Stowell*, 2 Mich. 332, 341-43 (1846).

[17] Joel Prentiss Bishop, *Commentaries on the Criminal Law*, vol. 1 (Boston: Little, Brown and Company, 1856), 577–78.

[18] *Congressional Globe*, 24th Congress, 1st session, June 8, 1836, Appendix, 457; "Legislature of New-York," *Evening Journal* [Albany, NY], February 4, 1848, 2.

[19] *Pennsylvania v. Wheeling & Belmont Bridge Company*, 54 U.S. 518, 566 (1851). See also *Murray's Lessee v. Hoboken Land Company*, 59 U.S. 272, 283 (1856), citing "the abatement of a public nuisance" as a recognized "instance of extrajudicial redress ... of a public wrong, by a private person."

[20] "Law Courts," *New-York Daily Tribune*, April 3, 1846, 2.

[21] Francis Hilliard, *The Law of Torts, or Private Wrongs,* vol. 2 (Boston: Little, Brown and Company, 1859), 94.

[22] Richard B. Kielbowicz, "The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860," *Law and History Review* 24 (2006): 559–600.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

fringe Philadelphia district of Kensington repeatedly removed the new-laid tracks of the Philadelphia and Trenton Railroad, which they asserted at a mass meeting were "a common nuisance" injurious to the public; the rioters cited rulings of the state supreme court to justify their summary actions.[23] The city authorities and population of Erie, Pennsylvania asserted and exercised the same right against a railroad several times in the 1850s.[24] Even when action was not taken, resolutions passed by public meetings chaired and attended by leading citizens declared the right of the entire community to abate nuisances by direct action. A meeting in Syracuse, New York in 1850 protested against the intrusion of a steam railroad in the city's main thoroughfare. It announced that, if no other arrangement could be negotiated, the people of the city were entitled under nuisance law to tear up the tracks.[25]

During the 1850s, however, the right of public abatement was most energetically, frequently, and visibly exercised in the Northern states by temperance activists. In that decade, in Northern communities that a historian has numbered in the dozens, bands of women closed down unlicensed drinking establishments by force.[26] The Salem trial of James Brown's lawsuit, with Shaw presiding, was apparently the first resulting case to come before a state appellate-bench judge.

Shaw stated the law as he understood it in his charge to the jury. Under the Massachusetts statutes, he observed, "all intoxicating liquors illegally kept for sale, together with the vessels and implements of the trade, and the building in which they are to be found, are common nuisances, which individuals may

[23] "Kensington Meeting," *Public Ledger* [Philadelphia, PA]., August 6, 1840, 1; Michael Feldberg, "Urbanization as a Cause of Violence: Philadelphia as a Test Case," in *The Peoples of Philadelphia: A History of Ethnic Groups and Lower-Class Life*, ed. Allen F. Davis and Mark H. Haller (Philadelphia: Temple University Press, 1973), 58–61.

[24] "Injunction Granted," *Erie* [PA] *Weekly Observer*, December 31, 1853, 3; "Memorial," *Erie* [PA] *Weekly Observer*, January 14, 1854, 3; and "Railroad Mass Meeting," *Erie* [PA] *Weekly Observer*, January 13, 1855, 2.

[25] "Great Railroad Meeting," *Syracuse* [NY] *Daily Star*, April 16, 1850, 2. For other examples, see *Southern Telegraph* [Rodney, MS], July 15, 1836, 2; "River Meeting," *Des Moines* [IA] *Courier*, June 9, 1853, 2; and "Public Meeting," *Nebraska News* [Nebraska Territory], February 27, 1858, 2. Dams were also an early target of self-help abatement until mill acts in many states did away with the common-law nuisance remedies: Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977), 48; and John Cumbler, *Reasonable Use: The People, the Environment, and the State: New England 1790-1930* (New York: Oxford University Press, 2001), 63–65. The attackers were usually persons especially injured (other millers on the same stream or farmers whose lands had been flooded), but community concerns about loss of fisheries sometimes played a role—Gary Kulik, "Dams, Fish, and Farmers: Defense of Public Rights in Eighteenth-Century New England," in *The Countryside in the Age of Capitalist Transformation*, ed. Steven Hahn and Jonathan Prude (Chapel Hill, NC: University of North Carolina Press, 1985), 25–50—as did the public health hazards of stagnant waters: *Gates v. Blincoe*, 32 Ky. 158 (1834). Some of those who attempted to destroy a large water-power storage dam in 1859 in New Hampshire, which lacked a mill act, may have been members of the general public rather than aggrieved landholders: Theodore Steinberg, *Nature Incorporated: Industrialization and the Waters of New England* (New York: Cambridge University Press, 1991), ch. 4.

[26] Jed Dannenbaum, "The Origins of Temperance Activism and Militancy among American Women, 1830-1860," *Journal of Social History* 15 (1981): 242.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

abate." "All persons," Shaw continued, "have a right to abate a public nuisance. ... I am of opinion that liquors kept illegally for sale, with the implements of trade, having been declared by law a public nuisance, every person may destroy them." "If kept in a shop," he added, "not a dwelling house, it is justifiable to use so much force as is necessary to come at such liquor and vessels, for the purpose of destroying them," although he cautioned that the destruction of the building itself would be excessive and unlawful. "If the act is justifiable when done by one person," Shaw pursued, "then it is justifiable when done by the combined action of many." He concluded by warning that the right was "to be strictly construed" and used only when necessary.[27] The jury found for the defendants.

Shaw's charge, coming from an experienced and esteemed jurist, attracted wide attention. That he should give the Rockport "hatchet gang" his legal imprimatur seemed an unchallengeable confirmation of its bona fides, extending by implication to the rest of the decade's outbreak of community self-help abatement of illegal saloons. Press comment nonetheless divided sharply, in a pattern clearest at the ideological extremes. The most radically reformist major newspaper of the period, Horace Greeley's *New-York Daily Tribune*, led a chorus of progressive praise.[28] It was joined by Boston's Wendell Phillips in William Lloyd Garrison's *The Liberator* and by the upstate New York abolitionist Gerrit Smith, who wrote: "For judicial decisions to this end I have labored and longed these many years."[29] Other strongly Republican and pro-temperance journals of the Northeast chimed in.[30] Greeley's *Tribune* argued that the good sense of the American public and the limits Shaw had stipulated were sufficient protections against the abuse of the power, and it emphasized the beneficial effects on public behavior and private well-being. Alcohol was a poison, the *Tribune* commented, its overconsumption was a menace to peace and order, and unlicensed establishments selling it violated the law, yet the formal route to their suppression was too often blocked by sympathetic judges and juries who refused to act. The doctrine Shaw enunciated removed that obstacle. "An illegal grog-shop, being a public nuisance, is not under protection of the laws."[31]

At the other end of the political spectrum, the most conservative journals of the Northeast, those sympathetic to the pro-slavery Democratic administration

[27] Shaw's charge is printed in "Important Decision in a Liquor Case," *Daily Herald* [Newburyport, MA], May 6, 1858, 2.

[28] *New-York Daily Tribune,* May 27, 1858, 4; *New-York Daily Tribune,* June 7, 1858, 4.

[29] Wendell Phillips, "Speech of Wendell Phillips," *The Liberator* 28 (1858): 94; and Gerrit Smith, "Peace Better than War," *The Advocate of Peace*, July-August 1858, 97, 105. See also "Calumny and Falsehood," *The Liberator* 28 (1858): 78.

[30] "The Death Blow to the Groggeries," *Springfield* [MA] *Daily Republican*, May 6, 1858, 2; "Is Liquor-Selling a Nuisance?" *Aegis and Transcript* [Worcester, MA], May 8, 1858, 2; "Letter from Boston," *Aegis and Transcript* [Worcester, MA], May 8, 1858, 2; "The Liquor Decision," *Massachusetts Spy* [Worcester, MA], May 12, 1858, 2; *Hartford* [CT] *Daily Courant,* May 10, 1858, 2; "Judge Shaw on Liquor Nuisances," *New-York Reformer* [Watertown, NY], June 3, 1858, 2; and "Public Nuisances," *Boston Evening Transcript,* July 15, 1858, 2.

[31] Untitled editorial, *New-York Daily Tribune*, May 27, 1858, 4.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

of President James Buchanan, expressed deep misgivings about community abatement. In Massachusetts, the Buchananite *Boston Post* strongly criticized Shaw's jury charge. So did such administration organs as the *Providence Post* and the *New Hampshire Patriot* in New England and the *Brooklyn Daily Eagle* and the Albany *Atlas & Argus* in neighboring New York,[32] along with some conservative Republican, Whig, American (Know-Nothing) Party, and moderate Democratic newspapers, including the Boston *Courier* and *Herald*, the *New York Times* (chronically at odds with Greeley's more radical *Tribune*[33]), and the Buffalo *Commercial Advertiser*.[34]

To a considerable degree, these reactions reflected disagreements over liquor prohibition, which Democrats mostly opposed, but which found more favor among radical Republicans. The New York *Evening Post*, a Republican journal by 1858 as advanced on many issues as Greeley's *Tribune,* held to its Jacksonian Democratic origins in rejecting prohibition as an objectionable attempt to impose moral betterment by law. It denounced the methods of the Rockport rioters as "subversive of good order, and sound government."[35] Greeley, who so strongly applauded Shaw's charge, had loudly deplored the mob abatement of anti-slavery journals as nuisances,[36] as had *The Liberator*.[37] Individual and community action had been encouraged by political and social conservatives of high standing when directed against anti-slavery newspapers, speakers, and organizations in the North in the 1830s.[38] But by the 1850s, it was most readily associated with the resistance of many radical Republicans to the Fugitive Slave Act and support for prohibition coupled with nativist distrust of the foreign-born, in each case against a core constituency of the Democratic Party.

Papers unnerved by Shaw's jury charge deplored what they saw as its likely result—unbridled mob violence—but did not challenge its statement of the law. The conservative, nonpartisan Philadelphia *Public Ledger*, which headed its editorial "Rioting Legalized," conceded: "It is no new decision that any citizen has a right to abate a nuisance." Yet, it added, "the practical tendency of the principle is to riot and disorder."[39] The Boston *Daily Herald*, without questioning the

[32] Untitled editorial, *Boston Post,* May 7, 1858, 2; "The Sequence of Prohibitory Legislation," *Boston Post,* May 18, 1858, 2; "Is This Law?" *Providence* [RI] *Daily Post*, May 12, 1858, 2; "The Nuisance Law," *Providence* [RI] *Daily Post*, May 18, 1858, 2; "Important Liquor Decision," *New Hampshire Patriot and State Gazette,* May 12, 1858, 2; untitled editorial, *Brooklyn Daily Eagle*, May 12, 1858, 2; and "The 'Nuisance' Decision in Massachusetts," *Atlas & Argus* [Albany, NY], May 27, 1858, 2.

[33] Adam Tuchinsky, *Horace Greeley's New-York Tribune: Civil War-Era Socialism and the Crisis of Free Labor* (Ithaca, NY: Cornell University Press, 2009), 155–56.

[34] Untitled editorial, *Boston Evening Courier*, May 5, 1858, 2; untitled editorial, *Boston Daily Herald*, May 5, 4; "Massachusetts: The Legalization of Anarchy," *New York Times*, May 22, 1858, 2; and "The Power of Mobs to Abate Nuisances," *Buffalo Commercial Advertiser,* September 4, 1858, 2.

[35] "Judge Shaw's Liquor Decision," *The Evening Post* [New York, NY], May 25, 1858, 2. For the paper's stance on prohibition, see "The Temperance Bill," *The Evening Post* [New York, NY], April 7, 1854, 2.

[36] [Horace Greeley], "Editor's Preface," in *The Writings of Cassius Marcellus Clay: Including Speeches and Addresses*, ed., Horace Greeley (New York: Harper & Brothers, 1848), v–viii.

[37] "Lynch Law in Kentucky," *The Liberator* 15 (1845), 189.

[38] Leonard L. Richards, *"Gentlemen of Property and Standing": Anti-Abolition Mobs in Jacksonian America* (New York: Oxford University Press, 1970).

[39] "Rioting Legalized," *Public Ledger* [Philadelphia, PA], May 8, 1858, 1.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

charge's legal basis, opined that "any attempt to act in accordance with these principles must inevitably result in a subversion of law and order and the supremacy of the law of might over right."[40] The New York *Evening Post* expressed similar fears, but admitted that "no other decision was possible than the one rendered," Shaw's jury charge being "in strict accordance with the letter of the law."[41]

Shaw's words were received in some quarters with an enthusiasm that he might have found disquieting. Police officers in several Massachusetts cities and towns summarily destroyed bottles of liquor that they found in unlicensed establishments.[42] In doing so, they undermined the guarantees of due process that Shaw and the Supreme Judicial Court had tried to impose on the Massachusetts temperance laws a few years earlier.[43] At a public meeting, the suggestion that a milldam on the Concord River, which kept thousands of acres upstream overflowed, be breached in "the manner sanctioned by Judge Shaw of removing a nuisance" was met with applause.[44] Participants in a saloon raid similar to the Rockport one were vindicated by a local court in Ohio, consistently with Shaw's reasoning: "The Justices believed the concern a nuisance under the law, and held that being such any persons had a right to abate it—and they, therefore, discharged the prisoners."[45]

There soon followed a more lurid dramatization of what the doctrine could entail. On the nights of September 1 and 2, 1858, a mob numbering in the hundreds destroyed the large Quarantine Hospital complex of buildings maintained by New York State in the town of Castleton on Staten Island, first taking care to remove to the open air all of the hundred or so patients the facility then housed.[46] Established at the end of the eighteenth century, the Quarantine accommodated patients, passengers, and crew from vessels entering the port of New York who were infected with supposedly transmissible diseases. Neighborhood opposition to its presence had become vehement by the 1840s. An alternative facility established on the south shore of the island in 1857 was torched by nearby residents, rebuilt under armed guard, and destroyed again. With yellow fever cases appearing in town during the summer of 1858, Castleton's Board of Health on the afternoon of September 1 declared

[40] Untitled editorial, *Boston Daily Herald,* May 5, 1858, 4.

[41] "Judge Shaw's Liquor Decision," *The Evening Post* [New York, NY], May 25, 1858, 2.

[42] "Wholesale Destruction of Liquors.—First Fruits of Chief-Justice Shaw's Decision in Springfield," *Springfield* [MA] *Daily Republican*, May 6, 1858, 4; "Milford," *Aegis and Transcript* [Worcester, MA], May 15, 1858, 2; and "Our Chief of Police and the Nuisance Law," *Cambridge* [MA] *Chronicle*, May 15, 1858, n.p.

[43] *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854); Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, MA: Harvard University Press, 1957), 262–63; Novak, *The People's Welfare*, 181–83.

[44] "The Meadow Lands of the Concord River Valley," *New England Farmer* [Boston, MA], January 1, 1859, 2.

[45] "Warren Correspondence," *Cleveland* [OH] *Morning Leader*, July 12, 1858, 1.

[46] Kathryn Stephenson, "The Quarantine War: The Burning of the New York Marine Hospital in 1858," *Public Health Reports* 119 (2004): 79–92; and Andy McCarthy, "Salutary and Well-Intentioned Violence: The 1858 Quarantine Fires in Staten Island," *New York History* 103 (2022): 123–52.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

the Quarantine a nuisance and called upon the populace to abate it, a summons that was obeyed as soon as darkness fell.

In the aftermath of the hospital's destruction, Staten Islanders asserted as established law the right of any citizen to take such action.[47] The rioters had met so little resistance that they could plausibly plead innocent to a breach of the peace. They had had the authority of the Castleton Board of Health for considering the hospital a public nuisance that members of the public were not only entitled, but obligated, to help suppress. They could justify burning the Quarantine buildings to the ground, as they had done, as the only sure way to cleanse an infected plague spot. Defending the mob's leaders, Ray Tompkins and John C. Thompson, against charges of arson, their lawyer emphasized that the Quarantine's destruction "was conducted in a quiet, orderly manner, without riot, without undue force, and with every degree of care and regard for the safety of the sick," and he confidently maintained that any person could abate a common nuisance, invoking a dozen appellate-court decisions to that effect among what he called "an infinite number which may be cited."[48] The judge presiding dismissed the charges.[49]

Leading journals around the country expressed horror at the assault, many linking it to a growing spirit of lawlessness infecting the country.[50] Some had previously hailed Shaw's jury charge, of which more than one appalled observer depicted the Staten Islanders' actions as the logical outcome, even suggesting that it had been their direct inspiration.[51] Gerrit Smith, unfazed, held to his earlier views. Running for the governorship of New York in the fall of 1858 on an independent ticket emphasizing the twin issues of opposition to slavery and prohibition, he repeatedly affirmed the right of the people of Castleton to abate the Quarantine as they had done.[52] A *Tribune* editorial

[47] "Law for the Destruction of the Quarantine by Individuals," *New York Herald*, September 27, 1858, 8.

[48] William Henry Anthon, *Argument of William Henry Anthon, Esq., in Behalf of the Defendants, Messrs. Ray Tompkins and John C. Thompson* (New York: Wm. C. Bryant, 1858), 25, 30.

[49] "The Quarantine Imbroglio," *New York Herald*, November 12, 1858, 1. The New York Supreme Court, however, held the county liable for losses suffered in the attack: *Wolfe v. Supervisors of Richmond County*, 19 How. Pr. [NY] 370 (1860).

[50] See, for example, "The Staten Island Outrages!," *Evening Journal* [Albany, NY], September 4, 1858, 2; "The Staten Island Mob," *Boston Evening Transcript,* September 4, 1858, 2; "The New York Quarantine Mob," *Public Ledger* [Philadelphia, PA], September 4, 1858, 1; "The New York Mob," *Boston Post*, September 6, 1858, 2; untitled editorial, *Hartford* [CT] *Daily Courant*, September 6, 1858, 2;"The Spirit of Lawlessness," *Daily National Intelligencer* [Washington, DC], September 7, 1858, 3; untitled editorial, *The Daily Exchange* [Baltimore, MD], September 8, 1858, 2; "The Staten Island Sepoys," *Detroit* [MI] *Free Press,* September 9, 1858, 2; "The Mob Spirit," *Daily Picayune* [New Orleans, LA], September 15, 1858, 2; and "Supremacy of Law," *Memphis* [TN] *Daily Appeal*, October 23, 1858, 1.

[51] "The Power of Mobs to Abate Nuisances," *Buffalo* [NY] *Commercial Advertiser,* September 4, 1858, 2; "The Nuisance Law and Its Practical and Judicial Interpretation," *The Atlas & Argus* [Albany, NY], September 6, 1858, 2; and "The Riots at Quarantine," *New York Times,* November 13, 1858, 4.

[52] "Gerrit Smith at Association Hall," *The Atlas & Argus* [Albany, NY], October 6, 1858, 2; "Political: Speech of Gerrit Smith," *New-York Daily Tribune,* October 7, 1858, 5; and "Gerrit Smith," *Troy* [NY] *Weekly Times*, October 16, 1858, 1.

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highlighted the judge's similar finding in dismissing the charges against Tompkins and Thompson.[53] And precedent seemed still to be on their side. As one lawyer put it, there seemed to be "no doubt whatever as to the principle that any individual has a right of his own volition, to abate a nuisance," for "this right ... broadly and without qualification laid down by the Supreme Court of this state, is but the confirmation of the old common law doctrine on this head."[54]

The Right Denied

The justices of the Massachusetts Supreme Judicial Court could not have been unaware of the events on Staten Island as they considered James Brown's appeal of the verdict in the Rockport case. In late April, 1859, a unanimous bench reversed the outcome and ordered a new trial, citing errors in the instructions given by the judge.[55] An opinion that Shaw authored in the case was published in the *Massachusetts Reports* after his retirement in 1860.[56] Its key sentences upended the doctrine laid down in the 1858 charge to the jury: "It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. The right and power is never entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance." Several paragraphs later, Shaw restated and elaborated the same point: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called into question for so doing." An individual who was not particularly injured, Shaw continued, enjoyed no such right. The unlicensed sale of liquor, "if a nuisance at all, is exclusively a common nuisance" and "can only be prosecuted as a public or common nuisance in the mode prescribed by law," not by any person "breaking into the shop or building where it is thus sold, and destroying the liquor there found ...." He obliquely admitted that American precedent was against him: "Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern

[53] Untitled editorial, *New-York Daily Tribune*, November 12, 1858, 4.

[54] "Lex," "The Quarantine Controversy: The Legal Question," *The Evening Post* [New York, NY], September 17, 1858, 1; see also "Lex," "The Quarantine Controversy: Was the Hospital Nuisance Legally Abated?," *The Evening Post* [New York, NY], October 6, 1858, 2; "The Destruction of the Quarantine Buildings in New York: The Law for Abatement of a Public Nuisance," *Boston Post*, September 25, 1858, 1.

[55] "Court Record: The Rockport Liquor Case," *Boston Post*, April 27, 1859, 4.

[56] The published opinion ended: "This statement of the decision was drawn up by the chief justice to guide the new trial. His death prevented the writing out of a fuller opinion." *Brown v. Perkins*, 102.

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cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law."[57]

Two of these "modern cases" were from England, where the principle had held sway for some time already, although only the later one, handed down in 1847, clearly stated it.[58] The third that the opinion cited was *State v. Paul*, a Rhode Island decision announced around the time of Shaw's jury charge in 1858, which for the most part merely reiterated the principle emphasized in the fourth case, *Gray v. Ayres* (Kentucky, 1838): that the abatement of a nuisance could only go so far as to stop the offense, so that when it consisted merely of the way a building was used, it must stop short of destroying the building itself unless necessary to that goal.[59] Neither American decision explicitly denied the right of abatement of any member of the public, and *Gray* affirmed it.

Only at one point, and only by implication, did *State v. Paul* offer firmer ground for the conclusions Shaw built on it. In his opinion, Rhode Island Chief Justice Samuel Ames observed: "Public nuisances may undoubtedly be abated at common law by judgment of court upon indictment for the same, and, as well as private nuisances, by those who are specially injured or obstructed by them." But this last clause, even if read as implying that public nuisances could *not* be abated by those not specially injured or obstructed, was *obiter dictum*, forming no part of the basis for the decision. Neither did *Paul* cite any American cases in its own support, only two eighteenth-century English decisions on the impermissibility of doing more than abating a nuisance strictly required.[60]

The Rhode Island Court, however, spoke much more explicitly in a second opinion later in 1858, also authored by Ames, and subsequent to both Shaw's charge and the destruction of the Castleton Quarantine. In *State v. Keeran*, it clearly asserted "that the right of an individual to abate a public nuisance, like the right of an individual to maintain an action on account of it, depended upon its special injury to him, and the necessity arising from its special obstruction of his rights; the sole remedy for the injury sustained by him from the nuisance, in common only with the rest of the public, being by indictment," elaborating the point as follows:

> The law recognizes no Quixotry in redress of grievances. Private action of every nature, unless to prevent the commission of great crimes, is confined to private wrong; the injured individual alone being entitled to take it in his own recompense, or to prevent or to remove obstructions to the exercise of his private rights. ... Unless specially injured or obstructed by a public nuisance, no individual can maintain an action for damages on account of it, or a bill in equity to procure its abatement by decree; and still less, one would think, for the sake of peace and good order, can any individual or number of individuals lawfully constitute

[57] *Brown v. Perkins*, 100–102.
[58] *Earl of Lonsdale v. Nelson*, 7 B. & C. 302 (1823); and *Mayor of Colchester v. Brooke*, 7 Q. B. 339 (1847).
[59] *State v. Paul*, 5 R.I. 185 (1858); and *Gray v. Ayres*, 7 Dana [Ky.] 375 (1838).
[60] *State v. Paul*, 194–95.

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> themselves the redressers of public wrongs, and the abaters [sic] of public nuisances.[61]

Ames's sole authorities for this doctrine were English courts.[62] He cited no American decisions, nor did he discuss or try to distinguish any of the many that had held differently. And as well as assuming, rather than showing, that abatement and appeal to the courts must rest on the same bases, he silently slid from maintaining that one must be injured to have the right to abate, certainly a plausible position, to maintaining that one must in some way be more injured than others were, without explaining why or specifying how much more was necessary. He left unanswered an obvious objection: that a public or common nuisance was, by definition, something that injured everyone in its vicinity or in the community, so that his disparagement of "Quixotry" was beside the point. Moreover, Ames's remarks in *Keeran* were *obiter dictum*, unrelated to the legal issues in the case, for as in *Paul*, no act of public abatement had occurred or had been brought to the court's attention. Why, then, did Ames feel obliged to opine on this topic? A conservative Whig whose jurisprudence and politics closely resembled Shaw's, he may well have felt impelled to do what he could to curb a right that was becoming dangerous to public order.[63]

Keeran slightly preceded as well as foreshadowed *Brown*, but it was Shaw's decision, in which the denial of the right of public abatement was the central holding and not mere *dictum*, that later courts would rely upon. The Massachusetts chief justice and his colleagues had upheld a wide reach for the police powers of the state in the regulation of drink during the mid-1850s, while at the same time insisting on the requirements of due process in the execution of those powers.[64] The ruling in *Brown* in 1859 brought the law of the Commonwealth into harmony with the second of these concerns as Shaw's charge had not. It stopped just short of justifying itself on frankly pragmatic grounds, all but explicitly invoking the dangers of excess when the laws were enforced by the public rather than by the officers of the government, yet resting the outcome on the law as supposedly laid down in previous cases. But because previous American cases did not support it, as Shaw had been obliged to recognize in his jury charge, it is best understood as new law fashioned in light of the increasingly undesirable consequences the old law could have: consequences illustrated when the people of Castleton destroyed the Quarantine Hospital and in the rash of saloon abatements that had ensued in Massachusetts and elsewhere.

Characteristic of Shaw's jurisprudence was a willingness to adapt the law to the realities of new conditions of life even when it meant disregarding

[61] *State v. Keeran*, 5 R.I. 497, 509, 510 (1858).

[62] He relied chiefly on *Mayor of Colchester v. Brooke*, which Shaw had cited, and the similar conclusions reached in *Dimes v. Petley*, 15 Q. B. 276 (1850): *State v. Keeran*, 510–12.

[63] C. Peter Magrath, "Samuel Ames: The Great Chief Justice of Rhode Island," *Rhode Island History* 24 (1965): 65–76.

[64] Levy, *Law of the Commonwealth*, ch. 13.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

precedent. The right of public abatement, harmless enough and even beneficial in an earlier age, arguably threatened to become a dangerous anachronism in the mid-nineteenth-century United States. Both technological and statutory evolution had broadened the scope of the legal category of "nuisance" to include many new activities not foreseen in the classic statements of the rule. Many of them involved far larger material interests than the pre-industrial obstacles in road or river that the doctrine had mostly addressed.[65]

Moreover, political, economic, and cultural divides had greatly diluted the homogeneity and sense of common interests and values that might be needed for the right to do more good than harm. To many observers, American society itself during the mid- and late 1850s seemed on the point of disintegrating as conflicting elements—nativists and immigrants, saloon owners and prohibitionists, pro-slavery and free-soil factions in the disputed Kansas Territory—resorted to force to settle their differences.[66] Shaw, like many of his conservative contemporaries, particularly feared the sectional frictions arising from another burgeoning form of popular justice in the 1850s, the rescues by Northern vigilance committees of fugitive slaves in defiance of federal laws.[67] Ames would similarly strive as a member of the abortive "Peace Convention" of 1861 to avert secession by urging concessions addressing Southern white slaveholders' fears.[68]

The Right Dismissed: The Judges

The first responses by the courts of other states can be crucial to the fate of a jurisprudential innovation. The doctrine laid down by Shaw and Ames won a prompt and important endorsement from the General Term of the New York Supreme Court in *Harrower v. Ritson* (1861). Holding that "public nuisances should only be subject to abatement by one specially aggrieved by them," the court cited in support not the New England cases, but rather the English decisions that Shaw and Ames had also relied upon.[69] *Harrower* concerned only what could be done to remove an obstruction in a highway. The opinion, though, took a broader view in underlining what the competing doctrines might mean in more charged and explosive contexts. "To suffer any one, without necessity, to become the executor of this branch of the common law,

[65] Ibid. Ames, whose legal practice had emphasized corporation issues, would likely have shared these concerns: Magrath, "Samuel Ames."

[66] Paul A. Gilje, *Rioting in America* (Bloomington, IN: Indiana University Press, 1996), ch. 3; David Grimsted, *American Mobbing, 1828-1861: Toward Civil War* (New York: Oxford University Press, 1998), chs. 8–9.

[67] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975); and Peter Karsten, "Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and 1850s," *American Journal of Legal History* 58 (2018): 291–315. See also Michael F. Conlin, "The Dangerous *Isms* and the Fanatical *Ists*: Antebellum Conservatives in the South and the North Confront the Modernity Conspiracy," *Journal of the Civil War Era* 4 (2014): 205–33.

[68] L.E. Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention, for Proposing Amendments to the Constitution of the United States, Held at Washington, D.C., in February, A.D. 1861* (New York: D. Appleton & Company, 1864), 610–13.

[69] *Harrower v. Ritson*, 37 Barb. [N.Y.] 301, 304 (1861); affirmed, *Griffith v. McCullum*, 46 Barb. [N.Y.] 561 (1866).

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without the intervention of the ordinary forms of law and a resort to the process of the courts," Justice William F. Allen warned in writing for the majority, "would tend to gross injustice, breaches of the peace and riots, and the remedy would be worse than the disease."[70]

Allen, a conservative upstate Democrat, entered public life in the 1840s as a state legislator uncompromisingly hostile to the lawlessness and disorder he saw embodied in the Anti-Rent movement and the efforts of politicians to win its favor.[71] He remained active in New York politics while a judge, winning the Democratic nomination for lieutenant-governor in the pivotal election of 1860, and voluntarily withdrawing to facilitate the union of all anti-Republican factions in New York on a single ticket.[72] His conservatism extended to other realms as well. Around the time *Harrower* was decided, Allen refused to enforce a New York statute giving wives and husbands equal powers over their children, declaring it "mischievous," tending to "social anarchy and domestic discord," and subversive of "sound morals and good order."[73]

The Supreme Judicial Court of Maine was the next to adopt Shaw's argument, which it prominently cited, and Ames's, which it did not, but which it followed closely in wording. The occasion was the saloon case of *Hamilton v. Goding,* decided in 1867. Associate Justice Edward Kent held that the liquor trade "can in no proper sense be regarded as a private injury, so peculiarly affecting an individual member of the community as to enable him, of his own motion, to abate it as a nuisance."[74] He elaborated this doctrine into a peroration strikingly similar to the language used in *Keeran,* writing:

> The common law does not arm and send forth single knights errant to vindicate its authority or avenge its wrongs, by inflicting punishment on supposed offenders, according to the individual opinion and judgment of the avenger. Much less does it authorize any Quixote to assume, of his own will and motion, that character, and sally forth to put down even acknowledged evils and wrongs. Private action is, as a general rule, confined to private wrongs, and then only to be used when it becomes necessary to prevent or remove imminent and present obstructions to the exercise of his private right.[75]

Kent's biographer has identified a conservative devotion to social order as the central theme of his career. He shared it with Shaw and Ames, his fellow Whigs, and he maintained it as a moderate Republican from the mid-1850s onward, one who parted company with the party's radical wing before and during

[70] *Harrower v. Ritson*, 310.

[71] Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics* (Chapel Hill: University of North Carolina Press, 2001), 135–41, 358 n16.

[72] Sidney David Brummer, *Political History of New York State during the Period of the Civil War* (New York: Columbia University Press, 1911), 79, 84–85, 343–44.

[73] *People ex rel. Brooks v. Brooks*, 35 Barb. 85, 87, 90, 91 (1861).

[74] *Hamilton v. Goding*, 55 Me 419, 426 (1867).

[75] Ibid., 428.

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the Civil War and Reconstruction, and who upheld the freedoms of speech and the press of wartime dissenters: a pro-Southern Bangor newspaper suppressed by a mob as an alleged public nuisance.[76]

Other states soon fell into line. The common law permitted anyone to remove obstructions in highways and navigable streams, the Illinois Supreme Court announced in 1873, but "the right of the citizen to abate nuisances is confined alone to that class of cases."[77] It pointed to the dire consequences of a wider-ranging power. If a mob could decide "that a factory costing a large sum of money was a public nuisance, and that they might tear down and destroy the building, such attempts would inevitably lead to resistance and bloodshed. It would tend to violence, and be productive of great disorder."[78] In *Miller v. Forman* in 1874, New Jersey's Supreme Court, citing *Brown* as its authority, acknowledged only "the right of an individual to abate a nuisance by which his person or property is injuriously affected."[79] The Pennsylvania Supreme Court held likewise in 1882 that "a private person not specially aggrieved cannot abate a public nuisance ...."[80] California lawmakers placed a special-injury restriction on nuisance abatement in the civil code they enacted in 1872.[81]

The 1860s and 1870s saw only one dissenting opinion in a case in which the majority aligned with Shaw, and only one decision by a state appeals court that reiterated the right of any member of the public to abate a public nuisance. Both came from judges with radical Republican antecedents. New York Supreme Court Justice Le Roy Morgan dissented in *Harrower v. Ritson*. In contrast to Allen, the voice for the majority and a conservative Democrat, Morgan had joined the Republican Party upon its founding and had been a presidential elector for John C. Frémont in 1856; he had earlier represented defiers of the Fugitive Slave Act in a trial arising out of the 1851 "Jerry Rescue" in Syracuse.[82] In 1872, New Jersey's Vice-Chancellor, Amzi Dodd, emphatically affirmed that the common-law right of any member of the community to abate a public nuisance "still exists in full force. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities ... may abate what the common law deemed a public nuisance."[83] Dodd's free-soil views, like Morgan's, had led him into the

[76] David M. Gold, "A Republican on the Bench,"in *An Exemplary Whig: Edward Kent and the Whig Disposition in American Politics and Law* (Lanham, MD: Lexington Books, 2012), ch. 13.

[77] *Earp v. Lee,* 71 Ill. 193 (1873). See also *Phifer v. Cox*, 21 Ohio St. 248 (1871); *Clark v. Lake St. Clair and New Up-River Ice Company*, 24 Mich. 508 (1872); *State v. Flannagan*, 67 Ind. 140 (1879); *Larson v. Furlong*, 50 Wis. 681 (1881); *Corthell v. Holmes*, 87 Me 24 (1894); *Watts v. Norfolk & W. R.*, 39 W. Va. 196 (1894); *State v. Stark*, 63 Kan. 529, 536, 537 (1901); and *Nation v. District of Columbia*, 34 App. D.C. 453 (1910).

[78] *Earp v. Lee*, 19–97.

[79] *Miller v. Forman*, 37 N.J.L. 55, 57 (1874).

[80] *Fields v. Stokley*, 99 Pa. 306, 309 (1882).

[81] *Civil Code of the State of California,* 1872, §3495.

[82] Dwight H. Bruce, ed., *Onondaga's Centennial: Gleanings of a Century*, vol. 2 (Boston: The Boston History Company, 1896), 177–78.

[83] *Manhattan Manufacturing and Fertilizing Company v. Van Keuren*, 23 N.J. Eq. 251, 255 (1872).

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Republican Party at its founding, while Edward Scudder, who two years later rejected the right of public abatement in New Jersey law, was a lifelong Democrat.[84]

A famous New York decision in 1856 that Novak cited as foreshadowing the decline of the regulated society foreshadowed *Brown* as well and displayed a similar partisan basis.[85] The New York State Legislature in 1855 enacted a drastic prohibitory law declaring the keeping of intoxicating liquors to be a public nuisance. Opponents warned of the potential for disorder it created, given the recognized right of abatement of any person. They included a former chief judge of the state's Court of Appeals, Greene C. Bronson, a leader of the pro-Southern wing of the New York Democratic Party.[86] In 1856, a deeply divided Court of Appeals invalidated the law. The lead opinion, by a conservative Whig who would soon become a Democrat, observed disapprovingly that under its provisions, "individuals without authority, may go forth on a roving commission to seize and destroy all intoxicating liquors within the borders of the state, and plead an overruling necessity as a justification of their lawless acts."[87] The Court's Democrats concurred and the Republicans dissented.[88] The partisan divide over liquor regulation was fleeting. Within a few years, the Republican Party in most states distanced itself from the prohibition cause.[89] But for a short time, the issue was a significant one in partisan alignments, and in legal ones as well.[90]

The Right Debated: The Scholars

With his scanty citations in *Brown*, Shaw left an important job unfinished: that of showing that his apparent departure from American precedent was only an illusion. The writer who took on the task was the legal scholar Horace G. Wood (1831–93), in his first book, *A Practical Treatise on the Law of Nuisances in Their Various Forms* (1875).[91] Wood devoted a chapter to the topic of "Abatement of Public Nuisances by Act of Private Persons," arguing that such abatement had never been recognized in Anglo-American law. The first case he cited

[84] Willian Nelson, ed., *Nelson's Biographical Cyclopedia of New Jersey*, vol. 2 (New York: Eastern Historical Publishing Society, 1913), 649–54; and Francis Bazley Lee, ed., *Genealogical and Memorial History of the State of New Jersey*, vol. 1 (New York: Lewis Historical Publishing Company, 1910), 67.

[85] Novak, *The People's Welfare*, 186–87.

[86] *Reports of the Majority and Minority of the Select Committee on the Sale of Intoxicating Liquors* (Albany, NY: C. Van Benthuysen, 1855); and Metropolitan Society for the Protection of Private and Constitutional Rights, *The Unconstitutionality of the Prohibitory Liquor Law Confirmed* (New York: M'Intire & Parsons, 1855), 47, 62–63, 77–78.

[87] *Wynehamer v. The People*, 13 N.Y. 378, 402 (1856).

[88] Lex Renda, "Slavery, Law, Liquor, and Politics: The Case of *Wynehamer v. The People*," *Mid-America* 80 (1998): 35–53.

[89] Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800-1933* (Chicago: Ivan R. Dee, 1998), 45–52.

[90] John W. Compton, *The Evangelical Origins of the Living Constitution* (Cambridge, MA: Harvard University Press, 2014), 74–78.

[91] H.G. Wood, *A Practical Treatise on the Law of Nuisances in Their Various Forms; Including Remedies Therefor at Law and in Equity* (Albany, NY: John D. Parsons, 1875).

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was *Brown v. Perkins,*[92] and his discussion was an extended footnote to Shaw's opinion.

"A private person," Wood asserted, "may not of his own motion abate a strictly public nuisance under any circumstances." Only when a person had sustained "a special injury or damage from a public nuisance," one that would have grounded a legal action against it, did the right of abatement exist. The widespread impression to the contrary, Wood maintained, was sheer error, the result of "the many loose expressions that have been incorporated into the opinions of courts when deciding questions of this character, and of the gross errors committed by nearly all of the elementary writers who have treated upon this subject." obscuring a uniform rule that "is sustained by the judgment of every respectable court, and is the law both in this country and in England."[93] That it was the law in England was uncontested. The challenge facing Wood was to show that it had always been the law in the United States as well.

Many American decisions, Wood granted, had explicitly asserted that any person might abate a public nuisance. He correctly pointed out that in several of them, the assertion was *obiter dictum*, that right not having been directly at issue in the case being decided. In another, he showed, the abatement had been carried out solely by the officers of the government, not by private citizens.[94] In several more, the abator had suffered special injury.[95] But Wood's positive claim that American courts had always—or, indeed, ever—denied the right of abatement in the absence of special injury lacked support. In his principal exhibit, an Iowa decision from 1848, the assertion to that effect was mere *dictum*, for the parties involved plainly had experienced particular harm from the nuisance.[96] A New York case he cited from the 1820s only established a different point, one that Blackstone had made: that obtaining an award for damages against a public nuisance required special injury.[97] It was Wood who sought to extend that criterion to the separate question of a right of abatement.

Wood briefly waved aside a New York case in which a city alderman had led a group of citizens in destroying some filthy dwelling houses perceived as health hazards during a cholera epidemic, calling the circumstances "peculiar and extraordinary."[98] But the court that had upheld their actions had found the fact of the defendant's being a resident of the neighborhood, and thus a member of the public, sufficient to justify him in abating a public nuisance.[99] Wood likewise evaded a close engagement with the 1832 New York case of *Hart v. Mayor of Albany*, which told heavily against his argument. The owner of a floating storehouse had anchored it permanently at a public dock in the Hudson River basin in Albany, New York, and the city authorities had forcibly

[92] Ibid., 747 n1.
[93] Ibid., 747, 748.
[94] Ibid., 754, discussing *Harvey v. DeWoody*, 18 Ark. 252 (1856).
[95] Ibid., 749 n1, 755–56, discussing *Arundel v. McCulloch*, 10 Mass. 70 (1813), *Renwick v. Morris*, 7 Hill [N.Y.] 575 (1844), and *State v. Parrott*, 71 N.C. 311 (1874).
[96] *Moffett v. Brewer*, 1 Greene [Iowa] 348 (1848).
[97] *Pierce v. Dart*, 7 Cow. [N.Y.] 608 (1827).
[98] Wood, *Practical Treatise*, 751–52.
[99] *Meeker v. Van Rensselaer*, 15 Wend. [N.Y.] 397 (1836).

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removed it as an unauthorized obstruction and a public nuisance. Chancellor Reuben Walworth held that as any citizen might abate such a nuisance, if it existed, so necessarily might the city's officers.[100] The Court for the Correction of Errors resoundingly upheld his decision, with three of the four opinions echoing his reasoning, while the fourth did not challenge it.[101] In *Wetmore v. Tracy*, three years later, the New York Supreme Court took *Hart* to be conclusive on the public right of abatement.[102]

Apparently unable to challenge or distinguish them, Wood relegated to footnotes decisions by the Pennsylvania Supreme Court in 1846 and by the California Supreme Court in 1851 that, he acknowledged, contradicted his claims.[103] He was reduced as well to arguing that another recalcitrant decision had little value because it had been decided by a bare majority of a divided court,[104] and that in yet another contrary American case, "the court said what it did not mean."[105] Statements prior to *Brown* that clearly corroborated his alleged rule he found chiefly in the English cases that Shaw and Ames had invoked.[106] He thereby left open the possibility that English and American law had diverged.[107]

As if confessing that his argument could not stand on precedent alone, Wood depicted the horrible consequences of rejecting it: "acts of violence and barbarity, such as no civilized community could tolerate, and such a condition of anarchy and disorder as would be wholly in subversion of law and the public peace." Emphasizing—perhaps significantly—the menace to large businesses, he wrote that a factory that "produced such noxious smells and vapors as to produce a public injury, and became a nuisance," would then be "at the mercy of any person who might see fit to enter into and destroy its machinery. If such were the rule," he continued rather fancifully, "a stranger, who suffered no inconvenience from its operations, a resident of another city, town or State even, might with impunity, from motives of malice or mischief, prey upon the manufacturing or other interests of a community *ad libitum* ... the law would thus be converted into a shield to be used by any man or set of men, who desired to gratify either their malice, or propensities for mischief."[108] The rule Shaw had formulated was "suggested by sound public policy" and "certainly tends to sustain the public peace."[109]

Wood explicitly addressed some of his criticisms to the work of an older and more eminent law writer: Joel Prentiss Bishop (1814–1901).[110] In successive

[100] *Hart v. Mayor of Albany*, 3 Paige Ch. [N.Y.] 213, 214-215 (1832).
[101] *Hart v. Mayor of Albany*, 9 Wend. [N.Y.] 571, 589–90, 594–95, 607–11 (1832).
[102] *Wetmore v. Tracy*, 14 Wend. [N.Y.] 250 (1835).
[103] Wood, *Practical Treatise*, 747 n1, 748 n1.
[104] Ibid., 757.
[105] Ibid., 759.
[106] Ibid., 761–62.
[107] English courts might have been influenced by their country's earlier industrialization; their doctrines might, on the other hand, have reflected a greater reluctance to accept an informal and extrajudicial system of law enforcement.
[108] Wood, *Practical Treatise*, 750; see also 767: "our business and manufacturing interests."
[109] Ibid., 768.
[110] Stephen Siegel, "Joel Bishop's Orthodoxy," *Law and History Review* 13 (1995): 215–59.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

editions of his various treatises, Bishop insisted as stubbornly on the established right of any citizen to abate a public nuisance as Wood denied it. He first stated his views prior to *Brown* in his *Commentaries on the Criminal Law*.[111] He maintained them unaltered through several revisions, citing the classic antebellum cases in support, even in the face of a mounting series of new decisions that held the opposite.[112] He first took notice of the revisionist trend in 1873. In *Brown*, he observed, "the doctrine is laid down, that the right to abate a public nuisance can be exercised only by those who are personally and specially injured by it." A reader consulting the relevant decisions, he retorted, "will see that the authorities are not so. And what is said sustaining such a view in the cases cited by the Massachusetts court is mere *dictum*." "The better and just doctrine," he maintained, was supported by most American decisions and by common sense. Like Wood, Bishop offered an farfetched hypothetical situation to strengthen his argument:

> ... if an evil-minded person has laid a dangerous obstruction upon a public highway, but at a place where I have never any occasion to use the way, then, at nightfall, just before I know the way will be thronged by persons moving along it in the dark, I go and remove the obstruction, and so prevent threatened injury to life and limb, it would be contrary to all just notions of law, and still more to all just law, to hold that, in recompense for my good deed, I must answer to the villain in a civil suit.[113]

Four years later, Bishop stood his ground. He granted that *Brown* had perhaps reached the correct result if the physical destruction of the bottles of liquor in that case was unnecessary to abate the nuisance. But he reiterated that the judges had erred in denying the existence of a right that precedent unquestionably upheld. Moreover, he asserted, the right in question was "essential to the repose of the community," because all sorts of horrors might be perpetrated in its absence. Unlike Wood's, his examples were nuisances threatening the entire public alike. "An infernal machine might be hidden where throngs were passing, a bridge about to be packed with human beings might be so weakened that it would fall, or any number of other dangers might be created, yet, but for this doctrine, they could not be arrested in time to prevent the calamity." It was impossible, he wrote, to "look upon some late cases, in which it seems to be laid down in broad terms, that no one is entitled to abate a public nuisance unless personally and specially injured by it, as serious utterances of the courts"; he thought them best understood as being prompted by circumstances unique to the cases being decided.[114] In 1892, provoked by the contrary drift of decisions, Bishop protested against the credulous acceptance of "'the weight of

[111] Bishop, *Commentaries on the Criminal Law*, vol. 1, 577.

[112] Bishop, *Commentaries on the Criminal Law*, 2nd edition, vol. 1 (1858), 718–19; 3rd edition, vol. 1 (1865), 393; 4th edition, vol. 1 (1868), 404; 5th edition, vol. 1 (1872), 491.

[113] Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (Boston: Little, Brown and Company, 1873), 664 n1.

[114] Bishop, *Commentaries on the Criminal Law*, 6th edition, vol. 1, 609, 611, 612.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

authority'" whether or not it was consistent with good sense. Without the right denied in *Brown*, "no man could shoot a mad dog running in the street, or throw into the street the torch which an incendiary had left in another's building to burn the city."[115]

There is something to be said for the positions taken by both writers. Bishop could persuasively insist, at least in the early years, that *Brown* was at odds with American precedent, just as Wood, ever more convincingly as time went on, could invoke the trend of state-court decisions. The latter gained an important recruit in 1879, by which time the drift was unmistakable. If a nuisance were public, the eminent law writer and state supreme court Judge Thomas M. Cooley wrote, citing Shaw's *Brown* opinion, "only he may abate it who suffers a special grievance not felt by the public in general."[116]

Little has been written about Wood's career and associations. A recent scholar, however, has noted his close ties to corporate and especially railroad interests and observed how sharply the doctrine he is best remembered for enunciating, that of employment at will, conflicted with the free-labor ideology of Reconstruction-era radical Republicans.[117] Bishop, for his part, was an anti-slavery journalist in the 1840s before entering the law, and during the Civil War he criticized President Lincoln's moderate course toward slavery in the rebellious South.[118] His writings also suggest an evangelical moralism of the sort that was shared by many anti-slavery Whigs and their Republican successors, but that was distasteful to Jacksonian Democrats.[119] His background and views, in short, paralleled those of other defenders of a broad public right of abatement.

Conclusion

The right of any person to abate a public nuisance by direct action enjoyed wide acceptance in American law until it was abruptly denied by courts in Massachusetts and Rhode Island in the late 1850s and in New York in 1861, decisions which soon triumphed over earlier American precedents. They followed closely upon some dramatic exercises of the right: the sacking and destruction of saloons across the Northern states and the burning of the New York Quarantine in September, 1858. The power of community abatement in the immediate ante- and postbellum years was not randomly attacked or defended across the political spectrum. It found its most ardent defenders among radical Republicans espousing slavery restriction and temperance,

[115] Joel Prentiss Bishop, *New Commentaries on the Criminal Law; Upon a New System of Legal Exposition* (Chicago: T. H. Flood and Company, 1892), 651–52.

[116] Thomas M. Cooley, *A Treatise on the Law of Torts; or the Wrongs which Arise Independent of Contract* (Chicago: Callaghan and Company, 1879), 46.

[117] Leah VanderVelde, "The Anti-Republican Origins of the At-Will Doctrine," *American Journal of Legal History* 60 (2020): 397–449.

[118] Siegel, "Joel Bishop's Orthodoxy," 218; Joel Prentiss Bishop, *Thoughts for the Times* (Boston: Little, Brown and Company, 1863); and Joel Prentiss Bishop, *Secession and Slavery* (Boston: A. Williams and Company, 1864).

[119] Siegel, "Joel Bishop's Orthodoxy"; Howe, *Political Culture of the American Whigs*.

https://doi.org/10.1017/S0738248022000566 Published online by Cambridge University Press

and its most effective antagonists among conservatives made uneasy by signs of spreading disorder in the public sphere. The likelihood that the key decisions—*Brown*, *Keeran*, and *Harrower*—were driven by concerns of policy is strengthened by the tenuousness of their legal underpinnings as conventionally assessed.

The affinities between political and legal doctrine were as much rooted in transient and contingent circumstances as in philosophies. Most legal doctrines are potentially multi-edged, but in any particular time and place they will cut more deeply and painfully in some directions than in others. Newspapers hostile to slavery had been particular targets of community abatement before the 1850s just as saloons were later on. There was no inevitable or necessary link between prohibition and abolition or resistance to the fugitive slave laws, but such associations prevailed in the North in the late 1850s and apparently influenced attitudes toward the law of nuisance abatement.[120]

According to Novak's account, after 1876, the ideal of the self-regulating community equipped with the broad maxims and flexible powers of the common law gave way in the United States to higher-level governance regulated by the constitutional rights and freedoms of individuals. The decay of public abatement as a recognized and legitimate form of popular justice parallels this broader transformation, which, at least at first, was contested in somewhat similar ways. As another historian has established, some mid-century American judges who accepted the legality of traditional forms of regulation balked at their extension to new domains such as the liquor trade, about which there was less of a societal consensus, with Republicans more inclined to accept the expansion.[121] Yet the Republican Party itself, closely identified in its earlier years with the temperance crusade, soon backed away from that cause (just as it did, more gradually, from its Reconstruction-era commitments to racial equality). In doing so, it edged toward ground attractive to its business constituency and which the Democratic Party approached from a different starting point: the ideal of the non-interfering state that was dear to Jacksonians. The new legal order offered little room for a right of aggrieved community members, as opposed to especially aggrieved individuals, to abate public nuisances.

Acknowledgments. The author thanks Gautham Rao and the three anonymous reviewers for their many helpful comments, corrections, criticisms, and suggestions.

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[120] The suppression of unpopular newspapers by mobs took on a new political coloration during the war, when Northern journals suspected of sympathy with the South were its usual targets: Harold Holzer, *Lincoln and the Power of the Press* (New York: Simon & Schuster, 2014), 334–75.

[121] Compton, *Evangelical Origins.*

Cite this article: William B. Meyer, "'No Quixotry in Redress of Grievances': How Community Abatement of Public Nuisances Disappeared from American Law," *Law and History Review* 41 (2023): 171–191. https://doi.org/10.1017/S0738248022000566