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### Re-Evaluating the Demise of the Average, Ordinary, Reasonable Person: Unintended Consequences in the Law of Nuisance

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# RE-EVALUATING THE DEMISE OF THE AVERAGE, ORDINARY, REASONABLE PERSON: UNINTENDED CONSEQUENCES IN THE LAW OF NUISANCE

*George P. Smith, II<sup>+</sup> & William P. Lane<sup>++</sup>*

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#### INTRODUCTION

Albert Camus once wrote that “all men’s misery stems from the fact that he does not know how to use a simple language.”<sup>1</sup> Even though legal language is seen as an “instrument of social control and social intercourse,”<sup>2</sup> regrettably, this language is “highly technical” and, consequently, “incomprehensible to the layman.”<sup>3</sup> It also promotes judicial indecisiveness.<sup>4</sup>

A clear and demonstrable example of obfuscation in the language of law is found within the tort of negligence. Indeed, it has been suggested that the negligence doctrine is sustained “more by its accommodating imprecision than by the clarity of its beacons.”<sup>5</sup> Monochromatic colorings—tints, tones, and shades—subfuse this tort and are manifested vividly in the calculus of causation, which triggers the use of negligence as a legal cause of action.<sup>6</sup> While defined previously as embodying the philosophical ideal of justice and the economic standard of efficiency,<sup>7</sup> the theory of negligence was found—as early as 1980—to be “losing . . . battles” because any effort at systematic analytical thinking “poorly reproduces the proper roles of social efficiency and justice in the analysis of tort cases.”<sup>8</sup>

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1. Robert Zaretsky, *Moderate Rebel*, TIMES LITERARY SUPPLEMENT, Jan. 8, 2016, at 22 (reviewing EDWARD J. HUGHES, ALBERT CAMUS (2015)) (quoting a letter from Albert Camus to Louis Guilloux).

2. Karl Olivercrone, *Legal Language and Reality*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 151, 177 (Ralph A. Newman ed. 1962) [hereinafter ESSAYS IN JURISPRUDENCE].

3. *Id.* at 151.

4. MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 13 (2003).

5. William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1, 34 (1980).

6. See generally WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 228–29 (1987).

7. Rodgers, *supra* note 5, at 2.

8. Inasmuch as there is a discernible drift in the law of torts which imposes liability without any moral blame, some have asserted that the consequence of this position is that negligence is losing “its character as a branch of faulty liability”—especially since this drift results in requiring the “innocent to pay for the damage they do.” Because of this consequence, it is urged “that negligence should therefore largely be jettisoned.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS Ch. 13, § 75 (5th ed. 1984).

In order to rehabilitate the weakness of the tort of negligence, two models have, in the past, been suggested: “the rational decisionmaking model”<sup>9</sup> and “the nontraditional decisionmaking model.”<sup>10</sup> Under the first model, “when an injurer acts rationally strict liability should be imposed.”<sup>11</sup> Alternatively, under the second model, when behavior is determined to be non-rational and “of psychological origin . . . [l]iability should be imposed . . . only for failure to meet a subjective ‘best efforts’ test”—because, this type of behavior must be judged “unsuited to a social cost-benefit analysis.”<sup>12</sup> The foundational complication to this second analytical construct lies in the harsh reality that many—if, indeed, not most—social interactions are neither commenced nor completed in rational ways which can be predicted satisfactorily by economists.<sup>13</sup> Human behavioral patterns are recognized as “nonrational . . . and the product of reflex, habit, or snap judgment.”<sup>14</sup>

Today, concerns over the complexities of both applying and strengthening the tort of negligence remain.<sup>15</sup> Since in America, it is estimated that 14% of the population—or, some 32,000,000 adults—cannot read at a basic level and thus are impaired cognitively,<sup>16</sup> it is understandable that the “demise of the average, ordinary reasonable person” has been accepted and recorded.<sup>17</sup> In a very real way, this statistical profile raises the question regarding the extent to which the

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9. Rodgers, *supra* note 5, at 2.

10. *Id.*

11. *Id.* at 2.

12. *Id.*

13. *Id.* at 6.

14. *Id.* See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 20 (8th ed. 2011); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* xi (1980).

15. See Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2135–37 (2015) (discussing the complexities in tort law stemming from variations in the use of “reasonableness”).

16. *Illiteracy Statistics*, STATISTIC BRAIN (July 22, 2017), <http://www.statisticbrain.com/number-of-american-adults-who-cant-read/> (Aug. 22, 2016). Worldwide, it is estimated 775,000,000 people cannot read. *Id.* Another source, the Program for the International Assessment of Adult Competencies, determined in 2013 that there were 36,000,000 adults in the United States reading at a level below an average third grade level and that, for every six adults, one has low literacy skills. OECD, *TIME FOR THE U.S. TO RESKILL?: WHAT THE SURVEY OF ADULT SKILLS SAYS 12* (OECD Publishing, ed. 2013), <http://dx.doi.org/10.1787/9789264204904-en>.

17. George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 733 (1995); see also MORAN *supra* note 4, at 2.

Interestingly, the contemporary relevance of the notion of the average, ordinary person finds pertinence—it is argued—when acts of autonomous computer tortfeasors come into play and these acts are tested by the traditional negligence paradigm where unreasonable conduct establishes liability. Ryan Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, 86 GEO. WASH. L. REV. 1, 5, 7 (2018).

judicial system should safeguard “economic well-being”<sup>18</sup> for those members of society with cognitive impairment. Given that a central ingredient of society’s very qualities of life is found within the notion of economic liberty,<sup>19</sup> a strong argument can be made for protecting this special class of citizens.<sup>20</sup> Either by statutory enactment or by judicial oversight and interpretation based on principles of equity, efforts can and should be undertaken to safeguard the economic well-being of citizens who are impaired cognitively. With the demise of the notion of an average, ordinary, reasonable person—so central to establishing causation—the use and application of the tort of negligence is made even more cumbersome and, indeed, confounding.<sup>21</sup>

This Article presents a third alternative—or what could be viewed as a new analytical construct and seen as an unintended consequence for legal advocacy and for judicial decision-making—to dealing with the ongoing vicissitudes of the tort of negligence and the uncertainties of its application: namely, greater reliance and utilization of the tort of nuisance through alternative pleading allowed under Rule 8(a)(d)(2) of the Federal Rules of Civil Procedure.<sup>22</sup> Utilizing Sections 822, 827, and 828 of The Restatement (Second) of Torts,<sup>23</sup> this Article urges, specifically, a template—if not an effective construct—for determining when an unreasonable interference with the use and enjoyment of property arises and is, thus seen, as a nuisance.<sup>24</sup> No ablation of the tort of negligence is proposed. Rather, merely, a greater policy recognition and shift from negligence as a controlling and all-dominating civil wrong to a more manageable one in the tort of nuisance, through reliance on a cost/benefit test for determining when conduct is unreasonable, and thus, actionable.

While this policy shift, together with acceptance of the reality that the ideal of an average, ordinary, reasonable person—so essential to proving causation in negligence—is exceedingly problematic, if not indeed moribund,<sup>25</sup> the judiciary must now assume wider oversight of cases where issues of cognitive capacity are in play. When uneven bargaining positions are found to exist, particularly in predatory lending cases and contracts of adhesion, the courts must exercise their broad equitable powers under the doctrine of powers *parens patriae* in

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18. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

19. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 473 (rev. & expanded 2d ed. 2008).

20. Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 923 (1993) (discussing the scope of protected classes created by statute).

21. MORAN, *supra* note 4, at 13. *See generally* Abbott, *supra* note 17.

22. STEVEN BAILKER MCKEE ET AL., *FEDERAL CIVIL RIGHTS HANDBOOK* 358, 359, (2014).

23. RESTATEMENT (SECOND) OF TORTS §§ 822, 827–828 (AM. LAW INST. 1979).

24. *See generally* Smith, *supra* note 17.

25. *See* MORAN, *supra* note 4, at 13; *see generally* John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q. REV. 563 (2015).

order to protect the integrity of the contractual relationship, and thereby protect the economic well-being of the citizenry.<sup>26</sup>

Part I of this Article lays the predicate for examining the symbiotic relationship of capitalism, economic efficiency, and the law. This inter-relationship is then explored and tested throughout the Article. Part II considers challenges to reasonableness, the impact of heuristics on reasoned decision-making and two flagrant examples of how the economic well-being of the cognitively impaired is affected by predatory lending practice and lax judicial oversight of structured settlements. Part III evaluates the consequences of the “demise” of the average, ordinary, reasonable person through a careful study of the equitable powers of the judiciary to guide and “protect” the cognitively impaired not only through the *parens patriae* powers, but also by clear and sensible judicial decisions which validate the right of economic well-being for those impaired cognitively who seek corrective justice. Part IV tackles the actual legal consequences of encountering ambiguities arising from the growing displacement and/or demise of the average, ordinary reasonable person theory, internalized in establishing causation in order to prove the tort of negligence. Part V suggests a policy for encouraging alternative pleading for negligence and nuisance and the use of the cost/benefit test for determining the reasonableness of conduct—as set out by The Restatement of Torts—as an effective way to bypass the complexities and uncertainties of proof which result from holding fast to the doctrine of causation, hobbled though it may be. Part VI investigates a paradigmatic case of alternative pleading in order to test the strengths and weaknesses of pleading in this manner and concludes that this shift in policy—from traditional normative standards of reasonable personhood to use of an economic cost/benefit template for determining when conduct is unreasonable—will go far in achieving a more efficient and expeditious administration of justice. This Article concludes by reaffirming the breadth and the power of the standard of reasonableness to strengthen the very goal of law: namely, to secure economic or corrective justice when an injurious abridgement of it occurs.

#### I. CAPITALISM, ECONOMIC EFFICIENCY, AND THE LAW

First used as a word of art in 1854, capitalism still—today—is defined rarely, but used frequently.<sup>27</sup> A working consensus of the word’s taxonomy, however, finds economists applying the word to issues of protection, consumption and distribution of market resources.<sup>28</sup> Historians use a broader brush to define capitalism—approaching it as a socio-economic system emphasizing social

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26. George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 907–911 (1976).

27. THE OXFORD ENCYCLOPEDIA OF ECONOMIC HISTORY 195 (Joel Mokyr ed. 2003) available at <http://www.oxfordreference.com/view/10.1093/acref/9780195105070.001.0001/acref9780195105070?btog=chap&hide=true&pageSize=100&skipEditions=true&sort=titlesort&source=%2F10.1093%2Facref%2F9780195105070.001.0001%2Facref-9780195105070.2003>.

28. *Id.*

groupings within the government and the interdependence of these groups with political and economic institutions.<sup>29</sup>

The classical definition of capitalism is that it is “an economic system characterized by private or corporate ownership of capital goods by investments that are determined by private decisions, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market.”<sup>30</sup> Modernly, it has been suggested that the phrase, “age of betterment,” is preferable to “the age of capitalism” because of the alternative interpretations of the components of capitalism.<sup>31</sup>

Although varying interpretations of the definition and the provenance of capitalism exist, what is more certain is that the Common Law is viewed properly “as a system for promoting economic efficiency.”<sup>32</sup> The commitment to efficiency is strong yet is not seen as total.<sup>33</sup> Indeed, there is an ever-present tension between efficiency and morality.<sup>34</sup> This tension is more theoretical than real simply because the very principle “of law embodied in [both] the common law of England and of the United States[] is to correct injustices and thereby vindicate the moral sense.”<sup>35</sup>

While there may be a discrepancy between “efficien[t] maximization and notions of the just distribution of wealth,”<sup>36</sup> it is well to remember that in a market economy the roles for the law and for the government are “limited to controlling externalities and reducing transaction costs.”<sup>37</sup> This is the extent to which economic efficiency requires.<sup>38</sup> Inequalities in the distribution of income and wealth arise—and in turn generate substantial inequalities—because of the differences in not only the tastes and abilities of individuals, their levels of education and cognition, but also in their “luck.”<sup>39</sup> It is submitted that those who live within the system of capitalism as capitalists may be expected to conduct themselves in an efficient way designed to maximize their wealth and,

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29. *Id.*

30. *Capitalism*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 183 (11th ed. 2003).

31. DEIDRE NANSEN MCCLOSKEY, *BOURGEOIS EQUALITY: HOW IDEAS, NOT CAPITAL OR INSTITUTIONS, ENRICHED THE WORLD* 94–100 (2016). Differing views of the development of the economic history of capitalism are found at 94–100 and Chapter 12. *Id.*

32. See POSNER, *supra* note 14, at 342; see also James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 163 (1987) (discussing the origin of the “economic” view of the law).

33. See POSNER, *supra* note 14, at 344.

34. *Id.*

35. *Id.* at 342.

36. *Id.* at 344.

37. *Id.*

38. *Id.*

39. *Id.*

subsequently, happiness.<sup>40</sup> Stated otherwise, the average person assuredly acts rationally so as to maximize self-interests.<sup>41</sup> Money, which is but a natural product of human economy, is a medium through which a harmony of needs is achieved.<sup>42</sup> It remains for the courts, then—as architects and gatekeepers of the standards of reasonableness—to, in their decision-making, strive to issue reasonable opinions that reflect the philosophy of a capitalistic society.

## II. CHALLENGES TO REASONABLENESS

Reasonable conduct and rational decision-making are expected of all in their day-to-day conduct.<sup>43</sup> Indeed, economists have postured that, in order to maximize self-interest, the average person should act rationally.<sup>44</sup> Rational actions include: full knowledge of risks, identification of options, and deliberative assessment of costs and benefits, together with a practice of calculated choices over time.<sup>45</sup> Testing the extent to which conduct has failed to meet the standard of reasonableness and/or behavior is irrational is central to the judiciary's duty to resolve conflicts and provide a level of corrective justice which is seen, hopefully, if not accepted, as sensible decision-making. Theoretically, at least, a capitalist shall be dedicated by a need to be rational as well as a coordinated need to maximize personal wealth.

Reasonable is defined as “sensible” and equals or is synonymous with “rational.”<sup>46</sup> One “endowed with . . . reason” is reasonable<sup>47</sup> and “not irrational.”<sup>48</sup> Rational is defined as “endowed with reason”<sup>49</sup> and “having sound judgment,” being “sensible.”<sup>50</sup> Sensible, finally, is defined as “easily understood,”<sup>51</sup> “reasonable, judicious,”<sup>52</sup> “proceeding from good sense.”<sup>53</sup>

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40. UNDERSTANDING HUMAN WELL-BEING 4–5 (Mark McGillivray & Matthew Clarke eds., 2006); BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING 75–76 (2002).

41. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 85 (1985). Ideally, maximizing self-interest and advancing economic well-being promotes happiness for all and is the center goal of utilitarianism. See Jedediah Purdy, *Response, A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949, 955 (2009).

42. Smith, *supra* note 17, at 677.

43. See Elliot, *supra* note 41, at 85–87.

44. *Id.* See also Smith, *supra* note 17, at 721.

45. VICTOR ALEXANDER THOMPSON, DECISION THEORY, PURE AND APPLIED 3–16 (1971).

46. *Reasonable*, 13 OXFORD ENGLISH DICTIONARY 291 (2d. ed. 1998).

47. *Id.*

48. *Id.* “A reasonable person” is rare. *Id.*

49. *Rational*, 13 OXFORD ENGLISH DICTIONARY 218(A) (2d. ed. 1998).

50. *Id.*

51. *Sensible*, 14 OXFORD ENGLISH DICTIONARY 980–84 (2d. ed. 1998).

52. *Id.* at 983 (14a).

53. *Id.* at 984 (14b).



### A. *Heuristics as an Impediment to Reasoned Decision Making*

Heuristics, termed “mental shortcuts,” are a common vector of force in cognitive analysis and often allow “good decisions” to be made.<sup>54</sup> Yet when assessments of probabilities are inaccurate and “generalizations are wrenched out of context and treated as freestanding or universal principles,” a rational method for sound decision-making is lacking.<sup>55</sup>

In moral and political decision-making, there is a ready reliance on “simple rules of thumb.”<sup>56</sup> Indeed, “highly intuitive rules” form a foundation for much of a common sense course of action.<sup>57</sup> Decisions may well fail, however, when biases are too dominant in these rules.<sup>58</sup> Probabilities are very often assessed through reliance upon various heuristics—notably, probabilities.<sup>59</sup> And, a probability is measured typically by “asking whether a readily available example comes to mind.”<sup>60</sup>

### B. *Low Student Achievement in Secondary Education*

The Education Commission of the States has raised serious concerns that student achievement at the secondary level is decreasing significantly.<sup>61</sup> Nationally, an analysis of the Class of 2014 found that thirty-two states failed to require graduates take four years of English as well as Mathematics through Algebra II or its equivalent.<sup>62</sup> Indeed, California, South Carolina, and Tennessee recently eliminated rules that required students pass final or exit exams in order to qualify for a diploma.<sup>63</sup> Experts have found “[r]eading comprehension is a cognitive process that requires myriad skills and strategies.”<sup>64</sup> Given these

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54. CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* 137 (2014). See also RALPH HERWIG ET AL., *SIMPLE HEURISTICS IN A SOCIAL WORLD* VIII (2013).

55. SUNSTEIN, *supra* note 54, at 138.

56. *Id.* at 137.

57. *Id.*

58. *Id.* at 137–38.

59. *Id.* at 155.

60. *Id.* See also Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 *COGNITIVE PSYCHOLOGY* 430, 430 (1972); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1124 (1974).

61. Motoko Rich, *Graduation Rates Rise, Experts Fear Diplomas Come Up Short*, N.Y. TIMES, Dec. 26, 2015, <https://www.nytimes.com/2015/12/27/us/as-graduation-rates-rise-experts-fear-standards-have-fallen.html>.

62. *Id.*

63. *Id.*

64. Lucy Hart, *Cognitive Factors That Affect Reading Comprehension*, SEATTLE POST-INTELLIGENCER, <http://education.seattlepi.com/cognitive-factors-affect-reading-comprehension-1591.html> (last visited Feb. 17, 2017); see also Michael S. Roth, *Why Johnny (Still) Can't Read*, THE WALL ST. J., Jan. 10, 2017, 7:03 P.M., <https://www.wsj.com/articles/why-johnny-still-cant-read-1484093037> (concluding that teaching children how to read has become problematic because two-thirds of children score at low levels of competency, which, in turn, not only impairs literacy, but also compromises cognitive development or the ability to think, understand, and communicate); but see Richard L. Cupp, *Cognitively Impaired Humans, Intelligent Animals, and Legal*

statistics, it is relatively easy to predict the burdensome societal challenges facing the Nation ahead when more and more of its citizens are incapable of being informed and educated sufficient to allow them to function in the market place and not only understand the laws and regulations there, but also in other social exchanges: the ability to make rational choices will be limited severely.<sup>65</sup>

Cognitive limitations inhibit the ability to make rational choices.<sup>66</sup> Being rational endows one with “the faculty of reasoning,”<sup>67</sup> and the ability to make reasonable, sound, sensible judgments.<sup>68</sup> For economists, rationality is tested objectively, not subjectively.<sup>69</sup> The foundational assumption that human behavior is rational, however, seems contradicted by the “systemic departures from rationality”<sup>70</sup> found in everyday life experiences.<sup>71</sup>

### C. *Payday Loans*

An associated issue with safeguarding the economic well-being of cognitively impaired individuals can be seen with the practice of “payday loans.”<sup>72</sup> This predatory lending practice allows money to be borrowed against paychecks, typically with a provision that the borrowed sums are paid back within a short

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*Personhood*, 69 FLA. L. REV. 465, 502 (2017) (stating that assertions of this nature are an inappropriate reason for abridging or withholding rights of autonomous decision-making and concluding that cognitive capacity should be but one factor in asserting the extent to which such impairments compromise the “dignity interests” of such individuals as “a part of the human community”).

65. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 269–70 (1994) (arguing the existence of genetic, racial, and class differences with regard to intelligence); *but see*, THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA 5 (Steven Fraser, ed. 1995) (arguing lack of documentation for the Herrnstein and Murray thesis regarding differences in I.Q. and concluding until equal educational opportunities for all races exist, there will be evil disparities here); *see also* PHILIP E. VERNON, *INTELLIGENCE: HEREDITY AND ENVIRONMENT* 128 (1979) (posturing that the gap between environmental and genetic effects on intelligence is much smaller than believed originally).

Thomas Sowell attacks what is termed the socio-economic theory of invincible fallacy. Under this fallacy, different outcomes between people of different races or sexes are held to result from discrimination. Sowell asserts, however, that it is because of differing interests and capabilities and backgrounds that differing outcomes occur. This argument, thus, is in more in keeping with the idea of the environment, rather than genetic heritage, being determinative of cognitive development. *See generally* THOMAS SOWELL, *DISCRIMINATION AND DISPARITIES* (2018).

66. See POSNER, *supra* note 14, at 24.

67. *Rational*, 13 OXFORD ENGLISH DICTIONARY 218 (2d ed. 1998).

68. *Id.*

69. See POSNER, *supra* note 14, at 24.

70. *Id.* at 22.

71. *Id.* at 20.

72. See Mark Oppenheimer, *Full Faith and Credit: Christians Unite Against Predatory Lending*, N.Y. TIMES, June 10, 2016, <https://www.nytimes.com/2016/06/11/us/full-faith-and-credit-christian-groups-unite-against-predatory-lending.html>.

period of time—normally two weeks.<sup>73</sup> Payday offices are normally located near the working poor.<sup>74</sup> Interestingly, in Maryland, it is reported that there are more offices of this type “than Walmart, Starbucks and McDonald’s combined.”<sup>75</sup> Payday loans are accompanied by high interest rates; for instance, in Missouri, the payday loan’s annual interest rate cap is “1,950 percent.”<sup>76</sup> Indeed, the average interest charge for payday loans is “450 percent A.P.R.”<sup>77</sup>

These situations in both Maryland and Missouri show not only the need for the Consumer Financial Protection Bureau to re-double its effort at pay lending reform designed to cap credit interest for everyone at possibly thirty-six percent,<sup>78</sup> but also for the judiciary to cast a more watchful and supervisory eye in cases of this nature. Interestingly, in July 2016, the Bureau did in fact propose regulations designed to prevent customers from falling into traps in high-cost loans.<sup>79</sup> Lenders have—predictably—argued that the proposed regulations “would effectively wipe out the industry, hurting their customers.”<sup>80</sup>

Another area of predatory practice, if not contracts of adhesion, can be seen in the issuance of credit cards. In order to comprehend the conditions imposed upon the holders of credit cards, the reader must have, at minimum, an eleventh-grade reading level.<sup>81</sup> Yet, half of American adults have only a ninth-grade level or below reading skill.<sup>82</sup>

Complicating credit card issuance further, is the fact that those contracts have nearly 5,000 words.<sup>83</sup> Consequently, many applicants for a credit card merely

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Despite a prohibition on payday loans, as well as on all loans on amounts of money under \$250,000.00 carrying an interest rate above 16%, in the State of New York, online payday loans have nonetheless been made, forcing a new investigation by the Attorney General into the industry itself and the marketers participating in it. See *New York Expands Payday Lending Industry Investigation to Focus on Marketers*, KLEIN MOYNIHAN TURCO, <http://www.kleinmoynihan.com/new-york-expands-payday-lending-industry-investigation-to-focus-on-marketers/> (last visited February 19, 2017).

78. See Oppenheimer, *supra* note 72.

79. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47864-01 (July 22, 2016) (to be codified at 12 C.F.R. 1041).

80. Joseph Lawler, *Professor brings another take on payday lending*, WASH. EXAMINER, Jan. 16, 2017, <http://www.washingtonexaminer.com/professor-brings-another-take-on-paydaylending/article/2611612>; see also LISA SERVON, *THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES* 79 (2017) (suggesting that because 20% of Americans are “underbanked” and surely, have no bank account, payday loans can be readily obtained more expeditiously than processed through large retail banks).

81. *Study: Credit Card Agreements Unreadable to Most Americans*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/unreadable-card-agreements-study.php> (last updated Sept. 16, 2016).

82. *Id.*

83. *Id.*

“skim through” the provisions of the contract itself.<sup>84</sup> In fact, it is estimated that 75% of Americans do not even read contracts for their credit card.<sup>85</sup> Regrettably, financial illiteracy is significant and widespread among the general population.<sup>86</sup>

#### D. *Opportunities for Quick Cash*

A CBS television news report on April 20, 2016, by journalist Anna Werner, presented a sad report on the life of thirty-one year old Crystal Linton of Baltimore, Maryland—a functional illiterate suffering from irreparable brain damage who was not protected sufficiently by the legal system in managing a structured settlement of \$630,000.00 that she received from lead poisoning she suffered at age three.<sup>87</sup> As a consequence of an action, Crystal and her family recovered damages from two landlords for the poisoning and a structured settlement was executed.<sup>88</sup> Under the provisions of the settlement, Crystal was guaranteed monthly payments for forty years.<sup>89</sup> Subsequently, various loan companies, including the Stone Street Capital Company in Bethesda, Maryland, offered Crystal an opportunity to receive “quick cash.”<sup>90</sup> Consequently, she liquidated her “payment stream,” valued at \$408,000.00 for the sum of \$66,000.00—with the Stone Street Company being the principal recipient.<sup>91</sup> Furthermore, CBS found that some two-dozen other victims of lead poisoning in Baltimore had made similar deals with other loan companies.<sup>92</sup> The conclusion to this report found Crystal penniless and almost certainly facing homelessness.<sup>93</sup>

No doubt in very large measure because of this news report by Anna Werner, in addition to a protracted seven-month investigation, on May 10, 2016, the Maryland Attorney General announced that the State was bringing suit against several finance companies for “tricking victims of lead paint poisoning into signing over the bulk of their settlements in exchange for a one-time cash

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84. Jericka Duncan, *Reading the Fine Print: Why Credit Card Agreements are so Hard to Understand*, CBS NEWS (Sept. 8, 2016, 7:10 P.M.), <http://www.cbsnews.com/news/why-credit-card-agreements-are-so-hard-to-understand/>.

85. *Id.*

86. Justine S. Hastings, Brigitte C. Madrian & William L. Skimmyhorn, *Financial Literacy, Financial Education and Economic Outcomes*, 10 (Nat'l Bureau of Econ. Research, Working Paper No. 18412, 2012), published in 5 ANN. REV. ECON. 347 (2013).

87. Anna Werner, *Lead poisoning victims possibly targeted to sign over settlement funds*, CBS NEWS (April 20, 2016, 7:10 PM), <http://www.cbsnews.com/news/lead-poisoning-victims-possibly-targeted-to-sign-over-settlement-money/>.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

payment.”<sup>94</sup> Simply put, cognitive impairment prevented Crystal Linton and similarly impaired individuals from understanding what the financial consequences of their actions would be in selling their structured settlements.

### III. EQUITY AND CORRECTIVE JUSTICE

Aristotle’s concept of “corrective justice” gave rise to the idea of the rule of law as the bulwark of democratic societies.<sup>95</sup> Seen as grounded in economics, this concept of justice is admittedly highly abstract.<sup>96</sup> Corrective Justice “seeks to redress a preexisting equilibrium” or departure from it, “caused by the wrongful act.”<sup>97</sup> Accordingly, the Aristotelian argument asserts that when “wrongful behavior . . . disturbs the preexisting balance of wealth or other advantages between” two parties—with one sustaining injury because of this behavior, the injured party “is entitled to some form of redress that will, to the extent feasible, restores that preexisting balance . . . .”<sup>98</sup> Determining not only when behavior is, thus, unreasonable and injurious, as well as assessing factors necessary to sustain a point of equilibrium in the required balancing is problematic. While the Restatement of Torts’ model construct for determining when conduct is unreasonable and actionable under the tort of nuisance is significant,<sup>99</sup> the law of equity fortifies the efficacy and strength of the Restatement.

Although equity, in its original jurisdiction, protected “only property rights or rights of substance in the nature of property rights and [did] not protect personal or individual rights,”<sup>100</sup> the modern trend extends equitable relief to protect those rights termed “personal” and recognized as such by the judiciary.<sup>101</sup> Put simply, then, equity is understood popularly as signifying “natural justice or whatever is right and just as between man and man . . . .”<sup>102</sup>

Some fifteen maxims, although not recognized as binding rules, are seen as principles underlying various specific rules.<sup>103</sup> Three particular maxims would surely be in play when cases of predatory lending, for example, arise: “Equity will not suffer a wrong to be without a remedy[;]”<sup>104</sup> “He who comes to Equity

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94. Anna Werner, *Maryland A.G. Says Company Targeted Lead Poisoning Victims*, CBS NEWS, (May 10, 2016, 7:04 P.M.) <http://www.cbsnews.com/news/maryland-attorney-general-sues-finance-company-accused-of-targeting-lead-poisoning-victims/>.

95. See POSNER, *supra* note 14, at 338.

96. *Id.*

97. *Id.*

98. *Id.*

99. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

100. WILLIAM Q. DEFUNIAK, HANDBOOK ON MODERN EQUITY 10 (2d ed. 1956).

101. *Id.* at 124.

102. *Id.* at 1.

103. RICHARD EDWARDS & NIGEL STOCKWELL, TRUSTS AND EQUITY 34–48 (7th ed. 2005).

104. *Id.* at 42.

must come with clean hands[;]”<sup>105</sup> and, “Equity delights to do justice and not by halves[.]”<sup>106</sup>

#### A. *The United States Supreme Court’s Position*

In a key case in the U.S. Supreme Court in 1999, *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*,<sup>107</sup> Justice Ruth Bader Ginsburg argued forcefully that modern equity should be analyzed and viewed expansively in order to ensure that justice is done when disputations between parties arise.<sup>108</sup> The “Founders,” she said, “adopted equitable *principles* rather than equitable *practices*, leaving room for evolution and expansion of equitable remedies.”<sup>109</sup> Justice Scalia, however, expressed a cautionary view that unbounded dangers of equity existed if this expansive position were to be adopted.<sup>110</sup> For him, it remained for Congress to expand, if necessary, the jurisdictional base of equity, thereby responding to changed circumstances.<sup>111</sup>

It is argued for the cognitively impaired that the courts should exercise equitable supervisory powers in order to protect them from unfair and unjust conduct by those who deal with them. These powers can be seen as emanating from the very notion of social contract.

#### B. *Judicial Paternalism or Equitable Supervision*

The notion of a social contract existing between the citizen and the government was envisioned by Jean-Jacques Rousseau in 1762 in France and adopted subsequently by the American Constitutional Convention.<sup>112</sup> As such, the contract was viewed as the very foundation for legitimizing and for governing the common good.<sup>113</sup> Citizen protection was then, and is today, the

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105. *Id.* at 43.

106. See HANBURY & MARTIN: MODERN EQUITY (Jamie Glister & James Lee eds., 20th ed 2015).

107. 527 U.S. 308 (1999).

108. *Id.* at 336 (Ginsburg, J., dissenting in part).

109. James Fullmer, *The Outer Limits of Equity: A Proposal for Cautious Expansion*, 39 HARV. J. L. & PUB. POL’Y 557, 558 (2016) (citing *Grupo Mexicano De Desarrollo*, 527 U.S. at 336).

110. *Grupo Mexicano De Desarrollo*, 527 U.S. at 332.

111. Fullmer, *supra* note 109, at 558–59, 566 (suggesting that three types of remedies be recognized: legal, core equity, and peripheral equity); José Brutau, *Juridical Evolution and Equity*, in ESSAYS IN JURISPRUDENCE, *supra* note 2, at 82. *But see* Fullmer, *supra* note 109, at 560–61, 566 (looking to *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015) as evidence of a progressive expansionist “equitable mood”—termed “peripheral” by the author).

112. See generally ALFRED COBBAN, ROUSSEAU AND THE MODERN STATE (1964) (providing a history of Rousseau’s theories).

113. See generally George P. Smith, II & Richard P. Gallena, *Re-Negotiating A Theory of Social Contract for Universal Health Care in America or, Securing the Regulatory State?*, 63 CATH. U. L. REV. 423, 431 (2014).

goal of the contract.<sup>114</sup> The supervision and enforcement of “[f]air terms of cooperation” are essential to the effective success of the theory and the ideal of an enforceable social contract.<sup>115</sup> Implementation of this also requires “an informed and strategically focused citizenry.”<sup>116</sup>

Inasmuch as it has been shown in this Article that cognitive impairment is now commonplace among Americans,<sup>117</sup> and, as a direct consequence of this, the average, ordinary reasonable person is no longer just moribund, but is actually dead,<sup>118</sup> a strong argument is to be made that the judiciary has an important role to play in securing the integrity of the notion of an enforceable social contract. Accordingly, it is incumbent upon the judiciary to promote the efficient administration of justice by construing challenges and conflicts which arise—and specifically with cases of predatory lending<sup>119</sup> and contracts of adhesion<sup>120</sup> by fully exercising their equitable powers to protect the cognitively impaired. The well-established equitable remedy of reformation should be an important tool here, for, it seeks to correct a defective contract that does not reflect accurately the parties’ understanding of the contractual terms and ensures fairness.<sup>121</sup>

Courts should seek to act in the best (business-economic) interest of cognitively deficient parties.<sup>122</sup> Substantive judgments should be made judicially, based upon what is the fairest economical position for the injured party—a judgment that, in essence, would have been made initially when entering into a contractual relationship or other legal relationship if the party did not have diminished cognitive capacity.<sup>123</sup> These judicial “interferences” are justified in order to manage and protect against economic harm or negative externalities, both at the *micro* and the *macro* levels of society.

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114. *Id.* at 424–25, 432.

115. *Id.* at 432.

116. *Id.* at n.53.

117. *See supra* notes 16, 61–65, 84–85.

118. *See generally* MORAN, *supra* note 4, at 16, 315 (claiming that radical changes in the concept of what is reasonable is required for there to be an objective standard).

119. *See supra* Section II.C.

120. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (outlining seven characteristics defining a contract of adhesion). The bulk of contracts executed in the United States are adhesive; *see* 5 CORBIN ON CONTRACTS § 24.27A (rev. ed. 2018).

121. RESTATEMENT (SECOND) OF CONTRACTS § 155 (AM. LAW INST. 1981). *See also* 5 CORBIN ON CONTRACTS § 24.18 (2017); Thomas E. Baynes, Jr., *More Than You Wanted to Know About the Doctrine of Reformation*, 78 FLA. BAR. J. 55, 58 (Oct. 2004).

122. GOSTIN & WILEY, *supra* note 19, at 49–50.

123. *Id.* Interestingly, both the best interests and the substituted judgment constructs are used extensively in bioethical and healthcare decision-making cases. JANET DOLGIN & LOIS L. SHEPHERD, *BIOETHICS & THE LAW* 72–74 (2015).

### C. *The Role of Parens Patriae*

Although based originally on the state's right of guardianship of common resources, the doctrine of *parens patriae* has extended the very scope of sovereign interest to the general welfare of its citizens to act paternally.<sup>124</sup> Despite cognitive impairments, daily life decisions must, nonetheless, be made.<sup>125</sup> In order to make informed decisions, however, information sources—business, economic, scientific—must be utilized by the average citizen. Without knowledge or cognitive capacity (*e.g.*, intelligence) sufficient to access and process full and accurate information, about costs and benefits of their decisions, actions may be taken which run counter to the best economic and social interest of these decisionmakers.<sup>126</sup> Consequently, “[p]ersons who have insufficient understanding to make informed choices, to deliberate, and to act according to their . . . plans have diminished autonomy,”<sup>127</sup> and must—to the extent practical—be protected by the judicial system.

It is fully consistent with the states' *parens patriae* powers that it seeks to protect incompetent or economically at-risk persons who are unable to care for themselves in the marketplace.<sup>128</sup> These powers are shaped, often in “individualized context.”<sup>129</sup> It remains for the state, then—in exercising these powers—to act beneficently, and “to safeguard the general community interest in health, welfare, and economic benefit.”<sup>130</sup>

The need for a positive judicial stance here is all the more important given the reality that a legislative response through amendment of the Civil Rights Act of 1964 is not achievable presently.<sup>131</sup> This law, and other similar pieces of legislatively enacted safeguards have attempted—with varying degrees of

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124. Curtis, *supra* note 26, at 908.

125. GOSTIN & WILEY, *supra* note 19, at 51.

126. *Id.*

127. *Id.* at 49.

128. *Id.* at 95–98. See generally SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013) (arguing that state interference in individual autonomy should be the ideal standard).

129. GOSTIN & WILEY, *supra* note 19, at 96.

130. *Id.* at 98. While liberal principles of pluralism stress the need for government to remain neutral and allow individuals the autonomous freedom to establish their own life priorities, there is also a recognition that those “with intellectual disabilities” may have diminished levels of intellectual capacity to govern their own affairs, thereby bringing into play their competency to make rational decisions, especially in the market place. It is argued that “decisions about competency need to be made, whenever possible, through a formal legal process characterized by impartiality and fundamental fairness.” *Id.* at 45.

131. See generally Ted Barrett, *Congress is Back, and Here's What's on the Agenda*, CNN (Jan. 2, 2018, 12:31 P.M.), <https://www.cnn.com/2018/01/02/politics/congress-republicans-2018-agenda-return/index.html> (discussing the 2018 congressional agenda, but not naming civil rights as a priority). The Civil Rights Act of 1964 protected “race, color, religion, sex [and] national origin.” Title VII of the Civil Rights Act of 1964, 241 Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e17 (2012)).



success—to rid the country of various forms of discrimination, thereby allowing all citizens equal opportunities regardless of specific limiting conditions.<sup>132</sup>

The protective classes within Title VII of the 1964 Civil Rights Act<sup>133</sup> were established to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an indefinable group of white employees over other employees.”<sup>134</sup> Presently, Congress has expanded the original four protected classes in the 1964 Act to include twelve protected classes.<sup>135</sup>

#### D. *Judicial Validation of the Ethics of Efficiency*

Sensible judicial decision-making owes its success to what may be termed, “an intuitive sense of justice.”<sup>136</sup> While this approach has led to “sensible results . . . there has been no similar pressure [for the judiciary] to produce sensible explanations.”<sup>137</sup> Judges must guard against “subtle distortions of prejudice and bias.”<sup>138</sup> Legal disputes are resolved judicially by reference to “normative standards that enjoy sufficient resonance in the communities in which they are binding.”<sup>139</sup> Whether denominated as “legal doctrine” or based upon an “educated situation-sense,” their legitimacy and viability depend upon more than recognition that legal doctrine licenses or validates them.<sup>140</sup>

Although economic norms—and particularly those of efficiency—are properly viewed as foundational vectors of force in both capitalistic democracies and societies, judicial “sensitivity to political and social norms” has also played a significant role in judicial decision-making.<sup>141</sup> Indeed, the judicial mind is

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132. See Rotunda, *supra* note 20, at 923–28; see also Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1161–62 (2014).

133. Civil Rights Act of 1964, 241 Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e17 (2012)).

134. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“If an employment practice which operates to exclude [African-Americans] cannot be shown to be related to job performance, the practice is prohibited”). When considering a suit regarding protected classes, the party bringing the suit has the burden of proving a discriminatory intent or motive. See *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986. (1988). In facilitating this requirement, the Supreme Court devised a burden-shifting framework. *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255–56 (1981).

135. The twelve protected classes are: (1) Race, 42 U.S.C. § 2000e-2 (2012); (2) Color, *id.*; (3) Religion, *id.*; (4) National Origin, *id.*; (5) Sex, *id.*; (6) Pregnancy, *id.*; see also § 2000e (including pregnancy in the definition of “because of sex” or “on the basis of sex”); (7) Familial Status, § 3605(a); (8) Disability, § 12112; (9) Genetic Information, § 2000ff-1; (10) Age, 29 U.S.C. § 623(e)(2); (11) Citizenship, 8 U.S.C. § 1324b; and (12) Veteran Status, 38 U.S.C. § 4311.

136. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* ix (1991).

137. *Id.*

138. JOHN RAWLS, *A THEORY OF JUSTICE* 207 (rev. ed. 1999).

139. Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1983 (2015).

140. *Id.*

141. *Id.* For a collection of empirical studies exploring economic factors in judicial decision-

enriched not only by “emotion,” but by “temperament,” “experience,” and “background” together with “ideology” and an “objective understanding” of the law of the case.<sup>142</sup>

In crafting their judicial decisions, it is important for judges to be “realistic” and practical in their analysis.<sup>143</sup> The primary need remains to write a sensible opinion which would allow an “intelligent” layperson to review it as being correct.<sup>144</sup> To that end, exhibiting “common sense” goes far to make sound law.<sup>145</sup> Reasoned or reflective judgments are far better than making decision grounded in personal judgment.<sup>146</sup>

For Benjamin Cardozo, finding a “just decision” or “solution” is pivotal to sound judicial decision-making.<sup>147</sup> The judicial responsibilities of the judiciary, then, are very much the same as they have been over the years: namely, to craft decisions which are drawn from common sense, and thus reflect “sensible results[;]” decisions which are reasoned carefully and are reflective; and decisions which are “just.” Judicial philosophies should be clear and unambiguous and not seen as “mysteries.”<sup>148</sup>

In a contemporary society where capitalism is the cornerstone, it is incumbent upon the judiciary to protect and sustain economic liberties. Indeed, this very ideal is central to the Federal Constitution and its interpretation.<sup>149</sup> Furthermore, this notion is fortified when it is realized that the core of every legal case tests the propriety, or reasonableness, of the parties’ conduct. In reaching a decision on this very issue, then it is submitted that the courts should use the template suggested in the Restatement (Second) of Torts, Nuisance, for determining the

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making, see LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

142. RICHARD A. POSNER, *HOW JUDGES THINK* 174 (2008). Nine theories of judicial behavior are said to be: attitudinal; strategic; sociological; psychological; economic; organization; pragmatic; phenomenological; and legalistic. *Id.* at 19.

143. See RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 167–68 (2013).

144. See *id.* at 268.

145. *Peak v. United States*, 353 U.S. 43, 46 (1957).

146. See John Dewey, *Logical Method in Law*, 10 *CORN. L. REV.* 17, 24 (1924).

147. Robert John Araujo, *Justice As Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 *PEPP. L. REV.* 377, 404 (2000). Cardozo listed four methods which could be used in determining the “justest” and “rightest” decision: the logical or philosophical method; a consideration of historical antecedents relevant to the instant case; reference to prevailing social usages and customs; and sociological analysis of the face of a case. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 30–31 (1921).

148. Edwin W. Patterson, *reviewing* Julius Stone, *THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL* (1946), 47 *COLUM. L. REV.* 330, 331 (1947). See generally Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257–58 (2015).

149. See GOSTIN & WILEY, *supra* note 19, at 473 (“The Framers intended to defend economic freedoms, as evidenced by several constitutional provisions. Notably, the Constitution prevents the state from depriving persons of property (or life or liberty) without due process of law (economic due process), from impairing the obligations of contracts (freedom of contract), and from taking private property for public use without just compensation (“takings”).”) (footnotes omitted).

reasonableness of conduct.<sup>150</sup> The cost/benefit construct of the Restatement fortifies the economic ethic and rationale of efficiency which should be the standard used in deciding all cases where reasonable conduct is in issue.

#### IV. CAUSATION: NEMESIS OF THE TORT OF NEGLIGENCE

Most areas of law use reasonableness as either a “yardstick” for measuring conduct or understand it as an “overreaching legal concept” and, as such, “applicable *mutatis mutandis*.”<sup>151</sup> As observed, the fundamental “objective of tort liability” is the “deterrence of unreasonable risk.”<sup>152</sup> Accordingly, the determination of when risks are unreasonable is central to any fair application and use of the law of negligence.<sup>153</sup> The “essence of reasonableness” continues to bedevil the courts, with agreement upon one definition remaining a “logical impossibility.”<sup>154</sup> Normative definitions, which allow for concrete ethical theories (*e.g.*, consequentialist, deontological, or virtue), are however said to be preferable to positive definitions of reasonableness.<sup>155</sup> Alternatively, because the attributes of determining a reasonable character are so “illusory,” it has been suggested that the whole ideal or notion of determining whether conduct is reasonable or unreasonable be re-calibrated so that the determinative issue is whether a particular conduct is grounded in common sense.<sup>156</sup> In testing the contours of the integrity or rationality of common sense responses, “the quality of the normative choice that particular interactions reveal” should be determinative.<sup>157</sup> Consequently, what is taken as “normal” should be accepted, then, as reasonable.<sup>158</sup>

Others maintain a more realistic approach to resolving the quandary of measuring reasonable conduct is found through the utilization of community standards as an analogy to the reasonable person.<sup>159</sup> Therefore, courts should determine whether the questioned conduct reflects “the average conscience of the time” and, thus, should “be subject[ed] to the social sense of what is right.”<sup>160</sup>

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150. See generally POSNER, *supra* note 143.

151. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 391–92 (2012); see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 147–49 (1995) (discussing reasonable care).

152. See Miller & Perry, *supra* note 151, at 328.

153. See *id.* at 331.

154. *Id.* at 391.

155. *Id.*

156. MORAN, *supra* note 4, at 316; see also, Smith, *supra* note 17, at 733. Confusing efforts have been made to distinguish “practical reasonableness” (classified further as “instrumental rationality”) and “practical reason and practical judgment” from economic rationality. See Zipursky, *supra* note 15, at 2142.

157. MORAN, *supra* note 4, at 316.

158. *Id.* at 131.

159. Miller & Perry, *supra* note 151, at 391–92.

160. *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913).

Judge Learned Hand first suggested this approach in 1913,<sup>161</sup> and it was used as a judicial “formula” for adjudicating obscenity cases, specifically, in defining when conduct was obscene.<sup>162</sup> Over the years, Judge Hand clarified and refined his definition of reasonableness for negligence cases in terms of cost/benefit analysis.<sup>163</sup> Accordingly, Judge Hand’s economic definition “holds that a person acts unreasonably if he or she takes less than the socially optimal level of care.”<sup>164</sup> Therefore, for those who fail to take “cost-justified precautions,” under the Hand construct a claim of negligence is proper.<sup>165</sup>

Some have modified the Hand Formula so as to include a causation element, thereby supporting a balancing theory and driving economic efficiencies.<sup>166</sup> Others have criticized these efforts and contended that they essentially sound the

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161. *See id.*

162. Miller & Perry, *supra* note 151, at 392.

163. *Id.* at 398. *See also* Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949); United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Conway v. O’Brien, 111 F.2d 611, 612 (2d Cir. 1940); Gunnarson v. Robert Jacob, Inc., 94 F.2d 170, 172 (2d Cir. 1938). The Hand negligence calculus was stated as an algebraic equation: “if the probability [of harm] be called P; the [gravity of the resulting] injury, L; and the burden [of adequate precautions to avert the harm], B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .” *Carroll Towing Co.*, 159 F.2d at 173. Although recognizing the traditional notion “that a weighing of risks and utilities was necessary[,]” the original formula did not incorporate clearly causation into equation. DAN B. DOBBS, *THE LAW OF TORTS* § 161 (2d ed. 2018). *See generally* Keith N. Hylton, *Information and Causation in Tort Law: Generalizing the Learned Hand Test for Causation Cases*, 7 J. TORT L. 35, 37 (2014).

164. Miller & Perry, *supra* note 151, at 328. *See also* *Carroll Towing Co.*, 159 F.2d at 173. The economic definition of reasonableness is endorsed in the Restatement (Third) of Torts when provision is made that a negligent act results when an individual fails to exercise “reasonable care under all the circumstances.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (AM. LAW INST. 2010). The three variables in the Hand formula are then listed as the primary factors to be evaluated when determining whether “conduct lacks reasonable care”: namely (1) “the foreseeable likelihood that the person’s conduct will result in harm[.]” (2) “the foreseeable severity of any harm that may ensue[.]” and (3) “the burden of precautions to eliminate or reduce the risk of harm.” *See* Miller & Perry, *supra* note 151, at 389 (quoting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3).

165. Miller & Perry, *supra* note 151, at 328. Interestingly, a classic model of a pattern jury instruction defining negligence is:

“Negligence” is the omission to do something which a reasonable person guided by those considerations which ordinarily influence a person of reasonable prudence would do under all the circumstances of the situation in question, or the doing of something which a person of the ordinary reasonable prudence would not do under all the circumstances of the situation in question.

George P. Smith, II, *Effective Instructions to the Federal Jury in a Civil Case: A Consideration in Microcosm*, 18 SYRACUSE L. REV. 559, 576 (1967) (Appendix A, Model Pattern Jury Instructions).

166. *See* LANDES & POSNER, *supra* note 6, at 234 (advocating for a “refined version of the Hand formula” with a causation element); *see also* Zipursky, *supra* note 15, at 2151 (explaining Posner’s theory of negligence is the “classic interpretation of the negligence standard as an economic version of the Hand Formula”).

death knell altogether for the Formula.<sup>167</sup> The argument for this stance is that these economic revisions theories “not only fail to explain the existence and prominence of the actual causation requirement, but also make it increasingly clear that the requirement is—as first suggested by Calabresi—incompatible with wealth maximization.”<sup>168</sup>

Previously, as early as 1980, the Formula was seen as focused narrowly on a single claim in court, rather than as analyzing the defendant’s actions in the aggregate.<sup>169</sup> Arguing in 2015 that “the Hand formula grossly misrepresents what ‘negligence’ really is,”<sup>170</sup> Zipursky asserts that the Formula has lost relevance because of its failure to recognize the “moral principle that each of us owes a duty of ordinary care to others, and that liability in negligence is premised on a failure to live up to that duty.”<sup>171</sup>

Failing to meet a standard of reasonable care is the gravamen of the tort of negligence.<sup>172</sup> Consequently, when a party creates a risk which a reasonable person would not impose upon others, the standard of reasonable care is breached.<sup>173</sup> “Presupposed is the existence of a certain level of risk to which the defendant can expose the plaintiff without committing a wrong, even if injury should result.”<sup>174</sup> Liability, therefore, is imposed upon a defendant only when injuries materialize from risk conduct which exceeds that level.<sup>175</sup> Under the Common Law, a determination is made on a case-by-case basis as to the acceptability of risk.<sup>176</sup> The American position utilizes a comparison of the risk with precautionary costs necessary to prevent it. Interestingly, the English and Commonwealth position is to disregard the costs of prevention altogether in

167. See generally Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 438–55 (1985) (criticizing economic theories of analyses, such as those suggested by Calabasi, Shavel, Landes, and Posner).

168. *Id.* at 439.

169. Rodgers, *supra* note 5, at 9 (explaining that the “[s]ingle case applications of the Hand Formula understate the social costs of the private investment decision by overlooking all other accidents that could be avoided by the same safety expenditures”). Several years later, Landes and Posner sought to refute this point writing specifically, “[t]he first of those factors is the probability of not injuring a particular person but any person . . . . This point is overlooked in the attack on the economic approach to negligence . . . .” LANDES & POSNER, *supra* note 6, at 151 n.6.

170. Zipursky, *supra* note 15, at 2134.

171. *Id.* at 2169.

172. WEINRIB, *supra*, note 151, at 147. The traditional test for determining whether the tort of negligence has been committed is tied to the reasonable person test. Accordingly, negligence occurs whether action is undertaken, which under the circumstances, a reasonable person would not have undertaken; or, “from failing to do an act that a reasonable person would do.” Miller & Perry, *supra* note 151, at 325.

173. WEINRIB, *supra*, note 151, at 147. Seen as a “decision-guiding device” for judges and jurors alike, the reasonable person test allows these decision makers “to make reasonableness determinations where necessary.” Zipursky, *supra* note 15, at 2149.

174. WEINRIB, *supra*, note 151, at 147.

175. *Id.*

176. *Id.*

determining whether negligence has been committed.<sup>177</sup> Focus, instead, is placed upon determining whether a defendant has met its responsibility to meet a standard of care which is owed to a putative plaintiff.<sup>178</sup>

The concept of proximate cause, as seen, is fraught with ambiguity and difficulty in articulating this essentially because the term seeks to convey those legal circumstances where it is fair to impose liability for negligent wrongdoing.<sup>179</sup> Under any and all tests of proximate cause, the underlying purpose is the same: namely, “to limit the defendant’s liability for policy reasons . . . .”<sup>180</sup> Accordingly, the judiciary has considerable “leeway to dismiss lawsuits in cases where the judge is simply not comfortable with the idea of assigning blame to the defendant.”<sup>181</sup> Yet, when an economic analysis of tort law is followed, the very notion of causation can be dispensed with largely.<sup>182</sup> The reason for this is that since both plaintiff and defendant may have taken precautions in order to avoid conflict, the central task is more properly not to determine whether a defendant caused an injury to the plaintiff, but rather which of the parties—acting more “cheaply” or economically—could have avoided the accident altogether.<sup>183</sup>

#### V. NUISANCE LAW AND THE RESTATEMENT OF TORTS: UNINTENDED CONSEQUENCES AND NEW PROSPECTS FOR THE EFFICIENT ADMINISTRATION OF JUSTICE

Even though termed an “impenetrable jungle,”<sup>184</sup> the Common Law tort of nuisance must surely be recognized, at a minimum, as ubiquitous.<sup>185</sup> It is through the very ubiquity of the Common Law that the law of nuisance has shown its “historical capacity to adapt to . . . changing conditions . . . .”<sup>186</sup> By statute, California finds:

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177. *Id.* at 147–48.

178. *Id.* at 148. “[H]arm is universally regarded as the [proximate cause] . . . of the actor’s negligence.” RESTATEMENT (SECOND) OF TORTS § 435, cmt. b (AM. LAW INST. 1965).

179. See GOSTIN & WILEY, *supra* note 19, at 247. See also LANDES & POSNER, *supra* note 6, at Ch. 8.

180. GOSTIN & WILEY, *supra*, note 19, at 251.

181. *Id.* See generally, H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW (1959).

182. LANDES & POSNER, *supra* note 6, at 229. See also WEINRIB, *supra* note 172, at 47–48.

183. *Id.*

184. WILLIAM L. PROSSER, THE LAW OF TORTS 571 (4th ed. 1971).

185. See generally Smith, *supra* note 17.

186. George P. Smith, II & David M. Steenburg, *Environmental Hedonism Or, Securing The Environment Through The Common Law*, 40 WM. & MARY ENVTL. L. & POL’Y REV. 65, 106 (2015).

Public nuisance has been described as a “super tort”—this, because both the standards of fault and of causation are more pliable and, thus, are applied less rigorously than with claims of traditional negligence. When used by governments as plaintiffs, the remedy of nuisance is a form of strict no-fault liability. See GOSTIN & WILEY, *supra* note 19, at 245–46.

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.<sup>187</sup>

Stated more succinctly, an unreasonable interference with the use or enjoyment of real property is a nuisance.<sup>188</sup> In the law of nuisance, only when actions are shown to be unreasonable—rather than intentional—may, under the facts, they be classified as nuisance.<sup>189</sup> Concern is not given to “the riskiness of the defendant’s conduct,” but, rather, whether the defendant’s conduct was an “interference with the use and enjoyment of the plaintiff’s land.”<sup>190</sup>

In determining when unreasonable conduct gives rise to legal liability, the Restatement (Second) of Torts, Nuisance, Sections 822, 827, and 828 presents a template—if not a workable construct—for assessing the extent to which behavioral norms and economic value factors have been so compromised as to create a legal injury. The Restatement factors, or vectors of force, provide a framework which, in turn, allows the judiciary to test the extent to which the parameters of legally acceptable (*e.g.*, reasonable) conduct has been compromised.<sup>191</sup>

Section 822 of the Restatement of Tort, Nuisance, provides:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.<sup>192</sup>

In determining the gravity of the harm and the social value of activity allegedly causing injury, Sections 827 and 828 of the statement list a number of factors to be considered as:

- (a) The extent of the harm involved;
- (b) the character of the harm involved;

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187. Cal. Civil Code § 3479 (2012).

188. LANDES & POSNER, *supra* note 6, at 42. See *Wietzke v. Chesapeake Conf. Ass’n*, 26 A.3d 931, 939 (Md. 2011) (defining an interference as one which exceeds what a reasonable person can be expected to tolerate).

189. LANDES & POSNER, *supra* note 6, at 49.

190. WEINRIB, *supra* note 151, at 190. See generally Smith, *supra* note 17.

191. RESTATEMENT (SECOND) OF TORTS, §§ 822, 827, and 828 (AM. LAW INST. 1979).

192. *Id.* § 822. See DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, HANDBOOK ON TORTS, Ch. 30, § 30.6 (2d ed. 2016).

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.<sup>193</sup>

The “Utility of Conduct” balancing factors are listed in Section 828 as:

(a) the social value that the law attaches to the primary purpose of the conduct;

(b) the suitability of the conduct to the character of the locality; and

(c) the impracticability of preventing or avoiding the invasion.<sup>194</sup>

What is seen in Sections 827 and 828 of the Restatement, therefore, is nothing more than cost/benefit analysis of quintessential, or reasonable, conduct. The advantage of the Restatement’s position here is that rather than being tethered to positive definitions of reasonableness as seen with caution in the tort of negligence, which are “logically unacceptable[.]”<sup>195</sup> the Restatement seeks to determine, and thereby codify, the reasonable bounds of normative conduct (*i.e.*, legally acceptable conduct) by enumerating specific behavioral and economic factors to test when challenged conduct is not cost-effective and thus unreasonable.<sup>196</sup>

Interestingly, with terms such as “balancing the equities,” “comparative hardship,” “relative hardship,” and “the balance of consensus,” most state courts evaluate requests for injunctive relief for nuisance as some form of balancing mechanism.<sup>197</sup>

#### A. *Challenging the Balancing Test*

No doubt, the two major obstacles to the integrity of the balancing test for the Restatement are consistency and clarity—this, because, admittedly, there is no assurance, even theoretically, that like cases will be treated similarly. Subsequently, the effect of this reality is that uncertainty and lack of predictability exist regarding what standard of behavior is allowed and what is disallowed.<sup>198</sup> Yet, in considering nuisance law and the principal remedy of equitable relief through use of the injunction, the balancing test should be seen

193. RESTATEMENT (SECOND) TORTS § 822 (AM LAW INST. 1979).

194. *Id.* § 828.

195. Miller & Perry, *supra* note 151, at 391.

196. The three options to the Restatement of Torts position are: making a determination under English Common Law that a defendant’s conduct caused or threatened an invasion of land owned by a plaintiff; applying a community understanding of what is normal or abnormal uses of land; and, whether the complaining parties acted within the norms of “neighborliness” of the community in which they live. See Smith & Steenburg, *supra* note 186, at 105 (citing THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 28–29 (2d ed. 2012)).

197. Jeff L. Lewin, *The Silent Revolution in West Virginia’s Law of Nuisance*, 92 W. VA. L. REV. 235, 304 (1990).

198. Smith, *supra* note 17, at 720.



as a positive—if not dominant strength—because of the modernizing values and vectors of force it exhibits by incorporating these contemporary social values into the test, itself.<sup>199</sup>

*B. Fortifying the Restatement through the Common Law*

The whole of the Common Law can be seen properly as both sustaining and fortifying the Restatement's position on nuisance, for it is through the Common Law, and its capacity to adapt to the changing conditions of social conduct, that the most efficacious test of reasonableness can be found.<sup>200</sup> Indeed, this capacity for adapting to the changing condition of each community, and the views and understanding of the communities regarding what “normal land use” include, and the extent to which they are violated by unreasonable conduct, are central to the over-arching power of the Common Law.<sup>201</sup> The weight of the Restatement balancing factors for determining whether conduct is reasonable or tortious (*i.e.*, unreasonable) varies, then, within each community and with the community's progress or failure to integrate public civil values into new and significant factors.<sup>202</sup>

Adding to the guidance of the Common Law as a real and animated direction and force today are three important realities: the doctrine of waste,<sup>203</sup> the principle of “*Sic utere tuo ut alienum non laedas*,”<sup>204</sup> and the acceptance that the Common Law is best viewed properly “as a system promoting economic efficiency.”<sup>205</sup> Resource use is, ideally, guided by five values: economic efficiency; human flourishing; interpretational and future population groups; stability and consistency; and ecological balance.<sup>206</sup> Ideally, any metric for determining when a resource use is unreasonable and wasteful should therefore balance these values or vectors of force. This Article argues that economic efficiency should be pivotal to any determination of when a use—under the Restatement (Second) of Torts—is unreasonable, be it a nuisance or any other civil wrong.

199. *Id.*

200. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE LAW AND SOCIETY 57 (4th ed. 2010).

201. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 CHI. L. REV. 681, 729–33 (1973). *See also* Smith & Steenburg, *supra* note 186, at 106.

202. PLATER ET AL., *supra* note 200, at 57.

203. Michael Pappas, *Anti-Waste*, 56 ARIZ. L. REV. 741, 751, 756, 764 (2014). *See also* Smith, *supra* note 17, at 696 n.262.

204. *Id.* at 680.

205. POSNER, *supra* note 14, at 342. *See also* Elliot, *supra* note 41, at 71.

206. Pappas, *supra* note 203, at 741. *See generally* George P. Smith, II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENV'T'L L. REV. 53 (1991).

The *sic utere* principle mandates that the use of real property not be injurious to others.<sup>207</sup> Although seemingly open-ended, this principle lays the predicate for the Restatement's balancing factors and thus "fleshes out" the action which result in unreasonable conduct.<sup>208</sup> As argued, these balancing factors, in turn, provide a template for decision-making for all levels of the law and just not the tort of nuisance.

Accepting the fact that the Common Law promotes economic efficiency<sup>209</sup> establishes the efficacy of the notion that members of contemporary capitalistic society should seek to maximize their wealth by acting in a rational, efficient manner. This assumption, it is submitted, should be the controlling philosophy for the judiciary when challenges are made that conduct is not in conformance with this standard and is inefficient, unreasonable, and, thus, injurious. Reasonableness of conduct becomes the focal point of any judicial inquiry. The construct or template for proving this conduct is, then, to be found, as seen, within the cost/benefit balancing interests set out by the Restatement of Torts, Nuisance.

#### VI. PLEADING IN THE ALTERNATIVE: A PARADIGM OF CONFUSION OR CLARIFICATION?

The goal of the Federal Rules of Civil Procedure—through liberal construction of judicial pleadings—is to promote the efficient and expeditious administration of justice.<sup>210</sup> A final judgment "must grant all relief to which a plaintiff is entitled, whether or not demanded in the pleadings."<sup>211</sup> Specific authorization is granted under Rule 8(d) for a statement of as many claims or defenses deemed necessary regardless of this characterization as legal, equitable, or maritime.<sup>212</sup>

Alternative or hypothetical allegations, even if inconsistent, are allowed.<sup>213</sup> Accordingly, the pleader is neither required to elect among allegations put forward nor to elect remedies for relief.<sup>214</sup> It is the responsibility of the trier of fact to consider both plaintiff's claims and the defenses raised.<sup>215</sup> The Federal Rules require only that the defendant be given "a short and plain statement of the claim" which provides fair notice of the claims and grounds being put forward by a plaintiff.<sup>216</sup>

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207. Smith & Steenburg, *supra* note 186, at 69.

208. Smith, *supra* note 17, at 698.

209. *Id.* See also Smith & Steenburg, *supra* note 186, at 68–69.

210. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 467 (7th ed. 2012).

211. *Id.* at 466.

212. *Id.*

213. *Id.* at 470.

214. *Id.*

215. *Id.*

216. *Id.* at 468.

A case study of *Cline v. Dunlora South, LLC*<sup>217</sup> serves to illustrate both the positive and the negative consequences of pleading a nuisance action and one in negligence alternatively.

A. *Cline v. Dunlora South, LLC: The Facts*

The facts in *Cline* are straightforward. Dr. Matthew W. Cline was driving home from his dental practice on the evening of April 17, 2008, near the seven hundred block of Rio Road East, in Albemarle County, Virginia.<sup>218</sup> According to a Virginia Department of Transportation Daily Traffic Volume Estimate, twenty-five thousand vehicles drove on this portion of Rio Road East.<sup>219</sup> One parcel of property adjacent to Rio Road East near its intersection with Pen Park Drive was “owned and/or controlled, inspected, maintained and/or serviced” by Dunlora South, LLC (“Dunlora”).<sup>220</sup> As Dr. Cline drove his 1997 Ford Explorer home a large, dead or rotting, tree, approximately twenty-five inches in diameter, fell from the parcel of land owned by Dunlora onto the roof, windshield, and hood of his vehicle.<sup>221</sup> Dr. Cline suffered severe and permanent injuries from the accident, including fractures of his cervical spine.<sup>222</sup>

In modern tort law, many of the claims involving dead or rotting trees, such as the case in *Cline*, concern negligence and/or nuisance law.<sup>223</sup> Virginia Courts

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217. 726 S.E.2d 14, 15–16 (Va. 2012).

218. Opening Brief of Appellant at 6, *Cline v. Dunlora S., LLC*, 726 S.E.2d 14 (Va. 2012) (No. 110650), 2012 WL 6734517, at \*5.

219. *Cline*, 726 S.E.2d at 15.

220. Opening Brief of Appellant at 6, *Cline*, 726 S.E.2d 14 (No. 110650).

221. *Cline*, 726 S.E.2d at 15; Opening Brief of Appellant at 6, *Cline*, 726 S.E.2d 14 (No. 110650).

222. *Cline*, 726 S.E.2d at 15.

223. Daniel Bidwell, *Of Trees, Vegetation, and Torts: Re-Conceptualizing Reasonable Land Use*, 62 CATH. U. L. REV. 1035, 1036 (2014); see George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 687 (2005); Glenn A. McCleary, *The Possessor's Responsibilities As to Trees*, 29 MO. L. REV. 159, 173 (1964); Lane v. W.J. Curry & Sons, 92 S.W.3d 355 (Tenn. 2002) (discussing recent case law concerning tree-related harms in more urban settings); e.g., Townes at Grand Oaks Townhouse Ass'n, Inc. v. Baxter, 86 Va. Cir. 449 (Va. Cir. Ct. 2013) (finding no liability to a condominium owner in the absence of negligence of the homeowner association); Stackhouse v. Royce Realty & Mgmt. Corp., 970 N.E.2d 1224, 1227 (Ill. App. 2012) (finding defendants property owner and management corporation equally responsible in negligence when a rotted tree fell and injured a pedestrian); Taylor v. Olsen, 578 P.2d 779, 784 (Or. 1978) (finding no negligence on the part of a property owner when the rot of the center of the tree was not visible upon external inspection before the tree fell in a roadway, causing an accident); Hensley v. Montgomery Cty., 334 A.2d 542, 545 (Md. App. 1975) (finding no duty by the property owner or the county responsible for the road in a negligence claim when a tree limb from a dead tree fell through plaintiff's windshield as he was driving). See also RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (AM. LAW INST. 2010) (“An actor whose wrongful conduct harms or obstructs a public resource or public property is subject to liability for resulting economic loss if the claimant's losses are distinct in kind from those suffered by members of the affected community in general.”).

first addressed claims concerning dead or rotting trees in 1939.<sup>224</sup> In *Smith v. Holt*, the Supreme Court of Virginia established the Virginia Rule, which creates a nuisance cause of action for an adjoining landowner if “a sensible injury has been inflicted by the protrusion of roots from a noxious tree or plant onto [his land.]”<sup>225</sup> This duty follows the common law maximum “*sic utere tuo ut alienum non laedas*—one must so use his own rights as not to infringe upon the rights of another.”<sup>226</sup> Then, in *Fancher v. Fagella* the Virginia Supreme Court reexamined the Virginia Rule of negligence,<sup>227</sup> and instead decided to adopt a rule similar to the Virginia Rule, called the Hawaii Rule.<sup>228</sup> The Hawaii approach finds that “[e]ncroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property . . . .”<sup>229</sup> Under the Hawaii approach, a successful suit must show that a neighbor’s tree encroaching onto his land “cause[s] actual harm or . . . the imminent danger of actual harm . . . .”<sup>230</sup> Comparatively, a successful negligence claim involves showing four elements: (1) the defendant owed the plaintiff a duty; (2) the defendant failed to act on that duty; (3) the plaintiff suffered a harm (damages); and (4) the failure to act on the duty was the proximate and “but-for” cause of the harm the plaintiff suffered.<sup>231</sup> In tree-related negligence suits, the crux of the case will be whether the owner of a tree was under a duty not to injure the plaintiff.<sup>232</sup>

In February 2010, Dr. Cline filed suit in the Circuit Court for Albemarle County seeking recovery against several defendants believed to own the land from which the tree responsible for his injuries fell.<sup>233</sup> The premise of Dr. Cline’s suit was that an owner of property adjacent to a public highway owes a duty to care for, inspect, maintain, and/or service a tree abutting the public highway.<sup>234</sup> All of the defendants demurred, and at an oral hearing in August 2010, Dr. Cline sought a nonsuit as to three of the defendants, leaving Dunlora

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224. Bidwell, *supra* note 223, at 1036 (citing *Smith v. Holt*, 5 S.E.2d 492 (Va. 1939) *overruled* by *Fancher v. Fagella*, 650 S.E.2d 519 (Va. 2007)).

225. *Smith*, 5 S.E.2d at 495 *overruled* by *Fancher*, 650 S.E.2d at 519.

226. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 19 (Va. 2012) (Lemons, J., dissenting).

227. *Fancher*, 650 S.E.2d at 521. “The ‘Virginia Rule,’ holds that the intrusion of roots and branches from a neighbor’s plantings which were ‘not noxious in [their] nature’ and had caused ‘no sensible injury’ were not actionable at law, the plaintiff being limited to his right of self-help.” *Id.* (brackets in original).

228. *Id.* at 522. “The ‘Hawaii Rule,’ holds that living trees and plants are ordinarily not nuisances, but can become so when they cause actual harm or pose an imminent danger of actual harm to adjoining property.” *Id.* at 521.

229. *Cline*, 726 S.E.2d at 17 (quoting *Fancher*, 650 S.E.2d at 552).

230. *Id.* at 19 (Lemons, J., dissenting).

231. Bidwell, *supra* note 223, at 1038.

232. *Id.*

233. *Cline*, 726 S.E.2d at 15.

234. *Id.*

as the sole defendant.<sup>235</sup> In November 2010, Dr. Cline filed an amended complaint against Dunlora for the injuries he sustained, asserting that according to *Fancher v. Fagella*, and other Virginia case law, Dunlora had a duty to use reasonable care in the inspection, maintenance, and/or service of trees and other vegetation on their property, and to remove or make safe such trees, which presented a hazard to passersby.<sup>236</sup> Dr. Cline further asserted that Dunlora's ownership and maintenance of the property and the "dying, dead, and/or rotten tree" was a danger to passersby and constituted a nuisance.<sup>237</sup> Although theories of public nuisance<sup>238</sup> in Virginia protected against this type of obstruction,<sup>239</sup> Dr. Cline's nuisance claim did not receive as much attention as his negligence claim.<sup>240</sup> Dunlora filed another demurrer, which the Circuit Court of Albemarle County sustained without leave to amend, holding that Virginia law does not provide any authority for an award of personal injury damages caused by a tree

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235. *Id.*; Opening Brief of Appellant at 4, *Cline*, 726 S.E.2d 14 (No. 110650).

236. *Cline*, 726 S.E.2d at 15–16; Opening Brief of Appellant at 2, 5, *Cline*, 726 S.E.2d 14 (No. 110650) (“[T]raditional Virginia tort law, as well as the trend in other jurisdictions and secondary authorities, dictate[s] that a landowner has a duty to act reasonably to prevent its trees from injuring those for whom injury is reasonably foreseeable.”).

237. *Cline*, 726 S.E.2d at 15–16. The Virginia Supreme Court identified in footnote 1 of its opinion, “[Dr.] Cline’s nuisance claim is based upon Dunlora’s alleged conduct” and if Dunlora’s conduct was not negligent, the nuisance claim correspondingly fails. *Id.* at 16 n.1. *See also* DOBBS, *supra* note 163, at § 400 (“So far as a supposed nuisance rests upon proof of the defendant’s negligence, the case proceeds largely as would any other negligence case, and the nuisance label adds little or nothing to the analysis.”).

238. A public nuisance is “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979); *see also* Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984–85 (1952) (“Conduct which interferes solely with the use of a relatively small area of private land . . . is called a private nuisance. Conduct which interferes with the use of a public place or with the activities of an entire community is called a public nuisance.”).

239. In relation to public streets, “[a]ny unauthorized obstruction that unnecessarily impedes the lawful use of a public street is a public nuisance at common law.” *Breeding ex rel. Breeding v. Hensley*, 519 S.E.2d 369, 372 (Va. 1999); *see also* *Price v. Travis*, 140 S.E. 644, 647 (Va. 1927) (“[T]he essential characteristic of a public nuisance is that the thing imperils the safety of a public highway.”). Professor Prosser considered the obstruction of a public highway the “obvious illustration” of a public nuisance. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1001–02 (1966).

240. Although at the initial stage Dr. Cline pleaded theories of nuisance, *see* Amended Complaint, *Cline v. Dunlora S., LLC*, 81 Va. Cir. 235 (Va. Cir. Ct. 2010) (No. CL1000012200), 2010 WL 9100619, the Circuit Court of Albemarle County sustained Dunlora’s Demurrer, *see* *Cline v. Dunlora S., LLC*, No. CL10000122-00, 2011 WL 9809654 (Va. Cir. Ct. Jan. 4, 2011), which stated that Dr. Cline’s “[a]mended complaint failed to set forth facts sufficient to state a cause of action for nuisance.” Demurrer to Amended Complaint, *Cline*, 81 Va. Cir. 245 (No. CL1000012200). On review the Virginia Supreme Court considered a narrow question: “does a Virginia landowner have a duty to take reasonable precautions to prevent foreseeable personal injury caused by its tree that has been visibly dead and decaying for years?” Opening Brief of Appellant at 1, *Cline*, 726 S.E.2d 14 (No. 110650). The Virginia Supreme Court did not even consider whether nuisance would have been an alternative to negligence and it is unclear how they might have decided on this issue. *See generally* *Cline*, 726 S.E.2d 14.

on adjacent land.<sup>241</sup> In 2011, Dr. Cline appealed to the Supreme Court of Virginia.<sup>242</sup>

When Dr. Cline's case against Dunlora was before the Virginia Supreme Court in early 2012, the rule followed by the court was the Hawaii rule, which "gave injured plaintiffs access to legal remedies under the theory that trees could constitute a nuisance when they caused actual harm or posed the threat of imminent harm."<sup>243</sup> Therefore, the question before the Supreme Court of Virginia on appeal was whether a private landowner has a reasonable *sic utere* duty to prevent injuries caused by a dead or rotting "tree falling from private land onto. . . a public highway."<sup>244</sup>

### 1. *The Majority Opinion*

In a four to three split decision, the Supreme Court of Virginia affirmed the judgment of the Circuit Court of Albemarle County and entered a final judgment against Dr. Cline.<sup>245</sup> The Court held that a landowner only owes a duty "to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left."<sup>246</sup> Moreover, the Court opined that it had "never recognized, nor did [its] precedents support, a ruling that a landowner owes a duty to protect travelers on an adjoining public roadway from natural conditions on his or her land."<sup>247</sup>

In considering the question presented, a *de novo* standard of review was used, and the Court accepted as true the factual allegations of Dr. Cline's complaint, his attachments, and the reasonable inferences that followed, but not Dr. Cline's legal conclusions.<sup>248</sup> The opinion first examined the history of the duties a landowner owed to those outside the land and whether such duty exists.<sup>249</sup> Initially, the discussion considered common law and found that "a landowner owed no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous condition."<sup>250</sup> Then, the Court looked to its decision in *Smith v. Holt*, and observed how there was never a standard fashioned allowing for the application of the "principles of ordinary negligence [to] apply to natural conditions on land," but rather had allowed a nuisance cause of action, "if a sensible injury was inflicted by the protrusion of roots from a

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241. *Cline*, 81 Va. Cir. at 236, *aff'd*, 726 S.E.2d 14 (Va. 2012); *Cline v. Dunlora S., LLC*, No. CL10000122-00, 2011 WL 9809654 (Va. Cir. Ct. Jan. 4, 2011).

242. *Cline*, 726 S.E.2d at 15; Opening Brief of Appellant at 5, *Cline*, 726 S.E.2d 14 (No. 110650).

243. Bidwell, *supra* note 223, at 1036.

244. *Cline*, 726 S.E.2d at 15.

245. *See id.* at 15, 18.

246. *Id.* at 18.

247. *Id.*

248. *Id.* at 16.

249. *See id.* at 16–17.

250. *Id.* at 16.

noxious tree or plant on the property of an adjoining landowner.”<sup>251</sup> But, the Court also recognized that it had adopted the Hawaii approach in *Fancher* to encroaching vegetation and created a rule allowing relief from a neighbor’s tree encroaching onto the land of another as a nuisance, when the encroaching trees “cause actual harm or the imminent danger of actual harm.”<sup>252</sup>

The Court disagreed with Dr. Cline’s assertion that, logically, the *Fancher* principles create the existence of a duty because this duty “addresses a narrow category of actions arising from nuisance caused by the encroachment of vegetation onto adjoining . . . lands.”<sup>253</sup> And “[t]he duties . . . in *Fancher* and *Smith* [—i.e., the Hawaii and Virginia Rules—] are dramatically different than duties necessary to support an action for personal injury predicated upon a duty of a landowner regarding the natural decline of trees on his or her property, which is adjacent to a roadway.”<sup>254</sup> Moreover, property owners whose land is adjacent to a public highway only must “refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.”<sup>255</sup> Short of having taken an action to make the tree more dangerous than it was naturally, Dunlora escaped liability.<sup>256</sup>

## 2. *The Dissenting Opinion*

Three Justices dissented from the majority’s opinion and argued that the principles of ordinary negligence should apply here following *sic utere*.<sup>257</sup> As a case of first impression, the dissenters considered the varying approaches to the “not entirely unusual situation” of encroaching trees or vegetation.<sup>258</sup> Their discussion begins with the Restatement’s imposition of liability on landowners resulting from trees falling on public highways.<sup>259</sup> But, because multiple approaches have grown out of the Restatement’s standard, the justices examined leading jurisdictions’ approaches to the issue.<sup>260</sup>

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251. *Id.*

252. *Id.* at 17.

253. *Id.*

254. *Id.*

255. *Id.* at 18.

256. The duty owed by Dunlora was “to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.” *Id.* Had Dunlora taken an action to make the highway more dangerous, its conduct would have breached such duty.

257. *Id.* at 18–19 (Lemons, J., dissenting).

258. *Id.* at 19–20.

259. See *id.* at 19 n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 840(1) (AM. LAW INST. 1979)) (“[A] possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land.”).

260. *Id.* at 20. Further approaches might grow out of the Restatement’s standards as the recently published Restatement (Third) of Torts section 8 concerns public nuisances resulting in economic loss. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (AM. LAW INST. 2010). Importantly, however, section 8 “does not seek to restate the substantive law of public

Some jurisdictions, for example, have adopted a rule that considers the urban/rural distinction and finds no duty to inspect trees in a state of nature in a rural area.<sup>261</sup> Other jurisdictions blend the division between urban/rural and focus on “the size, type, and use of the highway and land to determine the proper liability standard — whether this is a duty to inspect.”<sup>262</sup> While other jurisdictions create a general duty to inspect any trees adjacent to public highways.<sup>263</sup> Still others impose a duty of reasonable care upon all landowners, without any specific duty to inspect trees adjacent to highways.<sup>264</sup> Moreover, the dissenting justices mentioned that the imposition of liability “require[s] the presence of patent visible decay.”<sup>265</sup> Ultimately, the dissent calls for a general duty of reasonable care suggesting that the court adopt the following rule that a “landowner should be liable for injuries resulting from a tree falling from his or her property onto a public highway if he or she knows or has reason to know of the imminent danger presented by the tree’s death, decay or other visible defect.”<sup>266</sup>

The rule the dissenting justices promoted “avoid[s] the rigid dichotomies expressed in other rules, which have been found unworkable by [other] courts,”<sup>267</sup> and, holds landowners to the same economic efficiencies fundamental to the *sic utere* doctrine.<sup>268</sup> However, the dissent could have gone further and decided on a theory of nuisance, which would have more fully embraced the economic efficiencies of the *sic utere* doctrine.

#### B. The Doctrine of Waste as a Vector of Force in Decision-Making

In *Cline*, the Court would have been wise to apply the *macro* approach used by courts when determining whether an individual committed the tort of “waste.” With roots in the common law maximum of *sic utere*,<sup>269</sup> the common

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nuisance 13 except as necessary to explain those cases that produce 14 liability in tort for economic loss.” *Id.*

261. *Id.*; see also *Ford v. S.C. Dep’t of Transp.*, 492 S.E.2d 811, 814 (S.C. Ct. App. 1997); *Lemon v. Edwards*, 344 S.W.2d 822, 823 (Ky. 1961); *Zacharias v. Nesbitt*, 185 N.W. 295, 296 (Minn. 1921).

262. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 19 (Va. 2012) (Lemons, J., dissenting); *Lewis v. Krussel*, 2 P.3d 486, 490–91 (Wash. Ct. App. 2000); *Taylor v. Olsen*, 578 P.2d 779, 782–83 (Or. 1978).

263. *Cline*, 726 S.E.2d at 20 (Lemons, J., dissenting).

264. *Id.*

265. *Id.*

266. *Id.* at 21.

267. *Bidwell*, *supra* note 223, at 1056.

268. *Id.* at 1057.

269. *Smith*, *supra* note 17, at 696 (discussing how the Doctrines of Waste, Public Trust, and Nuisance grew out of the *sic utere* doctrine); see also *Smith v. Cap Concrete, Inc.*, 184 Cal. Rptr. 308, 311 (Ct. App. 1982) (“Waste evolved and broadened from a cause of action designed to protect owners of succeeding estates against the improper conduct of the person in possession which harmed and affected the inheritance, to a legal means by which any concurrent non-possessory



law doctrine of waste protects those with an absolute claim to an estate from injuries caused to that estate by individuals with less than an absolute claim to the estate—such as leasehold estates.<sup>270</sup> To constitute waste there needs to be an act or omission that permanently diminishes or depreciates the value of the property.<sup>271</sup> There exist three types of waste: voluntary, permissive, and meliorating.<sup>272</sup> Permissive waste involves negligence or an omission that would allow for deterioration to the property.<sup>273</sup> Voluntary waste is a “deliberate, willful, or voluntary destruction or carrying away of something attached to [the property].”<sup>274</sup> Meliorating waste is a special type of waste that is seemingly in opposition of the theories of permissive and voluntary waste. Technically considered waste, meliorating waste improves the value of the land instead of decreasing the value.<sup>275</sup> Courts’ refusals to enter judgments of waste when the damages are only nominal, and the refusal of courts of equity to enjoin technical

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holders of interest in the land are enabled to prevent or restrain harm to the land committed by persons in possession.”).

270. See 78 AM. JUR. 2D *Waste* § 1 (2018); *Waste—Ameliorating Waste—Effect of Short-Term Lease*, 31 YALE L.J. 781, 781 (1922) (“Waste is the destruction or material alteration or deterioration of the freehold or of the improvements forming a material part thereof, by any person rightfully in possession but who has not the fee title or the full estate.”); see also *Luis v. United States*, 136 S. Ct. 1083, 1092–93 (2016) (“[T]he law of property sometimes allows a person without a present interest in a piece of property to impose restrictions upon a current owner . . . to prevent waste.”); *Rehman v. State Univ. of N.Y.*, 596 F. Supp. 2d 643, 660 (E.D.N.Y. 2009) (“[A]ctions in waste are generally relegated to cases where the holder of real property causes a deterioration [to] the property.”); *Cal. Dep’t of Toxic Substances Control v. Payless Cleaners*, 368 F. Supp. 2d 1069, 1082 (E.D. Cal. 2005) (defining waste and giving a brief history of the doctrine’s evolution); *Proffitt v. Henderson*, 29 Mo. 325, 325 (1860) (“Waste is a lasting damage to the reversion caused by the destruction, by the tenant for life or years.”). Waste can also occur to personal property when the property has become part of the real property. *Meyer v. Hansen*, 373 N.W.2d 392, 395 (N.D. 1985).

271. *Waste*, *supra* note 270, at § 1. Importantly, when a court considers waste, its application of the doctrine is flexible and considers factors like the characteristics of the estate and the type of property. *Id.* § 16.

272. See generally *id.* §§ 5, 7.

273. *Jowdy v. Guerin*, 457 P.2d 745, 748–50 (Ariz. Ct. App. 1969) (affirming a lower court’s judgment of waste when the evidence—although not showing the actual cause of deterioration—reflects the possessors’ failure to protect the property in any manner whatever); see also *Keesecker v. Bird*, 490 S.E.2d 754, 770 (W. Va. 1997) (emphasizing that plaintiffs brought a permissive waste claim where real property and personal property was not being cared for).

274. *Waste*, *supra* note 270, at § 5.

275. See *id.* § 7. In *J.H. Bellows Co. v. Covell*, the Defendants were developing a golf course on leased property attempted to change a “marshy” and “muck[y]” pond into an artificial lake. 162 N.E. 621, 621 (1927). The owners of the property threatened to enter upon the leased property to prevent the improvement to the pond, and the developers brought suit against them. The owners of the property brought a counter suit alleging the improvements were waste and sought an injunction. *Id.* at 621–22. The court considered how the improvements to the pond—although technically waste—resulted in an improvement to the land. *Id.* at 622. Accordingly, because this type of meliorating waste is allowed, the court denied the injunction. *Id.*

waste where the damages were trivial, has contributed to the theory of meliorating waste.<sup>276</sup>

Whether an act or omission constitutes waste heavily depends on the facts and circumstances of the particular act or omission.<sup>277</sup> In considering whether the particular facts constitute waste, an appropriate application “must be shaped and defined by a balancing of the costs and the benefits of allowing the questioned acts to continue.”<sup>278</sup> The doctrine of waste “mediates between the competing interests” of parties who have different incentives to maximize the value of property at different stages in the life of the property.<sup>279</sup> Balancing the costs and benefits is in the public interest and allows for improvements or alterations to the property by the tenant which otherwise under a strict liability standard of waste would be considered waste.<sup>280</sup> Part of this balancing involves the “average, ordinary reasonable person” and how this ideal person would treat his own property.<sup>281</sup> Here, utilizing the average, ordinary reasonable person, the similarity between the doctrines of waste and nuisance is unmistakable. Waste—like nuisance—has a tendency to depend on what a community considers waste.<sup>282</sup> The similarities between the two doctrines suggest the most efficient path to achieving a “waste-less” community and protecting the underlying goal of the doctrine of waste (*i.e.*, to ensure the property rights of those with an absolute claim to property are protected<sup>283</sup>) is achieved through nuisance principles.

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276. *Ameliorating Waste*, 14 HARV. L. REV. 226, 226 (1900).

277. *Chosar Corp. v. Owens*, 370 S.E.2d 305, 307 (Va. 1988). Waste, however, is not the ordinary wear and tear that occurs over time and with normal use. *See generally Waste*, *supra* note 270, at § 1.

278. Smith, *supra* note 17, at 696 n.262.

279. *See POSNER, supra*, note 14, at 92. For example, as Posner discusses, a tenant will have an incentive to maximize the present value of the earnings stream obtainable during his possession of the property. On the other side, the person who will inherit full ownership to the estate following the tenant’s term is concerned with the entire stream of earnings. *Id.* The common law doctrine of waste solves these conflicting incentives with its cost benefit balancing analysis.

280. *See Ameliorating Waste*, *supra* note 276, at 226.

281. Smith, *supra* note 17, at 696 n.262. The average, ordinary reasonable person is discussed in Section III. of this Article. As discussed there, the theory of the average ordinary reasonable person is not without flaws.

282. *See Smith, supra* note 17, at 696 n.262 (“The subject or focus of waste, then, as seen, is fluid and will vary from community to community and with customs and usages within each.”).

283. *See supra* note 270 and accompanying text.

1. *The Doctrine of Waste in Cline v. Dunlora South, LLC: Validating Principles*

The Court in *Cline* did not contemplate the doctrine of waste, and for good cause,<sup>284</sup> but some properties of the doctrine are floating around in the dissent.<sup>285</sup> Inherent in the Court's discussion of the damages caused by the tree falling on Dr. Cline's vehicle is the principles of waste—diminishment or depreciation of the value of the property caused by another person's acts or omissions. The dissent in *Cline* argued for an application of negligence following the doctrine of *sic utere*, which, as explained above, is part of the foundation of waste.<sup>286</sup> The dissent argues explicitly for a general duty of reasonable care; a reoccurring theme in the doctrine of waste.<sup>287</sup> Were facts of *Cline* different and were the doctrine of waste to apply, Dunlora's actions would be an example of waste. Dunlora did not care for the tree, it became dangerous, and caused damage to property.<sup>288</sup>

The theory to which the dissent in *Cline* eludes validates the principles of the tort of waste. The dissent would hold liable a landowner who did not remedy a dead, decaying, or otherwise visibly defective tree.<sup>289</sup> This rule would incorporate the economic considerations fundamental to the doctrine of waste. Waste is about the balance between the present tenant's rights versus the absolute owner's rights.<sup>290</sup> That balance is best achieved with a cost based consideration. The tenant is in the best position to ensure the property's value is not harmed. However, as seen with courts of equity and meliorating waste, a court will not find a tenant liable strictly because the elements of waste exists; there must be some harm to the absolute owner's interest. This is the fundamental cost benefit balancing judges are asked to do with the doctrine of waste and shows how the doctrine solves the issue at the *macro* level. Similarly, in *Cline* the court could have used a similar *macro* approach to help guide them in their decision.

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284. Waste is a tort concerning damages to real property or personal property that is a part of the real property, similar to fixtures, caused by a person with less than full rights to the property. See *Waste*, *supra* note 270, at § 1. In *Cline*, someone in less than full possession of the property did not cause the damages to Dr. Cline and his vehicle. *Cline v. Dunlora S, LLC*, 726 S.E.2d 14, 15 (Va. 2012). Rather, the damage was caused by the defendant's property; the doctrine of waste would not apply. See *id.*

285. See generally *id.* at 18–21 (Lemons, J., dissenting).

286. See *id.* at 20. See also *supra* note 270 and accompanying text.

287. See *Cline*, 726 S.E.2d at 20–21 (Lemons, J., dissenting) (quoting *Gibson v. Hunsberger*, 428 S.E.2d 489, 492 (N.C. Ct. App. 1993)). See also *supra* note 175 and accompanying text.

288. *Cline*, 726 S.E.2d at 15. This would be similar to *Keesecker v. Bird*, where the appellees allowed an injury to the property through their inaction. 490 S.E.2d 754, 769 (W. Va. 1997).

289. *Cline*, 726 S.E.2d at 21 (Lemons, J., dissenting) (internal citations omitted).

290. See *supra* notes 269–270 and accompanying text.

## 2. *Pleading Nuisance in the Alternative*

The dissent from *Cline* and Dr. Cline's amended complaint hint at a practical alternative for tree-related cases.<sup>291</sup> Instead of relying entirely on a negligence theory of liability—a theory, which as described earlier is deeply flawed<sup>292</sup>—plaintiffs might be wise to also plead a nuisance claim in the alternative.<sup>293</sup> Although the lines between nuisance and negligence have gradually blurred over time,<sup>294</sup> it would not be unprecedented to bring these claims together, and “there is no persuasive or compelling reason why a plaintiff should *not* be able to allege *both* negligence *and* nuisance.”<sup>295</sup> Pleading nuisance in the alternative would serve as a useful backstop for instances where a court might not find all of the elements of a negligence claim satisfied.

Still, plaintiffs cannot rely only on pleading nuisance in the alternative. As witnessed in *Cline* and as discussed in Dobbs' Law of Torts, if a nuisance action succeeds or fails upon the defendant's negligence, the case would depend on the negligence elements being satisfied.<sup>296</sup> What *Cline* illustrates, then, is that to plead successfully nuisance in the alternative, the defendant's negligence cannot be the central issue.<sup>297</sup> Rather, had Dr. Cline more clearly pleaded negligence

291. *Cline*, 726 S.E.2d at 21 (Lemons, J., dissenting); Amended Complaint, *Cline v. Dunlora S., LLC*, 81 Va. Cir. 235 (Va. Cir. Ct. 2010) (No. CL1000012200), 2010 WL 9100619. However, Dr. Cline needed to have pleaded nuisance more successfully so as to bring the question before the courts.

292. For example, in *Cline* the court struggled with whether Dunlora owed a duty to ensure the tree did not cause injury or whether Dunlora only owed a duty not to make the tree more dangerous than it was naturally. *Cline*, 726 S.E.2d at 18. See also Smith & Fernandez, *supra* note 206.

293. See *Lewis v. Krussel*, 2 P.3d 486, 489 (Wash. Ct. App. 2000); see also James T.R. Jones, *Trains, Trucks, Trees and Shrubs: Vision-Blocking Natural Vegetation and a Landowner's Duty to Those Off the Premises*, 39 VILL. L. REV. 1263, 1266 n.16 (1994) (“Counsel for injured travelers always should consider whether asserting a nuisance claim (or claims) in addition to an ordinary negligence claim might prove beneficial.”).

294. Howard L. Oleck, *Nuisance in a Nutshell*, 5 CLEV. MARSHALL L. REV. 148, 149 (1956). See also, William M. Cromer, *Absolute and Qualified Nuisance in Ohio*, 9 OHIO ST. L.J., 164, 164–65 (1948). For example, in *McFarlane v. City of Niagara Falls*, Justice Cardozo discussed that the nuisance in the case grew out of the defendant's negligence. 160 N.E. 391, 391 (N.Y. 1928). Still, “[n]egligence and nuisance . . . are not always mutually exclusive legal concepts.” *Jost v. Dairyland Power Co-op.*, 172 N.W.2d 647, 650 (Wis. 1969).

295. PETER N. SWISHER ET AL., VIRGINIA PRACTICE SERIES: TORT AND PERSONAL INJURY LAW § 8.1 (West rev. ed. 2015); accord W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 87, p. 622 (5th ed. 1984) (“The existence of a nuisance to the land does not of course preclude an independent tort action for ordinary negligence resulting in interference with the bodily security of the individual.”). See, e.g., *Jackson v. City of Blue Springs*, 904 S.W.2d 322, 328 (Mo. Ct. App. 1995) (plaintiffs filed suit against defendants under two theories: maintaining a public nuisance and negligence).

296. DOBBS, *supra* note 163, at § 400; accord *Cline*, 726 S.E.2d at 18. See also *Breeding ex rel. Breeding v. Hensley*, 519 S.E.2d 369, 373 (Va. 1999) (“[A] Town is liable for maintaining a public nuisance only if the plaintiffs can establish the Town employees were negligent.”).

297. See DOBBS, *supra* note 163, at § 400; *Wells v. Whitaker*, 151 S.E.2d 422, 434 (Va. 1966) (discussing circumstances where it is not necessary to allege or prove negligence).

and nuisance as two distinct causes of action instead of allowing the Court to blend them together, his nuisance claim could have proceeded even though his negligence claim failed. This type of pleading would allow the courts to be more efficient when allocating the costs of injury.

#### CONCLUSION

The calculus of causation for establishing negligence has become a paradox to the ideal of corrective justice and the need for the efficient and expeditious administration of justice.<sup>298</sup> As seen, there are both latent and patent ambiguities in theory and in application of the tort of negligence.<sup>299</sup> The prolonged demise of the pivotal “cast member” in the causation saga is the average, ordinary, reasonable person. Accordingly, when an action is followed which a reasonable person would not follow, or when action is—contrariwise—not undertaken that a reasonable person would pursue, negligence results.<sup>300</sup>

Today, the very notion of a citizenry composed of average, ordinary reasonable persons strains the limits of credulity as statistics show the already high rates of illiteracy and cognitive impairment growing.<sup>301</sup> The consequence of this growth means, simply, that more and more “aggrieved” parties will be litigating what they perceive are civil wrongs based on unreasonable conduct. The level of judicial scrutiny of every day transactions in the marketplace should be tempered by the status of the parties and, more specifically, a determination of whether one or more of the party litigants is impaired cognitively. This condition to exist should, at a minimum, be accepted as a mitigating factor for the courts to consider when ruling on the merits of an actionable claim, or alternatively, reforming a contract in dispute.

A new emphasis on objective standards of conduct—rather than normative standards which are used traditionally in testing the conduct of the average, ordinary, reasonable persons vis-à-vis causation for the torts of negligence to be established—is a recognition of the high rate of illiteracy in America<sup>302</sup> and an effort to allow more opportunities for corrective justice. Accepting the notion that, at the center, every legal case resolves around the need to test the reasonableness of conduct by the parties,<sup>303</sup> leads—then—to the conclusion that

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298. See MORAN, *supra* note 4, at 3–4; Rodgers, *supra* note 5, at 9–11.

299. See Gardner, *supra* note 25, at 31–32; Miller & Perry, *supra* note 151, at 324–25; Zipursky, *supra* note 15, at 2132 (discussing ambiguities of the reasonable person standard).

300. See Miller & Perry, *supra* note 151, at 325.

301. See *supra* notes 16, 61–65, 84 and accompanying text; see generally Cupp, *supra* note 64 (discussing whether granting legal personhood to animals based on cognitive abilities would endanger the rights of individuals with severe cognitive impairments).

302. See *supra* notes 16, 61–65, 84 and accompanying text.

303. See POSNER, *supra* note 143, at 272. (“[I]t sets no higher aspiration for the judge than that his decisions be reasonable in the light of the warring interests in the cases, although a reasonable decision is not necessarily a ‘right’ one.”).

defining reasonableness is of paramount concern in attempting to reach a level of corrective justice.

The question then becomes the extent to which the legal system is willing to maintain this doctrine on “life support” and thereby “accommodate[] imprecision”<sup>304</sup> rather than go with a more efficient pathway toward achieving efficiency in decision making by using—generically—the standard for determining reasonable conduct as set out in the Restatement (Second) of Torts for establishing liability for nuisance.<sup>305</sup> This proposed shift in thinking, policy, and practice would go far to resolve the ongoing *cri de coeur*—or outcry—raging over the extended use of the multi-purpose tort of negligence as the remedial panacea for nearly all civil wrongs.

The harmonious balancing of interests that Cardozo opined was the only hope for progress in the law,<sup>306</sup> is best achieved by adopting the balancing test set out for determining the reasonableness of conduct under the Restatement.<sup>307</sup> The courts should test parties in litigation, in order to determine which of them acted more rationally or soundly from an economic standpoint.<sup>308</sup> Courts might ask how their rulings could best achieve economic (or corrective) justice. Secondly, courts could ask whose interests are best served individually, from *micro* economic analysis or collectively, from a *macro* or societal point of view. Since the “spirit of the times” is a capitalistic society rooted in “economic efficiency,”<sup>309</sup> the courts should—then—strive for resolutions that make “the most sense [and are] both efficient and fair.”<sup>310</sup>

The “simple language,”<sup>311</sup> or *lingua franca*, that Camus sought in everyday discourse, will never for the law, be attainable. Yet, by lessening the “death grip” on the notion of an average, ordinary, reasonable person so necessary in proving causation for negligence, and utilizing, instead, objective cost/benefit factors for determining the reasonableness of conduct, progress will have been made toward achieving this aspirational goal set by Camus.

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304. Rodgers, *supra* note 5, at 34.

305. See *supra* note 196 and accompanying text.

306. CARDOZO, *supra* note 147, at 114, 115 n.25.

307. RESTATEMENT (SECOND) OF TORTS §§ 822, 827–28 (AM. LAW INST. 1979).

308. POSNER, *supra* note 14, at 3.

309. *Id.* at 342. See Elliot, *supra* note 41, at 62–63.

310. MERRILL & SMITH, *supra* note 196, at 64.

311. Zaretsky, *supra* note 1.

