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Nuisance Law: The Morphogenesis of a Historical Revisionist Theory of Contemporary Economic Jurisprudence

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I must acknowledge the igniting influence of Professor Henry G. Manne, Dean of the School of Law at The George Mason University in the preparation of this Article. The Summer of 1982 provided me with a unique opportunity to attend the Program in Law and Economics directed by Professor Manne and to discover, test and refine certain ideas which I had been working on for some time concerning the cause and effect of Common Law doctrines (and especially Nuisance) in the scheme of Economic Jurisprudence.

I also take this occasion to thank The Hoover Institution, Stanford University, for providing me with facilities to study and pursue research into comparative theories of economic analysis during the Summer of 1981 when I was a Visiting Scholar there.

After far too many interruptions to my efforts to complete the research and writing of this Article, during the Summer of 1991 I re-energized myself as a consequence of two research appointments at the faculties of law at the University of Auckland, New Zealand, and the University of Sydney, Australia. To Dean Grant Hammond of Auckland (now a Justice of the High Court of New Zealand) and Dean James Crawford of Sydney (now Whewell Professor at Cambridge University) I express my very sincere appreciation to them for the high level of support and accommodation they provided me. Their assistance was indispensable to my re-vitalized perspective for this writing project.

During my Spring sabbatical in 1992, I held two research appointments at the Faculty of Law, Trinity College, Dublin University and at the Faculty of Law, Cambridge University (where I as a Visiting Fellow at Wolfson College as well).
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Further revisions of writing this Article were undertaken during the time of these affiliations as well as during 1992 and 1993. The “final” phase of writing was concluded in late 1994—with constructive criticisms and revisions being made to the manuscript thereafter.

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This Article is dedicated, with respect, to an individual who has not only inspired me as a teacher and quickened my intellectual spirit as a scholar but allowed me, in turn, to endeavor to teach the Gospel of Economic Jurisprudence to countless students over the years. As a wise, erudite, and compassionate judge and educator, this individual has, more than any person in contemporary society, shown how innovative bridges can be built in all the fields of Law and Economics. His creative genius is, put simply, AWESOME; and I salute and acknowledge my lifetime debt of professional gratitude to Judge Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit.
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I. INTRODUCTION

It has been suggested that, "most people are ignorant about most matters," and thus fail to recognize that for every right of responsible citizenship or property ownership conferred by the government, there is a co-ordinate responsibility that it be exercised reasonably or effi-

ciently.4 This observation appears to be borne out by the growing trend among consumers in buying major appliances that, by all measures, simply defy common sense.5 Objective, rational decisionmaking is, sadly, neither a goal nor a result in a plethora of everyday business decisions.6 Indeed, it can be said that the notion of an average, ordinary, reasonable—economically motivated—person is becoming more and more of a myth.7 It is impossible to undertake a logical analysis of people's actions when those actions are mired in personal motivations.8

As legislators are guided more by the development of political agenda policies that appeal to constituent interests and catch the flavor of the moment instead of being motivated by objective goals of efficiency and fairness,9 the judiciary should pursue the quest for the establishment of broad general principles which can, through a mode of analysis, be developed and applied in substantial furtherance of stated constitutional prescriptions or statutory goals.10

It is becoming more apparent that it remains for the courts, in exercising their inherent parens patriae powers, to fill the void that consumers and legislators alike are creating for themselves in not facing the need to be economically minded and practical in their market place decisions. One widely respected view is that courts are properly concerned with fairness while economists should be concerned with efficiency.11 I suggest that there should be no wide chasm between

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4. A burden of common citizenship is realizing restrictions on use are often imposed upon ownership and that "no individual has a right to use his property so as to create a nuisance or otherwise harm others." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987).
fairness and efficiency; and, indeed, practical reasoning directed toward implementation of the standard of reasonableness should be the goal of consumer, legislator and judge.

If, from a micro-economic point of analysis, more and more individuals disregard economic factors in their day-to-day decisions, it becomes especially important for the judiciary to ensure that macro interests of society are considered and, thereby, simple and basic economic principles be engrafted to their market place decision. Indeed, judges have an obligation to make decisions that are consistent with efficiency simply because that is an intrinsic part of what should be termed a reasonable decision. Interests, this quest for a balanced (economic) response to living has early historical underpinnings in the writings of Aristotle and the early Christian Fathers.

It has been suggested that the concept of reasonableness be substituted for both legal and moral rightness. I shall go further in this Article and suggest reasonableness incorporates the goal of economic efficiency and that it is tested or shaped by a simple cost-benefit model that has its legal etiology in the equitable principle of balancing that, in turn, has its roots in the principle of Sic utere tuo ut alienum non laedas, or "So use your own property as not to injure your neighbor." Here is to be found the guiding standard that Justice Antonin Scalia seeks to unify and bind the law, that I submit operates as a fundamental truth at both trial and appellate levels of decisionmaking.

What is a reasonable course of action is a fact-sensitive issue and is reached by utilizing a cost-benefit standard that balances the total costs against total gains. In theory, the most efficient course of action should emerge because it achieves "the greatest gain in value at

12. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). When it becomes obvious individuals can no longer cooperate in a voluntary manner to advance their mutual obligations, the state must intercede to assure this. Thomas Hobbes, Leviathan 223-28 (C.B. MacPherson ed., 1968).
17. See Scalia, supra note 10, at 1183, 1185.
18. A redistribution of costs and benefits is appropriate under the traditional cost-benefit analytical test if the redistribution yields either a net positive benefit or if the redistributinal effects of the change can be acknowledged as beneficial. Frederick Anderson et al., Environmental Protection: Law and Policy 599 (2d ed. 1990).
the least expense."19 Stated otherwise, what is reasonable will depend ultimately upon the extent to which a sustained and compensable injury is proved.20

Lower or trial courts are confronted almost daily with the need to make determinations for which no broad, discernible general principle of law is available. Thus, the totality of circumstances test regarding the reasonableness of a particular situation becomes the standard by which a factual determination is made.21 A counter argument suggests appellate judges should resist, whenever possible, application of the totality of circumstances and balancing tests because they are expositors of the law, not lower court fact finders; and because at the appellate level, "the Rule of Law, the law of rules" should "be extended as far as the nature of the question allows."22 Such an argument fails to recognize the inextricable connection or relationship between balancing and its application in initial decisionmaking by the consumer through all phases of judicial and legislative analysis.

Balancing of one form or other—be it of facts,23 rules24 or results25—is to be found as an inherent part of the analytical process in all legal decisionmaking.26 If the word, "balancing," is off-putting, it should be regarded as but a synonym for "consider" or "take into account."27 The key should be to avoid semantic exercises which unduly obfuscate the primary goal for the courts of reaching reasonable decisions, or stated otherwise, those that are just, fair and wealth maximizing (e.g., efficient).

A study of the law of nuisance will serve as a paradigmatic focus for a consideration of the morphogenic or evolutionary exposition and development of the principle of reasonableness realized through application of the balancing of utilities, conveniences or costs, versus benefits in specific reference to the revised doctrine of *sic utere,*28 Indeed, it is within the crucible of nuisance law that the practical foundations and the tests of reasonableness and economic efficiency are realized in

20. See id. at 1317 passim.
24. Id. at 598 passim.
25. Id. at 600.
26. Id. at 601. Indeed, practical reasoning alone dictates the use of the balancing test. See Posner, supra note 3, at 891.
27. See McFadden, supra note 23, at 631.
both their original development and contemporary application. Stated otherwise, it is within nuisance law where the seedtime of economic jurisprudence flowers. There is a symbiotic, if not an inextricable or binding, relationship between both.

II. TOWARD A NEW ETHIC IN THE LAW OF PROPERTY

A. The Comprehensive Approach

Property has, at various times, been shaped by objective, technical definitions and by historical interpretation and re-interpretation.\(^{29}\) These efforts have been challenged recently as being defective and ill-conceived because of a flawed basic assumption. Namely, “that property is objectively definable or identifiable [totally] apart from social context; and that it represents and protects the sphere of legitimate, absolute individual autonomy.”\(^{30}\) Acceptance of a new “comprehensive approach” to property has been urged as a corrective measure of interpretation;\(^{31}\) one that sees property not as an autonomous individual right of assertion against the collective but rather an embodiment and reflection of an internalized tension between the individual owner and the collective.\(^{32}\) Under this new, comprehensive approach, it is urged that the scope of individual interests are subject to both collective definition and limitation,\(^{33}\) even though acknowledgement is made that in a modern, pluralistic society, an “alignment of individual and social interest, if it ever existed, exists no more.”\(^{34}\)

Nonetheless, this approach to property advocates a new, analytic vision which, if realized, would enhance and heighten, and thus clarify a construct for determining, through a balancing of competing interests, the extent and application of the rule of reasonableness by the courts in adjudications they must decide\(^{35}\) especially within the law of


\(^{30}\) See Francis S. Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691 (1938).

\(^{31}\) Underkuffler, supra note 29, at 128.

\(^{32}\) Id. at 129.


\(^{35}\) Underkuffler, supra note 29, at 139.

\(^{36}\) Id. at 145. See generally Richard A. Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & Econ. 201 (1971)(exploring economic rationales for protection of property interests).

\(^{37}\) See Underkuffler, supra note 29, at 146. This comprehensive approach would assist also in shaping the perimeters of analysis in 5th Amendment Due Process issues as well as Takings Clause jurisprudence, public trust, waste and public
nuisance where inevitable balances between individual and collective integrity must be struck. Thus, under the comprehensive approach, not only is recognition made of "the individual's need to develop the capacities of self in the context of relatedness to others," but emphasis is placed upon the interrelatedness of individual autonomy and social context.\textsuperscript{36} By viewing a collective context as necessary for the definition and exercise of individual rights, the comprehensive approach to property forces us to rethink the relationship between the community and individual rights. It is a step toward rapprochement of ideas of individual liberty, individual autonomy, and collective life.\textsuperscript{37}

B. A Sociobiological Connection?

Recently, building upon the theories of Hirshleifer regarding the relationship between evolution and economic theory,\textsuperscript{38} and his proposal that a sociobiological "connection" here explains the development of law,\textsuperscript{39} William H. Rodgers, Jr. has sought to give renewed interpretation to this theory by showing its contemporary significance to nuisance law,\textsuperscript{40} and thereby seek to use it as a "counterpoise to economic analysis."\textsuperscript{41}

Obsessive-compulsive behavior plagues many economists who have traditionally sought an understanding of the law through use of a model that casts the average consumer as a rational maximizer of self-interest.\textsuperscript{42} Today, that model is a false one. Similarly, philosophers in opposition to this theory advocate that theories of justice should be recognized as based upon theories of social contract.\textsuperscript{43} This, too, is

\bibitem{36} Underkuffer, supra note 29, at 147. It has been suggested that there are but two underlying purposes of Real Property Law: one being to assure land be put to its most productive use and the other that land be used for humane uses. "Interests in productivity and humanity, in efficiency and equity, will often be jointly served by the same real property rule. Sometimes, however, they will not . . . ." Paul Goldstein, Real Property xxI (1984).
\bibitem{37} Underkuffer, supra note 29, at 147.
\bibitem{40} William H. Rodgers, Jr., Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law, 10 ECOLOGY L.Q. 205, 220 (1982).
\bibitem{42} See Rodgers, supra note 40, at 205.
\bibitem{43} See JOHN RAWLS, A THEORY OF JUSTICE (1971).
challenged as being developed around false behavioral assumptions. What is needed, it has been urged, is a realization and acceptance of biological theory—certainly as no definitive response to legal analysis here—but more as a means of offering practical explanations of the behavioral preferences of human beings. Although far beyond the scope of this Article, it is nevertheless important to present briefly a glimpse of this new sociobiological approach to legal analysis in order to thereby understand the full scope of contemporary thinking and to see perhaps if sociobiology can in fact be used as an economic counterpoise in the law of nuisance.

A comprehensive theory of property, guided as such by sociobiological imperatives, recognizes a holder of property rights as capable of possessing three types of property: core or “human” property taken under terms specified by the holder; entitlements, or private property, taken only with proper compensation; and what has been recognized as social or provisional property interests, or an interest in resource commons, redefinable to the holder’s detriment without compensation.

It is within the law of nuisance that confirmation of the idea that human property is protected by right, and utilitarian or social property is vulnerable to uncompensated redefinition is seen. Although such a biological rights theory cannot be taken as a full explanation of nuisance law, it focuses renewed attention on the reality that courts express a “consistent aim to get the most out of conflicting uses.” Accordingly, “[m]ore is better so long as the basics are protected.” In its most classical form, then, nuisance law is viewed as but an effort to reallocate wealth in a finite world of resources. Its application as law “yields a working illustration of friction minimization” or the use of socially defined “best practices,” constrained by the resources of the party litigants to avoid unreasonable interference with the property rights of parties in interest.

Sociobiology provides a “systematic study of the biological basis of all social behavior.” The fundamental premise of sociobiology is that

44. See Rodgers, supra note 40, at 206.
45. Id.
46. Id. at 214-15.
47. Id. at 207.
48. Id. at 221 passim.
49. Id. at 221.
50. Id.
51. Id.
52. Id. at 219.
53. Id. at 220. See also 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 1.1, at 3-4 (1986)(positing that individuals generally utilize property to minimize interference with the property of others).
54. EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS 595 (1975). Sociobiology, then, focuses broadly "on animal societies, their population structure,
man has been programmed, through evolutionary biology, to a predisposition, either conscious or unconscious, to provide aid to other human beings in such a way that results in an ultimate benefit to himself.\(^5\) Placed within a legal context, this premise might be recast roughly as a rule of friction minimization; and a rule that would guide judges who view human nature as controlled by the tenets of sociobiology. Thus a recognition would be made that,

After their basic needs are satisfied, individuals in human society long have been expected to sacrifice for the benefit of neighbors. Human altruistic behavior extends to a variety of activities (sharing food and knowledge, helping in times of danger), and it is thought to have evolved because of the wide range of human reciprocal relations. Crudely put, an individual is kind and generous to others because it is useful to have them return the kindness and generosity. Biological theory supports a rule of best efforts to prevent resource usage from working to the disadvantage of another member of the society. Thus, in protecting human property and in enforcing reciprocity, nuisance law confirms the themes of biological property theory.\(^5\)

A biological property theory, then, is recognized as having three dimensions: one being but a simple recognition that the theory itself is inherently rights-oriented (with the limits of human manipulability being only hinted). The second dimension recognizes property "is that won by human effort unaided to any substantial degree by slavery or by technology."\(^5\) And, the third dimension anticipates human limitations on the extent to which national wealth can be appropriated will be imposed, with wealth accumulation being restricted as such by biological realities.\(^5\)

Although no panacea, evolutionary approaches to legal analysis and jurisprudence offer new opportunities to probe and thus evaluate human nature and the relationships that give rise to human conduct between individuals and their environment.\(^5\) Scholars can provide a directional basis here, but it remains for sophisticated judges to test the validity of these biological theories and thereby advance a fresh, contemporary view of decisionmaking.

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56. Rodgers, supra note 40, at 220.

57. Id. at 211.

58. Id.

59. Elliott, supra note 39, at 76-81.
C. Economic Liberties Under Siege: The Need for Ordered Liberty

Throughout the last half-century, judicial protection of economic liberties has been largely non-existent. Indeed, since 1937, the Supreme Court has not struck down a single economic regulation on substantive due process grounds. Although the Court has never explicitly rejected the idea that the liberty guaranteed by the fifth and fourteenth amendments includes some protection of economic rights, its scrutiny of economic and social legislation is so lenient that no law is ever likely to be declared invalid.

In order to assure enhanced protection of economic liberties, the most obvious judicial stance to take would be the revival of substantive economic due process. After acknowledging economic rights as "implicit in the concept of ordered liberty," and thus worthy of substantive due process protection, the Supreme Court could choose to afford due process protection through either a heightened means-end scrutiny or merely ends scrutiny. A means-end test, although not only inadequate, but exceedingly problematic as well, is nonetheless preferable to no examination at all.

Under a regime of means-end scrutiny alone, legislators would be tempted to try to circumvent invalidation of economic legislation through creative drafting. Although judges would be free to look behind stated motives, decisions based solely on a disagreement with legislative conclusions could always be criticized as mere substitutions of judicial for legislative wisdom. Moreover, means-end scrutiny alone would not define an area of clearly protected economic rights. By nature, evaluating the closeness of ends and means is more subjective than merely identifying the ends of a law.

The revival of ends scrutiny received a significant boost in Keystone Bituminous Coal Association v. DeBenedictis where, in a 5-4 ruling, the High Court upheld a statute that prohibited the removal of coal by underground coal operators to the point of causing land subsidence; and in so acting found neither a taking nor an interference with contract, even though both occurred. What the Court said was, "... this law is fine because it is fine. That is, the Court examined the purposes of the law, thought the protection of surface interests more compelling than either the mining of coal or the honoring of musty bargains, and

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61. Id. at 1363.

62. Id. at 1377. See Posner, supra note 7, at 625-34.


64. See Note, supra note 60, at 1378.

65. Id. at 1379.

66. Id. at 1379-80.

gave the law its blessing." What is seen here in *Keystone*, then, is “unabashed substantive review” that gives a clear signal to the lower courts that it is perfectly acceptable to “second guess the public legitimacy of legislative acts.”

If the Court were unwilling to revive fully economic due process, it could still examine the validity or invalidity of the relationship between an economic statute’s means and its end by utilizing a “nexus” test in order to thereby determine whether such a connection existed between a challenged statute’s desired ends and its means for effecting those ends. Additionally, it could import means-end scrutiny into the Due Process Clause and thus energize the moribund “rational-relation” test, or define property in a more expansive manner so as to thereby extend “the heightened means-end scrutiny of the takings clause to much government action.”

D. Formulating a New or Revitalized Economic Ethic of Property

Calling for “a constitutional ethos of economic liberty,” and at the same time recognizing the inherent difficulty in achieving this task, Justice Antonin Scalia has admonished that the first step to be taken in this process is recalling society to that belief in economic liberties which the founding fathers of the Republic shared. The complexity of this task is heightened by the realization that the root cause of this present lack of recognition extends well into as much modern theology as into contemporary social thought.

In the real world, what is often portrayed as a stark dichotomy between economic freedoms on one hand and civil rights on the other

70. See Note, supra note 60, at 1381.
74. Scalia, supra note 72, at 37. See also Richard H. Fallon, Jr., *Non-legal Theory in Judicial Decisionmaking*, 17 Harv. J.L. & Pub. Pol’y 87, 91, 92 (1994)(citing law and economics as well as critical legal studies as examples of such theories). It has been suggested that the real issue to be found when a comparison of the original Constitution is made with the present state of judicial interpretation is not the manner in which the status quo is to be protected but the types of incremental adjustments necessary to thereby re-establish the balance as it was set originally. Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Errors*, in *Economic Liberties and the Judiciary* 39, 45 (James A. Dorn & Henry G. Manne eds., 1987).
is but a difference in degree rather than one in kind; this being the case simply because all human liberties are dependent upon one another for their inherent recognition and safeguarding. The presupposition of relatively broad economic freedoms inherent in the operation of the free market has, in an historical sense, been the very “cradle of broad political freedom, and in modern times the demise of economic freedom has been the grave of political freedom as well.” Indeed, yet another practical reality is the fact that he who controls one’s economic destiny controls much of that individuals’ life as well.

The centrality of the economic dimension to everyday life is reflected in the vast bulk of civil business brought before the courts as a basis of litigation. Thus, “the vindication of economic rights between private individuals and against the government” becomes the centerpiece for most of the non-criminal “civil rights” cases here that are, in actuality, then to be seen as but disputes involving economic misunderstandings.

Absent clear and decisive directives for decision-making from the legislative and executive branches (together with the administrative agencies they have created), the best aid to developing a practical yardstick for judicial restraint is application of the standard of reasonableness to its deliberative consideration. As such, cost-benefit analysis becomes the structure for determining the extent to which reasonableness in fact is to be applied in holding for the plaintiff or the defendant. If the test of reasonableness is also to be discarded because of its alleged weaknesses, then the courts must remain captive of or lock-step respondents to a weak and fragile political process that, in itself, is often unable to ensure “that national policy does not stray too far from the social consensus.”

III. THE ORIGINS OF BALANCING

A. The Aristotelian Mean: The Classical Balancing

Aristotle, in Book 1 of his *Nicomachean Ethics,* states that every action and choice aims “at some good.” I argue that the most basic good that prudent men and women search for is economic well-being; for from that attainment, one can build security for subsequent social, philosophical and intellectual achievement. Just as it is suggested modernly no stark dichotomy exists between economic freedom and

75. See Scalia, supra note 72, at 31-32.
76. Id. at 32.
77. Id. See Posner, supra note 7, at 635-49.
78. See Scalia, supra note 72, at 32.
79. Id.
80. Epstein, supra note 74, at 39.
81. ARISTOTLE, NICOMACHEAN ETHICS (Martin Osterwald trans., 1962).
82. Id. at 3.
civil rights, so, too, do I contend no such status or divorcement was recognized clearly in Ancient History.

In recognizing the devisability of continuous entities or activities into parts—larger, smaller or equal—Aristotle suggests that the "equal" part is but "something median between excess and deficiency." The point of equipoise, in other words, between the balancing of the costs and benefits, or the pleasures and pains of an action, should be the median since "virtue aims at the median" and the median is the point of true excellence. The achievable mean of any action is to be defined by rational principles deduced by persons of "practical wisdom." Indeed, the mean is a characterization of virtue; and is a reference point for two vices—"the one of excess and the other of deficiency."

Loss and gain are inherent givens in voluntary fair exchanges. For "the just" to be attainable in such exchanges or just action recognized, however, there must be an "unqualified sense" of reciprocity which responds not to distribution nor rectification. Rather, the just is best considered as "the reciprocal return of what is proportional." Accordingly, if there is no proportionality, the exchange is neither equal nor is it fair. Need is the single standard by which all goods are measured for it is need that holds the community together as a unit. And, within the community, there must be a "kind of equality" established. Money, then, acts as a measuring standard for equality that "makes goods commensurable and equalizes them."

What is seen in the Nicomachean Ethics is a very early recognition and, indeed, initial structuring of an ethic which directs reasonable and prudent men and women to conduct their actions in a reasonable manner in the market place in order to achieve a mean of reciprocity in their fair dealings with one another. The achievement of this mean necessitates, I suggest, a balancing of rational (e.g., economic)

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83. Scalia, supra note 72, at 32-33.
84. See Aristotle, supra note 81, at 42.
85. Id. at 37.
86. Id. at 43.
87. Id. at 51.
88. Id. at 43.
89. Id.
90. Id. See Salkever, supra note 14.
91. See Aristotle, supra note 81, at 123.
92. Id.
93. Id. at 124.
94. Id.
95. Id. at 125.
96. Id. at 126.
97. Id. at 127.
principles of decisionmaking and "costing out" excesses over deficiencies, or in other words, economic advantages over disadvantages of a particular action to be taken. Reasonable persons, then, must make reasonable or economically motivated decisions if they are indeed to be seen as prudent and rational members of a functioning community or larger society.

B. Biblical Beginnings

In Biblical literature (c. 900 B.C.-A.D. 100), the earliest writings of the Pentateuch demonstrated clearly the societal concern with the day-to-day economic conduct and monetized economy. In early Christian days, the central focus of meaningful economic activity was, quite simply, but a "question of distribution at the micro level." For Jesus of Nazareth (c. 6 B.C.-A.D. 30), the blueprint for economic survival is recognized commonly as found within his Sermon on the Mount. There his words have been construed as suggesting that the most rational course to choose in order to meet issues of economic consumption is to avoid anxiety about them. Thus, "the people solve the economic problems as a byproduct of adherence to their pilgrim goal" of attaining the Kingdom. To be a pilgrim one takes risks and lives with uncertainty; yet, by trusting the Father and recognizing one's personal dependence on him, the pilgrim places a low valuation on present material needs in preference for future spiritual rewards. Any satisfaction of material needs comes as a byproduct, then, of the pilgrim's quest for spiritual fulfillment.

1. The Golden Rule

In his Sermon on the Mount, then, Jesus enunciated a principle or norm for interactive living when he stated, "Whatever you wish that men would do to you, do so to them." The popular gloss given to this precept, as the Golden Rule, states one should "Do unto others as you would have them do unto you." Although the origin of the

101. Id. at 60 (emphasis added). See generally ALexANDER DEL MAR, HISTORY OF MONETARY SYSTEMS (Chicago, Charles H. Kerr & Co. 1896).
102. See Gordon, supra note 100, at 55.
103. Id. at 56.
104. Id. at 55.
105. Id. at 56. See generally JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988).
term, "Golden Rule," is obscure, the principle it embodies is found in one form or another in not only religious but ethical systems as well, and is thus not uniquely Christian. Accordingly, the Buddhist is guided by the principle that, "That which one desireth not for oneself, do not do unto others"; the Sikh by the principle, "Treat others as thou wouldst be treated thyself"; the Hindu by a version of the principle demanding, "Never do to others what would pain thyself"; and the Jew by the Talmudic declaration, "What is hurtful to yourself do not to your fellow man." For the Greek Stoics, one of their essential obligations of life was acceptance of the maxim that, "What you do not wish to be done to you, do not do to anyone else.

It remained for Jesus to restate or re-work the negative form of these rules, precepts or principles into a positive admonition. Thus, while countless others had urged, "Do not do to others what you would not have them do to you," it was Jesus who preached, "Do to others what you would have them do to you."

In Paul's Letters (or Epistles), the Christian is urged to be self-sufficient and not impose himself as a drain on others. For the Christian with capital excesses, no message of dis-investment is preached. For Paul, all economic activity is to be promoted and pursued as but a simple excuse on behalf of a central obligation to Jesus. While he assumed an economic community of continuous growth and sustained development in those areas of his concern, it remained for Jesus to structure his message for "a stagnant economy on the brink of extinction as an entity."

What I see in the Golden Rule, as well as the early likeminded principles from other religious and ethical traditions, is a call that daily actions be regulated by what I term "economic self-respect", or if you will, "economic determinism"—this in addition, of course, to ethical norms of behavior to which I give a broad interpretative gloss. Thus, being of proper ethical conduct was but promotive of good business. Conversely, if one were unethical, charged usurious rates of interest for commercial or personal loans and cheated, this would be

108. Id.
110. Id. at 69.
111. Id.
112. Id.
114. Id. at 274-75.
115. Id. at 275.
116. Id. at 57.
117. Id. at 68.
118. Id. See also SHEPARD B. CLOUGH, THE ECONOMIC DEVELOPMENT OF WESTERN CIVILIZATION 19-67 (1959); M.I. FINLEY, THE ANCIENT ECONOMY (1989); SILVER, supra note 15.
poor or bad business and, in the long run, be uneconomic with the subsequent loss of business resulting from such practices. What I suggest, then, is that not only in ancient times, but modernly as well, no stark dichotomy exists between economic freedom and civil rights, and I contend further such a status of divorcement is wrongful.

a. Rawls and a Principle of Intergenerational Justice

I think it not far fetched or strained to suggest, as Rawls, that a standard of economic inter-generational justice be developed and applied. Accordingly, under such an operational standard or “new” Golden Rule, the present generation should not encumber future generations with economic disharmonies and burdens caused by fiscally unsound actions that increase the national debt and cause extended borrowing to pay this debt thus forcing a permanent imbalance of payments. Stated simply, the present generation should do unto the next generation as we would (should) do unto ourselves. Just as the biblical Golden Rule specifies no particular content, yet seems to be bursting with self-evident meaning and operative significance, the economic inter-generational Golden Rule should be guided by an invisible hand or standard of reasonableness that mandates sound economic decisionmaking at both legislative and judicial levels—especially when individuals in the market place show themselves to be lacking in economic sophistication or acting under a “veil of ignorance.”

C. Early Christian Fathers and Economics

There is continuing argument over whether the teachings and doctrinal principles of the early Christian Fathers were independent of both economic and humanitarian considerations or whether, in point of fact, economic values directed religious thought. Rather than acknowledge a natural right to private property, the Fathers taught that all things enjoyed a commonality of “ownership” and use. Accordingly, obligations were imposed upon the rich to share their resources with the poor and, as an ideal, promote a “common use of riches.” Normally, this idea of sharing was understood as meaning alms giving and did not embrace theories of common production. Interestingly, compulsory alms giving was not advocated. No concern was exhibited by the Fathers about issues of economic inequality except, that is,
when such inequality “involved private riches in excess of what was morally safe for the owners, or where it was a sign of lack of compassion on the part of the rich for those living in extreme poverty.”

While Theodoretus argued in 435 A.D. that the principal service the wealthy performed to the poor was developing commercial markets for the distribution of their products, others held to the idea that man’s only vital concern was to prepare for the after life. Since the early Christian lived, as modern ones do today, within a civil law system of governance that promoted and maintained various social institutions, he, of necessity, needed to acquire in some manner the necessities of life. Thus, the early Christian Fathers accepted, substantially as unchangeable facts, the political and the social institutions of the day.

The only remedy proposed to meet poverty was alms giving to the needy. The wealthy were not encouraged to abjure their wealth. While individual Christians were taught to subordinate their temporal objectives to more spiritual ones, they were not told to reject as impermissible a limited measure of enjoyment that came from the commodities of the market place. Man was allowed to enjoy all the things of this earth that God had created for him. Accordingly, Christianity then (as perhaps still in main line philosophy today) had no specific mandate to either promote or to impair the advancement of temporal prosperity that was economic in character or purpose.

One prominent medieval moral theologian, Cardinal Cajetan, in commenting on the *Summa Theologica* of St. Thomas, acknowledged that “everyone is permitted to wish for himself and his family full participation in the human felicity to which all men are eligible, and to strive to deliver them from the necessity of manual and commercial labor.” So it is seen that in medieval moral theology, property, as a

127. *Id.*
128. *Id.* at 18-19.
129. *Id.* at 13.
130. *Id.*
131. *Id.* at 20. Indeed, voluntary poverty was neither recommended nor approved except in very few cases for individuals who had an “aptitude for perfection.” *Id.* at 61.
132. *Id.* at 30.
133. *Id.*
134. *Id.* at 31. A new, revised Roman Catholic Catechism—while affirming traditional tenets of faith—identifies a range of new sins that are products of modern day society. The new economic sins make it morally illicit to charge excessive prices designed to speculate “on the ignorance or distress of others”; or for that matter make “the value of goods vary with a view to profiting to the detriment of others. . . .” Alan Riding, *New Catechism for Catholic Defines Sins of Modern World*, N.Y. TIMES, Nov. 17, 1992, at A1.
lawful institution, was not only accepted but embraced without question.136

1. Satisfying Economic Needs

From very early times, then, economy of effort and the quest for efficiency have been major societal goals.137 Accordingly, “goods of first order”—necessaries and comforts (e.g., food, drink, clothing and shelter)—must be achieved before goods of higher order are sought to be regulated.138 The most important of all human endeavors is the attempt to make provision for the satisfaction of needs, for with this satisfaction comes well-being, the foundation of all other needs.139 Indeed, it has been suggested that, “all the goods an economizing individual has at his command are mutually interdependent,”140 and that, furthermore, the preservation of life and well being are only achieved in combination with other goods.141

Classically, Adam Smith postured that an individual could only be judged rich or poor by “the quantity of that labour which he can command or which he can afford to purchase.”142 Money, then, is best viewed as a natural product of human economy143 and a means to attain well-being.144 It is a medium through which a harmony of needs is achieved and thus what is popularly understood as the “good” or Elysian life is assured.

139. Id. at 77.
140. Id. at 75.
141. Id.
142. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3 (1937). Smith also, however, observed that as to the social and economic differences between the rich and the poor,

the rich consume little more than the poor . . . they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants. . . . When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to be left out in the partition. These last too enjoy their share of all it produces. In what constitutes the real happiness of human life, they are no respect inferior to those who would seem so much above them.

143. See MENGER, supra note 138, at 262 passim.
144. Id. In early times, a variety of saleable commodities were used as money—e.g., cattle, salt chunks, cakes of whey, beaver skins and precious metals. Id. at 312-20.
The quest for need-satisfaction is based upon knowledge\textsuperscript{145} and foresight.\textsuperscript{146} And, when knowledge is absent, an ignorance of objective and "planless" activity result.\textsuperscript{147} Indeed, it could be posited that without knowledge, a "veil of ignorance" is drawn over the ideal of rational self-interest as the motivating force in the quest for economic justice.\textsuperscript{148}

It has been said that, "the degree of economic progress of mankind will still, in future epochs, be commensurate with the degree of progress of human knowledge."\textsuperscript{149} Thus, in cases where average, ordinary reasonable persons in the market place cannot be found, the courts and the legislatures must, through an inherent \textit{parens patriae} power, make decisions that are fundamentally sound economically.

D. The Formative Influences of Lord Coke, Holmes, Pound and Posner

In 1628, Lord Edward Coke stated, "Reason is the Life of the Law; nay the Common Law is nothing else but reason."\textsuperscript{150} In 1897, Oliver Wendell Holmes, Jr., expressed his concern that the judges were not adequately recognizing their duty to weigh "considerations of social advantage,"\textsuperscript{151} social experience, or in other words, social policy, and to recognize further "how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."\textsuperscript{152} He urged the lawyers, as a class, to consider "more definitely and explicitly the social advantage on which the rule they lay down must be justified. . . ."\textsuperscript{153} And, interestingly, Holmes called upon lawyers "to seek an understanding of economics."\textsuperscript{154} In so doing, he acknowledged the cost-benefit theory of legal analysis by observing, "We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know that we are doing so when we elect."\textsuperscript{155}

\textsuperscript{145} \textit{Id.} at 80.
\textsuperscript{146} \textit{Id.} at 89.
\textsuperscript{147} \textit{Id.} at 80.
\textsuperscript{148} \textit{See Rawls, supra note 43, at 128, 129, 137. See also Raymond B. Marcin, Justice and Love, 33 CATH. U. L. Rev. 363 (1984)(questioning whether defining "justice" in terms of human acquisitiveness crushes or shapes the ideal of love as the basis of justice).}
\textsuperscript{149} \textit{See Menger, supra note 138, at 74.}
\textsuperscript{150} \textit{Edward Coke, Commentary Upon Littleton 97b (London, Elizabeth Nutt & R. Goffing, 11th ed. 1719).}
\textsuperscript{151} Oliver Wendell Holmes, \textit{The Path of The Law}, 10 HARV. L. REV. 457, 467 (1897).
\textsuperscript{152} \textit{Id.} at 466.
\textsuperscript{153} \textit{Id.} at 468.
\textsuperscript{154} \textit{Id.} at 474.
\textsuperscript{155} \textit{Id.} (emphasis added).
Roscoe Pound tried to develop more clearly, and thus expand, a theory of economic jurisprudence in 1943 by stressing the need, in legal decisionmaking, to weigh or value claims or demands with other such claims or demands, recognizing also that, in the Common Law, social interests are synonymous with public policy.

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands... so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.

It remained for Judge Richard A. Posner to chart and, indeed, spur the development, in the last quarter century, of the application of economics to a widening range of legal fields and to show eloquently that not only is efficiency a significant goal in modern society, but the very basic theory of the Common Law is best understood as a system of promoting economic efficiency. The most direct and vivid paradigmatic example of this fact is seen through the balancing mechanisms of the Restatement (Second) of Torts which mandate each time a charge of nuisance is raised, economic posturing occurs that, at least in theory, advances the ultimate goal of efficiency or the reasonable use and accommodation of property interests. The balancing tests, thus, have a built-in economic stabilizing mechanism in their very utilization.

157. *Id.* at 4.
158. *Id.* at 39.
160. *Id.* at 23.
162. William D. Manson, *A Reexamination of Nuisance Law*, 8 Harv. J.L. & Pub. Pol’y 185, 189-191 (1985). Those factors to be weighed or balanced in assessing the gravity of the offending harm to the plaintiff versus the utility of the offender's conduct consist of: the extent of the harm involved and its character; the social value attaching by law to the type or use of the enjoyment invaded; and the suitability of either the use or the enjoyment to the character of the locality together with the burden on the injured person of avoiding the harm. Restatement (Second) of Torts § 827(a) (1977). In assessing the social value attaching by law to the primary purpose of the conduct, not only will the suitability of the conduct to the character of the locality be considered but the impracticability of
IV. EARLY ENGLISH HISTORY: FORMULATING PRECEDENT

A. Sic Utere as a Guiding, Fundamental Principle: An Initial Statement

No doubt the most well-established or inherent principle of the law of nuisance163 as well as its most contentious164 is to be found in the principle of Sic utere tuo ut alienum non laedas.165 This maxim was a form of strict liability that made actionable any interference with another’s enjoyment of their real property.166 Some regard the principle to be mere verbiage—this because the application of various balancing tests often leaves the plaintiff to bear a loss as damnum absque injuria.167

The more reasonable and preferred posture, however, is to consider sic utere as of incalculable merit as a framework for shaping the perimeters of the initial or fundamental inquiry into whether a particular set of facts may be characterized as being a nuisance. Stated otherwise, the principle tests when a defendant’s conduct is unreasonable or invasive of a plaintiff’s rights, not when it fails a test shaped and directed by social costs or benefits. Thus, the proper emphasis is placed, through use of the balancing test, on testing patterns of behavior—reasonable and unreasonable—and not on pursuing “a particular outcome pattern.”168

It is the individual property owner who—after utilizing a balance of utilities or conveniences test in order to determine those elements necessary by his own personal standards for a decent existence on his property—revives the underpinning principle of sic utere and blends it together, as a melange, with a basic balancing of behavioral patterns

164. St. Helen’s Smelting Co. v. Tipping, 11 Eng. Rep. 1483 (H.L. 1865). This case is regarded improperly as the progenitor of the balancing of utilities doctrine. See also Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc., 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959); Rose v. Socony-Vacuum Corp., 173 A. 627, 629 (R.I. 1934). Indeed, a classic example of what must be recognized as “the symbiotic relationship between economics and legal principles” is seen clearly in Fontainebleau. Macey, supra note 73, at 112-13.
166. 2 WILLIAM BLACKSTONE, COMMENTARIES 56 (New York, W.E. Dean 1852).
167. JESSE DEKEMINIER & JAMES E. KRIER, PROPERTY 1000, 1001 (1981); Jeff L. Lewin, Compensated Injunctions and The Evolution of Nuisance Law, 71 IOWA L. REV. 775, 775 n.1 (1986); Manson, supra note 162, at 206 passim; Jeremiah Smith, Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor, 17 COLUM. L. REV. 383, 386-90 (1917).
by a defendant that are potentially injurious to him as a plaintiff landowner. Inherently, then, there are two balancing tests performed: one by the property owner to determine the reasonableness of his own actions vis-à-vis the maintenance of a decent existence on the particular property, and one by the same property owner in evaluating the offensive or injurious nature of his neighbor's conduct which may, in turn, lead him to seek injunctive relief through an action for nuisance. The vitality of the balancing test of costs versus benefits is sustained anew when the adjudication of claims of nuisance is undertaken by the courts themselves.

1. Characterizing Protected Interest Categories: Easements and Natural Incidents of Ownership

In the 1590s, the remedy of nuisance was viewed more and more as a personal wrong and less of a proprietary assault. Policy questions were being raised about standards of good neighborliness vis-à-vis the reasonable use of one's property. Borrowing from Ulpian, the principle of sic utere tuo ut alienum non laedas was introduced as a framework for resolving nuisance conflicts. The open-ended vagueness of the principle played havoc with questions the nature of: When does a neighbor become a nuisance?; and, may a landowner build a building that blocks the access to light and air by his neighbor? While it was relatively easy to hold the enjoyment of light and air were but "commodities" or incidents of ownership of property rights, with infringements thereof being ipso facto a tort, applying this comprehensively was difficult; for the difficulty arose in the fact that some rights of ownership were seen as independent and not attaching to the occupation of property because of grant or long usage. Thus, it became more convenient to classify and divide nuisance actions into two categories of interest: those for which existence was recognized as

170. Id.
171. Id.
172. Id. Under the Common Law Doctrine of Ancient Lights, if a landowner receives sunlight across adjoining property for a given time period, he is entitled to continue receiving unobstructed access to that sunlight across the adjoining property. Prah v. Maretti, 321 N.W.2d 192 (Wis. 1982). But see Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357 (Fla. App. 1959), where the Florida District Court held that in the absence of a contract or statute, a property owner does not acquire a presumptive or implied right to the free flow of light and air across adjoining land. Thus, a lawful structure causing injury to another by cutting off light and air—whether or not erected partly for spite—will not sustain an action for damages or one for injunctive relief. See generally Sophia Douglass Pfeiffer, Ancient Lights: Legal Protection of Access to Solar Energy, 68 A.B.A. J. 288 (1982).
173. Id.; BAKER, supra note 169, at 355.
a consequence of grant or prescription (e.g., easements) and those regarded as the natural incidents of land ownership.\textsuperscript{174}

When easements were interfered with, as a matter of course, an action on the case lay. Since the matter was one of property, there was no need to balance the interest or conveniences of the parties or entertain policy issues.\textsuperscript{175} Relief for nuisance actions became more troublesome during the sixteenth and seventeenth centuries when the very scope of the tort came under re-examination.\textsuperscript{176}

Although it was recognized firmly that noise, heat and smell could give rise to a nuisance under specific facts, it was also during this period when the reality soon came upon the legal system that not every inconvenience could be the basis for an action in nuisance. Some type of balance had to be struck "between a man's freedom to do as he liked with and upon his own property, and his duty not to injure his neighbour."\textsuperscript{177} Over time, it became settled that if some activity were found to be a nuisance, this conclusion was not subject to reconsideration regardless of the utility of the questioned acts.\textsuperscript{178}

Even though the standards of reasonableness, of necessity, then as now, were fluid and flexible, a basic framework of analysis, through use of \textit{sic utere}, was developed that stated,

\begin{quote}
Whether an activity amounts to a nuisance depends on whether those affected by it ought reasonably to be expected to put up with it; and although the law does not protect oversensitivity, it will provide a remedy against anything insalubrious or offensive which renders the enjoyment of life and property unduly uncomfortable.\textsuperscript{179}
\end{quote}

During Victorian times, because of the need to develop England's national economy, the standard of reasonableness was set at a rather low level; with the result being that the Common Law of nuisance was regarded as largely impotent in controlling a number of the unpleasant and injurious processes associated with industrial growth.\textsuperscript{180} It remained for Parliament to enact specific legislation in order to deal with these vexatious abuses.\textsuperscript{181}

\section*{B. William Aldred's Case (1611): The Beginning}

At Common Law, to be actionable, a nuisance not only had to result in an \textit{injuria}, or legal injury, but \textit{damnum}, or material damage as

\begin{footnotes}
\item[174] Id.
\item[175] Id. at 356.
\item[176] Id. at 357.
\item[177] Id.
\item[178] Id. at 358.
\item[179] Id.
\item[180] Id.
\item[181] Id.
\end{footnotes}
The extent to which the necessary element of injuria being *omne id quod non uire fit* (anything wrong freely done), was never defined in a commonly accepted manner. Cases in the 1300s found in the *Year Book* placed wrongs of this nature as interferences with either the actual property owner or present possessor's "natural rights" which arose as such by and through the inherent operation of property law with no dependency for relevance or recognition upon either an express grant or by prescribed use. The extent of these natural rights incident to seisin of freehold land, together with the limitations of *damnum* and *injuria*, provided continuing sources of judicial uncertainty and thus debate.

The landmark decision in *William Aldred's Case*, handed down in 1611, was an attempt by Sir Edward Coke to define and thus clarify the "natural rights" of seisin. In his report of this case, Lord Coke summarizes the facts succinctly: defendant erected a hog sty near plaintiff's house which not only had the effect of befouling the air in the plaintiff's house but, additionally, cutting off his light. The plaintiff won his action on the case against the defendant at the Norfolk Assizes and was awarded damages. An appeal was taken to the King's Bench where the defendant argued:
That there was no damnum to the plaintiff in the "corrupted air"—because the law should not favor delicate wishes, "one ought not to have so delicate a nose, that he cannot bear the smell of hogs";¹⁹⁰
(2) that the blocking of windows was permitted by a local custom;¹⁹¹ and
(3) "that the building of the house for hogs was necessary for the sustenance of man."¹⁹²

These pleadings presented two interesting matters. First, they illustrated and thereby validated the extent to which an action on the case for nuisance could be maintained.¹⁹³ Heretofore, the availability and use of remedial relief for a claim of nuisance was restricted to the assize of nuisance that had the practical effect of excluding a number of potential plaintiffs (e.g., leaseholders, guardians) because they were not owners of a freehold estate.¹⁹⁴ By the use of the action on the case by the defendant-appellant in William Aldred's Case, judicial acceptance of the remedy itself was established.¹⁹⁵ It confirmed furthermore not only the availability of this remedy for nuisance to non-freehold interest holders (e.g., lessees for year and tenants in common) but confirmed the availability of relief to those individuals injured by acts of nuisance caused by nonfeasance or individuals other than, for example, the adjacent freeholder.¹⁹⁶

The second point of interest presented in the defendant's pleadings on appeal was perhaps an even more substantial and enduring recognition, for this was the first time a clear claim of social utility was raised as a defense to an action for nuisance.¹⁹⁷ It was raised specifically through the pleading that the defendant's building of the hog house "was necessary for the sustenance of man."¹⁹⁸

In dismissing the defendant's case on appeal and upholding the damages award of the Norfolk Assizes, the Court, according to Lord Coke's report, enunciated two points relevant to nuisance law that, in

conveniences be undertaken by the courts if the issue is litigated or should sic utere be invoked?

¹⁹⁰. Coquillette, supra note 165, at 773 (citing William Aldred's Case, 77 Eng. Rep. 816, 817 (K.B. 1611)).
¹⁹¹. Id. (citing William Aldred's Case, 77 Eng. Rep. 816, 820 (K.B. 1611)).
¹⁹². Id. (citing William Aldred's Case, 77 Eng. Rep. 816, 817 (K.B. 1611)).
¹⁹³. See id. at 773, 774.
¹⁹⁴. Id. at 773.
¹⁹⁵. Id. at 774.
¹⁹⁶. Id.
¹⁹⁷. Id. at 775.
¹⁹⁸. William Aldred's Case, 77 Eng. Rep. 816, 817 (K.B. 1611). The court took no quarrel with the argument made by the defendant that the hog building was "necessary for the sustenance of man" and, further, that the lime kiln was "good and profitable." Id. at 821. Rather, consistent with my argument, the court essentially balanced the right of one property owner to act in a way that jeopardized the peaceful use and enjoyment by another property owner of his rights. Interestingly, the court chose not to discuss the additional defense argument that the smells from the hog building were de minimus. Coquillette, supra note 165, at 777.
turn, have been the source of considerable challenge over the succeeding years. The first was that if a plaintiff were to have the enjoyment of his land compromised by a defendant in such a way (e.g., unreasonable) as to abridge an absolute necessity of the plaintiff's full enjoyment of his land beyond purely aesthetic concerns—here, through the production of unwholesome air and clouded avenues of light—that plaintiff had sustained an actionable injury under the law of nuisance. It was clear, as a consequence of this holding, that a direct limitation on the "natural rights" of seisin had been set. Thus, the courts were allowed to insist that not only a legal wrong be proved but that injury to a thing of necessity be established as well. What was characterized as a necessity was recognized as a question of law; and this, in turn, meant in some cases the rule of necessity would allow courts to disallow some nuisances as a matter of law.

The second major conclusion from William Aldred's Case holding was a delineation of the rule of *sic utere tuo ut alienum non laedas* that thereby served as a structural response to defendants defense that the social utility of his business justified his interference with the plaintiff's rights of property. Stated simply, since the plaintiff had shown actionable damages to elements of necessity for his use and enjoyment of his real property, the court could not undertake the balancing of social utilities. Thus,

> [T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a Glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, ... and this stands with the rule of law and reason, ... *sic utere tuo ut alienum non laedas.*

It has been suggested that the court in William Aldred's Case most likely, "considered the requisite degree of damage as a matter of fact..."
already determined by the Norfolk jury’s finding that the *injuria* of nuisance existed, and saw as its task merely to determine, as a matter of law, whether the *damnum* was actionable.”203 Indeed, the rule set down here may be seen ultimately as but an attempt to shape a rule that made a reasonable attempt to preserve these property rights that were an inherent part of the natural enjoyment of the real property itself—all set within a social and demographic society that was expanding dramatically and making maintenance of open spaces a real struggle.204

C. *St. Helen’s Smelting Co. v. Tipping* (1865): Birthing the Balance of Utilities Doctrine, or The Case of Mistaken Identity

In August, 1863, William Tipping, owner of the Bold Hall Estate consisting of some 1,300 acres, maintained an action on the case for nuisance against St. Helen’s Smelting Company, that smelt cooper, for “noxious vapors” which were diffused on to the plaintiff’s neighboring land some one and a half miles away from the factory.205 At trial, the plaintiff claimed that the vapors not only damaged the trees and the shrubs on his estate but also bothered the employees and live-in occupants of the estate.206

The principal defense was that because St. Helen’s company was operating as a business when the plaintiff purchased his estate, he had, in essence, assented to the actions undertaken by this lawful business (or come to the alleged nuisance). Furthermore, since several factories were operational in the same area, it could not be shown directly that the defendant’s factory caused the alleged injury. The trial court judge, Justice Mellor, instructed the jury that:

>... every man... was bound to use his own property in such a manner as not to injure the property of his neighbours;... that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it.... [I]t was clear that in countries where great works had been erected... persons must not stand on their extreme rights... for if so, the business of the whole country would be seriously interfered with.207

In addition to restating the law of William Aldred’s Case, the Justice reiterated the *sic utere tuo* principle and disavowed the balancing of utilities doctrine though setting a limit on damages for those

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204. *Id.* at 779.
206. *Id.* at 1484.
207. *Id.* (emphasis added).
“things of necessity” as Lord Coke would have termed them. The trial jury determined not only that plaintiff’s property was damaged, but that the smelting company conducted its business in an ordinary and proper manner. Yet, it determined the smelting company was not operating within a proper area and set damages totalling some three hundred sixty-one pounds for plaintiff Tipping. Subsequently, an unsuccessful appeal was taken to the Court of Exchequer alleging improper instruction to the jury. The same grounds were used as a basis of appeal to the House of Lords.

On perfection of their appeal, the defendants argued error had been committed when Justice Mellor neglected to instruct that when a neighborhood is “denaturalized” by industry, “a person who comes into that neighborhood cannot complain that what was done before he came there is continued.” The six Law Lords deliberating the case held the lower trial court’s decision was to be sustained. Thus it is seen that the true holding of St. Helen’s Smelting rejects explicitly the principle of balancing and restates essentially the sic utere tuo test of William Aldred’s Case, that is still law in England.

Because of confusing dicta in the appeal by Lord Westbury, many have mistakenly concluded St. Helen’s Smelting stands for the principle of balancing utilities. Westbury stated:

With regard to ... personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate

208. Coquillette, supra note 165, at 786.
210. Id.
211. Id.
212. Id.
213. Id. at 1485. Hole v. Barlow, 140 Eng. Rep. 1113, 1118 (C.P. 1858), a lower court case, was cited for the proposition that the Common Law right of clean, unpolluted air was subject to a qualification that allowed for interference or qualification of the right when such actions were essential to business life and were conducted reasonably as to manner and place.
216. Coquillette, supra note 165, at 788. Further points of confusion crept into the decision when Lord Wensleydale suggested, improperly, that Justice Mellors at the trial court structured a rule that required a balancing of utilities before material damage to property could be established or significant discomfort to the senses recognized. Id. at 789. Lord Craworth was imprecise to the point of being ambiguous in stating the reasons for his decisions and by making a confused reference to an unreported case supporting a rule embracing a balancing of utilities. Id. at 789-90.
locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. . . . But when an occupation . . . causes a material injury to property, then there unquestionably arises a very different consideration.217

What Lord Westbury appears to be saying is that while personal sensibilities could never be subsumed under the natural rights of seisin and thus protected, they could be subjected nonetheless by the courts to a balancing of utilities.218

V. AMERICAN LEGAL HISTORY, SIC UTERE, BALANCING AND A THEORY OF HISTORICAL REVISIONISM

A. Historical Undercurrents

In the early years of nineteenth century America and before that in post-colonial America, the primary source of legal authority was to be found in Blackstone's Commentaries.219 And, Blackstone's absolute imposition of liability under nuisance for any injury to a land interest under the sic utere tuo maxim was followed.220 For the first third of the nineteenth century in fact, America continued its colonial period in many economic senses.221 Even though harsh economic conditions developed between the mid-1830s and the Civil War, the courts adhered nonetheless to formal application of sic utere tuo throughout the antebellum period.222

The most important subsidiary doctrine limiting the maxim's application was the defense of "statutory justification."223 Essentially, under this doctrine certain enterprises—mills, railroads and those with government franchises—were exempted or immunized from nuisance law,224 because of their specific statutory authorization for use. In the absence of negligence, the activities undertaken by these businesses were thus immune from damages.225 It is believed that this

218. Coquillette, supra note 165, at 789. While St. Helen's Smelting remains the last major case before the House of Lords to deal directly with the issue of balancing equities, id. at 791, in the case of Halsey v. Esso Petroleum Co., 1 W.L.R. 683 (Q.B. 1961), heard before the Queen's Bench in 1961, the Westbury dictum was incorrectly treated as the holding.
220. Id.
221. Id.
223. Lewin, supra note 219, at 245-46.
224. Id. at 246.
225. Id.
one crucial defense may well have been the pivotal factor in promoting the expansion of the railroad; for by demonstrating all reasonable precautions had been taken, the railroads could avoid all liability for damages that occurred from fires caused by cinders or sparks to either buildings or crops.226

Remarkable economic growth in America was charted from 1871 through 1916.227 With this expansion, the American judicial system began to recognize the need to re-shape private nuisance litigation. Thus, during this period, the courts were less likely to hold a nuisance was public simply because many landowners were affected or to accept a defense of statutory justification.228 Industrialization gave rise to a marked tension between two aspects of the "natural rights" theory of property: the right against interference (as seen in sic utere tuo) promoted by plaintiffs and the right to beneficial use (as seen in the maxim cuius est solum ejus est usque ad coelum et ad infernos)229 emphasized by defendants.230

As American courts sought to accommodate economic development, they began gradually to restrict the property owners zone of absolute protection from interference to, instead, one of beneficial use.231 In so doing, the courts undermined the natural rights foundation of property rights and thereby advanced the formulation of the positivist view of nuisance that took form in the Restatement of Torts and was recast ultimately as a utilitarian framework wherein property rights were not only defined but directed toward the achievement of the greatest social good.232

1. Balancing Hardships

When evaluating requests for injunctive relief for nuisance, most state courts employ a form of balancing test, with labels running the gamut from "balancing the equities," "comparative hardship" and "relative hardship" to "balance of conveniences."233 Used interchangeably, the boundaries between them are not well established. Yet, each

226. Id.
227. Id. at 250.
228. Id.
229. This maxim translates as "whoever owns the soil owns all the way to heaven and all the way to the depths." See United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963). But see Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964), cert. denied, 379 U.S. 989 (1965).
231. Lewin, supra note 219, at 251.
233. Lewin, supra note 219, at 304.
of these tests focus essentially on one of three factors: the character of the conduct of the parties, the relative economic costs to the parties, and the impact on the community and the general public of the grant or denial of an injunction.234

In 1868, Pennsylvania became the first jurisdiction to allow a balancing of hardships between parties in a nuisance action.235 The Supreme Court of Pennsylvania was confronted in Richard's Appeal236 with a case brought by a property owner who alleged injury as a consequence of air and noise pollution emitted from an iron works company located in the neighborhood. Citing no authority in support of its analysis,237 the court acknowledged it would "consider whether [an injunction] would not do a greater injury . . . than [that which] would result from refusing [it]."238 The facts of the case disclosed not only an investment of $500,000 in the factory itself but the employment of more than eight hundred employees. Considering the severity of the economic hardship associated with the closing of a factory that would be inflicted on the defendant, it was determined, accordingly, that the injury suffered by but one homeowner was insufficient to merit the granting of injunctive relief. In addition, it appears that by considering the consequence of unemployment in its decision, the court included in its balancing a regard for the economic structure of the community, even though it did not explicitly state that it did so. The "economic analysis" carried out in Richard's Appeal not only redefined the character of 19th century nuisance law, but also "represented the thinking of courts into the 20th century."239

Other jurisdictions embraced Richard's Appeal widely;240 with one in particular being Alabama in the case of Clifton Iron Co. v. Dye.241 There, the use of a stream by a mining company to wash its ores caused a stream on plaintiff's land to, in turn, become polluted. It also resulted in causing an overflow of the stream which in turn deposited sediment on the plaintiff's property. The main use of the stream by plaintiff was for watering and bathing livestock. While finding significant that fact that the plaintiff had another source of water on his property, and thereby casting doubt on the amount of "material in-

234. Id.
238. Id. at 113-14, quoted in Kurtz, supra note 222, at 657.
239. Kurtz, supra note 222, at 658.
241. 6 So. 192 (Ala. 1889).
jury” actually suffered, the court sought to structure a basic test for issuance of injunctive relief in cases of nuisance.242 Thus, it was held simply that in either issuing or refusing the issuance of an injunction, a court “should weigh the injury that may accrue to the one or the other party, and also to the public . . . .”243 Concluding, by way of denying the injunction, the court found that when an injury suffered by the plaintiff was weighed against “the great public interests and benefits” of the mining operation, the plaintiff must fail.244

For a court that “balances the equities,” the character of the parties conduct is crucial. Thus, if the defendant’s conduct is willful or otherwise wrongful, an injunction is more likely to be granted. Contrariwise, if plaintiff has been guilty of laches, acquiescence, or fraud, or is estopped from asserting a claim, injunctive relief is less likely to be granted.245 With both the tests of “comparative hardship” and “relative hardship,” the defendant’s costs from the grant of an injunction is compared with plaintiff’s damage arising from the defendant’s activity, with injunctive relief being denied if the latter is outweighed by the former. Under the third test, the “balance of conveniences,” commonly thought to be somewhat skewed in favor of defendants, the effect of an injunction not only on the community but broadly as well on the employment markets as well as other economic consequences, is evaluated. In the regard that it considers only the negative economic consequences of the injunction without also considering the possible benefits from the injunction, this test is weighted in favor of defendants.246 In determining the appropriateness of injunctive relief, the Restatement (Second) of Torts mandates a consideration of all three of these factors.247

242. Id. at 193.
243. Id.
244. Id.
245. Depending upon the balance of the equitable factors struck within each case, same or similarly related activities may or may not be held to be nuisances. See, e.g., Michael G. Walsh, Annotation, Funeral Home as Private Nuisance, 8 A.L.R. 4th 324 (1981); Milton Roberts, Annotation, Existence of, and Relief from, Nuisance Created by Operation of Air Conditioning or Ventilating Equipment, 79 A.L.R. 3d 320 (1977); J.W. Thomey, Annotation, Billboards and Other Outdoor Advertising Signs as Civil Nuisance, 38 A.L.R. 3d 647 (1971); J.C. Vance, Annotation, Parking Lot or Place as Nuisance, 82 A.L.R. 2d 413 (1962); J.H. Crabb, Annotation, Quarries, Gravel Pits, and the Like as Nuisances, 47 A.L.R. 2d 490 (1956).
246. Lewin, supra note 219, at 350.
2. Contemporary Practice

While today the balancing of utilities doctrine is to be found in almost all American jurisdictions, within the factual context of William Aldred's Case, when material damage to property owned by either owners or lessees occurs, the classical integrity of *sic utere* is not compromised, as the ruling is still good law in England. The misconstrued rationale of *St. Helen's Smelting* has, however, compromised the foundational underpinning of *William Aldred's Case* by providing the courts with a ready option of focusing on the limitation imposed by *Aldred's Case* of recognizing injury to those things regarded as necessitous to decent living and thereby ignoring the central holding altogether of the case: namely, its refusal to allow a balancing of conveniences or utilities. Again, my position as a revisionist is simply to suggest that a balancing does in fact occur throughout the whole decisional process of analysis in determining whether a set of actions are reasonable or unreasonable, nonactionable or actionable.

B. Modern Dilemmas of Choice

Today, as with the early English society at the turn of the sixteenth century, the legal system still sees demands placed upon it to develop doctrines which are not only responsive to, but, indeed, satisfy a plethora of complex social needs, yet justify, similarly, curtailment of the rights of property owners and those of possessors. In as much as property rights are "too fundamental to be determined on an ad hoc basis," allocations of such rights should be rationalized according to "a universal property doctrine that society as a whole accepts as just." I suggest herein that the most acceptable doctrine to be applied is that of balancing utilities of choice or preference. I argue, as a revisionist, that, contrary to what might be termed "ad hoc," cost-benefit balancing of utilities is done routinely by the average, ordinary, prudent consumer. In this analysis, patterns of behavior—some reasonable, some unreasonable—will be of pivotal concern; for this behavior alone will determine an outcome.

Determining what is a necessity for decent existence is a fact-sensitive issue and shaped not only by geographics but by custom and
usage, socio-economic status and age. Of necessity, these factors must be weighed against one another in determining when a standard of acceptability is met.

When I was a young boy growing up in a small town in Indiana, air-conditioning was not a necessity for living. On many intensively hot summer days and nights, living would have been enhanced immeasurably by home air-conditioning. But in those "olden" times (circa 1939-1957), only electric fans and paper hand-fans were available. Interestingly, three local establishments had air-conditioning: the local funeral home and the two downtown movie theaters. Obviously, the latter were preferable to the former place as a temporary place of respite. Difficult though it was, life was still, according to Midwestern standards, decent. Faced with this situation today, I might well be more insistent in demanding air-conditioned living facilities if I were in Indiana. Why? Because older individuals have different (perhaps higher) creature-comfort standards than younger people. The young are normally willing to go along with a situation—tough-it-out, if you will. In a word, younger people are more resilient.

Presently, in many areas of the country—and especially within inner cities—air-conditioning is not uniformly available to all who wish it. And, as a consequence, life is not as pleasant as it would otherwise be if air-conditioning were available. Yet, life can be lived satisfactorily if other major necessities of life, such as food, shelter, gas or electricity for food preparation and warmth and water for cleanliness, are provided. A family of modest means might well decide, in conserving scarce economic resources, to balance its enjoyment of television with the enjoyment of air-conditioning and decide television is more enjoyable as a "necessity" for a sustained standard of pleasurable living as air-conditioning in their home or even a telephone for that matter. Yet, contrariwise, that same family might today simply choose air-conditioning because it is cheaper in real (i.e., inflation-adjusted) terms to obtain. Each individual or familial preference is, then, to my way of thinking, structured automatically by a cost-benefit preference balancing. Family and personal budgets are perhaps the clearest example of how many attempt to balance earnings and investments against expenditures.

The distinction between the fundamental acknowledgement of inalienable property rights seen through sic utere and the balancing of utilities test is, to my notion, contrived. I suggest this because of my contention that a balancing of choices or uses in order to achieve the most efficient or economic use of a land resource is how normally the average, ordinary, reasonable person should behave consciously by intention or unconsciously. When, as shall be seen modernly, such behavior is not pursued and the average, ordinary, reasonably prudent person is displaced by the average, ordinary, stupid one, it remains for
the courts and/or legislatures to ensure this balancing of economic interests be undertaken in order to thereby reach and maintain a standard of economic justice, or in other words, achieve a standard of economic utilitarianism that assures the greatest economic benefit to the greatest number of citizens. Stated otherwise, in a capitalistic system, if the citizens cannot (consciously) act in a way that maximizes their individual wealth, the courts and legislatures must safeguard this mandated goal of a capitalistic economy, and through their parens patriae powers, act accordingly—thereby not only protecting individual economic rights but collective, societal or macro rights to wealth maximization.

C. A New Historical Interpretation of Nuisance and Economic Jurisprudence

While the sic utere tuo principle has heretofore been interpreted as an absolute restriction on the use of one's property so as to injure another, I would suggest a new, interpretative gloss to this principle. Accordingly, I see this operative principle as implying that in the use of one's property, he must make use of it reasonably. To make a reasonable use of it involves—directly or intuitively—an assessment, evaluation or balancing of one's preferences set against those of society at large. Through the restrictive influences of the Doctrines of Waste,254 Public Trust,255 Public Nuisance256 and Eminent Domain,257 the perimeters of the free exercise of property rights are set.

254. See infra note 262.
255. See infra note 263.
257. Eminent Domain is the right of the federal or state government to take private property for a public use. It is traditionally acknowledged that the eminent domain power applies only to takings—and not regulatory controls—of private property. While eminent domain appropriates real property to advance a public use or benefit, exercises of the police power—through passage and implementation of regulatory schemes (e.g., zoning plans)—are validated as a type of community planning mechanism designed to regulate the use of property or to impair rights in it in order to prevent detriment to the public's interest.

When a regulation goes too far and becomes a taking is a matter of degree depending on the particular facts and necessities of each case. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In assessing the questioned action as either a valid exercise of the power of eminent domain (for which a just compensation must be paid), or a non-compensable exercise of the police power, the court will balance the relative interests of the public against those of the individual; the goal being not to restrict a reasonable exercise of the government in the perform-
What may be considered a reasonable use of one's property by the individual property owner himself may, to the government, for example, be considered unreasonable or uneconomic.\textsuperscript{258}

Under the basic Common Law yardstick of measuring the validity of one's actions by the paradigm of what would the average, ordinary person have done under similar circumstances, one sees, at least by implication, that that person will measure or gauge his conduct here \textit{vis-à-vis} the use of his real property reasonably. In order to adhere to
standards of reasonableness, a balancing of interests will always occur.\(^{259}\)

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant’s conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.\(^{260}\)

Thus, instead of seeing the principle of *sic utere tuo* as inconsequential and outdated,\(^{261}\) it should be viewed as the cornerstone or foundation upon which the pyramid of real property interests (see Appendix) is built. Waste, Public Trust, and Nuisance Law complete the pyramid—all conjoined and strengthening the principle gauge of action for all conduct undertaken—namely, reasonableness.

1. **An Inter-relatedness with Underpinnings of Waste, Public Trust and Eminent Domain**

My contention is that the principle of *sic utere* initially shaped *in utero* by the Aristotelian ideal of the Golden Mean in turn became the seedling from which grew the Doctrines of Waste,\(^{262}\) Public Trust\(^{263}\) and Eminent Domain.

\(^{259}\) Pendergrast v. Aiken, 236 S.E.2d 787 (N.C. 1977).

\(^{260}\) Id. at 797 (citation omitted).

\(^{261}\) See DUKEMINIER & KRZER, supra note 167.

\(^{262}\) Waste is defined generally as a tort, the focus of which is alteration, destruction, misuse or neglect of real property or a part of a tenement by an individual in lawful possession, as a tenant for life or for years, to the detriment of the estate or interest therein of another. The extent to which an act is determined to be waste depends heavily upon the facts of the situation under which the acts occurred, customs of the neighborhood, character of the premises and the extent to which the reasonableness of the contested acts is regarded as useful. 78 Am. Jur. 2d Waste §§ 1, 15, passim (1975). See generally Morton Gitelman, *The Impact of The Statute of Gloucester on The Development of The American Law of Waste*, 39 Nw. L. Rev. 669 (1986)(exploring the development of the American Common Law of waste); George W. Kirchevey, *Liability for Waste*, 8 Colum. L. Rev. 425 (1908)(exploring Common Law history of waste doctrine).

Flexibility, then, not rigidity is the guiding principle or policy in determining actions of waste. In turn, this flexibility must be shaped and defined by a balancing of the costs and the benefits of allowing the questioned acts to continue. The actions of what a reasonable or prudent person "would not do with his own property" become crucial in making a determination of when an "unconscientious abuse" of one's rights occur and are thus subject to a charge of equitable waste. 78 Am. Jur. 2d Waste §§ 1, 4 (1975). See Rodgers, supra note 40, at 248-50.

Contrariwise, voluntary or commissive waste is recognized as the undertaking of a deliberate or voluntary act of destructive use while permissive waste is seen as the failure to preserve or protect the real estate in question according to those
standards of ordinary care a prudent person would follow under similar circumstances. Yet, a third major type of waste is also recognized: that is meliorating. Although technically waste, actions termed as such improve the property and thus may not always form a basis for compensation, restitution, or injunctive relief. Traditionally, the English Common Law, regardless of economic enhancement, regarded any change in either character or use of the original estate as waste. 78 Am. Jur. 2d Waste §§ 3-5 (1975). The strictness of this posture was tied to the conviction that improvement of this nature would not only have a net effect of change on the husbandry of the land's use but also on "the evidence of title, since the nature of the land was an essential part of the description in many ancient muniments of title." 78 Am. Jur. 2d Waste § 17 (1975).

At one level, the law of waste tests the principle of good husbandry in the management of a parcel or parcels of land by a present possessory interest holder for the ultimate use of a future or reversionary interest holder. The law of nuisance, however, draws its vitality from the sic utere maxim and involves conflicts arising between and among neighboring property owners. Robert R. Wright & Morton Gitelman, Cases and Materials on Land Use 17-18 (4th ed. 1991). Both legal doctrines test the extent to which reasonableness has been followed, or as the case may be, abridged. 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. Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899). "[T]he same act may be waste in one part of the country while in another it is a legitimate use of the land . . . ." Id. at 739.

263. The doctrine of res communes, as formulated in the early Roman Institutes of Justinian, is taken as the progenitor of the doctrine of Public Trust. The doctrine of res communes recognized certain forms of property were incapable of exclusive private ownership; rather, the commonality (the people) owned them and the state, thus, did not hold ownership in fee. Instead, it was the responsibility of the state to hold a title in trust for the beneficial ownership interests of its citizens. See George P. Smith, II, Restricting the Concept of Free Seas: Modern Maritime Law Re-Evaluated 13-14 (1980); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

Although traditionally the doctrine of Public Trust was applied to the areas below the low water mark on the margin of the sea and the Great Lakes, the waters over those lands as well as the waters within the rivers and streams of consequence, there has been a gradual expansion of the doctrine to go beyond the primary principles of navigation and fishery and now embrace free public access to all waterways, sand, gravel, shellfish and seaweed, bathing and other recreational uses, conservation and even aesthetics. See Joseph L. Sax, Liberating The Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185 (1980); Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762, 775-779 (1970). See generally Christopher D. Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972)(examining the extension of rights to natural entities and objects).

The limits of applying Public Trust are guided by the doctrine of reasonableness or reasonable use that in turn directs, as applied here, that trust property must be used for a particular public purpose and thereby available for actual use by the public and not be sold. Sax, Public Trust Doctrine, supra, at 477. As with waste, what is in operation here is application of an obligatory sharing of a limited resource by present users for the benefit of future uses. The extent to which the state asserts its authority here will be for it largely a matter of balancing the costs of adding various natural resources to its present protection versus the ben-
Far from being antithetical, what is seen linking all legal concepts is the mandate—self-imposed or enforced by the government—that individuals use their natural resources in the most economic (i.e., reasonable) way possible under all circumstances. This use, of necessity, then is tied to the utilization of a balancing test that weighs the gravity of harm to the plaintiff of defendant's unrestricted conduct versus the utility of defendant's conduct if not abated. As *sic utere* forms the base of the pyramid of real property interests, private nuisance is the apex; for, what was initially but a somewhat vague mandate to act "reasonably" becomes—in the doctrine of private nuisance—a codified formula for determining when one's conduct is unreasonable or uneconomic.

VI. MODERN NUISANCE LAW IN FOCUS: CAUSE AND EFFECT

A. The Double Balancing of *Sic Utene*

At the heart of all nuisance actions is annoyance or inconvenience. *Sic utere*, as a practical principle, attempts to set a standard of tolerance by assuring protection of the physical premises of a landowner or interest holder as well as their basic sensibilities. In
this regard, its application has never been responsible for promoting policies that obstructed economic growth.\textsuperscript{268} Rather, by its reasonable application, it has sought to effect a responsible, balanced approach to property use; an approach which seeks to accommodate fundamental principles of utilitarianism with a functional recognition of absolute property ownership—all guided as such by a standard of reasonableness effected by application of a balancing test.

Under my revisionist or neo-contemporary view of \textit{sic utere}, I suggest that, while recognizing inalienable property rights are protectable, the scope of protection is extended to only those elements for a decent existence on the property: elements which promote comfort and joy and enhance and preserve the inherent value of the property without forcing a diminution of it.\textsuperscript{269} Based upon my theory, in order to balance the extent of a reasonable or decent existence, a two-part balancing test of utilities or conveniences is consciously or unconsciously undertaken by a property owner: once to establish what is necessary and reasonable for his own existence and again in assessing a putative defendant's conduct as to whether it is sufficiently unreasonable in threatening his basic, decent existence which, in turn, merit his pursuit in equity to abate the private nuisance.

Ultimately, the issue's resolution can be seen clearly as one tied to a matter of degree; whether, that is, an interference with comfort or convenience is significant enough to constitute a nuisance.\textsuperscript{270} Realizing that there is no precise, universal formula for determination, the courts strike a balance between what is considered to be reasonable use by a defendant and the degree of "absoluteness" the privileges of property ownership by a plaintiff are injured. Generally in reaching conclusions, courts should be guided by what is regarded commonly as reasonable "according to ordinary usages of mankind living in a particular society."\textsuperscript{271}

\textit{Sic utere tuo ut alienum non laedas}, then, provides a first-order framework for initial testing of the standard of reasonableness, and obviously, under my interpretative gloss, to effect this standard, a balancing of utilities or conveniences occurs. Acceptance of this argument re-focuses the significance and the value of the principle of \textit{sic utere} and underscores the inherently practical value of the balancing

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\textsuperscript{268} Coquillette, \textit{supra} note 165, at 799.
\textsuperscript{270} \textit{See} \textit{CLERK & LINDSELL, supra} note 215, \textsection 24-05.
\textsuperscript{271} \textit{Id.} at 1359.
test that is both guided and set by the principle of reasonableness or economic efficiency.

B. Trespass or Nuisance?

While a trespass is recognized as a type of direct injury to or upon real property,272 by contrast, a nuisance is defined "as an unlawful act which causes injury to a person in the enjoyment of his estate, unaccompanied by an actual invasion of the property itself."273 In trespass law, normally only two parties are involved and the costs (transaction costs) of A and B meeting and bargaining to accommodate one or the other or both are low. Thus, if one of the parties—here, B—wishes the right to enter A's property for, hypothetically, use of a way, and B wishes the right to enter more than A wishes to block that entry and use, B can offer A enough money to obtain assent for an entitlement.274

When in nuisance law, a horizontal conflict exists between A and B, courts will strive normally to not only protect A's core or fundamental rights to make a productive use of his property, but as well to let B live in a reasonable, comfortable manner on his property. There is a substantial middle ground between the two where the ultimate outcome will turn upon impact assessments upon the other person and on society at large. Quite often courts find themselves not only being rights advocates but utilitarians as well—all within the same case.275

C. High Transaction Costs of Nuisance

Most generally, causes of action maintained under a nuisance theory are set within a setting of high transaction costs.276 Thus, if one were to build a factory on his own property that proceeds to emit smoke and thereby reduce the values of residential properties nearby,
transaction costs will normally be high simply because of the number of properties affected. It would, accordingly, be inefficient to give either the owner of the factory an absolute right to emit smoke or to give the owners of the adjacent properties an absolute right to be free from smoke; for all of the parties to the scenario have competing rights of considerable, if not equal value. To resolve the legal dilemma posited, the issue must be reshaped in order to determine the extent to which the positive economic theory of tort law, which determines whether nuisance law (that governs interferences of this type to the enjoyment of land) bestows a property right or simply imposes liability, is given application. And, here, it will be found that it imposes liability.

In order to constitute a justifiable claim in nuisance, the action complained of must have given rise to either an injury that is tangible or appreciable to neighboring property or one that renders the property “especially uncomfortable or inconvenient.” Accordingly, what is reasonable use and enjoyment is incapable of precise definition; for what is a wrongful interference in one locality (or residential area, for example) may not be one in another residential locale.

Interestingly, while some courts will determine a nuisance exists only when an injury caused by a defendant’s use of his land is unreasonable, others require merely that the injury pass some threshold of substantiality—taken as “the difference between negligence and strict liability . . . rather than between liability rules and property rights.” Generally, no injunction will be granted (or, as the econo-

277. Id.
278. Id. at 43-44.
279. Id. at 44. The substantial and unreasonable interference may be intentional or it may be the result of negligent or reckless conduct or even of an activity that is abnormally dangerous. 1 Rodgers, supra note 53, § 2.4, at 41.
280. De Funiax, supra note 273, at 60. See Restatement (Second) of Torts § 822 (Tentative Draft No. 16, 1970).
282. Landes & Posner, supra note 273, at 44. Although free from fault, liability for nuisance may be imposed for activity otherwise actionable under the principles that shape and control liability for abnormally dangerous activities. 1 Rodgers, supra note 53, § 2.4, at 43.
283. Landes & Posner, supra note 273, at 44. Not every interference with one’s use and enjoyment of land is actionable under a claim of nuisance. Thus, noises that would otherwise not be recognized by a normal person as bothersome do not become actionable because a particular plaintiff or the activity which he conducts on his own land is unusually sensitive to such noise. No liability in nuisance accrues even though plaintiff sustained an injury. So too would a level of noises actionable if annoying to an average person in his home not be considered action-
mist defines it, a property right will not be recognized), even when liability is imposed strictly, "unless the costs of the damage exceed the costs of abating the damage."\textsuperscript{284} These costs, then, include those benefits foregone by the defendant—such as lost profits—from the elimination of his injurious activity.\textsuperscript{285} Thus, it is seen that injunctive relief will not be granted unless a standard of efficient resource allocation mandates the defendant to cease his injurious actions to a plaintiff's real property.\textsuperscript{286}

D. Commonality of Factors in Balancing

Actually, what in fact is seen in operation here are two separate balancing tests used by the courts: one, in determining whether to classify defendant's acts as unreasonable in relation to its effect on the plaintiff's land, and, if found in fact to be such; another balancing occurs in determining whether to issue an injunction to abate the wrong. This dual balancing is vital to an objective assessment of the point at which an optimum level of economic efficiency can be achieved.\textsuperscript{287}

In both traditional balancing tests used by the courts, the factors are similar, if not, perhaps, identical.\textsuperscript{288} More specifically, "the relative hardships of the parties, . . . and the interests of the public are balanced and an injunction is issued or denied as the balance seems to be able if and when it occurred in an industrial park. Rabin, \textit{supra} note 19, at 1316-21. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

\textsuperscript{284} \textbf{LANDES & POSNER}, \textit{supra} note 273, at 44.
\textsuperscript{285} \textit{Id.}
\textsuperscript{286} \textit{Id.}
\textsuperscript{287} \textbf{DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES} 357 (1973). One commentator has argued that balancing is not appropriate in all such remedial situations. Rather, he maintains equitable relief is never conferred \textit{ipso facto} as a matter of right. Instead, it can only be granted when either an efficiency or a utilitarian calculus demonstrates that, as a whole, society would be advantaged more by the relief than it would if it were denied. The second possibility suggested is where injunctive relief is granted when a legislative cost-benefit calculus mandates the result totally without regard to competing values. The next would be in those cases where, to the courts satisfaction, the fundamental rights of the plaintiff are afforded sufficient protection by a dollar remedy. And, finally, the situations where judicial temperament and practice recognize the "fact" that the winner in a nuisance action always gets an injunction. 1 \textbf{RODGE\textsc{s}, \textit{supra} note 53, \S 2.6, at 66-68.}

\textsuperscript{288} \textbf{DOBBS, \textit{supra} note 287, at 357.} \textbf{De Funiak} states the balancing of equities or the balancing of conveniences or hardships doctrine states simply that the court will "weigh the loss, injury or hardship resulting to the respective parties from granting or withholding equitable relief; that if the loss resulting to the plaintiff from denying the equitable relief will be slight as compared to the loss or hardship caused to the defendant if the injunction is granted, the equitable relief will be denied. The plaintiff is left to pursuit of damages as his remedy." \textbf{DE FUNIAK, \textit{supra} note 273, at 43.}
There appears to be general agreement that, in addition to hardships being balanced, equities between the party litigants (e.g., bad faith or misconduct) should also be considered. Some courts balance rather heavily the plaintiff's rights against the hardships of the defendant, while in other cases, courts will weigh the defendant's hardships and their economic significance more heavily than they do the rights of the plaintiffs. In the final analysis, the judicial "call" is but a matter of judgment.

1. The Developing Trend

A discernible trend in contemporary case law, as to the balancing of hardships and equities, finds development and use of a technique using a type of partial or experimental injunction, especially where large industrial activities are involved. Accordingly, instead of a judicial balancing of case factors—with an injunction issuing against a defendant's activities or not being issued as the case may be—courts will mandate certain changes in manufacturing design or operation in order to thereby minimize the nuisance.

E. Permanent or Temporary Nuisances: Computing Damages

Should an action be classified as temporary in nature, the moving party plaintiff may either obtain injunctive relief or elect to bring an action for damages. Contrariwise, if the questioned action is determined to be of a permanent nature, the plaintiff is constrained to seek damages which will provide him with a one-time or lump-sum compensation for the diminished value of his property interest caused by the defendant. In those cases where the challenged actions by a defendant are taken to be of a temporary nature, the threat of an in-
junction or of repeated damage suits, provides that defendant with a proper incentive to adjust his actions accordingly and thus abate the nuisance. When modest changes in use and behavior will not provide an abatement, the nuisance must be viewed as permanent. Thus, the defendant—if determined by a court to have used his land unreasonably—will either be ordered to cease such operations (with the result being no danger of fostering future damage reduction measures), or upon the payment of damages, be allowed to continue his operations.

F. Common Defenses

A number of defenses are available to a defending party, most of which are difficult to sustain. Under prescription, an extremely technical requirement must be shown: namely, proof of "a knowing acquiescence in conduct no thinking person would abide if it were known." Thus, if recognized at all, a prescriptive right to develop and maintain a private nuisance requires that an open interference be asserted not only under a claim of right but with a knowledge and acquiescence by the injured plaintiff for a continuous period of time that is comparable to the statute of limitations for recovering possession of real property.

For success with laches, as a creature of equity, it must be recognized first that its full use depends totally upon discretion of the court and the facts of each case. With a defense of laches, all that need be asserted and proved is a showing of unreasonable delay—delay in maintaining a claim for nuisance and a subsequent injury to the defendant because of this untimely action. It is a common defense for cases with multiple party defendants, for under it they would attempt to show they now have more at stake financially than they would have if plaintiff had brought his suit in nuisance earlier.

297. LANDES & POSNER, supra note 273, at 47.
298. In calculating damages for nuisance, the measure should be an amount that compensates the plaintiff for whatever losses he sustains as the natural and direct consequence of the wrongful act. Thus, as to real property cases, the general rule in calculating the measure of damages "is the difference between the money value of the plaintiff's interest in the property before the damage and the money value of his interest after the damage; and this is not necessarily the same as the cost of repair or replacement." 28 HALISBURY'S LAWS OF ENGLAND § 234, at 164 (3rd ed. 1959). Where no actual or perceptible injury is shown, yet a plaintiff has had an absolute legal right infringed upon, he is entitled to nominal damages. Id. § 235, at 164. Punitive damages will be assessed a party defendant when his actions are shown to be willful. Id.
299. 1 RODGERS, supra note 53, § 2.10, at 87.
300. Id.
301. Id. § 2.10, at 88. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of The Cathedral, 85 HARV. L. REV.
Estoppel requires an actual consent or positive encouragement, and thus, more than a mere passive acquiescence to be operative. It consists of three elements, all especially difficult to prove in an environmental case. First, it must be shown that a misleading communication occurred either by words or by silence. Next, a reliance upon that asserted communication by another must be established. Finally, it must be proved that a material harm to the defendant will occur if the plaintiff is permitted later to maintain a claim regarded as inconsistent with his earlier conduct.\textsuperscript{302} With these principal defenses—as with equitable estoppel, acquiescence, etc.—a strong utilitarian statement is being made: namely, certain social considerations are deemed significant enough to justify displacement, or for that matter, a complete divestiture of a vested property right.\textsuperscript{303}

The fact that a plaintiff may have known at the time of his acquisition of a parcel of property of the condition in which a defendant was maintaining his property (in other words came to the nuisance), is not regarded as an indication he either knew or realized its effect upon him of his own personal occupancy and ownership of his property.\textsuperscript{304}

Even if the plaintiff knew of the effect it would have upon his use and enjoyment of his property, he is not thereby estopped from seeking equitable relief, if his use of his property rather than the defendant's use of the defendant's property is in conformity with the general use of property in the locality.\textsuperscript{305}

\textsuperscript{302} 1\textsuperscript{st} RODGERS, \textit{supra} note 53, \$ 2.10, at 89.

\textsuperscript{303} \textit{Id.} Some fourteen situations (or defenses) were recognized at Common Law as insufficient to "justify" the existence of a nuisance. Among those defenses were cases where the public benefit exceeds the disadvantages of the acts alleged to be a nuisance; or the character of the neighborhood has changed since the actions which caused the nuisance became acknowledged or even that the defendant's actions were, until taken in combination with others, harmless. 28 HALIBURTON'S \textsc{Laws of England} \$ 233, at 162-64 (3d ed. 1959). \textit{See Posner, \textit{supra} note 7}, at 63-64.

Drawing upon the balancing factors used by the \textit{Restatement (Second) of Torts} \textsc{\$s} 826, 827, 828(a) & (b), \\& 831 (1977), in order to determine when an act is a nuisance, Justice Antonin Scalia, in a majority opinion, has attempted to structure a test for eminent domain cases he terms a "total taking inquiry." As with nuisance law, Justice Scalia would seek under this test to consider, among other issues, "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992)(citations omitted). \textit{See supra} note 258 for further analysis of Justice Scalia's nuisance argument in \textit{Lucas}.

\textsuperscript{304} DE FUNIAK, \textit{supra} note 273, at 65. \textit{See also} 1\textsuperscript{st} RODGERS, \textit{supra} note 53, \$ 2.9, at 82 (advocating that priority in time is pertinent, even if not dispositive).

\textsuperscript{305} DE FUNIAK, \textit{supra}, note 273, at 65. \textit{The Restatement (Second) of Torts} recognizes, "[t]he fact that the plaintiff has acquired or improved his land after a nuisance
G. A New Counter Defense—Economic Captive

Perhaps a re-enforcing posture for a plaintiff to advance here might be that he is an economic captive. Under this approach, which is original to my thinking, plaintiff would assert that because of limited financial resources, he was forced to choose an area of living where the defendant has created an unsatisfactory (e.g., unreasonable) condition that has existed for a number of years. Thus, plaintiff—if not able to drive an automobile because of ill health—would not be living in defendant’s neighborhood, thereby subjecting himself to offensive conditions (i.e., nuisances). If plaintiff had greater financial reserves, he would be able to live elsewhere and perhaps even have a driver. Because plaintiff’s place of employment is now, as a consequence of his move to defendant’s neighborhood, within easy access, he had no choice but to move into the neighborhood (in the only available house next to the defendant) in an effort to contain daily transportation expenses. This argumentative gloss would add weight to the logical view that a prescriptive right may not be acquired to maintain (i.e., continue) a nuisance, and present a variant of coming to the nuisance—perhaps an even more convincing variant at that.

Another example of economic captivity at play could be found in a situation where, for example, a young college student unable to afford expensive on-campus living is forced to reside in a very poor, dilapidated housing unit in the inner city that is, however, within walking distance of the campus. Should the fact of the student’s residence in the impoverished neighborhood preclude him from asserting that unsatisfactory (i.e., unreasonable living conditions) create a private nuisance? In other words, did he come to a nuisance willingly or was he merely forced, because of strained economic circumstances, to be held “captive” in the neighborhood of his residence?

H. Comparative Nuisance: A Theory Before Its Time?

A new and creative idea for promoting greater fairness and efficiency and apportioning costs between the parties to a nuisance action has been advocated recently—namely, recognition of the principle of

interfering with it has come into existence is not in itself sufficient to bar his action, but is a factor to be considered in determining whether the nuisance is actionable.” Restatement (Second) of Torts § 840D, at 123 (Tentative Draft No. 16, 1970)(emphasis added).

306. De Funiax, supra note 273, at 64. While some courts may well deny plaintiff’s recovery, holding that the plaintiff “moved to the nuisance,” such rulings appear actually to be determinations of a substantive nature that no nuisance exists. It is both at the substantive level in deciding whether a defendant’s conduct is a nuisance, and at the remedial, in assessing the propriety of issuing injunctive relief, that the fact of a plaintiff’s coming to a nuisance is, however, considered properly. Dobbs, supra note 287, at 359. See also Harper et al., supra note 296, § 1.28, at 114-15.
comparative nuisance.307 Under this rule, liability would be apportioned in accordance with the outcome of a balancing test.308 Adoption of this rule would not validate an apportionment of nuisance damages in all or even in most cases. Indeed, recognition of a rule of comparative nuisance would inherently recognize plaintiffs as oftentimes deserving absolute protection from an interference to their use and enjoyment of land. Yet, accepting such a rule, “should impose a substantial share of the responsibility on the plaintiff only when there is some doubt that the defendant’s conduct is unneighborly, when the plaintiff is somewhat hypersensitive to injury, when the defendant has come to the nuisance, or when the plaintiff has otherwise failed to take reasonable and appropriate precautions.”309

While drawing heavily upon the present foundations and applications of existing nuisance law, a rule of comparative nuisance would differ significantly in the balance of utilities test. Thus, while traditional nuisance law focuses on the “utility” of the parties’ actions in an effort to determine ultimate entitlements for the plaintiff and the defendant, comparative nuisance would, instead, focus on the “responsibility” of the parties—thereby re-enforcing what is regarded as the primary role of tort law: namely, to serve as an instrument of corrective justice.310 Accordingly, comparative nuisance would seek to “emphasize the objective and foreseeable risks created by the acts of both parties and the parties’ legitimate expectations within their particular economic and social contest.”311

In assessing levels of comparative responsibility, among the factors to be considered would be the following:

[The intent and motives of each party; the level of risk created to the plaintiff and to third parties; the character, duration and severity of the actual damages to the plaintiff and to third parties; the costs to the litigants and to third parties of avoiding or preventing the damages or relocating or discontinuing either activity; the foreseeability of the conflict, including whether either party had knowledge, notice, or an opportunity to discover the potential conflict prior to its existence; the remoteness of the causal relationship; priority in time; the suitability of each activity to the particular location; whether the activity being interfered with was hypersensitive to injury; whether the offending activity was customary or usual; community standards reflecting the relative social value of the activities; and whether the benefit of each activity was public or private.]312

308. Id. at 1009.
309. Id. at 1033. The Comparative Hardship Doctrine provides that where the hardship to the defendant from being subjected to an injunction is great, relative to the hardship placed upon the plaintiff by continuance of the nuisance, the court will award damages instead of an injunction. Restatement (Second) of Torts § 941 (Tentative Draft No. 19, 1973).
310. See Lewin, supra note 307, at 1032-33.
311. Id. at 1033.
312. Id. at 1033-34.
Although, admittedly, various of these factors would be difficult to quantify, thus making any apportionment arbitrary, it is urged that, when applied as a unit, they would be less arbitrary than the present standards used in assessing traditional nuisance liability.\footnote{13} They would provide a touch of refined elegance to analytical decisionmaking here. Further analysis and explication of this new theory is far beyond the scope of this Article. Suffice it to observe, however, that much may be said for testing and applying it selectively because it holds great promise for making the present “impenetrable jungle of American nuisance law” more penetrable and thus accessible to use at least as widened equitable footpaths.

VII. COMMON LAW v. STATUTORY LAW AS CONSTRUCTS FOR INTERPRETATION

Even though the Common Law is essentially but a collection of “judge-made rules” (that, of course, can be “judge-unmade”),\footnote{15} with much of statutory law also consisting of such rules arising from “debatable interpretations of ambiguous enactments,”\footnote{16} there still remains a profound difference between the two bodies of law. The Common Law is a conceptual system where judges “understand” the system by interpretation of a substantial body of rules and standards which are grounded in a body of concepts.\footnote{17} Interpretation is central to the statutory law system. Accordingly, statutory law cannot be reversed by judges or restated in their own words.\footnote{18} Judges “cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute—that is, interpret the statute.”\footnote{19}

\begin{itemize}
  \item \footnote{13} Id. at 1034.
  \item \footnote{14} Id. at 1088.
  \item \footnote{15} Posner, supra note 3, at 47.
  \item \footnote{16} Id.
  \item \footnote{17} Id. at 247-48. Another interpretation recognizes a Common Law system as one deriving not so much from a defined set of explicit principles, but as one based on trained intuition of judges—an intuition developed over time from repeated reference to unarticulated rules of society that are adapted to both the reasoning and the results of previously decided cases. Accordingly, when considering new cases, Common Law judges make their decisions based on analogies with earlier cases and hypothetical situations similarly related to the instant case. Mario J. Rizzo, Rules Versus Cost-Benefit Analysis in the Common Law, in Economic Liberties and the Judiciary 225, 230-31 (James A. Dorn & Henry G. Manne eds., 1987). See F. Hayek, 1 Law, Legislation and Liberty: Rules and Order (1973); Edward H. Levi, An Introduction to Legal Reasoning (1948).
  \item \footnote{18} Posner, supra note 3, at 248. “[J]udges handle individual cases; the legislature generalizes.” Scalia, supra note 10, at 1176.
  \item \footnote{19} Posner, supra note 3, at 248. For the economist, statutes are enacted as a consequence of two motivational theories: the public interest group theory or the interest group theory. Under the first theory, the legislative process directs itself toward identifying market failures potentially amenable to correction by statu-
In a system in which prior decisions are authoritative, no opinion can leave total direction to later judges. It is all a matter of degree. At least the very facts of the particular case are covered for the future. But sticking close to those facts, not relying on overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the Common Law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time. The evolution of the Common Law may be viewed as a process of natural selection in which efficient rules survive because, simply, they are less prone to challenge by repeated litigation. Accordingly, "the more inefficient a legal rule, the greater the social cost it imposes and, thus, the greater the probability that it will be challenged through litigation since the benefits of litigation versus out-of-court settlement will also be greater."

A. Rules as Standards

Framing general rules is difficult, for even where a particular area is accommodative to clear rulemaking, judges must find a basis for them in the challenged text that either Congress or the Constitution has provided. They cannot create rules out of "whole cloth," nor is adherence to a rule a dictate of logic. While recognizing no

[320] Scalia, supra note 10, at 1177 (emphasis added).
[322] Although rules are logical in structure, legal rules are not only often vague and open-ended, but highly contestable, tenuously grounded, alterable and, indeed, altered frequently. Posner, supra note 3, at 455. See Patrick S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law, 70-95 (paperback ed. 1991). A rule is a norm applicable to a class of cases. Id. at 71. See also Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POLY 61, 63 (1994)(observing rules are not always preferable to standards or vice versa).
[324] Id. In the American system, judges and legislators often resort to principles, directly or indirectly, as sources of valid law more than the English system does. Atiyah & Summers, supra note 322, at 94-95. Principles are regarded in America as inherently capable of setting legal obligations, without need for use of rules or other legal norms. Ronald M. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 22-32 (1967).
[325] Posner, supra note 3, at 47. Statutes are, for example, accorded less mandatory formality in the American system than in the English system. As a consequence
general principle as always definitive, it is suggested that principles of this type be applied so far as possible "in substantial furtherance of the precise statutory or constitutional prescription."\(^{326}\)

Justice Antonin Scalia has, in fact, expressed his belief that the judicial process cannot function properly unless "broadly applicable general principles" are established.\(^{327}\) Justice Scalia has lamented the continued use of the "totality of the circumstances test and balancing modes of analysis"\(^{328}\) as, essentially, judicial "cop-outs" and abdications at the appellate level of the judicial responsibility to pronounce the law instead of performing a lower court fact-finding function.\(^{329}\) He does, nevertheless, recognize that once it becomes manifest that no pre-existing general principle of law can be developed or applied for a particular case, the totality of circumstances tests and the balancing tests are inevitably applied.\(^{330}\) Justice Scalia neglects, pointedly, to advise when the Rule of Law leaves off and when these two particular modes of analysis are utilized.\(^{331}\) But, he does acknowledge that there are indeed times when legal determinations are made that do not reflect a general rule,\(^{332}\) and that he, himself, will write opinions using them.\(^{333}\)

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of this practice in America, rules that appeared initially as hard and fast on their face are transformed into rules subject to wide discretionary modification at the point of application. Atiyah & Summers, supra note 322, at 78. Any effort to eliminate this discretionary power would—it is contended—stifle application of individualized justice. Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry 17 (1969).

326. Scalia, supra note 10, at 1183. The rules of American constitutional law are, for example, taken as quite flexible in design and application. They have low degrees of content and many merely state broad substantive principles. Thus, judges are given wide latitude to consider the substantive reasons for their development at the point of application and, if necessary, are allowed to look behind the authoritative wording of these rules to reach the substantive reasons for their existence. Atiyah & Summers, supra note 322, at 75. See also id. at 267-335 (describing the functions of courts and the legislatures in American law).

327. Scalia, supra note 10, at 1185.

328. Id. at 1187.

329. Id. at 1180-81.

330. Id. at 1186-87.

331. Id. at 1187. Because of what is perceived as an inextricable relationship between rules and cost-benefit analysis, it has been suggested that a policy neutral construct for judicial decisionmaking be developed and applied to abstract rules as a guarantee by the courts for not imposing a specific hierarchy of values in their decisionmaking. Rizzo, supra note 317, at 225.

332. Scalia, supra note 10, at 1186-87.

333. Id. at 1187.
VIII. THEORIES OF JUDICIAL DECISIONMAKING

A. Reaching a Reasonable Decision

The careful judge seeks nothing more in his deliberations than to reach a “reasonable decision.” Stated otherwise, judges should strive “to reach the most reasonable result in the circumstances—which include though are not limited to the facts of the case, legal doctrines, precedents, and such rule-of-law virtues as stare decisis.” Right-answer certainty in judicial decisionmaking is nothing more than a nostalgic reflection for “lost certitudes.” The goal, indeed, is to achieve—from a substantive policy standpoint—the “perfect” answer, while “nice” is but one of a number of competing values in judicial decisionmaking, with the search for protection and the appearance of equal treatment being in competition with the quest for that perfection. Whenever possible, legal formalism—or, logical reasoning in law—is the preferred standard of analysis. And, interestingly, law and economics may be viewed properly as within the school of legal formalism.

Other forms of logic are also used in legal analysis—for example the principle which holds a proposition cannot be both true and false and the principle “that if two things are identical to a third they are identical to each other.” While most legal questions can be answered, because of their lack of inherent difficulty, syllogistically or, by simply applying a general rule to a particular factual setting where not only the mean and applicability are clear, but also the validity of the rule, a number are immune to syllogistic resolution. Thus, reasoning by analogy is often used as a not especially cogent substitute

335. Posner, supra note 3, at 130. Judges, as rule makers, cannot see when formulating rules the effect their rules will have in the future. Thus it is known “that those who are in an ex ante position cannot possibly see things ex post. But it may be equally true that judges cannot think their way back into an ex ante frame of mind, in any way except metaphorically.” Rose, supra note 272, at 603.
336. See Posner, supra note 334, at 830. But see RONALD DWORKIN, Is There Really No Right Answer in Hard Cases?, in A MATTER OF PRINCIPLE 119 (1985), who argues the need for right answers. Dworkin later modifies his position by declaring, “I have not said that there is never one right way, only different ways to decide a hard case.” RONALD DWORKIN, LAW'S EMPIRE 412 (1986).
337. Scalia, supra note 10, at 1178.
340. See Posner, supra note 3, at 41.
341. See Posner, supra note 334, at 890.
form of legal analysis. Interestingly, the essence of legal reasoning by analysis is but a search of the past for both relevant experience and other pertinent considerations to the instant case and, as such, is to be recognized as a dimension of practical reasoning.

Tacit or unconscious knowledge is also important in legal analysis. Over time, and seasoned with experience, some lawyers are able to develop a "feel"—that is not subject to articulation—for legal arguments "in the ballpark" and those which are simply not. This type of loose analysis is advanced and even fortified by an approach to practical reasoning that subjects a certain proposition "to the test of time" and then accepts its validity or conclusiveness if it stands over a certain period.

Since law relies heavily on practical reason for its enactment and enforcement, it is but natural that practical reasoning be employed for legal analysis. This form of reasoning has been termed a "grab bag" of methods, including for example, "deliberation, interpretation, reliance on authority [and] tacit knowledge" and can be used with a reasonable degree of certainty (and sometimes a quite high degree) to establish the truth of many propositions. When legal questions defy resolution by practical reasoning, an area of indeterminacy thus arises which in turn is filled "with contestable judgments of ethics or policy." If law and economics are not considered directly in first order legal formalism, then implicitly—it is contended here—they must enter the judicial decisionmaking process when, in seeking to structure a "reasonable" decision, the judge will consciously or unconsciously balance the costs (e.g., economic and social) against the socioeconomic benefits of a particular course of action. Economic fairness, then, becomes the goal or point of equipoise for efficient balancing. And, reaching this point of equipoise—theoretically—maximizes wealth. If efficiency be recognized as the animating force behind much

342. Id. See also Posner, supra note 3, at 92 passim (discussing the limitations of reasoning by analogy). Cross & Harris, supra note 338, at 192-99.
343. See Posner, supra note 3, at 98.
344. Id. at 109.
345. Id. at 112 passim.
348. Posner, supra note 334, at 890. For most American judges faced with deciding difficult cases, pragmatism is favored over formalism simply because "pragmatic jurisprudence connotes a rejection of the idea that law is something grounded in permanent principles." Posner, supra note 3, at 405.
349. Posner, supra note 334, at 891.
of the development of the Common Law, it can be argued that contemporary judges have some type of "obligation to make decisions that will be consistent with efficiency."\textsuperscript{350}

All too often, when judges style the language of their opinions as searches for corrective justice, they implicitly utilize economic criteria for reaching this goal.\textsuperscript{351} Indeed, people can and do apply economic principles intuitively—and thereby "do" economics without realizing what they are doing.\textsuperscript{352} Thus, it has been argued "that economic principles are encoded in the ethical vocabulary that is a staple of judicial language, and that the language of justice and equity that dominates judicial opinions is to a large extent the translation of economic principles into ethical language."\textsuperscript{353}

\textbf{B. Wealth Maximization or Utilitarianism}

While the term "wealth maximizing" can be substituted for the word "utilitarian,"\textsuperscript{354} a different spirit is to be found—it has been suggested—behind a system of wealth maximization and a utilitarian system.\textsuperscript{355} "Wealth maximization is an ethic of productivity and social cooperation—to have a claim on society's goods and services you must be able to offer something that other people value—while utilita-

\textsuperscript{350} Posner, \textit{supra} note 3, at 375. Learned Hand, in an opinion he authored in 1947, is credited with developing a formula regarded as the quintessential example of an economically efficient rule. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Essentially, under the formula, a calculation is made of the cost that a rational economic person would incur to avoid the possibility of injury to either his person or property. Using algebraic terms to structure his formula, Judge Hand used $P$ for Probability, $L$ for Injury and $B$ for Burden. He concluded that imposition of liability would depend upon whether $B$ (the Burden on the plaintiff to prevent an injury) is less than $L$ (the potential gravity of Loss should an injury occur) multiplied by $P$ (the Probability that an injury will occur): i.e., whether $B<PL$. The extent of an owner's duty to provide against resulting injuries, then, is a function of three variables: the probability of occurrence; the gravity of the resulting injury and the burden of adequate precautions. This formula has recently been said to be ethical rather than economic because, "[t]he duty to incur the same costs to avoid injuring oneself is ethical, not economic. The duty to undertake cost-justified precautions on behalf of another reflects the morality of the Golden Rule . . . ." Jeff L. Lewin, \textit{Is Justice Implicitly Efficient?}, 38 J. Legal Educ. 423, 432 (1989)(reviewing LANDES & POSNER, \textit{THE ECONOMIC STRUCTURE OF TORT LAW, supra} note 273). Interestingly, Judge Posner applied the Hand Formula in United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1026 (1982). \textit{See also} McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987)(Posner again applying the Hand Formula); Posner, \textit{supra} note 7, at 164-168.

\textsuperscript{351} LANDES & POSNER, \textit{supra} note 273, at 22-23.

\textsuperscript{352} Id.

\textsuperscript{353} Id.

\textsuperscript{354} POSNER, \textit{supra} note 3, at 378.

\textsuperscript{355} Id. at 391.
rianism is a hedonistic, unsocial ethic." As fashioned originally by Jeremy Bentham, laws that were utilitarian sought to maximize the greatest degree of happiness to the greatest number of citizens. Yet, if happiness is secured by the average person through economic security and maximization, it is obvious that it is anything but an hedonistic or unsocial ethic. It is, rather, a practical goal and/or principle.

No moral imperative directs wealth maximization; rather, it is but a pragmatic acceptance of its function and its level of efficient operation. Generally, in societies where markets function freely, its citizens are not only better off than those in other societies, but are recognized as having more liberty and dignity, together with a higher level of contentment. Thus, it is maintained "that wealth maximization may be the most direct route to a variety of moral ends."

There is valid reason to conclude that markets do in fact work and "that capitalism delivers the goods, if not the Good . . . ." It should be remembered, however, that while wealth maximization may be regarded generally as an "attractive objective to guide social choice," it does not correctly have as a social goal the attainment of income equality.
C. Efficiency and Ordered Liberty

A central role of the government is not only controlling both the distribution of wealth and income among the members of society, but also controlling the use of resources to thereby maximize the aggregate social product; thus, efficiency is not the principle goal of governmental action.\(^3\)\(^6\)\(^3\) Depending upon individual circumstances, efficiency may or may not be a "good thing", or for that matter, a virtue.\(^3\)\(^6\)\(^4\) It is recognized generally, however, as "a concept of ethical maximizing, implying the goodness of increasing some quantity to the limits of possibility . . . ."\(^3\)\(^6\)\(^5\) Accordingly, application of the concept is not narrowly confined in directional focus "on the total social output of tangible economic goods," nor does it "imply that this output is the quantity to be maximized."\(^3\)\(^6\)\(^6\) Rather, a process that is efficient "is one which maximizes the total amount of welfare, of personal satisfaction, in society, and not all satisfaction is material."\(^3\)\(^6\)\(^7\)

Individuals enjoy certain fundamental liberties to act as they wish regarding the things which they "own".\(^3\)\(^6\)\(^8\) The practical boundaries of these liberties are determined largely by "existing conditions of economic resources employment" within the social universe, or in other words, the general society, the community or the state.\(^3\)\(^6\)\(^9\) The state, in exercising its police power, often shapes the boundaries of certain property liberties. Indeed, both the police power and nuisance law direct the scope of the state's power to require or forbid certain real property uses by a landowner.\(^3\)\(^7\)\(^0\) And, what is seen commonly in testing the legitimacy of a police-power measure is a comparison or balancing of "the need of society for the measure, or the contemplated gain of society from it, with the harm it will cause to the individual or class of individuals complaining."\(^3\)\(^7\)\(^1\) The measure will be deemed legitimate if individual losses are determined to be outweighed by social gains.\(^3\)\(^7\)\(^2\)

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363. Michelman, supra note 32, at 1181. See generally Jules L. Coleman, Efficiency, Utility and Wealth Maximization, 8 Hofstra L. Rev. 509 (1980) (suggesting that wealth maximization could be included with the traditional analysis of economic efficiency).

364. Michelman, supra note 32, at 1176.

365. Id. at 1173.

366. Id.

367. Id.

368. Id. at 1167.

369. See id. at 1206-08 where a discussion of the social functionary theories of property is presented.

370. Id. at 1165.

371. Id. at 1193.

372. Id. The four factors usually deemed critical in determining whether an exercise of the police power is or is not compensable are: "(1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his
Instead of relying upon this balancing test, it has been suggested that a police-power measure should be recognized as compensable "if not to compensate would be critically demoralizing."373 Whether the "clarity" of this suggested standard would compensate for the perceived imprecision of the balancing test as well as the difficulty in formulating and applying fairness as a construct or standard for testing the legitimacy of political action,374 remains to be proved.

Land use measures that are fair and reasonable are—all other things being equal—more likely to encourage not only thrift and industry but good order to a more sustainable level than would an unfair measure. In turn, the fair treatment of property owners promotes the welfare of society. There is also a direct, albeit imperfect, "correlation between efficiency and utility."375 For, "all other things being equal, an efficient ruling in a nuisance case is more likely to promote utility than is an inefficient ruling."376 This is the case because, simply, "[a]n efficient use of land is more likely to maximize the greatest happiness for the greatest number than an inefficient use."377

IX. CONTEMPORARY BALANCING TESTS IN JUDICIAL REASONING

A. Modes of Balancing

Stated simply, the balancing test directs a judge to balance the plaintiff's interests against those of the defendant and thereby render judgment for the party found to have the more significant or weightier interests.378 Structured as such, the test poses what is regarded as a direct challenge to judicial reasoning that is rule based.379

1. Fact

There are essentially three forms of balancing: fact balancing, rule balancing and result balancing—with the latter form presenting the

373. Id. at 1213.
374. Id. at 1248. A judgment based on fairness is one that "is introspective and ineffable." Id. at 1249.
375. Rabin, supra note 19, at 1309.
376. Id. Professor Rabin presents a chart depicting the measures by which land use conflicts can be resolved with the goal of optimizing fairness and efficiency being achieved. Id. at 1310.
377. Id. at 1309.
378. McFadden, supra note 23, at 586. Taxonomically, the test is based on the metaphor of the scales. Id. at 596.
379. Id. at 588.
most difficulty. In fact balancing, judges and juries weigh the various evidentiary proofs presented in court in order to determine in fact the existence or non-existence of various states of affair put forward by the plaintiff and the defendant by "assigning" weight to each piece of evidence. Thus, formally or informally, balancing efforts to deduce facts is an ever present occurrence in a trial where conflicting evidentiary proofs are put forward by the interested parties.

2. Rule

The second type of balancing, rule balancing, has as its purpose the determination of a rule of law for suitable application in a legal action. Utilized in this manner, with or without use of this specific designation, the test presents no formidable challenge to the more traditional form of legal reasoning. In fact, more often than not, this test is subsumed under the rubric of "policy analysis." When a specific court does in fact refer to a "balancing" of the "weights" of competing legal arguments, it is merely attempting to describe a process whereby it is discerning "which litigant has 'made the better case.'"

Traditionally, when a court found no rule of law to cover the case at hand it turned to similar rules, in similar cases, and argued by analogy, or it attempted to determine a new rule by logical derivation from prior rules. In short, the materials out of which courts constructed new rules were other legal rules, and the tools of construction were deductive or inductive logic, more or less formally applied. In balancing interests to construct a new rule of law, however, the primary resources are not prior laws and logic, but the interests of the parties to the litigation or the interests of groups they are deemed to represent. To those interests the court applies neither induction or deduction, but the mechanism of balancing.

3. Result

Finally, in the third major type of balancing, result balancing, the end result of the process is neither a factual statement nor a rule of law, but rather a disposition of the case at bar or simply a legal result. Finding a precise line between result balancing, and rule balancing is admittedly difficult—for such a distinction will very often depend upon what the court has concluded it has done. Accord-

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380. Id. at 600, 651.
381. Id. at 597.
382. Id.
383. Id. at 598.
384. Id.
385. Id. at 599.
386. Id.
387. Id.
388. Id.
389. Id. at 600.
390. Id.
ingly, a court may acknowledge that it balanced the interests of the state against those of the individual and out of that balance has crafted a rule that will govern the type of case before it. Contrariwise, if the court concludes that its decision will affect only the case at bar, then it has reached its decision by engaging in result balancing.\textsuperscript{391} Oftentimes, courts may not even be aware of how they reached their decision and it remains for future courts to “divine” the process.\textsuperscript{392}

The canons of traditional legal reasoning are challenged by result balancing inasmuch as the standard approach of case disposition—turning as it does on the existence of physical fact or on questions of definition or classification—is discarded.\textsuperscript{393} Instead of tying the disposition of a case to an examination of the meaning of a word or resolving issues within the constraints of evidentiary rules, the result balancing test replaces all of this with an evaluation of the balance of competing individual interests or social values.\textsuperscript{394} Once it is introduced into an area of law, result balancing “asserts its presence again and again, in every future case of the same type. Thus the rule of law, in such an area, is to balance. Whenever the question arises, no matter how often, a balance must be struck.”\textsuperscript{395}

\section*{B. Applications and Values in Usage}

During the past thirty years, rule balancing, and result balancing have become popular.\textsuperscript{396} In the late 1950s, only a handful of cases utilized the tests; but by 1985, they had been utilized as the principal method of decision in some forty areas of constitutional law, Common Law and statutory adjudication.\textsuperscript{397} In 1987, rule balancing and result balancing were found in more than five hundred cases in the federal and state judicial systems.\textsuperscript{398} Interestingly, when judges do engage in result balancing, it has been found that they are more likely to label their own deliberations as comprising a “balancing test” than when they undertake other types of balancing.\textsuperscript{399} So it is, then, that most

\begin{thebibliography}{99}
\bibitem{391} Id.
\bibitem{392} Id.
\bibitem{393} Id. at 601.
\bibitem{394} Id.
\bibitem{395} Id.
\bibitem{396} Id. at 603.
\bibitem{398} McFadden, supra note 23, at 603.
\bibitem{399} Id.
\end{thebibliography}
cases referring to a "balancing test" actually involve result balancing.\textsuperscript{400}

The major reason for popularizing the principle of balancing outside the confines of equity "was the judicial desire for candor, the simple drive to tell the truth about judging, regardless of cost."\textsuperscript{401}

Although one can never describe with certainty the psychological and sociological imponderables that determine the judicial decision, perhaps it is close enough to the truth to confess that judges balance the interests of the parties before them. And if they do so openly, on the face of the opinion, one has restored, at least in part, the reportorial integrity of opinion writing \ldots \textsuperscript{402}

Too, the use of balancing tests is recognized as being not only simple, but descriptive and just;\textsuperscript{403} for the test involves but three considerations: setting the balance, acknowledging and thereby analyzing the elements to be weighed, and declaring the winning party.\textsuperscript{404}

The evidence regarding whether judges really balance interests in judicial decisions is mixed.\textsuperscript{405} There is, indeed, some evidence that the judges follow this very process.\textsuperscript{406} Even for those judges who do not acknowledge explicitly the fact that they balance interests, they subconsciously or by implication are nevertheless performing the balancing tests in determining whether a defendant's acts have created a nuisance.

Matters are implied \ldots because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.\textsuperscript{407}

In sum, then, the balancing test correctly underscores—or at least complements—the traditional view of the very nature of legal judgments: that is, they record a party litigant as either victorious or defeated.\textsuperscript{408} It has been suggested that the word "balance" in truth serves as but a synonym for "consider" or "take into account." Accordingly, when it is stated that judges "balance interests," what is meant simply is they either consider or take account of the multiple interests of the party litigants and then make their judgments.\textsuperscript{409}

The flexibility of the balancing test should be recognized as its principal virtue simply because each application of the test is limited

\textsuperscript{400} See \textit{id.} at 617.

\textsuperscript{401} \textit{Id.} at 620.

\textsuperscript{402} \textit{Id.} at 621.

\textsuperscript{403} Id. at 622.

\textsuperscript{404} \textit{Id.} at 622-23.

\textsuperscript{405} \textit{Id.} at 625-27.

\textsuperscript{406} Id. at 633-34.

\textsuperscript{407} Holmes, \textit{supra} note 151, at 466.


\textsuperscript{409} McFadden, \textit{supra} note 23, at 631.
strictly to the facts of each case in which it is used. Stare decisis, then, is only important or relevant as a simple framework for structuring a specific balancing test for a given case or a case that has common points of law and fact. In order to account for the peculiar facts of a case before the court, additional elements are simply added when appropriate to the judicial determination.

The largest obstacles to the balancing test are to be seen within the issues of consistency and clarity—for the test does not ensure, even theoretically, that similar cases will be treated similarly, and, thereby, introduces uncertainty or lack of predictability as to what behavior is permitted and what is not. In dealing with Nuisance Law and the equitable remedy of injunction, however, the balancing test should be viewed as a dominant strength simply because of the modernizing effect it shows by reflecting contemporary social values—values that change dramatically from one region of the country to another.

410. Id. at 635. See Boomer v. Atlantic Cement Co. Inc., 257 N.E.2d 870 (N.Y. 1970), where, because of the disparity in economic consequences (e.g., 300 employees made redundant and a capital investment of $45,000,000 destroyed) of enforcing injunctive relief, the court ruled an award in damages for the $185,000 worth of injuries sustained by plaintiff were preferable to the issuance of an injunction. See Ernest J. Getto & James L. Arnone, Nuisance Law in a Modern Industrial Setting: Confusion, Misinformation Can Prove Dangerous, 5 Toxics L. Rep. (BNA) 1118 (Feb. 6, 1991); Ernest J. Getto & James L. Arnone, Nuisance Law in a Modern Industrial Setting: Confusion, Misinformation Can Prove Dangerous, 5 Toxics L. Rep. (BNA) 1148 (Feb. 13, 1991).

Judge Posner suggests that the $45 million investment in the Atlantic Cement factory is but a rough estimate of the loss which could have well been higher or lower. Since the plaintiffs' costs of the nuisance were only $185,000, any price for seeking the dissolution of the injunction between $185,000 and $45 million would have made both party litigants better off than had the injunction been enforced. Thus, with this enormous bargaining range, "it would have paid each party to invest substantial resources to engross as much of it as possible." POSNER, supra note 7, at 71. See also Spur Industries Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972)(the first reported case of a compensated injunction); Jeff L. Lewin, Compensated Injunctions and the Evolution of Nuisance Law, 71 IOWA L. REV. 775 (1986).

411. See McFadden, supra note 23, at 635.


In lieu of the balancing tests, it has been suggested traditional injunctive relief be eliminated altogether and in its place full damage options to an injured party plaintiff be allowed or the wide use of the compensated injunction be acknowledged. Robert C. Ellickson, Alternative to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 738-48 (1973).
X. ECONOMIC INFLUENCES IN LAWMAKING

A. Searching for The Average, Ordinary Reasonable Person

Economists—in an effort to understand law—assume that the average person acts rationally in such a way as to maximize his own self-interest.\(^{413}\) In law, the actions of the average, ordinary reasonable person are always at center point in analyzing or testing whether a proper course of conduct has been undertaken by the parties in a legal controversy.\(^{414}\) Persons, as sapient individuals, are assumed to act reasonably—or in an economically efficient manner—in order to maximize their resources. There are, to be sure, cases when emotions reign supreme (e.g., more often than not when dealing with love), but generally, it is assumed in the final analysis, the head prevails wisely over the foolish heart.

Although the average reasonably prudent man is an abstraction and regarded as "a creature of the law's imagination," he nonetheless has been described both as a paradigm of "the man in the street" and of one "who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."\(^{415}\) This average, ordinary reasonable person is not regarded as without imperfection, but rather, representative of "the general average of the community."\(^{416}\) His capability of making errors in judgment as well as being selfish and being afraid "embodies the normal standard of community behavior."\(^{417}\) And I think it safe to speculate that this average, ordinary reasonable man wishes to maximize and/or strengthen his economic position; which is to say, he watches for sale items advertised in newspapers and on television, will use discount coupons and generally try to get as much for his money as possible.\(^{418}\)

In testing the extent to which the average, ordinary, reasonable person's conduct falls below the standard of normal rational behavior and is thus open to a charge of negligence, an objective standard of

\(^{413}\) Elliott, supra note 39, at 85. For a discussion of cooperative rationality and neo-classical rationality, see Herbert Hovenkamp, Rationality in Law and Economics, 60 GEO. WASH. L. REV. 293, 298 passim (1992).

\(^{414}\) See generally Goodman, supra note 161 (supporting and explaining Posner's argument that the Common Law developed on the assumption of economic efficiency).

\(^{415}\) 2 HARPER ET AL., supra note 296, § 16.2, at 389.

\(^{416}\) Id.

\(^{417}\) Id.

\(^{418}\) Continuous interaction between community members, experiences and values all combine to influence each other and, in turn, build confidence in their own probability judgments and shape the degree to which rationality in decisionmaking prevails. See also Robert C. Ellickson, A Critique of Economic and Sociological Theories of Social Control, 16 J. LEGAL STUd. 67 (1987)(discussing "norms of neighborliness" as a vector of force in decisionmaking).
evaluation is utilized. Yet, no matter how objective the test may be structured and presented to a jury for their determination, there is much evidence to the effect that in actuality, "the personal equation will be very much taken into account," especially since it is realized that frequently economic models are indeed formulated on unrealistic assumptions.

B. Micro-Economics as an Interpretative Tool

Micro-economics attempts to analyze and predict patterns of social behavior by analyzing two hypotheses. The first is that resources are scarce in relation to the desires of people to consume them, and choices (or trade offs) must be made between resources or activities. The second hypothesis is that since people generally behave in a rational manner when making market place decisions, seeking as such to maximize their personal utility, the law of demand becomes operational and dictates that when the price of a good increases, people will simply consume less of it and, conversely, when a decrease in price occurs, an increase in consumption will occur.

The major economic conclusion about social behavior drawn from these hypotheses is that when competitive conditions prevail, free trade among individuals will result in what may be said to be a socially optimal allocation of resources; with such an allocation defined theoretically as one in which no individual can better his position without injuring the position of at least one other individual. Thus, the allocation is characterized as either "pareto efficient" or "pareto optimal." While the pervasive recognition of uncertainty is a given in twentieth century economic thought, since the industrial revolution, there has been a confidence that whatever uncertainty there was it would ultimately be benevolent rather than harmful. Relative

419. See 2 Harper et al., supra note 296.
420. Id. § 16.3, at 393-95.
probabilities rather than absolute certainties then become the watchword.426

C. The Economists' Cost/Benefit Approach

For the economist who seeks to make a determination whether the average person has acted in such a rational manner as to maximize his own economic self interest, a relatively simple cost-benefit analysis is employed. Under such a test, a comparison is made "of all the costs and benefits associated with a policy change," with all cost and benefit streams being discounted to generate present values.427 Where benefits exceed costs, sufficient grounds then exist for proceeding with the policy.428 It is important to understand, that the appropriate comparison is between what happens if the policy is pursued and what happens if it is rejected. In other words, it is essential to have some way of predicting not only what will happen if we go ahead with the policy but also what will happen if we do not.429

The better known number of criteria used by economists to assist them in measuring aggregate gains and losses through a cost-benefit procedure are four: the Hicks-Kaldor test; the Pareto test; the Rawlsian Criterion; and Distribution Weights.430

Under the Hicks-Kaldor Test, reliance is placed upon the "proposition that if those individuals who gain from a policy change could at least potentially compensate the losers, the change in policy should be approved."431 Thus, for example, if, as a direct consequence of improving airport facilities, anticipated construction costs of $100 million will in turn reduce property values in the immediate vicinity by $20 million, yet air travelers will benefit in savings of $125 million, the construction should proceed. Although often impractical to structure frameworks "that permit the gainers to actually compensate the losers," this test—hypothetical by necessity—will, nevertheless, generally promote a decision.432

The second test, the Pareto Test, enjoyed great popularity in applied economics until the late 1930s when the work of Hicks and Kaldor introduced their test built upon potential compensation.433 Applying the Pareto Test, a policy change should be approved if, and only if, it allows one person in the economy to be better off than he was

426. Id.
428. Id.
429. Id.
430. Id. at 49-52.
431. Id. at 49. See Posner, supra note 7, at 12-16.
432. Bowles, supra note 427, at 49.
433. Id. See also HENRY G. MANNE, THE ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS 14 (1975)(stating Pareto optimality and Kaldor-Hicks are theoretic criteria for ranking, or judging, outcomes).
before the policy was implemented but also makes no one worse off.\textsuperscript{434} Since there are very few policy proposals that may be determined as having exclusively beneficial or neutral effects, the \textit{status quo} generally does rather well under this test.\textsuperscript{435}

The Rawlsian Criterion or Test derives from a book entitled, \textit{A Theory of Justice}, that was authored by John Rawls in 1971. It merely argues that the appropriate test of the validity of a policy is to be determined by analyzing “its effects on the least well-off,” accordingly, if the effects are deleterious, the policy must be rejected—regardless “of the size of benefits that it may bestow upon the better-off.”\textsuperscript{436}

The fourth test is but a variant of the Hicks-Kaldor Test, and is denominated as the Distributional Weights Test. Under its application, explicit weights must “be assigned to the gains and losses accruing to different groups.”\textsuperscript{437} Thus, changes in the income levels of the less well-off may for example be assigned more importance than changes in the income levels of the better-off. At different times it has been suggested that these weights be inferred from previous policy decisions (an approach which requires a degree of consistency in previous policy-making that some might think unlikely) or that decision-makers be confronted with having to assign their own weights in order to reach a measure of total gains and losses.\textsuperscript{438}

While the basic notion of cost-benefit analysis remains straightforward, there are obvious difficult technical features present in all of these four test criteria. Yet, by conducting an assessment of the costs and benefits to all individuals influenced by a policy change and by expressing them all carefully as a present value—or, in other words, as a number of dollars at current prices—the two can be compared directly. Accordingly, if the benefits exceed the costs, the change in policy should be effected; otherwise, the policy should not.\textsuperscript{439}

\section{Pareto Superiority}

As has been acknowledged, a Pareto superior transaction occurs when, as a consequence of its execution, at least one person is, economically, better off and no one is worse off.\textsuperscript{440} The best paradigm of a Pareto superior transaction is found in a simple contract; for here, un-

\begin{itemize}
\item \textsuperscript{434} Bowles, \textit{supra} note 427, at 49. \textit{See also} Posner, \textit{supra} note 7, at 13.
\item \textsuperscript{435} Id.
\item \textsuperscript{436} Id., at 50.
\item \textsuperscript{437} Id.
\item \textsuperscript{438} Id., at 51.
\item \textsuperscript{439} Id. at 51.
\item \textsuperscript{440} Asserting goods or resources are allocated according to Pareto optimality maintains “any further reallocation of resources will benefit one person only at the expense of another.” Jules L. Coleman, \textit{Efficiency, Exchange and Auction: Philosophic Aspects of The Economic Approach to Law}, 68 Cal. L. Rev. 221, 226 (1980).
\end{itemize}
less each party thought that he would be better off, he would simply
not execute it. Assuming an adequate flow of information relevant to
the provisions of the contract and no adverse effects on third parties,
the contract will be recognized as being Pareto superior. Certainly,
at least, this will be the case on an ex ante basis for it is quite conceivable
that, as situations develop, one or perhaps even both of the parties
may indeed be made worse off by the enforcement of the contract.
Such a result would be possible simply because “uncertainty is inevi-
table.”441 “The ethical appeal of the Pareto principle is similar to that
of unanimity. If everyone affected by a transaction is better off, how
can the transaction be socially or ethically bad?”442 So it is seen, then,
Pareto superior transactions make a strong case for ethical respect
because they draw from fundamental intuitions to both utilitarianism
and individualism: namely, respect for preferences and for persons.443

2. Pareto Optimality Under Siege

Judge Guido Calabresi concluded recently that Pareto optimality is
an inappropriate measure of efficiency.444 In particular, he stated
that “if efficiency is defined in terms of a strict . . . Pareto test, any
starting point will be, or will immediately lead to, an efficient end
point, even with transaction costs.”445 He reasoned that, if there were
a way that some people could be better off, without anyone else being
made worse off, society would already be at this point.446 Thus, if no
one is made worse off, then presumably no one would object to a
change. Accordingly, since there are no objectors, society would auto-
matically make that change without being told to do so.447 Con-
versely, if a party objects to a change, then, by definition, the change
would not be Pareto optimal.

Even if this model is correct, it does little to affect the viability of
using Pareto optimality as a tool of efficiency; for Calabresi overlooked
the fact that many people do not know what is in their best interests.

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441. Posner, supra note 3, at 388-89.
442. Id. at 389. See generally Ethics, Economics, and the Law (James Roland Pen-
nock & John William Champman eds., 1982)(essays presenting discussion of
ethics, economics, and law from various points of view).
444. Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 Yale
L.J. 1211, 1215 (1991). In practice, reaching Pareto optimality is an exceedingly
complex matter simply because of the existence of so many external effects which
markets find difficult to handle. Calabresi & Melamed, supra note 301, at 1103.
445. Calabresi, supra note 444, at 1215.
446. Id. at 1216-17.
447. Id.
Indeed, a court’s *parens patriae* powers stem from the fact that some people are incapable of recognizing what is best for them economically let alone socially.\(^{448}\) Hence, even though an individual may object to a change, it does not necessarily follow that that individual would be made worse off if the change were effected. For example, some landowners might object to installing air filters in their houses—due perhaps to laziness—regardless of the fact that the filters would improve their health.

D. Economic Efficiency

Although unrealistic assumptions often form the bases of economic models,\(^{449}\) the central norm for social ordering is that of efficiency.\(^{450}\) This norm builds, however, on a factual judgment that human actions are motivated and driven by rational behavior “in the minimal sense of aiming at general satisfaction of consistently ordered sets of privately experienced wants or preferences.”\(^{451}\) Efficiency is but the arrangement of matters in such a manner to allow for that fullest level of satisfaction “as nature’s immutable laws permit.”\(^{452}\)

Efficiency of private property, then, is but a hypothesis dependent upon two factors: rationally directed behavior that seeks to satisfy individual wants, and questions that measure the contents of the wants as well as the bearer’s social propensities—the latter of which may be determined empirically to a degree, while the former “can only be imputed through moral intuition or moral reason.”\(^{453}\) Thus, an empirical test of efficiency is not readily available.\(^{454}\)

Although admittedly difficult, determining an efficient result is solely a question of evaluating relative costs.\(^{455}\) Yet, this determination of relative costs—in and of itself—can be mired in complexities far exceeding what might, initially, be regarded as but a process tied


\(^{449}\) LANDES & POSNER, *supra* note 7, at 16.


\(^{451}\) Michelman, *supra* note 450. Economic efficiency as a societal goal is complemented also by the need for wealth distribution. Calabresi & Melamed, *supra* note 301, at 1098.

\(^{452}\) Michelman, *supra* note 450.

\(^{453}\) *Id.* The Coase Theorem posits that if economic gains are to be made from commercial trade, rational individuals will trade. And, similarly, if there are no gains to be made, no trading will occur. Accordingly, those who do not make exchanges that improve their net welfare are considered to be irrational. POSNER, *supra* note 7, at 51.

\(^{454}\) MANNE, *supra* note 433, at 105.

\(^{455}\) Rabin, *supra* note 19, at 1315 n.41.
to applying market costs against existing technology. All too often, personal party preferences may be at variance significantly from the market; and identifying the preferences may be quite difficult. Still, the most difficult and, at the same time, significant task is finding a result which is not only efficient but fair as well, and, hence, one which would likely have high utility.456

In 1776, Adam Smith postulated his theory that an inherent order existed in an economic system which recognized every individual pursues only his own personal good; but, as if led by an “invisible hand,” achieves, in the long run, the best good for all.457 Today, there can be no doubt that, as a maxim of political behavior, recognition must be made of the fact that most individuals—throughout daily facets of their lives in family, work and recreational settings—make interpersonal comparisons of utility. Once this form of subjectivism is accepted, a difficulty is presented: namely, how to interpret consequences in the aggregate without relegating “total utility” to a type of Platonic good somehow hovering over the heads of the individual members of society.

The answer to this conundrum is to be found in choosing a measure of social welfare which in turn allows judgments to be made concerning “(total) social states without requiring interpersonal comparisons of utility.”458 Pareto superiority appears to meet both conditions.459 Accordingly,

[when one says that state A of the world is better than state B, he means by this criterion that at least one person prefers (by his own subjective lights) state A to state B, while no persons (by his own subjective lights) prefers B to A. In that situation we can collectively prefer A to B without having to make any interpersonal comparisons of utility. Similarly, to say that a state is Pareto optimal means that no one can be made better off unless someone is made worse off. It is therefore odd to want any social state that is not Pareto

456. Id. at 1315, n.42. When inconsistencies do exist between fairness and economic efficiency, it is reasoned they are found because either “efficiency-oriented judges” are not doing a good job of economic analysis or the judges are incorrectly applying criteria that is inconsistent with achieving economic efficiency. Landes & Posner, supra note 273, at 22-23. See also Lewin, supra note 350, at 432.

457. Smith, supra note 142.

458. Epstein, Postscript: Subjective Utilitarianism, supra note 357, at 770. Stated otherwise, under classical utilitarianism, one is obligated to perform that action which, at a given time, will most likely “produce the greatest net balance of utility over disutility.” Under this formulation of the principle of utility, an interpersonal comparison of utilities is required. The standard of Pareto superiority allows a bypass to this difficult task of interpersonal comparability. Since a Pareto improvement produces no losers—only winners—there is no need to compare the relative gains and losses of either winners or losers in order to determine whether a particular course of conduct increases utility. For, where “conduct is Pareto superior, total utility increases . . . .” Jules L. Coleman, The Economic Analysis of Law, in ETHICS, ECONOMICS AND THE LAW, supra note 450, at 85.

459. Epstein, Postscript: Subjective Utilitarianism, supra note 357.
optimal: why not make X better off by his own lights if no one else is hurt thereby.460

Debates can be conducted on the issue of whether Pareto tests should be dominant over Kaldor-Hicks tests, and if so, within what context. Yet, two underlying points of comparative strength are found within both approaches. Both approaches or tests, associated with either "efficiency" or "social welfare" economics, can be placed within an ordinary definition of utilitarianism and both require "positing some Platonic pleasure independent of persons. . . ."461 Perhaps the more crucial point of contention is whether the application of Paretian criteria mandates a commitment to acceptance of "total utility" and "objective values"—both of which are regarded as an inherent part of classical utilitarianism.

So long as we know that each person advances by his own lights, then we are confident that total utility . . . has advanced, even if we do not know (or care) by how much. We do not have to sum utilities across people to make the necessary comparative judgments. Those who try to make social judgments in a world where interpersonal comparisons are not possible, are, it seems, utilitarians who are skeptical about the belief of interpersonal comparisons of utility . . . .462

E. Efficiency v. Fairness: Reconcilable or Irreconcilable

One of the pressing points of the dialogue between the economic justice jurisprudences or utilitarians and those who might be better termed deontologists, or natural law traditionalists, is whether economic efficiency and fairness are consistent or inconsistent, or for that matter, equivalent.463 A recent critic, in stating his conviction that there is no equivalence between justice and efficiency, concludes: "Justice is a far richer and broader concept than economic efficiency."464 Or, restated to my way of thinking, the question should be posited whether law is fluid or flexible. For me, it is a matter of simple semantics that, sadly, has become the proverbial "tempest in a [theoretical] teapot." Taking words at their simplest and most basic meaning from the Oxford English Dictionary, it is to be seen that just laws—fair laws—without exception, should theoretically, and in actuality, complement the notions of justice, and thus, promote their own reasonable, efficient administration. Similarly, law must be recog-

460. Id. at 770. See generally SAMUELSON, supra note 422, at 18 passim.
461. Epstein, Postscript: Subjective Utilitarianism, supra note 357, at 772.
462. Id.
nized as being both fluid (operating under policies of equity and public policy) and flexible (guided as such by the standard of reasonableness or economic efficiency), and thus, forever adjusting its balancing mechanism of these two concepts as the merits of each case or controversy dictate.

The *Oxford English Dictionary* defines "fairness" as "Equiteness, fair dealing, honesty, impartiality, uprightness," and in defining "efficient" as "Productive of effects" relates it to effectiveness, adequacy of qualification and skill, and "economic efficiency," where "the efficiency with which scarce resources are used and organised to achieve stipulated economic ends." In defining "economic" as "Relating to the private income and expenditure . . . Maintained for the sake of profit . . . Practical or utilitarian in application or use," it relates to an "economic man" or "one who manages his private income and expenditure strictly and consistently in accordance with his own material interests." "Economical" is defined as "Characterized by . . . saving, thrifty, opposed to wasteful." "Justice" incorporates the "principle of just dealing," and is defined in terms of "fairness" and "Conformity (of an action or thing) to . . . reason . . . . " Taking the plain, simple, and root or entomological meaning of fairness and justice, then, I suggest there is an inextricable linkage between justice and fairness. Accordingly, for justice to be achieved, it must be accomplished as a direct consequence of actions that are fair or equitable as well as reasonable and/or efficient.

1. The Rawlsian Concept

For Rawls, justice as fairness meant its reality and application by rational parties to an initial situation which is fair. Indeed, perhaps the most significant part of the theory of rational choice is the theory of justice; for "a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme for it meets the principles which free and equal persons would assent to under circumstances that are fair." In addition to a concept of justice, and social cooperation as necessary for a viable human com-

466. *Id.* at 84.
467. *Id.* (citing A. Gilpin, *Dictionary of Economic Terms* 57 (1966)).
468. *Id.* at 58.
469. *Id.*
470. *Id.* at 59 (emphasis omitted).
473. *Id.* at 12.
474. *Id.* at 16.
475. *Id.* at 13.
476. *Id.* at 6.
munity, due recognition must be given to the social problems of "coordi-
nation, efficiency and stability,"477 and the encouragement of "common-sense."478 Accordingly, individual plans within such a com-
munity must be executed (or pursued) in such a manner to "lead to the
achievement of social ends in ways that are efficient."479 Rational
prudence, then, becomes a sine qua non of rational, common-sense be-
behavior.480 In such a society, "every one has a natural duty to do his
part in the existing scheme."481

Although recognizing that certain conceptions of justice are "recog-
nizably egalitarian,"482 and that "it is reasonable to weigh obligations
and duties differently when they conflict,"483 Rawls recognizes that
society has a right—and I assert it is a fundamental right—"to maxi-
mize the net balance of satisfaction taken over all of its members."484
He disavows any concern with economics and, instead, presents his
exegesis as a study of the "moral problems of political economy,"485
and criticizes the principles of utilitarianism.486 I suggest that his ba-
sic ideas inadvertently substantiate the position that I have taken:
namely, that efficiency and wealth maximization are an inherent part
(or goal) of justice. Inadverence yields to direct support for my posi-
tion, however, when Rawls recognizes that society has a right "to max-
imize the net balance of satisfaction taken over all of its members."487
An inherent component of a scheme of satisfaction for the average rea-
sonable person—I suggest—is inescapably directed in his daily activi-
ties toward maximizing his own level of efficiency so that he can, in
turn, find an equilibrium between work and pleasure or general well-
being.

a. Efficiency as a Social Problem

By recognizing efficiency as a "social problem" of every viable soci-
ety, and, further, that individual plans must be pursued in such a
manner as to lead to the achievement of efficient social ends, does not
Rawls implicitly recognize economic efficiency as not only a problem to
be resolved but a goal to be achieved? Moreover, by recognizing cer-
tain concepts of justice as "egalitarian" and that reasonable actions
must be taken after they are weighed or balanced against conflicting

477. Id.
478. Id. at 28.
479. Id. at 6.
480. Id. at 295.
481. Id. at 115.
482. Id. at 538.
483. Id. at 344 (emphasis added).
484. Id. at 26.
485. Id. at 265, 360 passim.
486. Id. at 14 passim.
487. Id. at 26. See supra text accompanying note 484.
rights and duties of others, I would suggest and urge that Rawls does in fact recognize the need for balanced economic order in a just society. Indeed, he recognizes society's right "to maximize the net balance of satisfaction taken over all of its members."

The pivotal issue for any just society is the way in which it balances and distributes economic, social, moral, ethical or political rights and obligations. A just society is an efficient society in making this distribution. The goal of the Federal Rules of Civil Procedure is "to secure the just, speedy and inexpensive administration of Justice." Thus, Congress, in enacting the Rules, saw the perfect link between Justice and Efficiency. One simply complements the other. It might even be said that there is an inextricable relationship between the search and need for Justice and the search and need for Efficiency in a contemporary democracy grounded in basic principles of capitalism.

The integrity of one man's rights and obligations can only be extended or preserved in relation to a balanced consideration of them against another's rights and obligations. A single, un-enforced right, without use or application in a total social or economic setting, has little real significance or utility. The penultimate goal of a democratic society, then, should not be the enshrinement or protection of isolated rights or individual satisfactions, but rather the maximization of "the net balance of satisfaction taken over all of its members."

In a capitalistic economic system, a fair and equal return on capital investment should be a goal of likeminded citizens, for such treatment has a stabilizing effect on the whole of the social order. Moreover, it could be argued that an inherent part of fulfilling one's natural duty to society is to act reasonably and rationally in all dealings and, by so doing, promote the optimum efficiency of all in the social and economic workplace.

F. Economic Efficiency and Pareto Efficiency

For the economist, generally, efficiency is equated with "Pareto efficiency" or a theoretical standard that recognizes a stated situation as being efficient "if the outcome for any one participant cannot be improved without worsening the outcome of at least one other participant." Contrariwise, Kaldor-Hicks tests efficiency from an aggregate social utility standard, less stringent than Pareto efficiency.

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489. Id.
492. Lewin, supra note 167, at 775 n.5. Stated otherwise, a change in a legal rule is efficient "if winners gain more from the change than the losers." Landes & Posner, supra note 273, at 16.
Under it, the only requirement for efficiency is that even if “ordered to compensate losers, gainers would still be better off.”\textsuperscript{493} Under Kaldor-Hicks, there is no requirement the compensation in fact take place.\textsuperscript{494}

Debates, as observed, continue regarding whether Pareto tests or Kaldor-Hicks tests should dominate and within what contexts.\textsuperscript{495} Regardless of the strengths and the weaknesses of each method of analysis, two points are clear: they are both associated with efficiency and would appear to be placed within an ordinary layman's definition of utilitarian and, furthermore, they do not require “positing some Platonic pleasure independent of persons” for utilization.\textsuperscript{496}

\textbf{1. Advancing Total Utility}

Perhaps the bottom line should be an acknowledgment that, so long as we know that each person advances by his own lights, then we are confident that total utility . . . has advanced, even if we do not know (or care) by how much. We do not have to sum utilities across people to make the necessary comparative judgments. \textit{Those who try to make social judgments in a world where interpersonal comparisons are not possible, are, it seems, utilitarians who are skeptical about the belief of interpersonal comparisons of utility . . .}.\textsuperscript{497}

\textbf{2. Maximizing Wealth}

Two central features common to all humans is that in their daily actions they face not only a diminishing marginal utility of their wealth but also a broad general tendency toward averting risks.\textsuperscript{498} Perhaps stated differently, then, when one “advances by his own lights” what is meant is that he has chosen the “social optimum” between two courses of conduct or countervailing vectors of force within his daily life.\textsuperscript{499} That optimum will be the point at which wealth is maximized efficiently.\textsuperscript{500}

Even though contemporary judges may well refuse “to speak in the language of economics,”\textsuperscript{501} this does not, \textit{ipso facto}, result in their rulings being understood as not being based on principles of efficiency.

\textsuperscript{494} Valke, \textit{supra} note 493, at 1001 n.235.
\textsuperscript{495} Epstein, \textit{Postscript: Subjective Utilitarianism}, \textit{supra} note 357, at 772.
\textsuperscript{496} \textit{Id.}
\textsuperscript{497} \textit{Id.} (emphasis added).
\textsuperscript{498} Epstein, \textit{The Utilitarian Foundations of Natural Law}, \textit{supra} note 357, at 728.
\textsuperscript{499} \textit{Id.} at 738.
\textsuperscript{500} \textit{Id.}
People can apply the principles of economics intuitively—and thus 'do' economics without knowing they are doing it. We think that economic principles are encoded in the ethical vocabulary that is a staple of judicial language, and that the language of justice and equity that dominates judicial opinions is to a large extent the translation of economic principles into ethical language.\footnote{502} 

\section*{G. The Demise of the Average, Ordinary Reasonable Person}

It has been estimated by the United States Department of Education that national population figures show twenty-seven million citizens—or nearly ten percent of the nation's population—are functionally illiterate; that is, they can neither read, write nor think critically enough to attend to and meet the most basic requirements and responsibilities of everyday living.\footnote{503} Further estimates place the over-all national figure for functional illiterates as growing by 2.3 million a year.

It is not surprising people do not make decisions in objective, rational ways. Gross errors in the evaluation of objective information are committed consistently by laymen.\footnote{504} Often, individual values are injected into an ultimate decision; yet fundamental errors in logic are not the product of differing values.\footnote{505} Rather, they should be seen as the result of poor education, genetic deficiency or inferior environmental surroundings not conducive to learning.\footnote{506}

\footnotesize{\begin{enumerate}
  \item Landes & Posner, supra note 273, at 23.
  \item See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).
  \item See generally George P. Smith, II, GENETICS, ETHICS AND THE LAW (1981)(discussing the ethical aspects of using genetic information); George P. Smith, II, Genetics, Eugenics and Public Policy, 1985 So. Ill. Univ. L.J. 435 (presenting ethical and policy considerations of eugenics theory). See also Richard J. Herrnstein & Charles Murray, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994)(arguing the existence of genetic, racial, and class differences in regards to intelligence). But see The Bell Curve Wars: Race, Intelligence, and the Future of America (Steven Fraser, ed. 1995)(arguing
\end{enumerate}
As might be expected, recent rather astonishing economic and philosophical studies are showing a disturbing trend: the average consumers in America make economic decisions that defy common sense. They are, in a word, unreasonable and thus inefficient.507 An example will highlight this response. If two refrigerators were offered in a department store, one priced at $700 (which uses $85 worth of electricity a year) and the other priced at $800 (which costs but $25 a year to operate), with neither model requiring repair services for some ten years, it was found that the overwhelming preferred choice of purchase was not the second model.508 In this example, this preference shows “people are generally unwilling to pay a little more money up front to save a lot of money in the long run.”509 This poses a particular problem for an economy which wishes to become energy independent by using its electricity more efficiently: namely, how can this goal be realized if the average consumer refuses to purchase energy-efficient appliances even when such purchases are in their best personal interests?

The empirical research into the economic behavior patterns of consumers is tied to a concept referred to as the discount rate or that measurement of how the average consumer compares the value of a dollar he receives today with one he may receive the following day.510 Indeed, the studies of consumer behavior in purchasing home appliances have shown the existence of discount rates two, and sometimes three, times higher than could be justified on purely economic grounds. What this in turn shows is that “while consumers were very much aware of savings to be made at the point of purchase, they so heavily discounted the value of monthly electrical costs that they would pay over the lifetime of their dryer or freezer that they were oblivious of the potential for greater savings.”511

Another example of irrational economic decisions by consumers was found in a recent survey of the salary preferences of one hundred adults for a hypothetical job lasting six years. They were asked if they would prefer their salaries 1) be paid in equal installments, 2) be paid...
over the entire six-year period in installments that would gradually decrease, or 3) be paid over the entire six-year period in installments that would gradually increase.\textsuperscript{512} Twelve percent opted for identical payments, another twelve percent chose to receive their paychecks with declining amounts, and the remainder—seventy-six percent—said they “wanted their wages to increase.” When the researchers sought to explain, through follow-up contacts with the respondents, the rational reasons why they would be better off economically if they elected to have their wages start high and then decrease (e.g., they could either invest the surplus at the beginning of the pay period and, thereby, earn six years interest income, or if they resigned during the six year time of employment, their income would have been maximized), sixty-nine percent still chose the increasing salary scale.\textsuperscript{513} The conclusion to be drawn was simply: “consumers irrationally inflate the value of future paychecks even as they heavily discount the value of future [savings on] electricity bills.”\textsuperscript{514}

What this all points up rather obviously to is that the average, ordinary, wealth-maximizing American is vanishing; and in his place a rather stupid, uneducated person is appearing. Another study illustrates this conclusion decisively.

1. The Consumer Federation of America Test Results

The Consumer Federation of America, with funding by the TRW Foundation, undertook in 1989 with the assistance of the Educational Testing Service, the development and subsequent administration of a test composed of two hundred forty-nine questions on a broad range of subjects. This test was designed to gauge the extent of practical knowledge that the average consumer exhibited in a variety of his daily activities. There were six categories of questions dealing with: banking (consumer credit and checking-savings accounts); insurance (automobile and life); housing (purchase and rental); food (purchase and nutrition); product safety (household products and drugs); and durable goods (auto purchase, auto repair and maintenance, and appliance purchase and repair). The total sampling population for the test consisted of one thousand one hundred thirty-nine (1,139) individuals in five different parts of the nation. Blacks and Hispanics were over-represented and low income and less well-educated persons were somewhat under-represented. The conclusions of the study revealed,

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\textsuperscript{512} Id.  
\textsuperscript{513} Id.  
\textsuperscript{514} Id. See generally George J. Stigler, The Intellectual and the Market Place (1963).
rather predictably, that Americans were not knowledgeable about consumption.515

The average score on the test was only fifty-four percent. This is exceedingly low when it is realized that by guessing, one could answer about twenty-five percent of the questions correctly. Scores were low on housing purchases (45%), checking-savings (50%) and life insurance (51%). On a number of specific questions testing essential consumer knowledge, low results were recorded. Specifically, only seventeen percent of the respondents knew the name of the federal agency issuing information on automobile recalls; twenty-five percent knew when and how to remove asbestos; thirty-six percent knew the basis for labeling of ingredients on food items; thirty-three percent knew who real estate agents represent; twenty-six percent knew the decreasing importance of life insurance as one grows older; and twenty-one percent were aware of the extent to which automobile insurance rates vary from company to company.516

As to deficiencies among groups in the study, a twenty-two percentage point difference in average scores of the best and least well-educated groups was found, while a seventeen percentage point difference between the most and least affluent, and a thirteen to fifteen percentage point difference between whites and minorities was recorded. Those individuals in their twenties scored considerably lower than did those in their forties and fifties. However, persons sixty and over did considerably worse. Particular concern was registered regarding the test scores of senior citizens regarding food purchases and drugs since these products are most frequently purchased by them.517

Not surprisingly, the greatest differences in scores among groups reflected education, and this factor may well account for many of the significant differences in scores among income and ethnic groups. . . . This examination demonstrates that the nation must make a stronger commitment to educating its citizens as consumers.518


516. Id.

517. Id.

518. Id. at 15. In 1993, the most comprehensive literacy study ever undertaken by the U.S. government, “Adult Literacy in America”, found that the most difficult tasks for some 90 million adults include: 1) calculating the difference in price between two items; 2) executing Social Security forms; 3) determining the correct change using prices in a menu, and 4) using a calculator to determine the total cost of carpeting to cover a room, when given the room measurements and cost per square yard of the carpeting. The Secretary of Education, Richard W. Riley, urged the business community to increase workplace training efforts and parents to pay more attention to their children’s education. He acknowledged that the study shows conclusively that the vast majority of Americans do not have sufficient skills to earn a living in a technological society. Mary Jordan, Literacy of 90 Million is Deficient: U.S. Survey Sounds Alarm over Skills in Reading, Arithmetic, Wash. Post, Sept. 9, 1993, at 1.
If the model of the average, ordinary, reasonable, consuming person in the market place is being replaced by an irrational, inefficient and thus unreasonable member of the public, it is more incumbent than ever to insist the courts and legislatures (and especially the courts) employ economic criteria in their decisionmaking. Put simply, the language of "corrective justice" is implicitly a language of practical or utilitarian economics; it is "positive economic theory." Instead of threatening to subvert the legal system and the cultural fabric of society, "economic reductionism" offers the hope of strengthening, and thereby stabilizing, the very bedrock of a capitalistic society—its economic foundation.

2. The National Literacy Act: A False Positive?

The National Literacy Act of 1991 was enacted to structure a national effort to combat the problem of illiteracy in the United States. Recognizing that the central or core difficulty in confronting literacy is "intergenerational" and closely related to poverty, and furthermore poses "a major threat to the economic well-being of the United States," Congress set an aspirational goal of eliminating illiteracy by the year 2000. Under the provisions of the Act, "literacy" is defined as "an individual's ability to read, write, and speak in English, and compute and solve problems at levels of proficiency necessary to function on the job and in society, to achieve one's goals, and develop one's knowledge and potential."

Adding concern to the plight of future generations, another study for the Department of Education found that more than two-thirds of U.S. children cannot read up to their grade level. Rochelle Sharp, Two-thirds of Children in U.S. Read Below Their Grade Level, Study Finds, WALL ST. JOURNAL, Sept. 16, 1993, at A5. In 1994, for the first time in seventy years, the U.S. Department of Education Reading Report Card, which surveys the reading skills of American students, found only one out of three students qualified as proficient readers. Recent reports show television consumes, on average, three and one-half hours of every child's day. ABC WORLD NEWS, THE GROWING ILLITERACY IN AMERICA, Transcript #523-5 (June 1, 1995). A 1993 Report from the Department of Education showed fifty percent of adults are classified as being functionally illiterate. Renee Stovisky, Learning By The Book, Chicago Tribune, Dec. 30, 1993, at 7 (Eve. Update Ed.).

Ironically, as nationwide book sales have increased thirty percent since 1991, with dedicated readers reading more than ever, the number of functionally illiterate or simply those who do not read, continues to grow. ABC WORLD NEWS, supra. In 1990, sixty percent of all American homes bought neither a single book nor a newspaper. Stovisky, supra.

519. See LANDES & POSNER, supra note 273, at 22-23.
In a concerted effort to forestall the need to train or retrain as many as 50,000,000 workers because of their functional illiteracy, Congress established The National Institute for Literacy under the Act and delegated to it the responsibility for improving access to and enhancing the delivery of literacy services to those educationally disadvantaged citizens most in need of improvement. This Herculean organizational task was underwritten with a $15,000,000 appropriation for each of the fiscal years 1992-1995 which in large part is to be disbursed to assist the states, together with "local public and private nonprofit efforts to eliminate illiteracy." States are thus encouraged to enter into interstate agreements and to establish regional adult literacy resource centers as well as establish state advisory councils on adult education and literacy.

To facilitate improvement of the basic skills of individuals with marginal educational backgrounds, and at the same time, assist small and medium sized businesses in addressing the literacy needs of their workforce, a new division within the Department of Labor was established: The National Workplace Literacy Assistance Collaborative. Toward this end, the Secretary of Labor is directed to "reserve not more than $5,000,000 to establish a program of grants to facilitate the design and implementation of national strategies to assist," not only unions but small and medium sized businesses as they endeavor to provide literacy training as well as basic skills training to their employees.

Recognizing that problems of illiteracy exist at all strata of society, Congress encouraged through the issuance of state grants under the Literacy Act the establishment of Family Literacy Programs and even authorized the Secretary of Education to contract with the Corporation for Public Broadcasting in order to arrange "for the production and dissemination of family literacy programming and accompanying materials which would assist parents in improving family literacy skills and language development." Finally, literacy

533. Pub. L. No. 102-73, § 304, 105 Stat. 354a (1991). Building upon the need for enhanced and continued educational opportunity, especially for commercial drivers, the National Literacy Act also authorizes the Secretary to issue grants to the states for the purpose "of establishing and operating adult education programs which increase the literacy skills of eligible commercial drivers." 20 U.S.C. § 1211b(a) (1991).
challenge grants were authorized to encourage “eligible public agencies and private organizations to pay the Federal share of the costs of establishing, operating or expanding community or employee literacy programs or projects that include the use of full-time or part-time volunteers as one method of addressing illiteracy.”

While the National Literacy Act is a grand and comprehensive scheme to meet, and hopefully resolve, the national problems of illiteracy, whether a massive infusion of money is sufficient to “cure” these problems is yet to be seen. It certainly is a strong, positive first step. Whether the intellectually handicapped will have the sustained initiative and stamina to overcome their difficulties by full participation in the various programs made available under this new law will be the crucial determinant in the success or the failure of these governmental efforts to eliminate illiteracy by the year 2000. My concern is that the complacencies of the national welfare system provide insufficient incentives for the illiterate to become literate. Self-respect and self-improvement, sadly, are not positive motivating forces in individuals who, tragically, have not been raised or do not now live within a positive and re-enforcing environment. What this means for American society is that there will be a rather constant level of illiteracy over the years ahead and the hoped-for resurrection of the average, ordinary reasonable person will simply not occur.

XI. CONCLUSIONS

“Law is forward-looking” and “pragmatic” and should be as but a servant of human needs. One of the most basic of human needs is to be secure economically; for from that security comes an ability to purchase goods in the market place (e.g., food, clothing, shelter) which are necessary to sustain life at a level of enjoyment and thus promote individual happiness. If the evidence is correct in its disclosure that the average, ordinary, reasonably thinking (e.g., rational) person is being replaced by an uninformed semi-literate, it is vitally important that the courts assume great vigilance in safeguarding—both institutionally, at the macro level, and individually at the micro level—the economic underpinnings of the capitalistic free-market economy.

Quite obviously, it would be dangerous to allow the judicial system to assume the primary role of economic decisionmakers. The legislatures should, to be sure, set the economic scales for broad policy mat-


ters. But, as to individual cases brought before the courts, if the participating parties have not considered the pertinent economic issues and results of their litigation, the courts must assume this role through their inherent *parens patriae* powers, and, in so doing, realize their obligation to make decisions that are consistent with basic tenets of economic efficiency since this presents the core of a reasonable judicial decision.\(^{536}\) The courts, then, should continue to be translators of economic principles, through practical reasoning,\(^{537}\) into ethical constructs of their legal decisions,\(^{538}\) and, by so doing, demonstrate the consistency, if not equivalency, of economic fairness and efficiency. Once the confusion over this semantic dialogue of terms ends, the courts can then more effectively seek to establish "a constitutional ethos of economic liberty."\(^{539}\)

The framework for principled decisionmaking is already in place to advance and establish an ethos of economic liberty; and it is to be found within the basic principle of reasonableness and its application through a cost-benefit balancing test of facts, rules, or results at the trial level and of rules at the appellate level.\(^{540}\) The historical foundation upon which this contemporary theory of economic jurisprudence is to be found is in the deceptively simple recognition of the principle of *Sic utere tuo ut alienum non laedas*, that through contemporary analysis and re-interpretation, shows not only its true and universal application but its enhanced logic, clarity and coherence\(^{541}\) as a bulwark of modern economic jurisprudence.

In cases that challenge or test the degree to which one has acted reasonably in the use of his property, to achieve fairness (and thus efficiency), modern courts should, consistent with the *Restatement (Second) of Torts*,\(^{542}\) balance the relative hardships of the parties, substantively and procedurally, in deciding the initial characterization of whether the actions are a nuisance, and then, determine procedurally whether injunctive relief or damages are to be awarded. Stated otherwise, what is considered or balanced by a judge in every legal action is, essentially, the value of what is obtained (by holding for the plaintiff) versus the value of what is sacrificed to obtain it.\(^{543}\) And, again, it is seen clearly that practical reasoning dictates the use of the balancing principle.

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536. *Id.* at 375.
539. Scalia, *supra* note 72, at 37.
542. *Restatement (Second) of Torts* §§ 827(a), 828(a) (1977). See also *supra* note 162.
People act to maximize their economic interests efficiently.


*Sic utere tuo ut alienum non laedas*—So use your own property as not to injure your neighbor (Roman Civil Law). See Daniel R. Coquillette, *Mosses From an Old Manse*, 64 Cornell L. Rev. 761 (1979).
