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July 12, 2011

# Re-conceptualizing the Law of Nuisance through a Theory of Economic Captivity

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# **Re-conceptualizing the Law of Nuisance through a Theory of Economic Captivity**

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## **INTRODUCTION**

### **Coming to the Nuisance or Becoming an Economic Captive?**

Ann and Conrad Riedi have lived in the same rent-controlled apartment in Manhattan for forty years.<sup>1</sup> Despite this long-term entrenchment, the Riedis and many of their neighbors are being forced to move to make way for a new subway construction.<sup>2</sup> Due to their relatively low income and inability to pay typical Manhattan rent because of their age and status as retirees, the Riedis may very well be forced to relocate out of the neighborhood and out of a borough in which they have lived most of their lives.<sup>3</sup> The Riedis have, in essence, become “economic captives” for, put simply, their economic situation severely limits their choices as to where to relocate.<sup>4</sup> An economic captive, then, is someone whose housing choices are determined detrimentally by his socio-economic status, providing him with extremely limited options for places to live. Further, the housing available to an economic captive is often in poor repair, in blighted and/or high crime areas, and far from the person’s current neighborhood.

The classical situation defining the forces of economic captivity is illustrated when relocation by a landowner thereupon subjects him directly to a nuisance or a nuisance-like activity. For example, acquisition of real property in an industrial area may almost necessarily burden—significantly—the new owner with smog or noise, while relocation to an agricultural community may subject other homeowners to putrefying odors.<sup>5</sup> If the economic captive asserts

a nuisance claim, the defendant may then raise an affirmative defense that the plaintiff came to the nuisance; in other words, the defendant and the injurious activity were established *prior* to the plaintiff's arrival.<sup>6</sup> In such a situation, should the plaintiff's status be considered a counter-veiling factor or argument to the defendant's affirmative defense that the plaintiff actually came to the central policy issue which must be resolved: specifically, the manner in which society (be it governmental units or private entities) deals with these inherent conflicts presented by a recognized theory of economic captivity.

The phenomenon of the economic captive is a reality of modern capitalistic society.<sup>7</sup> Notwithstanding this reality, the question still remains whether a person's socioeconomic status can serve as an effective counter to the defense that the plaintiff came to the nuisance. An examination into how the law should treat economic captives whose presence in a location is inconsistent with a higher use for the land will yield the answer to this question. Examining the efficacy of a variety of approaches leads to the conclusion that the best approach is through the working of managed growth and bonus zoning *in tandem* in order to achieve some level of harmony amongst a range of demographic groups.<sup>8</sup> The employment of amortization provisions, where the economic captive is allowed to remain in his home for a reasonable period of time, is a necessary component to this solution as well.<sup>9</sup> Concluding that this approach is the most efficacious leads to the determination that one's status as an economic captive deserves to be included as a factor in the requisite balancing under which a nuisance cause of action is tested initially.<sup>10</sup> However, such a status is not automatically dispositive in dealing with a coming to the nuisance defense and must be viewed in light of the desired goal of protecting the common good.<sup>11</sup> The fact remains, importantly, that there is a place for the economic captive and that

individual is not left defenseless in the world of nuisance law. If recognized, the plaintiffs' status as an economic captive should offset, or at least neutralize, the fact that he came to a nuisance and thereby provide him with an avenue for relief.

This Article will begin with an analysis of nuisance law and its purpose. At the heart of a nuisance action is a fact-specific balancing of competing interests which this Article will organize into a general framework for nuisance inquiries. Furthermore, this Article will examine the affirmative defense of coming to the nuisance and what the appropriate application of such a defense entails.

The evolving land use principle that mandates a balance, or fair share, of low and moderate income (affordable) properties be provided in any legal zoning plan<sup>12</sup> will then be analyzed within the context of its effect on recognition of a theory of economic captivity.<sup>13</sup>

Subsequently the economic captive will be introduced through the description of examples of this economic captivity ranging from a socio-economically homogenous inner-city enclave to a college student with limited resources. Thereafter, this Article will examine a variety of approaches to dealing with the relocation of economic captives in light of their displacement. It will be through this evaluation of efficacy that some amalgamation of solutions will yield the ideal approach that should be taken toward the economic captive and a determination will be made as to exactly what role the notion of economic captivity should play in contemporary nuisance law.

## I.

### 1. NUISANCE LAW AND COMING TO THE NUISANCE AS A VALID DEFENSE

#### A. Ad Hoc Balancing Quantifies Reasonableness in Furtherance of the Common Good

The basic definition of any nuisance is the unreasonable interference with the use and enjoyment of one's real property.<sup>14</sup> When analyzing whether or not some action constitutes a nuisance most courts employ a balancing test.<sup>15</sup> The Restatement (Second) of Torts broadly provides that at the heart of the resolution of a nuisance action is a balancing of the utility of certain conduct versus the gravity of its harm.<sup>16</sup> In fact, in stating that a balance must be struck between a defendant's right to reasonably use his property and the plaintiff's right to enjoy his property, Prosser has stated that those two rights are "correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other."<sup>17</sup> This balancing of a defendant's rights and the utility of the action against a plaintiff's rights and the harm caused serves as a judicial tool by which a court can establish whether one's conduct was unreasonable, in which case a nuisance would be found.<sup>18</sup> The results of this balancing test are not uniform irrespective of locality.<sup>19</sup> Rather, what may be reasonable in one area could be unreasonable in another.<sup>20</sup>

A nuisance can be either private or public.<sup>21</sup> A private nuisance occurs when one individual violates the maxim, *sic utere tuo ut alienum non laedas*, and uses their land so as to injure another individual or small group of individuals—the legal equivalent of unreasonableness.<sup>22</sup> In contrast, a public nuisance occurs when there has been an unreasonable interference with a group of citizen's rights as a community.<sup>23</sup> Often the difference is a matter of degree and depends upon the number of individuals affected by the nuisance.<sup>24</sup>

The utility of a nuisance cause of action is that it helps to reinforce and preserve the common good through a codification of what conduct a society deems to be a reasonable use of real property in relation to the rights of others.<sup>25</sup> The common good can be described as achieving a social benefit that is greater than any individual citizen's personal concerns.<sup>26</sup> Stated otherwise, the common good is the achievement of the greatest good for the greatest number.<sup>27</sup> It is through a balancing test that the courts determine which use of property furthers the common good<sup>28</sup> or, in other words, is more reasonable.

Examining the common good through the lens of economics seems to be an almost inescapable enterprise.<sup>29</sup> The alternative is to place social justice, manifested in a fair share approach to legal solutions, as the main consideration for defining the common good.<sup>30</sup> Yet, economics and social justice are not necessarily two different and distinct notions.<sup>31</sup> The same efficiency that is a desired goal of an economic approach also embodies elements of social justice.<sup>32</sup> Engaging in such an "economic analysis of the law" serves to reinforce the common good through an attempt to maximize society's aggregate wealth.<sup>33</sup> It is clear, then, that economics is inevitably at the fulcrum of any balancing test that courts must employ when analyzing the merit of a nuisance claim. It follows that the desired goal in resolving any nuisance claim is to permit that use which will best help to maximize the common good<sup>34</sup> or economic viability.

## **B. Coming to the Nuisance: No Longer a *Per Se* Bar, But Still Taken Into Account**

### **1. From Absolute Bar to But a Factor**

#### **a. Recognition of the Coming to the Nuisance Defense**

Early Common Law, dating back to the 19<sup>th</sup> Century, recognized coming to the nuisance as a valid defense to a nuisance claim.<sup>35</sup> The concept stemmed from the ancient maxim *volenti non fit injuria*, meaning no wrong is done to him who consents.<sup>36</sup> In a coming to the nuisance defense, in which timing is the key, an established resident who has been carrying on the complained of activity for some time seeks favorable treatment over a new inhabitant. It also entails a presumption that the plaintiff understood and accepted the conditions of the area. For this reason, coming to the nuisance could be likened to the defense of assumption of the risk.<sup>37</sup> An early case often cited as recognizing coming to nuisance as an affirmative defense to a nuisance claim is *Rex v. Cross*.<sup>38</sup> In that case, an English court held that

[i]f a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of the noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other.<sup>39</sup>

As that court's holding illustrates, early Common Law favored established inhabitants based upon the principle that the plaintiff consented to the conduct by moving into the area wherein the complained of activity was already taking place.<sup>40</sup>

### **b. Repudiation of Coming to the Nuisance as a *Per Se* Defense**

In response to the growth of industrialization and the shift towards urbanization during the 19<sup>th</sup> Century, courts began refusing to recognize coming to the nuisance as a *per se* defense in nuisance actions.<sup>41</sup> Many courts found that the concept of coming to the nuisance was contrary to public policy and the common good.<sup>42</sup> Allowing such a defense, it was found, allowed a property owner to control the use of the surrounding areas not within his ownership.<sup>43</sup> Additionally, courts were facing plaintiffs with limited housing options, such as persons moving into overcrowded cities bustling with industrial work.<sup>44</sup> Thusly, courts began protecting citizens and their dwellings over established businesses.

An example of this shift is the 1873 case heard before the Pennsylvania Supreme Court, Wier's Appeal, in which several residents in a growing borough outside of Pittsburgh brought a private nuisance action seeking an injunction to prevent Wier from building and maintaining a gun powder storage building on his property.<sup>45</sup> In upholding the injunction, the court stated “[c]arrying on an offensive trade for any number of years in a place remote from building and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood.”<sup>46</sup> Further clarifying the court’s response to societal changes the court continued, “as the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This public policy, as well as the health and comfort of the population of the city, demand.”<sup>47</sup> As the Wier case illustrates, the expansion of cities and industrialization helped spur a shift in the minds of judges that lead to protecting private dwellings, even at the cost of established businesses.<sup>48</sup>



Although courts began refusing to recognize coming to the nuisance as a *per se* defense, not all completely ignored the timing of events, nor do they today.<sup>49</sup>

### **c. Current Stance: Coming to the Nuisance as a Factor in Determining Reasonableness**

As observed, at the heart of any nuisance action is reasonableness; and currently, although it is not a *per se* defense, most jurisdictions do consider whether a plaintiff came to the nuisance as a factor in the ultimate determination of reasonable use.<sup>50</sup> When taking into account coming to the nuisance, it must first be established that the plaintiff had actual or constructive knowledge of the conditions of the area before acquiring the property.<sup>51</sup> A plaintiff can have constructive knowledge if he knew information that “would lead a prudent man to believe that the fact existed, and that if followed by inquiry must bring knowledge of the fact home to him.”<sup>52</sup> Without the requisite knowledge, it cannot be said that a plaintiff voluntarily came to the nuisance. Although such a plaintiff or economic captive may have knowledge of the surrounding property, thus allowing a court to consider coming to the nuisances as a factor, other considerations may weigh in favor of the economic captive.

When considering coming to the nuisance as a factor in determining reasonableness, several sub-factors can also affect the weight of the coming to the nuisance defense.<sup>53</sup> The first consideration is often the general use of the location wherein the nuisance-like activity is taking place.<sup>54</sup> It is critical whether the plaintiff is complaining of conditions typical of industrial activities in a well established industrial neighborhood or agricultural regularities in a farming region.<sup>55</sup> A plaintiff will have a more difficult time overcoming the coming to the nuisance factor if, for instance, the area is zoned for uses other than personal dwellings.<sup>56</sup> This is because courts

have favored “industrial operators who are a part of a long-established and recognized industrial center, wherein the area is dominated by manufacturing enterprises.<sup>57</sup> Therefore, an economic captive has a stronger case if the area in which he lives has some dwellings and is not used exclusively for industry or agriculture.

Another sub-factor vital to a court’s consideration of a coming to the nuisance defense is public policy, which in many instances will weigh heavily in favor of an economic captive.<sup>58</sup> As one court has stated, “[t]he law recognizes that the nuisance claims of private owners must at times yield to public interest and convenience,” while at other times an established business must yield to the needs of the public.<sup>59</sup> For instance, an established business may need to move or cease operations if a city extends and houses are built in the area.<sup>60</sup> Alternatively, public policy may favor a long standing business because of its role to the community.<sup>61</sup> Such was the finding in *Powell v. Superior Portland Cement*, where the Supreme Court of Washington refused to grant damages to a homeowner despite smoke, gas, and noise because roughly half of the town’s livelihood was tied to the cement plant.<sup>62</sup> To an economic captive, public policy could be a significant consideration against a coming to the nuisance defense. Although an economic captive has limited housing options, he should have the same rights as others to enjoy his property. For instance, the U.S. District Court for the Northern District of West Virginia noted in a 1982 case that the defense of coming to the nuisance was “out of place in modern society where people often have no real choices as to whether or not they will reside in an area adulterated by air pollution.”<sup>63</sup> For this reason, public policy dictates that limited options and financial hardship should not require a home owner to endure unreasonable living conditions.

Sub-factors other than public policy and location can also play a role in a court's consideration of the fact that a plaintiff came to the nuisance. These include whether the complained of activity has increased or changed.<sup>64</sup> Although a plaintiff may knowingly move into the vicinity of a nuisance, that plaintiff should not have to suffer the consequences of increased noise, pollution, or other nuisance like conditions. An additional factor often analyzed by courts when considering coming to the nuisance is the price the plaintiff paid for the property.<sup>65</sup> If a plaintiff is able to purchase the property at a much lower rate, knowing the price was cheaper because of the complained activity, a court is more likely to place greater weight on a coming to the nuisance defense.<sup>66</sup> However, an economic captive is not comparable to a business, which chose to purchase cheap property in an effort to obtain maximum profits. An economic captive, by definition, has few choices, and as such should not be penalized for selecting property because of its price. Because most courts are currently considering coming to the nuisance as a factor in determining reasonableness, an economic captive should raise these sub-factors, in addition to public policy concerns, the nature of the area, and the plaintiff's knowledge of the conditions. It is only after addressing these sub-factors that a court can truly determine reasonableness.

## II.

### **The *Spur Industries* Approach to Coming to the Nuisance: Employment of the Compensated Injunction**

In *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, Spur Industries owned a cattle farm in an area of Arizona in which farming had begun in roughly 1911.<sup>67</sup> Spur's cattle farm was started in 1956 and by 1959 Spur had erected feedlots for approximately 7,500 cattle.<sup>68</sup> In 1960, Del

Webb began advertising a housing development that he was building, roughly two and a half miles north of the Spur feedlot area.<sup>69</sup> At the time of this marketing of the Del Webb property, they did not consider the Spur feedlot area's odors to be a problem and, in fact, continued to develop further and further south—getting closer and closer to the Spur property.<sup>70</sup> However, as Del Webb expansion continued pushing south, there became a significant sales resistance that made it nearly impossible to sell the proposed housing lots.<sup>71</sup> Del Webb then sued Spur Industries asserting that the operation of Spur's feedlots constituted a public nuisance because it rendered portions of Del Webb's property unfit for development, thereby making it impossible to sell any residential units.<sup>72</sup> In addition to their inability to sell residential units, Del Webb's public nuisance allegation was bolstered by the complaints of residents who had already purchased homes from the developer about various odorous emissions and secondary effects emanating from Spur's feedlot.<sup>73</sup>

As an initial matter, the Supreme Court of Arizona held that despite the fact that the operation was a lawful business, Spur's continued operation of its feedlots was indeed a public nuisance to the already established residents of the nearby community.<sup>74</sup> So far as the court was concerned, there was no doubt that the residents did have an actionable claim to abate Spur's business operations with respect to the feedlot in question.<sup>75</sup> This was because the odors and flies caused by the feedlots prevented the residents from lawfully enjoying the use of their property.<sup>76</sup>

The inquiry then turned to the validity of Del Webb's nuisance claim arising from the loss of sales and Spur Industries' defense that Del Webb came to the nuisance.<sup>77</sup> The court expressed that Spur's coming to the nuisance defense to Del Webb's nuisance claim was not falling on deaf ears when it noted that, “[i]n addition to protecting the public interest, however,

courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.”<sup>78</sup> Had Del Webb been the only injured party, the court stated that it would “feel justified” in ruling that Spur Industries had an adequate coming to the nuisance defense, a factor that would have ultimately resulted in a finding that Spur’s use was reasonable.<sup>79</sup> The court, however, acknowledged the important role that changing circumstances played in the case at bar.<sup>80</sup> More specifically, the court noted that a lawful business in a remote location may become surrounded by a growing population, in which case the “elastic” nature of nuisance law a court must determine what is fair and reasonable for the interests of the public.<sup>81</sup> Citing the needs of the general public which was increasingly populating the expanding city, the court granted the injunction requiring Spur Industries to move its feedlot.<sup>82</sup>

This injunction, however, did not relieve Del Webb of any responsibility to Spur Industries.<sup>83</sup> According to the court it did “not equitably or legally follow . . . that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained.”<sup>84</sup> The court noted that Del Webb voluntarily purchased land that was remote from current urban establishments, primarily used for agriculture, and was not protected by urban zoning.<sup>85</sup> Moreover, the court found that the feedlots were a foreseeable nuisance to the lots Del Webb was trying to sell.<sup>86</sup> Noting principles of equity at play in this case, the Supreme Court of Arizona required Del Webb to compensate Spur for their forced move of the feedlot.<sup>87</sup> The court stated, “it does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop . . . to indemnify those who are forced to leave as a result.”

Therefore, the court granted the injunction against Spur Industries while also requiring Del Webb to indemnify Spur Industries for the damages sustained in relocating the feedlot.<sup>88</sup>

The court's granting of this compensated injunction still reflects the current trend that coming to the nuisance, while a factor to consider, is not an absolute bar to a nuisance claim.<sup>89</sup> As the court stated, its decision was "not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public," which outweighed Spur Industries' interests because of the encroaching growing population.<sup>90</sup> The compensated injunction employed in *Spur Industries v. Del E. Webb Dev. Co.* is a viable tool in the judicial arsenal especially when, as the Arizona Supreme Court made clear, both the general public and the offending landowner are innocent, but the offending use clearly constitutes a nuisance.<sup>91</sup>

### III.

#### ***MOUNT LAUREL AND THE FAIR SHARE PRINCIPLE: A SEPARATE, YET RELATED, CONSIDERATION***

In 1975 in *South Burlington N.A.A.C.P. v. Township of Mount Laurel* (Mount Laurel I), the Supreme Court of New Jersey was faced with the question of whether a developing municipality could enact zoning regulations which made it extremely difficult for low-and moderate-income residents to reside in the town.<sup>92</sup> In response to an increasing suburbanization sweeping southern New Jersey, the town enacted a zoning ordinance, that gave more than enough space for potential industry and business development while severely limiting the potential for residential development.<sup>93</sup> For those zones in which residential development was allowed to occur, the ordinance was clearly geared towards upper- and middle-income

prospective residents by permitting only single family homes situated on large lots.<sup>94</sup> In striking down Mount Laurel's zoning ordinance as unconstitutional, the New Jersey Supreme Court explicitly adopted the provision that a municipality must "make realistically possible an appropriate variety and choice of housing" including low and moderate income housing.<sup>95</sup> The court focused on each municipality's greater regional responsibility, to permit housing for a "fair share" of the region's need for housing for the various demographics.<sup>96</sup> Other jurisdictions have also acknowledged the fair share principle with respect to a municipality's duty to afford a reasonable opportunity for a reasonable number of low- and moderate-income people to reside in that area.<sup>97</sup>

The New Jersey Supreme Court also addressed one significant concern with the fair share doctrine: the extent to which such a requirement of a municipality restricts that municipality's ability to provide quality government services and foster economic growth.<sup>98</sup> Providing a reasonable opportunity for affordable housing for various segments of society should not serve as an impediment for municipalities to "become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand."<sup>99</sup> It is important to note that in order to actually realize such a result in the face of fair share obligations, the court pointed toward active government planning and cooperation.<sup>100</sup> The court stopped short, in Mount Laurel I, of actually providing any clues of how governments can comply with such an obligation.<sup>101</sup> Rather, the court vaguely pointed to a cooperative effort to achieve the desired goal of social equity—a reasonable affordance of housing opportunities for all economic classes of people.<sup>102</sup>

Eight years later in *Mount Laurel II*, the Supreme Court of New Jersey developed a template to clarify the broad directive of its earlier decision.<sup>103</sup> *Mount Laurel II* arose as a result of substantial municipal noncompliance with the fair share doctrine previously discussed.<sup>104</sup> Imposition of the fair share obligation, the court determined, should only affect those localities deemed to be “growth areas” by the state’s development plan.<sup>105</sup> Through its reliance on the state development plan, the court sought to impose the fair share obligation in a manner consistent with the state’s desires while avoiding irrational development.<sup>106</sup> In seeking to resolve the great difficulty in calculating what fair share actually meant,<sup>107</sup> the court suggested the creation of a judicial body that would serve as an administrative tribunal to determine and enforce the fair share obligation.<sup>108</sup> It was intended that this body would, through the resolution of a few initial cases, establish a pattern that would create consistent expectations for each region and the state as a whole.<sup>109</sup> Further, a formula was suggested that would take into account a variety of factors when determining a locality’s fair share obligation.<sup>110</sup> The court suggested that affirmative measures such as subsidies and inclusionary zoning devices were necessary to effectuate the desired goal.<sup>111</sup> Judicial remedies were also discussed in the event of a failure of a locality to meet its fair share obligations.<sup>112</sup> While *Mount Laurel I* failed to produce concrete guidelines for achieving the fair share aspirations, *Mount Laurel II* succeeded—and was vilified as a result.<sup>113</sup>

Following *Mount Laurel II*’s directives, the New Jersey legislature enacted the Fair Housing Act that established an agency, as opposed to a judicial body,<sup>114</sup> to determine regional housing needs and whether the fair share obligation was met.<sup>115</sup> The agency, the New Jersey Council on Affordable Housing, in turn, provides policies with respect to what local governments can do to create realistic housing opportunities as well as review demographic



distribution plans submitted by municipalities.<sup>116</sup> The Supreme Court of New Jersey addressed this statute's validity in light of their previous jurisprudence in what would come to be called Mount Laurel III.<sup>117</sup> In upholding the constitutionality of the Fair Housing Act, the court noted that the legislation's effects were in line with its previous Mount Laurel rulings.<sup>118</sup> Furthermore, the court expressed its preference for legislative rather than judicial resolution of the fair share question.<sup>119</sup> Complete judicial deference, however, was not granted as the court exhibited a dedication to enforce the fair share obligation in the event the Fair Housing Act failed to do so.<sup>120</sup> The presumption of the Act's constitutionality would only be overcome if it were almost certain to fail to achieve the Mount Laurel objectives.<sup>121</sup> The court, thus, accepted the legislature's revision of the Mount Laurel II template.

*A reasonable* opportunity for a variety of classes of people is not an unattainable summit. The reasonableness limitation on municipality's responsibilities helps to prevent situations in which there is an underwhelming demand for affordable housing in a particular municipality.<sup>122</sup> In examining the appropriate fate of the economic captive, the answer as to the correct path for municipalities in the aftermath of the Mount Laurel cases can also be extracted. In fact, the solution of some combination of managed growth and bonus zoning in tandem with amortization provisions not only takes care of the economic captive, but also relieves the *Mount Laurel* albatross from the necks of municipalities.<sup>123</sup> Affordable housing is provided in accordance with a plan that will maximize the economic benefits to a locality; therefore, achieving a balance between opportunities for an economic captive and economic growth.

## IV.

### THE PLIGHT OF THE ECONOMIC CAPTIVE

The economic captive, first recognized by Smith in 1995, is an individual who, due to a limited economic status, is forced to live in a particular area.<sup>124</sup> The aspects of the location which prompt the economic captive to call such a place home share one common thread—economic necessity. Such exigencies include proximity to a place of employment, government-mandated rent-control, and cultural necessity, but this list is not exhaustive. In fact, all that is required for one to be considered an economic captive is that he must live in an area for socioeconomic reasons and have little choice in the matter due to financial, personal, or other social reasons. The following discussion of examples of economic captives will highlight three possible classes of people upon whom this designation could be bestowed. Understanding the nature of the economic captive's situation will enable a more complete analysis of what role they should have with respect to nuisance law.

#### A. Mr. and Mrs. Riedi Meet Wilhelmina: Elderly Exigencies

The case of Ann and Conrad Riedi discussed previously, provides but one example of economic captives.<sup>125</sup> As observed, despite the fact that the elderly couple has lived in the same apartment for 40 years the Riedis are faced with the choice of having to relocate to allow for new subway construction.<sup>126</sup> The Riedis are economic captives in the sense that, because of their limited resources, age, and government rent control policy, they are confined not only to that part of the city, but that particular building.<sup>127</sup> Their situation does not exist in isolation. In the landmark takings case *Kelo v. City of New London*,<sup>128</sup> a corollary may be found to the Riedi's

situation. One of the landowners who was challenging the taking of her property in the name of economic redevelopment was Wilhelmina Dery, an elderly resident.<sup>129</sup> Wilhelmina lived in her house for her entire life and her husband also lived there for roughly sixty years.<sup>130</sup> As was the case with the Riedis, the only reason why Wilhelmina was being forced to move was because her house stood in the way of a development project; blight was not an issue.<sup>131</sup>

The situations of Wilhelmina and the Riedi's highlight a circumstance that will become more and more frequent with an ever-increasing elderly population in this country.<sup>132</sup> Many of these people can be described as having modest income.<sup>133</sup> As such, this elderly segment of the population will have a severely limited choice in terms of where to live. Proximity to medical care, government services, and safety are very real considerations that warrant the need for an elderly economic captive to reside in a certain area. Once relocated to an area that meets these specific criteria, an elderly economic captive should not be forced to endure nuisance-like conditions.

### **B. An Economic Captive with Cultural Needs to Boot**

There may also be other social underpinnings in addition to economic needs that account for an economic captive's decision to live in a particular locale. In *Asian Americans For Equality v. Koch*, a proposed development project in Manhattan would have displaced residents of New York City's Chinatown district.<sup>134</sup> At the time of the case, New York City had the largest Chinese community in America.<sup>135</sup> The area of the proposed redevelopment was described as a "major housing resource for the relatively recent immigrant families, the future immigrant families, those families who came . . . a long time ago, but remain at the bottom of the economic

ladder, and a small group of middle-income professionals and business persons.”<sup>136</sup> Also, many residents of this area fell below the poverty line.<sup>137</sup> In addition to the economic necessity of living in this area, there were also important cultural reasons that made it almost imperative for these economic captives to live in Chinatown. Residing in this neighborhood was instrumental in the assimilation process for Chinese immigrants and there were employment opportunities in Chinese-owned business that were in close proximity to the economic captives’ homes.<sup>138</sup>

The case of an economically-dependent person with additional cultural needs that bind him to a particular area of residence adds another complication to the plight of the economic captive. If some weight is to be given to one’s economic situation when analyzing the viability of a coming to the nuisance defense, should cultural exigencies factor into the analysis as well? There is actually an economic efficiency argument that weighs in favor of consideration of an economic captive’s cultural needs.<sup>139</sup> That argument holds that the quicker an immigrant population assimilates into United States society, the sooner that population can contribute to the economy—and at a more productive rate than would result if assimilation took longer. The socioeconomic implications that attach to the economic captive immigrant warrant their consideration in the nuisance calculus. A denial of its operative validity would result in both social and economic disharmonies.

### **C. Learning Lessons of Hardship: The Collegiate Economic Captive**

The example of a college student as an economic captive was first expressed in the initial pronouncement of the theory.<sup>140</sup> Under such an example, a college student without the means to afford university housing must live in off-campus residences in order to pursue the furtherance of

their education.<sup>141</sup> However, the off-campus housing could very well be “in a very poor, dilapidated housing unit in the inner city that is, however, within walking distance of the campus.”<sup>142</sup> The question becomes whether this economic captive with a collegiate permutation has any standing to bring a nuisance action against the conditions their status as a student of a particular university required them to move into. In such a case, the defendant may argue, and a court may consider as a factor, that the economic captive came to the nuisance. Once again, an economic justification can be found for affording this economic captive some recourse against the coming to the nuisance defense they would surely face. While post-secondary education has a plethora of social values, it also furthers economic utility through the creation of a more intelligent and skilled workforce that breeds entrepreneurship. Given the utility of college attendance, it would be counterproductive to discourage it by ignoring a student’s status as an economic captive when sorting through the nuisance calculus.

## V.

### **SOLUTIONS: EFFICACIES AND FLAWS**

#### **A. The Federal Approach: The Uniform Relocation Act**

In the event that an individual’s property is taken for some government initiative consistent with Fifth Amendment powers, “just compensation” is required.<sup>143</sup> The federal government has provided its own mechanism for the compilation of just compensation for people who are displaced as a result of a federal agency’s taking of their property. In such an event, the agency is required to pay the “actual reasonable expenses in moving [the displaced person], his family, business, farm operation, or other personal property.”<sup>144</sup> The displaced person should be

relocated into a comparable living situation.<sup>145</sup> The justification behind such a federally-funded relocation assistance program is founded in concerns with equity and fairness.<sup>146</sup> This relocation legislation was intended “to minimize the hardship of displacement on such persons.”<sup>147</sup> Additional compensation is afforded for any additional reasonable costs of relocation not in excess of \$22,500.<sup>148</sup> Replacement housing costs for displaced tenants are also considered in the federal statute.<sup>149</sup>

The federal approach to dealing with the relocation of displaced persons as a result of a government taking does have an admirable purpose that seemingly falls in line with the underlying notion of fairness that is required of governments.<sup>150</sup> This approach is founded on the notion that the displaced person is being put in a comparable housing situation and that the compensation for such relocation is just. Similarities exist between this approach and the compensated injunction of *Spur Ind. v. Del Webb*.<sup>151</sup> As is the case with a compensated injunction, the federal government is seeking to provide for the mitigation of harm to virtually innocent landowners while at the same time acknowledging a higher use of the property is in society’s best interest and should be allowed to displace the current use.<sup>152</sup> The burden of compensation is placed on the invading party—in this case, the government. Furthermore, the compensation of reasonable additional expenses is a valiant attempt to impose no further displacement costs on the person being forced to relocate. Ultimately, the most redeeming quality of the federal relocation assistance program is that it seeks to achieve a compromise between competing interests.<sup>153</sup> Implicit in the statute is the recognition that there are certain governmental needs the fulfillments of which are highly beneficial to society. At the same time,

an attempt is made to put the relocated persons in a whole state at the conclusion of the ordeal by trying to minimize the difference between the old residence and the one relocated to.

Admirable as these goals may be, there are inherent flaws in the federal approach that make it untenable with respect to the economic captive. While an attempt is made to relocate the displaced person to a place of comparable characteristics, this may be impracticable for the economic captive. Consider the case of the Riedis' as an archetypical situation that thwarts the purpose of the statute. The federal government is seeking to implement the provisions of the aforementioned statute to facilitate the Riedis' move to another locale in order to make way for a Manhattan subway development.<sup>154</sup> The government-sponsored real estate agent charged with facilitating the move to comparable housing suggested that the couple relocate to an area of Manhattan that faces a busy intersection at the entrance to a bridge.<sup>155</sup> This relocation alternative proved to be untenable for people in the Riedis' situation as the busy intersection is unsafe for the elderly.<sup>156</sup> The only other alternative that is being suggested to them, based on their housing needs and financial situation, coupled with the scarcity of housing in Manhattan, that meets such criterion is moving out of Manhattan and perhaps into another borough of the city.<sup>157</sup> The Riedis' situation belies a major failing of the federal approach with respect to economic captives—the unique socioeconomic position of the economic captive may make finding comparable housing alternatives within close proximity to their former residence impossible. This may move the economic captive outside of the small radius that their unique socio-economic status requires them to reside in. The aftermath of such a move could very likely feature an increasing incompatibility of uses of land if the economic captive is moved to an area ill-suited for their needs. Refusing to weigh the economic captive's socioeconomic situation against the coming to

the nuisance defense in resulting nuisance actions would create an inequitable exacerbation of a status quo in which the economic captive becomes an increasingly marginalized member of society. In order to give acknowledgment that economic captives should be included in societal considerations, legal significance must be given to their socioeconomic status.

## **B. Local Government Responses**

### **The District of Columbia**

A dramatic, contemporary illustration of economic captivity—and a laudable effort, by the government, to deal with the pernicious effects of it—is found in the distribution of federal stimulus (TARP) monies.<sup>158</sup> Specifically, in December, 2009, approximately \$7.5 million dollars from the U.S. Department of Housing and Urban Development’s Homelessness Prevention and Rapid Re-Housing Program was given to the District of Columbia government.<sup>159</sup>

This disbursement was designated to assist families—for upwards of eighteen months—with subsidy payments for property rental arrangements and payment of utility bills past due. Designed as “a new tool that allows the city to help low-income people [*e.g.*, captives], who would otherwise become homeless,”<sup>160</sup> the program recognizes and—in a very real way—validates the theory of economic captivity. Impoverished individuals are, essentially, provided with an economic incentive from these grant monies to remain in their housing units and thereby, ideally, stabilize and improve their neighborhoods and forestall homelessness.<sup>161</sup> As well, by these grants, the government is recognizing that it has a responsibility to maintain a standard of living—albeit meager to be sure—for those unfortunate citizens who do not have the economic freedom to seek better housing and, thus, are relegated to the status of economic captives.



## **New York City**

As a consequence of the popularity of suburbanization which reached its zenith at the end of World War II, major U.S. cities lost a significant amount of their populations and soon became concentrated heavily with the urban poor.<sup>162</sup> Even with current efforts to promote new forms of revitalized urbanization through Smart Growth policies, the expenses of poverty in the inner cities of America remain a significant, if not staggering, concern to municipal governments.<sup>163</sup> Indeed, re-distributing clusters of poverty regionally and out of the inner city cores has become, since *Mt. Laurel I* was decided in New Jersey in 1975,<sup>164</sup> a national fixation.<sup>165</sup>

New York City owned in 1979 some 8,950 buildings which provided 110,000 housing units.<sup>166</sup> Today, the city owns approximately 190 buildings.<sup>167</sup> During the period of time from 1979 to 2010, the city sought—by divestiture—to take 100,000 slumlord units and convert them into 100,000 rehabilitated ones which, in turn, served as catalysts for redevelopment of ten neighborhoods throughout the city.<sup>168</sup> Presently, approximately 442 of the rehabilitated buildings are delinquent in their payment of municipal tax assessments and utilities.<sup>169</sup> A total debt of \$140 million is owed, collectively, on these buildings—with nearly half of this amount being levied on a per unit debt of \$3,000.<sup>170</sup>

Clustered principally in Bedford Stuyvesant, Brooklyn, the South Bronx and Harlem, these originally rehabilitated buildings are now populated by poor residents and are owned either by private or non-profit associations overseeing building management.<sup>171</sup> Because of this socioeconomic demographic in occupancy level, the building owners have “margin thin” assets to operate.<sup>172</sup> This situation is complicated further by the fact that, to protest against what have

become substandard living conditions in these once rehabilitated buildings, many of the tenants-captives have simply stopped paying their monthly rents.<sup>173</sup> The city plans to protect these low-income tenants by foreclosing on approximately eleven of these distressed properties.<sup>174</sup> The tenants would be protected under these forced sales because all pre-existing municipal regulations, such as rent stabilization, would continue.<sup>175</sup>

### **1. Subjectivity in Determining Just Compensation**

Currently, just compensation for the taking of one's property through eminent domain is the fair market value of that property.<sup>176</sup> However, this approach has been criticized for its rigidity and the inequitable consequences imposed on the homeowner.<sup>177</sup> Compensating someone only through payment of the fair market value of the property taken fails to take into account any amount of subjective value that that particular homeowner has attached to the land.<sup>178</sup> The fair market value approach, it has been argued, fails "to differentiate between what money could buy and what it could not."<sup>179</sup> One suggestion has been to compensate the homeowner an additional percentage of the fair market value based on how long they have lived in a home.<sup>180</sup> Another approach would be to undertake an objective consideration of what amount would need to be paid to the homeowner in order to make them feel "whole."<sup>181</sup>

While it is beyond the scope of this Article to make a conclusion as to the appropriate method of just compensation, it is worth noting that there is considerable debate on this issue.<sup>182</sup> Understanding, the fact that it is still unresolved in terms of what role subjectivity should play in the calculation of just compensation provides the necessary gloss for the inquiry into the compensatory efficacy of a method for dealing with relocation in lieu of eminent domain

proceedings. Given this discussion, another shortcoming of the Uniform Relocation Act is that it lacks any recognition of the subjective values attached by homeowners to their homes. The fact that the Riedis have lived in their apartment for over 40 years has no bearing on how much they are compensated.<sup>183</sup> Thus, the failure of the federal approach to provide for sentimental and other subjective attachments that the economic captive may have to their home amounts to another con of the program.

### **C. Managed Growth and Bonus Zoning**

Managed growth is a mechanism through which local governments seek to effectuate a greater quality of life and sustainability through the harmonious commingling of residential, commercial, and conservative goals.<sup>184</sup> Maryland's "Smart Growth" initiative embodies the principles and values that are accomplished in an ideal implementation of managed growth.<sup>185</sup> Under such an initiative, communities should be designed in a "compact, mixed-use, walkable design consistent with existing community character and located near available or planned transit options."<sup>186</sup> Further, specific attention is given to transportation<sup>187</sup> and the provision of housing to people of mixed ages and incomes.<sup>188</sup> At the heart of managed growth is a desire to maximize the economic development of localities. A managed or "smart" design for population and business distribution would provide "employment opportunities for all income levels within the capacity of the State's natural resources, public services, and public facilities."<sup>189</sup>

Though many municipal layouts are already entrenched, bonus zoning will allow the government to reshape the area over time to achieve the desired layout consistent with the goals of managed growth. Under such an approach, the municipality, in exchanging for granting a

permit to a developer, could require certain actions on the part of the developer for the betterment of the community at large.<sup>190</sup> While such an approach has been viewed with disfavor in some states, many others view this type of agreement favorably because “it provides flexibility to deal with unanticipated problems.”<sup>191</sup> Massachusetts, for example, has found that “the voluntary offer of public benefits beyond what might be necessary to mitigate the development of a parcel of land does not, standing alone, invalidate a legislative act.”<sup>192</sup> The merits of bonus zoning lie in the flexibility and collaborative nature inherent in its utilization.

The implementation of managed growth intermingled with bonus zoning should be very seriously considered—especially with respect to dealing with the issue of economic captivity. Instituting an early plan with respect to population distribution—as is the goal of managed growth—could be very effective in limiting the imposition of hardship on the economic captive. This foresight can be seen as a pre-litigation bargain in which transactional costs are minimized.<sup>193</sup> This Coasean efficiency benefits society by preempting costly litigation in light of government efforts to confront the reality of economic captivity from an early stage.<sup>194</sup> Additionally, through bonus zoning, there can be some cost-shifting from the government onto private entities in which they receive favorable zoning in exchange for providing for appropriate facilities for the economic captive in accordance with the affordable housing mandates of the managed growth initiative. Importantly, the end-game of managed growth and bonus zoning is economic maximization.<sup>195</sup> Managed growth achieves this end-game while also giving consideration to the “fair share” requirement and notions of social justice.<sup>196</sup>

Collaboration between public and private entities is inevitable under this system.<sup>197</sup> However, such an approach, in isolation, is not without its shortcomings. Managed growth may

be impracticable in certain areas—most likely in places with very high preexisting population densities—where changing the population distribution would require such an overhaul of the current distribution that creation of a managed growth area is unrealistic.<sup>198</sup> Further, little consideration is given to whatever subjective values the economic captives may have attached to their homes before they have been moved to the managed growth area.<sup>199</sup> Overall, though, there is much to say about the efficacy of such a design, especially when addressing the question of what to do with the economic captive.

#### **D. Utilizing Grandfathering and Amortization**

Grandfather clauses are legislative mechanisms whereby a temporary right to continue an activity is granted even though that activity has been deemed to be inappropriate in a locale.<sup>200</sup> This proposition reinforces the notion that a landowner has a vested right to continue a certain use of his land even after that use has been deemed to be non-conforming.<sup>201</sup> Similar to a grandfather clause, an amortization provision allows for a non-conforming use to be continued in an area where it was previously allowed.<sup>202</sup> Amortization, however, requires that the non-conforming use be eliminated within a specified period of time.<sup>203</sup> The length of such a period is determined based on the nature of the use and the economic-backed expectations of the landowner.<sup>204</sup> The goal is to strike a balance between “the relative importance to be given to the public gain and to the private loss.”<sup>205</sup> The fulcrum of this balance test must be economic considerations.

The options that these two mechanisms provide with respect to economic captives are to either grandfather in economic captives so that they cannot be forced to leave their property for

the duration of their lifetime, or alternatively provide for an amortization grace period of substantially reasonable length of time so as to mitigate the harm to the economic captive. In order to effectuate the economic progression of society,<sup>206</sup> an amortization period makes more sense as it creates a firm deadline for when the economic captives must relocate. Predictability is achieved. Amortization also serves as an acknowledgment that some credence should be given to the subject values attached to the home.<sup>207</sup> Allowing for economic captives to remain in their homes for a certain period of time allows for a transition period which lessens the harshness of forcing them to leave their home. One potential setback of such an approach is that the rigidity of an amortization period—the inability to remove a non-conforming use for an expressed period of time—could stunt economic growth and prevent the achievement of a municipality’s maximum potential. This concern is relieved by the determination of the reasonableness of the amortization period. Balancing the public versus private considerations will yield an amortization period that will neither severely hinder the needs of the locality nor impose too harsh of a burden on the economic captive as the reasonable period of time still provides for the achievement of the locality’s goals while providing economic captives with adequate time to adapt and relocate. As a complement to managed growth and bonus zoning, the utilization of an amortization period provides the necessary buffer for the implementation of a system whereby economic maximization is achieved without marginalizing the economic captive.

## **CONCLUSION**

There are low-income people in modern society.<sup>208</sup> This is a socioeconomic reality that cannot be avoided. As a member of this segment of society, an individual is essentially required

to live in a certain area due to its proximity to employment opportunities and the affordability of housing, among other reasons.<sup>209</sup> To date, this status provides no added legal significance with respect to nuisance law. When an economic captive is forced to relocate to an area where he is then subjected to a nuisance-like activity as a result of either eminent domain proceedings or socioeconomic necessity, his status does not currently factor into the traditional nuisance calculus. Although coming to the nuisance is not a *per se* bar against a nuisance claim, it is a factor that can weigh against an economic captive plaintiff. As such, weight should also be given to the fact that the plaintiff is an economic captive with limited housing choices.

An examination into the efficacy of a variety of approaches with respect to what to do with the economic captive in the event that they are displaced leads to the conclusion that their status should be given consideration as part of the requisite balancing test of nuisance actions.<sup>210</sup> Employing the principles of managed growth<sup>211</sup> and bonus zoning,<sup>212</sup> with an assist from the utilization of amortization periods,<sup>213</sup> proves to be the most efficacious means by which to relocate economic captives and thereby recognize their legal statuses as such, while minimizing potential conflicts in the form of nuisance actions as they will be relocated to areas in which their presence is compatible with the overall layout of the area. Managed growth provides for affordable housing for the economic captive in a planned location where they are in close proximity to sufficient transportation and employment opportunities. Bonus zoning provides for municipalities to have to bear the entire cost of creating these new managed communities. Furthermore, amortization periods allow for a transition period for the economic captives to be relocated while also acknowledging that some subjective value should be attached to one's home.

This proposed method for relocating the economic captive into a more desirable location seeks to minimize the number of nuisance actions brought by the economic captive, thereby minimizing transaction costs.<sup>214</sup> By making way for a transition of the economic captive into a more desirable location which would reduce the amount of nuisance-like activity that they would be subjected to, there is an implicit acknowledgment that attention should be given to one's status as an economic captive. Since the fact that a plaintiff has come to the alleged nuisance is but one factor that is considered in the modern *ad hoc* nuisance inquiry,<sup>215</sup> the possibility of weight being given to economic captivity is not foreclosed. The economic utility of the managed growth amalgamation reinforces the position that a plaintiff required to live in a certain location as a result of their socio-economic status should be taken into consideration as a counter to the coming to the nuisance defense. Accordingly, this will reduce the transactional costs of nuisance actions while providing for an equitable relocation of economic captives that will satisfy their needs.

Socio-economic status is, unquestionably, a factor if, indeed, not a decisive determinant, in choosing a place to live. As shown, those with limited financial reserves and low income are usually restricted to housing opportunities which are often deficient in public services and are in unsafe and unsanitary neighborhoods where standards of habitability are severely lower if not jeopardized totally.<sup>216</sup> The social costs expended in either maintaining sub-standard housing units in blighted communities or relocating inhabitants in these neighborhoods to better accommodations is staggering.<sup>217</sup>

In situations, for example, where either municipal, state or federal relocations are not feasible, economically, the "captive" residents in these substandard living accommodations



should not be seen as waving their legal rights to unreasonable interferences with their use and enjoyment of their real property interests. In truth, they have been forced to come to nuisances as economic captives. A common or basic sense of decency and of humanity should impose a legally enforceable responsibility for providing services which are deemed necessary for an acceptable standard of living or habitation.<sup>218</sup>

Rather than continue to abuse eminent domain powers and condemn “blighted” sub-standard housing (developments) or neighborhoods in order to promote economic development, it would be more equitable to rehabilitate the areas as both the District of Columbia<sup>219</sup> and New York City<sup>220</sup> are doing and—thereby—revalidate the law of nuisance; for, “the power to abate a nuisance requires no compensation.”<sup>221</sup> In today’s society, there is—most assuredly—a place for a theory of economic captivity to be recognized within the law of nuisance. Acceptance of this theory, of necessity, assures both a reconceptualization—and thus allows for a reinterpretation—of the undergirding economic policies which drive the whole of economic jurisprudence and thus impact directly nuisance law. Acknowledging this theory of economic captivity as not only efficacious but normative and sound economically, will prompt—hopefully—a new consideration, if not a direct effort, which will seek to balance efficiency and wealth maximization with (social) fairness and not treat these values as antithetical vectors of force.<sup>222</sup>

## ENDNOTES

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I acknowledge the research assistance of Brian D. Concklin, Esq., on Section I of this article.

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<sup>1</sup> Michael M. Grynbaum, *Tenants Making Way for Subway Ask: You Want Me to Move Where?*, N.Y. TIMES, Sept. 8, 2009, at A17.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at A18. While there are other rent-controlled apartments in various other neighborhoods in Manhattan, most of these units are already occupied. *Id.* As a result of this move, the Riedis may also have to part ways with their dog, Biscuit, in order to find a suitable place for them to live. *Id.* at A17.

<sup>4</sup> The Theory of the Economic Captive is unique to Prof. George Smith and was first posited in 1995. See George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 706 (1995).

<sup>5</sup> See e.g., *Spur Industries, Inc. v. Del E. Webb Development Co.* 494 P.2d 700, 705–06 (Ariz. 1972) (finding that a feedlot for cattle was a nuisance to nearby homeowners because of the obnoxious odors and flies); *Rosemary Patrick v. Sharon Steel Corp.* 549 F. Supp. 1259, 1267–68 (N.D. W.V. 1982) (rejecting defendant steel corporation’s coming to the nuisance defense against claims that defendant created air pollution and discharged toxins into waterways); *Wier’s Appeal*, 22 AM. LAW REG. 715 (P.A. 1873) (granting injunction against the use of gun powder

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magazine on the ground that it would be a nuisance to nearby residents despite the fact that the gun powder was necessary for defendant's established business).

*See* Tal S. Grinblat, *Offenses to The Olfactory Senses and The Law of Nuisance*, 21 LEGAL MEDICAL Q. 1 (1997) (discussing the noxious and putrid smells generated by large scale hog operations—*e.g.*, fatigue, depression, nausea, sleep disturbances, etc.—to populations downwind from these economically productive hog farms, together with the availability of nuisance law to abate, partially, these type of businesses).

<sup>6</sup> Courts across America have held that the fact that a plaintiff came to the nuisance is not a *per se* defense to a nuisance claim; however, many jurisdictions do consider coming to the nuisance as a factor in determining whether the defendant's activity is unreasonable. *See* discussion, *infra* Part I.B.

Two other defenses available, in principle, although not allowed often in practice by the courts, are to be found in contributory negligence and assumption of risk. RESTATEMENT (Second) TORTS § 840B, (contributory negligence); § 840C (assumption of the risk). 1 FOWLER v. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 1.28 at p. 83 (1956).

<sup>7</sup> *See generally* Manny Fernandez, *In New York Public Housing Some Concerns Over a Wall Street at the Helm*, N. Y. TIMES, May 17, 2009, at A26 (commenting that there are 402,00 people in New York City public housing).

<sup>8</sup> *See generally infra* Part IV.B.

<sup>9</sup> *See* discussion *infra* Part IV.C.

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<sup>10</sup> See Restatement (Second) of Torts § 826(a) (1979). The Restatement states that “[a]n intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if [ ] the gravity of the harm outweighs the utility of the actor’s conduct.” *Id.*

<sup>11</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 561 (7<sup>th</sup> ed. 2007) (“it is to the benefit of all interest groups that when courts are enforcing common law principles they should concentrate on trying to increase the aggregate wealth of society by making the principles and case outcomes efficient.”).

<sup>12</sup> See generally John M. Payne, *Fairly Sharing Affordable Housing Objectives: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365 (2000-2001).

See discussion *infra* Part III.

<sup>13</sup> See discussion *infra* Part IV.

<sup>14</sup> See, e.g., *Abdella v. Smith*, 149 N.W. 2d 537 (W.I. 1967).

<sup>15</sup> *Smith*, *supra* note 4 at 689.

<sup>16</sup> Restatement (Second) of Torts § 826(a) (1979). The Restatement explains that the calculation of the gravity of the harm employs an examination of “the extent of the harm involved,” “the character of the harm involved,” “the social value that the law attaches to the type of use or enjoyment invaded,” “the suitability of the particular use or enjoyment invaded to the character of the locality,” and “the burden on the person harmed of avoiding the harm.” Restatement (Second) of Torts § 827 (1979). Further, the utility of the good considers “the social value that the law attaches to the primary purpose of the conduct,” “the suitability of the conduct to the character of the locality,” and “the impracticability of preventing or avoiding the invasion.” Restatement (Second) of Torts § 828 (1979).

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<sup>17</sup> Prosser, *Law of Torts* (3d ed.) p. 616, sec. 90. In emphasizing the importance of a balancing test in nuisance actions. Prosser has stated:

The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other. Some balances must be struck between the two. The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff. The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both. In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant's conduct.

<sup>18</sup> Restatement (Second) of Torts § 826 cmt. c (1979) (noting an objective inquiry whereby "[t]he question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable"); *see also* DAN B. DOBBS, *THE LAW OF TORTS* 1320 (2000) (concluding that classifying a use as a nuisance "invoke[s] a regime of reasonable accommodation between conflicting uses").

<sup>19</sup> *See* Smith, *supra* note 4, at 701; *see also* WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 170–71 (1954) (explaining that "[t]here has been general recognition in the nuisance cases that the relation of the activity to its surroundings is the controlling factor").

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<sup>20</sup> *Id.*; see also Fowler v. Harper, Fleming James, Jr. & Oscar S. Gray, HARPER, JAMES AND GRAY ON TORTS 97 (3d ed. 2006) (commenting that “[i]t is the type of interest invaded that gives to the tort what little unity or coherence it may have”).

Common law jurisdictions choosing neither to accept nor to follow the Restatement of Torts balancing test factors, have been faulted for balancing “competing interests as they see fit, considering only ‘the needs of justice’ broadly defined.” Neither definitive rules nor normative principles exist which can clearly guide courts in determining those interests as appropriate to evaluate when balancing actually occurs. Jared A. Goldstein, *Equitable Balancing in The Age of Statutes*, 96 VA. L. REV. 485, 525 (2010).

<sup>21</sup> William Q. DeFuniak, HANDBOOK OF MODERN EQUITY 60 (2d ed. 1950) (stating that these two designations “deserve[] separate consideration” from each other based on public nuisance’s protection of the general welfare and private nuisance’s more individualistic scope).

<sup>22</sup> Smith, *supra* note 4, at 698–99.

See Matthew Saunig, *Rebranding Public Nuisance: City of Cleveland v. Ameriquest Mortgage Securities Inc. as a Failed Response to Economic Crisis*, 59 CATH. L. REV. 911 (2010) (analyzing the proper limits of public nuisance claims and cautioning against unfettered expansions of the tort).

<sup>23</sup> Restatement (Second) of Torts § 821B (1979). Public nuisance has been called “a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.” W. PAGE KEETON, PROSSER AND KEETON ON TORTS 618 (5<sup>th</sup> ed. 1984).

<sup>24</sup> *Spur Industries Inc. v. Del E Webb Development Co.* 494 P.2d 700, 705 (Ariz. 1972).

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<sup>25</sup> Smith, *supra* note 4, at 699 (“by its reasonable application, [nuisance] 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”).

<sup>26</sup> Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 874-75 (2001) (noting that a community’s values play an important role in the calculus of the common good of that locale).

<sup>27</sup> See John C. Duncan, *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations* 24 *COLUM. J. ENVTL. L.* 169, 216 note 216 (1999) (explaining that the common good draws its foundation from utilitarianism). Utilitarianism “focuses less directly on aggregation of ‘good’ and ‘bad’ and more on attainment of greater societal ‘happiness,’ exempt from societal ‘pain.’” *Id.* According to the Supreme Court, however, there may be very few limits on the common good as seemingly just about anything goes with respect to the public purpose requirement for a Fifth Amendment takings case. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (finding that economic redevelopment constituted a valid public purpose and was sufficient justification for the taking of property). However, in practice, the expanded definition of public purpose to include economic redevelopment is not guaranteed to be successful. See Eric Gershon, *Pfizer to Close New London Headquarters*, *HARTFORD COURANT*, Nov. 9, 2009, available at <http://courant.com/business/hc-pfizer11100nov10,0766810.story> (reporting that the Pfizer plant that was the focus

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of New London’s redevelopment plan was closing down and relocating to another part of Connecticut).

<sup>28</sup> Smith, *supra* note 4, at 680.

*See also* DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMICS OF PROPERTY RIGHTS AND NUISANCE LAW* 17 (1992) stating that economic analysis not only seeks to determine “which allocation of scarce resources maximizes wealth,” but is concerned generally “with efficiency, not fairness.”

<sup>29</sup> *See generally* Posner, *supra* note 11, at 3–16 (explaining the role of economic reasoning—especially rational choice and utility—as an undercurrent of legal decision-making).

<sup>30</sup> *See, e.g., South Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, 732 (N.J. 1975) (holding that “a developing municipality’s obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to ‘. . . the municipality’s fair share of the present and prospective regional needs’”).

<sup>31</sup> Posner, *supra* note 11, at 26–27 (addressing criticisms of the economic approach to law and explaining that economics inherently reinforces justice through its attempt to avoid waste).

<sup>32</sup> *Id.* at 27 (noting that “[e]ven the principle of unjust enrichment can be derived from the concept of efficiency”).

<sup>33</sup> *Id.* at 561. Such an approach is necessary in the absence of a world in which the courts could effectively redistribute wealth throughout society to achieve the greatest level of equity. *Id.* (commenting that the legislature is far better equipped at redistributing wealth through income taxes and government programs than its judicial counterpart).

<sup>34</sup> *See* discussion *supra* notes 21–24.



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<sup>35</sup> See, e.g., *Rex v. Cross*, 172 ENG. REP 219 (?) (cited in *East St. Johns Shingle Co. v. City of Portland*, 195 OR., 505, 510 (OR. 1952)); *Wier's Appeal*, 1873 WL, 11580, \*10 (PA. 1873).

See HARPER & JAMES, *supra* note 6.

<sup>36</sup> *East St. Johns Shingle Co. v. City of Portland*, 195 OR. 505, 510 (OR. 1952).

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., *Rex*, 172 ENG. REP. 219 (?) (cited in *East St. Johns Shingle Co. v. City of Portland*, 195 OR. 505, 510 (OR. 1952)).

<sup>39</sup> *Id.*

<sup>40</sup> *East St. Johns Shingle Co.*, 195 OR. at 510.

<sup>41</sup> See *Franklyn Lawrence v. Eastern Airlines Inc.* 81 SO.2d 632 (FLA. 1955) (stating “the majority view [of jurisdictions] rejects the doctrine of coming to the nuisance as an absolute defense.”).

<sup>42</sup> See, e.g., *Id.*; *U.S. v. Luce*, 141 F. 385 (DE. 1905) (stating that recognizing coming to the nuisance as a defense would “be so unreasonable and oppressive as to work its own condemnation.”).

<sup>43</sup> *Id.*

<sup>44</sup> *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259 (N.D. W.V. 1982).

<sup>45</sup> *Wier's Appeal*, 22 AM. L. REG. 715 (PA. 1873).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., *Id.*; *Ensign v. Walls*, 34 N.W. 2d 549 (MICH. 1948) (granting injunction against operator of dog breeding and boarding business due to odors and flies despite the fact that the

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plaintiffs moved into the area after the creation of the business); *Carter v. Lake City Baseball Club, Inc.*, 62 S.E. 2d 470 (SC. 1950) (enjoining the use of school baseball field by professional team because it caused a nuisance to nearby homeowners and noting that it is no defense that the plaintiff voluntarily moved into the vicinity); *Franklyn Lawrence v. Eastern Airlines, Inc.* 81 So. 2d 632 (FLA. 1955) (stating in nuisance action against airline company that “it is no defense to an action of this character that the plaintiff ‘came to the nuisance’”).

<sup>49</sup> See, e.g., *Powell v. Superior Portland Cement, Inc.* 129 P.2d 536 (WASH. 1942) (dismissing action for injunction against concrete plant because defendant’s business was well established, the plaintiff knew the conditions of the property he purchased, and because the defendant’s business was an integral part of the community); 42 A.L.R. 3d 344.

<sup>50</sup> See, e.g., *Ensign*, 34 N.W. 2d at 552–53; *Abdella v. Smith*, 149 N.W. 2d 537 (Wis. 1967) (stating, “[a] plaintiff, of course, is not *ipso facto* barred from relief in the courts merely because of ‘coming to the nuisance,’ but it is a factor.”); 42 A.L.R. 3d 344; Rest. 2d Torts § 840D (1979).

<sup>51</sup> See, e.g., *Powell*, 129 P2d at 537; (denying injunction against cement business in part because the plaintiff knew of the conditions caused by the plant); *Mark v. Oregon*, 84 p.3d 155, 163 (Ct. App. OR. 2004) (stating that coming to the nuisance is only a consideration if the plaintiff knew or should have known of the complained of activity before moving onto the property).

<sup>52</sup> *Id.* (citing *Tucker v. Constable*, 19 P. 13 (OR. 1888)). In affirming an injunction preventing the use of a nude beach the Court of Appeals of Oregon in *Mark v. Oregon* refused to consider the fact that the plaintiffs came to the nuisance as a factor because the defendant could not establish that the plaintiffs knew or should have know that the nude beach was next to their property. *Id.* This was because the plaintiffs only visited the area during the winter months when no

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sunbathers were present, no maps or signs in the area indicated that it was a nude beach, and the seller never indicated that the adjacent property was a nude beach. *Id.* at 163-64.

<sup>53</sup> *Id.* 42 A.L.R. 3d 344.

<sup>54</sup> *See e.g.*, Powell, 129 P.2d at 537 (noting that at least half of the residents of the town depended upon the defendant's cement business, whose location was necessary because of its proximity to a limestone deposit); *East St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 563-64 (OR. 1952) (holding private party could not obtain damages based on nuisance, in part because the area in which the plaintiff purchased the land was a well established industrial district); *Abdella v. Smith*, 149 N.W. 2d 537, 541 (WIS. 1967) (stating that one reason the defendant's use of his property as a horse riding academy was reasonable was because it was in a rural area).

<sup>55</sup> *Id.*

<sup>56</sup> *See supra* note 50.

<sup>57</sup> *East St. Johns Shingle Co.* 246 P.2d at 560.

<sup>58</sup> *See, e.g.*, Wiers Appeal, 22 AM. LAW REG. 715 (PA. 1873); *Kelo v. Yaffe v. Ft. Smith*, 10 S.W. 2d 886 (ARIZ. 1928); *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (ARIZ. 1972).

<sup>59</sup> *East St. Johns Shingle Co.* 246 P.2d at 562.

<sup>60</sup> Wiers Appeal, 22 AM. LAW REG. at 715.

<sup>61</sup> *Powell v. Superior Portland Cement, Inc.*, 129 P.2d 536 (WASH. 1942).

<sup>62</sup> *Id.* at 537.

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More contemporaneous with this decision in *Powell* is the landmark case of *Boomer v. Atlantic Cement Co.*, 309 N.Y. 2d 312, 257 N.E. 2d 870 (N.Y. 1970). Here, although the New York County of Appeals found that dust, smoke and vibration emanating from a cement plant constituted a continuing and recurrent nuisance, no injunctive relief was ordered to be given to predate plaintiffs; rather, permanent damages were assessed. The court reasoned that significant economic consequences would result to the local and state economies if it issued a prohibiting injunction.

<sup>63</sup> *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259, 1267 (N.D. W.V. 1982).

<sup>64</sup> *See, e.g., East St. Johns Shingle Co.*, 246 P.2d at 563–64 (noting that the coming to the nuisance doctrine did apply, in part, because the complained of activity was not increased beyond what should have been anticipated).

<sup>65</sup> *See Spur Industries, Inc. v. Del E. Webb*, 494 P.2d 700, 708 (ARIZ. 1974) (noting that it was not unfair to require the plaintiff to indemnify the defendant because the plaintiff was able to purchase cheaper and larger tracts of land).

*See generally* Rohan Pitchford & Christopher M. Snyder, *Coming to the Nuisance: An Economic Analysis from an Incomplete Contracts Perspective*, 19 J.L. ECON. & ORG. 491 (2009).

<sup>66</sup> *Id.*

<sup>67</sup> *Spur Ind.*, *supra* note 65 at 703–04.

<sup>68</sup> *Id.* at 704.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

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<sup>71</sup> *Id.* at 705.

Del Webb’s complaint cited “the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City” as the alleged nuisance-like activity that the continued operation of Spur’s feedlot was causing. *Id.*

<sup>72</sup> *Id.* The Supreme Court of Arizona found that there was “no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area.” *Id.*

<sup>73</sup> *Id.* at 706.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 707.

<sup>80</sup> See Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713, 724 (2002) (noting that changing circumstances may transform a once reasonable land use into a nuisance). The court explained that Spur had “no indication . . . that a new city would spring up, full-blown alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city.” *Spur Ind.*, 494 P.2d at 707–08.

<sup>81</sup> *Spur Ind.* 494 P.2d at 707–08.

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<sup>82</sup> *Id.* at 708 (recognizing that the injunction was being granted through no fault of Spur’s).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of Spur Industries on Nuisance Law*, WASH. U. J. URB. & CONTEMP. L. 75, 88–89 (1992) (noting that such a trend is particularly efficacious “if a plaintiff is part of a natural wave of growth and development that has gradually approached a defendant’s formerly harmless use”).

<sup>90</sup> *Spur Ind.*, 494 P.2d at 707–08.

<sup>91</sup> Reynolds, *supra* note 89 at 99. However, the compensated injunction has only been applied sparingly. See Janet v. Siegel, *Negotiating for Environmental Justice: Turning Polluters into “Good Neighbors” Through Collaborative Bargaining*, 10 N.Y. U. ENVTL. L. J. 184, note 194 (2002) (commenting that it is highly unlikely for a court to employ a compensated injunction).

<sup>92</sup> *South Burlington N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975).

<sup>93</sup> *Id.* at 718–19. The court explained that “much more land has been zoned that the reasonable potential for industrial movement or expansion warrants” and that this land cannot be used for residential purposes according to the ordinance. *Id.* at 719.

<sup>94</sup> *Id.* at 721.

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<sup>95</sup> *Id.* at 724 (holding that there must be some affirmative effort on the part of the municipality to provide for housing opportunities to a variety of socioeconomic groups).

<sup>96</sup> *Id.* at 726–27. In noting the need for better regional development, it was explained that “[he] effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries” and the modern trend of greater suburbanization “refuses to be governed by such artificial lines.” *Id.*

<sup>97</sup> *See, e.g., BAC, Inc. v. Board of Supervisors of Millcreek Township*, 633 A.2d 144, 146 (Pa. 1993). The Supreme Court of Pennsylvania has also held that “[w]here a municipal subdivision is a logical place for development to occur, it must assume its rightful part of the burdens associated with development, neither isolating itself nor ignoring the housing needs of the larger region.” *Id. Beach v. Planning and Zoning Comm’n of Town of Milford*, 103 A.2d 814, 817 (CONN. 1954) (holding that approval of a subdivision cannot be denied on the basis that that subdivision will impose a financial burden on the town).

<sup>98</sup> *See generally Mount Laurel I*, 336 A.2d at 733–34.

<sup>99</sup> *Id.* at 733.

<sup>100</sup> *Id.*

<sup>101</sup> *See Id.* at 734.

<sup>102</sup> *Id.* (noting that a coalition of “private builders, various kinds of associations, or, for public housing by special agencies created for that purpose at various levels of government” should work together in furtherance of this objective).

<sup>103</sup> *South Burlington N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390, 413 (N.J. 1983) (explaining that “[a]lthough [Mount Laurel] set forth important guidelines for implementing the

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doctrine, their application to particular cases was complex, and the resolution of many questions left uncertain”).

<sup>104</sup> *Id.* at 410.

<sup>105</sup> *Id.* at 424 (making this determination in accord with public policy considerations). The court accepted the proposition that the state’s development plan was an accurate reflection of where growth was expected to occur in the state. *Id.* at 426. The goal of this determination was “to channel the *entire* prospective lower income housing need in New Jersey into ‘growth areas.’” *Id.* at 433.

<sup>106</sup> *Id.* at 435.

<sup>107</sup> *Id.* at 436 (noting that it was “the most troublesome issue” and “takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of [Mount Laurel I]”).

<sup>108</sup> *Id.* at 438. This judicial body consisted of three judges, each responsible for determining and enforcing the fair share obligation in a particular part of the state. *Id.* at 439.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 440–41 (suggesting that the regional factors (*e.g.*, employment opportunities and other factors already employed in the state for determining water and sewer fair shares) should be given more weight than those pertaining to any particular municipality).

<sup>111</sup> *See Id.* at 442–50 (commenting that the governments should take a proactive approach in providing for affordable housing).



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<sup>112</sup> See generally, *Id.* at 452–60 (suggesting a builder’s remedy, judicial revision of a town’s zoning ordinance, and further judicial orders in the event that revised zoning still fails to satisfy the town’s fair share obligation).

<sup>113</sup> John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 22 (1987) (explaining that even the Governor of New Jersey equated Mount Laurel II with communism).

<sup>114</sup> See discussion *supra* text accompanying note 108.

<sup>115</sup> See generally N.J. STAT. ANN. §§ 52.27D-301–52.27D 329 (1985). This legislation was passed only after the public outcry over Mount Laurel II abated. See David L. Callies, Robert H. Freilich & Thomas E. Roberts, *CASES AND MATERIALS ON LAND USE* 551 (5<sup>th</sup> ed. 2008); Payne, *supra* note 12.

<sup>116</sup> Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997).

Political interests and, indeed, constraints have obfuscated the work of the Council and limited its achievements and overall effectiveness. Matthew Rao, *Fair Share in Practice: The Council on Affordable Housing and The Mount Laurel Doctrine*, April 19, 2010, at 26, [ramov@design.upenn.edu](http://ramov@design.upenn.edu).

<sup>117</sup> *The Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621, 631 (N.J. 1986).

<sup>118</sup> *Id.* at 640 (stating that the Fair Housing Act “addressed the main needs delineated in our prior decisions on this matter, namely, the consistency on a statewide basis of the determination of regional need, fair share, and the adequacy of municipal measures”).

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<sup>119</sup> *Id.* at 634 (holding that, until the legislature takes action, it is the duty of the courts to enforce the constitution).

<sup>120</sup> *Id.* at 633.

In a case determined in 2009 by a New Jersey court, it was held that even though a township not only met but exceeded their fair share of affordable housing, the township’s land use planning board must nonetheless give requests for additional low income housing the presumption of fulfillment of certain variance criteria. *Homes of Hope Inc. v. Easthampton Twp. Land Use Planning Board*, 409 N.J. Super. 330, 334 (N.J. Super 2009) 976 A.2d 1128.

<sup>121</sup> *The Hills Dev. Co.*, *supra* note 117 at 643 (stating that the court “must assume, if the assumption is at all reasonable, that the Act will function well and fully satisfy the *Mount Laurel* obligation”); *see also* text accompanying *supra* notes 101–102 (discussing the fair share objectives of *Mount Laurel I*).

<sup>122</sup> *Toll Brothers, Inc. v. Township of West Windsor*, 803 A.2d 53, 85 (N.J. 2002). In expressing that a municipality need only provide affordable housing opportunities in relation to demand, the New Jersey Supreme Court stated that “developers are motivated by profit, and there is likely no greater area of concern for a developer than marketability of its project. The colloquial phrase ‘if you build it, they will come’ does not translate well to the building of homes.” *Id.*

<sup>123</sup> *See* discussion *infra* Part IV.B. and Part IV.C.; *cf.* Katrin C. Rowan, *Anti-Exclusionary Zoning in Pennsylvania: A Weapon for Developers, a Loss for Low-Income Pennsylvanians*, 80 TEMP. L. REV. 1271, 1304 (2007) (“[b]y focusing on property rights rather than people and their need to live in decent, affordable housing, Pennsylvania’s ‘fair share’ case law removes the

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focus from low- and moderate-income Pennsylvanians and instead places power in the hands of developers, who generally do not have a profit incentive to build affordable housing”).

<sup>124</sup> Smith, *supra* note 4, at 706.

<sup>125</sup> See text accompanying *supra* notes 1–3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

See Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAWYER 201 (2006) (arguing *Kelo* is a case of *reductio ad absurdum* since its premise is defective in that it deems almost everything to be a “public use”).

See generally Robert C. Ellickson, *Federalism and Kelo: Question for Richard Epstein*, 44 TULSA L. REV., 751 (2009).

<sup>129</sup> *Kelo v. City of New London* at 475.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

On June 24, 2010, the New York Court of Appeals held that the New York State Urban Development Corporation had exercised—properly—its power of eminent domain on behalf of Columbia University’s plan for a \$6.3 billion expansion in West Harlem. A crucial 17 acres of private property was blocking this expansion of the University which would not only upgrade the “blighted” neighborhood by a civic project which would be dedicated to research and expansion of laboratories, libraries, and student housing, but create some 6,000 permanent jobs which—in turn—would make contributions to a better society in biotechnology and in health research. The

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appellate Division had determined previously by a 3 to 2 decision, that the power of eminent domain had been *ultra vires* and thus unconstitutional. *Matter of Kaur v. New York State Urban Dev. Corp.*, 72 A.D. 3d 1, 892 N.Y.S. 2d 8, 2009 N.Y. App. Div. LEXIS 8799 (N.Y. App. Div. 1<sup>st</sup> Dep't., 2009, 15 N.Y. 3d 235, \_\_\_ N.E.2d \_\_\_ (2010)).

*But see* Alexander D. Racketa, *Takings for Economic Development in New York: A Constitutional Slam Dunk?*, 20 CORNELL J. LAW & PUB. POL'Y 191 (2010) (questioning the implicit recognition by the New York Court of Appeals for economic development as a valid public use under the eminent domain power of the state constitution and calling upon the Court to not only constrain the expansion of this notion but to also define, with care, the boundaries of "blight" in seeking its removal as advancement of a public purpose).

Generally, when a taking adds significant wealth to society, courts will sustain it as being valid. Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 108 (1986).

Interestingly, Justice Clarence Thomas, in his dissent in *Kelo v. City of New London*, 545 U.S. 469, 519, 526, (2005) cited *Lucas v. South Carolina Coastal Council* 55 U.S. 1003, 1029 (1992), in support of his contention that when slums exist and are "blighted," nuisance law should be seen as controlling over an exercise of the eminent domain power. The power to abate a nuisance requires no compensation.

<sup>132</sup> Wan He, Manisha Sengupta, Victoria A. Velkoff & Kimberly A. DeBarros, U.S. Dep't. of Health and Human Services & U.S. Dep't. of Commerce, *65+ in the United States*, 2005 813 (2005) available at <http://www.census.gov/prod/2006pubs/23-209.pdf> (noting that the elderly population in the United States "is projected to double between 2000 and 2030").

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<sup>133</sup> *Id.* at 101 (noting that the median income for a household in which the householder was 75 or over was \$29,280 in 2003). Also, in 2003, 10.2% of the population over age 65 lived in poverty.

*Id.*

<sup>134</sup> *Asian Americans For Equality v. Koch*, 128 N.Y.S. 2d 939, 942 (N.Y. App. Div. 1987).

<sup>135</sup> *Id.* at 953 (noting, also, that the city was expected to receive another 150,000 to 200,000 Chinese immigrants by 1980).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* The percentage of such people ranged from 20-33% of the population. *Id.*

<sup>138</sup> *Id.* A study of the area concluded that “[p]roblems of assimilation for new immigrants are minimized by the absence of language and cultural barriers and the opportunities for employment from Chinese-owned businesses within walking distance from their homes.” *Id.*

<sup>139</sup> *C.f.*, *supra* note 11 (explaining that society’s end-game should be wealth maximization).

<sup>140</sup> *See Smith*, *supra* note 4, at 706.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> U.S. Const. Amend. V.

<sup>144</sup> 42 U.S.C. § 4622(a)(1) (2009). For the purposes of the federal solution, “displaced person” refers to:

any person who moves from real property, or moves his personal property from real property as a directed result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance.

42 U.S.C. § 4601(6)(A)(i)(I) (2009).

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<sup>145</sup> See U.S.C. § 4623 (2009). “Comparable replacement dwelling” is statutorily defined as:

Any dwelling that is decent, safe, and sanitary; adequate in size to accommodate the occupants; within the financial means of the displaced person; functionally equivalent, in an area not subject to unreasonable adverse environmental conditions; and in a location generally not less desirable than the location of the displaced person’s dwelling with respect to public utilities, facilities, services, and the displaced person’s place of employment.

42 U.S.C. § 4601(10) (2009).

<sup>146</sup> 42 U.S.C. § 4621(b) (2009).

<sup>147</sup> *Id.*

<sup>148</sup> 42 U.S.C. § 4623(a)(1) (2009). Additional reasonable costs could include title searches, recording fees, closing costs, and any debt service costs. *Id.*

<sup>149</sup> See 42 U.S.C. § 4624 (2009). For tenants, the additional reasonable relocation expense provision covers amounts not in excess of \$5,250. 42 U.S.C. § 4624(a) (2009).

<sup>150</sup> See generally discussion *supra* Part III.

In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court held that a community could be condemned—here, in order to allow the General Motors Corporation to build a factory. Even though the condemnation meant some 1,300 homes, 140 businesses, 6 churches and 1 hospital were demolished, the court reasoned that Eminent Domain seizures of this nature served only to safeguard the common good by revitalizing, and thus sustaining, the economic foundations of the municipality and the state as well. 410 MICH. 616, 304 N.W. 2d 455 (Mich. 1981).

The same state Supreme Court ruled on July 30, 2004, that the *Poletown* precedent was to be discarded. Accordingly, in *Wayne County v. Edward Hathcock*, the court held that economic

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development was an insufficient reason for justifying the condemnation of private property. 684 N.W. 2d 765 (MICH. 2004). Interestingly, *Hathcock* does not support complete private to private condemnations. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and The Future of Public Use*, 2004 MICH. ST. L. REV. 1005. Indeed, *Hathcock* recognizes three exceptions to the ban on private-to-private transfers and compounds uncertainty in its application of failing to explain adequately how these three tests are to be employed prospectively. See James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859. The Michigan Supreme Court permits transfers to private parties if “(i) the public retains control over the property, (ii) the condemnation was for a public necessity, or (iii) the condemnation was for a purpose separate from the transfer to the private party, such as blight removal.” 684 N.W. 2d at 783.

<sup>151</sup> See *supra* Part I.B.2. There are also similarities with efforts to rebuild localities after they have been decimated by a natural disaster. See Terry L. Clower, *Economic Applications in Disaster Research, Mitigation, and Planning 6* available at <http://training.fema.gov/EMIWeb/edu/docs/EMT/ Disciplines%20Disasters%20and%20EM%2Book%20-%20Chapter-Econ%20appli%20in%20disasters%20research.doc> (noting “surprisingly liberal attitudes” toward disaster relief). However, many disfavor rebuilding disaster areas with taxpayer dollars. IRC study Finds Strong Support for Government Policies to Mitigate Damage from Natural Disasters Before They Happen But Also Finds Lack of Personal Preparation 2 (2006) available at [http://www.harrisinteractive.com/news/newsletters/clientnews/2006\\_IRC.pdf](http://www.harrisinteractive.com/news/newsletters/clientnews/2006_IRC.pdf) (showing that roughly 60% of people do not support using tax dollars to subsidize disaster insurance). It may be better to just compensate these displaced people for their losses instead of rebuilding their

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homes in the same high-risk area. In fact, “the usual lesson from economics is that people are better off if they are given money and allowed to make their own decisions, much as they are with car insurance.” Edward L. Glaeser, *Should the Government Rebuild New Orleans, Or Just Give Residents Checks?*, 2 THE ECONOMISTS’ VOICE 1, 2 (2005). The underlying consideration for such an approach is a cost-benefit analysis which shows that rebuilding homes destroyed by natural disasters is too costly a proposition. *Id.* at 5.

<sup>152</sup> See discussion *supra* Part I.B.2.

<sup>153</sup> The utility of such a goal can be witnessed through the discussion of the undeniable need for the employment of a balancing test in nuisance actions. See discussion *supra* Part I.A.

<sup>154</sup> Grynbaum, *supra* note 1, at A18.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* As such, the Riedis refused to relocate to this proposed location. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Darryl Fears, *75 million to keep a roof over their Heads*, WASH. POST, Dec. 1, 2009, at

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TARP is an acronym for Troubled Assets Relief Program.

*But see* Gary Lawson, *Burying The Constitution Under a Tarp*, 33 HARV. J. L. & PUB. POL’Y 55 (2010) (arguing that the President’s Executive Powers do not constitutionally include a power which allows him to take any course of action that he thinks is important for the country—regardless of congressional inactions or lack of statutory basis).

<sup>159</sup> Fears, *supra* note 1.

<sup>160</sup> *Id.*



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<sup>161</sup> *Id.*

*See infra* notes 205–06, discussing grandfathering and amortization as methods to confront the plight of the economic captive.

<sup>162</sup> Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty Related Expenses*, WASH. U. J. URB. & CONTEMP. L. 3, 7, 10–17 (1995).

<sup>163</sup> *Id.*

<sup>164</sup> *South Burlington N.A.A.C.P. v. Township of Mount Laurel* 363 A.2d 713 (N.J. 1975).

<sup>165</sup> Poindexter, *supra* note 162.

It has been suggested, however, that a contemporary model for municipal growth relies upon a central assumption: namely, “that a city’s economic development is really a competition for mobile taxpayers.” Accordingly, a city should not develop policies that are concerned exclusively only with the well being of current residents. Richard C. Schragger, *Re-thinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 338 (2010).

<sup>166</sup> Cara Buckley, *Rescued from Blight, Falling Back Into Decay*, N.Y. TIMES, July 18, 2010, at

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

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See Mary Marsh Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 JOHN MARSHALL L. REV. 424 (2007) (suggesting a new judicial supervisory approach for revitalizing the implied warranty of habitability which would thereby serve as a catalyst for accelerating repairs of rental housing and thereby make them more habitable).

*But see* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES observing that only four states have failed to recognize an implied warranty of habitability for residential tenancies and acknowledging the continuing debate regarding whether a mandated implied warranty of habitability improves the welfare of low-income tenants or whether it is negligible. *Id.* at 728, 731–35.

<sup>173</sup> Buckley, *supra* note 166.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See James J. Kelly, Jr., “*We Shall Not Be Moved*”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923, 939 (2006) (criticizing the fair market value approach as “the quite limiting default rule for constitutionally mandated compensation”).

In order to protect against excessive uses of their taking powers, government entities should be held to some form of heightened scrutiny under the Due Process clause—possibly by use of pre-condemnation hearings. This approach is, however, problematic because the U.S. Supreme Court has yet to define—fully—the legal rights of property owners facing eminent domain actions by

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local, state or federal authorities. D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L. J. 1281, 1306–11, 1320–21 (2010).

Under the Supreme Court’s 1985 holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, in order for a property owner to pursue compensation under a Fifth Amendment takings claim in the federal courts, he must first pursue his claim for compensation through state procedures. 473 U.S. 172 (1985). In order to expedite claims of this nature, it has been urged that the federal courts resume their obligation to adjudicate property right claims. J. David Breemer, *Ripeness Madness: The Expansion of Williamson County’s Baseless ‘State Procedures’ Takings Ripeness Requirement to Non-takings Claims*, 41 URBAN LAWYER 615 (2009).

Another approach to limiting the abuse of eminent domain powers would be the revival of the necessity doctrine which holds the necessity or expediency of a taking under eminent domain powers is a legislative determination and not subject to judicial review. Robert C. Bird, *Reviving Necessity in Eminent Domain*, 33 HARV. J. L. & PUB. POL’Y 239, 243, 256 (2010).

<sup>177</sup> John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 790 (2006) (explaining the inequity “[b]ecause just compensation law generally undervalues the home, it does not adequately deter government from using eminent domain against homes”).

<sup>178</sup> *Id.* at 790–91.

<sup>179</sup> Kelly, *supra* note 176, at 989.

<sup>180</sup> *See* Fee, *supra* note 177, at 818 (providing a model statute in which a “personal detachment award” is calculated based on how long a person has lived in the house, allowing for greater compensation the longer one has lived in a house).

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<sup>181</sup> Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 274 (2007) (relying on “the considered judgments of others about what makes a person whole”).

<sup>182</sup> Callies, Freilich & Roberts, *supra* note 115, at 305–06 (explaining that the current fair market value method of compensation does not take subjective values into account, but that some states provide for compensation to include more than 100% of the fair market value of the property). The debate over just compensation has intensified in the wake of expanding notions regarding the public use. *Id.* at 305.

<sup>183</sup> Ann Riedi best expressed this concern when she said, “[h]ow do you take the memories?” Grynbaum, *supra* note 1, at A18.

<sup>184</sup> MD Code, Art. 66B, § 1.01(1).

<sup>185</sup> *See generally* MD Code, Art. 66B, § 1.01; *but see* Lisa Rein, *Study Calls Md. Smart Growth a Flop*, WASH. POST, Nov. 2, 2009, at B1 (claiming that Maryland’s smart growth has largely been unsuccessful “because it has no teeth to force local governments to comply and because builders have little incentive to redevelop older urban neighborhoods”).

<sup>186</sup> MD Code, Art. 66B, § 1.01(4). This type of community design is intended to be an efficient utilization of local resources while maintaining a consistency with the locale’s socioeconomic and natural character. *Id.*

<sup>187</sup> MD Code, Art. 66B, § 1.01(6) (citing the goal of creating “a well-maintained, multimodal transportation system [that] facilitates the safe, convenient, affordable, and efficient movement of people”).

<sup>188</sup> *See* MD Code, Art. 66B, § 1.01(7).

<sup>189</sup> MD Code, Art. 6B, § 1.01(8).

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<sup>190</sup> JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 195 (1998).

<sup>191</sup> *Id.* at 196.

<sup>192</sup> *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359 (2003) (upholding an agreement between a municipality and a developer whereby the developer would provide \$8 million to the town’s general fund in exchange for a rezoning favorable to the developer).

<sup>193</sup> *See generally* RONALD H. COASE, THE PROBLEM OF SOCIAL COST, 3 J.L. & ECON 1 (1960).

<sup>194</sup> *Id.*

<sup>195</sup> *See* discussion, *supra* Part 1.A.

<sup>196</sup> *See supra* Part II. (explaining that, under the holding in *South Burlington N.A.A.C.P. v. Township of Mount Laurel*, municipalities are required to provide affordable housing in proportion to their fair share of various demographic groups).

<sup>197</sup> Steven P. Frank, *Yes in my Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 232–33 (2009) (noting that managed growth decision making involves direct negotiations between municipalities and developers); *but cf.* Braham Boyce Ketcham, *The Alexandrian Planning Process: An Alternative to Traditional Zoning and Smart Growth*, 41 URB. LAW. 339, 354 (2009) (commenting that managed growth, described as an imposition of “order from above,” is not guaranteed to feature cooperation as developers have to independently decide to invest in such a project).

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<sup>198</sup> Rein, *supra* note 185, at B1 (citing a study saying that “smart growth has not made a dent in Maryland’s war on sprawl”).

<sup>199</sup> *Supra* Part IV.A.1. (examining the debate over what exactly is just compensation).

<sup>200</sup> *See Wisconsin Wine & Spirit Inst. v. Ley*, 416 N.W.2d 914, 919 (Wis. Ct. App. 1987) (holding that a grandfather clause is valid so long as it has a rational basis).

<sup>201</sup> *Whaley v. Dorchester County Zoning Bd. of Appeals*, 524 S.E.2d 404, 410 (S.C. 1999) (Toal, J., dissenting).

<sup>202</sup> JUERGENSMEYER & ROBERTS, *supra* note 190, at 158.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 158–59.

<sup>205</sup> *City of Los Angeles v. Gage*, 274 P.2d 34 (Cal. Dist. Ct. App. 1954).

<sup>206</sup> *See supra* Part I.A. (explaining that the desired goal of the law is to further the economic advancement of society).

<sup>207</sup> *See* discussion *supra* Part IV.A.1.

<sup>208</sup> *See* Fernandez, *supra* note 7, at A26 (describing the hundreds of thousands of people living in public housing, many of whom have to endure “crime, poverty, vandalism and poor maintenance [that] contribute[s] to a sense of decay or indifference”).

<sup>209</sup> *See generally, supra* Part III. (commenting on the fact that Economic Captives are forced to live in certain areas based on the necessities their socioeconomic status imposes upon them).

<sup>210</sup> *Supra* Part I.A. (explaining that in a nuisance action, it is the duty of the courts to balance the utility of the good versus the gravity of the harm in order to resolve the dispute). Economics

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serves as the inherent fulcrum upon which the balance of two competing uses should be placed.

Smith, *supra* note 4, at 699.

<sup>211</sup> *Supra* Part IV.B.

<sup>212</sup> *Supra* Part IV.B.

<sup>213</sup> *Supra* Part IV.C.

<sup>214</sup> *See generally* Coase, *supra* note 193 (noting that such a position is optimal for society and will best serve the common good).

<sup>215</sup> Restatement (Second) of Torts § 840D (1979).

<sup>216</sup> *See* Zulack and MERRILL & SMITH, *supra* note 172.

<sup>217</sup> *See supra* notes 158–175 referencing these costs in the District of Columbia and New York City.

<sup>218</sup> MERRILL & SMITH, *supra* note 172.

<sup>219</sup> *Supra* notes 158–164.

<sup>220</sup> *Supra* notes 162–175.

<sup>221</sup> *See* Justice Clarence Thomas, *supra* note 131.

<sup>222</sup> BARNES & SMITH, *supra* note 28.