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The Silent Revolution in West Virginia's Law of Nuisance

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THE SILENT REVOLUTION IN WEST VIRGINIA'S LAW OF NUISANCE†

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I. INTRODUCTION

In *Hendricks v. Stalnaker*,[1] a seemingly insignificant dispute between two adjacent landowners as to the location of a water well and a septic system, the Supreme Court of Appeals has completely transformed the law of nuisance in West Virginia. A private nuisance is any "substantial and unreasonable interference with the private use and enjoyment of another's land."[2] In *Hendricks*, the plaintiffs had claimed that the defendant's new well constituted a nuisance because it precluded them from installing a septic system, which interfered with their planned use of their property for mobile home sites. The Circuit Court of Lewis County had granted an injunction ordering the defendant to cease using the well, but the Supreme Court of Appeals reversed, holding that the water well was not a nuisance because it was not an unreasonable use of the defendant's land.[3]

The decision itself is unremarkable insofar as it holds that the water well was not a nuisance. Judge Neely's opinion is revolutionary, however, in adopting the *Restatement (Second) of Torts*' "balance of utilities"[4] test for determining the existence of a nuisance: "An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm."[5]

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1. 380 S.E.2d 198 (W. Va. 1989).

2. *Id.* at 200. *See also* W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 87 (5th ed. 1984) [hereinafter PROSSER & KEETON]; RESTATEMENT (SECOND) OF TORTS § 822 (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (1st ed. 1941).

3. *Hendricks*, 380 S.E.2d at 203.

4. *Id.* at 202; RESTATEMENT (SECOND) OF TORTS § 826(a) (1977). *See also* RESTATEMENT OF TORTS § 826 (1939).

5. *Hendricks*, 380 S.E.2d at 199 syl. pt.2. *See also id.* at 202.

Prior to the opinion in *Hendricks*, the court had viewed nuisance law as a protection of a landowner's "natural right" to the use and enjoyment of property, expressed in the maxim *sic utere tuo ut alienum non laedas* ("so use your own as not to injure that of another"). A plaintiff was protected against any "unreasonable" interference, and the determination of reasonableness involved a normative and qualitative evaluation of the parties' two competing activities, rather than a quantitative balancing of costs and benefits. For fifty years the court had virtually ignored the *Restatement's* approach to nuisance law, rarely citing the *Restatement* in its nuisance opinions and never mentioning the balance of utilities test.[6] The court in *Hendricks* now wholeheartedly embraces the *Restatement's* approach, implying that it is entirely consistent with the court's own past opinions. There is no hint in *Hendricks* of the philosophical differences between the *Restatement's* positivist utilitarian conception of property rights and the natural rights rhetoric employed by the court in its earlier nuisance decisions. Nor is there any apparent recognition of the numerous long-established nuisance-related doctrines in West Virginia that would be altered by a wholesale adoption of the nuisance provisions of the *Restatement*.

To fully appreciate the significance of the *Hendricks* decision, one must first view it in historical perspective. Section II of this article provides an overview of American nuisance law, including its inception in the English common law writs, its reception in antebellum America, its accommodation of industrialization in the latter part of the nineteenth century, and its transformation in the twentieth century. Readers who are primarily interested in current nuisance doctrine may wish to skip over the historical material in Sections II-A, B, and C; the essential background is provided in Section II-D, which explains the *Restatement's* balance of utilities test. Section III describes the evolution of nuisance law in West Virginia, culminating in an evaluation of the extent to which the *Hendricks* decision may alter or clarify the determination of nuisance liability in West Virginia.

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6. See *infra* note 160 and accompanying text.

Section IV examines several important subsidiary doctrines that may limit a plaintiff's right to redress for a nuisance. The first topic considered is the overlap of private and public nuisance and the peculiar requirement of "special injury" as a prerequisite to a private suit for a public nuisance. Next, consideration is given to the "balance of conveniences" doctrine that may result in a denial of injunctive relief against a private nuisance, limiting the plaintiff to compensation in damages. Statutes of limitation provide a third restriction on a plaintiff's right to recover, and their application in nuisance disputes may depend on whether the nuisance is characterized as temporary or permanent. Finally, a defendant who was "first-in-time" may assert a defense of temporal priority under various doctrinal labels, including "coming to the nuisance," assumption of risk, and contributory negligence. For each of these topics, existing doctrine in West Virginia is analyzed with respect to the potential impact of the *Restatement*.

Section V considers the intersection of nuisance law and water law. West Virginia has developed distinct rules pertaining to diversion of surface water, deprivation of riparian rights, diversion of rivers and streams, and deprivation of percolating water. The *Restatement* has taken a more unified approach to water-related nuisance conflicts, applying one or another version of the balance of utilities test to all such disputes. The *Hendricks* case itself involved competing uses of water, and the opinion indirectly hints that the West Virginia court eventually will adopt the *Restatement*'s approach to all disputes over the use or misuse of water. Accordingly, that section of the article analyzes the implications of the *Hendricks* decision for West Virginia water law, comparing current doctrine with the applicable provisions of the *Restatement*.

II. The Historical Development of American Nuisance Law

A. English Origins: From the Conquest to Blackstone

The word nuisance derives from the Latin *nocumentum*, by way of the French *nuisant*.[7] *Nocumentum* is a medieval Latin word which

7. W. Prosser, *supra* note 2, at 550 n.7; Winfield, *Nuisance as a Tort*, 4 Cambridge L.J. 189 (1931).

simply means loss, damage, or detriment.[8] Similarly, the French word *nuisant* means hurtful, injurious, or prejudicial.[9] Having no intrinsic limitations, the term nuisance eventually became somewhat of a legal grab-bag which the courts seized upon as a substitute for analysis whenever they wished to provide redress for an injury.[10] The law of nuisance remains an "impenetrable jungle"[11] to many lawyers and judges.

The action for private nuisance can be traced to the twelfth century.[12] The word nuisance (*nocumentum*) first appears in Glanvill's compilation of formal writs in approximately 1187 within several examples of a writ known as the Assize of Novel Disseisin.[13] This variant of the Assize of Novel Disseisin was employed when the defendant's actions interfered with a plaintiff's easements or natural rights in land, and the form eventually acquired its own distinct identity as the Assize of Nuisance.[14] In the thirteenth and fourteenth

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8. According to the definitive dictionary of medieval Latin, C. Dufresne (Domino du Cange), 4 GLOSSARIUM AD SCRIPTORES MEDIAE ET INFIMAE LATINITATIS 1133 (1739), *nocumentum* was defined as *damnum* (loss, damage) or *detrimentum* (detriment), and it appeared in a gloss on a papal bull of Alexander III in 1172, shortly before its appearance in Glanvill's treatise in approximately 1187. GLANVILL, (G. Hall 1965). *See infra* note 13. No reference could be found to any earlier usage. The word *nocumentum* apparently did not exist in classical Latin. It does not appear, for example, in D. SIMPSON, CASSELL'S LATIN DICTIONARY (5th ed. 1968), nor in C. LEWIS, A LATIN DICTIONARY FOR SCHOOLS (1889). It probably derives from the classical Latin word *nocuus*, meaning hurtful or injurious. CASSELL'S LATIN DICTIONARY, *supra*, at 366.

9. NEW CASSELL'S FRENCH DICTIONARY 516 (1962).

10. W. PROSSER, *supra* note 2, at 549-50: "It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." For a compilation of commentary on the meaninglessness of the term "nuisance," *see* Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91, 109-112 (1921).

11. William Prosser introduced his discussion of nuisance law with the oft-quoted aphorism: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" W. PROSSER, *supra* note 2, at 549.

12. *See* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW (1970 ed.); RESTATEMENT OF TORTS ch. 40 at 218-19 (1939); Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 765-72 (1979); Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144 (1978); Newark, *The Boundaries of Nuisance*, 65 L. Q. REV. 480 (1949); McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948); Winfield, *supra* note 7, at 190.

13. These writs contain allegations of wrongful acts by the defendant *ad nocumentum liberi tenementi* ("to the nuisance of the freehold") of the plaintiff. *See, e.g.*, GLANVILL, *supra* note 8, Bk. XIII, chs. 35 & 36; also reprinted in C. FIFOOT, *supra* note 12, at 14; Loengard, *supra* note 12, at 159 n.45 (reprinting ch. 35).

14. Whereas Glanvill listed these nuisance writs as examples of Novel Disseisin, Bracton, in

centuries, the Assize of Nuisance very much resembled the modern cause of action for private nuisance, redressing interference with the use and enjoyment of plaintiff's land resulting from acts on the defendant's land.[15]

The Assize of Nuisance had certain limitations, however. It was only available to protect a freehold estate against the wrong of another freeholder,[16] and the procedures were quite cumbersome.[17] An alternative remedy for private nuisance was available through the writ *quod permittat prosternere*, a writ in the nature of the Writ of Right.[18] This writ was broader than the Assize of Nuisance,[19] but the procedures were even more inefficient.[20]

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the next century, referred to the same writs as examples of a separate Assize of Nuisance. *Compare* GLANVILL, *supra* note 8, Bk. XIII, chs. 35 & 36 *with* BRACTON § 233b *reprinted in* C. FIFOOT, *supra* note 12, at 14, 21. Bracton purported to distinguish the two writs according to the location of the wrongful act: Novel Disseisin was appropriate when the wrongful act was done on the plaintiff's land, whereas Nuisance lay for interferences arising from conduct on the defendant's land. BRACTON, § 234b; *reprinted in* C. FIFOOT, *supra* note 12, at 21.

Following Bracton's distinction, some scholars have assumed that the two writs developed in parallel from the outset. *See, e.g.*, RESTATEMENT OF TORTS ch. 40 at 218 (1939); Newark, *supra* note 12, at 481-82. Others have suggested that the Assize of Nuisance was created to fill a gap resulting from the Assize of Novel Disseisin's limitation to acts occurring on the plaintiff's own land. *E.g.*, Winfield, *supra* note 7, at 190-91. It seems more likely, however, that the thirteenth century Assize of Nuisance simply represented a new name for a variant of the twelfth century Assize of Novel Disseisin. *Cf.* Coquillette, *supra* note 12, at 766-67. Loengard correctly points out that Glanvill's nuisance writs were examples of the Assize of Novel Disseisin, and she asserts that the Assize of Nuisance was "a name which the twelfth century certainly did not know." Loengard, *supra* note 12, at 158.

Loengard suggests that the nuisance-like actions under the Assize of Novel Disseisin were "founded in and mandated by" the statutory enactment of Henry II that had set out the rules and procedure for the Assize of Novel Dissessein. (She posits either a lost Assize of Novel Disseisin or possibly a missing article in the text of the Assize of Clarendon.) She rejects the suggestion made by others that the extension of the Assize of Novel Disseisin to actions sounding in nuisance was the result of a judicial gloss. She does not explain why a separate Assize of Nuisance eventually supplanted the use of the nuisance variant of the Assize of Novel Disseisin.

15. Examples of fourteenth century actions under the Assize of Nuisance appear in McRae, *supra* note 12, at 37 nn.62-66. The Assize of Nuisance was broader than the modern private nuisance action in that it also protected persons with franchise rights in a fair, mill, or ferry against local competitors. *Id.* at 37; C. FIFOOT, *supra* note 12, at 10.

16. The Assize could not be used by a plaintiff who was a leaseholder, copyholder, or holder of rights in a commons. Coquillette, *supra* note 12, at 773. It was not available if the defendant was a stranger and did not own the servient estate. C. FIFOOT, *supra* note 12, at 93-94. The Assize lay only for positive acts of misfeasance, and not for nonfeasance. 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 334 n.2 (1926).

17. McRae, *supra* note 12, at 38.

18. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 20 (1923). The authorities differ concerning

To avoid the limitations and burdens of the Assize of Nuisance and the writ *quod permittat*, litigants sought to redress interferences with land under the newly-developing "action on the case." In the sixteenth century an action on the case for nuisance could be brought when the Assize was not available and there was no other legal remedy.[21] By the beginning of the seventeenth century litigants were permitted to elect between the two writs.[22] Trespass on the case thereafter "became the usual and established remedy for nuisance."[23]

The action on the case for nuisance had one significant disadvantage. Whereas abatement was available under the Assize of Nuisance, the sole remedy in an action on the case was money damages.[24] Abatement was available from the courts of equity, however, which developed equitable principles for nuisance cases that differed from those employed in the common law courts. The separate development of nuisance law in the common law and equity courts was a "potent cause of confusion," especially because the equity courts often did not closely observe the technical labels and distinctions employed by the law courts.[25]

Further complexity was introduced as the action on the case for nuisance was broadened to include actions for interference with a public right, such as obstruction of a public highway, by plaintiffs

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the origins of this writ. *Cf.* C. FIFOOT, *supra* note 12, at 4-5; 7 W. HOLDSWORTH, *supra* note 16, at 330; 3 W. BLACKSTONE, COMMENTARIES 221-22 (1768); 1 E. COKE, INSTITUTES OF THE LAW OF ENGLAND 404-08 pt. 2 (1809); McRae, *supra* note 12, at 27, 34; Winfield, *supra* note 12, at 191.

19. McRae, *supra* note 12, at 34.

20. Winfield describes the writ *quod permittat prosternere* as more "clumsy" than the Assize of Nuisance and says: "It was in the nature of a writ of right and was therefore open to the infinite delays appropriate to that form of procedure." Winfield, *supra* note 12, at 191.

21. Anon, Y.B. Easter, 14 Hen. 8, § 31, pl. 8 (1523) *reprinted in* C. FIFOOT, *supra* note 12, at 97.

22. Cantrel v. Church, Croke, Eliz. 845, 78 Eng. Rep. 1072 (1601) *reprinted in* C. FIFOOT, *supra* note 12, at 98-99. *See* McRae, *supra* note 12, at 40-43.

23. McRae, *supra* note 12, at 43. In 1768, Blackstone stated that the remedy for private nuisance was by an action on the case for damages. W. BLACKSTONE, *supra* note 18 at 220. He noted that abatement was available under the Assize of Nuisance and the writ of *quod permittat prosternere*, but he indicated that these two writs "are now out of use, and have given way to the action on the case." *Id.* at 220-22. The two older writs were abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27, s. 36). Winfield, *supra* note 12, at 191.

24. Winfield, *supra* note 12, at 191-92.

25. RESTATEMENT OF TORTS ch. 40 at p. 223 (1939).

suffering "special injury" from the public nuisance.[26] Thus, two entirely disparate wrongs—interference with the use and enjoyment of land ("private nuisance") and special injury from interference with a public right ("public nuisance")—both could be redressed in an action on the case for nuisance. Although private actions for public nuisance could have been, and often were, treated as actions on the case for negligence, they frequently were treated as nuisance cases; their holdings sometimes were cited as applicable to nuisance cases generally, without drawing a distinction between injuries to land from private nuisances and personal injuries from public nuisances.[27]

Leaving aside the complications introduced by private actions for public nuisance and equitable jurisdiction over private nuisance, the substantive law applicable to actions on the case for private nuisance was entirely consistent with the absolute protection of property rights provided by the Assize of Nuisance. The leading pre-Revolutionary nuisance decision was *William Aldred's Case* in 1611.[28] The plaintiff brought an action on the case against the defendant for erecting a hog sty near the plaintiff's house. The court established two major principles. First, in holding that an action lay for blocking the light and "infecting and corrupting the air," the court stated that an

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26. Originally, a "common" or "public" nuisance was a crime, abatable by local authorities and punishable in the local courts. In a sixteenth century case, however, it was stated in dictum that a plaintiff injured by a public nuisance could bring an action on the case for damages, but only if the defendant's conduct had inflicted on the plaintiff a special damage or inconvenience, different from that endured by the public at large. Anon., Y.B. Mich., 27 Hen. 8, § 27, pl. 10 (1535) *reprinted in* C. FIFOOT, *supra* note 12, at 98. *See* W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 424 (1926); Newark, *supra* note 12, at 483-84. This dictum eventually became law. William's Case, 5 Coke Rep. at 72b, 77 Eng. Rep. 163 (1595); Fowler v. Sanders, Cro. Jac. 446, 79 Eng. Rep. 382 (1618); Iveson v. Moore, 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (1700). Blackstone stated that an action would lie for a public or common nuisance only "where a private person suffers some extraordinary damage, beyond the rest of the king's subjects." W. BLACKSTONE, *supra* note 18, at 220. This requirement of "special injury" as a prerequisite for a private action to redress a public nuisance may have had a significant impact in antebellum American decisions. *See infra* Section II-B. The special injury requirement currently constitutes a substantial obstacle to private actions against public nuisances in West Virginia. *See infra* Section IV-A.

27. Newark, *supra* note 12, at 484-90. Newark notes that "just as the [negligence-based public nuisance] cases were, by reason of their transference to the realm of nuisance, infected by notions of strict liability, so there was a tendency for 'cross-infection' to take place, and notions of negligence began to make an appearance in the realm of nuisance proper." *Id.* at 487.

28. 9 Coke Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611).

injury to the plaintiff's use and enjoyment of his land was actionable if it pertained to a matter of necessity, such as light and wholesome air, but not with respect to "things of delight," such as blocking a view. Second, for interference with essential uses of property, the court articulated the rule of *sic utere tuo ut alienum non laedas*, ("so use your own as not to injure that of another") expressly rejecting the defendant's invitation to consider the utility of the hog sty as a defense.[29]

The leading nuisance cases of the seventeenth century scrupulously followed the rule of *sic utere tuo*,[30] and it was reiterated by Blackstone in the eighteenth century.[31] Thus, on the eve of the American Revolution, the rule of *sic utere tuo* provided absolute protection against interference with the essential attributes of land ownership.

B. Pre-Industrial America and Antebellum Virginia

1. American Nuisance Law in the Antebellum Era

Blackstone's *Commentaries* provided the primary source of legal authority in post-colonial America, and in the early years of the nineteenth century American courts generally adhered to Blackstone's absolute rule imposing nuisance liability for any injury to an interest in land under the *sic utere tuo* maxim.[32] The absolute rule of *sic utere tuo* could have presented a substantial obstacle to

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29. The defendant had argued "that the building of the house for hogs was necessary for the sustenance of man." *Id.* at 58a-58b, 77 Eng. Rep. at 817, 820. The court replied:

> [T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it . . . . [T]his stands with the rule of law and reason, . . . *sic utere tuo ut alienum non laedas.*

Id. at 58b-59a, 77 Eng. Rep. at 821.

30. Coquillette, *supra* note 12, at 779-81.

31. Blackstone defined a private nuisance as "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 W. BLACKSTONE, *supra* note 18, at 216. He cited *William Aldred's Case* and the rule of *sic utere tuo*, indicating that even a lawful trade would be strictly liable for depriving a householder of light and air. *Id.* at 217.

32. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 74-76 (1977); Coquillette, *supra* note 12, at 781.

the beginning of industrialization. Any manufacturing concern that interfered with adjacent landowners use and enjoyment of their property—by generating vibrations, noise, dust, smoke, or fumes—was potentially subject to substantial damage liability and even to abatement by injunction. It is therefore somewhat surprising that nuisance law did not in fact impede economic development in the years leading up to the Civil War.[33]

Economically, the first third of the nineteenth century was in many respects a continuation of the colonial period.[34] Agriculture was the foundation of the economy. Manufacturing was conducted in small shops by skilled craftsmen, providing few occasions for land use conflicts.[35]

Economic conditions changed more rapidly between the mid-1830's and the Civil War.[36] The existence of large areas of undeveloped land undoubtedly was a major factor in forestalling the conflict between established landowners and entrepreneurial developers.[37] Nevertheless, as more of the new large-scale manufacturing enterprises began to inflict damages on their neighboring landowners, the volume of nuisance litigation increased substantially.[38]

With very few exceptions, the courts adhered to the formal rule of *sic utere tuo* throughout the antebellum period.[39] Nevertheless, it has been suggested that the courts subtly restricted the rule's application through a variety of subsidiary doctrines that limited the impact of private nuisance law on economic development.[40] Perhaps the most important doctrine was the defense of "statutory justifi-

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33. M. HORWITZ, *supra* note 32, at 74-75.

34. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 624 (1976).

35. *Id.* at 624.

36. *Id.* at 628. In 1839, agriculture accounted for 70% of the value of commodities in the economy, while mining, manufacturing, and construction accounted for only 30%; by 1870, agriculture represented only 50% of the total, while mining, manufacturing, and construction had grown to 50%.

37. M. HORWITZ, *supra* note 32, at 75.

38. Kurtz, *supra* note 34, at 628.

39. M. HORWITZ, *supra* note 32, at 74-76.

40. *See id.* at 74-80; Kurtz, *supra* note 34, at 629-51. *But see*, McBride, *Critical Legal History and Private Actions Against Public Nuisances, 1800-1865*, 22 COLUM. J.L. & SOC. PROB. 307, 309-12 (1989), in which the author takes issue with many of Horwitz's contentions.

cation," which exempted mills, railroads, and other enterprises carried out under franchise from the government from the reach of ordinary nuisance law. These activities were deemed to be exempt from nuisance injunctions by virtue of their statutory authorization, and the courts further held that they would not be liable for damages in the absence of negligence.[41] This defense may have been crucial to the expansion of the railroads, which, by demonstrating that they took all reasonable precautions, could entirely avoid liability for damages to adjacent buildings and crops caused by fires that inevitably resulted from the escape of sparks and cinders.[42]

It has also been claimed that the courts enlarged the obstacle posed by the rule requiring a plaintiff to show "special injury" to recover for a public nuisance by expanding the definition of public nuisance to encompass any dispute involving multiple plaintiffs, while at the same time narrowing the definition of special injury through a requirement that the plaintiff's damages be "different in kind" from those of the general public.[43]

With respect to injunctive relief, the courts apparently demonstrated a reluctance to enjoin new industrial projects, emphasizing the discretion of the court to deny an injunction against a nuisance.[44] The courts held that equity would only enjoin actual nuisances and not prospective ones.[45] The courts also demonstrated an increased willingness to view land as fungible and treat money damages as a complete redress for damage to land, denying injunctive relief on the basis of an adequate remedy at law.[46]

2. Nuisance Law in Antebellum Virginia

Regardless of whether the foregoing restrictions on the impact of nuisance law were adopted in other jurisdictions, they were not evident in antebellum Virginia. Most nuisance disputes in antebellum

41. M. Horwitz, *supra* note 32, at 78-80; Kurtz, *supra* note 34, at 649-51.
42. M. Horwitz, *supra* note 32, at 98-99.
43. *Id.* at 76-78; Kurtz, *supra* note 34, at 639-42. *But see* McBride, *supra* note 40.
44. Kurtz, *supra* note 34, at 630-31.
45. *Id.* at 637-39.
46. *Id.* at 635-37.

Virginia involved conflicts over water rights, especially concerning mill dams.[47] Mill owners protested the diversion of water by upstream users[48] or complained that the backflow from downstream dams raised the water level,[49] which reduced the power of their mills. Upstream landowners complained of flooding from mill dams.[50] Owners of nearby residences complained that stagnant water bred foul odors and disease.[51] Others complained that dams interfered with navigation.[52]

Mill dams in Virginia were erected pursuant to a statutory scheme involving judicial authorization upon payment of compensation to any affected landowners through a procedure akin to eminent domain. Despite this statutory authorization, the Virginia Supreme Court did not employ the defense of statutory justification to exempt mill dams from strict nuisance liability.[53] In two suits against mill owners by upstream landowners, the court ruled that the judgment permitting the erection of the dam was only a bar to actions for damages actually foreseen and estimated in that proceeding but did not confer any general license to inflict injuries on other landowners. *Miller v. Trueheart*[54] reversed the denial of an injunction against

47. Of ten reported decisions in private nuisance disputes from antebellum Virginia, seven involved mill dams: Calhoun v. Palmer, 49 Va. (8 Gratt.) 88 (1851); Nichols v. Aylor, 34 Va. (7 Leigh) 546 (1836); Miller v. Trueheart, 31 Va. (4 Leigh) 569 (1833); Stokes & Smith v. Upper Appomatox Co., 30 Va. (3 Leigh) 318 (1831); Coalter v. Hunter, 25 Va. (4 Rand.) 58 (1826); Dimmett v. Eskridge, 20 Va. (6 Munf.) 308 (1819); Wingfield v. Crenshaw, 14 Va. (4 Hen. & M.) 474 (1809). Two others involved flooding from dikes and culverts: Amick v. Tharp, 54 Va. (13 Gratt.) 564 (1856); Burwell v. Hobson, 53 Va. (12 Gratt.) 322 (1855). Only one was not water-related: Beveridge v. Lacey, 24 Va. (3 Rand.) 63 (1824). The three criminal nuisance prosecutions during the period also involved mill dams: White v. King, 32 Va. (5 Leigh) 726 (1835); Commonwealth v. Webb, 27 Va. (6 Rand.) 726 (1828); Commonwealth v. Faris, 26 Va. (5 Rand.) 691 (1827).

Disputes involving competing uses of water were among the primary sources of nuisance litigation throughout the United States in the early years of the nineteenth century. Of the nine nuisance injunction suits discussed by Kurtz during the period 1789-1836, five involved mill dams, and another involved riparian rights. Kurtz, *supra* note 34, at 624-27.

48. *Stokes & Smith*, 30 Va. (3 Leigh) 318; *Coalter*, 25 Va. (4 Rand.) 58.

49. *Nichols*, 34 Va. (7 Leigh) 546 (1836). *Cf. Wingfield*, 14 Va. (4 Hen. & M.) 474 (allegation that defendant had raised his mill dam to prevent plaintiff from building a mill).

50. *Calhoun*, 49 Va. (8 Gratt.) 88; *Wingfield*, 14 Va. (4 Hen. & M.) 474.

51. *Miller*, 31 Va. (4 Leigh) 569.

52. *See* Dimmett v. Eskridge, 20 Va. (6 Munf.) 308 (1819).

53. The court did, however, apply a negligence standard to cases involving fires caused by railroads. Jordan v. Wyatt, 45 Va. (4 Gratt.) 151 (1847).

54. 31 Va. (4 Leigh) 569 (1833).

rebuilding a mill that had been erected pursuant to statutory authority but subsequently proved to be a nuisance. *Calhoun v. Palmer*[55] held that the plaintiff could bring an action for damages from the raising of a mill to a height that was below the level authorized in the original judicial proceeding.

When nuisance disputes reached the courts,[56] *sic utere tuo* was strictly applied. The maxim was so well-accepted that it was cited as the legal standard without any further authority in the 1855 case of *Burwell v. Hobson*.[57] The Supreme Court of Virginia ruled that the defendant had no right to erect a dike on his side of the creek that caused flooding of the plaintiff's land whenever the creek overflowed its banks, even though the dike was necessary to prevent flooding of the defendant's land.[58]

Similarly, in the 1856 case of *Amick v. Tharp*,[59] the Virginia Supreme Court vindicated the absolute right of a landowner against interference with his property. The plaintiff complained of flooding resulting from the defendant's obstruction of a culvert. The culvert drained a spring on the plaintiff's land and emptied onto the defendant's land, but it had been constructed by the City of Wheeling

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55. 49 Va. (8 Gratt.) 88 (1851).

56. Parties did not always seek to resolve their differences in court. The right to abate a nuisance by self-help was recognized by Blackstone. 3 BLACKSTONE, *supra* note 18, at 220. In *Dimmett*, a judgment against the defendants for destruction of the plaintiff's dam was reversed because the trial court had refused to instruct the jury that the dam might constitute an abatable public nuisance if it interfered with a ford across the stream which was part of a public road. 20 Va. (6 Munf.) at 311.

57. 53 Va. (12 Gratt.) 322 (1855). The court stated:

> The maxim sic utere tuo ut alienum non laedas emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee.

Id. at 325.

58. *Id.* at 332. The flooding of the defendant's land was caused by a pre-existing dike on the plaintiff's side of the creek which had been erected by the owner of both properties before their partition. The trial court had ruled that each party could build a new dike at least forty feet from the center of the stream. In reversing, the court held that the plaintiff's dike was lawfully erected and that he could not be compelled to build a new dike further from the creek. *Id.* at 325. If the defendant wished to protect himself against flooding, he would have to do so without diverting water onto the plaintiff's land, which presumably would have required the defendant to build his dike much farther away from the creek, thereby reducing the defendant's usable acreage.

59. 54 Va. (13 Gratt.) 564 (1856).

before either of the parties owned the properties in question. The trial court instructed the jury that if the city had diverted the water from its natural channel, the defendant was justified in obstructing the culvert to protect his own property. The supreme court reversed, holding that the right of self-help was not available to the detriment of "unoffending third parties."[60]

The Virginia court said that plaintiff could not recover for a public nuisance unless he suffered "special injury,"[61] but it did not restrict plaintiffs' rights through an expansive definition of special injury.[62] Moreover, the court did not expand the concept of public nuisance to include all conduct that affected multiple plaintiffs. To the contrary, the court defined public nuisance narrowly in criminal nuisance prosecutions, requiring that the indictment allege injury to public rights affecting "all the citizens of the Commonwealth"[63] and declaring that acts affecting only "particular individuals" were private nuisances.[64]

With regard to injunctive relief, the Virginia Supreme Court in *Wingfield v. Crenshaw*[65] applied the familiar rule that an injunction would be denied if there was the possibility of an adequate remedy

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60. *Id.* at 568. The court plainly was hostile to the defendant's argument that protection of his own property would warrant imposition of damages on the innocent plaintiff. *Id.* at 568-71.

61. *Miller*, 31 Va. (4 Leigh) at 577 (dictum in opinion of Tucker, J.); *see* Beveridge v. Lacey, 24 Va. (3 Rand.) 63 (1824).

62. *See Beveridge*, 24 Va. (3 Rand.) at 63. The decision in *Beveridge* was curious. The plaintiff had alleged that the defendant's excavation in a public street would weaken the foundation of his house, obstruct his entry, and lessen the value of the property. On appeal from the grant of the injunction, the defendant cited the "special injury" rule, but also argued that there was no nuisance, either public or private, because in levelling the street the defendant was benefitting both the plaintiff and the public. In response, plaintiff's counsel pointed out that there had been no finding of a public nuisance, but only of private injury. The Supreme Court of Virginia reversed the injunction, finding that there was no private injury to the plaintiff. In the absence of *any* injury to the plaintiff, the fact that the defendant's conduct was arguably a public nuisance would appear to have been irrelevant, yet the court stated: "It is not the province of a Court of Equity, to correct abuses merely public." *Id.* at 65.

63. Commonwealth v. Faris, 26 Va. (5 Rand.) 691 (1827).

64. Commonwealth v. Webb, 27 Va. (6 Rand.) 726, 728 (1828). The court stated in dictum that the special injury which would be necessary to bring a private action for a public nuisance must be "different in kind" from the harm to the public. The court reasoned that since the injury to neighbors was not different in kind from the injury to the public, it should not find a public nuisance because such a ruling would preclude private nuisance actions by the neighbors in such cases. *Id.* at 779.

65. 14 Va. (4 Hen. & M.) 474 (1809).

at law. In that case the plaintiff already had pending an action for damages, and it did not appear that the court was employing this rule in order to restrict the availability of injunctive relief. In subsequent decisions, the court did not hesitate to approve the issuance of nuisance injunctions.[66]

In sum, on the eve of the Civil War, the Virginia Supreme Court continued to adhere to the Blackstonian conception of nuisance law as an absolute protection of property owners against interference with their use and enjoyment of property. Whatever trends may have emerged in other states, the rights of potential plaintiffs were not circumscribed by an enlarged definition of public nuisance or a broad defense of statutory justification. Nor was there any reluctance to vindicate the rights of property owners through injunctive relief. When West Virginia achieved statehood, it inherited a common law of private nuisance that had evolved very little in the ninety-five years following the publication of Blackstone's *Commentaries*.

C. Industrialization and the Rule of Reasonable Use

Although America experienced substantial industrial development in the twenty-five years preceding the Civil War, the period between 1871 and 1916 witnessed the most remarkable economic growth in American history.[67] The railway system expanded, manufacturing grew, and new industries developed, including mining and oil drilling. By 1889, the United States had become the world's leading industrial nation.[68]

At the same time, American courts began to remove the barriers to private nuisance litigation that had been erected in the antebellum period. Courts frequently rejected the statutory justification defense and were less likely to find that a nuisance was public simply because many landowners were affected.[69] The courts increasingly were forced to reach the merits and determine whether a particular activity constituted a private nuisance.

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66. *See Burwell*, 53 Va. (12 Gratt.) 322; *Miller*, 31 Va. (4 Leigh) 569.
67. Kurtz, *supra* note 34, at 651.
68. *Id.*
69. *Id.* at 653-56.

The pressures of industrialization resulted in a substantial transformation of American property law and nuisance law in the nineteenth and early twentieth centuries.[70] At the beginning of the nineteenth century, virtually all jurists viewed property as a "natural right." That is, the rights of private property owners were not created by law (the modern "positivist" conception), but existed prior to and independent of the legal and social system. Industrialization focused attention on the inherent tension between two aspects of these natural property rights: the right of beneficial use and the right against interference by others. Plaintiffs emphasized the right against interference, invoking the *sic utere tuo* maxim. Defendants emphasized the right to beneficial use, invoking the *cujus est solum* maxim.[71]

Traditional nuisance doctrine accorded priority to the right against interference. In attempting to accommodate economic development, American courts began to restrict the zone of absolute protection against interference and emphasized the property owner's right of beneficial use. The courts attempted to do so without abandoning the natural law foundation of property rights, employing at least three distinct theories that viewed property as a natural right. For simplicity, they may be referred to as the "static," "dynamic," and "correlative" theories of property.[72] None of these compromises was successful, and they ultimately undermined the natural rights foundation of property rights, setting the stage for a positivist refor-

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70. Morton Horwitz emphasized developments in the early years of the nineteenth century, but he conceded that formal nuisance doctrine remained unchanged up to the time of the Civil War. M. HORWITZ, *supra* note 32, at 31, 74. Kurtz discussed substantive and procedural limitations on the injunctive remedy in two periods, 1837-1870 and 1871-1916. Kurtz, *supra* note 34. According to Robert Bone, the significant developments in natural law theory occurred between 1850 and 1920. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1104 (1987).

71. *Cujus est solum, ejus est usque ad coelum et ad infernos.* ("Whoever owns the soil owns all the way to heaven and all the way to the depths.")

72. In an analysis of normative theories of property rights between 1850 and 1920, Robert Bone identified three "models" that embodied the conception of property as a natural right. Bone, *supra* note 70. Bone referred to these three natural rights models as the "static absolute dominion model," the "dynamic absolute dominion model," and the "relative property rights model." *Id.* The following discussion is based almost entirely on Bone's analysis and on the authorities cited in his study. In the interests of brevity, I generally have not provided cross references to Bone's work or to the sources he cites. For the same reason, I have not systematically indicated the points where our conclusions differ in only minor respects.

mulation of nuisance law in the *Restatement of Torts*. Within this positivist vision, nuisance law was recast as a utilitarian calculus in which property rights were defined with the aim of achieving the greatest social good.[73]

1. The Plaintiff-Centered Static Theory of Property

The static theory of property was rooted in the Jeffersonian ideal of agrarian republicanism. The individual, absolute, and natural property right protected uses necessary to satisfy basic human needs, especially the rights of habitation and agriculture. The static theory resolved potential conflicts by focusing almost exclusively on the plaintiff's right, giving priority to a limited set of preferences. A residential plaintiff prevailed against interference by agricultural or industrial defendants. An agricultural plaintiff prevailed against industrial defendants.

Within the static model, the primary restriction on the right of a residential plaintiff was the threshold requirement of substantial injury. A plaintiff's property rights were infringed only if the offending activity substantially interfered with comfort and enjoyment and materially depreciated the property's value. The static model also permitted a limited "locality" rule which, consistent with its agrarian roots, accorded somewhat greater protection to rural than urban plaintiffs. Urban dwellers could be expected to endure the

73. This analysis is to some extent consistent with what has been called the "subsidy thesis": that nineteenth century tort law witnessed the development of numerous liability-limiting doctrines which had the effect, if not the purpose, of subsidizing emerging industry by sacrificing the welfare of ordinary victims. The "subsidy thesis" is associated with L. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); M. HORWITZ, *supra* note 32; Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951). The thesis is criticized in Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Williams, Book Review, 25 UCLA L. REV. 1187 (1978) (reviewing M. HORWITZ, *supra* note 32). I agree with Bone, *supra* note 70, at 1107-08, that the subsidy thesis is at best incomplete in that it fails to take into account the theories and values of the judges, according too much weight to the outcomes of the cases and too little weight to the language of the opinions. Also, the proponents of the subsidy thesis emphasize changes in the antebellum period, whereas my analysis suggests that the substantive transformation of nuisance law primarily took place after the Civil War and remained incomplete until the publication of the fourth volume of the RESTATEMENT OF TORTS in 1939.

ordinary discomforts and annoyances of city life, so the threshold of actionable nuisance was necessarily somewhat higher in urban areas.

The static theory of property rights, focusing almost exclusively on the rights of the plaintiffs, was generally inhospitable to industrialization. Neither the threshold requirement of substantial injury nor the limited locality rule imposing a higher threshold in urban areas constituted a significant limitation on the traditional rule of *sic utere tuo.*

2. The Defendant-Centered Dynamic Theory of Property

The dynamic theory of property rights proved more favorable to entrepreneurial interests, focusing on the liberty interests of those wishing to use and develop their property. The dynamic theory was rooted in Locke's theory of the social contract. The natural right of individuals to the fruits of their own labor was viewed as existing prior to the formation of society, and the social contract imposed only limited restrictions on these pre-existing property rights. Dynamic theory was also influenced by the Hegelian view that property constituted an essential element in the full realization of individual personality. Dynamic theory saw the natural individual as a capitalist, and it was congenial to *laissez faire* social theory that viewed unfettered private control of property as essential to economic growth and social progress.[74]

For dynamic theorists, *sic utere tuo ut alienum non laedas* was secondary to the primary right of a property owners to make productive use of their property. These theorists restricted the scope of the *sic utere tuo* doctrine by narrowly interpreting the word *laedas* to mean not "injury" but "legal injury." Legal injury only occurred from a legal wrong, an unlawful act. If the defendant had the legal right to make a particular use of his property, then the damage

74. Bone contends that although laissez faire theorists invoked utilitarian arguments linking economic freedom with economic and social progress, their approach was "consistent with a natural property right on the assumption, quite common in the late nineteenth century, that the progress or evolution of society itself was a natural phenomenon." Bone, *supra* note 70, at 1125.

inflicted on the plaintiff was *damnum absque injuria*, damage without legal wrong or without legal injury.

The dynamic model was theoretically deficient in that it could not itself establish the boundaries of nuisance liability. The legal limits on a defendant's rights could not be determined from an analysis of property rights, but instead required reference to a socially-based normative theory as to what constituted a "legal wrong."

The dynamic model also was deficient in its inability to provide adequate protection to the property rights of plaintiffs. Pure dynamic theory would have imposed liability only on unlawful uses within the narrow category of "nuisances *per se*." Apart from nuisances *per se*, no particular "use" of property would give rise to liability.

3. Conflicting Natural Rights and the Rule of Reasonable Use

Dynamic theorists sought to extend the protection afforded to plaintiffs without abandoning the conception of property rights as natural and absolute. The resulting compromise purported to recognize the natural rights of both parties to nuisance disputes within a rule of reasonable use. Two different versions of the reasonableness test emerged, one emphasizing the rights of defendants and the other focusing on the rights of plaintiffs. These defendant- and plaintiff-centered rules of reasonable use represented an improvement over the pure static and dynamic theories, but they ultimately were unable to resolve nuisance disputes without sacrificing the natural rights of one of the parties.

a. The Defendant-Centered Rule of Reasonable Use

In attempting to expand the scope of nuisance liability beyond the category of unlawful activities that were nuisances *per se*, dynamic theorists drew upon the developing principles of negligence law to make a distinction between "use" and "manner of use." Although a particular use of property might itself be lawful, the defendant would be liable if the manner of use was negligent or imposed unnecessary harm on adjacent landowners.

Negligence-based nuisance doctrine could not provide adequate protection to residential plaintiffs, however, because many manufacturing and industrial uses unavoidably interfered with the comfort and enjoyment of residential property owners, even when conducted with the greatest possible care. Because negligence-based nuisance liability was incapable of protecting residential plaintiffs against most industrial uses, few jurisdictions limited private nuisance liability exclusively to negligent conduct.[75]

Some courts further expanded the scope of liability for nuisances *per se* and nuisances based on negligence by considering the nature of the location and other surrounding circumstances in determining that an otherwise lawful use constituted a prima facie nuisance or that the defendant had been negligent in selecting a location.[76] The category of prima facie nuisances was too rigid to accommodate the various land use disputes associated with industrialization, but it opened the door to consideration of factors beyond the defendant's use and manner of use, including the nature of the locality and other surrounding circumstances.

Dynamic theorists generalized these considerations of locality and other circumstances into a defendant-centered rule of "reasonable use." Instead of distorting the categories of negligence and nuisance *per se*, these courts expanded the concept of wrongfulness to impose liability for conduct that was "unreasonable" under all of the circumstances. This defendant-centered version of the reasonable use rule represented an elaboration of the principles underlying negligence-based nuisance doctrine, with the wrongfulness of the defendant's conduct serving as justification for the imposition of nuisance liability.

The flexibility of the reasonableness standard provided somewhat greater protection to plaintiffs than a negligence rule. Nevertheless,

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75. Although many courts employed the language of negligence in discussing the law of nuisance, the exclusive reliance on negligence-based nuisance liability generally was limited to the category of legislatively-authorized uses, such as mills, railroads, and public utilities, which could not be deemed unlawful because of their express statutory authorization.

76. For example, the manufacture and storage of explosives was not unlawful or *malum in se*, but some courts created a special category of prima facie nuisances or nuisances as a matter of law for dangerous activities conducted in proximity to residences or other sensitive uses, while others ruled that such defendants had been negligent in selecting an inappropriate location.

the limitation of nuisance liability to "unreasonable" conduct still permitted most well-run industrial enterprises to escape liability for interference with the comfort and enjoyment of neighboring landowners.

b. The Plaintiff-Centered Rule of Reasonable Use

An alternative compromise was sought in a "competing rights" version of the reasonable use rule that accorded more weight to the rights of plaintiffs than the defendant-centered version described above, while remaining consistent with the dynamic model of property rights. Premised on the Lockean social contract, this plaintiff-centered version of the reasonable use rule posited that holders of natural rights surrendered a portion of their rights when they entered into society so that all could enjoy their property without unreasonable interference. The defendant's right to beneficial use was limited by the plaintiff's right to be free of unreasonable interference.[77]

By focusing on the unreasonableness of the damage to the plaintiff instead of the reasonableness of the defendant's conduct, the competing rights version of the reasonable use rule would have imposed nuisance liability on even the most well-run industrial enterprises if they imposed an unacceptably high level of harm on neighboring landowners. Unfortunately, the courts that adopted the competing rights version of the reasonable use rule did not succeed in maintaining the distinction between the reasonableness of the harm to the plaintiff and the reasonableness of the defendant's conduct,

77. For a classic statement explaining the natural rights origins of the rule of reasonable use, see H. G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 2 (1st ed. 1875):

> While it is true that every person has and may exercise exclusive dominion over his own property of every description, and has a right to enjoy it in all the ways and for all the purposes in which such property is usually enjoyed, yet, this is subject to the qualification that his use and enjoyment of it must be reasonable, and such as will not prejudicially affect the rights of others. It is a part of the great social compact to which every person is a party, a fundamental and essential principle in every civilized community, that every person yields a portion of his right of absolute dominion and use of his own property, in recognition of, and obedience to the rights of others, so that others may also enjoy their property without unreasonable hurt of hindrance.

if indeed they recognized it at all. The phrase "reasonable *use*" suggested that the crucial criterion was the defendant's conduct rather than the plaintiff's harm, and the judicial opinions do not reflect any conscious consideration of the distinction.[78] Consequently, it is questionable whether American jurisprudence in the nineteenth century truly recognized these two distinct versions of the reasonable use rule within the dynamic natural rights model, and in the following discussion they will be referred to jointly as the dynamic rule of reasonable use.

c. Doctrinal Development Within the Dynamic Rule of Reasonable Use

Regardless of whether it focused on the reasonableness of the defendant's conduct or the reasonableness of the harm to the plaintiff, the dynamic rule of reasonable use required a meaningful definition of the boundary between reasonable and unreasonable harm or conduct. Starting from the assumption that all parties had equal and absolute rights, dynamic theorists attempted to deduce a number of more specific doctrines to guide the application of the reasonableness standard. Their aim was to define the limits on the rights of all parties in a way that avoided rights conflicts while preserving an equal sphere of right for each party. In most cases, these doctrines tended to reduce the zone of conflict at the expense of the plaintiffs.

Several doctrines limited the areas of conflict by restricting the scope of the plaintiff's right to comfortable use and enjoyment. In keeping with the general trend toward objective standards, courts applied an "ordinary plaintiff" standard to measure the effect of an interference on the plaintiff. If the defendant's activities would not have caused substantial discomfort to an ordinary person, there

78. In asserting that the competing rights version of the reasonable use rule focused on the reasonableness of the harm to the plaintiff, Bone, *supra* note 70, at 1115 n.20, cites the above language from Wood's influential treatise, which is itself somewhat ambiguous in referring both to the reasonableness of the defendant's use and the reasonableness of the harm to the plaintiff. The judicial opinions often fail to reflect any recognition of this distinction, and their rhetoric vacillates between the defendant-centered and plaintiff-centered standards for evaluating the reasonableness of the defendant's activity.

would be no liability to a plaintiff who happened to be peculiarly susceptible or unusually sensitive.

The courts also required some form of physical invasion or damage to the plaintiff as a prerequisite to liability. A plaintiff could not recover for a purely visual "aesthetic injury," nor could a plaintiff recover where the only harm suffered was a decline in market value. The courts reasoned that so long as the defendant's activities had no physical impact beyond the boundaries of his property, the defendant could not be deemed to have infringed the rights of his neighbors.

Perhaps the most significant doctrine associated with the dynamic version of the reasonable use rule was the expansion of the "locality rule." In the static model, the locality rule created a preference for rural over urban plaintiffs. In the dynamic model, the locality rule created more refined distinctions among residential, commercial, and industrial neighborhoods. The threshold of actionable injury was measured against the background level of interference normally prevailing in each neighborhood or area.[79]

Among the other factors included in determining the reasonableness of the defendant's use, a few courts expressly considered the value or utility of the defendant's conduct. These courts did not, however, advocate a balancing of interests or a quantitative weighing of social utility. The value of an activity was simply a factor in the overall qualitative evaluation of its reasonableness. A balancing of interests would have been inconsistent with the absolute conception of property rights underlying the dynamic rule of reasonable use.

Sitting as courts of equity, however, the judges in a growing number of jurisdictions perceived their equitable discretion as permitting or even requiring the consideration of the impact of an injunction on the defendant and the public. This trend toward "balancing the equities" in suits seeking injunctive relief developed slowly. According to the traditional doctrine, the plaintiff had an absolute right to injunctive relief against interference with estab-

79. *See* Kurtz, *supra* note 34, at 668-69. The courts frequently cited Directors of the St. Helen's Smelting Co. v. Tipping, 11 Eng. Rep. 1483 (H.L. 1865).

lished property rights. In the latter part of the nineteenth century, however, the courts began to emphasize their equitable discretion in injunction actions. Especially after the turn of the century, a growing number of courts adopted balancing tests for the issuance of injunctive relief, employing such labels as "the balance of conveniences" or "balancing the equities."[80] The balancing of equities was strongly criticized by adherents of the natural rights approach, but it steadily gained ground, becoming the prevailing view by the end of the 1930's.[81]

4. The Correlative Theory of Property and the "Relative Rights" Rule of Reasonable Use

Correlative theory viewed property rights as both natural and relative. Property rights were *relative* in that they were defined by the social context, including existing economic conditions and technology. Property rights were *natural* in that they were necessarily and intrinsically defined by the social context, and they were not simply the result of social convention or the sovereign's command. Within correlative rights theory, the task of the judge was to discover

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80. *See, e.g.*, City of New York v. Pine, 185 U.S. 93, 106-08 (1902); Bliss v. Anaconda Copper Mining Co., 167 F. 342 (C.C.D. Mont., 1909), *aff'd sub. nom.*, Bliss v. Washoe Copper Co., 186 F. 789 (9th Cir. 1911); McCarthy v. Bunker Hill & Sullivan Mining & Coal Co., 147 F. 981 (C.C.D. Idaho, 1906), *modified* 92 C.C.A. 259, 164 F. 927 (C.C.A. Idaho) *aff'd*, 164 F. 927 (9th Cir. 1908), *cert. denied*, 212 U.S. 583 (1909); McCleery v. Highland Boy Gold Mining Co., 140 F. 951 (C.C.D. Utah, 1904); Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192 (1888); Robb v. Carnegie Brothers, 145 Pa. 324, 22 A. 649 (1891); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Galveston H. & S.A. Ry. Co. v. DeGroff, 102 Tex. 433, 118 S.W. 134 (1909). For additional cases, *see* Kurtz, *supra* note 34, at 656 n.178.

81. The gradual acceptance of the balancing of equities can be traced in the following series of annotations: Annotation, 7 A.L.R. 749 (1920); Annotation, 55 A.L.R. 880 (1928); Annotation, 61 A.L.R. 924 (1929); Annotation 40 A.L.R.3d 601 (1971). Kurtz claims that by 1916 a majority of states applied a balancing test to determine the propriety of injunctive relief. Kurtz, *supra* note 34, at 656. On the other hand, the balancing test was said to be a "minority view" in Note, *Nuisance—Absence of Negligence—Economic Unavoidability as Defense*, 77 U. PA. L. REV. 550, 552 (1929). In Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927), Judge Learned Hand applied the balance of convenience doctrine but said that the law was "in great confusion." *Id.* at 738. *See also* Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306 (1924); Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940); McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565 (1928); Note, *Injunctive Relief Against Sound, Smell and Sight Nuisances, and the Doctrine of "Balance of Interests,"* 25 VA. L. REV. 465 (1939); Comment, *Injunction—Nuisance—Balance of Convenience*, 37 YALE L.J. 96 (1927); Note, *Public Convenience and Injunctions Against Torts*, 36 HARV. L. REV. 211 (1922).

the property rights that were naturally determined by existing social conditions.

The correlative theory of property rights purported to eliminate the tension between industrialization and the rights of existing property owners by asserting that the parties' rights were complementary. The correlative nature of property rights was reflected in the "relative rights" version of the reasonable use rule. Within correlative theory, each landowner had two correlative rights: a right to reasonable use and a right to be free from injury caused by another's unreasonable use. An unreasonable use of land was defined as one that interfered with another's reasonable use and enjoyment of land. A reasonable use of land, by definition, did not interfere with the reasonable use or enjoyment of other land. Being so defined, there could never be a conflict between natural rights.

The relative rights rule of reasonable use thus differed in an important theoretical respect from the dynamic rule of reasonable use. The dynamic version assumed that natural rights were absolute and could conflict, and the rule of reasonable use with its subsidiary doctrines constituted a *restriction* on the natural rights of the parties. In the relative rights version, the parties' natural rights were *defined* by the rule of reasonable use and could not ever conflict, so no further doctrines were needed to avoid rights conflicts.

The relative rights version of the reasonable use rule was most often associated with the doctrine of riparian rights. Riparian rights incident to the ownership of land along a watercourse were treated as natural rights but were defined in part by reference to the consequences of their exercise upon other riparian landowners. The riparian rule of reasonable use allowed all riparian owners to make reasonable use of the water in the stream, a use which would not cause unreasonable harm to other riparian owners.[82]

The New Hampshire Supreme Court took the lead in extending the reasonable use rule beyond its riparian rights origins into a gen-

82. *See infra* Section V-B for a discussion of the doctrine of riparian rights.

eral rule applicable to all land use conflicts.[83] The New Hampshire cases expressly endorsed a balancing of interests in determining the relative rights of the parties under the rule of reasonable use. The relative rights of the parties depended upon a comparison of individual benefits and harms as well as consideration of social consequences. Few courts outside of New Hampshire adopted a relative rights approach to nuisance conflicts, and even in New Hampshire the courts did not consistently adhere to it.

5. The Decline of Natural Rights Theory

The natural rights theories of property failed in their attempts to accommodate the tensions between the rights of plaintiffs and defendants in nuisance disputes, and the various context-dependent rules of reasonable use ultimately undermined the natural rights foundation of nuisance law.

With regard to the dynamic version of the reasonable use rule, the limiting doctrines were not intrinsically linked to the nature of property rights, and they did not eliminate the necessity of referring to extrinsic social norms of reasonableness. One's property rights could not truly be natural and absolute if they were relative to the locality and other circumstances. Moreover, the courts tended to justify both the limiting doctrines and the decisions in particular cases with reference to utilitarian arguments about economic or social benefits. This appeal to utilitarian justifications further contributed to the erosion of the natural rights foundation of dynamic property theory.

The relative rights version of the reasonable use rule was even less stable than the dynamic version. Whereas dynamic property theory referred to the social context as an extrinsic limitation on natural

83. The court first extended the reasonable use rule to water that did not flow in a well-defined stream, including surface water and percolating underground waters. Bassett v. Salisbury Manufacturing Co., 43 N.H. 569 (1862); Swett v. Cutts, 50 N.H. 439 (1870). (In other jurisdictions such disputes were governed by doctrines involving absolute rights. See *infra* at Sections V-A and V-D). The court then extended the reasonable use rule to cases involving water pollution. Hayes v. Waldron, 44 N.H. 580 (1863). Eventually, the reasonable use rule was applied to all land use conflicts. Thompson v. Androscoggin River Improvement Co., 54 N.H. 545 (1874).

property rights, correlative property theory intrinsically relied upon the social context for the determination of natural property rights. The rejection of late nineteenth century social determinism destroyed the natural rights foundation of correlative property theory, and the balancing of interests within the relative rights rule of reasonable use came to be viewed as an example of legal positivism. In balancing the interests, the judge was not discovering the natural rights of the parties, but simply seeking a policy justification for judicial law-making.

Thus, in the early years of the twentieth century, nuisance disputes in most jurisdictions were governed by reasonable use rules that were becoming increasingly estranged from their natural rights origins.[84] Although few courts engaged in an express balancing of interests, most courts determined the reasonableness of an activity by considering the locality and other circumstances, including the nature and extent of the harm to the plaintiff and the social value of the defendant's activity.

D. Positivist Property Theory and the Restatement's Balance of Utilities Test

In the early years of the twentieth century, legal positivism superceded natural rights as the dominant philosophy in American jurisprudence in general and with respect to property rights in particular. Legal positivism found its clearest expression in the American Law Institute's *Restatement of Torts*. In the chapter on nuisance law, as elsewhere in the *Restatement*, the rights of the parties were not treated as natural rights but were defined by the applicable legal rules. The *Restatement* succeeded in clarifying much of the law of private nuisance, but it also cut nuisance law off from its natural rights origins, substituting a positivist right determined according to utilitarian criteria of cost and benefit.

The *Restatement* eliminated much of the confusion associated with the law of nuisance by defining private nuisance as a tort based

84. *See* Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383 (1917).

on the nature of the interest invaded rather than the nature of the conduct giving rise to liability.[85] Previously, courts often had focused on the nature of the defendant's conduct, unsuccessfully attempting to distinguish nuisance from negligence or nuisance from ultrahazardous activity. The *Restatement* broadened the scope of nuisance law to encompass all claims involving a "non-trespassory invasion of another's interest in the private use and enjoyment of land."[86] The "invasion" giving rise to nuisance liability could be either "intentional and unreasonable" or "unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."[87] The *Restatement* thus succeeded in clarifying the scope and nature of the action for private nuisance.

For unintentional invasions, nuisance liability simply involved application of general principles governing liability for negligent, reckless, or ultrahazardous conduct. With respect to intentional invasions, however, the drafters had to develop a new set of criteria for determining when an invasion would be deemed "unreasonable." It was in the definition of "intentional and unreasonable" that the *Restatement* worked a fundamental change in nuisance law, adopting what has come to be known as the "balance of utilities" test. The *Restatement* declared that reasonableness was to be determined according to utilitarian criteria aimed at promoting the public good: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable . . . , unless the utility of the actor's conduct outweighs the gravity of the harm."[88]

The balance of utilities test represented a radical departure from existing precedent. Although the ALI indicated that many jurisdictions employed a reasonable use rule that took into account the

85. RESTATEMENT OF TORTS, introductory comment to ch. 40 (1939).

86. *Id.* § 822. The drafters of the first Restatement had attempted to avoid use of the term "nuisance" in order to eliminate the confusion associated with the various uses of the word. In the second Restatement, it was recognized that "the name of nuisance cannot be cast aside without departing entirely from the legal terminology that is universally accepted . . . ." RESTATEMENT (SECOND) OF TORTS introductory comment to ch. 40 (1977). Accordingly, a definition of private nuisance was added. *Id.* at 821D.

87. RESTATEMENT OF TORTS § 822(d) (1939).

88. *Id.* at 826. The factors involved in determining the gravity of the harm and the utility of the conduct were enumerated in sections 827 and 828, respectively. *Id.* at 827-28.

utility of the defendant's conduct, only one of the three illustrative cases quoted in the explanatory notes had purported to balance the importance of the defendant's use against the harm to the plaintiff.[89] The ALI conceded that the courts "do not expressly analyze the problem of unreasonableness in the terms used in this Chapter."[90]

While the balancing test itself was new, most of its components were derived from existing precedent. Courts employing the dynamic rule of reasonable use had frequently referred to the factors listed by the *Restatement* as relevant to determining the gravity of the plaintiff's harm and the utility of the defendant's conduct: the nature and extent of the harm to the plaintiff, the motives of the defendant, the social value of the parties' conduct, the suitability of their conduct to the character of the locality, and the cost of prevention or avoidance.[91]

What distinguishes the balance of utilities test from most prior judicial opinions is the quantitative nature of the balancing test. In earlier decisions, the foregoing factors were considered qualitatively in a normative evaluation of reasonableness within a natural rights framework, whereas the *Restatement* strongly implied that costs and benefits were to be weighed quantitatively in order to maximize social value.[92]

The *Restatement's* balance of utilities test was promptly endorsed by William Prosser in the first edition of his influential *Handbook*

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89. RESTATEMENT OF TORTS 73 (Tent. Draft No. 16, 1938). The sole case consistent with the ALI's approach was Gulf C. & S.F. Ry. Co., v. Oakes, 94 Tex. 155, 58 S.W. 999 (1900). The opinions in both Cogswell v. New York, N.H. & H.R. Co., 103 N.Y. 10, 8 N.E. 537 (1886), and McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907), represented traditional expressions of the competing rights version of the reasonable use rule, in which public utility or economic necessity was simply a factor in the qualitative evaluation of reasonableness.

90. RESTATEMENT OF TORTS 73 (Tent. Draft No. 16, 1938).

91. RESTATEMENT OF TORTS §§ 827-31 (1939). *Cf.* Smith, *supra* note 84, at 385.

92. The *Restatement* is somewhat ambiguous in this regard: "Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards." RESTATEMENT OF TORTS § 826 comment b (1939). Regardless of whether the comparison is qualitative or quantitative, it is at least clear that "social value" is not necessarily equivalent to economic value. *See id.* § 827 comment e; § 828 comments d, e. Comment e of § 3828 refers to considerations of social value that reflect the natural rights origins of nuisance law, including the preference for residential and agricultural uses associated with the static theory.

of the Law of Torts,[93] and it has been adopted in many American jurisdictions.[94] Not all courts accepted the *Restatement*'s balance of utilities approach, however. Several courts expressly refused to balance utility in determining the existence of a nuisance, holding that balancing was only appropriate in determining the availability of injunctive relief under the relative hardship or balance of conveniences doctrines.[95] Other courts have balanced the equities with respect to injunctive relief without discussing the possibility of balancing utility with respect to the issue of liability.[96]

The primary deficiency in the Restatement's balance of utilities test was that any activity with sufficient social value was rendered absolutely immune from liability for interference with the use and enjoyment of nearby land. Moreover, because the balancing of equities already applied to plaintiffs seeking injunctive relief,[97] the balance of utilities doctrine lacked any substantial independent justification.

The balance of utilities test represents bad economics as well as bad law.[98] The balance of utilities test tends to undermine economic efficiency in two respects: it creates insufficient incentives for the

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93. W. PROSSER, *supra* note 2, at 580. Prosser's discussion reflects a curious mixture of the natural rights and positivist approaches to nuisance law, referring to the rights of the parties as "correlative and interdependent," indicating that nuisance law "is very largely a series of adjustments to limit the reciprocal rights and privileges of both," and concluding that "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."

94. Although no one has as yet provided a systematic compilation, commentators uniformly refer to the *Restatement's* balance of utilities test as the prevailing American view. *E.g.*, PROSSER & KEETON, *supra* note 2, F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS (2d ed. 1986); R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY (1984); R. BOYER, SURVEY OF THE LAW OF PROPERTY, (3d ed. 1981); 6A AMERICAN LAW OF PROPERTY § 28.26 (1954); Coquillette, *supra* note 12.

95. *E.g.*, Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957); Furrer v. Talent Irrigation Dist., 258 Or. 494, 466 P.2d 605 (1970); Jost v. Dairyland Power Coop., 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

96. *E.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (N.Y. Sup. Ct. 1970).

97. In the chapter on injunctions, the ALI adopted a "relative hardship" test that essentially involved a balancing of the equities. RESTATEMENT OF TORTS § 941 and comments (1939). It also requires consideration of the interests of third persons and the public. *Id.* § 942.

98. For a more complete discussion of the economic implications of nuisance law, *see* Lewin, *Comparative Nuisance*, 50 U. PITT. L. REV. 1009, 1053-69 (1989).

abatement of nuisance damages by activities with high social utility,[99] and it leads to an inefficient allocation of resources into such activities.[100]

Instead of affording an absolute immunity from nuisance liability, certain critics argued that the social utility of an activity should at most provide an incomplete or conditional privilege, protecting the continuation of the activity but without restricting its liability for damages.[101] They asserted that an activity's privilege to inflict damage on its neighbors should be conditioned upon the payment of compensation. In the language of nuisance doctrine, they said that an interference may be reasonable if the defendant provides compensation to those it injures, but unreasonable if the defendant fails to pay for the resulting damages.[102]

In response to growing criticism of the balance of utilities test, the ALI reluctantly accepted the principle that activities should not escape all liability under nuisance law simply because they have a high degree of economic and social utility. In the *Restatement (Second) of Torts*, the ALI supplemented the balance of utilities test with a provision imposing damage liability "if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation."[103] This requirement of compensation for severe harm regardless of due care or social utility was qualified, however, by a restriction that rendered it inapplicable if damage liability would put the defendant out of business. Section 826 was amended to reads as follows:

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99. The exemption of particular activities from nuisance liability leaves owners with no incentive to abate or reduce the damages they inflict on their neighbors. To create efficient incentives, all activities must bear the full costs of any damages to nearby landowners.

100. Efficient allocation of resources requires that the price of every product reflect the full costs of its production. Insofar as activities with a high degree of social utility are not required to compensate for the costs they inflict on neighboring landowners, they receive an implicit subsidy. As a result, these products are sold at a price below the true social cost associated with their production, leading to excessive investment of resources in these industries and excessive consumption of these products by consumers.

101. This strand of criticism drew heavily on Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

102. *See* R. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 431-32 (1959); W.P. Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 461-62, 471 (1959).

103. RESTATEMENT (SECOND) OF TORTS § 829A (1977).

§ 826. Unreasonableness of Intentional Invasion

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[104]

Thus, Section 826 of the *Restatement* now embodies both a plaintiff-centered and a defendant-centered standard for evaluating the reasonableness of an invasion. The balance of utilities test asks whether the conduct of the defendant is unreasonable, whereas the rule requiring compensation for serious harms asks whether it is reasonable for the plaintiff to bear the damages without compensation.

The net result under the *Restatement's* approach is that a plaintiff who qualifies under the balance of utilities test is entitled to either damages or an injunction, but a plaintiff who fails this test may nevertheless qualify for damages under the provision requiring compensation for serious or severe harms. The overall scheme is thus substantially equivalent to the more direct approach of the courts that balance the equities with respect to the remedy but refuse to balance utilities with respect to nuisance liability. Under both approaches, a court will issue an injunction if the harms imposed by the nuisance on the plaintiff and others in the community outweigh the costs an injunction would impose on the defendant and others in the community; if this balance weighs against the plaintiff, the plaintiff will at least be entitled to damages in compensation for serious harms.[105]

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104. *Id.* at 826. The history of the adoption of these provisions is recounted in Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 782-85 (1986); Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165, 170-71 (1972).

105. The only situations in which the outcomes might differ would be where an award of damages would force the defendant to cease the offending activity. In such cases, the *Restatement* would deny damages, whereas jurisdictions that engaged in balancing only with respect to injunctive relief probably would award damages. Even in jurisdictions that do not follow the *Restatement*, however, a court might be persuaded to deny a claim for damages if the defendant argued that an award of damages would have the same effect as an injunction.

III. The Development of Nuisance Law in West Virginia

The historical development of nuisance law in West Virginia is complicated by the fact that both the nuisance label and the *sic utere tuo* maxim have been applied to a diverse array of land use disputes,[106] many governed by specialized doctrines. For example, principles of nuisance law are discussed in numerous opinions pertaining to water rights, but the decisions themselves apply particular rules applicable to surface water, streams, and percolating water. Likewise, abnormally dangerous activities often are referred to as nuisances but are subject to a distinct rule of liability. Largely because of the variety of contexts in which land use disputes have arisen, and the unique doctrinal labels that have been applied, the law of nuisance in West Virginia has lacked a coherent or systematic pattern of development. The West Virginia nuisance decisions share one common factor, however: all of the opinions reflect the unresolved tension between the rights of plaintiffs to the undisturbed enjoyment of their property and the rights of defendants to make productive use of their property.

A. Broad Application of Sic Utere Tuo Prior to 1889

The first important nuisance-related decision in the West Virginia Supreme Court of Appeals, in 1873,[107] involved a claim against a railroad for damage caused by flooding of surface water resulting from an inadequate or improperly maintained culvert. In upholding a verdict for the plaintiff, the court declared that the activities of the railroad were subject to the principle of *sic utere tuo* and indicated that it had a duty "to construct, or to keep in repair, a

106. Railroads frequently were defendants because they inflicted a broad range of injuries on nearby land. The trains themselves generated noise, smoke, and cinders, and their sparks and burning embers caused fires on nearby land. *See* Battrell v. Ohio River, 34 W. Va. 232, 236, 12 S.E. 699, 700 (1890) (risk of fire); McKenzie v. Ohio River R.R., 27 W. Va. 306, 307 (1885) (noise). The tracks and embankments blocked access to adjoining property. *Battrell*, 34 W. Va. at 236, 12 S.E. at 701. *McKenzie*, 27 W. Va. at 308. Embankments also diverted surface water onto neighboring properties. Beaty v. Baltimore & O. R.R., 6 W. Va. 388, 390 (1873); *see also* cases cited *infra* at Section V-A. Railroad bridge abutments blocked the flow of streams, leading to flooding and erosion of riparian land. See cases cited *infra* at Section V-C.

107. Beaty v. Baltimore & O. R.R., 6 W. Va. 388 (1873).

sufficient drain."[108] The court rejected the negligence-based theory of nuisance liability, upholding the trial court's refusal of an instruction that would have excused the defendant from liability if the roadbed "was properly constructed."[109] The court said: "a railroad may be properly constructed for its own purposes, but not so constructed as to prevent injury to the land of a neighboring proprietor."[110]

Railroads were constructed pursuant to statutory authority which enabled them to acquire easements by eminent domain. Initially, it appeared that railroads could raise a statutory justification defense and escape liability for any incidental damage done to adjacent lands, so long they were constructed and operated carefully, without negligence.

The West Virginia Constitution of 1872 eliminated the statutory justification defense by requiring just compensation whenever private property was taken *or damaged* for public use.[111] Accordingly, the West Virginia Supreme Court of Appeals held that although adjacent landowners could not enjoin the construction or operation of a railroad built with the consent of a local government, the railroad would be liable for damages to the same extent as it would have been in the absence of any legislative authority.[112] In subsequent decisions, the court consistently rejected defendants' claims for a defense of statutory authorization, holding that the liability of railroads and other internal improvement companies was to be deter-

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108. *Id.* at 390.
109. *Id.* at 392.
110. *Id.* at 394.
111. W. VA. CONST., art. 3 § 9 (1872):
Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.
112. Spencer v. Point Pleasant & O. R.R., 23 W. Va. 406, 447 (1884); Smith v. Point Pleasant & O. R.R., 23 W. Va. 451, 451 (1884).

mined according to the same principles as applied to the acts of private citizens.[113]

The early West Virginia nuisance cases reflected a plaintiff-centered approach to nuisance law, consistent with the static theory of property rights. The court viewed nuisance disputes from the plaintiffs' perspective, vindicating their right to be free from substantial interference with the enjoyment of their property. Defendants were subject to the *sic utere tuo* maxim and had an absolute duty to avoid injury to the plaintiffs.[114]

In *Hargreaves v. Kimberly*,[115] the plaintiffs sought recovery for damage to their property from surface water and for damage to their trees, their health, and their comfortable enjoyment of the property from coke-oven fumes. Although the plaintiffs' verdict was reversed because of the erroneous introduction of evidence with respect to damages, the court approved the instructions on liability which were consistent with a rule of absolute liability for property damage.[116]

In *Snyder v. Cabell*,[117] the court upheld an injunction against the operation of a roller skating rink obtained by nearby residents. The defendants noted that they had a permit from the City of Charleston and asserted that the associated noise "will only be such slight and incidental annoyance, inconvenience and injury, as result

113. Peddicord v. County Court, 121 W. Va. 270, 274, 3 S.E.2d 222, 224 (1939); Cline v. Norfolk & W. Ry., 69 W. Va. 436, 437, 71 S.E. 705 (1911); Pickens v. Coal River Boom & Timber Co., 66 W. Va. 10, 15, 65 S.E. 865, 867 (1909); Pickens v. Coal River Boom & Timber Co., 58 W. Va. 11, 12, 50 S.E. 872, 873 (1905); Guinn v. Ohio River R.R., 46 W. Va. 151, 153, 33 S.E. 87, 87 (1899); Rogers v. Coal River Boom & Driving Co., 41 W. Va. 593, 597-98, 23 S.E. 919, 920 (1896); Henry v. Ohio River R.R., 40 W. Va. 234, 245, 21 S.E. 863, 864 (1895).

114. One significant exception to the imposition of absolute liability was the adoption of a negligence standard with regard to railroad liability for fires resulting from the sparks and cinders emitted by passing trains. *See* Snyder v. Pittsburgh, Cin. & St. L. Ry., 11 W. Va. 14, 41 (1877). Fire from sparks raised a presumption of negligence, however, shifting the burden to the defendant to prove that it took reasonable care. Aglionby v. Norfolk & W. Ry., 80 W. Va. 687, 689, 93 S.E. 812, 813 (1917) (and cases cited).

115. 26 W. Va. 787 (1885).

116. *Id.* at 793. The trial court had refused to give an instruction requested by the defendant which would have told the jury to "consider the locality in which the plaintiffs [sic] property is situated." *Id.* The court did not discuss the merits of this instruction because the defendant had not preserved the issue with a timely exception. *Id.* at 794.

117. 29 W. Va. 48, 1 S.E. 241 (1886).

from the lawful and legitimate use of respondents' said property, and will be *damnum absque injuria*."[118] The court held that the injunction was justified by "noise alone" because the sound of the skates was "so loud as to very materially interfere with the comfort of those living near the rink."[119]

Medford v. Levy[120] was a nuisance dispute arising from a conflict between two families sharing a residential dwelling. The decision is noteworthy for its holding that legitimate acts may constitute a nuisance if done wantonly and maliciously.[121]

B. *Origins of The Rule of Reasonable Use*

The court underwent a total change in personnel between January of 1889 and December of 1890,[122] and the new court took a far different approach to private nuisance disputes. The transformation is reflected in the two leading cases of the transitional period, *Gaston v. Mace*[123] and *Powell v. Bentley & Gerwig Furniture Co.*[124]

In *Gaston v. Mace*,[125] the plaintiff sought damages for the destruction of his mill-dam by saw logs and timber floated by the defendants. The defendants claimed that the stream was navigable,

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118. *Id.* at 51, 1 S.E. at 243.

119. *Id.* at 62, 1 S.E. at 251. The court expressly denied that its opinion was influenced by the fact that the defendants were black. *Id.* The court's sympathies were clearly with the residential plaintiffs. (One of the plaintiffs was the court's own Judge Snyder, who did not participate in the decision.) For example, the court said that the noise aggravated the illness of one neighbor, and apparently took seriously the evidence of a physician that "in case of typhoid fever . . . such noise . . . would . . . probably prove fatal." *Id.* at 53, 1 S.E. at 244.

120. 31 W. Va. 649, 8 S.E. 302 (1888).

121. *Id.* at 659, 8 S.E. at 308. The court ruled that the complaint had stated a cause of action, but it held that the plaintiff was not entitled to an injunction because he had not come into the court of equity with clean hands; both parties were at fault in this "unseemly controversy." *Id.* at 658, 8 S.E. at 308.

122. The "old court" consisted of Okey Johnson (1876-1889), Thomas G. Green (1876-1889), Adam Snyder (1882-1890), and Samuel Woods (1883-1890). The "new court" consisted of Henry Brannon (1889-1913), J.W. English (1889-1902), H.A. Holt (1890-1898), and Daniel B. Lucas (1889-1893). Lucas was succeeded by Marmaduke Dent (1893-1904). Holt was succeeded by Henry C. McWhorter (1898-1908).

123. 33 W. Va. 14, 10 S.E. 60 (1889).

124. 34 W. Va. 804, 12 S.E. 1085 (1891).

125. *Gaston*, 33 W. Va. at 15, 10 S.E. at 60-61 (1889). Henry Brannon had represented the plaintiffs in the trial court and did not sit on the appeal.

that they had the right to float timber on it, and that the plaintiff had improperly constructed his dam without a sluice so that it obstructed this public highway. On appeal from a verdict for the defendant, the court ruled that although the stream was not "navigable," it constituted a "floatable" stream, and it held that the rights of the public and of riparian proprietors in a floatable stream were governed by a rule of "reasonable use."[126] The court's opinion reflected a dynamic conception of conflicting property rights, without clearly favoring the rights of plaintiffs or defendants.[127] The court held that the plaintiff's dam, constructed without a suitable sluice, was a public nuisance.[128] Since there was no evidence that

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126. *Id.* at 22, 10 S.E. at 63.

127.

> This right of the public, however, must be exercised in a reasonable manner, since each person has an equal right with every other person to its enjoyment, and the enjoyment of it by one, necessarily, to a certain extent, interferes with its exercise by another .... The plaintiff had asserted a prescriptive right to obstruct the stream based on the dam's existence for more than twenty years at that location. The Court held that the plaintiff could not acquire prescriptive rights to the prejudice of the public use. The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors ... The same principle in regard to use by the riparian proprietors applies as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties. Thus in considering this subject we find the public right of way over the stream, and the land-owner's right of soil under it, and his right to use its flow. The rights of both these parties are necessary for the purposes of commerce, agriculture, and manufactures. The products of the forest would be of little value if the riparian proprietors have no right to raise the water by dams, and erect mills for the manufacture of these products into lumber. The right to use the water of such streams for milling purposes is as necessary as the right of transportation .... Each right is the hand-maid of civilization, and neither can be exercised without in some degree impairing the other. This conflict of rights, therefore, must be reconciled. The common law, in its wonderful adaptation to the vicissitudes of human affairs, and to promote the comfort and convenience of men as unfolded in the progress of society, furnishes a solution of this difficulty by allowing the owner of the soil over which a floatable stream which is not technically navigable passes to build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience.

Id. at 22-24, 10 S.E. at 63-64, (quoting Lancey v. Clifford, 54 Me. 487 (Dickerson, J.)).

128. *Id.* at 30, 10 S.E. at 66. The plaintiff had asserted a prescriptive right to obstruct the stream based on the dam's existence for more than twenty years at that location. The court held that the plaintiff could not acquire prescriptive rights to the prejudice of the public use.

the defendants had used the stream in an unreasonable manner, the court affirmed the verdict for the defendants.

Powell v. Bentley & Gerwig Furniture Co.[129] was the first reported West Virginia nuisance case involving a conflict between a factory and a residential plaintiff. Based on the plaintiff's complaints of excessive noise, the trial court had enjoined the defendants' use of their property as a furniture factory. The supreme court reversed the injunction and remanded the case for determination of whether the factory constituted a nuisance in an action at law for damages.[130]

Judge Holt's opinion provided a comprehensive and thoughtful review of the history and foundation of the action for private nuisance. The opinion treated property rights as natural and absolute, declaring that nuisance disputes were to be decided according to a dynamic rule of reasonable use.[131]

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129. 34 W. Va. 804, 806, 12 S.E. 1085, 1086 (1891) The plaintiff/appellee was represented by former Judge Okey Johnson.

130. *Id.* at 813, 12 S.E. at 1088 (The plaintiff had filed a parallel action for damages which was pending when the case was heard by the West Virginia Supreme Court of Appeals).

131. The opinion cannot readily be assigned to the defendant-centered or plaintiff-centered versions of the dynamic rule of reasonable use. The rhetoric is ambiguous, referring on one hand to the plaintiff's right to freedom from interference under the *sic utere tuo* maxim, and on the other to the defendant's right "to do with it as he pleases." 34 W. Va. at 807-09, 12 S.E. at 1086-87:

> ITS FOUNDATION: It [the common-law doctrine of nuisance] is founded on what we call the absolute rights of liberty and property. Each man has the right to that which he has made his own, and without control or diminution, save by the laws of the land. If each has it, all have it; so that it follows from this that each one must so use his property and rights as not to injure those of others. Each has his right for himself, and owes a corresponding duty to the other.
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> . . . .
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> THINGS TO BE CONSIDERED IN DETERMINING WHAT IS A NUISANCE: Every man, as we have seen, has the exclusive dominion and the right to the full and exclusive enjoyment of his own property, to do with it as he pleases. His neighbor has the same right over his own property. Hence it follows as the duty of each to so use his own as not to injure that of the other, each one's duty qualifies his own right and creates a corresponding right in the other.
>
> HARM WITHOUT LEGAL INJURY: But this duty must be taken with qualifications, for, in the nature of things and of society, it is not reasonable that every annoyance should constitute an injury such as the law will remedy or prevent. One may therefore make a reasonable use of his right, though it may create some annoyance or inconvenience to his neighbor . . . .

34 W. Va. at 807-09, 12 S.E. at 1086-87. This passage arguably might be interpreted as expressing

In defining reasonable use, the opinion discussed virtually all of the factors that are fundamental to the modern law of nuisance: the nature of the harm to the plaintiff, the usefulness of the defendant's activity, and the convenience of the location. The court adopted an objective "normal man" standard for measuring the reasonableness of annoyance or interference with the comfort and enjoyment of property.[132] With regard to the usefulness of the defendant's activity, the court said that "public policy and general convenience require that . . . something more shall be conceded to useful and beneficial work than to useless and idle amusements."[133] Public utility was thus a factor, but not an overriding factor, in the determination of reasonableness. The convenience of the defendant's location of the activity was also deemed to be important, although the court explained that a location was "convenient" only if it avoided injury to the plaintiff; convenience was thus determined from a plaintiff-centered rather than a defendant-centered perspective.[134] The opinion indicated that these various factors were to be

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a correlative theory of property rights insofar as the rule of reasonable use imposes "corresponding" rights and duties. The opinion is essentially inconsistent with correlative theory, however, because the rule of reasonable use does not define the relative rights of the parties, but instead "qualifies" or limits their pre-existing "absolute" rights.

132. *Id.* at 810-11, 12 S.E.at 1087. The court stated:

> [W]e know that our people, in a steadily increasing ratio, are crowding into the centers of population, seeking the conveniences, comforts, and amenities of town life, notwithstanding its noise and bustle and other annoyances. For such standard it will not do to take the man who, by reason of his sensitive nature, inborn or acquired, or by reason of his habits or mode of living, is supersensitive to the annoyance complained of; nor, on the other hand, are we to take one who, by nature or habit, is abnormally insensible to such things. The idiosyncracies or peculiar habits or modes of living of neither class furnish the proper test; and this, not because the oversensitive man or man in ill health has less right, but because it is impossible in practice for the law to extend to him exceptional immunity or protection. Therefore we must take as our standard the normal man; the one of ordinary sensibility; of ordinary habits of living; the plain, well-to-do people, who make up the great mass of our busy world. If this should lead to hardship in particular cases, such as sickness, practical conveniences make it impossible to have any other criterion. In such cases we must appeal to the humanity and good-will of our neighbor, rather than to any supposed enforceable right of our own.

Id.

133. *Id.* at 809, 12 S.E. at 1087.

134. *Id.* at 809-10, 12 S.E. at 1087. In discussing the convenience of the defendant's location, the court stated as follows:

> HOMES AND FACTORIES: According to our settled notions and habits, there are convenient places—one for the home, one for the factory; but, as often happens, the two must

applied on a case-by-case basis, without any particular formula beyond the general rule of reasonableness.

Powell is also one of the earliest American decisions to expressly consider the public impact of an injunction as a factor in determining whether to abate a private nuisance. The court said that the rule of reasonableness applied to both suits at law and suits in equity, but it noted that damages are awarded as a matter of right whenever a nuisance is found, whereas injunctive relief is discretionary. Judge Holt recognized that injunctive relief often was indispensable, but he declared that a court should exercise "great caution" in exercising its equitable discretion because of the potential impact on the public, as well as the defendant, from an injunction that could "silence a useful and costly factory."[135]

Although the opinion discussed the utility of the defendant's conduct, the court contemplated a qualitative evaluation rather than a quantitive weighing of costs and benefits. The qualitative nature of

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be so near each other as to cause some inconvenience. The law can not take notice of such inconvenience, if slight or reasonable, all things considered, but applies the common-sense doctrine that the parties must give and take, live and let live; for here extreme rights are not enforceable rights—at any rate, not by injunction. (citation omitted)

CONVENIENT PLACE: But the term "convenient place" does not mean the one best for the profit and convenience of the owner of the offensive factory, but the one where it shall cause no actionable injury to others. One nuisance does not justify another; still it may be taken as one of the surrounding circumstances to be considered in determining whether or not the other be a nuisance.

Id.

135.

But often this [award of damages] is only a half-way remedy, leading sometimes to endless litigation and to irreparable mischief. So that the remedy by injunction is sometimes the only one at all effective or complete . . . And now, since the power of man over the elements and forces of nature have become and are becoming so great and so far-reaching, this remedy grows in frequency and indispensability. Yet by reason in part of its very completeness and effectiveness, it is exercised, especially in cases like this, with great caution, and only after the fact of nuisance has been put beyond all ground for fair questioning. For although a court of equity in such cases follows precedent, and goes by rule, as far as it can, yet it follows its own rules—and among them is the one that to abate or restrain in case of nuisance is not a matter of strict right, but of orderly and reasonable discretion, according to the right of the particular case—and hence will refuse relief, and send the party to a court of law, when damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the state and town, as well as to the owner.

Id. at 811, 12 S.E. at 1087.

the balancing process is evident in the court's application of the legal and equitable principles to the facts of the case.[136] Even though all of the factors in the reasonableness test appeared to weigh in the defendant's favor, the court declined to rule as a matter of law that the furniture factory was not a nuisance, nor did it rule that injunctive relief was necessarily inappropriate. Instead, the court held that because the evidence was conflicting, it would be more appropriate for the question of the existence of a nuisance to be determined by the jury in the pending action at law.[137]

The *Powell* opinion provided the foundation for the development of nuisance law in West Virginia. No other opinion contains such a thorough and original treatment of the various issues of nuisance law. It would not be far wrong to describe the subsequent nuisance decisions of the court, until the recent decision in *Hendricks*, as being little more than a gloss on the principles set forth in *Powell*.

C. *Nuisance, Negligence, and Strict Liability*

In the dozens of nuisance decisions between *Powell* and *Hendricks*, the court failed to directly address the inherent tension between the plaintiff-centered and defendant-centered approaches to the determination of reasonableness. The court instead vacillated

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136. In reversing the award of an injunction, the court contrasted the instant case with the facts of *Snyder v. Cabell*, a case in which the issuance of an injunction was affirmed. The skating rink in *Snyder* was said to be "an unnecessary amusement," whereas the furniture factory was "a trade of public utility, as well as of private benefit, costing more than thirty thousand dollars and employing more than sixty people." *Id.* at 812, 12 S.E. at 1088. The skating rink was located in an area "devoted for the most part to residences," whereas the furniture factory was located on a street under the approach to a railway bridge "and for that reason not generally highly valued as a place for homes." *Id.* The skating rink operated at night, so that the noise disturbed rest and sleep, whereas activity in the furniture factory ceased between six in the evening and seven in the morning. *Id.* at 813, 12 S.E. at 1088. The residents in *Snyder* were said to be persons of ordinary sensibility, whereas "[h]ere the plaintiff and his principal witnesses, living near the factory, seem to be, by reason of ill health or by nature, rather supersensitive to such things." *Id.* at 812-13, 12 S.E. at 1088.

137. *Id.* at 813, 12 S.E. at 1088. The court explained:

> By such course we would avoid the possibility or likelihood of the awkward predicament that now confronts us, of a court of equity having silenced as a nuisance a factory of great cost and of general utility, which the jury in the suit at law should afterwards find to be, all things considered, no nuisance at all. Besides, if the jury should find it to be a nuisance by giving substantial damages, the chancellor would then have safer ground for his decree.

Id.

between the two perspectives. In many opinions it emphasized the *sic utere tuo* maxim and the plaintiff's right to be free from interference. In others, it stressed the defendant's economic liberty and suggested that legitimate productive activity would not constitute a nuisance in the absence of negligence. The determinative factor in many of these decisions has been the suitability of the defendant's activity in relation to the nature of the locality.

Following *Powell*, the next nuisance dispute to reach the court was *Wilson v. Phoenix Powder Mfg. Co.*,[138] an action for damages arising from the explosion of a gunpowder factory. The powder works was described as a "lawful and honorable business," but the court applied the *sic utere tuo* maxim and held that this dangerous activity constituted a public nuisance because it was carried on in proximity to residences and highways.[139] The plaintiff's particular losses satisfied the requirement of "special injury," and the defendant was held strictly liable for damages from the explosion.

The court again applied a locality-based test for determining the existence of a nuisance in *McGregor v. Camden*,[140] an action seeking to enjoin the sinking of an oil well near residential property. The plaintiffs alleged that the defendant's well, located near their property line, would greatly interfere with the use and enjoyment of their dwelling because of the noise of the machinery and the danger of an explosion. The court held that a lawful business can become a nuisance "from its surrounding places and circumstances, or the manner in which it is conducted."[141] Although the court recognized the economic importance of oil and gas wells, it ruled that "public policy will not justify the maintenance of an oil well that is a nuisance to private property."[142]

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138. 40 W. Va. 413, 21 S.E. 1035 (1895).

139. *Id.* at 417, 21 S.E. at 1036.

140. 47 W. Va. 193, 34 S.E. 936 (1899).

141. *Id.* at 196, 34 S.E. at 937. The trial judge had dismissed the complaint on demurrer, but the court ruled that the plaintiffs had stated a "strong case of nuisance" and were entitled to have a preliminary injunction pending a final hearing.

142. *Id.* at 197, 34 S.E. at 937. The court supported its ruling with reference to the "damaging" clause of the West Virginia Constitution: "The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare. (citation omitted) Yet public policy itself is qualified by the constitutional provision that private property shall not be taken or damaged for public use without just compensation." *Id.*, citing Uhl v. Ohio River R.R., 47 W. Va. 59, 34 S.E. 934 (1899).

In the early years of the twentieth century, the court declared that the "property rights of defendants as well as plaintiff must be considered,"[143] and it reiterated the dictum from *Powell* that "extreme rights are not enforceable rights."[144] Nevertheless, during the next quarter century the court treated nuisance liability as absolute whenever smoke, fumes, or dust associated with a defendant's business substantially interfered with the plaintiff's use and enjoyment of property.[145]

The court applied a somewhat different rule, however, to damages caused by the escape of stored water. In *Weaver Mercantile Co. v. Thurmond*,[146] the plaintiff recovered damages for the flooding of his storeroom caused by the bursting of a large wooden tank that supplied water to defendant's hotel. The bursting water tank was referred to as a nuisance, but the case was tried and affirmed as a negligence case rather than a case of absolute liability.[147] Nevertheless, the practical effect of the case was to impose strict liability, for the negligence consisted of breach of an absolute duty to keep the water confined, and the court applied the rule of *res ipsa lo-*

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143. Chambers v. Cramer, 49 W. Va. 395, 401, 38 S.E. 691, 693 (1901).

144. Pope v. Bridgewater Gas Co., 52 W. Va. 252, 256, 43 S.E. 87, 89 (1902).

145. *E.g.*, in Keene v. City of Huntington, 79 W. Va. 713, 92 S.E. 119 (1917), the court affirmed an award of damages against the City to a residential plaintiff who suffered from odors, smoke, and greasy deposits caused by the operation of a nearby incinerator plant. There was evidence that "this plant was the most modern plant devised for the purpose of disposing of garbage," it was erected "in a skillful and proper manner" at a cost of $12,000, it was "operated properly and skillfully," and it was "an absolute necessity" for the City. Nevertheless, in an appeal on the issue of the amount of damages, the defendant did not question the trial court's instructions "to the effect that if the plaintiff's property was affected in the way she and other witnesses testified, and was thereby injured, she was entitled to recover." *Id.* at 715, 92 S.E. at 120.

Bartlett v. Grasselli Chem. Co., 92 W. Va. 445, 115 S.E. 451 (1922), and Lyon v. Grasselli Chem. Co., 106 W. Va. 518, 146 S.E. 57 (1928), involved damage to farmland from gases, fumes, smoke, and dust emitted by defendant's zinc smelting operations. Again, the only issue on appeal was the measure of damages. In explaining why only temporary damages should have been awarded, the court in *Bartlett* stated:

> There is no ground upon which an individual or a purely private corporation can be accorded right to maintain and continue in force a business, structure or other agency working injury to the property of another, in such manner and to such extent as to constitute a private nuisance, if the injury so wrought is such as impairs or destroys the enjoyment or value of the property, or is deemed by the law to be irreparable and not compensable in damages.

92 W. Va. at 453, 115 S.E. at 454.

146. 68 W. Va. 530, 70 S.E. 126 (1911).

147. *Id.* at 532, 70 S.E. at 127.

quitur, stating that the defendant was "bound at his peril to prevent it from injuring the property of his neighbor."[148] In essence, the court adopted the doctrine of *Rylands v. Fletcher*,[149] imposing an absolute duty to prevent the escape of potentially dangerous substances, but it treated the doctrine as a rule of negligence, rather than an absolute protection of property rights. The court adhered to its negligence-based approach to liability for the escape of dangerous substances in *Wigal v. City of Parkersburg*,[150] another case involving damages caused by the bursting of a water tank.[151]

Except for the negligence-based rule applicable to the escape of dangerous substances, the court generally had approached private nuisance actions from the property-based perspective of the *sic utere tuo* maxim. It was therefore somewhat surprising that the court in *Rinehart v. Stanley Coal Co.*[152] implied that there might be some doubt whether a defendant could be held liable for damage from smoke, fumes, and dust in the absence of negligence. The defendant

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148.

> [T]he liability of the defendant does not depend on negligence in construction, but upon negligence in not keeping the water confined. No matter in what the negligence consisted, it is proved by the bursting of the tank. The rule, *res ipsa loquitur* applies. If the person whose duty it was to keep the tank in good repair, had not been negligent in some respect, the tank would not have burst . . . . Liability in cases like the present rests upon the principle that a man who erects a structure upon his premises which, because of neglect to take care of it, becomes a nuisance, either to the public or to the property of an adjoining owner, is liable. He is bound, at his peril, to prevent it from injuring the property of his neighbor.

Id.

149. 3 L.R. 330 (H.L. 1868), *aff'g* Fletcher v. Rylands, 4 H. & C. 263, L.R. 1 Exch. 265, [1861-73] All E.R. Rep. 1 (Exch. Ch. 1866). The West Virginia court declared:

> Every person who, for his own profit or advantage, brings upon his premises and collects and keeps there any thing which, if it escapes, will do damage to another, subject to some exceptions rendered necessary for the protection of industrial interests, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it in upon his own premises. If he does not, he is answerable for all the damages that result therefrom, without any reference to the degree of care or skill exercised by him in reference thereto.

68 W. Va. at 532, 70 S.E. at 127 (quoting 1 WOOD ON NUISANCES § 111 (3d ed. 1893)). Wood in turn cited *Rylands* as authority for this point; the court itself cited *Rylands* later in the opinion. 68 W. Va. at 534, 70 S.E. at 128.

150. 74 W. Va. 25, 81 S.E. 554 (1914).

151. The court rejected the City's claim of immunity, holding that the maintenance of the water tanks was not "purely governmental," so the City was liable on the same principles as applied to private corporations. *Id.* at 27, 81 S.E.at 555.

152. 112 W. Va. 82, 163 S.E. 766 (1932).

in that case had deposited highly combustible "bug dust" from its mining operations onto its general refuse pile, which subsequently ignited by spontaneous combustion, sending noxious smoke, fumes, and dust onto plaintiff's adjacent farm. The defendant denied liability, contending that "the removal of refuse from the mine was not only required by the mining department, but was necessary in the natural development of its property." The court responded to this argument as follows:

> Without deciding whether defendant would be liable if it had exercised due care in disposing of the mine refuse, we are of opinion that it did not do so. . . . [T]he duty imposed on defendant to remove the "bug dust" from its mine did not license it to create a private nuisance in the negligent disposal of a potentially dangerous substance.[153]

The doubts raised in *Rinehart* concerning the basis of nuisance liability seem to have been limited to disputes involving the coal mining industry. Just two years later, the court unquestioningly applied traditional nuisance principles to a land use dispute that did not involve the coal industry. In *Ritz v. Woman's Club of Charleston*,[154] the court found that the noise associated with dances at the defendant's club in a residential district created a nuisance because it interfered with the plaintiffs' sleep and lowered their property values.[155] The opinion emphasized the residential character of the neighborhood, stating that a nuisance resulted from the introduction in a residential district of "an unusual and recurring noise" that "prevents sleep or otherwise disturbs materially the rest and comfort of the residents."[156]

The nature of the locality was crucial to the decision in *Parkersburg Builders Material Co. v. Barrack*.[157] The court in that case denied injunctive relief against the operation of an automobile junkyard because the neighborhood was "not a clearly established res-

153. *Id.* at 84, 163 S.E. at 766-67. The court's only syllabus point states: "An owner is liable for negligently using his property to the injury of another." *Id.* at 82 syl. pt., 163 S.E. at 766 syl. pt.

154. The court followed *Synder* in holding that: "Noise alone may create a nuisance, depending on time, locality, and degree." 114 W. Va. 675, 677, 173 S.E. 564, 565 (1934).

155. 114 W. Va. at 675 syl. pt.1, 173 S.E. at 565 syl. pt.1.

156. *Id.* at 675 syl. pt.2, 173 S.E. at 565 syl. pt.2.

157. 118 W. Va. 608, 191 S.E. 368 (1937).

idential community."[158] The opinion is significant in recognizing the possibility, in an appropriate case, of finding nuisance liability solely on the basis of visual offensiveness.[159]

In 1939 the American Law Institute published the third and fourth volumes of the *Restatement of the Law of Torts*, including the chapter governing actions for private nuisance. Although one of the Advisers to the Reporter for the chapter on nuisance law was J. Warren Madden, former Dean of the West Virginia University College of Law, the nuisance provisions of the *Restatement* initially were ignored by the West Virginia Supreme Court of Appeals.[160] Until *Hendricks*, the court failed to avail itself of the conceptual clarification provided by the *Restatement*'s definition of private nuisance as an interference with the use and enjoyment of land, comprising claims based on negligence and on strict liability for abnormally dangerous activities, as well on conduct that is intentional and unreasonable. Instead, the Court persisted in treating nuisance and negligence as though they were entirely distinct and unrelated causes of action.

The first post-*Restatement* decision of the West Virginia Supreme Court of Appeals, *Board of Commissions of Ohio County v. Elm*

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158. *Id.* at 608 syl. pt., 191 S.E. at 368-69 syl. pt. Although 96% of the properties in the general vicinity were residential, there were several commercial establishments and a number of vacant lots in the immediate two or three block area, so that the court was "unable to ascribe to the community a predominantly residential characterization." *Id.* at 609, 191 S.E. at 369.

159. The court referred to "evolutional conceptions respecting the right and duty of society to protect itself from undesirable and disagreeable conditions," stating:

> There is a growing belief that that which is offensive to the view, an eye-sore, a landscape-blight, may attain such significance as to warrant equitable interposition. . . . Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values.

Id. at 612-13, 191 S.E. at 370-71.

160. The court's first reference to the *Restatement* appeared in its quotation from an Illinois case in Harless v. Workman, 145 W. Va. 266, 278, 114 S.E.2d 548, 555 (1960) (citing § 822). Only three other nuisance decisions cited the *Restatement*, and none mentioned the balance of utilities test, Section 826. *See* Mahoney v. Walter, 157 W. Va. 882, 890, 205 S.E.2d 692, 698 (1974) (citing the relative hardship test in the chapter on injunctions, RESTATEMENT (SECOND) OF TORTS § 941 (1965)); West v. National Mines Corp., 168 W. Va. 578, 588, 285 S.E.2d 670, 677 (1981) (citing the provision imposing nuisance liability on the employer of an independent contractor in the RESTATEMENT (SECOND) OF TORTS, § 427B (1965)), Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616, 620 (W. Va. 1985) (citing the definition of public nuisance in the RESTATEMENT (SECOND) OF TORTS, § 821B (1977)), *appeal dismissed*, 474 U.S. 1098 (1986).

Grove Mining Co.,[161] addressed the problem of gob fires without directly answering the question left open in *Rinehart* concerning the standard for imposing liability in a private nuisance action. *Elm Grove* was a suit by the county to enjoin the mining company from depositing combustible materials on its refuse dump or "gob pile." The trial court granted the injunction, finding that fumes from the burning gob pile constituted a public nuisance. The Supreme Court of Appeals substantially affirmed the decree, rejecting the defendant's contention that the deposit of refuse materials outside the mine was essential to its operations.[162] The court replied:

> But public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby.
>
> Notwithstanding a business be conducted in the regular manner, yet if in the operation thereof, it is shown by facts and circumstances to constitute a nuisance affecting public health "no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law."[163]

The court clearly indicated that operation of a business "in the regular manner" was not a defense, but the holding was limited to an act that constituted a public nuisance by virtue of its impact on public health.

Oresta v. Romano Bros.[164] also dealt with the problem of refuse from mining operations. The defendants had collected the debris from their strip mining operation and built an embankment on the hillside above the plaintiffs' property; the plaintiffs sought damages for injury caused by dirt, mud, and rock that was washed down onto their property following any heavy rainfall. The defendants asserted that liability had not been established because they were not negligent and had mined the coal according to an "approved and recognized method of strip mining."[165] The court said that the

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161. 122 W. Va. 442, 9 S.E.2d 813 (1940).

162. The West Virginia Coal Association, as amicus curiae, warned: "To affirm the decree in this instance is to decree from existence the mining of coal in this State." *Id.* at 451, 9 S.E.2d at 817.

163. *Id.* (quoting 1 WOOD ON NUISANCES § 19 (3d Ed. 1893)).

164. 137 W. Va. 633, 73 S.E.2d 622 (1952).

165. *Id.* at 641, 73 S.E.2d at 627.

defendants clearly were guilty of negligence,[166] holding that the negligence consisted of the failure to discharge their absolute duty to prevent the debris from being washed onto plaintiff's land.[167] In effect, the court applied the same standard of liability to damages from the defendants' artificially constructed embankment as it had applied to damages from the release of stored water, proclaiming a rule of negligence but applying the *sic utere tuo* maxim and establishing negligence under the principle of *res ipsa loquitur*, without requiring evidence of particular negligent acts.[168]

The court employed a similar analysis in *Pope v. Edward M. Rude Carrier Corp.*,[169] a case arising from the explosion of dynamite while being transported by a contract carrier on a public highway. The court applied a negligence standard to the shipment of explosives, holding that the trial court should have sustained demurrers to the two counts based on maintenance of a nuisance and on absolute liability for damages from explosions. In holding that the *transportation* of explosives on a public highway was not a public nuisance *per se*, the court had to distinguish its earlier ruling that the *manufacture* and *storage* of explosives near a highway consti-

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166. The court affirmed the award of a new trial, however, on the grounds that the damages were excessive. *Id.* at 652, 73 S.E.2d at 632-33.

167. The court described the defendant's duty as follows:

> It was the duty of the defendants securely to confine and restrain those materials to the land used by them in connection with their strip mining operation and to place them, or cause them to be placed, at such point and in such position that it could not reasonably be expected that they, or some of them, would escape from the land used by the defendants and roll, or slide, or be washed down the steep slope of the hillside, upon the land of the plaintiffs at and near the bottom of the slope. This duty the defendants did not observe or discharge.

Id. at 639, 73 S.E.2d at 626.

168. The court quoted from both the syllabus and text of *Weaver Mercantile Co. v. Thurmond* to the effect that a person erecting a structure upon his premises is bound at his peril not to allow it to become a nuisance or injure the property of his neighbor. 137 W. Va. at 640, 73 S.E.2d at 626. In its own syllabus, the court declared: "A person in possession of land is required so to use it as not to injure the property of another person." *Id.* at 633 syl. pt.1, 73 S.E.2d at 623 syl. pt.1. Given the court's derivation of the defendant's duty from traditional nuisance principles, it is somewhat curious that the court persisted in treating its decision as a rule of negligence rather than one of absolute duty under the *sic utere tuo* maxim. Perhaps the plaintiffs and/or the court believed that a stricter standard of liability could be imposed under a negligence analysis, employing an absolute duty coupled with the rule of *res ipsa loquitur*, than would be imposed by the reasonable use rule applicable to actions for an intentional nuisance in a non-residential area.

169. 138 W. Va. 218, 75 S.E.2d 584 (1953).

tuted a public nuisance.[170] The rejection of claims based on nuisance or absolute liability was of little practical significance, however; the court held that the doctrine of *res ipsa loquitur* applied to the explosion of dynamite during transportation, so the plaintiff would be able to recover without any direct evidence of particular negligent acts by the defendant's employees.

While the manufacture and storage of explosives were governed by nuisance principles, and the transportation of explosives was governed by principles of negligence, the court imposed strict liability for damages resulting from the intentional use of explosives in blasting activities.[171] The court referred to blasting operations as "intrinsically dangerous and extraordinarily hazardous," adopting the *Restatement's* rule of strict liability for ultrahazardous activities.[172]

In preserving the distinctions among the manufacture and storage of explosives, their transportation, and their use in blasting operations, the court apparently was unaware that the *Restatement's* rule of strict liability was meant to apply in all such cases.[173] Under the *Restatement's* approach, the handling of explosives is an abnormally dangerous activity, and the defendant is strictly liable for any damages caused by either intentional or accidental explosions; insofar as an explosion causes damage to real property, it constitutes a private nuisance governed by a standard of strict liability.[174] Consistent application of the *Restatement's* approach to abnormally dangerous

170. Wilson v. Phoenix Powder Manufacturing Co., 40 W. Va. 413, 21 S.E. 1035 (1895), discussed *supra* note 138-39 and accompanying text. The court also quoted a legal encyclopedia for the proposition that the doctrine of *Rylands v. Fletcher* had been rejected for injuries caused by explosives during shipment in the absence of negligence. The court apparently was unaware that although most American jurisdictions had completely rejected the doctrine of *Rylands v. Fletcher*, the West Virginia Supreme Court of Appeals implicitly had adopted the doctrine with regard to the storage of potentially dangerous substances in Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126 (1911).

171. Whitney v. Ralph Myers Contracting Corp., 146 W. Va. 130, 118 S.E.2d 622 (1961). See also Konchesky v. S.J. Groves & Sons Co., 148 W. Va. 411, 135 S.E.2d 299 (1964); Perdue v. S.J. Groves & Sons Co., 152 W. Va. 222, 161 S.E.2d 250 (1968); Ellison v. Wood & Bush Co., 153 W. Va. 506, 170 S.E.2d 321 (1969).

172. *Whitney*, 146 W. Va. at 139, 118 S.E.2d at 627, citing RESTATEMENT OF TORTS § 519 (1939). The RESTATEMENT (SECOND) OF TORTS § 519 (1976) now refers to such activities as "abnormally dangerous" instead of "ultrahazardous."

173. See comments to RESTATEMENT OF TORTS §§ 519 & 520 (1939) and RESTATEMENT (SECOND) OF TORTS §§ 519 & 520 (1976).

174. RESTATEMENT (SECOND) OF TORTS § 822(b) and comment j (1977).

activities would greatly simplify West Virginia law with regard to damages caused by explosions, without substantially changing the results in particular cases.

The interaction of principles of nuisance, negligence, and strict liability was not addressed in *Martin v. Williams*,[175] an opinion containing the court's most extensive discussion of nuisance law in the 98 years between *Powell* and *Hendricks*. In *Martin*, a divided court affirmed the issuance of an injunction ordering the defendant to cease operation of a used car business in a residential area because of the associated noise, lights, unsightliness, and reduction of property values. The majority opinion cited the *sic utere tuo* maxim, but said that it was "of little value" in deciding individual disputes because each case must turn on its particular facts.[176] The opinion discussed precedent from West Virginia and other jurisdictions, but it made no attempt to derive any general rules or principles from these authorities apart from defining a nuisance as anything that greatly interferes with the use, comfort, and enjoyment of property.

The *Martin* opinion is significant in endorsing consideration of the aesthetic aspects of the plaintiffs' complaint: the bright strings of lights, the unsightliness of the merchandise, and the "garish carnival atmosphere."[177] The court did not rely entirely on these aesthetic concerns, nor on the reduction in property values, which concededly would not alone have warranted a finding of nuisance, but also on the noise of loud voices, slamming hoods, racing engines, and screeching brakes. Inasmuch as two earlier decisions had ruled that noise alone could constitute a nuisance,[178] the court was not creating any new doctrine in its holding that a nuisance could be found in this case based on noise accompanied by aesthetic injury and reduction in property value.[179] The court emphasized that the

175. 141 W. Va. 595, 93 S.E.2d 835 (1956).

176. *Id.* at 610, 93 S.E.2d at 844.

177. *Id.* at 598, 93 S.E.2d at 837.

178. Snyder v. Cabell, 29 W. Va. 48 syl. pt.5, 1 S.E. 241 syl. pt.5 (1886). Ritz v. The Woman's Club of Charleston, 114 W. Va. 675 syl. pt.1, 173 S.E. 564 syl. pt.1 (1934).

179. Judge Haymond's strong dissenting opinion expressed the view that the defendant's business was not a nuisance, but he did not question the legal foundation for the court's ruling. Although he disagreed with the weight accorded to aesthetic considerations, his dissent primarily disputed the

exclusively residential character of the neighborhood distinguished the instant case from *Parkersburg Builders Material Co. v. Barrack*.[180]

In *Flanagan v. Gregory & Poole, Inc.*,[181] the court treated nuisance and negligence as though they were entirely separate theories instead of recognizing that nuisance liability can arise from negligence as well as from conduct that is intentional and unreasonable.[182] The court upheld the overruling of a demurrer to an amended complaint in nuisance that added allegations of negligence, holding that the initial complaint alleged a nuisance and that the amended complaint did not alter the identity of the original cause of action because the allegations of negligence were superfluous.[183]

In several of the reported cases, the application of negligence principles to nuisance disputes reflected a strategic decision by plaintiffs' counsel rather than a doctrinal ruling by the court. In *Akers v. Ashland Oil & Refining Co.*,[184] the court affirmed a verdict for the plaintiff whose farm land was damaged by oil, sludge, and waste which the defendant had negligently permitted to escape from its plant into the river that separated the two properties. This was not an intentional nuisance, and since the court had previously applied negligence principles to the escape of dangerous substances, the plaintiff quite logically elected to try the case under a negligence theory.

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majority's interpretation of the facts, characterizing the noise as "ordinary and usual" and suggesting that the plaintiffs were abnormally sensitive to trivial annoyances. The dissenters also believed that the injunction was overly broad and should have been modified to prohibit the offensive aspects of the business without shutting it down entirely. *Martin*, 141 W. Va. at 612-27, 93 S.E.2d at 845-52.

180. 118 W. Va. 608, 191 S.E. 368 (1937).

181. 136 W. Va. 554, 67 S.E.2d 865 (1951).

182. The court said: "The creation of a nuisance is the violation of an absolute duty. Negligence is the violation of a relative duty." *Id.* at 562, 67 S.E.2d at 871.

183. The case involved an inadequate culvert that impeded the flow of a creek. In other such cases, the court has applied a rule of strict liability based on the doctrine of riparian rights, without necessarily referring to the defendant's conduct as a nuisance. *See infra* Section V-C. It is unclear whether the court in *Flanagan* could have reached the same result if it had recognized that the amended complaint purported to assert two alternative theories, strict liability and negligence, the second of which was demurrable only insofar as it pleaded a new cause of action. Although the same result could have been reached if the court had granted the demurrer with respect to the allegations of negligence, it might have been constrained to allow the demurrer to the entire amended complaint.

184. 139 W. Va. 682, 80 S.E.2d 884 (1954).

In *Koch v. Eastern Gas and Fuel Associates*,[185] another dispute arising from a gob pile fire, the plaintiffs' election to plead the case as a negligence action probably reflected reliance upon the court's earlier decisions in *Rinehart* and *Oresta*.[186] In *Koch*, the court noted that a nuisance can arise from negligence, and on two occasions it emphasized the "skillful" drafting of the complaint as an action for continuing trespass rather than private nuisance. Plaintiffs' choice between nuisance and negligence apparently was an important factor in the court's ruling with respect to the plaintiffs' demurrer to defendant's assumption of risk defense.[187] Similarly, the nuisance/negligence distinction was deemed to be relevant to the court's ruling that the defendant had not effectively asserted a prescriptive right to maintain its gob pile.[188]

The relationship between negligence and nuisance was crucial to the decision in *Harless v. Workman*,[189] an action by plaintiffs for damages to their property caused by fumes, coal dust, soot, and other airborne contaminants emanating from defendants' coal crusher and tipple. The plaintiffs contended that the coal crusher was a nuisance and that the defendants should be held liable irrespective of negligence or due care, but the trial court submitted the case to

185. 142 W. Va. 386, 95 S.E.2d 822 (1956).

186. Interestingly, the court in *Koch* referred to *Oresta* as an action for private nuisance. *Id.* at 399, 95 S.E.2d at 830.

187. The court said that because the plaintiffs had not alleged that the gob pile constituted a nuisance, it did "not have the question of 'coming to a nuisance.'" *Id.* at 400, 95 S.E.2d at 830. The court reversed the trial court's decision to sustain the demurrer to the assumption of risk defense, but it noted that because the plaintiffs were alleging a progressive and continuing wrong, assumption of risk could not be a bar to damages accruing after the plaintiffs had acquired the property and after the defendants knew or should have known of the injurious effects of its gob pile. *Id.* For a discussion of the coming to the nuisance and assumption of risk defenses, *see infra* Section IV-D.

188. The court said that prescription was recognized as a defense, but the defendant's plea was defective because it lacked allegations that the use was adverse and continuous during the statutory period and that the damage was of the same extent and character as that now complained of by the plaintiff. The court said that the result might have been different if the case had involved a permanent nuisance instead of continuing trespasses. The court did not explain why this might be so, although it did indicate that for a trespass action the ten-year statutory period ran from the date the gob piles began to burn, rather than from the date they were established. *Id.* at 402-03, 95 S.E.2d at 831. The court could have reached the same result in an action based on nuisance rather than continuing trespasses, however, so long as the complaint asserted that the nuisance arose from the gob pile *fire* rather than from the existence of the gob pile itself. For a discussion of the distinction between temporary and permanent nuisances, *see infra* Section IV-C.

189. 145 W. Va. 266, 114 S.E.2d 548 (1960).

the jury on the basis of negligence and due care rather than on a nuisance theory.[190] The Supreme Court of Appeals affirmed the jury verdict for the defendants, holding that "in the circumstances of this particular case, the trial court did not err in submitting the case to the jury on the basis of principles relating to the law of negligence."

Although the court recognized the potential significance of its decision, it did not explain the reason for its holding, and it expressly declined to establish any rule or guideline as precedent for future decisions.[191] The opinion is opaque, but the implication of the *Harless* decision is that ordinary mining activities in a "coal mining community" would not constitute a nuisance unless they were negligently conducted.[192] In a "coal mining community," plaintiffs were

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190. The jury was instructed that the plaintiff could recover only if the defendant was negligent, and not if "the injuries claimed to have been sustained by the plaintiffs have been trifling, and not substantial, and such as are necessarily incident to the business of loading coal." *Id.* at 279, 114 S.E.2d at 555.

191. The court did, however, expressly hold that *Weaver Mercantile Co. v. Thurmond*, which had adopted the doctrine of *Rylands v. Fletcher* with respect to a bursting water tank, was not a proper guide in the instant situation. *Id.* at 275, 114 S.E.2d at 552. The court apparently was not aware that *Weaver Mercantile* had been cited as controlling authority with respect to a strip mining operation in *Oresta*; the *Oresta* decision was not even cited by the court in *Harless*. Although both *Oresta* and *Harless* involved the mining industry, they are arguably distinguishable in that *Oresta* involved the construction of an embankment on a hillside, which could be characterized as an "artificial" collection of potentially dangerous substances, whereas *Harless* involved damages from the operation of a coal crusher and tipple.

192. The discussion of legal principles was prefaced with the following statement:

> It appears from the evidence that Racine is a coal mining community, and that the economy of the community is dependent predominantly on the coal mining industry. It is quite obvious from the testimony that a problem of coal dust to at least some degree is inevitable wherever coal is mined, processed, handled and transported. The situation, therefore, involves a balancing of the conflicting interests of the individual home owner on the one hand and of the basic, sustaining industry of the community on the other hand. This leads naturally to a discussion of pertinent principles of law pertaining to nuisances.

Id. The legal discussion primarily consisted of an extensive series of quotations from Corpus Juris Secundum, including the following:

> [W]here the torts are coexisting and practically inseparable, as where the same acts or omissions constituting negligence give rise to a nuisance, the rules applicable to negligence will be applied. Where an act and condition can become a nuisance solely by reason of the negligent manner in which it is performed or permitted, there can be no recovery independently of the existence of negligence.

Id. at 276-77, 114 S.E.2d at 553-54 (citing 66 C.J.S. *Nuisances* § 11 (1950)).

> [A] business which with its incidents might well be considered a nuisance in a residential portion of the city or village may not be subject to complaint when conducted in a business

expected to bear any damages "necessarily incident to the business of loading coal" as *damnum absque injuria*. Unlike earlier decisions, in which nuisance was treated as entirely separate from negligence, the court here held that nuisance liability could not exist in the absence of negligence. *Harless* represents an extreme application of the negligence-based rule of reasonable use within the dynamic theory of property rights, focusing entirely on the reasonableness of the defendant's conduct, while ignoring the unreasonableness of the harm to the plaintiff.

Outside of mining communities, however, the court continued to apply ordinary nuisance principles to the coal industry. In *Severt v. Beckley Coals, Inc.*,[193] the court affirmed an award of damages to the plaintiffs, indicating that there was evidence of either negligence in the location and operation of the mining facility or nuisance or both. The court described the locale as "the rural community of Pierpoint, in Wyoming County,"[194] and it noted that when the plaintiffs constructed their home "there were no coal, rail or other industrial operations within a quarter of a mile of the Pierpoint community."[195]

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or manufacturing locality.

> A reasonable amount of dust in a manufacturing community does not necessarily constitute a nuisance, even though it may cause some annoyance. Mining, when done in a lawful manner, is not a public nuisance.

Id. at 276-77, 114 S.E.2d 553-54 (quoting 66 C.J.S. *Nuisances* § 13 at 757-58, § 23b at 777, § 75(3) at 822). The court concluded:

> [A] business enterprise which is lawful and proper in one locality may be a nuisance in another locality. We have noted earlier herein that Glenview Subdivision of the Town of Racine is located in a coal mining community. From the testimony the trial court and the jury were warranted in finding that the defendant Workman exercised due care and observed reasonable precautions to minimize the problem of coal dust necessarily incident to the operation of his lawful business enterprise. Such business enterprise was not unlawful in itself, it did not constitute a nuisance *per se*, and the resultant injuries of which plaintiffs complain were not inflicted unlawfully, wilfully or wantonly. The business was not concerned with a substance or product inherently dangerous or deleterious to the health of human beings.

Id. at 280, 114 S.E.2d at 555.

193. 153 W. Va. 600, 170 S.E.2d at 577 (1969).

194. *Id.* at 602, 170 S.E.2d at 579.

195. *Id.* at 603, 170 S.E.2d at 580. The characterization of the area as a rural rather than a coal mining community involved a somewhat arbitrary definition of its boundary. Although there were no coal mines within a quarter mile, there were "several small and two large mining operations within a range of a quarter of a mile and two miles from the home of the plaintiffs."

The court continued to grapple with the issue of aesthetic nuisance. In *State Road Commission v. Oakes*,[196] it held that the deposit of debris, rubbish and other unsightly material on the defendants' property was not a nuisance, affirming the trial court's refusal to order its removal in the absence of evidence of a health hazard or fire hazard. Judge Haymond wrote for a unanimous court that "the element of unsightliness, without more, does not produce or create an abatable nuisance."[197]

In *Sanders v. Roselawn Memorial Gardens, Inc.*,[198] the court sustained the denial of an injunction against the operation of the cemetery's service area, holding that the trial court's determination of whether a business constitutes a nuisance is based on a reasonableness test that involves mixed questions of law and fact, which will not be reversed unless clearly wrong.[199] The plaintiffs had complained of the unsightliness of the service area, including a greenish light used for illumination, and of noise resulting from use of the service area. The court emphasized the nature of the locality, pointing out that the cemetery was "in a rural area as distinguished from an urban or residential area."[200]

In *Mahoney v. Walter*,[201] the court affirmed the award of an injunction against the operation of an automobile salvage yard in a residential community. The court held that the test for a nuisance "is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all the existing circumstances."[202] In addressing the importance of the character of the locality, the court quoted from a legal encyclopedia's discussion of "rights of habitation" as "natural rights" which, at least in resi-

196. 150 W. Va. 709, 149 S.E.2d 293 (1966).

197. *Id.* at 719-20, 149 S.E.2d at 300.

198. 152 W. Va. 91, 159 S.E.2d 784 (1968).

199. *Id.* at 113-14, 159 S.E.2d at 798. The court did, however, hold that the potential nuisance claim constituted adequate consideration for an earlier compromise agreement between the parties, reversing the trial court's ruling that the agreement was void for lack of consideration. *Id.* at 104-07, 159 S.E.2d at 792-94.

200. *Id.* at 113, 159 S.E.2d at 798.

201. 157 W. Va. 882, 205 S.E.2d 692 (1974).

202. *Id.* at 882 syl. pt.2, 205 S.E.2d at 693 syl. pt.2.

dential districts, are "superior to the rights of trade or business."[203] Although the primary complaints against the defendant's business were aesthetic, the trial court found that the location of the salvage yard was a threat to the health of the residents,[204] and the Supreme Court of Appeals held that considerations of public health and safety justified the issuance of the injunction, regardless of whether the neighborhood was exclusively or primarily residential.[205]

In *West v. National Mines Corp.*,[206] the court took a plaintiff-centered approach to a nuisance dispute in a coal mining area, emphasizing the *sic utere tuo* maxim and rejecting a negligence-based standard of nuisance liability. The case is especially noteworthy for its holding that a cause of action for nuisance was stated by allegations that private individuals made unreasonable use of *public* property, a public road. The plaintiffs complained that the vast quantities of dust raised by the frequent passage of coal trucks on a dirt road constituted an unreasonable interference with the use and enjoyment of their property, alleging that it damaged their health, interfered with their sleep, dirtied their home, fouled their water, and spoiled their garden. They sued both the owner of the nearby mine and the contract haulers that carried the coal. The trial judge dismissed the complaint because the mining company was not itself involved in hauling the coal, and the other defendants could not be deemed negligent because they were using a public road. The Supreme Court of Appeals reversed, holding that the unreasonable, negligent, or unlawful use of a public road can constitute a nuisance and that a person who employs an independent contractor is subject to nuisance liability when the employer knows or has reason to know that the work is likely to involve the creation of a nuisance. The court further ordered that a preliminary injunction be granted abating the dust problem pending a trial.

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203. *Id.* at 891-92, 205 S.E.2d at 698-99 (citing 58 AM. JUR. 2D *Nuisance* § 38 [n.d.]). The court held that there was evidence to sustain the trial court's findings that the community "was basically a residential area" and "that the area, in the immediate vicinity of the salvage yard, was exclusively residential."

204. *Id.* at 886, 205 S.E.2d at 696.

205. *Id.* at 893-94, 205 S.E.2d at 699-700.

206. 168 W. Va. 578, 285 S.E.2d 670 (1981).

Justice McGraw's opinion evinced great concern for the rights of residential plaintiffs and far less attention to the nature of the locality, attaching little importance to the fact that mining operations had been going on above the plaintiffs' property for decades. In discussing the plaintiffs' right to the reasonable use and enjoyment of their property regardless of the surrounding circumstances, the opinion employed the rhetoric of the plaintiff-centered dynamic theory of natural property rights.[207]

This dispute was again before the court on the plaintiffs' appeal from an unfavorable result at trial.[208] On remand, the Circuit Court of Wyoming County had issued a preliminary injunction which required the defendants to treat the road with water, to travel the road at reduced speeds, and to operate the coal trucks in such a manner as to eliminate spillage, all of which significantly reduced the dust problem. At trial, the jury found that there were no damages, and the judge dissolved the temporary injunction. The supreme court "reluctantly" affirmed the verdict on the issue of damages, but held that the dissolution of the injunction was procedurally improper because of the absence of findings of fact or conclusions of law.

Justice McGraw dissented from the affirmance of the jury's finding of no damages, stating that "the verdict was decidedly against

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207. *Id.* at 587, 285 S.E.2d at 676-77. The court stated:

> It is a part of the great social compact to which every person is a party, and a fundamental and essential principle in every civilized community that every person yields a portion of his right of absolute dominion and use of his own property, in recognition of, and obedience to, the rights of others, so that others may also enjoy their property without unreasonable hurt or hindrance. Wood, *The Law of Nuisances* at 2-3 (3d ed. 1893). Just as the right to the free use of one's own property is subject to the implied obligation to use it so that it will not be unreasonably injurious to others, so the right to use public property also should be subject to the same implied obligation.
>
> While it is true that the public has a legitimate right to the use and enjoyment of a public roadway, that right must be exercised in a reasonable manner and with due regard for the right of adjoining property owners to the use and enjoyment of their property. The law does not allow anyone, whatever his circumstances or conditions may be, to be driven from his house or compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity.

Id.

208. West v. National Mines Corp., 336 S.E.2d 190 (W. Va. 1985).

the clear and unequivocal weight of the evidence."[209] He also would have found error in the trial court's failure to recognize the "distinction between nuisance and negligence":[210]

> Foremost was the trial court's mistaken view that "nuisance in this particular type case must be based on some negligence." Not only did this misconception result in the trial court's complete elimination of the operative standard of recovery, that of "reasonableness," from the instructions given the jury over the objections of counsel for the appellants, argument of counsel for the appellees to the jury emphatically reinforced this erroneous standard by repeatedly inquiring of the jury in a rhetorical fashion, "What is illegal about that? What is negligent about that?" in reference to the activities alleged to constitute nuisance.[211]

Justice McGraw was certainly correct that the jury instructions should have referred to a standard of reasonableness rather than principles of negligence. Once the defendants had been notified of the damage they were causing to the plaintiffs, the continuous passage of coal trucks past the plaintiffs' property constituted an intentional act, subject to the rule of reasonable use. Justice McGraw's status as a lone dissenter suggests that as of 1985 the court continued to be perplexed by the relationship between principles of nuisance and negligence. The court's subsequent discussions of nuisance law, prior to *Hendricks*, shed little additional light on the subject.[212]

D. Hendricks v. Stalnaker

In 1984, Harry and Mary Hendricks purchased approximately 2.95 acres of land adjacent to a ten-acre tract owned by Walter

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209. 336 S.E.2d at 192 (McGraw, J., dissenting).

210. *Id.* at 196 (McGraw, J., dissenting).

211. *Id.* at 197 (McGraw, J., dissenting). Justice McGraw also complained of the defense counsel's threats in his closing argument that a verdict for the plaintiffs would destroy the coal industry and the local economy. He responded: "Although economic prosperity is unquestionably a legitimate concern of any community, the legal rights of its members cannot be sacrificed, accompanied by solemn incantations of improving the business climate, at the altar of mammon." *Id.* at 198.

212. In Sticklen v. Kittle, 168 W. Va. 147, 287 S.E.2d 148 (1981), the court reaffirmed the reasonableness test as set forth in *Mahoney*; it reversed the trial court's dismissal of the nuisance action under Rule 12(b)(6), holding that whether the construction of a high school adjacent to the county airport constituted an enjoinable nuisance was a question of fact to be determined at trial. In Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985), the court reiterated the reasonableness test for private nuisance and held that city's regulation of public nuisances was subject to the same standard. The opinion by Justice Miller cited the definition of public nuisance in the RESTATEMENT (SECOND) OF TORTS § 821B (1977) and described nuisance law as "particularly effective in addressing environmental problems." *Id.* at 620, 621.

Stalnaker in Lewis County.[213] Mr. Stalnaker built a home on his property in 1985 and had two water wells dowsed. In December of 1985, Mr. Hendricks met with the county sanitarian to determine locations for a water well and septic system on the couple's property so that it could be used as a mobile home site. The only practical location for the septic system was near the Stalnaker property, and on January 13, 1986, the Hendricks' completed their application for a septic system permit at that location.

Mr. Stalnaker had contemplated drilling a new well on his property. When he learned of the Hendricks' proposed septic system, he immediately contacted a well driller, who applied for and received a permit on January 14, 1986. On January 15, 1986, the Hendricks' application for a septic system permit was denied because their absorption field was within one hundred feet of Mr. Stalnaker's well.

Mr. and Mrs. Hendricks subsequently filed suit against Mr. Stalnaker in the circuit court, seeking both injunctive relief and damages, alleging that the water well was a private nuisance because it interfered with their ability to use their property as a mobile home site.[214] In a bifurcated trial, the jury found that the water well was a private nuisance, and the trial judge ordered it to be abated; on the issue of damages the jury found for the defendant and awarded no damages.[215]

On appeal, defendant Stalnaker asserted that the trial court should have granted his motion for a directed verdict.[216] The defendant did not assert error in the instructions to the jury, and the appeal did not involve any dispute over the applicable law. Both parties agreed that this was a nuisance dispute governed by a standard of reasonable use.[217]

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213. These facts appear in the opinion in Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989).

214. Hendricks v. Stalnaker, No. 87-C-9, Lewis County Cir. Ct., W. Va. (filed Feb. 20, 1987).

215. The issue of liability was tried on September 2, 1987; the issue of damages was tried on September 4, 1987.

216. The three assignments of error were that the trial court erred in refusing to direct a verdict at the close of the plaintiffs' case, refusing to direct a verdict at the close of all the evidence, and refusing to grant defendant's motion to set aside the verdict. Brief for Appellant at 7-8, Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989) (No. 18489).

217. *See id.* at 6-9; Brief for Appellee at 7-9, Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989) (No. 18489).

Ultimately, the dispute presented a classic example of the tension between the plaintiff-centered and defendant-centered perspectives on property rights. The plaintiffs relied upon the *sic utere tuo* maxim and argued that the location of the defendant's well precluded the planned use of their real estate.[218] The defendant emphasized the right to make legitimate productive use of his property.[219]

Neither party advocated a change in the law, and the case could have been decided under existing principles without reference to the *Restatement*. Indeed, neither of the parties cited the *Restatement* as authority in their briefs. It is therefore somewhat surprising that, without the benefit of briefing or argument on the issue, the court in this case elected to adopt the *Restatement's* balance of utilities test for determining the existence of a nuisance.

Apart from its adoption of the *Restatement*, the court's decision is uncontroversial. Justice Neely discussed the conflicting rights of the parties in a clear and balanced fashion, recognizing the inherent tension between their competing uses. He noted that if the plaintiff's septic system had been built first, the defendant might have asserted a nuisance claim because the septic system would have precluded him from sinking a well. The holding of the case is that, as a matter of law, the balancing of interests between the well and the septic system was "at least equal or, perhaps, slightly in favor of the water well,"[220] so that the well was not an unreasonable use of land and could not be a private nuisance.

Although the court listed the factors that would be relevant to evaluate the "gravity of the harm" and the "social value" of the competing activities, it did not explain how these factors were to be weighed against each other. In the instant case, the interests were

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218. "Appellant's use of his real estate annoyed or disturbed the free use of the Appellee's real estate, interfered with the Appellee's rights to enjoyment of their property and materially lessened the Appellees' enjoyment of their property. 'A person in possession of land is required so to use it as not to injure the property of another person.'(citing *Oresta*)" Brief for Appellee at 11, 380 S.E.2d 198 (W. Va. 1989) (No. 18489).

219. "Where a use is reasonable and necessary to the enjoyment in one's own property, it may not be the basis of a nuisance action, although the rights of the adjoining landowner are invaded." Brief for Appellant at 9, Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989) (No. 18489).

220. *Hendricks*, 380 S.E.2d at 202-03.

quite similar and readily comparable, whereas in other cases the court may find itself comparing apples and oranges. How, for example, does one balance the suitability of the locality against the utility of the conduct? One inherent weakness of the balance of utilities test is that it invites a court to eschew a qualitative balancing of normative values and engage in a purely quantitative balancing of economic values in which a large industrial operation with a large workforce has a decided advantage in disputes with small numbers of residents or farmers.

The rhetoric of the opinion in *Hendricks* is consistent with a qualitative and normative approach to the balance of utility. Justice Neely mentioned the economic and practical consequences for the parties, but he consistently referred to "social value" rather than simple economic value, and he emphasized that unreasonableness involves a balancing of "interests." [221] The reference to "interests" rather than "rights" reflects the positivist foundation of the balance of utilities test in which the rights of the parties do not exist independently but are determined by the balancing of their interests. The opinion contains no suggestion, however, that the court in future cases will blindly sacrifice the rights or interests of the plaintiffs in obedience to the results of a narrowly focused cost-benefit analysis. The court correctly viewed the case before it as "relatively simple," recognizing that it did not require consideration of various factors pertaining to potential legal or equitable remedies.[222]

Among the factors that the court did not address was the applicability of the compensation rule embodied in Section 826(b) and Section 829A of the *Restatement (Second) of Torts*, which complements the balance of utilities test in Section 826(a).[223] As explained in Section II-D of this article, the balance of utilities test addresses the question of whether it is reasonable for the defendant to engage in the offensive activity, whereas the compensation rule considers whether it is reasonable for the plaintiff to bear the damages without

221. *Id.*

222. *Id.* at 203 n.9.

223. The compensation rule was not at issue in *Hendricks* because the plaintiffs had not filed a cross-appeal from the jury verdict that awarded them no damages.

compensation. The premise underlying the compensation rule is that, regardless of an activity's social utility, it is unreasonable for an activity to inflict severe damage without compensating those whom it injures. The compensation rule reflects considerations of both justice and economic efficiency, and it is an essential corollary to the balance of utilities test. Without it, the balance of utilities test would be unfair to potential plaintiffs and produce substantial economic distortion. One hopes that when the situation presents itself, the court will adopt the compensation rule.[224]

It is too soon to evaluate the impact of the court's adoption of the *Restatement's* approach to nuisance law. The *Restatement's* approach could eliminate the uncertainty associated with the distinctions among nuisance, negligence, and strict liability. Any interference with the use and enjoyment of land would be actionable as a nuisance. Liability could be established by proof that the defendant was negligent or reckless, that the defendant was strictly liable for engaging in an abnormally dangerous activity, or that the defendant's activity was intentional and unreasonable. So long as the court takes a qualitative and normative approach to the balancing of utilities, and complements this test with a rule requiring compensation for serious harms, it will have created a simple, just, and economically sound law of nuisance for the state of West Virginia.

IV. Doctrinal Limitations on Nuisance Liability

Beyond the rules governing the determination of whether an activity constitutes an actionable nuisance, the rights of potential nuisance plaintiffs have been circumscribed by various subsidiary doctrines. Among the most significant are the rule restricting standing to sue for a public nuisance, the balancing tests that may result

224. When it does so, the court should reject the proviso to Section 826(b) that would immunize a defendant from damage liability if the financial burden of compensation would "make the continuation of the conduct not feasible." If a defendant truly could not afford to pay compensation, this would mean that the profitability of the activity was less than the costs it was imposing on others. In such a case, it is doubtful that the defendant's activity should even pass muster under the balance of utilities test, since the gravity of the harm would seem to outweigh the social value of the activity. Only in an exceptional case should an activity be deemed to have so much social value that it could be excused from payment of damages on the grounds that the financial burden of compensating the victims would force it to shut down.

in a denial of injunctive relief and limit a successful nuisance plaintiff to recovery of damages, the statute of limitations defense, and defenses based on claims of temporal priority. This section of the article analyzes each of these limitations on the rights of nuisance plaintiffs, along with certain related doctrines, in order to determine the most fair and efficient approach to each of these issues and to assess whether the court's adoption of the *Restatement* in *Hendricks* portends any changes in existing West Virginia law.

A. Public Nuisance and the Requirement of Special Injury

A public nuisance is an unreasonable interference with a public right, such as the obstruction of a highway or navigable stream.[225] Historically, a public nuisance was a common law crime, subject to both criminal prosecution and abatement.[226]

The prosecution and abatement of public nuisances were public functions, and the English common law did not permit a private person to bring an action seeking abatement or punishment of a public nuisance. In the sixteenth century, however, the English courts recognized that a person who suffered personal injury from a public nuisance could recover damages in a private civil action.[227] The right to bring an action for "special injury" caused by a public nuisance has been treated as an exception to the general rule precluding private actions to redress a public nuisance.[228]

Liability for personal injuries or pecuniary damages caused by a public nuisance has little in common with liability for a private nuisance. The former redresses injuries caused by interference with a public right, whereas the latter redresses interference with the use

225. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

226. In West Virginia, various activities are denominated public nuisances by statutes which specify criminal penalties and/or procedures for abatement by public authorities. In addition, a municipality has plenary authority to abate anything which its governing body denominates a public nuisance. W. VA. CODE § 8-12-5(23) (1984). *See also* Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616, 625 (W. Va. 1985).

227. *See supra* notes 26-27 and accompanying text.

228. For recent cases interpreting the special injury rule, *see* Annotation, *What Constitutes Special Injury That Entitles Private Party to Maintain Action Based on Public Nuisance—Modern Cases*, 71 A.L.R.4TH 13 (1989).

and enjoyment of private property. Nevertheless, a substantial overlap between public and private nuisance may exist whenever a public nuisance interferes with an individual's use and enjoyment of land. Obstruction of a public highway may also block the plaintiff's access to his property. Emanation of smoke and fumes from a factory may disturb individual property owners as well as threatening public health. In such cases, the defendant's activity may constitute both a public and a private nuisance.[229]

In the early years of the nineteenth century, many American courts misunderstood the relationship between public and private nuisance, and they misapplied the rule requiring special injury as a prerequisite to a private action to redress a public nuisance, thereby barring many private nuisance actions. These courts tended to find a public nuisance whenever the defendant's activity affected a large number of persons, and they held that individual plaintiffs could not obtain an injunction or damages unless they could demonstrate that their injuries were "different in kind" from those suffered by others. These courts failed to realize that insofar as the public nuisance also constituted a private nuisance, the plaintiff's injury—interference with the use and enjoyment of private property—*was* different in kind from the injury to the general public, which consisted of interference with a public right. As noted earlier, the courts retreated from this restrictive application of the special injury rule in the latter part of the nineteenth century,[230] and it was never employed in antebellum Virginia.[231] Nevertheless, the special injury rule has proved quite troubling to the West Virginia Supreme Court of Appeals.

Citing precedent from Virginia, two early decisions of the West Virginia court acknowledged the existence of the special injury rule, but correctly held that it was satisfied if the individual plaintiff suffered damages in his capacity as a landowner that were more severe than those suffered by the general public.[232] In subsequent

229. RESTATEMENT (SECOND) OF TORTS § 821B comment h (1977).
230. *See supra* notes 43 & 69 and accompanying text.
231. *See supra* notes 61-64 and accompanying text.
232. Spencer v. Point Pleasant & Ohio R.R., 23 W. Va. 406, 437 (1884) (to sue railroad for

opinions, however, the court began to apply a more restrictive definition of special injury. The process began with the 1889 case of *Talbott v. King*,[233] in which the court reversed an injunction against obstruction of a road, in part because the plaintiff had not suffered special injury.[234] The court said that the rationale for the general rule against private actions for public nuisance was a distrust of individuals acting for private ends and a concern about the risk of endless litigation.[235] It stated:

> An individual can not enjoin a public nuisance, such as the obstruction of a road, unless it work special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious affecting the substance and value of the plaintiff's estate.[236]

The court indicated that injury "even greater in degree than the others" would not suffice.[237] This position was reiterated fourteen years later in *Wees v. Coal & Iron Ry.*,[238] the court again indicating that damage that was "only greater in degree" would not constitute the "special or peculiar injury" necessary to justify a private action for injunction.[239] Ten years later, in *Davis v. Spragg*,[240] the court expressly held that the requisite special injury must be "different in kind and not merely in degree from the injury to the public at large."[241] In addition to requiring that the plaintiff's injury be "different in kind" from that suffered by the general public, the court

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noise and obstruction of access, damages must be "peculiar to her as the owner of this property, and in excess of the damages or inconvenience sustained by the public generally"); Keystone Bridge Co. v. Summers, 13 W. Va. 476 (1878) (owner of toll bridge held to have requisite special injury in suit to enjoin defendants from obstructing public highway).

233. 32 W. Va. 6, 9 S.E. 48 (1889). This was Judge Henry Brannon's first opinion as a member of the court.

234. *Id.* The court also held that the road in question was not a public road, so the discussion of the special injury rule in cases of public nuisance was arguably dictum. Nevertheless, the court included the special injury rule in its syllabus. *Id.* at 6-7, 9 S.E. at 48.

235. *Id.*

236. *Id.* at 6-7 syl. pt.1, 9 S.E. at 48 syl. pt.1.

237. *Id.* at 10, 9 S.E. at 50.

238. Wees v. Coal & Iron Ry., 54 W. Va. 421, 429, 46 S.E. 166, 169 (1903).

239. *Id.* at 429, 46 S.E. at 169.

240. 72 W. Va. 672, 79 S.E. 652 (1913).

241. *Id.* at 674, 79 S.E. at 653 (quoting 2 ELLIOT ON ROADS AND STREETS, § 850a [n.d.]). The court held that the plaintiff must be injured "in a manner different from the public in general."

began to suggest that the plaintiff's injuries must differ from those of other *landowners* who were similarly situated.[242]

All of the foregoing decisions arose out of actions for injunctive relief, and the rationale and holdings of the cases were limited to suits in equity. In actions seeking damages, there would have been less reason to fear that the plaintiff was employing the vindication of a public right as a pretext for advancing private ends. Nevertheless, in *Harris v. Poulton*[243] the court suggested that the special injury rule would apply in a suit for damages,[244] and in *International Shoe Co. v. Heatwole*[245] the court expressly applied the special injury rule and the "different in kind" standard to a private damage action.

The plaintiff in *Heatwole* had received an award of damages from a district justice in the amount of $98 for pollution of the river running through his property. The supreme court issued a writ of prohibition enjoining the district justice from enforcing the judgment, holding that the plaintiff had no special damages because his enjoyment of fishing, bathing, and scenic beauty was not different "in character" from rights enjoyed by the general public.[246] The

242. In Curry v. Boone Timber Co., 87 W. Va. 429, 105 S.E. 263 (1920), the plaintiffs had brought suit to enjoin the defendant from hauling timber on its railroad, alleging that it created a danger of flooding and accidents and that it interfered with the plaintiffs' access to their properties. In reversing the injunction, the supreme court said that the plaintiffs had failed to show "an injury different in kind from that suffered by others similarly situated." *Id.* at 433, 105 S.E. at 264. In Thacker v. Ashland Oil & Refining Co., 129 W. Va. 520, 41 S.E.2d 111 (1946), an action seeking to enjoin further use of a gas pipeline along a road abutting the plaintiff's property, the court held that the plaintiff's complaint failed to state a cause of action in part because the risk of fire and explosion was not "different from that inflicted upon the public in general, both in degree and character." *Id.* at 537, 41 S.E.2d at 120. As in *Curry*, the court implicitly imposed an additional requirement that the plaintiff's injury be different from other landowners similarly situated, stating: "his situation is not other and different from that of other property holders whose lands adjoin said road." *Id.* at 537, 41 S.E.2d at 120.

243. 99 W. Va. 20, 127 S.E. 647 (1925).

244. *Id.* The court held that a cause of action was stated by plaintiff's complaint seeking damages for lower rental values and higher insurance rates resulting from the risk of fire and loud noises associated with defendant's operation of a garage that was built in violation of a municipal building code. The opinion is ambiguous, and it is unclear whether the court deemed the complaint to state a cause of action for a public nuisance, with sufficient allegations of special injury, or whether it instead recognized that the complaint simply stated a cause of action for private nuisance. *Id.*

245. 126 W. Va. 888, 30 S.E.2d 537 (1944).

246. *Id.* at 892, 30 S.E.2d at 540.

opinion indicated that special injury would exist only if the pollution had impaired plaintiff's use of the water for domestic purposes or if sludge was deposited on the plaintiff's property, but not if the injury was to a right also shared by the public, albeit different in degree. The court ignored the fact that, regardless of the impact on the public, the pollution of the water flowing through plaintiff's land constituted a private nuisance, substantially interfering with the use of the property for recreation. The court was thus repeating the error made a century earlier in other jurisdictions whose courts had misapplied the special injury rule because of a failure to appreciate the overlap of public and private nuisance.

West Virginia's special injury rule is entirely inconsistent with the principles of standing employed in other litigation in West Virginia. In civil litigation, West Virginia allows class action suits on behalf of persons similarly situated without any requirement of special injury.[247] To the contrary, the plaintiff's claims must be typical of those of the class in order to ensure their adequate representation.

West Virginia's special injury rule is also contrary to the principles of standing applicable to suits challenging the actions of governmental agencies. In *Snyder v. Callaghan*,[248] the court allowed a class action by an organization of riparian property owners seeking to compel the Department of Natural Resources to hold a hearing before permitting the alteration and filling of the bed of a river passing through their property. The introduction of foreign material into the flow of the natural watercourse was said to infringe the property rights of the riparian owners to reasonable use of the stream without disturbance, interference or material diminution. The infringement of this property right was itself sufficient to confer standing, without any requirement that the plaintiffs' injuries be different in kind from those suffered by the general public or others similarly situated.

The unfairness and irrationality of the special injury rule is apparent from a comparison of *Heatwole* and *Snyder v. Callaghan*.

247. W. VA. R. CIV. P. 22.
248. 168 W. Va. 265, 284 S.E.2d 241 (1981).

In the latter case, the plaintiffs were permitted to bring suit based on the allegation that foreign materials were about to be deposited into the stream and would infringe their property right in the natural flow of the stream. If the special injury rule of *Heatwole* had been applied, however, the plaintiffs would not have had standing because they could not have proved that their injuries would differ from those suffered by the general public. Moreover, if such a construction project had been completed by a private party without the requisite certification, in violation of the Clean Water Act, and the diminution of the flow or quality of the water interfered with the plaintiffs' use of the river for swimming, boating, or aesthetic pleasure, *Heatwole* would preclude any recovery unless there was physical damage to the plaintiffs' land or interference with their domestic uses of water for drinking or irrigation. As interpreted in *Heatwole*, West Virginia's special injury rule poses a potential obstacle to a nuisance action whenever the defendant's activities constitute a public as well as a private nuisance.

The *Restatement (Second) of Torts* provides a more sensible solution to the problem raised by the overlap of public and private nuisance.[249] The *Restatement* requires special damage as a prerequisite to an individual action to redress a public nuisance.[250] It recognizes, however, that whenever a public nuisance interferes with the use and enjoyment of the plaintiff's land, it constitutes a private nuisance, in which case the harm is different in kind from that suffered by the general public.[251]

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249. The subject of public nuisance was not addressed in the first *Restatement of Torts.*

250. RESTATEMENT (SECOND) OF TORTS § 821C (1977):

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

(2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must

(a) have the right to recover damages, as indicated in Subsection (1), or

(b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or

(c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

251. RESTATEMENT (SECOND) OF TORTS § 821C, comment e (1977):

e. Private nuisance. When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance

The complete abolition of the special injury rule as an obstacle to private actions for a public nuisance was advocated in this Law Review sixteen years ago in an article by Mark Rothstein.[252] If the court is unwilling to go that far, it should at least follow the *Restatement* and find that the requisite special injury exists whenever a public nuisance so substantially interferes with the plaintiff's use and enjoyment of property that it also constitutes a private nuisance. The plaintiff should not be faced with a greater barrier to an action for an injunction or damages simply because the defendant's activities are so obnoxious that they interfere with the rights of the public as well as those of individual landowners.

B. Balancing Interests with Respect to Injunctive Relief

Most states employ some form of balancing test with respect to the issuance of nuisance injunctions. A variety of labels have been attached to these balancing tests, including "balancing the equities," "comparative hardship," "relative hardship," and "the balance of conveniences." These terms often are used interchangeably, and the boundaries between them are not well-established. Nevertheless, each of these tests primarily focuses on one of three factors: the character of the parties' conduct, the relative economic costs to the parties, and the impact of the grant or denial of an injunction on the community and the general public.

A court that "balances the equities" considers the character of the parties' conduct. An injunction is more likely to be granted if the defendant's conduct is willful or otherwise wrongful; it is less likely to be granted if the plaintiff has been guilty of laches, acquiescence, or fraud, or is for any other reason estopped from as-

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as well as a public one. In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance. One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations and laches do not run against the public right, even when the action is brought by a private person for particular harm.

252. Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453 (1974). Professor Rothstein was a member of the faculty of the West Virginia University College of Law from 1980 to 1986.

serting a claim. Under the "comparative hardship" and "relative hardship" tests, the cost to the defendant from the grant of an injunction is compared with the damage to the plaintiff from the defendant's activity, and an injunction is denied if the latter is outweighed by the former. The "balance of conveniences" test considers the effect of an injunction on the community, including possible loss of jobs and other economic consequences. Insofar as it considers only the negative economic consequences of the injunction without also considering the possible public benefits from the injunction, the "balance of conveniences" doctrine is somewhat skewed in favor of defendants.

In its chapter on injunctions, the *Restatement* mandates consideration of all three of these factors in determining the appropriateness of injunctive relief.[253] Under the label "Relative Hardship—'Balancing the Equities,'" the *Restatement* includes both the character of the parties' conduct and their relative economic hardship from the grant or denial of an injunction.[254] Under the general rubric of the "interests of third persons and of the public," it also considers the positive and negative consequences for the community from the grant of an injunction.[255]

The West Virginia Supreme Court of Appeals has at times considered each of these factors.[256] Nevertheless, except for cases in which other equitable principles favored the defendant, the court rarely has denied injunctive relief in a private nuisance action based on the disparity of the economic consequences for the parties or the adverse public impact of an injunction.

The character of the parties' conduct was the determinative factor in the denial of injunctive relief in *Medford v. Levy*.[257] Invoking

253. RESTATEMENT (SECOND) OF TORTS §§ 933-51 (1977). *See especially* § 936 (Factors in Determining Appropriateness of Injunction).

254. RESTATEMENT (SECOND) OF TORTS § 941 and comments (1977).

255. RESTATEMENT (SECOND) OF TORTS § 942 (1977).

256. *See* Note, *Remedies—Private Nuisance—Comparative Injury Doctrine in West Virginia*, 77 W. VA. L. REV. 780 (1975). The Note discusses all of the various factors that the court has deemed relevant to the issuance of nuisance injunctions under the rubric of the doctrine of "comparative injury." *See id.* at 784 & n.29. In so doing, the Note includes several equitable doctrines that have little to do with a balancing of interests, and it ignores the distinction that the court itself has made between the comparative hardship and balance of conveniences doctrines.

257. 31 W. Va. 649, 8 S.E. 302 (1888).

the equitable maxim that the plaintiff must come with clean hands, the court reversed the injunction because both parties were at fault in this "unseemly controversy."

The court has occasionally employed a balancing test that considers the relative costs and benefits to the two parties, without reference to the public interest, but it generally has denied injunctive relief on the basis of comparative hardship only where the plaintiff was to some extent responsible for the conflict.[258] The consideration of relative costs under the "comparative hardship" doctrine is a general principle of equity, and its application has not been limited to nuisance disputes.[259]

The need to consider the public interest in connection with nuisance injunctions was recognized a century ago in *Powell*. Judge Holt expressed the view that in exercising its discretion, a court of equity may find that "damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the state and town, as well as to the owner."[260]

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258. The equitable principle of comparative hardship was employed in Brokaw v. Carson, 74 W. Va. 340, 81 S.E. 1133 (1914), a suit to enjoin the operation of an ice plant on account of excessive noise. The trial court had enjoined the operation of the plant, but the West Virginia Supreme Court of Appeals reversed, holding that the lower court should have determined whether it was practical for the defendants to reduce the noise without changing its location. If so, the defendants could be ordered to reduce the noise, but if not, the court held that the plaintiff would be barred by equitable estoppel because of his failure to object to the erection of the plant until after it was completed at great expense to the defendants. Given the plaintiff's acquiescence, the court held that it was "proper to consider the expense and inconvenience to defendants to move it, and compare their trouble and expense with the annoyance and inconvenience to plaintiff." *Id.* at 343, 81 S.E. at 1134.

Similarly, in Beard v. Coal River Collieries, 103 W. Va. 240, 137 S.E. 7 (1927), the court reversed an injunction in a private nuisance action on the grounds of equitable estoppel. The court noted in dictum that in "balancing the equities" a court "has discretion to refuse relief where the benefits to a plaintiff are small and insignificant as compared with the damage and inconvenience done to defendant if the relief to plaintiff was granted." 103 *Id.* at 247, 137 S.E. at 10.

The court mentioned the comparative hardship doctrine in Severt v. Beckley Coals, Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969), but its affirmance of the denial of injunctive relief was premised on the existence of an adequate remedy at law.

259. *See, e.g.*, State *ex rel.* Donley v. Baker, 112 W. Va. 263, 164 S.E. 154 (1932) ("comparative hardship or convenience" considered with respect to injunction directing that property be turned over to receiver); Chafin v. Gay Coal & Coke Co., 109 W. Va. 453, 156 S.E. 47 (1930) (balance of equities applied in suit to enjoin use of easement that imposed additional burden on servient estate).

260. Powell v. Bentley & Gerwig Furniture Co., 34 W. Va..804, 811, 12 S.E. 1085, 1087 (1891).

Consideration of the economic consequences of an injunction has not always resulted in the denial of injunctive relief. For example, in *McGregor v. Camden*,[261] the court ruled that the plaintiffs had stated a "strong case of nuisance" and were entitled to have a preliminary injunction pending a final hearing based on allegations that the sinking of an oil well near their property line would interfere with the use and enjoyment of their residence due to the noise of the machinery and the risk of an explosion. Although the court recognized the economic importance of oil and gas wells, it said that "public policy will not justify the maintenance of an oil well that is a nuisance to private property."[262]

On the other hand, in *Chambers v. Cramer*,[263] the court held that the risk of fire and the associated diminution of property value and increase in insurance rates did not warrant the issuance of injunctive relief against the erection of a machine shop and blacksmith shop. The court noted that "[t]he property rights of defendants as well as plaintiffs must be considered," and it cited public policy in support of its ruling:

> The defendants were engaging in a proper and legitimate business, in harmony with, and in furtherance of the material interests of the town and community, one of the many useful industries that mark the progress of that rapidly developing section of our State. It would seem that inducements would be offered to encourage the building up of industries of that character.[264]

The court distinguished the case before it from *Snyder v. Cabell*, involving an injunction against a skating rink, as well as from two cases from other jurisdictions that had granted injunctions against bowling alleys, stating that such amusements are not "of any service to the community" and are "of no use to the public in any way whatever."[265]

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261. 47 W. Va. 193, 34 S.E. 936 (1899).

262. *Id.* at 197, 34 S.E. at 937. The court supported its ruling with reference to the "damaging" clause of the West Virginia Constitution: "The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare. (citation omitted) Yet public policy itself is qualified by the constitutional provision that private property shall not be taken or damaged for public use without just compensation." *Id.*

263. 49 W. Va. 395, 38 S.E. 691 (1901).

264. *Id.* at 400, 38 S.E. at 692.

265. *Id.* at 404, 38 S.E. at 694. The court also was influenced by the speculative character of

Two years later, in *Wees v. Coal & Iron Ry. Co.*,[266] the court expressly adopted the "balance of conveniences" test with respect to the issuance of injunctions against *public* nuisances.[267] The court held:

> When the alleged nuisance is of a public character the court will consider the injuries which may result to the public by granting the injunction, as well as the injuries to be sustained by the plaintiff in refusing it.
>
> When the public benefit derived from the thing complained of outweighs the private inconvenience an injunction will not be granted.[268]

In *Ritz v. Woman's Club of Charleston*,[269] the court considered both the "comparative injury" to the parties and "the balance of conveniences," but it affirmed an injunction against nighttime dances at the defendant's clubhouse. The court said that the comparative injury doctrine should be applied "with great caution," noting that "the weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction."[270] The court also stated that "there can be no balancing of conveniences when such balancing involves the preservation of an established right."[271] The court held: "The rights of habitation of plaintiffs are established and so the doctrine must yield to them."[272] The defendants argued that their primary purpose was to serve the public. The court could have responded by denying that the clubhouse promoted the public interest, citing *Powell* and *Chambers* for the dis-

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plaintiff's complaint. It noted that the building had not yet been erected, stating that the law presumes that a person entering into a legitimate business will conduct it in a proper way. Although the court did not attempt to distinguish the earlier ruling in *McGregor*, the difference between the two cases presumably rests on the lesser degree of intrinsic danger associated with the operation of a blacksmith shop. The contingent and speculative nature of the injury was also the grounds for the denial of injunctive relief in Pope Bros. & Co. v. Bridgewater Gas Co., 52 W. Va. 252, 43 S.E. 87 (1902), and Thacker v. Ashland Oil & Refining Co., 129 W. Va. 520, 41 S.E.2d 111 (1946).

266. 54 W. Va. 421, 46 S.E. 166 (1903).

267. *Id.* The court cited both the special injury rule and the balance of conveniences doctrine as reasons for its affirmance of the denial of injunctive relief to the plaintiffs.

268. *Id.* at 421 syl. pt.4 & 5, 430-31, 46 S.E. at 166 syl. pt.4 & 5, 170.

269. 114 W. Va. 675, 173 S.E. 564 (1934).

270. *Id.* at 678, 173 S.E. at 565 (quoting POMEROY'S EQUITY JURISPRUDENCE § 1944 (2d ed. 1892)).

271. *Id.* at 678, 173 S.E. at 565 (quoting Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 555, 57 A. 1065, 1071 (1904)).

272. *Id.* at 678, 173 S.E. at 565.

tinction between important public services and mere "amusements." Instead, the court stated that the public benefit from the defendant's club was irrelevant in this private nuisance action.[273]

In *Board of Commissioners v. Elm Grove Mining Co.*,[274] the court again discussed both "comparative injury" and "the balance of conveniences" in the context of a suit by the county health commissioners to enjoin a burning gob pile as a public nuisance. In affirming the injunction with only minor modifications, the court rejected the defendant's argument that the order would destroy not only its business but the coal industry generally. The court stated:

> "The 'comparative injury' doctrine should be applied with great caution" in nuisance cases, even though not involving public health [citation omitted]. With all the more reason there is extremely narrow basis for undertaking to balance conveniences where people's health is involved.[275]

In this public nuisance action, the court considered not only the public economic interest favoring continuation of defendant's activity, but also the public health interest against it, attaching greater weight to the latter.

In *Mahoney v. Walter*,[276] the court contrasted the traditional equitable doctrine of "relative hardship" with the "balancing of con-

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273. *Id.* at 678, 173 S.E. at 565-66. The court explained:

> The fact that the primary purpose of defendant is to serve the public does not alter the situation. It would be manifestly unfair to require plaintiffs to bear all the ill-effects of this nuisance, merely that the public might benefit indirectly. The Constitution itself forbids injury to private property for a public purpose without just compensation. There is no compensation to the plaintiffs for this nuisance. Consequently, loss to the public cannot affect their rights herein.

Id. The court apparently did not consider the possibility that plaintiffs would still have the right to sue for damages if they were denied injunctive relief on the grounds of the public benefit from defendant's activity.

274. 122 W. Va. 442, 9 S.E.2d 813 (1940).

275. *Id.* at 452, 9 S.E.2d at 817 (quoting Ritz v. Woman's Club of Charleston, 114 W. Va. 675, 173 S.E. 564, 182 S.E. 92 (1934)). The court also stated:

> But public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby.
>
> Notwithstanding a business be conducted in the regular manner, yet if in the operation thereof, it is shown by facts and circumstances to constitute a nuisance affecting public health "no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law."

Id. at 451, 9 S.E.2d at 817 (quoting 1 WOOD ON NUISANCES § 19 (3d Ed. 1893)).

276. 157 W. Va. 882, 205 S.E.2d 692 (1974).

veniences doctrine," referring to the latter as a "comparatively new development" which considers the disparity of economic consequences for the public as well as the two parties. As such, the court expressed a skeptical attitude toward the balance of conveniences doctrine.[277] Because "there was no evidence in this case of a general public interest," the court declined to engage in a balancing of conveniences. The court applied only the relative hardship standard, and it did so quite perfunctorily.[278]

Defendants have also attempted to invoke the balance of conveniences doctrine in land use disputes involving legal theories other than private nuisance, such as trespass or interference with water rights. In those cases, the court repeatedly has held that the balance of conveniences does not apply where the defendant's conduct is intentional and violates a "clear legal right" of the plaintiff.[279]

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277. *Id.* at 889-90, 205 S.E.2d at 697-98. The court explained:

> The appellant contends that the doctrine of the 'balancing of conveniences' should be applied—that is, that when the injury to the defendant in losing its business location is so much greater than the inconvenience to the owners of nearby property, the permanent injunction should be denied or, at the very least, the injunction order should be tailored to permit the continued operation of the salvage yard with appropriate steps being taken to reduce the objectionable features . . . . Under this doctrine, economic consequence to the business owner and the public is compared to the damage to the adjacent property owners who may be compensated by action and damage. The damage to the business owner is normally the loss of investment, loss of profit and the like. The damage to the public is the loss of economic stimuli such as loss of employment.
>
> One of the chief problems with this doctrine is that it compares the general loss to the public, such as loss of jobs, while it only considers specific loss to the private land owner, *i.e.*, the specific money damage to his property, notwithstanding he may be damaged in many general ways which cannot be translated into specific damages.

Id. The court apparently did not consider the possibility of limiting the balance of conveniences doctrine to public nuisances.

278. *Id.* The court simply *assumed* that the trial court had considered the effect of the injunction on the defendants' business in comparison with the present and prospective harm to the plaintiffs if an injunction were denied, yet the trial court's memorandum had not mentioned these factors.

279. In a trespass action for construction of a private tramway on the plaintiffs' property, the court in Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 34 S.E.2d 348 (1945), said that the balancing of convenience ordinarily would not be allowed to deprive a person of "established property rights." The court added that the balancing of equities did not apply in cases of "deliberate invasion of plaintiffs' rights" and that "the expense and great inconvenience to defendant" was not grounds for a balancing of equities, declaring emphatically: "Injunctive relief will not be denied on the theory of 'balance of conveniences', where it appears there are no equities in favor of the litigant invoking that doctrine." *Id.* at 587 syl. pt.7, 597, 34 S.E.2d at 350 syl. pt.7, 354-55. The court went on to explain that the economic advantages to the community from the lumber operation were too indefinite

In sum, in the eighty-six years since the adoption of the balance of conveniences doctrine in *Wees*, the court has never employed this doctrine to deny injunctive relief against an otherwise actionable nuisance.[280] The doctrine is repeatedly cited, but it has virtually no impact on the outcome of reported cases.

The decision in *Hendricks* portends a fundamental change in this regard. Now that the court has clarified the substantive law of nuisance by adopting the balance of utilities test, it probably will devote increased attention to the evaluation of appropriate remedies.[281] A court that has mandated an express balancing of social utility in determining the existence of a nuisance is unlikely to hesitate to engage in a similar balancing of interests in determining the appropriateness of an injunction. Moreover, having adopted the *Res-*

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and affected too many persons to warrant relinquishment of plaintiffs' property rights:

> The economic advantages claimed for the community where the lumber operation is located no doubt exist and are desirable. However, such advantages are indefinite and affect too many persons to furnish a basis for a holding that plaintiffs should relinquish their land for the furtherance of a private undertaking. Plaintiffs' property rights are such that even though a general economic advantage would result from the continued operation of the tramway, it is more important to protect those rights than to permit an invasion thereof on the nebulous ground that an economic advantage accrues from an invasion of those rights.

Id. at 598, 34 S.E.2d at 355.

In County Court of Harrison County v. West Virginia Air Service, Inc., 132 W. Va. 1, 54 S.E.2d 1 (1948), the court affirmed an injunction against repeated trespasses, stating that the doctrine of the balance of conveniences did not apply "where the wrong is wilful [sic], wanton and unprovoked, or where, as here, the acts complained of are tortious and the plaintiff county court is seeking to preserve a clear legal right." *Id.* at 12, 54 S.E.2d at 7. In McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951), the court held that the "doctrine of the balance of equities or conveniences" did not apply to the infringement of the property right of the plaintiff from diversion of the natural flow of a stream. The court quoted at length from a legal encyclopedia to the effect that the doctrine applies only where the plaintiff's injuries were "trivial or uncertain or remediable at law" and not where they were "substantial, certain and irreparable" or where "the wrong complained of is wilful [sic], wanton, or unprovoked" or where "the preservation of a clear right is involved." *Id.* at 586, 68 S.E.2d at 740. Similarly, in Stuart v. Lake Washington Realty Corp., 141 W. Va. 627, 92 S.E.2d 891 (1956), the court affirmed an injunction against inundation of plaintiff's lands, holding that the balance of conveniences did not apply because "the plaintiff had the absolute and exclusive right to the full enjoyment of her property" and "[t]his right is a natural right which will be regarded and protected." *Id.* at 651-52, 92 S.E.2d at 904-05.

280. The failure of the court to employ this doctrine is somewhat ironic, inasmuch as it has continued to employ the special injury rule as an absolute bar to private suits for public nuisances. If the court is unwilling to invoke the public interest as a justification for the denial of injunctive relief, it is unclear why it continues to bar such suits *ab initio* under the special injury rule.

281. For an indication that Justice Neely has begun to consider alternative approaches to the determination of nuisance remedies, see *Hendricks*, 380 S.E.2d at 203 n.9.

tatement's approach to nuisance law, the court can also be expected to follow the *Restatement's* approach to nuisance injunctions, which accords substantial weight to the relative hardship to the parties and to the interests of the public and third parties. In following the *Restatement's* approach to nuisance remedies, the court would not even need to depart from existing precedent. Except for the labels, there is little difference between the relative hardship and public interest tests in the *Restatement* and the comparative hardship and balance of conveniences doctrines currently employed by the court.

C. Permanent or Temporary Nuisance

One of the most heavily litigated issues in nuisance disputes in West Virginia has been the determination of whether a nuisance is temporary or permanent. The question arises in three contexts: in determining the measure of damages, in deciding whether an action is barred by the statute of limitations, and in deciding whether it is barred by a former recovery under the principle of res judicata.

With respect to the measure of damages, a long line of cases formerly held that permanent damages were measured by the decline in property value,[282] whereas for temporary injury the plaintiff recovered the loss of rents or profits during the pertinent period plus the cost of repair and reimbursement for expenses.[283] This distinction between temporary and permanent damages generated a great deal

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282. *See* cases cited in Jarrett v. E.L. Harper & Son, Inc., 160 W. Va. 399, 402, 235 S.E.2d 362, 364 (1977). *See also* Ellison v. Wood & Bush Co., 153 W. Va. 506, 170 S.E.2d 321 (1969); Konchesky v. S.J. Groves and Sons Co., 148 W. Va. 411, 135 S.E.2d 299 (1964); Kirk v. Norfolk & W. Ry., 119 W. Va. 622, 196 S.E. 501 (1938); Keene v. City of Huntington, 79 W. Va. 713, 92 S.E. 119 (1917); Guinn v. Ohio River R.R., 46 W. Va. 151, 33 S.E. 87 (1899).

283. *See* cases cited in *Jarrett*, 160 W. Va. at 401-02, 235 S.E.2d at 364. *See also* cases cited in Cline v. Paramount Pacific, Inc., 156 W. Va. 641, 645, 196 S.E.2d 87, 90 (1973); Lyon v. Grasselli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928); Covert v. Chesapeake & O. Ry., 85 W. Va. 64, 100 S.E. 854 (1919); Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 77 S.E. 525 (1912); Tracewell v. Wood County Court, 58 W. Va. 283, 52 S.E. 185 (1905); Pickens v. Coal River Boom & Timber Co., 58 W. Va. 11, 50 S.E. 872 (1905); Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 41 S.E. 400 (1902); Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 19 S.E. 401 (1894); Hargreaves v. Kimberly, 26 W. Va. 787 (1885).

of confusion for litigants and trial judges,[284] producing anomalous results in a number of cases.[285]

In *Jarrett v. E.L. Harper & Son, Inc.*,[286] the court eliminated the classifications of temporary and permanent injury for purposes of measuring damages to real property. The court held that the damages would equal the cost of repair plus any expenses and loss of use or profits, but if repair were impossible or would exceed the property's market value, the owner could recover the decline in market value plus expenses and loss of use. The court said that it was overruling all previous cases that differentiated between temporary and permanent injuries with respect to the measure of damages for injury to real property.[287]

Jarrett did not, however, eliminate the distinction between temporary and permanent injuries to real property. The issue remains

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284. *See, e.g.*, McCabe v. City of Parkersburg, 138 W. Va. 830, 79 S.E.2d 87 (1953) (reversing verdict because of evidence and instructions on permanent damages when plaintiff was entitled only to temporary damages); Swick v. West Virginia Coal & Coke Co., 122 W. Va. 151, 7 S.E.2d 697 (1940) (reversing verdict because plaintiff was entitled to permanent damages but introduced only evidence of yearly damages); Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922) (reversing verdict on grounds that only temporary damages were proper despite parties' tacit agreement to try case upon theory of permanent damages). *See also* Konchesky v. S.J. Groves & Sons Co., 148 W. Va. 411, 135 S.E.2d 299 (1964); Riddle v. Baltimore & O. R. Co., 137 W. Va. 733, 73 S.E.2d 793 (1952); Manley v. Brown, 90 W. Va. 564, 111 S.E. 505 (1922); Covert v. Chesapeake & O. Ry. Co., 85 W. Va. 64, 100 S.E. 854 (1919).

285. Essentially the same type of damage might be compensated by permanent or temporary damages, depending upon whether the court focused on the character of the injury or the character of the nuisance itself. *Compare, e.g.*, Akers v. Ashland Oil & Refining Co., 139 W. Va. 682, 690, 80 S.E.2d 884, 888 (1954) ("primary consideration has been given to the character of the injury"; single instance of inundation with polluted water held to have caused permanent injury because decrease in fertility would continue indefinitely) *with* Jones v. Pennsylvania R.R., 138 W. Va. 191, 192 syl. pt.2, 75 S.E.2d 103, 104 syl. pt.2 (1953) ("The nature of damages to real estate, whether temporary or permanent, is determined by the character of the nuisance to which the land is subjected, and not the quantum of damage sustained thereby;" plaintiff entitled only to temporary damages for harm to foundation of dwellings and destruction of trees and shrubs because defendant later removed the obstruction that had diverted waters against plaintiffs' properties). Damages from a temporary structure could be permanent if its duration was indefinite, whereas damages from a permanent structure could be temporary if they occurred intermittently. *Compare, e.g.*, Severt v. Beckley Coals, Inc. 153 W. Va. 600, 170 S.E.2d 577 (1969) (although defendant estimated that all coal would be mined within two years, damages from dust and noise were permanent because the remaining period of operation "is of indefinite duration") *with* Oresta v. Romano Bros., 137 W. Va. 633, 73 S.E.2d 622 (1952) (plaintiff could only recover temporary damages because the landslides from the embankment of debris from defendant's strip mining operations were "occasional, intermittent and recurrent").

286. 160 W. Va. 399, 235 S.E.2d 362 (1977).

287. *Id.* at 403, 235 S.E.2d at 365.

important in applying the statute of limitations to nuisance disputes and in determining whether a former action is a bar to recovery. It also remains relevant to the determination of whether the plaintiff is entitled to damages for prospective as well as past injury to the property.

If a nuisance is characterized as temporary, the plaintiff can only recover damages sustained up to the time of suit.[288] The plaintiff may bring successive suits every two years for damages sustained in the intervening period.[289] A delay in bringing suit bars recovery of damages accruing more than two years prior to the date of the complaint, but it is not a bar to suit for future injuries.[290] The defense of res judicata applies only to damages sustained during the period covered by the previous lawsuit.[291]

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288. Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 451, 41 S.E. 400, 402 (1902); Eells v. Chesapeake & O. Ry., 49 W. Va. 65, 66 38 S.E. 479, 480 (1901); Henry v. Ohio River R.R., 40 W. Va. 234, 242-43, 21 S.E. 863, 866 (1895); Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 207, 19 S.E. 521, 525 (1894); Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 278, 19 S.E. 401, 403 (1894).

289. The statute of limitations for damage to real property is two years. W. VA. CODE § 55-2-12 (1981 repl. vol). *See* Handley v. Town of Shinnston, 169 W. Va. 617, 619, 289 S.E.2d 201 (1982).

For an example of successive suits for temporary damages subject to a five-year statute of limitations, see Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 41 S.E. 400 (1902) (reversing award to plaintiff because instruction may have misled jury to award permanent damages); Pickens v. Coal River Boom & Timber Co., 58 W. Va. 11, 50 S.E. 872 (1905) (affirming verdict for damages for period 1894-1899); Pickens v. Coal River Boom & Timber Co., 66 W. Va. 10, 65 S.E. 865 (1909) (affirming verdict for damages for period 1899-1904). On the third appeal, Judge Williams wrote a lengthy dissent, asserting that the injuries were continuous and permanent and should have been barred by plaintiff's failure to sue within five years after the first injury to the mill in 1893.

The court's reversal of an award of permanent damages to the plaintiffs in Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922), created a precedent for numerous damage actions against the defendant by landowners in the vicinity of its smelter, which had commenced operations in 1911. Plaintiffs in a related action had filed suit in 1919, and on March 29, 1924 they obtained a judgment for temporary damages for the period 1914 to 1919; three weeks later, they instituted a second action seeking temporary damages for the period 1919 to 1924. Lyon v. Grasselli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928).

290. *See* Eells v. Chesapeake & O. Ry., 49 W. Va. 65, 38 S.E. 479 (1901), in which the court rejected the defendant's statute of limitations defense with respect to a suit in 1898 for recent damages caused by a railroad bridge erected in 1870. The defendant's bridge diverted the course of a river, causing erosion of the plaintiff's land. Because the damage occurred intermittently, the court characterized the damages as temporary and held that the plaintiff "could sue at any time for the injury as it occurred at intervals" *Id.* at 66, 38 S.E. at 480.

291. Principles of collateral estoppel may, however, preclude relitigation of issues actually decided in an earlier action.

If a nuisance is characterized as permanent, the statute of limitations begins to run from the date the plaintiff or any predecessor first could have brought suit, and the plaintiff must recover all damages, both past and future, in a single lawsuit.[292] Thus, if suit is not brought within two years after the cause of action accrues for a permanent nuisance, the plaintiff is forever barred from recovery.[293] Once a landowner has recovered damages for a permanent nuisance, the defendant can raise the defense of res judicata in an action by the plaintiff or subsequent owners of the plaintiff's property.[294]

Because an award of damages for a permanent nuisance essentially confers on the defendant a license to continue the activity,[295] the court has been reluctant to find that nuisance damages were permanent. In *McCabe v. City of Parkersburg*,[296] the court said: "In all cases of doubt respecting the permanency of the injury inflicted by a nuisance, the courts are inclined to favor the right to bring successive actions."[297] The determination that a nuisance was temporary is premised on the supposition that a defendant would remove or abate the nuisance rather than compensate the entire damage.[298] The court at times elevates this supposition into a legal presumption, holding that if a structure causes a nuisance, the law cannot regard it as permanent and must presume that it is tem-

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292. Eells v. Chesapeake & O. Ry., 49 W. Va. 65, 66, 38 S.E. 479, 480 (1901); Henry v. Ohio River R., 40 W. Va. 234, 242, 21 S.E. 863, 866 (1895); Smith v. Point Pleasant & Ohio River R.R., 23 W. Va. 451, 453 (1884).

293. No West Virginia cases have applied the statute of limitations as a bar to an action against a permanent nuisance, but this is largely because the courts have characterized nuisances as temporary in order to avoid the bar of the statute. *See* the cases cited *supra* notes 288-89.

294. Kirk v. Norfolk & W. Ry., 119 W. Va. 622, 196 S.E. 501 (1938) (plaintiff's action barred by res judicata because action by predecessor in title was characterized as claim for permanent damages).

295. Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 451, 41 S.E. 400, 402 (1902); Watts v. Norfolk & W.R. Co., 39 W. Va. 196, 207, 19 S.E. 521, 525 (1894); Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 278, 19 S.E. 401, 403 (1894); Miller v. Shenandoah Pulp Co., 38 W. Va. 558, 567, 18 S.E. 740, 743 (1893); Hargreaves v. Kimberly, 26 W. Va. 787, 788, 799 (1885).

296. 138 W. Va. 830, 79 S.E. 87 (1953).

297. *Id.* at 839, 79 S.E.2d at 93, (quoting 14 MICHIE JUR., *Nuisances* § 43 (1989 repl. vol.)).

298. Hargreaves v. Kimberly, 26 W. Va. 787, 788 syl. pt.9, 799 (1885). The failure of the defendant to abate a temporary nuisance can result in an assessment of punitive damages in subsequent litigation. Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 452, 41 S.E. 400, 403 (1902).

porary, regardless of the intention with which it was erected.[299] The presumption that a nuisance is temporary has protected plaintiffs from the statute of limitations defense. For a temporary nuisance, the expiration of the two-year statute of limitations is a bar only to recovery of damages occurring more than two years prior to suit, whereas for a permanent nuisance it would be a total bar.

Although the statute of limitations will never constitute a complete defense with respect to a temporary nuisance, the *Restatement* recognizes that prescriptive rights in the nature of an easement can arise from the continuous infliction of nuisance damages.[300] In West Virginia, a defendant may acquire a right to continue a private nuisance by prescription,[301] but acquisition of prescriptive rights requires

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299. Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 450-51, 115 S.E. 451, 453 (1922); Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 278-79 syl. pt.3, 19 S.E. 401, 403-04 syl. pt.3 (1894). The court in *Bartlett* held that the damages inflicted by a large zinc smelting plant were temporary, despite the tacit agreement of the parties to try the case on the theory of permanent damages, because the defendant might abate the nuisance either voluntarily or by judicial process. 92 W. Va. at 456, 115 S.E. at 455. *See also* McHenry v. City of Parkersburg, 66 W. Va. 533, 66 S.E. 750 (1909) (holding that plaintiff could recover only temporary damages for flooding caused by sewer system because City might remove or abate the problem).

As the court explained in *Bartlett*: "To make the cause of the injury permanent in the legal sense of the term, there must be legal right to maintain it in force or operation." 92 W. Va. at 451, 115 S.E. at 453. The court is therefore more likely to find that damages are permanent when they are inflicted by the activities of municipalities or other public or quasi public corporations. *See, e.g.*, Keene v. City of Huntington, 79 W. Va. 713, 725, 92 S.E. 119, 124 (1917). *But see* McHenry v. City of Parkersburg, 66 W. Va. 533, 66 S.E. 750 (1909).

300. RESTATEMENT (SECOND) OF TORTS § 899 comment d (1977). On the other hand, the *Restatement* provides than one cannot acquire a prescriptive right to maintain a *public* nuisance: "One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations and laches do not run against the public right, even when the action is brought by a private person for particular harm." *Id.* § 821C comment 3.

301. Koch v. Eastern Gas and Fuel Associates, 142 W. Va. 386, 402-03, 95 S.E.2d 822, 831-32 (1956); Eells v. Chesapeake & O. Ry., 49 W. Va. 65, 68, 38 S.E. 479, 480-81 (1901). *But see* Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1266-67 (N.D. W. Va. 1982), denying a motion for summary judgment asserting a prescriptive easement to pollute the plaintiff's land with fumes from its coke works, in part because of Judge Haden's belief that the West Virginia Supreme Court of Appeals would not allow a prescriptive easement in a nuisance case. Judge Haden relied on the Court's opinion in Sticklen v. Kittle, 168 W. Va. 147, 287 S.E.2d 148 (1981), which held that an airport could not acquire an easement of "aviation" by prescription based upon continuous overflights. *Sticklen* is entirely distinguishable, however, resting on the unique attributes of an easement of aviation. The court cited decisions from other jurisdictions which had denied such easements because airplane overflights were essentially nonhostile, and it noted that "[v]arious practical problems would make such a prescriptive easement difficult to define." 168 W. Va. at 160, 287 S.E.2d at 155. Moreover, insofar as the Airport Authority was attempting to enjoin the construction of a high school, its asserted easement of aviation was essentially a "negative easement," like an easement for light

ten years of continuous adverse use without any protest by the plaintiff.[302] If the damage is intermittent rather than continuous, the defendant may never be able to acquire a prescriptive right, regardless of how long the source of the nuisance remains in existence.

The characterization of a nuisance as temporary or permanent also affects the quantum of damages recoverable by the plaintiff. Although *Jarrett* adopted a comprehensive rule for *measuring* damages, it did not discuss the *time period* to which this measure would be applied. *Jarrett* involved a discrete incident that damaged a well, which was subsequently repaired. There was no claim for future damages, and the court in *Jarrett* did not consider how the measure of damages would apply to ongoing activities that would result in future damages.

The determination of whether a nuisance is permanent or temporary raises difficult questions of fairness and of public policy. If the nuisance is deemed to be permanent, an award of permanent damages leaves the defendant with no incentive to abate the nuisance or reduce the damages it inflicts on the neighbors. The award may also prove to be inadequate if it turns out that the damages from a nuisance were more severe than could be determined when the initial suit was brought.[303] On the other hand, treating a nuisance

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and air or an easement of support, and the American rule is that negative easements cannot be acquired by prescription. *See* J. DUKEMINIER & J. KRIER, PROPERTY 874 (2d ed. 1988); Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982); Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) *cert. denied* 117 So. 2d 842 (Fla. 1960); Maioriello v. Arlotta, 364 Pa. 556, 73 A.2d 374 (1950). There is nothing in the *Sticklen* opinion that questions the availability of prescriptive easements in general or that would cast substantial doubt on their availability with respect to a private nuisance. Consequently, it seems fairly certain that the West Virginia court would recognize the possibility of acquiring a prescriptive easement to maintain a private nuisance, provided that the defendant could establish all of the requisite elements. On the other hand, West Virginia is likely to follow the *Restatement* and hold that prescriptive rights cannot be obtained with respect to a public nuisance.

302. Eells v. Chesapeake & O. Ry., 49 W. Va. 65, 66-67, 38 S.E. 479, 480-81 (1901). Because prescriptive rights are based on the fiction of a lost grant, a protest by the plaintiff during the ten-year period will preclude establishment of a prescriptive right to continue the nuisance. *Id.* at 67-68, 38 S.E. at 480-81. As the law now stands, a landowner can prevent the defendant from acquiring a prescriptive right either by making a verbal protest (thereby destroying acquiescence) or by giving verbal permission (thereby destroying adversity, although creating the possibility of estoppel by virtue of reliance).

303. After an initial award of permanent damages, the plaintiffs may recover additional damages only if they can demonstrate that the nature or extent of the defendant's activity had changed subsequent to the first lawsuit.

as temporary subjects both the defendant and the plaintiff or plaintiffs to the cost and uncertainty of a series of lawsuits, and the defendant would face the possibility that an injunction could be granted at any time in the future. The burden of successive lawsuits is more serious today than it was at the turn of the century, because the applicable statute of limitations has been shortened from five years to two.

Although the decision in *Jarrett* eliminated the distinction between temporary and permanent injury with respect to the measure of damages, it shed little light on the distinction between temporary and permanent nuisance for purposes of applying the defenses of the statute of limitations and res judicata, nor did it address the recoverability of prospective damages.[304] *Jarrett* does, however, signal the court's willingness to examine these issues afresh and to reject an established line of cases in favor of a more appropriate rule. In view of the importance of these issues, such a reexamination is certainly in order.

The analysis should begin with a reconsideration of the supposed distinction between permanent and temporary nuisances, for it appears that this terminology may itself be a source of confusion. In the past, temporary damages have been awarded for injuries caused by a permanent structure, while permanent damages have been awarded for injuries caused by a temporary problem or condition. Ultimately, the issue is not whether the structure or the damages are permanent or temporary, but whether the damages awarded should be prospective as well as retrospective.

In answering this question, it may prove helpful to abandon the twofold categorization of permanent and temporary nuisances in favor of a more functional analysis that considers *both* the nature of the offending activity and the nature of the damages it causes.

304. The decision in Jarrett v. E.L. Harper, 160 W. Va. 399, 235 S.E.2d 362 (1977), may even increase the parties' uncertainty. In the past, the trial judge was required to categorize the nuisance as permanent or temporary in order to instruct the jury as to the measure of damages. Now that *Jarrett* has mandated a comprehensive rule for the measurement of damages, the judge may not recognize the necessity of determining whether the nuisance is temporary or permanent, and the parties may be left uncertain of their status with respect to future lawsuits.

A more fruitful approach may distinguish among three categories of injuries: (1) discrete, (2) continuous, and (3) intermittent.

"Discrete" injuries are those that result from an isolated act or event and will not be affected by the defendant's future activity. Examples would include injuries to land from an oil spill or an explosion on the defendant's property. "Continuous" injuries are associated with a defendant's ongoing activity that generates a relatively constant level of interference because of the resulting smoke, fumes, or noise. "Intermittent" injuries are damages that recur periodically as a result of a defendant's structure or activity, such as flooding or erosion that occur only in conjunction with heavy storms. Intermittent injuries partake of elements of both discrete and continuous injuries, and there is not necessarily a clear line dividing continuous from intermittent injuries. For example, if landslides from an embankment of strip mining debris occurred with virtually every heavy rainfall, they might be characterized as continuous, whereas if they occurred less often than once a year, they could be characterized as intermittent, and each incident could be treated as a discrete injury.

Where injuries are discrete, the plaintiff is limited to a single lawsuit in which all damages, both past and prospective, must be recovered, and there is no possibility of successive lawsuits. The two year statute of limitations would apply to any action for discrete damages, and there should be no confusion concerning the defense of res judicata.

Where injuries are continuous, the court generally has limited the plaintiff to recovery of past damages under the assumption that the defendant might abate the activity in the future. Such an absolute presumption is unfair and inefficient. Instead, the plaintiff generally should have the option to elect to sue for prospective as well as past damage. So long as there is evidence that the defendant's activity will inflict approximately the same level of damages for the indefinite future, the plaintiff should not be required to bear the cost of repeated lawsuits against a continuous nuisance. The mere possibility that the defendant might abate the activity in the future does not warrant any limitation on the plaintiff's right to recover prospective damages. Only if the defendant voluntarily agreed to a schedule of

abatement should the court restrict the plaintiff's recovery of prospective damages.

On the other hand, there are good reasons why a plaintiff might elect to claim only past damages and forego a claim for prospective damages. Prospective damages may be difficult to ascertain, and a small recovery of such damages in one lawsuit ordinarily would foreclose any subsequent damage claims. In any future lawsuit, the plaintiff would have the burden of demonstrating that the damages for which recovery was sought were the result of a change in the nature or extent of the defendant's activity that constituted a separate wrong, not addressed in the original lawsuit.

The plaintiff should have the option either to seek a single recovery of past and future damages or to bring a succession of suits for past damages. The *Restatement* would allow the plaintiff such an election with respect to damages for past and future invasions. In Section 930, entitled "Damages for Future Invasions," the *Restatement* provides that whenever a plaintiff's property is subjected to "continuing or recurrent tortious invasions" and "it appears that the invasions will continue indefinitely," the plaintiff "may at his election recover damages for the future invasions in the same action as that for the past invasions."[305] The plaintiff has the burden of pleading and proving the enduring character of the wrong, but the election to recover prospective damages need not be made until trial.[306]

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305. RESTATEMENT (SECOND) OF TORTS § 930 (1977):
DAMAGES FOR FUTURE INVASIONS
(1) If one causes continuing or recurrent tortious invasions on the land of another by the maintenance of a structure or acts or operations not on the land of the other and it appears that the invasions will continue indefinitely, the other may at his election recover damages for the future invasions in the same action as that for the past invasions.
(2) If the future invasions would not be enjoined because the defendant's enterprise is affected with a public interest, the court in its discretion may rule that the plaintiff must recover for both past and future invasions in a single action.
(3) The damages for past and prospective invasions of land include compensation for
(a) the harm caused by invasions prior to the time when the injurious situation became complete and comparatively enduring, and
(b) either the decrease in the value of the land caused by the prospect of the continuance of the invasion measured at the time when the injurious situation became complete and comparatively enduring, or the reasonable cost to the plaintiff of avoiding future invasions.

306. *Id.* comment b.

Regardless of the plaintiff's election, the defendant would not be prejudiced. If the defendant intended to abate the nuisance in the future but feared a large recovery of prospective damages based on an extrapolation from current levels of damage, the defendant could agree to a schedule of abatement in order to minimize the recovery of future damages. Conversely, if the defendant intended to continue or expand its activities in the future and was concerned about the prospect of a succession of damage actions or a future injunction, it could purchase a servitude from the plaintiff that would give the defendant a perpetual right to impose certain damages on the plaintiff's property.[307]

The foregoing considerations apply to intermittent injuries as well as to continuous injuries, and here, too, the plaintiff should retain the option of suing for prospective as well as past damages. Even though injuries occur intermittently and sporadically, the impact of these future injuries often are ascertainable insofar as they create a definite reduction in the market value of the property.[308] A plaintiff who chose to recover prospective damages for recurring future injuries should not be permitted to complain, however, if the injuries proved to be more frequent or more severe than were anticipated, provided that the defendant's activity remained the same. Because of the uncertainty and risk associated with recovery of prospective damages for recurring or intermittent injuries, in most cases plaintiffs probably would elect to sue only for past damages.[309] Nevertheless, there is no reason why the plaintiff in an appropriate case

307. According to the "Coase Theorem," the parties can be expected to negotiate an efficient solution to any nuisance dispute in the absence of "transaction costs" that would impede the bargaining process. See Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, *supra* note 104, at 785-88. By placing all of the damages from the defendant's activity at issue in a single lawsuit, instead of requiring a succession of lawsuits, the current proposal would eliminate à substantial source of transaction costs that currently impose an obstacle to negotiations.

308. For example, an expert probably could estimate the dollar amount of the reduction in property value resulting from a risk of occasional flooding. Even though amount of actual damage from such incidents would be entirely speculative, the current market value of the property would reflect the nature and extent of the expected damages and would accurately measure the value of the plaintiff's loss.

309. Although the plaintiff elected to sue only for past damages, the *Restatement* provides the court with discretion to require recovery of past and future damages in a single action whenever future invasions would not be enjoined because the defendant's activity was "affected with a public interest." RESTATEMENT (SECOND) OF TORTS § 930(2) (1977) (quoted in full *supra* at note 305).

should be foreclosed from recovering all of the damages in a single lawsuit.

While plaintiffs should be given the option of suing for prospective damages from continuous or intermittent nuisances, in applying the statute of limitations, the courts should presume that the plaintiff would have elected to sue only for past damages. The two-year statute of limitations would therefore be a bar only to damages occurring more than two years prior to suit. In order for the defendant to acquire a prescriptive right to continue an offending activity, the nuisance would have to exist continuously and adversely for ten years. Even if a nuisance might be deemed "permanent," the expiration of the two-year statute of limitations should not bar a suit for damages accruing in the future. Regardless of how permanent the structure or activity that gave rise to the nuisance, it would be entirely unfair to allow the defendant to acquire a perpetual right to inflict damages on a property simply by virtue of a two-year delay by the owner in bringing suit.

By giving nuisance plaintiffs the option of seeking recovery of prospective damages, the courts should rarely ever have to decide whether a nuisance is temporary or permanent. Regardless of whether the nuisance might in the past have been characterized as permanent, in applying the defenses of the statute of limitations and res judicata, the courts may presume that the plaintiff only would have sought recovery of retrospective damages.[310] Whenever the plaintiff sought recovery of prospective damages, the court's consideration would be limited to the functional questions of whether the invasions were likely to continue indefinitely and whether the damages were reasonably ascertainable, without the need to characterize the nuisance as temporary or permanent.

D. "Coming to the Nuisance" and Other Defenses Based on Temporal Priority

One of the most controversial issues in nuisance law is the extent to which the defendant can assert his temporal priority as a defense

310. In applying the bar of res judicata, the courts should presume that the plaintiff recovered only past damages unless the pleadings and jury instructions from the initial lawsuit clearly indicated that prospective damages had been sought. *Compare* Kirk v. Norfolk & W. Ry., 119 W. Va. 622, 196 S.E. 501 (1938).

against a plaintiff who "comes to the nuisance." As described in the previous section, a defendant eventually can acquire prescriptive rights with respect to neighboring land through continuous adverse use, in effect obtaining an easement to inflict damage on the servient properties. Even if not enough time has passed to give rise to such a prescriptive right, a defendant who established an offensive activity at an earlier date may claim that his rights are superior to those of a plaintiff who subsequently acquired nearby land or commenced a new activity on land in proximity to the defendant. Defendants have asserted claims of temporal priority under a variety of labels, including "coming to the nuisance," assumption of risk, and contributory negligence. The uncertain application of these alternative doctrines has produced arbitrary results that fail to achieve either of the twin goals of nuisance law: justice between the particular parties and efficiency in the allocation of economic resources.

1. Doctrines Associated with Claims of Temporal Priority

Although defendants often have asserted that the plaintiff came to the nuisance, this defense has rarely been accepted by the courts. The coming to the nuisance defense has been expressly rejected in England and in a majority of American jurisdictions.[311] The *Restatement* has taken the position that coming to the nuisance is not an absolute defense but that it is a relevant factor in the evaluation of the "reasonableness" of the harm inflicted on the plaintiff by an intentional nuisance.[312]

Considerations of temporal priority are also reflected in one of the central elements in the *Restatement's* balance of utilities test: the suitability of the conduct to the locality.[313] Evaluation of the suitability of each party's activity to the locality does not depend on which *party* was first in time, but rather on which *activity* was

311. *See* Annotation, *Coming to Nuisance as a Defense or Estoppel*, 42 A.L.R.3d 344 (1972).

312. RESTATEMENT (SECOND) OF TORTS § 840D (1977): "The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable."

313. RESTATEMENT (SECOND) OF TORTS §§ 827(d), 828(b), 831 (1977).

first in time.[314] Nevertheless, insofar as the very presence of the defendant's activity may be an important factor in determining the area's essential character, a factfinder is more likely to conclude that the locality was suitable for the defendant's activity whenever the plaintiff arrived after the defendant had already commenced operations. Thus, although coming to the nuisance is not recognized as an absolute defense, temporal priority may be an important factor in the determination of nuisance liability.

A defendant may also assert a claim of temporal priority under the rubric of the assumption of risk defense. The *Restatement* takes the position that assumption of risk can be an absolute defense to a nuisance claim to the same extent as in any other tort action.[315] Because a plaintiff usually has other reasonable alternatives, the acquisition or improvement of land in proximity to a nuisance ordinarily would be considered a voluntary act, potentially triggering the assumption of risk defense.[316] Assumption of risk may be a defense to nuisance actions based on negligence or strict liability, but it is not a defense to an intentional nuisance.[317]

A plaintiff who acquired or improved land adjacent to a nuisance might also be deemed contributorily negligent. According to the *Restatement*, principles of contributory negligence are fully applicable to nuisance claims based on the negligent conduct of the defendant, but not to claims based on intentional nuisance or strict liability.[318] Although contributory negligence formerly constituted an absolute defense, most states now apply principles of comparative negligence

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314. For example, if the area is characterized as primarily residential, it may not matter that the individual plaintiff arrived after the defendant had commenced operations.

315. RESTATEMENT (SECOND) OF TORTS § 840C (1977).

316. *See* RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965). The defense has been applied, for example, against plaintiffs who purchased land in proximity to existing coal refuse piles. Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Steele v. Rail & River Coal Co., 42 Ohio App. 228, 182 N.E. 552 (1927).

317. RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965) (negligence). *Id.* § 523 (1977) (strict liability). Although assumption of risk is not a defense to an intentional nuisance, the defense of "consent" may apply. *Id.* §§ 892 & 892A (1977).

318. RESTATEMENT (SECOND) OF TORTS §§ 481 & 484 (1963) and RESTATEMENT (SECOND) OF TORTS § 840B (1977). *See* Lewin, *Comparative Nuisance*, *supra* note 98 at 1076-88.

and reduce the award of damages in proportion to the plaintiff's negligence.[319]

The availability of these various defenses in nuisance actions thus is heavily dependent upon whether the nuisance is characterized as one arising from negligence, recklessness, strict liability, or intentional conduct. Most nuisances are intentional in the sense that the defendant intentionally engages in the offensive activity with knowledge that it is substantially certain to interfere with the use and enjoyment of nearby land.[320] Therefore, in most cases temporal priority is simply an important factor in the overall determination of reasonableness but cannot provide an absolute defense. The absolute defense of assumption of risk may be available if the nuisance arises from negligence, recklessness, or strict liability. If the nuisance arises from negligence, a claim of temporal priority can result in apportionment under the rule of comparative negligence.

2. West Virginia's Response to Claims of Temporal Priority

Despite the large volume of nuisance litigation in West Virginia, surprisingly few defendants have raised defenses based on temporal priority. To a great extent, this door was closed by the 1904 decision in *Richards v. Ohio River R.R.*,[321] which held that coming to the nuisance was not a defense to an action by a plaintiff who had purchased a dwelling adjacent to a railroad embankment and suffered flooding damages because of an inadequate culvert that existed at the time of plaintiff's purchase. The court said that the railroad had a duty to install a proper culvert, and it declared:

> [The plaintiff] had right to assume that the duty would be performed, and was not in any way bound to refrain from buying a residence there because the railroad was already there. If one comes to a nuisance, that does not debar him in legal proceedings for harm from it, or to restrain it.[322]

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319. *See* Lewin, *Comparative Negligence in West Virginia: Beyond* Bradley *to Pure Comparative Fault*, 89 W. VA. L. REV. 1039 (1987) (hereinafter *Pure Comparative Fault*).

320. RESTATEMENT (SECOND) OF TORTS § 825 (1977). For the proposition that most nuisances are intentional, *see* Lewin, *Comparative Nuisance*, *supra* note 98, at 1084 n.305.

321. 56 W. Va. 592, 49 S.E. 385 (1904).

322. *Id.* at 593, 49 S.E. at 386 (citations omitted).

The court's discussion of the issue was arguably dictum, since the defendant had "merely mentioned" the point without relying upon it as a defense. Nevertheless, the issue was reflected in both points of the court's syllabus.[323]

Subsequent to the decision in *Richards*, the court has never discussed the coming to the nuisance defense in a private nuisance action. In *Koch v. Eastern Gas & Fuel Associates*,[324] the court said that the defense was inapplicable because the case was pleaded as an action for continuing trespasses rather than for nuisance. By negative implication, the opinion suggested that the defense might have been available in a nuisance action. Nevertheless, in a federal diversity action applying West Virginia law, Judge Haden held that the defense could not be asserted against plaintiffs who acquired residences in proximity to the defendant's existing coke works.[325]

Although the West Virginia Supreme Court of Appeals has rejected the coming to the nuisance defense, it probably would allow the assumption of risk defense against a nuisance claim, but only as to damages accruing prior to the plaintiff's purchase of the property. In *Koch*, the court held that assumption of risk provided a partial defense in a trespass action that could have been pleaded as an action for private nuisance. The plaintiffs had purchased property in the vicinity of the defendants' gob pile and sought recovery of damages for "continuing trespasses" resulting from fires allegedly caused by defendants' negligence. The trial court sustained a demurrer to defendants' plea of assumption of risk. The supreme court reversed in part, holding that the assumption of risk defense barred recovery of damages sustained prior to the plaintiffs' arrival but did not bar recovery of damages accruing after the plaintiffs moved onto their property.[326] Presumably, the court would apply the same dis-

323. *Id.* at 592, syl. pts. 1 & 2, 49 S.E. at 385, syl. pts. 1 & 2.

324. 142 W. Va. 386, 95 S.E.2d 822 (1956).

325. Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267-68 (N.D. W. Va. 1982). In denying a motion for summary judgment, Judge Haden wrote: "[t]he Court believes West Virginia would follow the majority view, and *Richards* in disallowing this anachronistic doctrine to serve as a defense in nuisance cases." *Id.* at 1268. Judge Haden cited the RESTATEMENT (SECOND) OF TORTS § 840D (1977), and his opinion did not necessarily rule out the possibility of considering priority in time as a factor in determining whether the defendant's conduct constituted a nuisance. *Id.* at 1267.

326. 142 W. Va. at 390, 95 S.E.2d at 825.

tinction in a nuisance action,[327] allowing an assumption of risk defense as to past damages but not as to prospective damages.[328]

It is not clear how the court would respond to the assertion of an assumption of risk defense in an action for a "permanent" nuisance. Regardless of whether the nuisance was temporary or permanent, it would be unfair to allow the defendant to acquire a perpetual right to inflict damages on adjacent properties simply by being first-in-time. It takes a full ten years for a defendant to acquire prescriptive rights. If the plaintiff acquired property in the vicinity of a nuisance within that ten-year period, the assumption of risk defense should not be a bar to recovery of future damages. At most it should prevent the plaintiff from buying damaged land at a discount and then suing the defendant for damage done in the two years before the plaintiff's purchase.

The court could reach an appropriate result by applying a presumption that all nuisances are temporary, as was advocated above with respect to the statute of limitations. The permanent character of the nuisance would not give rise to any greater rights on the part of the defendant. Regardless of the nature of the nuisance, the assumption of risk defense would apply only to damages accruing prior to the plaintiff's purchase.

It is not clear whether the court would apply the assumption of risk defense as a bar to recovery of damages by a plaintiff who *improved* land that was subject to interference by an adjacent activity. *Koch* held that assumption of risk did not bar a purchaser's recovery of future damages, but it did not address the question of

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327. Although the court in *Koch* expressly limited its holding to suits for recovery of temporary damages from continuing trespasses, as opposed to temporary damages from a private nuisance, there is no apparent reason why the scope of the assumption of risk defense should differ between trespass actions and nuisance actions.

328. Insofar as it applies only to past damages, the assumption of risk defense arguably is superfluous. Applying traditional principles for assessment of damages, the court in *Koch* could have reached the same result without employing the assumption of risk defense. Any past damages to the land presumably were reflected in the purchase price, and the plaintiffs should have acquired it at a discount commensurate with the extent of those damages. (The seller would retain the right to sue the defendant for damages in the period prior to suit). The plaintiffs would take the land as they found it and could only recover damages for additional injuries inflicted subsequent to the purchase.

improvements made with knowledge of an existing nuisance.[329] *Pickens v. Coal River Boom & Timber Co.*[330] suggests that assumption of risk would not apply to improvers of land affected by a nuisance. In *Pickens*, the court held that the plaintiff could not recover for the cost of partly constructed improvements that were abandoned in the face of the defendant's nuisance. The court declared that the plaintiff "should proceed with his improvements and make the nuisancer pay for the rental thereof until the nuisance is abated."[331] *Pickens* involved a nuisance that was characterized as temporary, however, and the opinion assumed an eventual right on the part of the plaintiff to obtain abatement of the nuisance. The court's rationale would not apply if the nuisance were permanent and not subject to abatement.

The court has held that a plaintiff has no duty to undertake additional effort or care to protect against or *reduce* injuries for which only temporary damages are recoverable,[332] but in two early cases it applied the doctrine of "mitigation of damages" to conduct of the plaintiff that *increased* the amount of injury from a nuisance.[333] The doctrine of mitigation of damages ought to bar recovery for improvements made to property that was already subject to interference by an existing nuisance, unless the plaintiff sought abatement of the nuisance in conjunction with the claim for damage to the improvements. If injunctive relief was not sought or obviously

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329. 142 W. Va. at 400, 95 S.E.2d at 830.

330. 51 W. Va. 445, 41 S.E. 400 (1902).

331. *Id.* at 453, 41 S.E. at 403. The court also said: "He has the right to have the nuisance abated by repeated actions and if he fails to assert this right he cannot make the nuisancer liable in addition to the rental of the property for the costs of improvements unnecessarily abandoned by him." *Id.*

332. Oresta v. Romano Bros., 137 W. Va. 633, 650, 73 S.E.2d 622, 632 (1952). By negative implication, the opinion suggested that there may be a duty to undertake costly precautions to protect against a permanent nuisance. The question of whether a plaintiff should have an affirmative duty to protect against nuisance damages is discussed at length in Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25, 35-38 (1989).

333. Hargreaves v. Kimberly, 26 W. Va. 787, 799-800 (1885) (defendant could have pleaded "in mitigation of damages, that the damages alleged by the plaintiff are caused in part by his wrongful act"); Knight v. Brown, 25 W. Va. 808, 812 (1885) (plaintiff's denuding of banks of stream was not available as setoff and was not contributory negligence but "so far as it may have operated to aggravate the injury, may be proved in diminution of the damages claimed by him"); *cf.* Hurxthal v. Boom Co., 53 W. Va. 87, 44 S.E. 520 (1903) (mitigation of damages applied with respect to damages arising from breach of a contract to keep mill race free of debris).

would not have been available, the plaintiff should not be permitted to recover damages for injury to pointless improvements.

With regard to the defense of contributory negligence in nuisance cases, the court again has rarely discussed the issue. In one early case, the court said that the plaintiff's wrongful act did not raise a contributory negligence defense, but only the defense of mitigation of damages.[334] In that case, defendant was strictly liable for the plaintiff's damages, so a contributory negligence defense would not have been appropriate. In an action for personal injuries resulting from a public nuisance,[335] the court has held that contributory negligence would not constitute a defense unless the plaintiff's negligence was "the proximate cause of the injury."[336] More recently, the court recognized that contributory negligence did constitute a proper defense to an action alleging negligence by the defendant in the location and maintenance of a service pipe that obstructed the flow of a stream.[337]

When it adopted the rule of comparative negligence, the court said that it would be a defense only in actions based on negligence, and not those based on reckless or intentional misconduct.[338] Thus, the court is likely to apply the partial defense of comparative negligence only in nuisance actions arising from negligence.[339] The all-or-nothing assumption of risk defense may be allowed in nuisance actions arising either from negligence or from abnormally dangerous

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334. Knight v. Brown, 25 W. Va. 808, 812 (1885).

335. Baker v. City of Wheeling, 117 W. Va. 362, 185 S.E. 842 (1936).

336. *Id.* at 363, 185 S.E. at 844. The court stated: "In an action sounding in nuisance, the ordinary conception of contributory negligence does not obtain. A defendant who creates a nuisance will be absolved from liability for an injury chargeable thereto, only when it appears that the negligent conduct of the plaintiff was the proximate cause of the injury." *Id.*

337. Thrasher v. Amere Gas Utilities Co., 138 W. Va. 166, 75 S.E.2d 376 (1953).

338. Bradley v. Appalachian Power Co., 163 W. Va. 332, 335-36, 345-46, 256 S.E.2d 879, 882, 887 (1979). I have advocated the extension of comparative fault principles to all tort actions, including those based on aggravated or intentional misconduct or strict liability. *See* Lewin, *Pure Comparative Fault, supra* note 319, at 1077-84.

339. Despite the dictum in *Bradley* noting that contributory negligence was not recognized as a defense in strict liability actions under the doctrine of *Rylands v. Fletcher*, it is possible that the court will apply the rule of comparative negligence in nuisance actions based on strict liability for abnormally dangerous activities. The court already has held that comparative negligence may be raised as a defense in products liability claims governed by rules of strict liability. Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

activities, but only as to past damages. Most nuisances are intentional, and in these cases temporal priority would not provide a defense but would simply be a factor in the overall evaluation of reasonableness.

3. An Alternative Approach: Comparative Nuisance

The West Virginia Supreme Court of Appeals has recently indicated its willingness to rethink fundamental assumptions and undertake a modern approach to nuisance law. In the area of nuisance defenses, there is so little precedent in West Virginia that the principle of *stare decisis* should not present a substantial barrier to a fresh consideration of these issues.

The question of priority of use is relevant to virtually all nuisance disputes. In very few cases do the plaintiff and the defendant commence their incompatible activities at the same time. For each nuisance dispute it should be possible to identify a "first user" and a "second user." Regardless of whether the plaintiff or defendant is the first user, considerations of both justice and economic efficiency tend to favor the rights of the first user, but at the same time these considerations do not justify an absolute right based on priority of use.

An important aspect of justice is the protection of the parties' legitimate expectations. The principle of "first in time, first in right" is not an absolute, but it certainly expresses a broadly-shared feeling that claims of right arise from temporal priority. A party who commenced an activity without apparent conflict would usually have a reasonable basis for expecting to be able to continue to engage in that activity. A first user would experience substantial disappointment if these settled expectations were disrupted by a second user who inflicted damages on the first user or demanded that the first user cease engaging in the activity because of potential harm to the second user. On the other hand, if the first user should have anticipated the existence of a potential conflict with the uses of neighboring land, it would be unfair to allow a first user to preempt all second users by commencing an activity that was particularly sensitive or obnoxious.

There are sound economic reasons for according some measure of protection to first users and imposing most, but not all, of the responsibility of nuisance conflicts on the second user.[340] The second user usually is the "least-cost-avoider" of the conflict. The first user has already incurred the cost of selecting a location and commencing operations, whereas the second user has not yet incurred these costs and in most cases could select another location. The second user is also in a better position to obtain the information necessary to evaluate the possibility of incompatible uses and to take appropriate precautions.[341]

Although the second user may be the least-cost-avoider of the dispute, it nevertheless could be more efficient for the second user to commence operations in proximity to the first user if the particular value of that location to the second user exceeded the nuisance costs that would be generated by the ensuing conflict. Even in these situations, considerations of efficiency dictate that a greater share of the nuisance costs be borne by the second user. The second user is in a better position to evaluate the relative costs and benefits, so imposition of the cost of the conflict on the second user should deter that person from initiating inefficient nuisance conflicts. Affording protection to first users also would give them an incentive to develop their land without insecurity about future nuisance conflicts. The commentators therefore generally favor rules that protect first users, whether they be plaintiffs or defendants.[342]

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340. *See generally*, Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557 (1980).

341. Second users already know their own intended use and can easily ascertain the identity of all property owners in the area and inquire about their actual or intended uses. They can then either avoid potential conflicts by locating elsewhere or else negotiate an amicable resolution of the potential conflict through the purchase or sale of an appropriate servitude. First users, on the other hand, cannot learn the identities of potential second users who have not yet purchased property in the vicinity, and they would have no feasible means of anticipating all of the potential conflicting uses of adjacent property. It would not be economical for a potential first user to purchase servitudes from all neighboring landowners, especially if he believed that the location was more suitable for his intended use than for most of the anticipated conflicting uses. In the absence of protection based on temporal priority, first users would be subject to the risk of extortion by neighbors or others who threatened to commence potentially sensitive or offensive activities on adjacent land.

342. *See, e.g.*, Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1321-28 (1977); Ellikson, *Alternatives to Zoning: Covenants, Nuisance Rule, and Fines as Land Use Control*, 40 U. CHI. L. REV. 681, 658-61 (1973). Note, *An Economic Analysis of Land Use*

But a rule of absolute protection based on priority of use would provide too much protection for first users. Under such a rule, first users would have no incentive to anticipate conflicting uses and select locations at which future conflicts would be minimized. Once in place, potential offending activities would have no incentive to minimize their impact on others. To the contrary, an absolute coming to the nuisance defense would encourage first users to maximize the offensiveness of their activities in order to establish a right of priority against potentially sensitive second users. In order to create efficient incentives, nuisance law should require both the first user and the second user to bear a portion of the nuisance costs, with the second user bearing most but not all of the cost.

Traditional winner-take-all nuisance rules create uncertain and inefficient incentives in this regard. In practice, the law often fails to place any of the nuisance cost on the second user, but when it does, the second user bears all of the cost. Because of the various rules that may apply, priority of use is a factor of indeterminate weight, which may or may not affect the result depending on the totality of the circumstances and the doctrinal label employed by the court. If the parties are optimistic and anticipate a favorable outcome in litigation, neither may take an appropriate share of the costs of the conflict into account in determining the location and manner of potentially offensive or sensitive uses.

As I have argued at length elsewhere,[343] a rule of "comparative nuisance" that apportioned nuisance costs among the parties on principles of comparative fault and comparative responsibility would be both more fair and more efficient than the all-or-nothing rules of traditional nuisance law. Under current law, the determination of whether an activity constitutes an actionable private nuisance depends on the result of a balancing test, yet the court ultimately must

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Conflicts, 21 STAN. L. REV. 293, 303-09 (1969). *Cf.* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1242-45 (discussing priority of use in the context of just compensation for regulatory takings).

343. *See* Lewin, *Comparative Nuisance*, *supra* note 98. Interested readers should consult this article for a complete exposition of the rationale for adoption of comparative nuisance and of the rules that would comprise such a system, especially with respect to injunctive relief, all of which is far beyond the scope of the present work.

rule in favor of one party and against the other.[344] The rule of comparative nuisance reflects the premise that whenever the balance is close, an apportionment of nuisance costs would be preferable to a total victory for either party. In addition to cases involving claims of temporal priority, a rule of comparative nuisance would apply to cases in which the plaintiff's use arguably was "hypersensitive" to injury or in which there were equities on both sides.[345]

Such an apportionment of costs would be more just than traditional rules, which place all of the costs on one party and often provide no protection based on priority of use. If the plaintiff were deemed partially responsible for the existence of a nuisance conflict because of the decision to locate a potentially sensitive activity in proximity to an established nuisance, the factfinder could hold the plaintiff responsible for an appropriate portion of the costs of the conflict. Likewise, the fact that a defendant should have known that its activity would be offensive to existing property owners should increase the defendant's share of responsibility for nuisance damages.

A rule of comparative nuisance that applied principles of comparative fault to all nuisance disputes would create far better incentives than traditional nuisance law with respect to the issue of priority of use. Under a rule of comparative nuisance, an apportionment of damages that reflected priority of use as an important factor would tend to impose a greater share of nuisance costs on second users, but it would allow for other offsetting factors to shift

344. Only if the nuisance arises from negligence might there be an apportionment of nuisance costs under principles of comparative negligence.

345. For example, in Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989), the defendant's well and the plaintiff's septic system were "similar competing interests," as to which the balance was only "slightly in favor of the water well." *Id.* at 203. An appropriate resolution might have been for each party to bear a share of the cost of this conflict. The court could have determined the lowest cost solution—relocating the defendant's well, having the plaintiff employ a septic system with pumps to other nearby land owned by the plaintiff, or restricting the plaintiff's land to non-residential development—and entered an order imposing this solution, apportioning the cost between the parties on an appropriate basis. In evaluating the comparative responsibility of the parties, the factfinder might have considered the fact that defendant already had a house on the property which was in need of a new well, but it also might have considered the fact that the plaintiff's completed application for a septic system permit was already pending when the defendant applied for and obtained his permit to drill the new well. *Id.* at 199-200.

some of the cost to first users. Second users could expect to bear a majority of nuisance costs if they were to commence activity in proximity to incompatible first users, so they would attempt to avoid such locations unless the benefits exceeded their estimated share of the nuisance costs. On the other hand, first users would expect to bear some portion of the cost of future nuisance conflicts, so they would attempt to select locations that would minimize such conflicts and would have an incentive to take cost-justified acts of prevention or avoidance with respect to second users.

A rule of comparative nuisance would also promote allocative efficiency more effectively than traditional nuisance law. Efficient resource allocation requires that the price of each resource fully reflects all costs associated with its production, including the costs of nuisance disputes with neighboring landowners. Allocative efficiency does not require that all nuisance costs be borne by the defendant, however, since each conflict is caused in part by the plaintiff's proximity.[346] Allocative efficiency would best be promoted by a rule that imposed an appropriate share of the nuisance costs on each of the parties to the dispute.[347] A rule of comparative nuisance would impose nuisance costs on each activity in proportion to the normative evaluation of its "responsibility" for the existence of those costs, which is certainly more appropriate than the all-or-nothing allocation of costs under traditional nuisance law.

A rule of comparative nuisance would also eliminate the difficulty associated with distinguishing among nuisance actions based on negligence, strict liability, and intentional misconduct. The sig-

346. For example, in the paradigmatic dispute between the farmers and the railroad concerning crop damages due to sparks from locomotives, it is unclear whether the cost of crop damage should be viewed as a cost of farming, a cost of railroading, or both. In the absence of liability, farmers would bear the entire cost of crop damage from the sparks, creating inefficiency through both underinvestment in farming and overinvestment in railroads. On the other hand, a rule imposing liability on the railroad might induce farmers to cultivate land in proximity to existing railroads, resulting in underinvestment in railroads as well as overinvestment in farming.

347. Under traditional all-or-nothing rules, allocative efficiency would be achieved only if the outcomes of the various disputes involving each activity tended to average out, so that each activity bore an appropriate share of the associated nuisance costs. Such a fortuitous net effect is unlikely, especially if certain activities systematically tended to escape from nuisance liability, while others tended to bear more than their appropriate share of nuisance costs.

nificance of the distinctions among the various bases of nuisance liability would be diminished, if not eliminated, were the court to apply principles of comparative responsibility in all nuisance disputes.

Finally, a rule of comparative nuisance would foster a climate of compromise, encouraging the negotiated resolution of nuisance disputes among neighbors. Winner-take-all nuisance rules create expectations that impede settlement by suggesting that property rights are absolute, rather than relative to circumstances and to the rights of other parties. The notion of absolute rights encourages each party to hold out for vindication in a total victory at trial rather than accept a compromise for some lesser amount. If compromise were embedded in the structure of nuisance law, and the parties expected a court-imposed compromise verdict, there would be less psychological incentive to resist compromise in negotiations.

V. Nuisance Liability and Water Law

There is no intrinsic reason why general principles of nuisance law should not extend to disputes involving damage to land caused by diversion of water or those involving interference with water rights. The action for private nuisance applies to any interference with the use and enjoyment of property, regardless of whether the causal mechanism involves smoke, fumes, noise, vibrations, or water. Thus, one would expect cases involving damage to land from the diversion of streams or surface water to be governed by ordinary principles of nuisance law. Similarly, insofar as water rights constitute "rights incident to the ownership of land," an interference with water rights would appear to involve an interference with the full use and enjoyment of a landowner's property rights, again invoking ordinary principles of nuisance law.

Nevertheless, due to accidents of historical development, water-related nuisance disputes have generated a variety of distinct doctrines that differ substantially from traditional nuisance law. One such rule governs injuries to land caused by the diversion or obstruction of surface water, and another governs injuries to land caused by diversion or obstruction of natural watercourses. In addition, specialized doctrines govern actions for interference with riparian

rights in streams and for interference with rights in percolating underground water.

The separate doctrinal niches associated with water-related nuisances were reflected in the structure of the ALI's provisions governing "invasions of interests in land other than by trespass" in the first *Restatement of Torts*.[348] While the *Restatement* paid lip-service to the historical distinctions among the rules governing nuisance, water-related damage to land, and interference with water rights, its practical effect was to render many of these distinctions irrelevant. The chapter on water rights was limited to conflicts involving the "competing use" of water,[349] and any other interference with water rights was to be governed by nuisance law rather than principles of water law. Thus, water pollution was included within the chapter on nuisance law rather than the chapter on water law,[350] as was damage to land resulting from interference with the flow of surface water.[351] Moreover, even with respect to competing uses of water, the *Restatement* employed essentially the same balance of utilities test that it employed with respect to actions for private nuisance.[352]

West Virginia has thus far ignored the *Restatement's* approach to each of these issues and has retained its own separate doctrines for actions involving water-related injury to land or interference with water rights.[353] Having adopted the *Restatement's* balance of utilities test in *Hendricks*, however, the court is likely to re-examine these

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348. This section, Division Ten, consisted of three chapters. Chapter 39 addressed "invasions of interests of the support of land," including the topics of lateral and subjacent support. RESTATEMENT OF TORTS §§ 817-21 (1939). Chapter 40 addressed "invasions of interests in the private use of land (private nuisance)." *Id.* §§ 822-40. Chapter 41 addressed "invasions of interests in the private use of waters ('riparian rights')," including watercourses, lakes, subterranean waters, and surface waters. *Id.* §§ 841-64. The foregoing structure was preserved in the RESTATEMENT (SECOND) OF TORTS (1977).

349. RESTATEMENT OF TORTS § 849 (1939).

350. *Id.* § 832.

351. *Id.* § 833. In so doing, the ALI rejected both of the traditional approaches to liability for interference with the flow of surface water, the "common law" and "civil law" rules. *See infra* notes 357-66 and accompanying text.

352. *Cf.* RESTATEMENT OF TORTS §§ 822, 826-28 (1939) (private nuisance) *with id.* §§ 849-54 (riparian rights) and *id.* §§ 858-63 (subterranean waters). One significant difference between the water rights and nuisance provisions of the Restatement is that the balance of utilities test in the latter has been supplemented with the requirement of compensation for severe harms. RESTATEMENT (SECOND) OF TORTS §§ 826(b) & 829A (1977).

353. For a summary, *see* Lugar, *Water Law in West Virginia*, 66 W. VA. L. REV. 191 (1964).

various doctrines in light of the perspective provided by the *Restatement*.[354] Although a thorough discussion of the legal, economic, and social implications of these issues is beyond the scope of the present article, it is worth pointing out the extent to which adoption of the *Restatement's* approach to water law would alter current doctrine.

A. Damage to Land from Diversion of Surface Water

Many of the earliest nuisance disputes in West Virginia involved claims for flood damages from the diversion of surface water caused by railroad embankments and municipal street improvements. The 1873 case of *Beaty v. Balt. & Ohio R.R.*,[355] was a damage action for flooding caused by an inadequate culvert in the railroad's embankment. Although the court did not refer to the embankment as a nuisance, it declared that the railroad's liability was governed by the principle of *sic utere tuo*,[356] and it upheld the refusal of instructions that would have suggested that the defendant was not liable in the absence of negligence.

The rule of absolute liability for flooding caused by diversion of surface water presented a potential obstacle to development. Courts in other states began to limit the scope of liability for diversion of surface water, devising what came to be known as the "common law" or "common enemy" rule that permitted each landowner to protect against the flow or accumulation of surface water without liability to adjacent landowners. This common law rule had become fairly well established by the early 1880's.[357] In its extreme form, the common law rule provided an absolute right to fend off surface water without liability. Most states that adopted the common law

354. Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989). *Hendricks* itself involved a dispute over water rights, and the opinion cited two decisions from other jurisdictions in which the nuisance provisions of the Restatement had been applied to disputes over damages caused by the diversion of surface water. *Id.* at 202. Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692 (1986); Looney v. Hindman, 649 S.W.2d 207 (Mo. 1983) (en banc).

355. 6 W. Va. 388 (1873).

356. *Id.* at 391.

357. *See* H.G. Wood, *supra* note 77, § 378 (2d ed. 1883). *Id.* § 378 (3d ed. 1893). The common law rule is not mentioned in the first edition of Wood's treatise in 1875. *Id.* (1st ed. 1875).

rule did so with certain qualifications, imposing liability if the defendant was negligent or had cast the water on the plaintiff's land by way of artificial channels.[358]

The West Virginia Supreme Court of Appeals adopted the qualified form of the common law rule in the 1896 case of *Jordan v. City of Benwood*,[359] holding that the city was not liable for damages caused by an increase in the amount of surface water flowing onto plaintiff's lot as the result of a change in the grade of a street. Judge Brannon discussed the conflict between two maxims, *sic utere tuo* and *cujus est solum*, stating that the latter must prevail under the common law rule "that surface water is, like waters of the sea, an enemy, which each may fight, and which he may consume, repel, or expel, without regard to any injury thereby occasioned to another proprietor."[360] This "harsh" rule was qualified by an exception imposing liability whenever surface water was "collected in a body" and "cast upon" the neighbor "in artificial channels."[361]

As of the early part of the twentieth century, a majority of American states followed the common law rule with respect to surface water, but a substantial minority followed the "civil law" rule that imposed a natural servitude on landowners and prohibited any interference with the natural flow of surface waters.[362] Because both

358. The rule imposing liability for diversion through artificial channels was mentioned in all three editions of Wood's treatise. *Id.* § 376 (3d ed. 1893); *id.* § 376 (2d ed. 1883); *id.* § 378 (1st ed. 1875).

359. 42 W. Va. 312, 26 S.E. 266 (1896), *overruled by* Morris Associates, Inc. v. Priddy, 383 S.E.2d 770 (W. Va. 1989). Three earlier West Virginia decisions in the 1880's arguably were consistent with the common law rule insofar as they upheld imposition of liability on defendants for flooding resulting from the collection and diversion of surface water through artificial channels, but none of these decisions indicated that the use of artificial channels was essential to liability. Hargreaves v. Kimberly, 26 W. Va. 787, 787 syl. pt.1, 789-90 (1885); Knight v. Brown, 25 W. Va. 808, 808 syl. pt.2, 810-11 (1885); Gillison v. City of Charleston, 16 W. Va. 282, 282 syl. pt.1, 302-05 (1880). As late as 1895, the court was still discussing liability for damage from surface water as an application of the *sic utere tuo* maxim. Henry v. Ohio River R.R., 40 W. Va. 234, 243, 21 S.E. 863, 867 (1895). In adopting the common law rule, the court in *Jordan* cited *Knight* and *Gillison* as cases that "recognize the general rule inferentially," but it did not cite the *Beaty* or *Henry* decisions which were premised on a rule of absolute liability for damages resulting from diversion of surface water. 42 W. Va. at 316, 26 S.E. at 267.

360. 42 W. Va. at 317, 26 S.E. at 267.

361. *Id.* at 318, 26 S.E. at 268.

362. The civil law rule was derived from Roman law and the Code Napoleon, which forbade

the common law and civil law rules were harsh and inflexible, many states adopted qualifications or exceptions to avoid injustice in particular cases.[363] Two states, Minnesota and New Hampshire, applied principles of reasonable use to disputes arising from the obstruction and diversion of surface waters.[364]

In the *Restatement of Torts*, the ALI rejected both the common law and civil law rules, adopting the rule of reasonable use and incorporating it within the chapter on private nuisance.[365] Under the *Restatement's* approach, liability can be imposed for damages resulting from a diversion of surface water caused by conduct that was either "negligent" or "intentional and unreasonable."[366]

Subsequent to the *Restatement's* adoption of the reasonable use rule, a growing number of states have abandonned their common law or civil law rules in favor of a reasonable use approach,[367] while others have modified their traditional rules to incorporate the principle of reasonable use.[368] The historical trend clearly is in the di-

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the owner of the higher ground from aggravating the flow of surface water and forbade the owner of the lower ground from obstructing its flow back onto the higher ground. *See Jordan*, 42 W. Va. at 315, 26 S.E. at 267; Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 893-95 (1940); Annotation, *Modern Status of Rules Governing Interference with Drainage of Surface Waters*, 93 A.L.R.3D 1193, 1197 (1979). THE CIVIL LAW RULE IS OFTEN EXPRESSED IN THE MAXIM *aqua currit et debet currere ut currere solebat* ("water flows and must flow as it is accustomed to flow"). As of 1939, twenty-one states followed the common law rule and eighteen followed the civil law rule. 16 A.L.I. PROC. 338 (1939).

363. *See* RESTATEMENT OF TORTS 117-23 (Proposed Final Draft No. 5, 1939); Annotation, *supra* note 362, at 1197-98.

364. Bush v. City of Rochester, 191 Minn. 591, 255 N.W. 256 (1934); Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901); Rindge v. Sargent, 64 N.H. 294, 9 A. 273 (1886); Swett v. Cutts, 50 N.H. 439, (1870).

365. *See* RESTATEMENT OF TORTS § 833; RESTATEMENT OF TORTS §§ 17-22, 113-28 (Proposed Final Draft No. 5, 1939); 16 A.L.I. PROC. 336-47 (1930). *See also* RESTATEMENT (SECOND) OF TORTS § 833 (1977).

366. *See* RESTATEMENT OF TORTS §§ 822, 832 (1939).

367. *See, e.g.*, Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Weinberg v. Northern Alaska Development Corp., 384 P.2d 450 (Alaska 1963); State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977); Tucker v. Badoian, 376 Mass. 907, 384 N.E.2d 1195 (1978); McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 62 Ohio St.2d 55, 402 N.E.2d 1196 (1980); Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980); Annotation, *supra* note 362 (1979 & Supp. 1989).

368. *E.g.*, Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (employing principles of reasonable use while purporting to adhere to civil law rule).

rection of a rule of reasonable use with respect to damages from diversion or obstruction of surface water.[369]

Until recently, West Virginia had adhered to the common law rule, imposing liability only if the defendant collected water and cast it upon the plaintiff through artificial channels or was in some respect negligent.[370] Quite recently, however, in *Morris Associates, Inc. v. Priddy*,[371] the court overruled *Jordan* and abandoned the common law rule in favor of a rule of reasonable use with respect to liability for the diversion of surface water. The decision in *Priddy* is curious in that it adopts the reasonable use test without ever citing the *Restatement*, yet ten of the sixteen cases cited in the opinion had cited the *Restatement's* surface water provision, and the West Virginia court itself unanimously adopted the *Restatement's* nuisance law provisions just four days later in *Hendricks v. Stalnaker*.[372]

It is virtually certain that the court soon will recognize that its new reasonable use test with respect to surface water is simply a specific application of the more general private nuisance provisions of the *Restatement*. Liability for diversion of surface water would

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369. R. CUNNINGHAM, W. STOEBUCK, & D. WHITMAN, THE LAW OF PROPERTY 433 (1984); C. DONAHUE, JR., T. KAUPER, & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTIONS 330-31 (1983).

370. Gallagher v. City of Westover, 167 W. Va. 644, 280 S.E.2d 330 (1981) (per curiam); Mason v. City of Bluefield, 105 W. Va. 209, 141 S.E. 782 (1928); Lindamood v. Board of Educ., 92 W. Va. 387, 114 S.E. 800 (1922); Manley v. Brown, 90 W. Va. 564, 111 S.E. 505 (1922); Lutz v. City of Charleston, 76 W. Va. 657, 86 S.E. 561 (1915); Atkinson v. Chesapeake & O. Ry., 74 W. Va. 633, 82 S.E. 502 (1914); Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 77 S.E. 525 (1913); McHenry v. City of Parkersburg, 66 W. Va. 533, 66 S.E. 750 (1910); Tracewell v. Wood County Court, 58 W. Va. 283, 52 S.E. 185 (1905); Neal v. Ohio River R.R., 47 W. Va. 316, 34 S.E. 245 (1899); Clay v. City of St. Albans, 43 W. Va. 539, 27 S.E. 234 (1897); Yeager v. Town of Fairmont, 43 W. Va. 259, 27 S.E. 234 (1897). *But see* Tierney v. Earl, 153 W. Va. 790, 172 S.E.2d 558 (1970) (affirming injunction based on claim that defendant interfered with natural flow of surface water, apparently without allegations of negligence or use of artificial channels; the opinion did not discuss the applicable law but was consistent with the civil law rule).

371. 383 S.E.2d 770 (W. Va. 1989).

372. 380 S.E.2d 198 (W. Va. 1989). Perhaps even more strange is the fact that two of the four cases cited by Justice Neely in *Hendricks* as authority for adoption of the *Restatement*'s nuisance provisions—Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis. 2d 129, 384 N.W.2d 692 (1986); Looney v. Hindman, 649 S.W.2d 207 (Mo. 1983) (en banc)—involved claims for damage from the diversion of surface water, yet neither of these cases was among the sixteen decisions cited by Justice Miller in *Priddy* as authority for adoption of the reasonable use rule. Although decided four days earlier than *Hendricks*, *Priddy* was not published in the advance sheets of the Southeastern regional reporter until October 26, 1989, whereas *Hendricks* was published on July 20, 1989.

then be subsumed within the law of private nuisance applicable to any non-trespassory interference with the use and enjoyment of land, and the reasonableness of any diversion of surface water would be determinated in accordance with the balance of utilities test and the rule requiring compensation for serious harms.

B. Interference with Riparian Rights

Each landowner along a watercourse is deemed to have "riparian rights" to the use of the waters as a natural right incident to the ownership of riparian land.[373] American courts have adopted two fundamentally different approaches to riparian rights, the "natural flow" theory and the "reasonable use" theory.[374]

Under the natural flow theory, each riparian landowner has a right to the natural integrity of the watercourse itself, not sensibly diminished in quantity or impaired in quality. A riparian landowner is privileged to use the water to supply "natural wants" (*e.g.*, household uses and watering livestock), but "artificial" or "extraordinary" uses (*e.g.*, irrigation and manufacturing) are privileged only if they do not materially affect the natural quantity or quality of the water. Use on non-riparian land is always unprivileged.[375]

Under the reasonable use theory, the fundamental right is not to the watercourse itself, but rather to the reasonable use thereof. A riparian owner has a right to make reasonable use of the water and to be free from unreasonable interference by others.[376]

The natural flow theory is definite and certain, but it tends to prohibit beneficial uses of water. The legal consequences of this theory are that any unprivileged use which depletes the volume of a watercourse gives rise to a cause of action, even if it interferes with no current use and causes no harm to other riparian owners. The statute of limitations begins to run from the first unprivileged

373. RESTATEMENT (SECOND) OF TORTS § 850 Scope Notes at 210-11; RESTATEMENT OF TORTS 71-79 (Proposed Final Draft No. 5, 1939).

374. RESTATEMENT (SECOND) OF TORTS § 850 Scope Notes at 210.

375. *Id.*

376. *Id.* at 211.

use, even in the absence of actual damage, and a prescriptive right may be acquired from continuous unprivileged use thereafter.[377]

The reasonable use theory is more hospitable to development. There are no absolute or technical rights, and a cause of action arises only when a use causes substantial harm and unreasonable interference with the rights of another riparian owner. The primary disadvantage is its uncertainty. One cannot always be certain whether a particular use is reasonable, and a reasonable use may become unreasonable if circumstances change over time.[378]

These two theories are conceptually quite distinct and have different legal consequences. Nevertheless, many courts fail to appreciate these differences and "attempt to apply both theories, with results that are not only illogical but weirdly inconsistent at times."[379] Unfortunately, West Virginia is no exception.

In *Gaston v. Mace*,[380] the West Virginia Supreme Court of Appeals adopted a rule of reasonable use with respect to the rights of riparian owners and the general public in "floatable streams," holding that the plaintiff could not recover for damage to his mill caused by defendant's sawlogs and timber because the defendant's use was reasonable and the plaintiff's use was unreasonable.[381]

With respect to injuries caused by pollution of a stream, however, the court in *Day v. Louisville Coal & Coke Co.*[382] did not mention the rule of reasonableness and instead applied the *sic utere tuo* maxim, holding that liability would be imposed without fault.[383]

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377. *Id.* at 210-12.

378. *Id.* at 211-12.

379. RESTATEMENT OF TORTS 75 (Proposed Final Draft No. 5, 1939).

380. 33 W. Va. 14, 10 S.E. 60 (1889).

381. *Id.* at 30, 10 S.E. at 66. The defendant's conduct was not unreasonable because the defendant had a right to use the water for purposes of transportation. Although the plaintiff had a right to use the stream for milling purposes, his construction of a milldam without an adequate sluiceway for the passage of logs was said to be a nuisance because it unreasonably interfered with the public use of the stream. *Id.*

382. 60 W. Va. 27, 53 S.E. 776 (1906).

383. *Id.* at 27, 53 S.E. at 776. Insofar as *Day* imposed joint and several liability on the defendants, it was overruled in Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920). The decision in *Farley* did not discuss the standard of liability, and it would not appear to overrule *Day* on this issue. In International Shoe Co. v. Heatwole, 126 W. Va. 888, 893, 30 S.E.2d 537, 541 (1944), both *Day* and *Farley* were cited in dictum as authority for the imposition of liability on a polluter for damage to riparian land.

The court rejected the defendant's argument that it was carrying on a lawful and useful business which was of great value to the people of West Virginia.[384]

With respect to competing of uses of water, in *Roberts v. Martin*[385] the court purported to apply a rule of reasonable use, but the decision was more consistent with the natural flow theory of riparian rights. The court held that the trial court had erred in denying an injunction to the owner of "an old style grist mill"[386] along a stream who had complained of the diversion of a small quantity of water to the defendant's store and dwellings on non-riparian land. No significance was attributed to the defendant's assertion that the plaintiff was not using his mill and could not show any actual damage. The court referred to the plaintiff's right "to have the water of the stream pass his land in its natural flow,"[387] holding: "A diversion of a natural water course, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage."[388] Despite the court's reference to the rule of reasonable use, it refused to consider the reasonableness of the defendant's use in relation to the absence of damage to the plaintiff.[389] Except for the nominal reference to the rule of reasonable use, the opinion would represent a classic expression of the natural flow

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384. 60 W. Va. at 29, 55 S.E. at 777. The court stated:

> If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal, or public weal, do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption as it passes through his land, the man up the stream must answer in damages. One man without fault is injured by another. That is enough for liability. This is the general principle of the common law. One man cannot thus injure another.

Id.

385. 72 W. Va. 92, 77 S.E. 535 (1913).

386. *Id.* at 93, 77 S.E. at 535.

387. *Id.* at 92, 77 S.E. at 535.

388. *Id.*

389. *Id.* at 99, 77 S.E. at 538. The court said:

> It may be, as is suggested in the brief for defendants, that plaintiff's mill is useless in these modern days and that he does not need the water. It may be that in good morals plaintiff should not deny the use of the water to defendants, his neighbors. These considerations can have no place in the determination of this suit. Plaintiff does object to the diversion. He does show violation of a right belonging to him, which the law will vindicate.

Id.

theory. The court repeatedly referred to plaintiff's right to the "natural flow" of the stream, rather than the use of the water. It treated non-riparian use as inherently unprivileged, essentially employing a rule of absolute liability, without regard to the reasonableness of the defendant's use or the unreasonableness of the plaintiff's assertion of a technical right in the absence of actual damage.[390]

In the *Restatement of Torts*, the ALI has taken an entirely different approach to issues relating to riparian rights. Liability for interference with the use of land arising from pollution of water was included within the chapter on private nuisance instead of the chapter relating to riparian rights.[391] With regard to competing uses of water by riparian owners, the ALI essentially adopted the reasonable use theory of riparian rights, but it transformed this natural right into a positive right by employing a balancing of utilities test for the determination of reasonableness.[392]

The West Virginia Supreme Court of Appeals has not altered its approach in light of the *Restatement*. The *Restatement* has not been cited in cases involving riparian rights, and the court continues to refer to the right of a riparian owner as a "property right in the flow of water" through his land rather than the right to reasonable

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390. The late Professor Lugar attempted to resolve the inconsistency by suggesting that *Roberts* created a rule of reasonable use for riparian uses and a natural flow rule for nonriparian uses. *See* Lugar, *supra* note 353, at 196-98. Some jurisdictions achieve the same result under a rule of reasonable use by holding that nonriparian uses are *per se* unreasonable, without regard to the impact on the plaintiff. *See* RESTATEMENT (SECOND) OF TORTS § 855 comment b (1977).

391. RESTATEMENT (SECOND) OF TORTS § 832 (1977); RESTATEMENT OF TORTS § 832 (1939).

392. RESTATEMENT OF TORTS §§ 849-57; RESTATEMENT (SECOND) OF TORTS §§ 850, 850A, 855-57 (1939). The ALI indicated that the reasonableness test applicable to riparian rights was essentially equivalent to that applicable to private nuisances:

> The problem involved in determining the unreasonableness of a riparian proprietor's use of water in a watercourse or lake is the same problem as that involved in determining the unreasonableness of an intentional, non-trespassory invasion of a possessor's interest in the use and enjoyment of his land. There are apparent differences between the two problems, but they arise out of the differences in the physical subject matter involved and not out of any differences in the controlling legal principle.

RESTATEMENT OF TORTS 88 (Proposed Final Draft No. 5, 1939) (citation omitted). The ALI initially declared that the distinction between riparian and non-riparian uses was an "important" factor in the determination of reasonableness. RESTATEMENT OF TORTS § 855 (1939). In the Second Restatement, the ALI has reversed its position: "The reasonableness of a use of water by a riparian proprietor is not controlled by the classification of the use as riparian or nonriparian." RESTATEMENT (SECOND) OF TORTS § 855 (1977).

use of the water.[393] Although nominally applying a rule of reasonable use, the court in fact applies the natural flow theory of riparian rights. If the court were to adopt the *Restatement's* provisions relating to pollution and deprivation of water to riparian owners, the result would be a total transformation of West Virginia law on a topic that may be crucial to the future economic development of the state.

C. *Damage to Land from Diversion of a Watercourse*

An obstruction or diversion of the flow of a river or stream that results in erosion or flooding of riparian land gives rise to a cause of action for private nuisance, and one would expect the action to be governed by the ordinary rules imposing liability for interference with the use and enjoyment of land, rather than the rules governing interference with riparian rights. Nevertheless, the West Virginia Supreme Court of Appeals generally has applied principles of riparian rights rather than principles of nuisance law in cases involving damage to land caused by interference with the flow of a watercourse.

In the earliest cases, such actions were governed by the *sic utere tuo* maxim, undiluted by considerations of reasonableness. In *Knight v. Brown*,[394] the court held that a complaint for damages was sufficient if it alleged that the defendant wrongfully diverted the stream onto the plaintiff's property in contravention of his right to enjoy the property free from such interference.

The earliest decisions to question the rule of absolute liability for damage to land from diversion of a watercourse involved actions against railroads that had constructed their bridges under statutory grants of authority. At first it was thought that these statutory grants immunized the railroads from liability for damages in the absence

393. *E.g.*, Snyder v. Callaghan, 168 W. Va. 265, 271, 284 S.E.2d 241, 246 (1981) ("a property interest in the flow of a natural watercourse through or adjacent to his property."); Halltown Paperboard Co. v. C.L. Robinson Corp., 150 W. Va. 624, 627, 148 S.E.2d 721, 724 (1966) ("a property right in the flow of water through or adjacent to his land"); McCausland v. Jarrell, 136 W. Va. 569, 569 syl. pt.2, 580, 68 S.E.2d 729, 731 syl. pt.2, 737 (1951) ("a right of property in such land to have the water of the stream pass to and from his land in its natural flow").

394. 25 W. Va. 808 (1885).

of negligence, but such claims of immunity were overridden by the Constitution of 1872, which provided that neither the state nor any internal improvement company could take or damage private property for public use without just compensation.[395] The constitution was interpreted as imposing liability on railroads, boom companies, and other internal improvement companies to the same extent as any private citizen.[396]

There was a substantial amount of litigation over the liability of railroads and boom companies for damage from diversion or obstruction of watercourses during Judge Brannon's tenure, and he authored most of the court's opinions on this subject between 1889 and 1912. In an early opinion, Judge Brannon discussed liability for obstruction of a watercourse as an application of the *sic utere tuo* principle.[397] Nevertheless, in an opinion by Judge English, the court applied a negligence standard to an action seeking damages for erosion of the plaintiff's land caused by his tenant's operation of a timber boom, holding that the trial court should have instructed the jury that the plaintiff could not recover in the absence of negligence.[398] On a subsequent appeal involving the same parties, however, the court reversed a demurrer to the plaintiff's second amended complaint which did not allege negligence but simply asserted that the defendant had acted "wrongfully, unlawfully, and improperly."[399] Judge Brannon indicated that a defendant would be strictly liable for harm to riparian owners from the obstruction or diverson of a stream.[400]

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395. W. VA. CONST. art. III, § 9. In Taylor v. Baltimore & O.R.R. Co., 33 W. Va. 39, 10 S.E. 29 (1889), Judge Brannon said that the court need not consider whether the Constitution of 1872 applied to the acts of a railroad that was chartered prior to that date but erected a bridge thereafter, because the defendant was negligent in maintaining a bridge with an inadequate waterway.

396. Pickens v. Coal River Boom & Timber Co., 66 W. Va. 10, 14-15, 65 S.E. 865, 866-67 (1909). *See supra* note 113 and accompanying text.

397. *Taylor*, 33 W. Va. at 46, 10 S.E. at 32.

398. Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 19 S.E. 401 (1894).

399. Rogers v. Coal River Boom & Driving Co., 41 W. Va. 593, 595, 23 S.E. 919, 919 (1896).

400. *Id.* at 597-98, 23 S.E. at 920. Judge Brannon wrote:

> A citizen or corporation lawfully using a floatable stream in a proper manner, without negligence, would likely be protected, but where an individual or corporation erects a structure in a stream, and collects obstructions to the water's natural flow, which changes the course of the current, and harms a riparian owner, that corporation or person is liable.

Id. at 597-98, 23 S.E. at 920 (citing Gaston v. Mace, 33 W. Va. 14, 10 S.E. 60 (1889); Taylor v. Baltimore & O. R.R., 33 W. Va. 39, 10 S.E. 29 (1889); Gillison v. Charleston, 16 W. Va. 282 (1880)).

In a number of cases the court did not need to address the question of liability in the absence of negligence because the plaintiffs had pleaded that the defendants were negligent in creating the obstructions,[401] and in these cases the defendant's negligent act was said to have given rise to a private nuisance. Although it applied a negligence standard, the court in these cases seemed to have inferred negligence from the fact of damage, essentially imposing an absolute duty on the defendant not to divert the watercourse.

Judge Brannon evidently became dissatisfied with this approach, and he dissented from the first of the court's three decisions in *Pickens v. Coal River Boom & Timber Co.*[402] The defendant boom company had partially obstructed the flow of a river, causing sand and other sediment to be deposited behind its piers, thereby reducing the power of the plaintiff's upstream mill. The court held that the complaint was defective in failing to allege that the defendant had acted improperly, negligently, unlawfully, or wrongfully. In dissent, Judge Brannon stated that the defendant should be liable for any damage done to the plaintiff, even if the defendant was not negligent in the location of its boom. He criticized the majority opinion for requiring negligence but then allowing it to be inferred from the mere occurrence of damage.[403] In the second decision involving these parties,[404] Judge Brannon implicitly adopted his earlier dissent, writing that the principles imposing liability on the defendant "will be found in the *two* opinions on the former decision of this court."[405] By the third appeal in this case, Judge Brannon's views had prevailed, and his opinion expressly stated that liability "exists without the element of negligence on the part of the boom company."[406]

In his final opinion for the court on the subject of liability for damage from diversion of a watercourse, Judge Brannon rejected the railroad's assertion that it could not be held liable in the absence

401. *E.g.*, Richards v. Ohio River R.R., 56 W. Va. 592, 49 S.E. 385 (1904); Neal v. Ohio River R.R., 47 W. Va. 316, 34 S.E. 914 (1899).

402. 51 W. Va. 445, 454, 41 S.E. 400, 403 (1902) (Brannon, J. dissenting).

403. *Id.* at 456, 41 S.E. at 404.

404. Pickens v. Coal River Boom & Timber Co., 58 W. Va. 11, 50 S.E. 872 (1905).

405. *Id.* at 13, 50 S.E. at 873 (emphasis added).

406. Pickens v. Coal River Boom & Timber Co., 66 W. Va. 10, 16, 65 S.E. 865, 867 (1909).

of negligence for damage caused by an invasion of water resulting from its embankments along the river.[407] He further held that the plaintiff had no duty to defend his land against this water, stating: "The work changed the channel and current, and Cline as a riparian owner was entitled to have the river as by nature it was."[408]

Roberts v. Martin[409] was decided shortly after Judge Brannon left the court, and the invocation in that case of a right to the natural flow of the stream provided further authority for the imposition of absolute liability for the obstruction or diversion of watercourses. In a long line of subsequent cases, the court has imposed liability without requiring proof of negligence or unreasonableness whenever the diversion or obstruction of a river or stream caused injury to the plaintiff's property.[410] The court has ignored the reasonable use

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407. Cline v. Norfolk & W. Ry. Co., 69 W. Va. 436, 71 S.E. 705 (1911).

408. *Id.* at 438-39, 71 S.E.2d at 706.

409. 72 W. Va. 92, 77 S.E. 535 (1913).

410. Covert v. Chesapeake & O. Ry., 85 W. Va. 64, 65, 100 S.E. 854, 854 (1919) (deposit of fill in river deprived plaintiffs "of the right to have the waters flow in their natural course undisturbed"); McMechen v. Hitchman-Glendale Consol. Coal Co., 88 W. Va. 633, 635, 107 S.E. 480, 481 (1921) (mining deposits deemed to constitute nuisance because they diverted the waters "out of their natural course and over the lands of plaintiffs"; no mention of negligence); Humphries v. Black Betsey Consol. Coal Co., 115 W. Va. 768, 771-72, 178 S.E. 273, 275 (1934) (quoting *Roberts*, 72 W. Va. at 99, 77 S.E. at 538.) ("'The diversion of the water is a private nuisance' . . . . The plaintiff here had a right to have the water . . . flow down to his land and over the same in its natural mode and course."); McCausland v. Jarrell, 136 W. Va. 569, 580, 68 S.E.2d 729, 737 (1951) ("The right of the owner of land through which a natural watercourse passes to have the water of the stream pass his land in its natural flow is a property right and exists as part of the land; . . . The obstruction or the unreasonable diversion of the water of a stream is also a private nuisance." (citation omitted)); Stuart v. Lake Washington Realty Corp., 141 W. Va. 627, 651, 92 S.E.2d 891, 904-05 (1956) (affirmed injunction against overflow of water onto plaintiff's land; "[t]he plaintiff had the absolute and exclusive right to the full enjoyment of her property and to hold it free from disturbance by any other person regardless of the amount of damage that may have resulted from such disturbance. This right is a natural right . . ."). For cases reaching the same result without explicit reference to the foregoing rationale, *see* Flanagan v. Gregory & Poole, Inc., 136 W. Va. 554, 67 S.E.2d 865 (1951); Mitchell v. Virginian Ry. Co., 116 W. Va. 739, 183 S.E. 35 (1935). While there are also numerous decisions imposing liability for negligent obstructions of rivers and streams, in none of these cases did the court hold that negligence was a prerequisite to liability. *E.g.*, O'Dell v. McKenzie, 150 W. Va. 346, 145 S.E.2d 388 (1965); State *ex rel.* Summers v. Sims, 142 W. Va. 640, 97 S.E.2d 295 (1957); Jones v. Pennsylvania R.R. Co., 138 W. Va. 191, 75 S.E.2d 103 (1953); Thrasher v. Amere Gas Utils. Co., 138 W. Va. 166, 75 S.E.2d 376 (1953); Riddle v. Baltimore & O. R.R., 137 W. Va. 733, 73 S.E.2d 793 (1953); Trump v. Bluefield Waterworks & Improvement Co., 99 W. Va. 425, 129 S.E. 309 (1925); Taylor v. Chesapeake & O. Ry., 84 W. Va. 442, 100 S.E. 218 (1919); Williams v. Columbus Producing Co., 80 W. Va. 683, 93 S.E. 809 (1917); Summers v. Parkersburg Mill Co., 77 W. Va. 563, 88 S.E. 1020 (1916); Atkinson v. Cheasapeake & O. Ry., 74 W. Va. 633, 82 S.E. 502 (1914); Wilson v. Guyandotte Timber Co., 70 W. Va. 602, 74 S.E. 870 (1912).

test announced in *Roberts*, emphasizing instead the plaintiff's right to have waters flow in their natural course. These cases are curious in that the court regularly refers to the defendant's diversion or obstruction of the watercourse as a private nuisance, yet it imposes absolute liability without regard to the "reasonableness" of the defendant's conduct.

The stricter standard of liability for diversion of watercourses stood in sharp contrast to the relaxed standard of liability under West Virginia's common law rule applicable to diversion of surface water, which formerly imposed liability only if the defendant employed artificial channels or was guilty of negligence. In many disputes, the outcome depended upon whether the water in question was characterized as a watercourse or surface water, forcing litigants and the courts to devote substantial attention to an essentially arbitrary distinction.[411]

The *Restatement* treats all such disputes as ordinary private nuisances, eliminating the distinction between surface water and streams with respect to liability for damages from flooding. The *Restatement's* reasonableness test would represent a middle ground between the rule of strict liability for diversion of watercourses and the negligence standard under the common law rule governing diversion of surface water.

The West Virginia court has recently rejected the common law rule applicable to damage from diversion of surface water in favor of a reasonableness test,[412] and it is probably only a matter of time until the court recognizes that reasonableness is also the appropriate standard where land is damaged by diversion or obstruction of a watercourse. If the court were to follow the *Restatement* in applying general nuisance principles to damages from the diversion of a stream, it could preserve continuity with existing authority by deeming any

411. *See, e.g.*, McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951) (denial of injunction reversed because trial court erroneously assumed that stream was surface water); Uhl v. Ohio River R.R., 56 W. Va. 494, 49 S.E. 378 (1904) (overflow from stream remains part of stream and is not surface water, so defendant was liable when its embankment blocked return of flood water to the stream, causing it to pool on plaintiff's land).

412. Morris Associates, Inc. v. Priddy, 383 S.E.2d 770 (W. Va. 1989).

interference with the natural flow of a watercourse to be unreasonable *per se*. On the other hand, it is more likely that the court will simply abandon its rule of absolute liability for damage from diversion of a watercourse, requiring the determination of reasonableness on a case-by-case basis under the principles of the *Restatement*.[413]

D. Interference with Rights in Ground Water

Authorities historically distinguished between underground waters existing in a "known and well-defined channel" from those which oozed or percolated in the earth. Underground streams generally were governed by the rules applicable to ordinary watercourses, but separate rules evolved for percolating waters.[414]

With respect to percolating waters, several American states adopted the "English rule"[415] of "absolute ownership" which gave each landowner complete freedom to withdraw percolating water without liability for diminution of the flow to a neighbor's well.[416] Most states recognized the need to grant some protection to users of percolating water and adopted the "American rule" of "reasonable use."[417] The American rule of reasonable use was quite defendant-centered, emphasizing the right of potential defendants to make use of their property without regard to the consequences for the plaintiff. A use of ground water was unreasonable only if it was wasteful or if it was not made on or in connection with the overlying land, so the rule did not protect small users against total depletion by larger users of the same spring or aquifer. To protect these small users, a few states developed a rule of "correlative rights" that gave all overlying landowners an equal right to the use of ground water.[418]

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413. This reasonableness test includes the compensation principle embodied in Sections 826(b) and 829A, so that even if the balance of utilities favored the defendant, a plaintiff could receive compensation for any serious harm resulting from the diversion or obstruction of a watercourse.

414. *See* RESTATEMENT (SECOND) OF TORTS § 858 Scope Notes at 256-57 (1977).

415. So called because it was based on Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843).

416. *E.g.*, Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).

417. The rule originated in Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 82 Am. Dec. 179 (1862). *See also* Higday v. Nickolaus, 469 S.W.2d 859 (Mo. 1971).

418. *E.g.*, Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1902).

In *Pence v. Carney*,[419] West Virginia adopted the American rule of reasonable use.[420] The court said that a use was reasonable so long as it was not wasteful and did not involve transportation of the water away from the overlying lands. It upheld the denial of an injunction in the case at bar because the disturbance of plaintiff's well did not result from an unreasonable use by the defendants. The defendants had pumped out a great deal of water in completing their own well, and although much water was wasted in the process, the depletion was for a beneficial purpose, was only temporary, and was without malice.

The rule of reasonable use applies not only to withdrawals of water, but also to other acts that deprive a plaintiff of the use of percolating waters. For example, the court has applied the rule of reasonable use respecting percolating water to coal mining operations that interfered with a plaintiff's well.[421]

It is unclear whether underground streams in West Virginia are governed by the doctrines applicable to riparian rights in streams or those applicable to percolating underground waters. Both doctrines purportedly involve rules of reasonable use, and in *Pence* the court suggested, without deciding, that the rule of reasonable use applicable to ground water might be essentially the same as the rule of reasonable use applicable to riparian rights in underground streams, potentially eliminating the necessity of distinguishing between underground streams and percolating waters.[422] In practice, however, West Virginia's reasonable use rule pertaining to riparian rights is closer to a rule of strict liability, whereas the reasonable use rule pertaining to underground waters permits a far greater level

419. 58 W. Va. 296, 52 S.E. 702 (1905).

420. *Id.* at 305, 52 S.E. at 706. Although the opinion referred in passing to the correlative rights of adjoining owners, *id.* at 301-02, 52 S.E. at 704, it clearly adopted only a very narrow version of the reasonable use rule: "We must yield assent to the later doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule .... Such reasonable or beneficial use has often been understood and held to mean, use for any purpose for which the owner of the land upon which underground, percolating waters are found might legitimately use and enjoy his land." *Id.* at 305, 52 S.E. at 706.

421. Drummond v. White Oak Fuel Co., 104 W. Va. 368, 140 S.E. 57 (1927).

422. 58 W. Va. at 305-06, 52 S.E. at 706.

of interference under its defendant-centered test.[423] In one case involving pollution of an underground stream, the trial court apparently applied a rule of strict liability,[424] so it would seem that underground streams are governed by West Virginia's riparian rights doctrine rather than the reasonable use rule applicable to percolating waters.

The *Restatement* eliminates the distinction between percolating waters and water in underground streams, referring to all such waters as "subterranean water"[425] or, more recently, as "ground water."[426] An interference with ground water that does not result from a competing use is governed by the rules applicable to private nuisances.[427] With regard to competing uses of ground water that interfere with another landowner's use of ground water, the *Restatement* applies a rule of reasonable use, including a balance of utilities test.[428] The *Restatement's* rule of reasonable use differs from the American rule of reasonable use and incorporates elements of the doctrine of correlative rights, prohibiting withdrawal of an unreasonable share as well as wasteful or unreasonable uses.

If the West Virginia Supreme Court of Appeals were to adopt the *Restatement's* approach to ground water, it would alter the defendant-centered rule of reasonable use established in *Pence v. Carney*.[429] Existing users of ground water would have greater protection against competing uses under the *Restatement* than under the weak rule of reasonable use adopted in *Pence*. Moreover, pollution of

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423. Lugar, *supra* note 353, at 215. Professor Lugar stated: "[T]he 'reasonable use' doctrine [applicable to percolating waters] . . . should not be confused with that doctrine as applied to the taking of waters from streams. That is a correlative rights approach, whereas here the test is the reasonableness of the use of the water on the land from which it is taken." *Id.*

424. Conner v. City of Spencer, 115 W. Va. 481, 176 S.E. 858 (1934). The only issue on appeal was whether the damages were permanent or temporary, and the court devoted little attention to the basis of liability. The plaintiff claimed that the defendant's regrading of the street, including blasting and removal of stones, had opened the strata and permitted seepage of surface water into the subterranean stream which fed plaintiff's spring. The court alluded to a factual dispute as to causation, but there was no indication that the city had been negligent or acted unreasonably in its regrading of the street.

425. RESTATEMENT OF TORTS § 845 (1939).

426. RESTATEMENT (SECOND) OF TORTS § 845 (1977).

427. *See* RESTATEMENT (SECOND) OF TORTS § 849 (1977); RESTATEMENT OF TORTS § 849 (1939).

428. RESTATEMENT (SECOND) OF TORTS § 850-58 (1977); RESTATEMENT OF TORTS § 858-63 (1939).

429. 58 W. Va. 296, 52 S.E. 702.

ground water or destruction of aquifers caused by activities such as excavation or mining would be governed by general principles of nuisance law rather than rules pertaining to percolating water, again affording greater protection to existing users of ground water.[430]

The *Restatement's* approach to water law appears to provide a sensible balance among the competing interests, and from the foregoing discussion it should be obvious that its adoption would greatly simplify the law of West Virginia. All competing uses of water would be governed by a uniform rule of reasonable use, similar to that applicable to private nuisances,[431] which would replace the ambiguous reasonable use rules that the court has employed in past disputes involving riparian rights and percolating waters. Any other water-related interference with the use and enjoyment of land would be governed by general principles of nuisance law, whether the damage resulted from the diversion of surface water, the pollution or obstruction of a watercourse, or the pollution or disruption of ground water.

VI. Conclusion

A seemingly insignificant lawsuit has produced a virtual revolution in West Virginia's law of nuisance. The court's adoption of the *Restatement's* nuisance provisions in *Hendricks v. Stalnaker* was not crucial to the outcome of the dispute between the two parties, but it portends sweeping changes in both nuisance law and water law. A century of contradictory and confusing precedent may be swept aside as the West Virginia Supreme Court of Appeals increasingly relies upon the *Restatement* in its struggle to achieve a just and efficient resolution of private land use conflicts.

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430. Dictum in Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989), suggests that the court already has decided that pollution of ground water will be governed by general principles of nuisance law: "In the case before us, we are asked to determine if the water well is a private nuisance. But if the septic system were operational, the same question could be asked about the septic system." *Id.* at 202-03.

431. The West Virginia court should consider the possibility of further harmonizing water law with the law of private nuisance by extending the requirement of compensation for serious harms to disputes involving competing uses of water.

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