RECONCEPTUALIZING THE LAW OF NUISANCE THROUGH A THEORY OF ECONOMIC CAPTIVITY

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I. INTRODUCTION: COMING TO THE NUISANCE OR BECOMING AN ECONOMIC CAPTIVE?

Ann and Conrad Riedi lived in the same rent-controlled apartment in Manhattan for forty years.[1] Despite this long-term entrenchment, the Riedis and many of their neighbors are being forced to move to make way for a new subway construction.[2] Due to their relatively low income and inability to pay typical Manhattan rent because of their age and status as retirees, the Riedis may very well be forced to relocate out of the neighborhood and out of a borough in which they have lived most of their lives.[3] The Riedis have, in essence, become "economic captive[s]" for, put simply, their economic situation severely limits their choices as to where to relocate.[4] An economic captive, then, is someone whose housing choices are determined detrimentally by his socio-economic status, providing him with extremely limited options for places to live.[5] Further, the housing available to an economic captive is often in poor repair, in blighted and/or high crime areas, and far from the

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[1] Michael M. Grynbaum, *Tenants Making Way for Subway Ask: You Want Me to Move Where?*, N.Y. TIMES, Sept. 8, 2009, at A17, http://www.nytimes.com/2009/09/08/nyregion/08mta.html?sq=grynbaum.

[2] *Id.*

[3] *Id.* at A20. While there are other rent-controlled apartments in various other neighborhoods in Manhattan, most of these units are already occupied. *Id.* As a result of this move, the Riedis may also have to part ways with their dog, Biscuit, in order to find a suitable place for them to live. *Id.* at A17.

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

[5] *See id.*

person's current neighborhood.[6]

The classical situation defining the forces of economic captivity is illustrated when relocation by a landowner thereby subjects the mover directly to a nuisance or a nuisance-like activity. For example, acquisition of real property in an industrial area may almost necessarily burden, significantly, the new owner with smog or noise, while relocation to an agricultural community may subject other homeowners to putrefying odors.[7] If the economic captive asserts a nuisance claim, the defendant may then raise an affirmative defense that the plaintiff came to the nuisance; in other words, the defendant and the injurious activity were established *prior* to the plaintiff's arrival.[8] Whether the plaintiff's status should be considered a countervailing factor or argument to the defendant's affirmative defense that the plaintiff actually came to the nuisance is the central policy issue which must be resolved: specifically, the manner in which society (be it governmental units or private entities) deals with these inherent conflicts presented by a recognized theory of economic captivity.

The phenomenon of the economic captive is a reality of modern capitalistic society.[9] Notwithstanding this reality, the question still

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[6] *See id.*; DANIEL R. MANDLKER, LAND USE LAW §§ 4.05, 4.08 (5th ed. 2003).

[7] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 705–06 (Ariz. 1972) (finding that a feedlot for cattle was a nuisance to nearby homeowners because of the obnoxious odors and flies); Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267–68 (N.D. W. Va. 1982) (rejecting defendant steel corporation's coming to the nuisance defense against claims that defendant created air pollution and discharged toxins into waterways); Wier's Appeal, 74 Pa. 230 (1873) (granting injunction against the use of gun powder magazine on the ground that it would be a nuisance to nearby residents despite the fact that the gun powder was necessary for defendant's established business); s*ee also* Tal S. Grinblat, *Offenses to the Olfactory Senses and the Law of Nuisance*, 21 LEGAL MED. Q. 1 (1997) (discussing the noxious effects and putrid smells generated by large scale hog operations—e.g., fatigue, depression, nausea, sleep disturbances, etc.—on populations downwind from these economically productive hog farms, together with the availability of nuisance law to partially abate these type of businesses). Aesthetics is also of growing concern in environmental nuisance cases. *See* George P. Smith, II, & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 54–56 (1991).

[8] Courts across America have held that the fact that a plaintiff came to the nuisance is not a *per se* defense to a nuisance claim; however, many jurisdictions do consider "coming to the nuisance" as a factor in determining whether the defendant's activity is unreasonable. *See* discussion *infra* Part I.B. Interestingly, by statute, several states have allowed a party plaintiff to seek injunctive relief on a theory of anticipatory nuisance and, thus, abate an action before it becomes a nuisance. *See* George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687 (2005). Two other defenses available, in principle, although not allowed often in practice by the courts, are to be found in contributory negligence and assumption of risk. RESTATEMENT (SECOND) OF TORTS § 840B, C (1979) (discussing contributory negligence and assumption of the risk); FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 83 (1956).

[9] *See generally* Manny Fernandez, *Wary of a Wall Streeter at the Helm*, N.Y. TIMES, May

remains whether a person's socioeconomic status can serve as an effective counter to the defense that the plaintiff came to the nuisance. An examination into how the law should treat economic captives whose presence in a location is inconsistent with a higher use for the land will yield the answer to this question. Examining the efficacy of a variety of approaches leads to the conclusion that the best approach is through the working of managed growth and bonus zoning *in tandem* in order to achieve some level of harmony amongst a range of demographic groups.[10] The employment of amortization provisions, where the economic captive is allowed to remain in his home for a reasonable period of time, is a necessary component of this solution.[11] Concluding that this approach is the most efficacious leads to the determination that one's status as an economic captive deserves to be included as a factor in the requisite balancing under which a nuisance cause of action is tested initially.[12] However, such a status is not automatically dispositive in dealing with a coming to the nuisance defense and must be viewed in light of the desired goal of protecting the common good.[13] The fact remains, importantly, that there is a place for the economic captive and that individual is not left defenseless in the world of nuisance law. If recognized, the plaintiffs' status as an economic captive should offset, or at least neutralize, the fact that he came to a nuisance and thereby provide him with an avenue for relief.

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

The evolving land use principle that mandates a balance, or "fair

17, 2009, at A26, *available at* http://www.nytimes.com/2009/05/17/nyregion/17housing.html?scp=1&sq=%27manny%20fernandez%22%20and%20helm&st=cse (noting that there are 402,000 people in New York City public housing).

[10] *See* discussion *infra* Part V.B.

[11] *See* discussion *infra* Part VI.D.

[12] *See* RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). The Restatement states that "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct." *Id.*

[13] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 715 (8th ed. 2011) ("[I]t is to the benefit of all interest groups that when courts are enforcing common law principles they should concentrate on trying to increase the aggregate wealth of society by making the principles and case outcomes efficient."). Indeed, "property rights are instrumental to achieving economic efficiency." *Id.* at § 3.11.

share," of low and moderate income (i.e., affordable) properties in any legal zoning plan[14] will then be analyzed within the context of its effect on recognition of a theory of economic captivity.[15]

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

II. NUISANCE LAW AND COMING TO THE NUISANCE AS A VALID DEFENSE

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

The basic definition of any nuisance is the "unreasonable interference with the . . . use and enjoyment of" one's real property.[16] When analyzing whether some action constitutes a nuisance, most courts employ a balancing test.[17] The Restatement (Second) of Torts broadly provides that at the heart of the resolution of a nuisance action is a balancing of the utility of certain conduct with the gravity of its harm.[18] In fact, in demonstrating that a balance must be struck between a defendant's right to reasonably use his property and the plaintiff's right to enjoy his property, Prosser has stated that "[these] two [rights] are correlative and

[14] *See* discussion *infra* Part III. *See generally* John M. Payne, *Fairly Sharing Affordable Housing Obligation: The* Mount Laurel *Matrix*, 22 W. NEW ENG. L. REV. 365, 370 (2001).

[15] *See* discussion *infra* Part IV.

[16] Abdella v. Smith, 149 N.W.2d 537, 539 (Wis. 1967).

[17] Smith, *supra* note 4, at 689.

[18] RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). The Restatement explains that the calculation of the gravity of the harm employs an examination of the following:

> (a) The extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.

Id. § 827. Further, the utility of the good considers "(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion." *Id.* § 828.

interdependent, and neither is entitled to prevail entirely, at the expense of the other."[19] This balancing of a defendant's rights and the utility of the action with a plaintiff's rights and the harm caused, serves as a judicial tool by which a court can establish whether one's conduct was unreasonable, in which case a nuisance would be found.[20] The results of this balancing test are not uniform irrespective of locality.[21] Rather, what may be reasonable in one area could be unreasonable in another.[22]

A nuisance can be either private or public.[23] A private nuisance occurs when one individual violates the maxim, *sic utere tuo ut alienum non laedas*,[24] and uses their land so as to injure another individual or small group of individuals—the legal equivalent of

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[19] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 616 (3d ed. 1964). In emphasizing the importance of a balancing test in nuisance actions, Prosser has stated:

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

Id. at 616–17 (citations omitted).

[20] RESTATEMENT (SECOND) OF TORTS § 826 cmt. c (1979) ("The question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable."); *see also* DAN B. DOBBS, THE LAW OF TORTS 1320 (2001) ("To classify a [use] as a nuisance . . . invoke[s] a regime of reasonable accommodation between conflicting uses.").

[21] *See* Smith, *supra* note 4, at 701; *see also* WILLIAM LLOYD PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 170–71 (photo reprint 1982) (1954) ("There has been general recognition in the nuisance cases that the relation of the activity to its surroundings is the controlling factor.").

[22] Smith, *supra* note 4, at 701; *see also* FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS 97 (3d ed. 2006) ("It is the type of interest invaded that gives to the tort what little unity or coherence it may have."). Common law jurisdictions choosing neither to accept nor to follow the Restatement of Torts balancing test factors, have been faulted for "balanc[ing] the competing interests as they see fit, considering only the 'needs of justice' broadly defined." Jared A. Goldstein, *Equitable Balancing in The Age of Statutes*, 96 VA. L. REV. 485, 525 (2010) (citing 27A AM. JUR. 2D *Equity* § 78 (2008)). Neither definitive rules nor normative principles exist which can clearly guide courts in determining those interests as appropriate to evaluate when balancing actually occurs. *Id.* at 525. *See also* MANDLKER, *supra* note 6 at § 4.12.

[23] WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 60 (2d ed. 1956) (stating that these two designations "deserve[] separate consideration" from each other based on public nuisance's protection of the general welfare and private nuisance's more individualistic scope).

[24] PROSSER, supra note 19, at 616 n.55 ("[U]se thine own so that thou dost no harm to another." (citation omitted)).

unreasonableness.[25] In contrast, a public nuisance occurs when there has been an unreasonable interference with a group of citizen's rights as a community.[26] Often the difference is a matter of degree and depends upon the number of individuals affected by the nuisance.[27]

The utility of a nuisance cause of action is that it helps to reinforce and preserve the common good through a codification of what conduct a society deems to be a reasonable use of real property in relation to the rights of others.[28] The common good can be described as achieving a social benefit that is greater than any individual citizen's personal concerns.[29] Stated otherwise, the common good is the achievement of the greatest good for the greatest number.[30] It is through a balancing test that the courts determine which use of property furthers the common good or, in other words, which use is more reasonable.[31]

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[25] Smith, *supra* note 4, at 698–99. *See* Matthew Saunig, *Rebranding Public Nuisance:* City of Cleveland v. Ameriquest Mortgage Securities Inc. *as a Failed Response to Economic Crisis*, 59 CATH. U. L. REV. 911 *passim* (2010) (analyzing the proper limits of public nuisance claims and cautioning against unfettered expansions of the tort).

[26] RESTATEMENT (SECOND) OF TORTS § 821B (1979). Public nuisance has been called "a species of catch-all criminal offense, consisting of an interference with the rights of the community at large." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 618 (5th ed. 1984).

[27] Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 705–06 (Ariz. 1972).

[28] Smith, *supra* note 4, at 699 ("[B]y its reasonable application, [nuisance] has sought to effect a responsible, balanced approach to property use; an approach which seeks to accommodate fundamental principles of utilitarianism with a functional recognition of absolute property ownership—all guided as such by a standard of reasonableness effected by application of a balancing test.").

[29] Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 874–75 (2001) (noting that a community's values play an important role in the calculus of the common good of that locale).

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

[31] Smith, *supra* note 4, at 680. *See also* DAVID W. BARNES & LYNN A. STOUT, THE ECONOMICS OF PROPERTY RIGHTS AND NUISANCE LAW 17 (1992) ("Economic analysis [not only seeks to] determin[e] which allocation of scarce resources maximizes wealth [but] is generally

Examining the common good through the lens of economics seems to be an almost inescapable enterprise.[32] The alternative is to place social justice, manifested in a fair share approach to legal solutions, as the main consideration for defining the common good.[33] Yet, economics and social justice are not necessarily two different and distinct notions.[34] The same efficiency that is a desired goal of an economic approach also embodies elements of social justice.[35] Engaging in such an "economic analysis of the law" serves to reinforce the common good through an attempt to maximize society's aggregate wealth.[36] It is clear then, that economics is inevitably at the fulcrum of any balancing test that the courts must employ when analyzing the merit of a nuisance claim. It follows that the desired goal in resolving any nuisance claim is to permit that use which will best help to maximize the common good[37] or economic viability.

B. Coming to the Nuisance: From Absolute Bar to But a Factor

1. Recognition of the Coming to the Nuisance Defense

Early common law, dating back to the Nineteenth Century, recognized "coming to the nuisance" as a valid defense to a nuisance claim.[38] The concept stemmed from the ancient maxim *volenti non fit injuiria*, meaning "no legal wrong is done to him who consents."[39] In a "coming to the nuisance" defense, in which timing is the key, an

concerned with efficiency, not fairness.").

[32] *See generally* POSNER, *supra* note 13, at 3–16 (explaining the role of economic reasoning—especially rational choice and utility—as an undercurrent of legal decision-making).

[33] *See, e.g.*, S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 336 A.2d 713, 732 (N.J. 1975). ("We have earlier stated that a developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to '. . . the municipality's fair share of the present and prospective regional need[s].'").

[34] POSNER, *supra* note 13, at 26–27 (addressing criticisms of the economic approach to law and explaining that economics inherently reinforces justice through its attempt to avoid waste).

[35] *Id.* at 35 ("Even the principle of unjust enrichment can be derived from the concept of efficiency.").

[36] *Id.* at 713–16. Such an approach is necessary in the absence of a world in which the courts could effectively redistribute wealth throughout society to achieve the greatest level of equity. *Id.* Posner states that the legislature is far better equipped at redistributing wealth through income taxes and government programs than its judicial counterpart. *Id.* at 715.

[37] *See* discussion *supra* notes 23–31.

[38] *See, e.g.*, E. St. Johns Shingle Co. v. City of Portland, 246 P.2d 554, 556 (Or. 1952) (citing Rex v. Cross, 172 Eng. Rep. 219 (1826)); Wier's Appeal, 74 Pa. 230, 241 (1873); *see* HARPER & JAMES, *supra* note 8.

[39] *E. St. Johns Shingle Co.*, 246 P.2d at 556.

established resident who has been carrying on the complained of activity for some time seeks favorable treatment over a new inhabitant.[40] It also entails a presumption that the plaintiff understood and accepted the conditions of the area. For this reason, "coming to the nuisance" could be likened to the defense of assumption of the risk.[41] An early case often cited as recognizing "coming to nuisance" as an affirmative defense to a nuisance claim is *Rex v. Cross*.[42] In that case, an English court held that:

> [i]f a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other.[43]

As that court's holding illustrates, early common law favored established inhabitants based upon the principle that the plaintiff consented to the conduct by moving into the area wherein the complained of activity was already taking place.[44]

2. Repudiation of Coming to the Nuisance as a Per Se Defense

In response to the growth of industrialization and the shift towards urbanization during the Nineteenth Century, courts began refusing to recognize "coming to the nuisance" as a *per se* defense in nuisance actions.[45] Many courts found that the concept of "coming to the nuisance" was contrary to public policy and the common good.[46] Allowing such a defense, it was found, allowed a property owner to control the use of the surrounding areas not within his

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[40] 58 AM. JUR. 2D *Nuisances* § 426 (2011).

[41] *Id.*

[42] *See, e.g.*, *E. St. Johns Shingle Co.*, 246 P.2d at 556 (citing Rex v. Cross, 172 Eng. Rep. 219 (1826)).

[43] Rex v. Cross, 172 Eng. 219, 219 (1826).

[44] *E. St. Johns Shingle Co.*, 246 P.2d at 556.

[45] *See* Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267 (N.D. W. Va. 1982) ("The majority view [of jurisdictions] rejects the doctrine of coming to the nuisance as an absolute defense." (quoting Lawrence v. E. Airlines, Inc., 81 So. 2d 632, 634 (Fla. 1955))).

[46] *See id.*; United States v. Luce, 141 F. 385, 387 (D. Del. 1905) (stating that recognizing coming to the nuisance as a defense "would be so unreasonable and oppressive as to work its own condemnation").

ownership.[47] Additionally, courts were facing plaintiffs with limited housing options, such as persons moving into overcrowded cities bustling with industrial work.[48] Consequently, courts began protecting citizens and their dwellings over established businesses.

An example of this shift is the 1873 case heard before the Pennsylvania Supreme Court, *Wier's Appeal*, in which several residents in a growing borough outside of Pittsburgh brought a private nuisance action seeking an injunction to prevent Wier from building and maintaining a gun powder storage building on his property.[49] In upholding the injunction, the court stated "[c]arrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood."[50] Further clarifying the court's response to societal changes, the court continued, "[a]s the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand."[51] As the *Wier* case illustrates, the expansion of cities and industrialization helped spur a shift in the minds of judges that lead to protecting private dwellings, even at the cost of established businesses.[52] Although courts began refusing to recognize coming to the nuisance as a *per se* defense, not all completely ignored the timing of events, nor do they today.[53]

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[47] *Luce*, 141 F. at 389. *See* Smith, *supra* note, 4 at 704–05, for analysis of an action for anticipatory nuisance; MANDLKER, *supra* note 6, at § 4.03.

[48] *Patrick*, 549 F. Supp. at 1267.

[49] Wier's Appeal, 74 Pa. 230, 231 (1873).

[50] *Id.* at 241.

[51] *Id.*

[52] *See id.*; Ensign v. Walls, 34 N.W.2d 549, 550 (Mich. 1948) (granting an injunction against operator of dog breeding and boarding business due to odors and flies despite the fact that the plaintiffs moved into the area after the creation of the business); Carter v. Lake City Baseball Club, Inc., 62 S.E.2d 470, 471, 478 (S.C. 1950) (enjoining the use of school baseball field by professional team because it caused a nuisance to nearby homeowners and noting that it is no defense that the plaintiff voluntarily moved into the vicinity); Lawrence v. E. Airlines, Inc. 81 So. 2d 632, 634 (Fla. 1955) (stating in nuisance action against airline company that "it is no defense to an action of this character that the plaintiff 'came to the nuisance'").

[53] *See, e.g.*, Powell v. Superior Portland Cement, Inc., 129 P.2d 536 (Wash. 1942) (dismissing action for injunction against concrete plant because defendant's business was well established, the plaintiff knew the conditions of the property he purchased, and because the defendant's business was an integral part of the community); *see also* Ferdinand S. Tinio, Annotation, *"Coming to Nuisance" as a Defense or Estoppel*, 42 A.L.R.3d 344 (1972).

3. Current Stance: Coming to the Nuisance as a Factor in Determining Reasonableness

As observed, at the heart of any nuisance action is reasonableness and currently, although it is not a *per se* defense, most jurisdictions do consider whether a plaintiff came to the nuisance as a factor in the ultimate determination of reasonable use.[54] When taking into account "coming to the nuisance," it must first be established that the plaintiff had actual or constructive knowledge of the conditions of the area before acquiring the property.[55] A plaintiff can have constructive knowledge if he knew "'information [that] would lead a prudent man to believe that the fact existed, and that if followed by inquiry must bring knowledge of the fact home to him.'"[56] Without the requisite knowledge, it cannot be said that a plaintiff voluntarily came to the nuisance. Although such a plaintiff or economic captive may have knowledge of the surrounding property, thus allowing a court to consider "coming to the nuisance" as a factor, other considerations may weigh in favor of the economic captive.[57]

When considering coming to the nuisance as a factor in determining reasonableness, several sub-factors can also affect the weight of the coming to the nuisance defense.[58] The first consideration is often the general use of the location wherein the nuisance-like activity is taking place.[59] It is critical whether the

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[54] *See, e.g.*, *Ensign*, 34 N.W.2d at 553; Abdella v. Smith, 149 N.W.2d 537 (Wis. 1967) ("A plaintiff, of course, is not *ipso facto* barred from relief in the courts merely because of 'coming to the nuisance,' but it is a factor."); Tinio, *supra* note 53; RESTATEMENT (SECOND) OF TORTS § 840D (1979).

[55] *See, e.g.*, *Powell*, 129 P.2d at 537–38 (denying injunction against cement business in part because the plaintiff knew of the conditions caused by the plant); Mark v. Oregon, 84 P.3d 155, 163 (Or. Ct. App. 2004) (stating that coming to the nuisance is only a consideration if the plaintiff knew or should have known of the complained of activity before moving onto the property).

[56] *Mark*, 84 P.3d at 163 (quoting Tucker v. Constable, 19 P. 13 (Or. 1888)). In affirming an injunction preventing the use of a nude beach, the Court of Appeals of Oregon in *Mark v. Oregon* refused to consider the fact that the plaintiffs came to the nuisance as a factor because the defendant could not establish that the plaintiffs knew or should have know that the nude beach was next to their property. *Mark*, 84 P.3d at 157, 163. This was because the plaintiffs only visited the area during the winter months when no sunbathers were present, no maps or signs in the area indicated that it was a nude beach, and the seller never indicated that the adjacent property was a nude beach. *See id.* at 158.

[57] *See* Spur Indus., Inc., v. Del E. Webb Dev. Co., 494 P.2d 700, 706 (Ariz. 1972).

[58] *Id.*; *see* Tinio, *supra* note 53.

[59] *See, e.g.*, *Powell*, 129 P.2d at 537 (noting that at least half of the residents of the town depended upon the defendant's cement business, whose location was necessary because of its proximity to a limestone deposit); *see also* E. St. Johns Shingle Co. v. City of Portland, 246 P.2d 554, 563–64 (Or. 1952) (holding private party could not obtain damages based on

plaintiff is complaining of conditions typical of industrial activities in a well-established industrial neighborhood[60] or agricultural regularities in a farming region.[61] A plaintiff will have a more difficult time overcoming the "coming to the nuisance" factor if, for instance, the area is zoned for uses other than personal dwellings.[62] This is because courts have favored "industrial operators who are a part of a long-established and recognized industrial center, wherein the area is dominated by manufacturing enterprises."[63] Therefore, an economic captive has a stronger case if the area in which he lives has some dwellings and is not used exclusively for industry or agriculture.

Another sub-factor vital to a court's consideration of a coming to the nuisance defense is public policy, which in many instances will weigh heavily in favor of an economic captive.[64] As one court has stated, "[t]he law recognizes that the nuisance claims of private owners must at times yield to public interest and convenience[,]" while at other times an established business must yield to the needs of the public.[65] For instance, an established business may need to move or cease operations if a city extends and houses are built in the area.[66] Alternatively, public policy may favor a long standing business because of its role to the community.[67] Such was the finding in *Powell v. Superior Portland Cement*, where the Supreme Court of Washington refused to grant damages to a homeowner despite smoke, gas, and noise because roughly half of the town's livelihood was tied to the cement plant.[68] To an economic captive, public policy could be a significant consideration against a "coming

nuisance, in part because the area in which the plaintiff purchased the land was a well-established industrial district); *Abdella*, 149 N.W.2d at 541 (stating that one reason the defendant's use of his property as a horse riding academy was reasonable was because it was in a rural area).

[60] *See E. St. Johns Shingle Co.*, 246 P.2d at 563.

[61] *See Abdella*, 149 N.W.2d at 541.

[62] *See* Weir's Appeal, 74 Pa. 230, 238–39 (1873).

[63] *E. St. Johns Shingle Co.*, 246 P.2d at 560.

[64] *Cf. Wier's Appeal*, 74 Pa. at 230; Yaffe v. City of Fort Smith, 10 S.W.2d 886, 890 (Ark. 1928); Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 702 (Ariz. 1972).

[65] *E. St. Johns Shingle Co.*, 246 P.2d at 562.

[66] *Wier's Appeal*, 74 Pa. at 236, 237.

[67] Powell v. Superior Portland Cement, Inc., 129 P.2d 536 (Wash. 1942).

[68] *Id.* at 537. More contemporaneous with the decision in *Powell* is the landmark case of Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). In *Boomer*, although the New York Court of Appeals found that dust, smoke, and vibration emanating from a cement plant constituted a continuing and recurrent nuisance, no injunctive relief was ordered to be given to the plaintiffs; rather, permanent damages were assessed. *Id.* at 871, 875. The court reasoned that significant economic consequences would result to the local and state economies if it issued a prohibiting injunction. *Id.* at 871.

to the nuisance" defense.[69] Although an economic captive has limited housing options, he should have the same rights as others to enjoy his property.[70] For instance, the U.S. District Court for the Northern District of West Virginia noted in a 1982 case that the defense of "coming to the nuisance" was "'out of place in modern society where people often have no real choices as to whether or not they will reside in an area adulterated by air pollution.'"[71] For this reason, public policy dictates that limited options and financial hardship should not require a homeowner to endure unreasonable living conditions.

Factors other than public policy and location can also play a role in a court's consideration of the fact that a plaintiff came to the nuisance. These include whether the complained of activity has increased or changed.[72] Although a plaintiff may knowingly move into the vicinity of a nuisance, that plaintiff should not have to suffer the consequences of increased noise, pollution, or other nuisance like conditions.[73] An additional factor often analyzed by courts when considering "coming to the nuisance," is the price the plaintiff paid for the property.[74] If a plaintiff is able to purchase the property at a much lower rate, knowing the price was cheaper because of the complained activity, a court is more likely to place greater weight on a "coming to the nuisance" defense.[75] However, an economic captive is not comparable to a business that can choose to purchase cheap property in an effort to obtain maximum profits.[76] An economic captive, by definition, has few choices, and as such should not be penalized for selecting property because of its price.[77] Because most courts are currently considering "coming to the nuisance" as a factor in determining reasonableness, an economic captive should raise these other factors, in addition to public policy

[69] *Cf. Powell*, 129 P.2d at 538–39.

[70] *See* Smith, *supra* note 4, at 706.

[71] Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267 (N.D. W. Va. 1982) (quoting Lawrence v. E. Airlines, Inc., 81 So. 2d 632, 634 (Fla. 1955)).

[72] *See, e.g.*, E. St. Johns Shingle Co. v. City of Portland, 246 P.2d 554, 554, 563–64 (Or. 1952) (noting that the "coming to the nuisance" doctrine did apply, in part, because the complained of activity was not increased beyond what should have been anticipated).

[73] *See id.* at 564.

[74] *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972) (noting that it was not unfair to require the plaintiff to indemnify the defendant because the plaintiff was able to purchase cheaper and larger tracts of land). *See also* Rohan Pitchford & Christopher M. Snyder, *Coming to the Nuisance: An Economic Analysis from an Incomplete Contracts Perspective*, 19 J.L. ECON. & ORG. 491, 492 (2003).

[75] *See Spur Indus., Inc.*, 494 P.2d at 708.

[76] *See id.* at 704.

[77] *See* Smith, *supra* note 4, at 706.

concerns, the nature of the area, and the plaintiff's knowledge of the conditions. It is only after addressing all factors that a court can truly determine reasonableness.

III. THE *SPUR INDUSTRIES* APPROACH TO COMING TO THE NUISANCE: EMPLOYMENT OF THE COMPENSATED INJUNCTION

In *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, Spur Industries owned a cattle farm in an area of Arizona in which farming had begun in roughly 1911.[78] Spur's cattle farm was started in 1956 and by 1959 Spur had erected feedlots for approximately 7,500 cattle.[79] In 1960, Del Webb began advertising a housing development that he was building, roughly two and one-half miles north of the Spur feedlot area.[80] At the time of this marketing of the Del Webb property, Del Webb did not consider the Spur feedlot area's odors to be a problem and, in fact, continued to develop further and further south, getting closer and closer to the Spur property.[81] However, as Del Webb expansion continued pushing south, there became a significant sales resistance that made it nearly impossible to sell the proposed housing lots.[82] Del Webb then sued Spur Industries asserting that the operation of Spur's feedlots constituted a public nuisance because it rendered portions of Del Webb's property unfit for development, thereby making it impossible to sell any residential units.[83] In addition to their inability to sell residential units, Del Webb's public nuisance allegation was bolstered by the complaints of residents who had already purchased homes from the developer about various odorous emissions and secondary effects emanating from Spur's feedlot.[84]

As an initial matter, the Supreme Court of Arizona found that despite the fact that the operation was a lawful business, Spur's

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[78] *Spur Indus., Inc.*, 494 P.2d at 703–04.

[79] *Id.* at 704.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 705. Del Webb's complaint cited "the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City" as the alleged nuisance-like activity that the continued operation of Spur's feedlot was causing. *Id.* at 705. The Supreme Court of Arizona found

> [t]here [was] no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area.

Id.

[84] *Id.*

continued operation of its feedlots was indeed a public nuisance to the already established residents of the nearby community.[85] So far as the court was concerned, there was no doubt that the residents did have an actionable claim to abate Spur's business operations with respect to the feedlot in question.[86] This was because the odors and flies caused by the feedlots prevented the residents from lawfully enjoying the use of their property.[87]

The inquiry then turned to the validity of Del Webb's nuisance claim arising from the loss of sales and Spur Industries' defense that Del Webb came to the nuisance.[88] The court expressed that Spur's coming to the nuisance defense to Del Webb's nuisance claim was not falling on deaf ears when it noted that "[i]n addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business."[89] Had Del Webb been the only injured party, the court stated that it would "feel justified" in ruling that Spur Industries had an adequate coming to the nuisance defense, a factor that would have ultimately resulted in a finding that Spur's use was reasonable.[90] The court, however, acknowledged the important role that changing circumstances played in the case at bar.[91] More specifically, the court noted that a lawful business in a remote location may become surrounded by a growing population, in which case the "elastic" nature of nuisance law a court must determine what is fair and reasonable for the interests of the public.[92] Citing the needs of the general public which was increasingly populating the expanding city, the court granted the injunction requiring Spur Industries to move its feedlot.[93]

This injunction, however, did not relieve Del Webb of any

[85] *Id.* at 706.

[86] *Id.*

[87] *Id.* at 705.

[88] *Id.* at 706–07.

[89] *Id.* at 706.

[90] *Id.* at 706–07.

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

[92] *Spur Indus., Inc.*, 494 P.2d at 707 (quoting Stevens v. Rockport Granite Co., 104 N.E. 371, 373 (Mass. 1914)).

[93] *Spur Indus., Inc.*, at 708 (recognizing that the injunction was being granted through no fault of Spur's).

responsibility to Spur Industries.[94] According to the court it did "not equitably or legally follow . . . that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained."[95] The court noted that Del Webb voluntarily purchased land that was remote from current urban establishments, primarily used for agriculture, and was not protected by urban zoning.[96] Moreover, the court found that the feedlots were a foreseeable nuisance for the lots Del Webb was trying to sell.[97] Noting principles of equity at play in the case, the Supreme Court of Arizona required Del Webb to compensate Spur for their forced move of the feedlot.[98] The court stated,

> [i]t does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop . . . to indemnify those who are forced to leave as a result.[99]

Thus the court found against Spur Industries while also requiring Del Webb to indemnify Spur Industries for the damages sustained in relocating the feedlot.[100]

The court's granting of this compensated injunction reflects the current trend that coming to the nuisance, while a factor to consider, is not an absolute bar to a nuisance claim.[101] As the court stated, its decision was "not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public," which outweighed Spur Industries' interests because of the encroaching growing population.[102] The compensated injunction employed in *Spur Industries, Inc.* is a viable tool in the judicial arsenal especially when, as the Arizona Supreme Court made clear, both the general public and the offending landowner are innocent but the offending use clearly constitutes a nuisance.[103]

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *See* Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of* Spur Industries *on Nuisance Law*, 41 WASH U. J. URB. & CONTEMP. L. 75, 88–89 (1992). Such a trend is particularly efficacious "if a plaintiff is part of a natural wave of growth and development that has gradually approached a defendant's formerly harmless use." *Id.* (citations omitted).
[102] *Spur Indus., Inc.*, 494 P.2d at 708.
[103] Reynolds, *supra* note 101, at 99. However, the compensated injunction has been

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

In 1975 in *South Burlington N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel I*), the Supreme Court of New Jersey was faced with the question of whether a developing municipality could enact zoning regulations, which made it extremely difficult for low and moderate income residents to reside in the town.[104] In response to an increasing suburbanization sweeping across southern New Jersey, the town enacted a zoning ordinance that gave more than enough space for potential industry and business development while severely limiting the potential for residential development.[105] For those zones in which residential development was allowed to occur, the ordinance was clearly geared towards upper and middle income prospective residents by permitting only single-family homes situated on large lots.[106] In striking down Mount Laurel's zoning ordinance as unconstitutional, the Supreme Court of New Jersey explicitly adopted the provision that a municipality must "make realistically possible an appropriate variety and choice of housing" including low and moderate income housing.[107] The court focused on each municipality's greater regional responsibility, to permit housing for a "fair share" of the region's need for housing for the various demographics.[108] Other jurisdictions have also acknowledged the fair share principle with respect to a municipality's duty to afford a reasonable opportunity for a reasonable number of low and moderate income people to reside in that area.[109]

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applied sparingly. *See* Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147, 184, n.194 (2002) (commenting that it is highly unlikely for a court to employ a compensated injunction).

[104] *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975). [hereinafter *Mount Laurel I*].

[105] *Id.* at 718–19. The court explained that "much more land has been so zoned than the reasonable potential for industrial movement or expansion warrants" and that this land cannot be used for residential purposes according to the ordinance. *Id.* at 719.

[106] *Id.* at 721.

[107] *Id.* at 724 (holding that there must be some affirmative effort on the part of the municipality to provide for housing opportunities to a variety of socioeconomic groups).

[108] *See id.* at 726–27. In noting the need for better regional development, it was explained that "'effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries'" and the modern trend of greater suburbanization "'refuses to be governed by such artificial lines.'" *Id.* (quoting Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 64 A.2d 347, 350 (N.J. 1949)).

[109] *See, e.g.*, BAC, Inc. v. Bd. of Supervisors of Millcreek Twp., 633 A.2d 144, 146 (Pa. 1993). The Supreme Court of Pennsylvania has also held that "[w]here a municipal

The New Jersey Supreme Court also addressed one significant concern with the fair share doctrine: the extent to which such a requirement of a municipality restricts that municipality's ability to provide quality government services and foster economic growth.[110] Providing a reasonable opportunity for affordable housing for various segments of society should not serve as an impediment for municipalities to "become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand."[111] It is important to note that in order to actually realize such a result in the face of fair share obligations, the court pointed toward active government planning and cooperation.[112] The court stopped short, in *Mount Laurel I*, of actually providing any clues of how governments can comply with such an obligation.[113] Rather, the court vaguely pointed to a cooperative effort to achieve the desired goal of social equity—a reasonable affordance of housing opportunities for all economic classes of people.[114]

Eight years later, in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel II*), the Supreme Court of New Jersey developed a template to clarify the broad directive of its earlier decision.[115] *Mount Laurel II* arose as a result of substantial municipal noncompliance with the fair share doctrine previously discussed.[116] Imposition of the fair share obligation, the court determined, should only affect those localities deemed to be "growth areas" by the state's development plan.[117] Through its reliance on

subdivision is a logical place for development to occur, it must assume its rightful part of the burdens associated with development, neither isolating itself nor ignoring the housing needs of the larger region." *Id.* (citations omitted). Beach v. Planning & Zoning Comm'n of Town of Milford, 103 A.2d 814, 817 (Conn. 1954) (holding that approval of a subdivision cannot be denied on the basis that that subdivision will impose a financial burden on the town).

[110] *See Mount Laurel I*, 336 A.2d at 733–34.

[111] *Id.* at 733.

[112] *Id.*

[113] *See id.* at 734.

[114] *Id.* The court noted that a coalition of "private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government" should work together in furtherance of this objective. *Id.*

[115] S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 456 A.2d 390, 413 (N.J. 1983) [hereinafter *Mount Laurel II*] ("Although [*Mount Laurel I*] set forth important guidelines for implementing the doctrine, their application to particular cases was complex, and the resolution of many questions left uncertain.").

[116] *Id.* at 410.

[117] *See id.* at 424 (making this determination in accord with public policy considerations). The court accepted the proposition that the state's development plan was an accurate reflection of where growth was expected to occur in the state. *Id.* at 426. The goal of this

the state development plan, the court sought to impose the fair share obligation in a manner consistent with the state's desires while avoiding irrational development.[118] In seeking to resolve the great difficulty in calculating what fair share actually meant,[119] the court suggested the creation of a judicial body that would serve as an administrative tribunal to determine and enforce the fair share obligation.[120] It was intended that this body would, through the resolution of a few initial cases, establish a pattern that would create consistent expectations for each region, and the state as a whole.[121] Further, a formula was suggested that would take into account a variety of factors when determining a locality's fair share obligation.[122] The court suggested that affirmative measures such as subsidies and inclusionary zoning devices were necessary to effectuate the desired goal.[123] Judicial remedies were also discussed in the event of a failure of a locality to meet its fair share obligations.[124] While *Mount Laurel I* failed to produce concrete guidelines for achieving the fair share aspirations, *Mount Laurel II* succeeded—and was vilified as a result.[125]

Following *Mount Laurel II*'s directives, the New Jersey legislature enacted the Fair Housing Act[126] that established an agency, as opposed to a judicial body,[127] to determine regional housing needs and whether the fair share obligation was met.[128] The agency, the

determination was "to channel the *entire* prospective lower income housing need in New Jersey into 'growth areas.'" *Id.* at 433.

[118] *Id.* at 435.

[119] *Id.* at 436 (noting that it was "[t]he most troublesome issue" and "takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of [*Mount Laurel I*]").

[120] *See id.* at 438. This judicial body consisted of three judges, each responsible for determining and enforcing the fair share obligation in a particular part of the state. *Id.* at 439.

[121] *Id.* at 439.

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

[123] *See id.* at 442–48 (commenting that governments should take a proactive approach in providing for affordable housing).

[124] *See generally id.* at 452–58 (suggesting that a builder's remedy, use of a special master, judicial revision of a town's zoning ordinance, and further judicial orders in the event that revised zoning still fails to satisfy the town's fair share obligation).

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

[126] DAVID J. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 551 (5th ed. 2008).

[127] *See Mount Laurel II*, 456 A.2d at 444.

[128] *See generally* N.J. STAT. ANN. §§ 52:27D-301–52:27D-329 (West 2011) (establishing a statutory system in which low and moderate income housing planning is realized with respect

New Jersey Council on Affordable Housing, in turn provides policies with respect to what local governments can do to create realistic housing opportunities as well as review demographic distribution plans submitted by municipalities.[129] The Supreme Court of New Jersey addressed this statute's validity in light of their previous jurisprudence in what would come to be known as *Mount Laurel III*.[130] In upholding the constitutionality of the Fair Housing Act, the court noted that the legislation's effects were in line with its previous *Mount Laurel* rulings.[131] Furthermore, the court expressed its preference for legislative rather than judicial resolution of the fair share question.[132] However, complete judicial deference was not granted as the court exhibited a dedication to enforce the fair share obligation in the event the Fair Housing Act failed to do so.[133] The presumption of the Act's constitutionality would only be overcome if it were almost certain to fail to achieve the *Mount Laurel* objectives.[134] The court, thus, accepted the legislature's revision of the *Mount Laurel II* template.

A reasonable opportunity for a variety of classes of people is not an unattainable summit. The reasonableness limitation on a municipality's responsibilities helps to prevent situations in which

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to regional needs). This legislation was passed only after the public outcry over *Mount Laurel II* abated. *See* CALLIES, FREILICH & ROBERTS, *supra* note 126, at 551; Payne, *supra* note 14, at 367 (citing N.J. STAT ANN. §§ 52:27D-301–52:27D-329).

[129] Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997) (citing N.J. STAT ANN. §§ 52:27D-307 et seq.). Political interests and, indeed, constraints have obfuscated the work of the Council and limited its achievements and overall effectiveness. Matthew Rao, Fair Share in Practice: The Council on Affordable Housing and the *Mount Laurel* Doctrine 26 (Apr. 19, 2010) (unpublished manuscript), *available at* http://www.planningpa.org/se_scholarships_fair_share.pdf.

[130] Hills Dev. Co. v. Twp. of Bernards, 510 A.2d 621, 631 (N.J. 1986) (citing *Mount Laurel II*, 456 A.2d 390, 439 (N.J. 1983); *Mount Laurel I*, 336 A.2d 713 (N.J. 1975)).

[131] *Hills Dev. Co.,* 510 A.2d at 640. The court stated that the Fair Housing Act "addresse[d] the main needs delineated in our prior decisions on this matter, namely, the consistency on a statewide basis of the determination of regional need, fair share, and the adequacy of the municipal measures." *Id.*

[132] *Id.* at 634 (holding that, until the legislature takes action, it is the duty of the courts to enforce the constitution).

[133] *Id.* at 633. In a case determined in 2009 by a New Jersey court, it was held that even though a township not only met but exceeded their fair share of affordable housing, the township's land use planning board must nonetheless give requests for additional low income housing review and consideration of the fulfillment of certain variance criteria. *See* Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd., 976 A.2d 1128, 1128, 1131 (N.J. Super. Ct. App. Div. 2009).

[134] *Hills Dev. Co.*, 510 A.2d at 643 ("The judiciary must assume, if the assumption is at all reasonable, that the Act will function well and fully satisfy the *Mount Laurel* obligation."). *See also supra* notes 107–09 and accompanying text (discussing the fair share objectives of *Mount Laurel I*).

there is an underwhelming demand for affordable housing in a particular municipality.[135] In examining the appropriate fate of the economic captive, the answer as to the correct path for municipalities in the aftermath of the *Mount Laurel* cases can also be extracted. In fact, the solution of some combination of managed growth and bonus zoning in tandem with amortization provisions not only takes care of the economic captive, but also relieves the *Mount Laurel* albatross from the necks of municipalities.[136] Affordable housing is provided in accordance with a plan that will maximize the economic benefits to a locality; therefore, achieving a balance between opportunities for an economic captive and desired economic growth.

V. THE PLIGHT OF THE ECONOMIC CAPTIVE

The economic captive, first recognized by Smith in 1995, is an individual who due to a limited economic status is forced to live in a particular area.[137] The aspects of the location, which prompt the economic captive to call such a place home, share one common thread—economic necessity.[138] Such exigencies include proximity to a place of employment, government-mandated rent-control, and cultural necessity, but this list is not exhaustive.[139] In fact, all that is required for one to be considered an economic captive is that he must live in an area for socioeconomic reasons and have little choice in the matter due to financial, personal, or other social reasons.[140] The following discussion of examples of economic captives will highlight three possible classes of people upon whom this designation could be bestowed. Understanding the nature of the economic captive's situation will enable a more complete analysis of

[135] Toll Bros., Inc. v. Twp. of W. Windsor, 803 A.2d 53, 85 (N.J. 2002). In expressing that a municipality need only provide affordable housing opportunities in relation to demand, the Supreme Court of New Jersey stated that "developers are motivated by profit, and there is likely no greater area of concern for a developer than the marketability of its project. The colloquial phrase 'if you build it, they will come' does not translate well to the building of homes." *Id.*

[136] *See* discussion *infra* Part V.B. and Part V.C.; *cf.* Katrin C. Rowan, *Anti-Exclusionary Zoning in Pennsylvania: A Weapon for Developers, a Loss for Low-Income Pennsylvanians*, 80 TEMP. L. REV. 1271, 1304 (2007) ("By focusing on property rights rather than people and their need to live in decent, affordable housing, Pennsylvania's 'fair share' case law removes the focus from low- and moderate-income Pennsylvanians and instead places power in the hands of developers, who generally do not have a profit incentive to build affordable housing.").

[137] Smith, *supra* note 4, at 706.

[138] *Id.*

[139] *Id.*

[140] *Id.*

what role the concept of economic captivity should have with respect to nuisance law.

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

The previously discussed case of Ann and Conrad Riedi provides but one example of economic captives.[141] As observed, despite the fact that the elderly couple has lived in the same apartment for forty years, the Riedis are faced with the choice of having to relocate to allow for new subway construction.[142] The Riedis are economic captives in the sense that, because of their limited resources, age, and government rent control policy, they are confined not only to that part of the city, but to that particular building.[143] Their situation does not exist in isolation. In the landmark takings case *Kelo v. City of New London*,[144] a corollary may be found to the Riedis' situation. One of the landowners who challenged the taking of her property in the name of economic redevelopment was Wilhelmina Dery, an elderly resident.[145] Wilhelmina lived in her house for her entire life and her husband had lived there with her for roughly sixty years.[146] As was the case with the Riedis, the only reason Wilhelmina was being forced to move was because her house stood in the way of a development project; blight was not an issue.[147]

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[141] *See* Grynbaum, *supra* note 1.

[142] *Id.*

[143] *Id.*

[144] Kelo v. City of New London, 545 U.S. 469 (2005); *see* Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 203 (2006) ("[*Kelo*] is a case of *reductio ad absurdum*, meaning that its premise is flawed in that it deems almost *everything* to be a 'public use.'"); s*ee also* Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751 (2009).

[145] *Kelo*, 545 U.S. at 475.

[146] *Id.*

[147] *Id.* On June 24, 2010, the Court of Appeals of New York held that the New York State Urban Development Corporation had exercised—properly—its power of eminent domain on behalf of Columbia University's plan for a $6.3 billion expansion in West Harlem. Kaur v. N.Y. State Urban Dev. Corp., 933 N.E. 721 (N.Y. 2010). A crucial seventeen acres of private property were blocking this expansion of the University, which would not only upgrade the "blighted" neighborhood by construction of a civic project which would be dedicated to research and expansion of laboratories, libraries, and student housing, but would also create some 6,000 permanent jobs which, in turn, would make contributions to a better society in biotechnology and in health research. *Id.* at 724–26, 729. The Appellate Division had determined previously, by a 3 to 2 decision, that the power of eminent domain had been *ultra vires* and thus unconstitutional. *Id.* at 729. *But see* Alexander D. Racketa, *Takings for Economic Development in New York: A Constitutional Slam Dunk?*, 20 CORNELL J.L. & PUB. POL'Y 191, 197 (2010). Racketa questions the implicit recognition by the New York Court of Appeals of economic development as a valid public use under the eminent domain power of the state constitution and calls upon the Court to not only constrain the expansion of this

The situations of Wilhelmina and the Riedis highlight a circumstance that will become more and more frequent with an ever-increasing elderly population in this country.[148] Many of these people can be described as having a modest income.[149] As such, this elderly segment of the population will have a severely limited choice in terms of where to live. Proximity to medical care, government services, and safety are very real considerations that warrant the need for an elderly economic captive to reside in a certain area.[150] Once relocated to an area that meets these specific criteria, an elderly economic captive should not be forced to endure nuisance-like conditions.[151]

B. An Economic Captive with Cultural Needs to Boot

There may also be other social underpinnings, in addition to economic needs, that account for an economic captive's decision to live in a particular locale. In *Asian Americans For Equality v. Koch*, a proposed development project in Manhattan would have displaced residents of New York City's Chinatown district.[152] At the time of the case, New York City had the largest Chinese community in America.[153] The area of the proposed redevelopment was described as a "major housing resource for the relatively recent immigrant families, the future immigrant families, those families who came . . .

notion but to also define, with care, the boundaries of "blight" in seeking its removal as advancement of a public purpose. *Id.* Generally, when a taking adds significant wealth to society, courts will sustain it as being valid. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 108 (1986). Interestingly, Justice Clarence Thomas, in his dissent in *Kelo*, cited a South Carolina takings case, *Lucas v. S.C. Coastal Council*, in support of his contention that when slums exist and are "blighted," nuisance law should be seen as controlling over an exercise of the eminent domain power. *Kelo*, 545 U.S. at 519–20 (Thomas, J., dissenting) (citing Lucas v. S.C. Coastal Council, 424 S.E.2d 484 (S.C. 1992)). The power to abate a nuisance requires no compensation. *See id.* Arguably, blighted areas could be considered aesthetic nuisances. *See generally* George P. Smith, II, *Aesthetic Nuisance: Reeducating the Judiciary*, 24 REAL EST. L.J. 26 (1995) (arguing for a new standard which courts should implicate when recognizing aesthetic nuisances).

[148] WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005 813 (2005), *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf (noting that the elderly population in the United States "is projected to double between 2000 and 2030.").

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

[150] *See* Ana Petrovic, *The Elderly Facing Gentrification: Neglect, Invisibility, Entrapment, and Loss*, 15 ELDER L.J. 533, 549–50 (2007).

[151] *Id.* at 542.

[152] Asian Ams. for Equal. v. Koch, 514 N.Y.S.2d 939 (N.Y. App. Div. 1987).

[153] *Id.* at 953 (noting that the city was expected to receive another 150,000 to 200,000 Chinese immigrants by 1980).

long ago, but remain at the bottom of the economic ladder, and a small group of middle-income professionals and business persons."[154] Also, many residents of this area fell below the poverty line.[155] In addition to the economic necessity of living in this area, there were also important cultural reasons that made it almost imperative for these qualified economic captives to live in Chinatown. Residing in this particular neighborhood was instrumental in the assimilation process for Chinese immigrants and there were employment opportunities in Chinese-owned business that were in close proximity to the economic captives' homes.[156]

The case of an economically-dependent person, with additional cultural needs that bind him to a particular area of residence, adds another complication to the plight of the economic captive. If some weight is to be given to one's economic situation when analyzing the viability of a "coming to the nuisance" defense, should cultural exigencies factor into the analysis as well? There is actually an economic efficiency argument that weighs in favor of consideration of an economic captive's cultural needs.[157] That argument holds that the quicker an immigrant population assimilates into United States society, the sooner that population can contribute to the economy and do so at a more productive rate than would result if assimilation took longer.[158] The socioeconomic implications that attach to the economic captive who is also an immigrant warrant consideration in the nuisance calculus. A denial of its operative validity would result in both social and economic disharmonies.

C. Learning Lessons of Hardship: The Collegiate Economic Captive

The example of a college student as an economic captive was first expressed in the initial pronouncement of the theory.[159] Under such an example, a college student without the means to afford university housing must live in off-campus residences in order to

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[154] *Id.*

[155] *Id.* (noting that the percentage of immigrants with socioeconomic restraints ranged from twenty to thirty-three percent of the population).

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

[157] *Cf.* POSNER, *supra* note 13, at 715 (explaining that society's end-game should be wealth maximization).

[158] *See Asian Ams.*, 514 N.Y.S.2d at 953–54.

[159] *See* Smith, *supra* note 4, at 706.

pursue the furtherance of their education.[160] However, the off-campus housing could very well be "in a very poor, dilapidated housing unit in the inner city that is, however, within walking distance of the campus."[161] The question becomes whether this economic captive with a collegiate permutation has any standing to bring a nuisance action against the conditions that their status, as a student of a particular university, theoretically required them to move to. In such a case, the defendant may argue, and a court may consider as a factor, that the economic captive came to the nuisance. Once again, an economic justification can be found for affording this economic captive some recourse against the "coming to the nuisance" defense they would surely face. While post-secondary education has a plethora of social values, it also furthers economic utility through the creation of a more intelligent and skilled workforce that breeds entrepreneurism.[162] Given the utility of college attendance, it would be counterproductive to discourage the pursuit of higher education by ignoring a student's status as an economic captive when sorting through the nuisance calculus.

VI. SOLUTIONS: EFFICACIES AND FLAWS

A. The Federal Approach: The Uniform Relocation Act

In the event that an individual's property is taken for some government initiative—consistent with Fifth Amendment powers—"just compensation" is required.[163] The federal government has provided its own mechanism for the compilation of just compensation for people who are displaced as a result of a federal agency's taking of their property.[164] In such an event of a taking, the taking agency is required to pay the "actual reasonable expenses in moving [the displaced person], his family, business, farm operation, or other personal property."[165] The displaced person

[160] *Id.*

[161] *Id.*

[162] *See* Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 952 (1992).

[163] U.S. CONST. amend. V.

[164] Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (Uniform Relocation Act), 42 U.S.C. §§ 4601–55 (2011).

[165] *Id.* § 4622(a)(1). For the purposes of the federal solution, "displaced person" refers to:

> (i) any person who moves from real property, or moves his personal property from real property—
>
> (I) as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a

should be relocated into a comparable living situation.[166] The justification behind such a federally-funded relocation assistance program is founded in concerns with equity and fairness.[167] This relocation legislation was intended "to minimize the hardship of displacement on such persons."[168] Additional compensation is afforded for any additional reasonable costs of relocation "not in excess of $22,500."[169] Replacement housing costs for displaced tenants are also considered in the federal statute.[170]

The federal approach to dealing with the relocation of displaced persons as a result of a government taking does have an admirable purpose that seemingly falls in line with the underlying notion of fairness that is required of governments.[171] This approach is founded on the notion that the displaced person is being put in a

Federal agency or with Federal financial assistance.

Id. § 4601(6)(A)(i)(I).

[166] *See id.* § 4623. "Comparable replacement dwelling" is statutorily defined as:

> [A]ny dwelling that is (A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

Id. § 4601(10).

[167] *Id.* § 4621(b).

[168] *Id.*

[169] *Id.* § 4623(a)(1). Additional reasonable costs could include title searches, recording fees, closing costs, and any debt service costs. *Id.* § 4623(a)(1)(C).

[170] *See id.* § 4624. For tenants, the additional reasonable relocation expense provision covers amounts not in excess of $5,250. *Id.* § 4624(a).

[171] *See* discussion *supra* Part IV. In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court held that a community could be condemned in order to allow the General Motors Corporation to build a factory. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). Even though the condemnation meant some 1,300 homes, 140 businesses, 6 churches and 1 hospital were demolished, the court reasoned that eminent domain seizures of this nature served only to safeguard the common good by revitalizing, and thus sustaining, the economic foundations of the municipality and the state as well. *Id.* The same state supreme court ruled on July 30, 2004, that the *Poletown* precedent was to be discarded. Accordingly, in *County of Wayne v. Hathcock*, the court held that economic development was an insufficient reason for justifying the condemnation of private property. Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 783, 787 (Mich. 2004). Interestingly, *Hathcock* does not support complete private to private condemnations. *See* Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1027–28 (2004). Indeed, *Hathcock* recognizes three exceptions to the ban on private-to-private transfers and compounds uncertainty in its application of failing to explain adequately how these three tests are to be employed prospectively. *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 863–64 (2004). The Michigan Supreme Court permits transfers to private parties if (i) the public retains control over the property, (ii) the condemnation was for a public necessity, or (iii) the condemnation was for a purpose separate from the transfer to the private party, such as blight removal. *Hathcock*, 684 N.W. 2d at 781–83.

comparable housing situation and that the compensation for such relocation is just. Similarities exist between this approach and the compensated injunction of *Spur Industries, Inc. v. Del E. Webb Development Co.*[172] As is the case with a compensated injunction, the federal government is seeking to provide for the mitigation of harm to virtually innocent landowners while at the same time acknowledging a higher use of the property is in society's best interest and should be allowed to displace the current use.[173] The burden of compensation is placed on the invading party, in this case, the government. Furthermore, compensation of reasonable additional expenses is a valiant attempt to impose no further displacement costs on the person being forced to relocate. Ultimately, the most redeeming quality of the federal relocation assistance program is that it seeks to achieve a compromise between competing interests.[174] Implicit in the statute is the recognition that there are certain governmental needs the fulfillments of which are highly beneficial to society. At the same time, an attempt is made to make the relocated persons whole at the conclusion of the ordeal by trying to minimize the difference between the old residence and the one relocated to.

Admirable as these goals may be, there are inherent flaws in the federal approach that make it untenable with respect to the economic captive. While an attempt is made to relocate the displaced person to a place of comparable characteristics, such action may be impracticable for the economic captive. Consider the

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[172] Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972). *See* discussion *supra* Part II.B.2. There are also similarities with efforts to rebuild localities after they have been decimated by a natural disaster. *See* Terry L. Clower, *Economic Applications in Disaster Research, Mitigation, and Planning* 6 (on file with Albany Law Review) (noting "surprisingly liberal attitudes . . . toward[] disaster relief."). However, many disfavor rebuilding disaster areas with taxpayer dollars. *See* INSURANCE RESEARCH COUNCIL, *IRC Study Finds Strong Support for Government Policies to Mitigate Damage from Natural Disasters Before They Happen But Also Finds Lack of Personal Preparation* 2, Aug. 31, 2006, http://208.84.250.9/irc/news/20060831.pdf (showing that roughly 60% of people do not support using tax dollars to subsidize disaster insurance). It may be better to compensate displaced people for their losses instead of rebuilding their homes in the same high-risk area. In fact, "the usual lesson from economics is that people are better off if they are given money and allowed to make their own decisions, much as they are with car insurance." Edward L. Glaeser, *Should the Government Rebuild New Orleans, Or Just Give Residents Checks?*, 2 THE ECONOMISTS' VOICE 1, 2 (2005), *available at* http://www.bepress.com/ev/vol2/iss4/art4. The underlying consideration for such an approach is a cost-benefit analysis which shows that rebuilding homes destroyed by natural disasters is too costly a proposition. *Id.* at 5.

[173] *See* discussion *supra* Part III.

[174] The utility of such a goal can be witnessed through the discussion of the undeniable need for the employment of a balancing test in nuisance actions. *See* discussion *supra* Part II.A.

case of the Riedis' as an archetypical situation that thwarts the purpose of the statute. The federal government sought to implement the provisions of the aforementioned statute to facilitate the Riedis' move to another locale, in order to make way for a Manhattan subway development.[175] The government-sponsored real estate agent charged with facilitating the move to comparable housing suggested that the couple relocate to an area of Manhattan that faces a busy intersection at the entrance to a bridge.[176] This relocation alternative proved to be untenable for people in the Riedis' situation as the busy intersection is unsafe for the elderly.[177] The only other alternative suggested to them, based on their housing needs, financial situation, and the scarcity of housing in Manhattan, was to move out of Manhattan and into another borough of the city.[178] The Riedis' situation belies a major failing of the federal approach with respect to economic captives—the unique socioeconomic position of the economic captive may make finding comparable housing alternatives within close proximity to their former residence impossible. This may move the economic captive outside of the small radius that their unique socio-economic status requires them to reside in. The aftermath of such a move could very likely feature an increasing incompatibility of uses of land if the economic captive is moved to an area ill-suited for their needs.[179] Refusing to weigh the economic captive's socioeconomic situation against the "coming to the nuisance" defense in resulting nuisance actions would create an inequitable exacerbation of a status quo in which the economic captive becomes an increasingly marginalized member of society. In order to give acknowledgment that economic captives should be included in societal considerations, legal significance must be given to their socioeconomic status.

B. Local Government Responses

1. The District of Columbia

A dramatic, contemporary illustration of economic captivity—and a laudable effort, by the government, to deal with the pernicious effects of it—is found in the distribution of federal stimulus

[175] Grynbaum, *supra* note 1, at A17.
[176] *Id.* at A20.
[177] *Id.* (discussing the Riedis' refusal to relocate to this proposed location).
[178] *Id.*
[179] *Id.* at A17, A20 (explaining that in the relocation search, the government's idea of equivalent housing is not the same as the residents' idea of equivalent housing).

("TARP") monies.[180] Specifically, in December 2009, approximately $7.5 million dollars from the U.S. Department of Housing and Urban Development's "Homelessness Prevention and Rapid Re-Housing" Program was given to the District of Columbia government.[181]

This disbursement was designated to assist families—for up to eighteen months—with subsidy payments for property rental arrangements and payment of utility bills past due.[182] Designed as "a new tool that allows the city to help low-income people [e.g., captives], who would otherwise become homeless,"[183] the program recognizes and, in a very real way, validates the theory of economic captivity. Impoverished individuals are essentially provided with an economic incentive, in the form of grant monies, to remain in their housing units and thereby, ideally, stabilize and improve their neighborhoods and forestall homelessness.[184] As well, by these grants, the government is recognizing that it has a responsibility to maintain a standard of living—albeit meager to be sure—for those unfortunate citizens who do not have the economic freedom to seek better housing and are thus relegated to the status of economic captives.

2. New York City

As a consequence of the popularity of suburbanization, which reached its zenith at the end of World War II, major U.S. cities lost a significant amount of their populations and soon became concentrated heavily with the urban poor.[185] Even with current efforts to promote new forms of revitalized urbanization through "Smart Growth" policies, the expenses of poverty in the inner cities of America remain a significant, if not staggering, concern to municipal governments.[186] Indeed, redistributing clusters of

[180] TARP is an acronym for the "Troubled Assets Relief Program." *See* Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 57 (2010).

[181] Darryl Fears, *$7.5 Million to Keep a Roof Over Their Heads*, WASH. POST, Dec. 1, 2009, at B10. *But see* Lawson, *supra* note 180. Lawson argues that the President's executive powers do not constitutionally include a power to take any course of action that the executive thinks is important for the country, regardless of congressional inactions or lack of statutory basis. *Id.*

[182] *Id. See* Debbie Cenziper, *infra* note 191.

[183] Fears, *supra* note 181, at B10.

[184] *Id. See* discussion *infra* Part VI.D. (discussing grandfathering and amortization as methods to confront the plight of the economic captive).

[185] Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 WASH. U. J. URB. & CONTEMP. L. 3, 9–10 (1995).

[186] *Id.*

poverty regionally and out of the inner city cores has become, since *Mount Laurel I* was decided in New Jersey in 1975,[187] a national fixation.[188]

In 1979, New York City owned some 8,950 buildings which provided 110,000 housing units.[189] In 2010, the city owned approximately 190 buildings.[190] During the period of time from 1979 to 2010, the city sought—by divesture—to take 100,000 slumlord units and convert them into 100,000 rehabilitated ones, which in turn, served as catalysts for redevelopment of ten neighborhoods throughout the city.[191] Approximately 442 of the rehabilitated buildings are delinquent in their payment of municipal tax assessments and utilities.[192] A total debt of $140 million is owed, collectively, on these buildings—with nearly half of this amount being levied on a per unit debt of $3,000.[193]

Clustered principally in Bedford Stuyvesant, Brooklyn, the South Bronx, and Harlem, these originally rehabilitated buildings are now populated by poor residents and are owned either by private or non-profit associations overseeing building management.[194] Because of this socioeconomic demographic in occupancy level, the building owners have "razor-thin margins to operate on."[195] This situation is

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[187] *Mount Laurel I*, 336 A.2d 713 (N.J. 1975).

[188] *See* Poindexter, *supra* note 185, at 37–38. It has been suggested, however, that a contemporary model for municipal growth relies upon a central assumption, namely, "that a city's economic development is really a competition for mobile taxpayers." Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 338 (2010). Accordingly, a city should not develop policies that are concerned exclusively with the well being of current residents.

[189] Cara Buckley, *Rescued from Blight, Falling Back Into Decay*, N.Y. TIMES, July 19, 2010, at A18.

[190] *Id.*

[191] *Id.* The practical difficulties confronting other large American cities—such as Charlotte, North Carolina—in finding affordable housing through housing rental units and houses for the poor, are often compounded by issues of financial mismanagement of Home Fund grant monies from the Federal Department of Housing and Urban Development (HUD)—a fund set aside purposely for low income assistance housing. This conduct, in turn, has resulted in significant loss of expected housing opportunities for the poor which will now be exacerbated by recent Congressional budget cuts to HUD. Debbie Cenziper, Amid Need, *A Push to Review Projects*, WASH. POST, Dec. 12, 2011, at 1. *See also* Michael Cooper, *Tough Choice for Cities as Federal Aid Shrinks*, N.Y. TIMES, Dec. 22, 2011, at A19 (highlighting the plight of Allentown, Pennsylvania).

[192] Buckly, *supra* note 189 at A15.

[193] *Id.*

[194] *Id.*

[195] *Id. See also* Mary Marsh Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 J. MARSHALL L. REV. 425, 429 (2007) (suggesting a new judicial supervisory approach for revitalizing the implied warranty of habitability which would thereby serve as a catalyst for accelerating repairs of rental housing and thereby make them more habitable). *But see* THOMAS W. MERRILL & HENRY E. SMITH,

complicated further by the fact that, to protest against what have become substandard living conditions in these once rehabilitated buildings, many of the tenants-captives have simply stopped paying their monthly rents.[196] The City plans to protect these low-income tenants by foreclosing on approximately ten of these distressed properties.[197] The tenants would be protected under these forced sales because all pre-existing municipal regulations, such as rent stabilization, would continue.[198]

C. Subjectivity in Determining Just Compensation

Currently, just compensation for the taking of one's property through eminent domain is the fair market value of that property.[199] However, this approach has been criticized for its rigidity and the inequitable consequences imposed on the

PROPERTY: PRINCIPLES AND POLICIES 728, 732–35 (2007). Only four states have failed to recognize an implied warranty of habitability for residential tenancies and Professor Merrill and Professor Smith acknowledge the continuing debate regarding whether a mandated implied warranty of habitability improves the welfare of low-income tenants or whether it is negligible. *Id.* Yet, when a tenant "changes the condition" of property, waste is committed. Thomas W. Merrill, *Melms v. Pabst Brewing Co. and The Doctrine of Waste in American Property Law*, 94 Marq. L.Rev. 1055, 1091 (2011). Posner cautions, however, that not every change in the condition of property may be classified as waste. POSNER, *supra* note 13, at § 3.11.

[196] Buckley, *supra* note 191, at A18.

[197] *Id.*

[198] *Id.*

[199] *See* James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 939 (2006) (criticizing the fair market value approach "as the quite limiting default rule for constitutionally mandated compensation."). In order to protect against excessive uses of their taking powers, government entities should be held to some form of heightened scrutiny under the Due Process Clause—possibly by use of pre-condemnation hearings. D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1306–11, 1320–21 (2010). However, this approach is problematic because the U.S. Supreme Court has yet to fully define the legal rights of property owners facing eminent domain actions by local, state, or federal authorities. *Id.* at 1286. Under the Supreme Court's 1985 holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, in order for a property owner to pursue compensation under a Fifth Amendment takings claim in the federal courts, he must first pursue his claim for compensation through state procedures. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985). In order to expedite claims of this nature, it has been urged that the "federal courts [should] resume their obligation to adjudicate property rights claims." J. David Breemer, *Ripeness Madness: The Expansion of* Williamson County*'s Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 651 (2009). Another approach to limiting the abuse of eminent domain powers would be the revival of the necessity doctrine which holds the necessity or expediency of a taking under eminent domain powers is a legislative determination and not subject to judicial review. Robert C. Bird, *Reviving Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL'Y 239, 243, 256 (2010).

homeowner.[200] Compensating someone only through payment of the fair market value of the property taken fails to take into account any amount of subjective value that a particular homeowner has attached to the land.[201] The fair market value approach, it has been argued, "fail[s] to differentiate between what money could buy and what it could not buy."[202] One suggestion has been to compensate the homeowner an additional percentage of the fair market value based on how long they have lived in a home.[203] Another approach would be to undertake an objective consideration of what amount would need to be paid to the homeowner in order to make them feel "whole."[204]

While it is beyond the scope of this article to make a conclusion as to the appropriate method of just compensation, it is worth noting that there is considerable debate on this issue.[205] Understanding the fact that it is still unresolved in terms of what role subjectivity should play in the calculation of just compensation provides the necessary gloss for the inquiry into the compensatory efficacy of a method for dealing with relocation in lieu of eminent domain proceedings. Given this discussion, another shortcoming of the Uniform Relocation Act is that it lacks any recognition of the subjective values attached by homeowners to their homes.[206] The fact that the Riedis have lived in their apartment for over forty years has no bearing on how much they are to be compensated.[207] Thus, the failure of the federal approach to provide for sentimental and other subjective attachments that the economic captive may have to their home amounts to another criticism of the program.

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[200] John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 790 (2006) ("Because just compensation law generally undervalues the home, it does not adequately deter government from using eminent domain against homes.").

[201] *Id.* at 790–91.

[202] Kelly, *supra* note 199, at 989.

[203] *See* Fee, *supra* note 200, at 818 (providing a model statute in which a "personal detachment award" is calculated based on how long a person has lived in the house, allowing for greater compensation the longer one has lived in a house).

[204] Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 274 (2007) (relying on "the considered judgments of others about what makes a person whole.").

[205] CALLIES, FREILICH & ROBERTS, *supra* note 128, at 305–06. The current fair market value method of compensation does not take subjective values into account, but that some states provide for compensation to include more than 100% of the fair market value of the property. *Id.* The debate over just compensation has intensified in the wake of expanding notions regarding the public use. *Id.* at 305.

[206] *See* Grynbaum, *supra* note 1, at A20.

[207] *Id.* at A17. Ann Riedi best expressed this concern when she said, "'[h]ow do you take the memories?'" *Id.* at A20.

D. Managed Growth and Bonus Zoning

Managed growth is a mechanism through which local governments seek to effectuate a greater quality of life and sustainability through the harmonious commingling of residential, commercial, and conservative goals.[208] Maryland's "Smart Growth" initiative embodies the principles and values that are accomplished in an ideal implementation of managed growth.[209] Under such an initiative, communities should be designed in a "compact, mixed-use, walkable design consistent with existing community character and located near available or planned transit options."[210] Further, specific attention is given to transportation[211] and the provision of housing to people of mixed ages and incomes.[212] At the heart of managed growth is a desire to maximize the economic development of localities.[213] A managed or "smart" design for population and business distribution would provide "employment opportunities for all income levels within the capacity of the State's natural resources, public services, and public facilities."[214]

Though many municipal layouts are already entrenched, bonus zoning will allow the government to reshape the area over time to achieve the desired layout consistent with the goals of managed growth.[215] Under such an approach, the municipality, in exchange for granting a permit to a developer, could require certain actions on the part of the developer for the betterment of the community at large.[216] While such an approach has been viewed with disfavor in some states, many others view this type of agreement favorably because "it provides flexibility to deal with unanticipated problems."[217] Massachusetts, for example, has found "that the

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[208] MD. CODE ANN., LAND USE § 1.01(1) (LexisNexis 2011).

[209] *See id.*; *but see* Lisa Rein, *Study Calls Md. Smart Growth a Flop*, WASH. POST, Nov. 2, 2009, at B1 (regarding claims that Maryland's smart growth has largely been unsuccessful "because it has no teeth to force local governments to comply and because builders have little incentive to redevelop older urban neighborhoods").

[210] LAND USE § 1.01(4). This type of community design is intended to be an efficient utilization of local resources while maintaining a consistency with the locale's socioeconomic and natural character. *Id.*

[211] *Id.* § 1.01(6) (citing the goal of creating "a well-maintained, multimodal transportation system [that] facilitates the safe, convenient, affordable, and efficient movement of people").

[212] *Id.* § 1.01(7).

[213] *See id.* § 1.01.

[214] *Id.* § 1.01(8).

[215] *See* N.Y. TOWN LAW § 261–b (McKinney 2011).

[216] JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 195 (1998).

[217] *Id.* at 196.

voluntary offer of public benefits beyond what might be necessary to mitigate the development of a parcel of land does not, standing alone, invalidate a legislative act."[218] The merits of bonus zoning lie in the flexibility and collaborative nature inherent in its utilization.

The implementation of managed growth intermingled with bonus zoning should be very seriously considered—especially with respect to dealing with the issue of economic captivity. Instituting an early plan with respect to population distribution—as is the goal of managed growth[219]—could be very effective in limiting the imposition of hardship on the economic captive. This foresight can be seen as a pre-litigation bargain in which transactional costs are minimized.[220] This "Coasean" efficiency benefits society by preempting costly litigation in light of government efforts to confront the reality of economic captivity from an early stage.[221] Additionally, through bonus zoning, there can be some cost-shifting from the government onto private entities in which they receive favorable zoning in exchange for providing for appropriate facilities for the economic captive in accordance with the affordable housing mandates of the managed growth initiative. Importantly, the end-game of managed growth and bonus zoning is economic maximization.[222] Managed growth achieves this end-game while also giving consideration to the "fair share" requirement and notions of social justice.[223]

Collaboration between public and private entities is inevitable under this system.[224] However, such an approach, in isolation, is not without its shortcomings. Managed growth may be impracticable in certain areas—most likely in places with very high

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[218] Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 363 (Mass. 2003) (upholding an agreement between a municipality and a developer whereby the developer would provide $8 million to the town's general fund in exchange for a rezoning favorable to the developer).

[219] *See* Jerome G. Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUTGERS L.J. 689, 694, 698 (1975).

[220] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8, 13, 15–16 (1960).

[221] *See id.* at 17–18.

[222] *See* discussion *supra* note 213 and accompanying text.

[223] *See supra* Part IV. (The court in *Mount Laurel I*, held that municipalities are required to provide affordable housing in proportion to their fair share of various demographic groups). *Mount Laurel I*, 336 A.2d 713, 734 (1975).

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

preexisting population densities—where changing the population distribution would require such an overhaul of the current distribution that creation of a managed growth area is unrealistic.[225] Further, little consideration is given to whatever subjective values the economic captives may have attached to their homes before they have been moved to the managed growth area.[226] Overall though, there is much to say about the efficacy of such a design, especially when addressing the question of what to do with the economic captive.

E. Utilizing Grandfathering and Amortization

Grandfather clauses are legislative mechanisms whereby a temporary right to continue an activity is granted even though that activity has been deemed to be inappropriate in a given locale.[227] This proposition reinforces the notion that a landowner has a vested right to continue with a certain use of his land even after that use has been deemed non-conforming.[228] Similar to a grandfather clause, an amortization provision allows for a now non-conforming use to be continued in an area where it was previously allowed.[229] Amortization, however, requires that the non-conforming use be eliminated within a specified period of time.[230] The length of such a period is determined based on the nature of the use and the economic-backed expectations of the landowner.[231] The goal is to strike a balance between "the relative importance to be given to the public gain and to the private loss."[232] The fulcrum of this balancing test must be economic considerations.

The options that these two mechanisms provide with respect to economic captives are to either grandfather in economic captives so that they cannot be forced to leave their property for the duration of their lifetime, or alternatively provide for an amortization grace period of substantially reasonable length of time so as to mitigate the harm to the economic captive. In order to effectuate the

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[225] Rein, *supra* note 209, at B1 (citing a study saying that "smart growth has not made a dent in Maryland's war on sprawl.").

[226] *See supra* Part VI (examining the debate over what is just compensation).

[227] *See* Wisc. Wine & Spirit Inst. v. Ley, 416 N.W.2d 914, 919 (Wis. Ct. App. 1987) (holding that a grandfather clause is valid so long as it has a rational basis).

[228] Whaley v. Dorchester Cnty. Zoning Bd. of Appeals, 524 S.E.2d 404, 410 (S.C. 1999) (Toal, J., dissenting) (citations omitted).

[229] JUERGENSMEYER & ROBERTS, *supra* note 216, at 158.

[230] *Id.*

[231] *Id.* at 158–59.

[232] City of Los Angeles v. Gage, 274 P.2d 34, 44 (Cal. Dist. Ct. App. 1954).

economic progression of society,[233] an amortization period makes more sense as it creates a firm deadline for when the economic captives must relocate. Predictability is achieved. Amortization also serves as an acknowledgment that some credence should be given to the subject values attached to the home.[234] Allowing for economic captives to remain in their homes for a certain period of time allows for a transition period, which lessens the harshness of forcing them to leave their home. One potential setback of such an approach is that the rigidity of an amortization period—the inability to remove a non-conforming use for an expressed period of time—could stunt economic growth and prevent the achievement of a municipality's maximum potential. This concern is relieved by the determination of the reasonableness of the amortization period. Balancing the public versus private considerations will yield an amortization period that will neither severely hinder the needs of the locality nor impose too harsh of a burden on the economic captive as the reasonable period of time still provides for the achievement of the locality's goals while providing economic captives with adequate time to adapt and relocate. As a complement to managed growth and bonus zoning, the utilization of an amortization period provides the necessary buffer for the implementation of a system whereby economic maximization is achieved without marginalizing the economic captive.

VII. CONCLUSION

That there are low-income people in modern society is a socioeconomic reality that cannot be avoided.[235] As a member of this segment of society, an individual is essentially required to live in a certain area due to geographic proximity to employment opportunities and the availability of affordable housing, among other reasons.[236] To date, this status provides no added legal significance with respect to nuisance law. When an economic captive is forced to relocate to an area where he is then subjected to a nuisance-like activity as a result of either eminent domain

[233] *See supra* Part II.A. (explaining that the desired goal of the law is to further the economic advancement of society).

[234] *See* discussion *supra* Part VI.

[235] *See* Fernandez, *supra* note 9, at A26. Of the hundreds of thousands of people living in public housing, many have to endure "crime, poverty, vandalism and poor maintenance [that] contribute[s] to a sense of decay or indifference." *Id.*

[236] *See generally, supra* Part VI (commenting that economic captives are forced to live in certain areas based on the necessities their socioeconomic status imposes upon them).

proceedings or socioeconomic necessity, his status does not currently factor into the traditional nuisance calculus. Although "coming to the nuisance" is not a *per se* bar against a nuisance claim, it is a factor that can weigh against an economic captive plaintiff. As such, weight should also be given to the fact that the plaintiff is an economic captive with limited housing choices.

An examination into the efficacy of a variety of approaches with respect to what to do with the economic captive in the event that they are displaced leads to the conclusion that the economic captive status should be given consideration as part of the requisite balancing test of nuisance actions.[237] Employing the principles of managed growth[238] and bonus zoning,[239] with an assist from the utilization of amortization periods,[240] proves to be the most efficacious means by which to relocate economic captives and thereby recognize their legal statuses as such, while minimizing potential conflicts in the form of nuisance actions as they will be relocated to areas in which their presence is compatible with the overall layout of the area. Managed growth provides affordable housing for the economic captive in a planned location, with close proximity to sufficient transportation and employment opportunities. Bonus zoning puts the burden on municipalities to bear the entire cost of creating these new managed communities. Furthermore, amortization periods allow for a transition period for the economic captives to be relocated while also acknowledging that some subjective value should be attached to one's home.

This proposed method for relocating the economic captive into a more desirable location seeks to minimize the number of nuisance actions brought by the economic captive, thereby minimizing transaction costs.[241] By making way for a transition of the economic captive into a more desirable location, which would reduce the amount of nuisance-like activity that the economic captive would be subjected to, there is an implicit acknowledgment that attention should be given to one's status as an economic captive. Because the fact that a plaintiff has come to the alleged nuisance is but one

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[237] *Supra* Part II.A. (explaining that in a nuisance action, it is the duty of the courts to balance the utility of the good versus the gravity of the harm in order to resolve the dispute). Economics serves as the inherent fulcrum upon which the balance of two competing uses should be placed. Smith, *supra* note 4, at 699; MANDLKER, *supra* note 6 at § 4.12.

[238] *See supra* Part VI.D.

[239] *See supra* Part VI.D.

[240] *See supra* Part VI.E.

[241] Coase, *supra* note 220 (noting that such a position is optimal for society and will best serve the common good).

factor that is considered in the modern *ad hoc* nuisance inquiry,[242] the possibility that weight will be given to economic captivity status is not foreclosed. The economic utility of the managed growth amalgamation reinforces the position that a plaintiff required to live in a certain location as a result of their socioeconomic status should be taken into consideration as a counter to the "coming to the nuisance" defense. Accordingly, this will reduce the transactional costs of nuisance actions while providing for an equitable relocation of economic captives that will satisfy their needs.

Socioeconomic status is unquestionably a factor if indeed not a decisive determinant, in choosing a place to live. As shown, those with limited financial reserves and low income are usually restricted to housing opportunities which are often deficient in public services and are located in unsafe and unsanitary neighborhoods where standards of habitability are severely lower if not jeopardized entirely.[243] The social costs expended in either maintaining sub-standard housing units in blighted communities or relocating inhabitants in these neighborhoods to better accommodations are staggering.[244]

In situations, for example, where neither municipal, state nor federal relocations are feasible economically, the "captive" residents in these substandard living accommodations should not be seen as waiving their legal rights to unreasonable interferences with their use and enjoyment of their real property interests. In truth, they have been forced to come to the nuisance(s) as economic captives. A common or basic sense of decency and humanity should impose a legally enforceable responsibility to provide services that are deemed necessary for an acceptable standard of living or habitation.[245]

Rather than continue to abuse eminent domain powers and condemn "blighted" sub-standard housing (developments) or neighborhoods in order to promote economic development, it would be more equitable to rehabilitate the areas, as both the District of Columbia[246] and New York City[247] are doing and, thereby, revalidate the law of nuisance; for, "the power to abate a nuisance,

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[242] RESTATEMENT (SECOND) OF TORTS § 840D (1987).

[243] *See* Zulack, *supra* note 197; MERRILL & SMITH, *supra* note 195.

[244] *See Mount Laurel I*, 336 A.2d 713 (N.J. 1975); Lawson, *supra* note 180; Schragger, *supra* note 188; Poindexter, *supra* note 185; Buckley, *supra* note 189; Fears, *supra* note 181.

[245] *See* MERRILL & SMITH, *supra* note 195.

[246] *See* Lawson, *supra* note 180; Fears, *supra* note 181.

[247] *See Mount Laurel I,* 336 A.2d at 713; Schragger, *supra* note 188; Poindexter, *supra* note 185; Zulack, *supra* note 195; MERRILL & SMITH, *supra* note 195; Buckley, *supra* note 189.

require[s] no compensation."[248] In today's society, there is, most assuredly, a place for a theory of economic captivity to be recognized within the law of nuisance. Acceptance of this theory of necessity, assures a re-conceptualization—and thus allows for a reinterpretation—of the undergirding economic policies that drive the whole of economic jurisprudence and thus impact directly nuisance law. Acknowledging that this theory of economic captivity is not only efficacious but normative and sound economically, will prompt—hopefully—a new consideration if not a direct effort, which will seek to balance efficiency and wealth maximization with (social) fairness and not treat these values as antithetical vectors of force.[249]

[248] Kelo v. City of New London, 545 U.S. 469, 519 (2005) (Thomas, J., dissenting).
[249] *See* BARNES & STOUT, *supra* note 31.