COMMON ENEMY OR UNILATERAL THREAT: WHY JURISDICTIONS NEED TO BECOME REASONABLE IN REGARDS TO DIFFUSE SURFACE WATERS

INTRODUCTION

In 2002, urban properties accounted for less than three percent, or 59.6 million acres, of the 2.3 billion acres of property in the United States.¹ Even though urban properties comprised less than three percent of the total property area, these properties housed seventy-nine percent of the U.S. population.² Between 1945 and 2002, the Census Bureau reported the United States' population doubled.³ During that same period, urban property area quadrupled from approximately fifteen million acres in 1945 to roughly sixty million in 2002.⁴ In 2006, the private construction industry spent $11.3 trillion.⁵ The expenditures of the private construction industry are approximately equal to eighty-five percent of the United States' 2006 gross domestic product of $13.16 trillion.⁶ These construction projects included the erection of commercial structures including warehouses, office buildings, multi-family homes, lodging, and shopping centers.⁷ For example, each of the 2256 Wal-Mart Supercenter locations averaged 187,000 square feet as of January 31, 2007.⁸ This equates to Wal-Mart Supercenter locations occupying more than 420 million square feet of property.⁹

More broadly, urban properties in the United States are increasingly covered with impermeable surfaces.¹⁰ In Salt Lake City, Utah, the city's total paved surface area was 170 square kilometers in a 560

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2. Id. at 28.
3. Id. at 30.
4. Id.
7. U.S. CENSUS BUREAU, supra note 5.
9. Id. at 4.
square kilometer metropolitan area. The United States also maintains 4,165,110 kilometers of paved roads. Together, the large amount of impermeable surfaces used for commercial structures, roads, and parking lots, means that vast amounts of property are no longer able to naturally absorb or drain away diffuse surface waters. Despite the significant use of concrete and other impermeable surfaces in modern building techniques, diffuse surface water problems caused by development began almost two hundred years ago.

Throughout the nineteenth century, courts struggled to find a legal principle that balanced the interests of landowners who wished to develop their properties with the interests of landowners who would be affected by the others' development activities. During the nineteenth century, this struggle resulted in a majority of courts adopting one of two dominant legal principles to adjudicate diffuse surface water disputes: the common enemy doctrine or the civil law rule. The common enemy doctrine allowed landowners to drain or repel diffuse surface waters upon neighboring properties without accounting for the consequences to other landowners. Civil law rule jurisdictions allowed higher elevated properties to drain diffuse surface waters onto lower properties without liability as long as the lower properties were only subjected to diffuse waters, which would have naturally drained upon the lower properties. Recently, state courts have begun adopting a third legal principle in diffuse water cases, the

13. See supra notes 7-12 and accompanying text.
15. See Gannon v. Hargaden, 92 Mass. (10 Allen) 106 (1865) (adopting the common enemy doctrine for water drainage); Bassett v. Salisbury Mfg. Co., 43 N.H. 569 (1862) (adopting the reasonable use doctrine for water drainage); Orleans Navigation III, 2 Mart. (o.s.) at 214, 1812 WL 814 (adopting the civil law rule for water drainage).
16. See Orleans Navigation III, 2 Mart. (o.s.) 214, 1812 WL 814 (adopting the civil law rule for water drainage); Ogburn v. Connor, 46 Cal. 346, 351-52 (1873) (adopting the civil law rule for water drainage); Mayor of Albany v. Sikes, 20 S.E. 257, 258 (Ga. 1894) (adopting the civil law rule for water drainage); Gannon, 92 Mass. (10 Allen) at 109-10 (adopting the common enemy doctrine for water drainage); Greeley v. Maine Cent. R.R., 53 Me. 200, 1865 WL 894 (1865) (adopting the common enemy doctrine for water drainage); Town of Union v. Durkes, 38 N.J.L. 21, 22, 1875 WL 6958, *1 (1875) (adopting the common enemy doctrine for water drainage).
reasonable use doctrine.\textsuperscript{19} The reasonable use doctrine imposes liability on a landowner who drains or repels diffuse surface water upon neighboring properties after considering the factual circumstances of each case.\textsuperscript{20} However, in order to appropriately apply these doctrines, one must be able to define what constitutes diffuse surface water.\textsuperscript{21}

Diffuse surface waters are those waters snow and rain normally create.\textsuperscript{22} Diffuse waters, which follow no definite course, are those waters which are lost by evaporation, by percolation, or by reaching a substantial body of water or a defined watercourse into which they flow.\textsuperscript{23} Additionally, diffuse surface waters are defined as those waters which do not flow in a defined bed, bank, or channel, but seem to wash over the face of the property with no permanent source.\textsuperscript{24} Thus, diffuse surface waters may not include waters which are contained within a defined lake, pond, or watercourse and, in such situations, drainage of these bodies of water will result in very different legal consequences.\textsuperscript{25}

Following the political theorist John Rawls ("Rawls"), this Note argues that the principle of justice as fairness can only be served when diffuse surface water laws promote equality amongst the competing interests of neighboring landowners.\textsuperscript{26} Following a Rawlsian approach, diffuse surface water laws should only be those laws which individuals without personal prejudice or interests would accept if operating in a state of equality.\textsuperscript{27} Because diffuse surface water laws do not promote a Rawlsian view of equality, unless they contain a reasonableness component, states should add a reasonableness component to their diffuse surface water laws or adopt the reasonable use doctrine.\textsuperscript{28}

This Note proceeds in three sections.\textsuperscript{29} The Background provides a general overview of Rawls' theory of justice as fairness.\textsuperscript{30} The Background then examines the three general rules that state courts apply

\begin{itemize}
\item[19.] Heins Implement Co. v. Mo. Highway & Transp. Comm'n, 859 S.W.2d 681, 690-91 (Mo. 1993).
\item[20.] \textit{Heins}, 859 S.W.2d at 689.
\item[21.] Pendergrast v. Aiken, 236 S.E.2d 787, 790 (N.C. 1977).
\item[22.] Keys, 412 P.2d at 531.
\item[23.] Fenmode, Inc. v. Aetna Casualty & Surety Co., 6 N.W.2d 479, 481 (Mich. 1942).
\item[25.] Pendergrast, 236 S.E.2d at 790; see also Borgmann v. Florissant Dev. Co., 515 S.W.2d 189, 195 (Mo. Ct. App. 1974) (distinguishing between a watercourse and a surface water channel or drainway).
\item[26.] See infra notes 263-548 and accompanying text.
\item[27.] See infra notes 273-96 and accompanying text.
\item[28.] See infra notes 467-548 and accompanying text.
\item[29.] See infra notes 41-262, 263-548, 549-55 and accompanying text.
\item[30.] See infra notes 41-67 and accompanying text.
\end{itemize}
in diffuse surface water cases and the state law variations on these general rules.\textsuperscript{31} The Argument section demonstrates how courts' applications of the common enemy doctrine and the various versions of the civil law rule have inequitably and unjustly allowed commercial developments to burden neighboring properties with diffuse surface waters.\textsuperscript{32} First, the Argument proposes that jurisdictions violate Rawls' theory by arbitrarily bestowing property rights upon certain groups of landowners to the detriment of other landowners.\textsuperscript{33} The Argument then proposes that an arbitrary assignment of property rights amongst landowners is a violation of the Rawlsian view that all individuals should be placed in a position of equality.\textsuperscript{34} Additionally, the Argument proposes that the reasonable use doctrine, or a reasonableness element, should be adopted in any jurisdiction that currently does not impose such a standard in its diffuse surface water laws.\textsuperscript{35} Furthermore, the Argument proposes that by adopting the reasonable use doctrine or grafting a reasonableness element onto the common enemy doctrine or civil law rule, all landowners will be treated equally in compliance with Rawls' theory of justice.\textsuperscript{36} Therefore, this Article will propose that the adoption of the reasonable use doctrine or a reasonableness exception to the civil law rule and common enemy doctrine will lead to diffuse surface water laws which comply with a Rawlsian theory of justice.\textsuperscript{37}

BACKGROUND

A. John Rawls' Theory of Justice as Fairness Promotes Equality Among Landowners

Political theorist John Rawls' ("Rawls") theory of justice as fairness provides a framework from which to analyze questions of justice.\textsuperscript{38} In an attempt to determine what justice actually entails, Rawls developed a systematic arrangement of the ideas individuals have about what is just.\textsuperscript{39} Rawls proposed that individuals without knowledge of their place in society, natural abilities, intelligence, and psychological propensities would agree to principles of justice which

\begin{itemize}
\item \textsuperscript{31} See infra notes 68-258 and accompanying text.
\item \textsuperscript{32} See infra notes 297-443 and accompanying text.
\item \textsuperscript{33} See infra notes 327-35, 402-17 and accompanying text.
\item \textsuperscript{34} See infra notes 327-35, 402-17 and accompanying text.
\item \textsuperscript{35} See infra notes 444-66 and accompanying text.
\item \textsuperscript{36} See infra notes 467-548 and accompanying text.
\item \textsuperscript{37} See infra notes 444-66 and accompanying text.
\item \textsuperscript{39} Max Rheinstein, A Theory of Justice, 73 COLUM. L. REV. 1515 (1973) (reviewing Rawls, supra note 38).
\end{itemize}
promote equity. These principles would then govern the duties and obligations expected from members of the individuals' society. Thus, Rawls' theory of justice as fairness is a view that members of society would choose to be governed by laws which promote equality.

Rawls premises his conception of justice on the idea that society determines the principles of justice by an original agreement. The original agreement is compromised of the principles of justice that free and rational individuals would accept if they were placed in a position of equality to regulate all future forms of government. According to Rawls, the hypothetical situation of equality is the original position. In the original position, individuals do not know their place or status in society. Because individuals do not know their status in society, they are also unaware of their individual biases and prejudices, which are normally based upon class position, social status, or natural abilities such as intelligence, strength, and psychological propensities. In the original position, individuals are left with a sense of rationalism, wanting to meet their desired ends by the most effective means, because they do not know how the rules will affect them. Thus, individuals in the original position are placed behind a veil of ignorance when choosing the principles of justice. Operating behind the veil of ignorance, individuals develop rules that do not advantage or disadvantage any individual solely because of social circumstances or natural abilities. Because individuals do not know whether the chosen rules will advantage or disadvantage them, they do not possess incentives to design arbitrary principles that would favor their particular positions. Under this incentive structure, the rules developed behind the veil of ignorance are just; the rules are just because the rules are the product of fair bargain. Overall, Rawls' theory of justice is that justice is fairness. The theory of justice as fairness expresses the idea that the initial principles of justice are determined behind the

40. Rawls, supra note 38, at 11.
41. Rheinstein, supra note 39, at 1515.
42. Rawls, supra note 38, at 12-13.
43. Id. at 10.
44. Id.
45. Id. at 11.
46. Id.
47. Id.
48. Id. at 12.
49. Id. at 118.
50. Id. at 11.
51. Id. at 129 (Black's Law Dictionary 112 (8th ed. 2004) defines the term arbitrary as something founded on preference or prejudice rather than reason or fact).
52. Id. at 11.
53. Id. at 10. Hereinafter, justice refers to the Rawlsian theory of justice as fairness.
veil of ignorance, where individuals have an incentive to produce rules that are fair to all participants.\textsuperscript{54} After individuals in the original position have agreed to the principles of justice, they establish a constitution and legislative body to enact laws that would be in accordance with the principles of justice the individuals reached.\textsuperscript{55}

Because individuals in the original position are in a position of equality, it is highly unlikely that they would agree to a legal principle that provides some members of society more advantages than others.\textsuperscript{56} The individuals in the original position would not agree to provide more opportunities for some individuals over others because these individuals would not know if they would be the ones benefited or disadvantaged once the veil of ignorance was removed.\textsuperscript{57} Therefore, to retain the most advantages for themselves, individuals would insist that legal opportunities be afforded to all individuals equally.\textsuperscript{58} Furthermore, because all individuals in the original position desire to protect their interests, they would not submit to a rule that could subject them to an enduring loss just to bring about a greater amount of satisfaction for others.\textsuperscript{59} Thus, a rational individual in the original position would not assent to a rule simply because it maximized the advantages of the majority of society without regard to their own fundamental rights and interests.\textsuperscript{60} However, in the instance that certain economic or social inequalities existed in society, justice as fairness would still be realized if the benefit enjoyed by a few resulted in an improved situation for the people who did not receive the added benefit.\textsuperscript{61}

Justice, according to Rawls, is achieved when a society’s principles of justice seek to give individuals equal liberties, and thus equal rights.\textsuperscript{62} Under a Rawlsian theory of justice, a rule or law is fair if it does not arbitrarily distribute rights among individuals.\textsuperscript{63} Therefore, under Rawls’ theory of justice, a law is considered fair if that law maximizes the advantages of society as a whole or inequitably distributes rights while simultaneously improving the situation of the least advantaged.\textsuperscript{64}

\textsuperscript{54} Id. at 11.
\textsuperscript{55} Id. at 11-12.
\textsuperscript{56} Id. at 13.
\textsuperscript{57} Id. at 17, 125.
\textsuperscript{58} Id. at 13, 210, 211.
\textsuperscript{59} Id. at 13.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 53.
\textsuperscript{63} Id. at 129.
\textsuperscript{64} Id. at 13, 68.
B. THE CIVIL LAW RULE, FROM ITS NATURALISTIC BEGINNINGS TO ITS MODERN DAY EXCEPTIONS

1. Under the Traditional Civil Law Rule, Diffuse Surface Waters Were Allowed to Drain Naturally From Higher Estates to Lower Estates

The civil law rule, also known as the natural flow rule, was derived from the French and Spanish civil codes, rooted in Roman Law or the Napoleonic Code.65 The civil law rule's beginnings in the United States can be traced to 1812 in Louisiana where courts first applied the doctrine.66 In Orleans Navigation Company v. City of New Orleans,67 the Superior Court of Louisiana determined that under the civil law rule, the landowner of a lower property must accept the diffuse surface waters of a higher property in quantities which would naturally flow onto the lower property.68 In Orleans Navigation Company v. City of New Orleans,69 the Orleans Navigation Company (“Orleans Navigation”) filed suit against the City of New Orleans (“City”) in the Superior Court of the Territory of Orleans to restore a dam the City had destroyed.70 Orleans Navigation erected the dam to prohibit the City’s diffuse surface waters from draining into the canal Carondelet.71 Orleans Navigation contended the City’s drainage of waters was incompatible with Orleans Navigation’s exclusive right to use the canal as a means of navigation.72 The court rendered divided opinions and later reexamined the issue.73

During the court’s reexamination of Orleans Navigation’s claim that the City should be prohibited from draining its waters and filth into the canal Carondelet, the court decreed that the City must desist from draining its waters into the canal and enjoined the City from interfering with any improvement Orleans Navigation constructed to facilitate the navigation of the canal.74 However, one judge motioned

69. 1 Mart. (o.s.) 269, 1811 WL 1683 (Orleans 1811).
70. Orleans Navigation Co. v. City of New Orleans (Orleans Navigation I), 1 Mart. (o.s.) 269, 1811 WL 1683 (Orleans. 1811).
71. Orleans Navigation I, 1 Mart. (o.s.) at 269, 1811 WL 1683.
72. Id., 1811 WL at *1.
for a new trial on the grounds that the decree was contrary to the law and the evidence presented.\footnote{75}

On motion for a new trial, the court noted that the civil law rule required lower properties to receive the waters naturally flowing from higher elevated properties.\footnote{76} However, the court stated that the City could not possess a natural servitude to drain its diffuse surface waters into the canal based upon its status as a higher, or superior, estate because under the civil law rule, the canal was only bound to receive diffuse surface waters which flowed into it naturally, without alteration or modification, unless neighboring landowners entered into a compact or agreement with each other.\footnote{77} Because the City altered the natural drainage pattern of the waters, the canal could not be required to receive a greater volume of water than would have naturally flowed into it.\footnote{78} Therefore, the court overruled the City’s motion for a new trial.\footnote{79}

Some courts adhere to the civil law rule following the historical maxim, \textit{Aqua currit, et debet currere, ut currere solebat ex jure naturae} (water runs, and ought to run, as it is used to run from the law of nature).\footnote{80} Initially, the traditional civil law rule was praised for its predictability, which inferentially afforded prospective buyers of property assurances of their rights with respect to surface waters.\footnote{81} Under the traditional civil law rule, buyers of higher estates, as designated by elevation, were allowed to have diffuse surface waters flow naturally from their estate, which was neither altered nor modified by the hands of man, onto servient, or lower elevated estates.\footnote{82} A higher estate possesses an implied natural servitude across a lower estate for the purpose of natural surface water drainage, and imposed liability upon any individual which interfered with the natural diffuse water drainage pattern if such interference caused injury to either the higher or lower estate.\footnote{83} Thus, a lower estate holder incurred liability when the lower estate holder prohibited or prevented a higher estate’s surface waters from flowing onto the lower estate.\footnote{84} The lower estate was prohibited from interfering with diffuse surface water flow, and

\footnotesize{75. Id. at *5-*6.} 
\footnotesize{76. Keys, 412 P.2d at 402, n.4; Orleans Navigation III, 2 Mart. (o.s.) 214, 1812 WL 814, at *6, *8.} 
\footnotesize{77. Orleans Navigation III, 2 Mart. (o.s.) 214, 1812 WL 814, at *8.} 
\footnotesize{78. Id.} 
\footnotesize{79. Id. at *6, *9.} 
\footnotesize{80. Heins, 859 S.W.2d at 688.} 
\footnotesize{81. Keys, 412 P.2d 532.} 
\footnotesize{82. Orleans Navigation III, 2 Mart. (o.s.) 214, 1812 WL 814, at *8; Bunch v. Thomas, 49 S.W.2d 421, 423 (Tex. 1932).} 
\footnotesize{83. Heins, 859 S.W.2d at 688.} 
\footnotesize{84. Id.}
thus the natural easement, by lessening the volume accepted onto the lower estate or changing the natural drainage pattern of diffuse surface waters which naturally drained upon the lower estate.\textsuperscript{85} Similarly, the higher estate was precluded from impounding diffuse surface waters which flowed and naturally drained into the lower estate.\textsuperscript{86} Additionally, the higher estate was precluded from discharging surface waters onto a lower estate in a greater volume than would naturally flow to the lower estate.\textsuperscript{87} Any violations of the implied natural servitudes or easements the civil law rule granted, which was considered a branch of property law, resulted in possible penalties under a trespass action.\textsuperscript{88}

While the civil law rule had the beneficial characteristic of ensuring that new development would not alter the amount of surface waters which were discharged onto neighboring properties, in its strictest form, the civil law rule inhibited not only the development of higher estates, but lower estates as well.\textsuperscript{89} This inhibition resulted because almost any change to property was likely to cause diffuse surface water drainage to be altered in some degree, justifying a complaint by either the lower or higher estate holder.\textsuperscript{90} Therefore, to combat the inhibition to development which resulted under a strict adherence to the civil law rule, some jurisdictions imposed exceptions to the civil law rule.\textsuperscript{91}

2. The Modified Civil Law Rule Has Altered Landowners’ Diffuse Surface Water Drainage Rights

a. The Reasonableness Exception to the Civil Law Rule Has Forced Jurisdictions to Consider the Factual Circumstances of a Landowner’s Development Before Imposing Liability

One exception to the civil law rule that allows landowners to develop their properties while continuing to drain diffuse surface waters upon lower estates is the reasonableness exception.\textsuperscript{92} Several jurisdictions, including California, Idaho, Illinois, Iowa, Maryland, and Pennsylvania, have imposed a reasonableness standard upon the civil law rule.

\begin{itemize}
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Orleans Navigation III, 2 Mart. (o.s.) 214, 1812 WL 814, at *8.
\item \textsuperscript{88} Heins, 859 S.W.2d at 689; Highview N. Apartments v. Ramsey County, 323 N.W.2d 65, 72 (Minn. 1982).
\item \textsuperscript{89} R. Timothy Weston, Gone with the Water-Drainage Rights and Storm Water Management in Pennsylvania, 22 VILL. L. REV. 901, 907 (1977).
\item \textsuperscript{90} Keys, 412 P.2d at 536, 537.
\item \textsuperscript{91} Heins, 859 S.W.2d at 689.
\item \textsuperscript{92} Keys, 412 P.2d at 536, 537.
\end{itemize}
law rule. The reasonableness standard required courts to consider all relevant facts of a situation, including the amount of harm the development caused, the foreseeability of the harm, and the landowner's motive at the time in which the landowner altered the natural drainage of the diffuse surface waters, before imposing liability. Thus, under the reasonableness standard, a court is mandated to determine whether the utility of the diversion of diffuse surface waters was greater than the harm which was incurred. Following this analysis, if the utility in altering the drainage of the diffuse surface water was greater than the harm it caused, then the person who altered the drainage acted reasonably and without liability. However, if the harm caused was unreasonably severe, then the landowner who altered the natural drainage conditions has to bear the damages incurred. Furthermore, if the circumstances of the case indicated that both landowners acted reasonably, the court abided by the traditional civil law rule.

In Keys v. Romley, the Supreme Court of California determined that the trial court must determine if it was reasonable for the builder of an ice rink to discharge surface waters across his parking lot to the detriment of neighboring landowners. In Keys, Wesley Keys ("Keys") sought a permanent injunction and $4384.78 in damages against Hazel Romley ("Romley"), in the Superior Court of Contra Costa County, California. In the Superior Court, Keys established that he had built a television and appliance store on his property in 1956, while Romley had constructed his ice rink in 1957 on an adjoining property. Additionally, Romley's ice rink's roof directed surface water into four downspouts. The downspouts emptied onto a paved parking lot, and the surface water eventually flowed upon Keys' property, only to be stopped by a temporary earthen pile. Upon Keys' removal of the earthen pile in 1959, the surface water drainage from Romley's ice rink resulted in the continual flooding of Keys' appliance.

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95. Sheehan v. Flynn, 61 N.W. 462, 466 (Minn. 1894).
96. Keys, 412 P.2d at 537.
97. Id.
98. Id.
102. Id. at 530.
103. Id.
104. Id.
store. The evidence established that Romley had collected surface waters and unlawfully discharged them upon Keys’ property in a different manner than existed naturally. Therefore, the court granted Keys’ request for a permanent injunction and damages.

Romley appealed to the Supreme Court of California. The court stated that while Keys did not actively try to protect his appliance store from the surface waters by replacing the earthen pile, possibly upon the belief that California adhered to the traditional civil law rule, the superior court could not determine liability solely upon a finding that the natural drainage pattern of surface waters had been changed from that which existed naturally. Instead, the court had to employ a reasonableness standard. Therefore, the supreme court reversed the lower court’s finding that Romley was liable for Keys’ damages and remanded with instructions to consider each landowner’s reasonableness.

Similarly, in Westbury Realty Corp. v. Lancaster Shopping Center, Inc., the Supreme Court of Pennsylvania also inferred the need for a reasonableness exception to the civil law rule. The court determined that neighboring landowners stated a valid cause of action against developers of a shopping center by claiming that the developers must protect neighboring landowners from the burden of an increased shedding of surface waters upon existing development when new development restricted natural absorption of such waters. In Westbury, Westbury Realty Corporation, Lynn Londrey, Bertha Londrey, Wendell Stadel, Bertha Stadel, Alexander Reid, and Thelma Reid, ("Neighbors") filed for an injunction in the Court of Common Pleas of Lancaster County, Pennsylvania, to prevent the developers of the Lancaster Shopping Center ("Developers") from discharging surface waters onto their properties. The Neighbors’ complaint stated that because of the Developers’ construction and paving, the flow and discharge of surface waters had greatly increased, causing their

105. Id. at 530-31.
106. Id. at 531.
107. Id.
108. Id. at 529, 530.
109. Id. at 538.
110. Id.
111. Id.
114. Westbury, 152 A.2d at 672.
115. Id. at 669, 670.
properties to flood.\textsuperscript{116} The Developers objected to the Neighbors' complaint, arguing the complaint failed to state a cause of action in negligence and failed to show that the Developers created an artificial channel that was used to collect and discharge surface waters upon the Neighbors' properties.\textsuperscript{117} The Court of Common Pleas sustained the Developers' objections and granted the Neighbors leave to amend their complaint.\textsuperscript{118}

However, the Neighbors appealed the Court of Common Pleas' decision to the Pennsylvania Supreme Court rather than amend their complaint because they could not establish the Developers' negligence or channeling of surface water.\textsuperscript{119} On appeal, the Pennsylvania Supreme Court stated that in Pennsylvania, the civil law rule applied to development of property in rural areas, and the reasonableness exception to the civil law rule applied to rural properties which were used for an artificial purpose.\textsuperscript{120} The Developers argued that because the shopping center was built in a rural area, the civil law rule for drainage of surface waters applied.\textsuperscript{121} However, the court stated that a commercial development, such as the shopping center, was not a contemplated use of rural property when Pennsylvania's concepts of water flow were formulated.\textsuperscript{122} Therefore, the court reasoned that the reasonableness exception was applicable to the case.\textsuperscript{123}

To apply the reasonableness exception, the Supreme Court of Pennsylvania engaged in an analysis to balance the reasonableness of the Developers' actions against the harms the Neighbors incurred.\textsuperscript{124} The court noted that the shopping center essentially covered seventeen acres of property with non-porous material and buildings which prevented the soil from absorbing the surface waters.\textsuperscript{125} Furthermore, the Developers did not construct a storm sewer drainage system, at a cost of $9600, which would have reduced the amount of surface waters flowing onto neighboring properties.\textsuperscript{126} After balancing the equities of the situation, the court stated that the cost of constructing an adequate drainage facility was a rather insignificant sum, as compared with the shopping center's cost, to remedy the

\begin{enumerate}
\item[116.] Id. at 671.
\item[117.] Id.
\item[118.] Id. at 669, 671.
\item[119.] Id.
\item[120.] Heins, 859 S.W.2d at 690; Westbury, 152 A.2d at 669, 671-72.
\item[121.] Westbury, 152 A.2d at 671-72.
\item[122.] Id. at 672.
\item[123.] Argyelan II, 435 N.E.2d at 986 (Hunter, J., dissenting); Westbury, 152 A.2d at 672.
\item[124.] Westbury, 152 A.2d at 669, 672.
\item[125.] Id. at 671, 672.
\item[126.] Id. at 672.
\end{enumerate}
abuse which the Developers' inflicted upon the Neighbors' properties. Therefore, the Supreme Court of Pennsylvania reversed the Court of Common Pleas' determination that the Neighbors had not stated a claim against the Developers and ordered the Court of Common Pleas to proceed with the Neighbors' case. However, other courts using a modified civil law rule do not require development to be reasonable.

b. The Acceleration Exception Allows Landowners' to Increase the Volume of Diffuse Surface Waters Cast Upon Neighboring Properties

Jurisdictions including Alabama, Colorado, Georgia, Kansas, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Vermont have imposed an acceleration exception on the civil law rule which permits a landowner to accelerate drainage of diffuse surface waters into watercourses in which the diffuse surface waters would have naturally drained, but does not recognize a right for the landowner to collect and discharge the diffuse surface waters to the injury of neighboring properties. Therefore, courts in these jurisdictions have maintained that the natural drainage conditions of the property may be altered as long as the diffuse surface water shed is not collected and discharged upon lower estates; the diffuse surface water must be solely allowed to shed upon the lower estate naturally. Thus, courts in these jurisdictions need not

127. Id.
128. Id. at 669, 672.
129. See, e.g., Terrebonne Parish Policy Jury v. Matherne, 405 So.2d 314, 318 (La. 1981) (stating a higher estate can alter and accelerate the flow of diffuse surface waters so long as they are diverted to their natural destination); Garbarino v. Van Cleave, 330 P.2d 28, 30 (Or. 1958) (stating the higher estate can shed diffuse water onto lower estates as long as artificial means are not utilized).
consider the reasonableness of development so long as natural water courses are utilized in the drainage.\textsuperscript{132}

In acceleration jurisdictions that have not followed a reasonableness exception, an upper estate was not liable for diffuse surface water damages sustained by lower estates if the diffuse surface water drainage was accelerated through a natural watercourse.\textsuperscript{133} In \textit{Leiper v. Heywood-Hall Construction Co.},\textsuperscript{134} the Supreme Court of Pennsylvania determined that a higher estate may shed, and accelerate, increased volumes of surface waters onto lower estates without liability, as long as the surface waters were allowed to flow into a natural watercourse before descending upon the lower estate.\textsuperscript{135} In \textit{Leiper}, George Leiper ("Leiper") sought to enjoin Heywood-Hall Construction Company ("Heywood") from diverting surface waters off of a fifty-six acre property development onto Leiper's property, which caused substantial injury.\textsuperscript{136} The Court of Common Pleas, Montgomery County, found the Heywood's development of four residential units per acre diverted the diffuse surface water as a necessary result of the property's proper use.\textsuperscript{137} Additionally, the Court of Common Pleas concluded that while the diffuse surface waters from Heywood's property did flow onto Leiper's property, the water was flowing through a natural water course and, as such, the defendant could not incur liability.\textsuperscript{138} Leiper appealed to the Supreme Court of Pennsylvania.\textsuperscript{139}

On appeal, the Supreme Court of Pennsylvania stated that while Heywood's property was formerly rural, and had since become urbanized, landowners were permitted to make improvements upon their property, without liability to neighboring landowners, so long as the drainage occurred through a natural watercourse.\textsuperscript{140} Therefore, the court affirmed the Court of Common Pleas' decision and did not impose liability on Heywood, the developer.\textsuperscript{141}

\textsuperscript{132} \textit{Leiper}, 113 A.2d at 150.
\textsuperscript{133} \textit{Id}.
\textsuperscript{134} 113 A.2d 148 (Pa. 1955).
\textsuperscript{135} \textit{Leiper}, 113 A.2d at 150.
\textsuperscript{136} \textit{Id}. at 148.
\textsuperscript{137} \textit{Id}. at 148, 149.
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}. at 148.
\textsuperscript{140} \textit{Id}. at 148, 149, 150.
\textsuperscript{141} \textit{Id}. at 148, 150.
c. The Good Husbandry Exception Allows Landowners of Higher Agricultural Estates to Increase Diffuse Surface Water Drainage onto Neighboring Properties Through Natural Waterways

Other jurisdictions, including Louisiana, Oregon, and South Dakota, have created a good husbandry exception to the civil law rule.\(^\text{142}\) The good husbandry exception extends an easement right to the landowner of a higher agricultural estate to accelerate and hasten the drainage of diffuse surface waters upon a lower estate.\(^\text{143}\) However, the surface waters must be drained through the same natural watercourse that the surface waters would have flowed down naturally.\(^\text{144}\) The good husbandry exception is typically applied in situations where surface water drainage was accelerated for an enhanced cultivation of the higher estate, thus rendering the exception virtually valueless to commercial development.\(^\text{145}\) For example in *Lee v. Schultz*,\(^\text{146}\) the landowner of the higher estate cut an artificial ditch to connect a landlocked slough to another slough on the higher estate which naturally drained to a lower estate.\(^\text{147}\) Thereafter, surface waters from both sloughs naturally drained onto the lower estate causing damage stemming from a loss of crops.\(^\text{148}\) Applying the good husbandry exception, the court held that the landowner of the higher estate had an easement, for the purpose of good husbandry, to hasten and accelerate the flow of surface waters onto a lower estate which lies in the same natural watercourse as the higher estate.\(^\text{149}\)

C. The Common Enemy Doctrine, From Its Historic Beginnings to Its Modern Exceptions

1. The Traditional Common Enemy Doctrine Allowed All Landowners to Cast Diffuse Surface Waters Upon Their Neighbors Without Fear of Liability

Although several states’ judicial branches have aligned their jurisprudence with some variation of the civil law rule, other states have adhered to the common enemy doctrine to determine diffuse surface water rights.\(^\text{150}\) In its most basic form, the common enemy doctrine, which is sometimes referred to as the common law, was founded upon

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\(^{142}\) [Terrebonne, 405 So.2d at 318; Garbarino, 330 P.2d at 31, 32; Lee v. Schultz, 374 N.W.2d 87, 90 (S.D. 1985).]
\(^{143}\) [Lee, 374 N.W.2d at 90.]
\(^{144}\) [Id.]
\(^{145}\) [Garbarino, 330 P.2d at 30.]
\(^{146}\) [374 N.W.2d 87.]
\(^{147}\) [Lee, 374 N.W.2d at 88.]
\(^{148}\) [Id.]
\(^{149}\) [Id. at 90.]
\(^{150}\) [Heins, 859 S.W.2d at 690 n. 13.]
a historic maxim which proclaimed that *cujus est solum, ejus est usque ad coelum et ad inferos* (whose is the soil, his it is even to the skies above and to the depths below).\(^{151}\) Under this maxim, courts regarded the right of landowners to do as they pleased upon their own property as a right which could not be obstructed because of resulting injury to others.\(^{152}\)

Initially, the traditional common enemy doctrine was believed to be deduced from English common law.\(^{153}\) Historians later discovered that during the time in which the common enemy doctrine was being implemented in the Massachusetts court system in the 1850s, English law lay unsettled.\(^{154}\) While the traditional common enemy doctrine’s legal beginnings continue to remain a mystery, it is clear that the phrase “common enemy” was first utilized in the United States in 1875 in *Town of Union v. Durkes*,\(^{155}\) where Chief Justice Beasley stated that diffuse surface water was the common enemy, which all landowners could fight and get rid of as best they could.\(^{156}\)

When a court adheres to the common enemy doctrine, as set forth in *Durkes*, landowners may divert any and all diffuse surface waters onto another’s property without regard to liability.\(^{157}\) Thus, a landowner had the right to divert the course in which diffuse surface waters flowed and could throw diffuse surface waters back upon neighboring properties by erecting dams, which prohibited diffuse surface waters from coming onto the landowner’s property.\(^{158}\)

The traditional common enemy doctrine’s popularity among early courts was based upon the belief that the traditional common enemy doctrine promoted property development and economic growth.\(^{159}\) However, over one hundred years after the *Durkes* decision was delivered, no jurisdiction follows the common enemy doctrine in its original form.\(^{160}\) The general lack of adherence to the traditional common enemy doctrine is due, in part, to the doctrine’s harsh results, where it becomes a neighborhood contest betwixt “pipes and dikes” in which breach of the peace will be inescapable.\(^{161}\) Just as courts adhering to

\(^{151}\) *Keys*, 412 P.2d at 532; *Heins*, 859 S.W.2d at 688.


\(^{153}\) *Heins*, 859 S.W.2d at 688.

\(^{154}\) *Keys*, 412 P.2d at 531; *Heins*, 859 S.W.2d at 688.

\(^{155}\) 38 N.J.L. 21 (1875).

\(^{156}\) *Keys*, 412 P.2d at 531; *Town of Union v. Durkes*, 38 N.J.L. 21 (1875).

\(^{157}\) *Keys*, 412 P.2d at 531.


\(^{159}\) *Weston*, *supra* note 89, at 907.


\(^{161}\) *Weston*, *supra* note 89, at 908.
the civil law rule have limited and modified the rule, so too have
courts which adhere to the common enemy doctrine.162

2. The Modified Common Enemy Doctrine Has Instated Liability
for Diffuse Surface Water Injuries in Certain Situations

a. The Due Care Exception Allows Landowners, Who Are
Developing Their Properties, to Drain Damaging Amounts of
Diffuse Surface Waters Upon Neighboring Landowners if the
Harm is Reasonably Necessary for the Development of Their
Property

One court system adhering to a modified common enemy doctrine,
Arkansas, has declared that landowners must exercise due care in
their attempt to fend off diffuse surface waters so as to avoid unnec-
 essary injury to neighboring landowners.163 The due care exception re-
mains a court to consider only whether the landowners employed due
care in improving their property, but does not impose a duty upon
landowners to determine the importance of their improvements
against the harm which could result to neighboring landowners.164
Thus, the due care exception does not limit landowners' rights to make
improvements to their property.165 Instead, the due care exception
ensures that landowners limit the harm caused to neighboring land-
owners to those harms which are reasonably necessary.166

Similarly, courts in Maine, Montana, Nebraska, Oklahoma, and
Virginia impose either a reasonable care or negligence standard upon
landowners in their attempt to shed diffuse surface waters off of their
properties.167 However, the phrase “reasonable care” should not be
confused with “reasonable use” because reasonable care is a negli-
gence concept, whereas the phrase “reasonable use” refers to the rea-
sonable regard of other landowners’ rights so that harm can be
prevented or minimized.168

The reasonable care requirement in Montana does not bestow a
duty upon the landowner of a higher estate to prevent diffuse surface
waters from flowing onto lower estates, but merely requires a land-

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162. Keys, 412 P.2d at 410; Nu-Dwarf Farms, Inc. v. Stratbucker Farms, Ltd., 238
163. Pirtle, 601 S.W.2d at 266.
165. Currens, 983 P.2d at 630.
166. Id. at 629, 631.
167. Greely v. Me. Cent. R.R. Co., 53 Me. 200 (1865); Dept. of Highways v. Feenan,
752 P.2d 182, 184 (Mont. 1988); Nu-Dwarf Farms, Inc., 238 Neb. at 400-01, 470 N.W.2d
at 777 (1991); Mattoon v. City of Norman, 617 P.2d 1347, 1349 (Okla. 1980); Mullins v.
Greer, 311 S.E.2d 110, 112 (Va. 1984).
168. Highview N. Apartments v. County of Ramsey, 323 N.W.2d 65, 72 (Minn.
1982).
owner who actively diverts surface waters to act reasonably after considering the possible damages that may befall upon neighboring lower estates. In Oklahoma, it is a question of fact as to whether a landowner diverted diffuse surface waters in a reasonable manner. Additionally, in Virginia a landowner is not liable for increasing the amount of diffuse surface waters which are discharged onto neighboring properties, as a result of reasonable development, so long as the landowner does so in good-faith. The landowner, to comply with the good-faith expectation, must not discharge diffuse surface waters onto neighboring properties wantonly, unnecessarily, or carelessly. Thus, Virginia allows properties to be graded and buildings to be erected seemly without liability as long as the development is reasonable.

For example, in *Harris Motor Company v. Pulaski Furniture Co.*, the Supreme Court of Appeals of Virginia determined that the erection of a building, covering essentially an entire property, did not violate a modified common enemy rule that allowed for the drainage of surface waters without liability, except in cases where the drainage was done in a needless and negligent way. In *Harris Motor Co.*, Harris Motor Company ("Harris") sued Pulaski Furniture Company ("Pulaski") in the Circuit Court of Pulaski County, Virginia, for damages stemming from Pulaski's erection of a building upon its own property. The evidence established that Pulaski's building covered nearly the entirety of the property, leaving only ten feet between Pulaski's building and Harris' building to accept the surface water from Pulaski's building. Thus, the erection of Pulaski's building, which covered a pre-existing baseball field, virtually resulted in the elimination of all means of natural absorption of surface waters which fell upon Pulaski's property. Furthermore, Pulaski removed preexisting natural drains which could divert the surface waters away from Harris' building. However, upon a demurrer by Pulaski, the jury determined that Pulaski was not liable for damages Harris sustained on the grounds that Pulaski had the right to construct its building as long as it was done in a proper and reasonable manner which did not

171. *Mullins*, 311 S.E.2d at 112.
172. *Id.*
173. *Id.*
174. 144 S.E. 414 (Va. 1928).
176. *Harris Motor*, 144 S.E. at 414.
177. *Id.* at 414-15.
178. *Id.* at 415.
179. *Id.* at 416.
inflict needless injury upon Harris.\textsuperscript{180} Harris appealed to the Supreme Court of Appeals of Virginia.\textsuperscript{181}

On appeal, the Supreme Court of Appeals of Virginia stated that while construction of Pulaski's building altered the flow of surface waters, which could have been avoided by the construction of culverts or openings in the foundation which would have allowed the surface water to flow naturally, the facts indicated that Pulaski constructed his building in the usual method.\textsuperscript{182} Additionally, the court determined that Pulaski could not be liable for Harris' damages without evidence that the alteration cast surface waters from other premises than those of Harris and Pulaski.\textsuperscript{183} Thus, the court affirmed the circuit court's judgment while noting that a case may arise in which the negligent erection of a structure could support a negligence action.\textsuperscript{184} However, the court did not provide any guidance as to what constituted a negligent erection.\textsuperscript{185}

Similarly, in \textit{Jorgenson v. Stephens},\textsuperscript{186} the Supreme Court of Nebraska determined the developer of an apartment complex was not liable for damages to a neighboring landowner's property when the apartment complex increased the surface water drainage into a neighboring property, resulting in the constant flow of surface water to the neighboring property.\textsuperscript{187} In \textit{Jorgenson}, Mina Jorgenson ("Jorgenson") sought an injunction in the District Court for Lancaster County, Nebraska, requiring Frank Stephens ("Stephens") to desist from discharging surface waters from Stephens' newly constructed apartment complex onto her residential property.\textsuperscript{188} Jorgenson filed for an injunction after the discharge of diffuse waters from a neighboring apartment complex flowed continually into her property; the property had not flooded prior to the newly constructed apartment complex.\textsuperscript{189} The district court found that Stephens was not liable for Jorgenson's damages incurred from the increase in diffuse surface water.\textsuperscript{190} The court reasoned that Jorgenson could not establish negligence in the construction or grading of Stephens' apartment complex.\textsuperscript{191}

\textsuperscript{180} \textit{Id.} at 414, 417.
\textsuperscript{181} \textit{Id.} at 414.
\textsuperscript{182} \textit{Id.} at 414, 415.
\textsuperscript{183} \textit{Id.} at 416.
\textsuperscript{184} \textit{Id.} at 416, 417.
\textsuperscript{185} \textit{See generally id.} at 417 (stating that the plaintiff failed to establish an injury which was negligently inflicted by the defendant's erection of a building).
\textsuperscript{186} 143 Neb. 528, 10 N.W.2d 337 (1943).
\textsuperscript{188} \textit{Jorgenson}, 143 Neb. at 529, 531-32, 10 N.W.2d at 337, 338-39.
\textsuperscript{189} \textit{Id.} at 529, 10 N.W.2d at 337-38, 339.
\textsuperscript{190} \textit{Id.} at 529, 10 N.W.2d at 338.
\textsuperscript{191} \textit{Id.} at 529, 534, 10 N.W.2d at 338, 340.
Jorgenson appealed the district court's decision to the Supreme Court of Nebraska. The court declared that Nebraska adhered to the modified common enemy doctrine. The court relied upon *Morrissey v. Chicago, Burlington & Quincy Railroad Company*, which stated that landowners were free to protect their properties from surface waters, even if the protection resulted in damages to a neighboring property, and could only be held liable if their protection was negligent. Therefore, under Nebraska's modified common enemy doctrine, the court affirmed the district court's decree and determined that without evidence of Stephens' negligence, Stephens could not be mandated to install an unnatural and artificial outlet to carry the apartment complex's diffuse surface waters away from Jorgenson's property. Additionally, the court stated that to mandate a developer of urban properties to install adequate drainage systems would be a stumbling block in the pathway of progress and would arrest urban development because of the burden of overcoming the forces of gravity. Furthermore, the Supreme Court of Nebraska instructed Jorgenson to protect her property through use of her own resources.

b. The Collection and Discharge Exception to the Common Enemy Doctrine Bars Landowners From Draining Diffuse Surface Waters Onto Neighboring Properties Directly From an Impounded Water Source

Several other states which still purport to adhere to a modified common enemy doctrine have imposed some variation of a collection and discharge standard. In the District of Columbia, surface waters may be diverted or repelled onto neighboring properties so long as the surface waters are diverted or repelled as a result of the ordinary use of the property. The ordinary use of the property does not allow discharging surface waters through ditches, channels, or other extraordinary construction. However, the ordinary use of one's property includes the reasonable grading of the property, which results in

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192. *id.* at 528, 529, 10 N.W.2d at 337, 338.
193. *id.* at 534, 10 N.W.2d at 340.
195. *Jorgenson*, 143 Neb. at 533, 10 N.W.2d at 339.
196. *id.* at 534-35, 10 N.W.2d at 339.
197. *id.* at 535, 10 N.W.2d at 340.
198. *id.*
201. *id.*
diffuse surface waters being shed onto neighboring properties.\textsuperscript{202} Wyoming allows landowners to change the grade of their property and erect buildings thereon as long as they do not collect and discharge diffuse surface waters upon the neighboring landowner in greater quantities than discharged naturally.\textsuperscript{203} Additionally, while South Carolina prohibits landowners from collecting and subsequently discharging concentrated quantities of diffuse surface waters upon neighboring landowners, it continues to allow for increased water discharge onto neighboring properties which results from the reasonable development of property.\textsuperscript{204}

In \textit{Argyelan v. Haviland},\textsuperscript{205} the Supreme Court of Indiana held that landowners of a commercially developed property were not liable to neighboring landowners, in the absence of newly created drainage channels, for damages incurred when surface water pooled upon the neighboring landowner's property.\textsuperscript{206} In \textit{Argyelan}, Harold and Maxine Haviland ("Havilands") filed suit for damages and an injunction in the Circuit Court of Marion County, Indiana, to stop Steve and Anna Argyelan's ("Argyelans") diffuse surface waters from draining and collecting upon the Havilands' property.\textsuperscript{207} The circuit court entered a judgment for the Havilands after determining the Argyelans' discharge of surface water onto the Havilands' property resulted in $7500 in damages.\textsuperscript{208} The Argyelans appealed the judgment.\textsuperscript{209} The Court of Appeals of Indiana, Second District, reversed the circuit court's decision and determined that the Argyelans were not liable for the pooling of surface waters upon the Havilands' property because the waters were not discharged in a concentrated manner.\textsuperscript{210} In so determining, the court stated that while the Argyelans' downspouts, which were twenty feet from the property line, discharged diffuse waters toward the Havilands' property, the Argyelans' erection of a four-inch retaining wall adequately ensured that the discharge from the downspouts would disperse uniformly along the property line and not in a concentrated flow.\textsuperscript{211} The Havilands then appealed the court of appeals' decision to the Supreme Court of Indiana.\textsuperscript{212}

\textsuperscript{202} Id.
\textsuperscript{203} Eiselin, 868 P.2d at 898.
\textsuperscript{204} Irwin, 341 S.E.2d 784, 785.
\textsuperscript{205} 435 N.E.2d 973 (Ind. 1982).
\textsuperscript{206} Argyelan II, 435 N.E.2d at 973, 974, 975, 977-78.
\textsuperscript{207} Id. at 973, 974.
\textsuperscript{209} Argyelan I, 418 N.E.2d at 571.
\textsuperscript{210} Id. at 569, 573, 575.
\textsuperscript{211} Id. at 573.
\textsuperscript{212} Argyelan II, 435 N.E.2d at 973.
In its opinion, the Supreme Court of Indiana agreed with the appellate court and determined that the Argyelans did not violate Indiana's modified common enemy doctrine when they discharged diffuse waters through downspouts toward the Havilands' property. The court reasoned that while the downspouts did channel the diffuse surface waters toward the Havilands' property, by the time the diffuse surface waters reached the property line, the channeled diffuse surface waters had reverted to unchanneled diffuse surface water. Therefore, the Argyelans did not violate Indiana's modified common enemy doctrine because the diffuse surface water was not channeled when the water entered the Havilands' property. Additionally, the court determined that the Argyelans' grading, paving, and erecting of structures upon their property, which blocked the absorption of diffuse surface waters and caused an increase in the quantity of diffuse water to be drained onto the Havilands' property, was not a violation of Indiana's modified common enemy doctrine because those activities did not channel and cast diffuse surface waters upon the Havilands' property.

Furthermore, in Argyelan, the court explicitly chose to continue adhering to the modified common enemy doctrine over the reasonable use doctrine. The court determined that the reasonable use doctrine simply gave an advantage to landowners who were first in time to develop their property or to landowners who could arouse the greater sympathy for their plight. Despite Indiana's adherence to the modified common enemy doctrine, a majority of the state judicial branches now favor the reasonable use doctrine.

D. The Reasonable Use Doctrine Allows Factual Circumstances to Determine Property Rights

The third major diffuse surface water doctrine is the reasonable use doctrine. Under the reasonable use doctrine, an estate holder is obligated to sic utere tuo ut alienum non laedas (use your property so as not to injure that of another). Therefore, all landowners have the right to make reasonable use of their properties, while simultane-

213. Id. at 973, 976.
214. Id. at 976.
215. Id.
216. Id. at 974, 976.
217. Id. at 977-78.
218. Id. at 977.
219. Id. at 977-78; Heins, 859 S.W.2d at 690.
221. Heins, 859 S.W.2d at 688.
ous being held liable for unreasonable harm caused to neighboring landowners.222

Courts have rejected a specific test for the reasonable use doctrine in favor of allowing the doctrine to remain flexible.223 The reasonableness of a landowner's casting of diffuse surface waters upon neighboring properties depends upon several factors.224 These factors include the need for drainage, the amount of care utilized to avoid damaging the neighboring property, a balancing of the benefit to the property being drained compared to the burden bestowed upon the neighboring properties, and the reasonable construction and implementation of an artificial drainage system which aids the natural drainage of diffuse surface waters.225

Therefore, states which have embraced the reasonable use doctrine, including Alaska, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin, have determined that the reasonable use doctrine ensures the optimum development and enjoyment of property while allocating the costs of development equitably amongst the competing interests.226 Part of the allocation of costs requires commercial developers to engage in a careful and considerate analysis of the proposed development's effect upon the surface water drainage pattern in an attempt to lessen any burdens which neighboring properties may have to bear.227

223. Enderson v. Kelehan, 32 N.W.2d 286, 289 (Minn. 1948).
224. Enderson, 323 N.W.2d at 289.
225. Id.
227. Weston, supra note 89, at 911.
For example, in *Armstrong v. Francis Corporation*, the Supreme Court of New Jersey adopted the reasonable use doctrine in surface water cases because the doctrine better served the common well-being of landowners. In *Armstrong*, David and Mary Armstrong ("Armstrongs") sought relief in the Superior Court, Chancery Division, from diffuse surface waters the Francis Corporation ("Francis") discharged into a stream bordering the Armstrongs' property by way of an iron pipe. The drainage pipe carried diffuse surface water off of the Francis property following a natural watercourse, which the pipe generally paralleled. In particular, the drainage pipe served as a means to carry the surface water drainage from eighty-seven acres of Francis' property development, as well as from the percolating waters which lay beneath Francis' property. Draining the percolating waters allowed the water table to reside underneath the Francis property, resulting in a drier terrain more suitable for development. Because of the increase of surface water drainage, the once babbling brook increased in flow and became discolored, evil smelling, and devoid of fish. The stream's accelerated and heightened flow resulted in periodic flooding and erosion to the banks of the Armstrongs' property. Erosion removed ten feet of the Armstrongs' shore's bank, putting the stream only fifteen feet away from the Armstrongs' septic tank.

The superior court stated that it was reasonable to assume that another forty acre tract of property, which drained into the same basin as the Francis development, would be developed sometime in the future. Francis, however had built the drainage pipe large enough to accommodate any possible drainage from the forty-acre tract. The superior court stated that this additional diffuse surface water drainage would lead to further erosion and flooding of the Armstrongs' property. The superior court concluded the Armstrongs were clearly entitled to relief under the circumstances of the case and the sole sensible and permanent solution to the Armstrongs' problem would be to pipe the entire brook so that the drainage pipe emptied

228. 120 A.2d 4 (N.J. 1956).
229. *Armstrong*, 120 A.2d at 10.
230. *Id.* at 4, 5, 6.
231. *Id.* at 6.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 6-7.
236. *Id.* at 6.
237. *Id.* at 7.
238. *Id.*
239. *Id.*
into Milton Lake, the eventual body of water where the stream in contention drained. This additional piping was to be done at the sole expense of Francis. Upon the superior court's decision, Francis appealed.

On appeal, the Supreme Court of New Jersey stated the essential legal question was whether Armstrongs' damages were *damnum absque injuria*, or the non-actionable consequences of Francis' privileged drainage of surface waters from its property. In determining this issue, the court stated that while New Jersey had historically followed a modified version of the common enemy doctrine, a careful consideration of all pertinent circumstances should determine surface water cases. As such, the court declared the adoption of the reasonable use doctrine in the State of New Jersey which ensured that costs were not arbitrarily imposed upon neighboring landowners instead of those involved in profitable development. Additionally, in affirming the lower court's decision, the Supreme Court of New Jersey stated that social progress, as well as the common wellbeing, was better served by the just and right balancing of conflicting interests according to the customary principles of fairness and rationality, commonly associated with the application of the reasonable use doctrine.

Similarly, in *Clark County v. Powers*, the Supreme Court of Nevada determined the reasonable use doctrine should be adopted in Nevada for rural or semi-rural properties which would be shortly transformed into urban properties. In *Powers*, Albert Powers ("Powers") and Rufus Wallace ("Wallace") filed a cause of action in the Eighth Judicial District Court of Clark County against Clark County for damages incurred from flooding by diffuse surface waters which were drained from new developments. The district court awarded Powers and Wallace damages, and Clark County appealed to the Supreme Court of Nevada.

On appeal, Clark County contended that it was error for the district court to adopt the reasonable use doctrine. Clark County's contention was based on the belief that the reasonable use doctrine

240. *Id.* at 5-6, 7.
241. *Id.* at 7.
242. *Id.*
243. *Id.* at 4, 7; *Black's Law Dictionary* 420 (8th ed. 2004) (defining the phrase *damnum absque injuria* as damage without wrongful act).
244. *Id.* at 10.
245. *Id.*
246. *Id.*
250. *Id.* at 1072, 1073-74.
251. *Id.* at 1075.
would restrict development of properties due to the lack of predictability regarding the permissible uses of the properties affected by the development.252 However, the Supreme Court of Nevada stated that water rights in Nevada had to be flexible to allow for reasonable development which did not injure neighboring landowners.253 The court also stated that water law should ensure that landowners could not make their property more valuable at the expense of neighboring landowners.254 Thus, courts in Nevada would have to consider the type and surface of the property, the potential for natural and artificial drainways, and the costs and benefits produced pursuant to the drainage of diffuse surface waters.255 Furthermore, the court stated that the reasonable use doctrine promoted sharing of the costs landowners incurred from the necessary planning required to ensure that diffuse surface waters were adequately dealt with before and after development.256 This equitable distribution of costs coincided with Nevada’s concepts of social progress and the public’s common well-being.257

The Supreme Court of Nevada affirmed the district court’s decision to hold Clark County liable under the reasonable use doctrine for the damages Powers and Wallace incurred from Clark County’s involvement with the development of the properties.258 The court reasoned that Clark County failed to improve the natural drainage system, failed to complement the natural drainage by way of an artificial drainage system, and failed to ensure that the benefits of the development would result in greater benefits than harm.259

ARGUMENT

The current civil law rule, without a reasonableness exception, and the common enemy doctrine (collectively “Rules”) governing diffuse surface waters violate John Rawls’ (“Rawls”) approach to justice as fairness.260 Because the Rules violate Rawls’ theory of justice, states adhering to the Rules should either adopt a reasonableness exception to the Rules or replace their respective Rules with the reason-
The reasonable use doctrine, as well as the reasonableness exception, comply with Rawls' theory of justice.

The reasonable use doctrine complies with Rawls' theory of justice because it keeps equality, with respect to property rights, among all landowners until a determination of the facts requires an inequality. Although inequality ultimately follows the judicial decision, the right to argue the facts of a case in an effort to secure more property rights places the un-benefited landowner in an improved position over that, which currently exists under arbitrary diffuse surface water rules. Additionally, the reasonableness exception to the civil law rule places higher and lower estates in a state of equality because the right to drain diffuse surface waters onto neighboring properties is only allowed when a judicial court determines the facts of the situation dictate that one landowner should enjoy superior property rights to that of the other landowner. Thus, similarly to the improved position of the non-benefited landowner under the reasonable use doctrine, the reasonableness exception to the civil law rule ultimately distributes inequitable rights to landowners but improves the non-benefited landowner's position by allowing the non-benefited landowner to argue the facts of the case instead of being bound by a strict, arbitrary rule.

Therefore, the reasonable use doctrine and reasonableness exception requires courts to examine the facts of each case. This examination complies with Rawls' theory of justice because while one landowner will ultimately have the right to drain or stop drainage of diffuse surface waters, the other landowner will have had the opportunity to present his or her case. The reasonable use doctrine's right of presentation is an improved situation from other doctrines which impose arbitrary rules.

A. RAWLS' THEORY OF JUSTICE AS FAIRNESS MANDATES AN EQUITABLE DISTRIBUTION OF RIGHTS

Rawls' theory of justice stipulates that rights have to be equitably distributed amongst the members of society. Rawls' theory of justice as fairness is based upon the presumption that the principles of

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261. See infra notes 444-66 and accompanying text.
262. See infra notes 467-548 and accompanying text.
263. See infra notes 467-504 and accompanying text.
264. See infra notes 498-504 and accompanying text.
265. See infra notes 509-48 and accompanying text.
266. See infra notes 540-46 and accompanying text.
267. See infra notes 487, 527 and accompanying text.
268. See infra notes 501, 546 and accompanying text.
269. See infra notes 444-66 and accompanying text.
justice are the principles that free and rational individuals, who are concerned with furthering their own interests, would accept in a setting of equality known as the original position. In the original position, individuals do not know their relative position in society, class, or social status, nor do they know their own natural abilities such as intelligence or strength. The original position assures that no individual is influenced in his or her choice of principles of justice merely because of natural chance or social circumstances. The qualities and characteristics of the original position are known collectively as the veil of ignorance. Thus, individuals are placed in a hypothetical situation in which the veil of ignorance ensures that no individual is able to design the principles of justice to favor his or her particular circumstances. Individuals do not know what their status, position, or abilities will be once they leave the veil of ignorance, so they have an incentive to select rules that are fair and just to all. The determination of what rules are fair and just is a rational choice that individuals behind the veil of ignorance agree provides the greatest personal benefit to all individuals. Because no individual can favor his or her own circumstances while acting behind the veil of ignorance, the chosen principles would be the product of fair agreement or bargain.

However, while individuals cannot favor their own circumstances, they still retain the sense of rationalism of wanting to meet their desired ends by the most effective means. Rawls assumed that each individual would want more primary social goods than less. Primary social goods include the rights, liberties, and opportunities afforded to individuals. Additionally, income and wealth are primary goods. However, according to Rawls, individuals do not seek to impose injuries or confer benefits on each other. Instead, each individual seeks to maintain equality of rights. If individuals in the original position make proposals for the principles of justice, they have

271. Id. at 10, 17.
272. Id. at 11.
273. Id.
274. Id. at 118.
275. Id. at 11.
276. Id. at 11, 130.
277. Id. at 10-11.
278. Id. at 11.
279. Id. at 11, 12.
280. Id. at 123.
281. Id. at 54.
282. Id.
283. Id. at 125.
284. Id. at 13.
no incentive to propose arbitrary principles. To be arbitrary, a principle must be based on prejudice or preference, instead of reason or fact. For example, no individual operating behind the veil of ignorance would suggest a principle that basic rights ought to be conditioned on an individual's skin color; behind the veil of ignorance, no individual knows his or her skin color, so individuals could not gain an advantage or disadvantage by proposing such a principle. Additionally, because each principle is a restraint on an individual's liberty of action, such a principle would not be accepted without a logical relationship to the advancement of society's interests.

Because individuals in the original position operate in a position of equality, Rawls reasons that it is unlikely the individuals would agree to a legal principle that required lesser life prospects for certain individuals for the good of others. In the original position, where all individuals desire to protect their own interests, they would not submit to an enduring loss for themselves just to bring about a greater amount of satisfaction for others. A rational individual in the original position would not assent to a rule simply because the rule maximized the advantages of the majority. Rawls' theory of justice rejects utilitarianism. However, in the inevitable instance that certain economic or social inequalities would exist in society, justice as fairness would still be realized if the benefit enjoyed by a few resulted in an improved situation for the individuals who did not receive the added benefit.

B. THE MODIFIED CIVIL LAW RULE IN COMMERCIAL SITUATIONS

DOES NOT ADHERE TO RAWLS' THEORY OF JUSTICE AS FAIRNESS IF IT DOES NOT INCLUDE A REASONABLENESS EXCEPTION

The modified civil law rule jurisdictions, which do not impose a reasonableness exception for diffuse surface waters, violate Rawls' theory of justice as fairness. Because these jurisdictions' modified

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285. Id. at 11, 129.
286. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).
287. RAWLS, supra note 270, at 129.
288. Id.
289. Id. at 13.
290. Id.
291. Id.
293. See RAWLS, supra note 270, at 13 (stating that because the well-being of each individual depends upon a system of cooperation without which no individual would enjoy a satisfactory life, a separation of advantages would draw every individual into a state of willing cooperation).
294. See infra notes 327-43 and accompanying text.
Civil law rules violate Rawls' theory of justice, states adhering to these rules should either adopt a reasonableness exception to their civil law rules or replace the civil law rule with the reasonable use doctrine. The reasonable use doctrine, as well as the reasonableness exception, comply with Rawls' theory of justice.

Jurisdictions in Alabama, Colorado, Georgia, Kansas, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Vermont impose modified civil law rules, which do not include a "reasonableness" element in situations where commercial developments have caused diffuse surface waters to burden neighboring properties. The civil law rule states, in its purest form, that a holder of a higher elevated estate is granted an implied natural easement across the properties of lower estates for the purpose of natural diffuse water drainage. However, in some circumstances, if the properties were "touched" by the hands of man, the implied easement for diffuse water drainage was eliminated. Thus, the civil law rule protected lower estates from development only if development would cast surface water upon the lower estates in a more burdensome manner than nature intended. Justifying this system of rights, the courts reasoned that individuals purchasing property should expect, and be required to accept, the property subject to the encumbrance of natural drainage. However, because even the slightest development of the higher estate would permit a court to impose liability on the developer, the civil law rule was modified to allow development to accelerate the drainage of diffuse surface waters.

295. See infra notes 451-66 and accompanying text.
296. See infra notes 471-504, 505-46 and accompanying text.
299. Bunch v. Thomas, 49 S.W.2d 421, 423 (Tex. 1932).
301. Keys, 412 P.2d at 532.
302. Id. at 533.
The acceleration modification, which was made to the civil law rule to promote development, allows a higher estate holder to accelerate surface water drainage onto lower estates so long as the diffuse surface waters are carried onto the lower estate through natural watercourses.\textsuperscript{303} However, while this exception aides in the development of property, the acceleration exception does nothing more than allow commercial developers to develop their properties at the expense of lower estates.\textsuperscript{304}

For example, in \textit{Leiper v. Heywood-Hall Construction Company},\textsuperscript{305} the Supreme Court of Pennsylvania affirmed that a higher estate holder may accelerate diffuse surface waters onto lower estates without liability, so long as a natural watercourse is used as the means of drainage.\textsuperscript{306} In \textit{Leiper}, George Leiper ("Leiper") sued Heywood-Hall Construction Company ("Heywood") seeking an injunction to prevent diffuse surface waters from being drained in unusual quantities onto Leiper's property resulting in substantial damages.\textsuperscript{307} The Court of Common Pleas, Montgomery County, rendered a decree for Heywood stating that without evidence of drainage through artificial channels, any damages caused to Leiper's property from the diffuse surface water was \textit{damnum absque injuria} (damage without a wrongful act).\textsuperscript{308}

Leiper appealed to the Supreme Court of Pennsylvania.\textsuperscript{309} In \textit{Leiper}, Heywood developed a fifty-six acre residential housing project which consisted of grading the previously undeveloped fifty-six acres, installing paved streets, and building 149 dwellings.\textsuperscript{310} The development caused Leiper to incur substantial injuries from an increase in surface water drainage onto his property.\textsuperscript{311} The increases in surface water occurred in part because Heywood did not install artificial drains to remove the surface waters.\textsuperscript{312} The Supreme Court of Pennsylvania affirmed the trial court's decision that while Heywood's construction of buildings and streets had increased the volume of surface waters which flowed upon Leiper's property, Heywood could not be held liable because the surface waters were allowed to flow through a natural watercourse.\textsuperscript{313} Furthermore, the Supreme Court of Penn-

\begin{itemize}
\item \textsuperscript{303} Garbarino, 330 P.2d at 30.
\item \textsuperscript{304} See infra notes 308-19 and accompanying text.
\item \textsuperscript{305} 113 A.2d 148 (Pa. 1955).
\item \textsuperscript{306} \textit{Leiper}, 113 A.2d at 150.
\item \textsuperscript{307} \textit{Id.} at 148.
\item \textsuperscript{308} \textit{Id.} at 148, 149; \textit{Black's Law Dictionary} 420 (8th ed. 2004).
\item \textsuperscript{309} \textit{Leiper}, 133 A.2d at 148.
\item \textsuperscript{310} \textit{Id.} at 148, 149.
\item \textsuperscript{311} \textit{Id.} at 148.
\item \textsuperscript{312} \textit{Id.}
\item \textsuperscript{313} \textit{Id.} at 149, 150.
\end{itemize}
sylvania agreed with the trial court that Heywood’s development was a use of the property which was normal, appropriate, and reasonable.\textsuperscript{314} Thus, the court found that Heywood did not unreasonably and unnecessarily injury Leiper under the civil law rule.\textsuperscript{315} The court affirmed the trial court’s decision and concluded that a higher estate may not be held liable to a lower estate for injuries sustained from an increased drainage of diffuse surface waters if the drainage occurs through a natural watercourse.\textsuperscript{316}

To determine whether justice was reached in cases such as \textit{Leiper}, one must again revisit the hypothetical situation, the original position, in which individuals from all backgrounds and walks of life meet behind the veil of ignorance, and everyone’s individual biases and interests are eliminated.\textsuperscript{317} In this original position, where everyone is placed in a position of equality, individuals are unwilling to agree to an arbitrary principle of justice because once they leave the veil of ignorance, the arbitrary principle will benefit some individuals over others.\textsuperscript{318} Because the individuals do not know if they will be the ones benefited, they have an incentive to propose and assent to just and equitable principles.\textsuperscript{319} However, this is not to say that the individuals in the original position believe that total equality must be maintained in all circumstances.\textsuperscript{320} The individuals realize that some inequalities will exist; however, to accept such inequality, the individuals agree that justice requires that the individual subjected to inequality must correspondingly receive an improved situation.\textsuperscript{321} Thus, left to determine principles which will govern their lives once they leave the veil of ignorance, individuals in the original position seek fairness, and thus justice, by reaching equitable rules.\textsuperscript{322} Equitable principles would not include favoring one landowner over another as the modified civil law rule allows.\textsuperscript{323}

Individuals in the original position would ask themselves whether they would be willing to give the landowner of a higher estate the right to increase the volume of diffuse surface water drainage onto lower estates if there was an equal chance they would be the land-

\begin{itemize}
\item \textsuperscript{314} \textit{Id.} at 148, 149, 150.
\item \textsuperscript{315} \textit{Heins,} 859 S.W.2d at 690; \textit{Leiper,} 113 A.2d at 149, 150.
\item \textsuperscript{316} \textit{Leiper,} 113 A.2d at 150.
\item \textsuperscript{317} \textit{See infra} notes 321-24 and accompanying text.
\item \textsuperscript{318} \textit{See supra} notes 321-25 and accompanying text.
\item \textsuperscript{319} \textit{Id.}
\item \textsuperscript{320} \textit{Id.} at 55.
\item \textsuperscript{321} \textit{Id.}
\item \textsuperscript{322} \textit{Id.} at 10-11.
\item \textsuperscript{323} \textit{See supra} notes 321-25 and accompanying text.
\end{itemize}
owner of the lower estate. Applying the Rawlsian analysis, the answer would likely be no. The reason individuals in the original position would likely answer no is because an arbitrary award of property rights exist in jurisdictions with laws similar to Leiper, where courts have awarded landowners of higher estates the right to drain increased amounts of diffuse surface waters upon lower estates as a result of development. An arbitrary law, based upon the elevation of one's property, would not promote equality because one landowner, by natural chance, would enjoy a right that another did not. Rawls specifically rejects basing rules on natural conditions or circumstances outside one's control. Unlike Rawls, the civil law rule as illustrated by Lieper allows upper landowners to drain surface waters onto the properties of lower landowners. Thus, while some landowners would be put into a position of superior rights because their property lies at a higher elevation, the lower property subjected to the diffuse surface water would have no recourse against the upper landowner's drainage rights. Individuals in the original position would not give landowners such a right at the expense of others because the individuals have no way of knowing if the right would be to their advantage. Therefore, it is unlikely individuals operating behind the veil of ignorance would reach the decision rendered in Leiper simply because Leiper's property was situated at a lower elevation because such a decision would be based on arbitrary distinctions.

Instead, behind the veil of ignorance, the individuals would agree that property rights should be given as the equities of the situation dictate. Individuals in the original position would require that Heywood's development activities, including the failure to install artificial diffuse surface water drains, be evaluated according to the cir-

324. See infra note 333 and accompanying text.
325. See infra notes 329-47 and accompanying text.
326. Compare RAWLS, supra note 270, at 129 (stating that individuals in the original position have no incentive to suggest arbitrary principles), with Leiper, 113 A.2d at 150 (stating that the owner of a higher estate is privileged to develop their property to the detriment of the lower estate without liability if diffuse surface water drains onto the lower estate via a natural watercourse).
327. See supra note 320 and accompanying text.
328. See RAWLS, supra note 270, at 11 (stating that the removal of an individual's knowledge of their own natural abilities and assets ensures that the fundamental agreements which are reached behind the veil of ignorance are fair and promote the idea of justice as fairness).
329. Leiper, 113 A.2d at 149.
331. See generally RAWLS, supra note 270, at 129 (stating that special privileges would not be given to a group of people arbitrarily because individuals in the original position do not know if such privileges would be to their own advantage).
332. See supra notes 329-34 and accompanying text.
333. See infra note 340 and accompanying text.
cumstances of the case before awarding Heywood the legal right to continue draining his development's diffuse surface waters onto Leiper's property.\textsuperscript{334} Unlike \textit{Leiper}, where the court allowed Heywood to develop its property and drain diffuse surface waters upon Leiper's property through a natural watercourse without liability, Rawls' theory of justice would have mandated Heywood to install a drainage system and pay Leiper for his damages in order to maintain equality pertaining to the rights that each individual possessed.\textsuperscript{335} This result is likely because Rawls would have allowed Heywood to develop the property to provide residential housing, which would be in society's interest, and placed Leiper in an improved position where his property would be less burdened with diffuse surface waters.\textsuperscript{336}

Unlike \textit{Leiper} where Heywood was allowed to develop its property so long as the water was drained through a natural watercourse, individuals in the original position would ensure each landowner has an equal opportunity to use the property in an economically beneficial way.\textsuperscript{337} However, individuals in the original position would allow one landowner to obtain additional rights over another only upon a determination of the facts of each case.\textsuperscript{338} Because diffuse water rights would not be given arbitrarily based upon elevation, a case-by-case determination of diffuse surface water drainage rights would be accepted by individuals in the original position based upon notions of rationality.\textsuperscript{339} Therefore, under a Rawlsian theory of justice, the \textit{Leiper} decision would be viewed as unjust.\textsuperscript{340}

While the modified civil law rule as applied in Alabama, Colorado, Georgia, Kansas, Louisiana, Michigan, New Mexico, Oregon, Penn-

\textsuperscript{334} \textit{See infra} note 340 and accompanying text.

\textsuperscript{335} \textit{Compare} \textit{Leiper}, 113 A.2d at 150 (stating that a landowner may develop his or her own land without liability for the additional flow of surface water through a natural watercourse), with \textit{RAWLS}, \textit{supra} note 270, at 130, 131 (stating that individuals start with a principle requiring equal opportunities and basic liberties but allow inequalities if the situation of the least advantaged individual is improved).

\textsuperscript{336} \textit{Compare} \textit{RAWLS}, \textit{supra} note 270, at 131 (stating that inequities are allowed so long as they improve the least advantaged's situation), with \textit{Leiper}, 113 A.2d at 148, 149 (stating that Heywood built a residential development which caused a diversion of surface waters onto Leiper's property without installing sewers, gutters, drains, or reservoirs to carry off the surface water).

\textsuperscript{337} \textit{Compare} \textit{Leiper}, 113 A.2d at 150 (stating that a landowner may develop his or her own land without liability for the additional flow of surface water through a natural watercourse), with \textit{RAWLS}, \textit{supra} note 270, at 130 (stating that individuals start with a principle requiring equal opportunities and basic liberties).

\textsuperscript{338} \textit{Compare} \textit{Leiper}, 113 A.2d at 150 (a person is allowed to make improvements upon his or her land without incurring liability for effects upon neighboring properties if additional flows of surface waters are discharged through a natural watercourse), with \textit{RAWLS}, \textit{supra} note 270, at 129 (stating that individuals in the original position have no incentive to award other individuals special privileges or suggest arbitrary principles).

\textsuperscript{339} \textit{See supra} notes 340, 341 and accompanying text.

\textsuperscript{340} \textit{See supra} notes 320-26 and accompanying text.
sylivania, South Dakota, Tennessee, Texas, and Vermont has allowed for the development of properties unhindered by the notion that diffuse surface water must run naturally without exception, the modified civil law rule has failed to provide just results to neighboring landowners under Rawls' theory of justice. To conform to a Rawlsian theory of justice, diffuse surface water rights must be decided on a case-by-case basis. A case-by-case determination of diffuse water rights is currently available in jurisdictions recognizing the reasonableness exception or the reasonable use doctrine. Therefore, jurisdictions which do not incorporate a reasonableness exception into their diffuse surface water rules should adopt a reasonableness exception or the reasonable use doctrine.

C. The Common Enemy Doctrine in Commercial Situations Does Not Adhere to Rawls' Theory of Justice as Fairness

The modified common enemy doctrines governing diffuse surface waters violate Rawls' theory of justice as fairness. Because the common enemy doctrines violate Rawls' theory of justice, states adhering to the common enemy doctrines should either adopt a reasonableness exception to the common enemy doctrines or replace the common enemy doctrines with the reasonable use rule. The reasonable use rule, as well as the reasonableness exception, comply with Rawls' theory of justice.

Jurisdictions in Arkansas, the District of Columbia, Indiana, Maine, Montana, Nebraska, Oklahoma, South Carolina, Virginia, and Wyoming currently impose a modified common enemy doctrine in situations where diffuse surface waters have burdened neighboring properties because of commercial development.

341. See supra notes 308-43 and accompanying text; see also Mitchell, 376 So.2d at 686; Calvaresi, 534 P.2d at 654; Gill, 117 S.E.2d at 165; Dougan, 757 P.2d at 273; Wood, 313 So.2d 898; Bennett, 65 N.W.2d at 797; Budagher, 637 P.2d at 550; Garbarino, 330 P.2d at 30; Leiper, 113 A.2d 148; Sherburn, 593 N.W.2d at 417; Bailey, 126 N.W. at 270; Slatten, 124 S.W.2d at 316; Johnson, 15 S.W.2d at 1025; Powers, 553 A.2d at 140.

342. See infra notes 451-66 and accompanying text.

343. See infra notes 451, 508 and accompanying text.

344. See infra notes 444-66 and accompanying text.

345. See infra notes 389-443 and accompanying text.

346. See infra notes 444-66 and accompanying text.

347. See infra notes 451-60 and accompanying text.

form, the common enemy doctrine allowed landowners to possess an unqualified right to divert diffuse surface waters off of their property. Additionally, landowners had the unqualified right to take any measures to prevent diffuse surface waters from entering their property from neighboring properties. Diversions of diffuse surface waters could not result in liability of the diverter because landownership was seen as absolute.

Despite modern modifications to the common enemy doctrine, the harsh results that occurred under the common enemy doctrine have not been eliminated. In Argyelan v. Haviland, the Supreme Court of Indiana determined that diffuse surface water, which was once channeled, is not channeled in violation of the collection and discharge exception if the diffuse surface water becomes diffused to a general flow before entering a neighboring property. In Argyelan, Harold and Maxine Haviland ("Havilands") sued Steve and Anna Argyelan ("Argyelans") in the Circuit Court of Marion County Indiana. The Havilands sued to recover damages and for injunctive relief pertaining to the discharge of diffuse surface waters which flowed onto the Havilands' residential lot from the Argyelans' commercial lot. The circuit court entered judgment for the Havilands in the amount of $7500.

The Argyelans appealed to the Court of Appeals of Indiana, Second District. The Argyelans claimed that Indiana's diffuse surface water laws did not support the circuit court's decision. Following the common enemy doctrine, the court of appeals reversed in the Argyelans' favor. Applying Indiana's common enemy doctrine, the court stated that without evidence that the Argyelans participated in the positive, tortuous, wrongful collection of diffuse surface water and dis-
charged it in a concentrated flow onto the Havilands' property; the Argyelans could not be held liable.361

The Havilands then appealed to the Supreme Court of Indiana.362 On appeal, the Havilands argued that by erecting downspouts which drained toward the Havilands' property line, paving their property, and erecting a retaining wall along the property line, the Argyelans exceeded the permissible limits of fending off surface water.363 The facts of the case showed that the Havilands purchased their home in 1948.364 At the time of purchase, a large two-story residence occupied the property which adjoined the Havilands' northern property line; shortly thereafter, the building was demolished, leaving only grass and trees.365 In 1970, the Argyelans purchased the property and changed the property's zoning from residential to commercial.366 The Argyelans also raised the elevation of the property three feet, constructed two commercial buildings, and paved the remainder of the two-acre property.367 Because the Argyelans' property was unable to absorb any precipitation, the Havilands' garden, garage, and utility shed, which were situated at a lower elevation, were constantly flooded by diffuse surface water that drained from the Argyelans' property.368

The Havilands incurred $800 in damages to antiques kept in their garage from the constant flooding.369 They also incurred $4700 in damages to the shed and garage floors when the floors settled unevenly and cracked.370 The bottom portions of the garage began to rot, a gravel driveway was washed away, and their residence diminished in value.371 The Havilands estimated it would cost $30,000 to $35,000 to move into a similar house.372 However, despite evidence of actual damages, the Supreme Court of Indiana refused to award damages or an injunction, simply stating that the Argyelans did not violate the common enemy doctrine because the diffuse waters, while greater in volume, were not directly channeled over the property line in violation of the collection and discharge exception.373 Therefore,

361. Id.
363. Id. at 976.
364. Id. at 979 (Hunter, J., dissenting).
365. Id.
366. Id.
367. Id.
368. Id. at 979-80.
369. Id. at 980.
370. Id.
371. Id. at 980, 981.
372. Id. at 981.
373. Id. at 973, 976, 978 (majority opinion); Argyelan I, 418 N.E.2d at 571.
the Supreme Court of Indiana vacated the court of appeals decision and reversed the judgment of the trial court.\textsuperscript{374}

Similarly, in \textit{Jorgenson v. Stephens},\textsuperscript{375} the Supreme Court of Nebraska decided that without evidence showing that a landowner unnecessarily or negligently caused surface waters to injure a neighboring landowner, the landowner can control surface waters which fall or come onto his or her property.\textsuperscript{376} In \textit{Jorgenson}, Mina Jorgenson ("Jorgenson") sued Frank Stephens ("Stephens") in the District Court of Nebraska, Lancaster County, for damages and an injunction restraining Stephens from draining surface waters onto Jorgenson's property.\textsuperscript{377} The district court rendered a decree for Stephens.\textsuperscript{378}

Jorgenson appealed to the Supreme Court of Nebraska.\textsuperscript{379} In \textit{Jorgenson}, Stephens developed an apartment complex in which paved surfaces essentially eliminated all means of absorption of precipitation on Stephens' property.\textsuperscript{380} Because the apartment complex's property could absorb substantially less precipitation, surface waters continually flowed onto Jorgenson's residential property.\textsuperscript{381} The Supreme Court of Nebraska stated that while it was clear that Jorgenson would continue to suffer inconvenience from the drainage of surface waters onto her property and that Jorgenson's property had been damaged, Stephens could not be held liable without evidence of negligence.\textsuperscript{382} Thus, Jorgenson was unable to obtain an injunction requiring Stephens to provide an artificial drain to lessen the amount of surface waters which drained onto her property.\textsuperscript{383} Without an injunction, Jorgenson was left to her own resources to eliminate the surface water threat.\textsuperscript{384} Therefore, the Supreme Court of Nebraska affirmed the decree of the district court.\textsuperscript{385}

However, are the outcomes of \textit{Argyelan} and \textit{Jorgenson} compliant with a Rawlsian theory of justice as fairness?\textsuperscript{386} If a world could be fashioned where the Mina Jorgensons, Frank Stephens, Harold and Maxine Havilands, and Steve and Anna Argyelans could be placed behind the veil of ignorance, would they agree that it was fair and equi-

\begin{itemize}
  \item \textsuperscript{374} \textit{Argyelan II}, 435 N.E.2d at 973, 978.
  \item \textsuperscript{375} 143 Neb. 528, 10 N.W.2d 337 (1943).
  \item \textsuperscript{376} \textit{Jorgenson v. Stephens}, 143 Neb. 528, 533, 534, 10 N.W.2d 337, 339, 340 (1943).
  \item \textsuperscript{377} \textit{Jorgenson}, 143 Neb. at 528, 529, 10 N.W.2d at 337, 338.
  \item \textsuperscript{378} \textit{Id.} at 529, 10 N.W.2d at 338.
  \item \textsuperscript{379} \textit{Id.}
  \item \textsuperscript{380} \textit{Id.} at 530-31, 10 N.W.2d at 338.
  \item \textsuperscript{381} \textit{Id.} at 531-32, 10 N.W.2d at 339.
  \item \textsuperscript{382} \textit{Id.} at 532, 533, 535, 10 N.W.2d at 339, 340.
  \item \textsuperscript{383} \textit{Id.} at 534-35, 10 N.W.2d at 340.
  \item \textsuperscript{384} \textit{Id.} at 535, 10 N.W.2d at 340.
  \item \textsuperscript{385} \textit{Id.} at 528, 535, 10 N.W.2d at 337, 340.
  \item \textsuperscript{386} See infra notes 390-443 and accompanying text.
\end{itemize}
table for a landowner to bear the burden of a neighbor's diffuse surface waters simply because the neighbor thought it more profitable for their property to be covered by impermeable surfaces?387 Essentially, the question asked of individuals in the original position would be whether decisions such as Jorgenson and Argyelan were just?388 Applying Rawls' theory of justice, the answer would inevitably be no.389

The determination of whether justice was reached in Jorgenson and Argyelan depends on the rules or laws individuals in the original position would agree to.390 In the original position, individuals from different generations, genders, and cultures are placed behind a veil of ignorance.391 Behind this veil, the individuals' interests are eliminated so that the principles reached are fair and equitable.392 According to Rawls, individuals do not know their status, class, nationality, or other defining characteristics when they are behind the veil of ignorance, so they have an incentive to create rules that are fair and equitable to all.393 Because these individuals are rational and want to obtain the most protection for their own interests once the veil of ignorance is lifted, each individual has an incentive only to assent to equitable principles, because no individual knows if he or she will be put at an advantage or disadvantage by each principle reached.394 Thus, individuals in the original position would not assent to an arbitrary rule or principle that benefited some individuals over others and put others in a state of inequality.395 Additionally, while equality may not be maintained in all situations, individuals in the original position would assent to a principle that benefited one individual over another so long as the non-benefited individual's situation also improved.396

Modified common enemy doctrine jurisdictions adhering to a due care exception governing diffuse surface waters violate Rawls' approach to justice as fairness.397 Because the common enemy doctrine violates Rawls' theory of justice, states adhering to the common enemy doctrine should either adopt a reasonableness exception to the common enemy doctrine or replace the common enemy doctrine with the reasonable use doctrine.398

387. See infra notes 391-443 and accompanying text.
388. See infra notes 392-443 and accompanying text.
389. See infra notes 400-42 and accompanying text.
390. See infra notes 394-99 and accompanying text.
391. RAWLS, supra note 270, at 118.
392. Id. at 11, 118.
393. Id.
394. Id. at 123, 129.
395. Id. at 13, 129.
396. Id. at 13.
397. See infra notes 402-42 and accompanying text.
398. See infra notes 444-66 and accompanying text.
In *Argyelan* and *Jorgenson*, the modified common enemy doctrines the courts applied were arbitrary rules. To be arbitrary, a rule must be based on prejudice or preference, rather than reason or fact. The court in *Argyelan* applied an arbitrary rule based on semantics and meaningless distinctions, instead of logic. The diffuse water laws in *Argyelan* solely forbade a landowner from collecting and discharging surface waters. Individuals in the original position would not propose arbitrary laws. Therefore, because the diffuse surface water law in *Argyelan* exhibits a preference for landowners who drain diffuse surface waters in any manner except by collecting and discharging it, individuals in the original position would perceive such a law as unjust. Behind the veil of ignorance, individuals would not know whether they would be adversely affected by such a law once they exited the veil of ignorance. To maintain equality amongst themselves, a modified common enemy law prohibiting collection and discharge would be dismissed as unjust by individuals acting behind the veil of ignorance.

Additionally, a diffuse surface water law, such as the one applied in *Jorgenson*, which imposed liability solely upon the preference of having diffuse waters be drained in a manner consistent with due care, would be rejected by individuals in the original position. The due care exception only requires the court to consider whether the landowner employed due care in improving his or her property. Determining due care essentially requires a court to consider whether the harm caused to neighboring landowners was limited to that which was required for the improvement to take place. Because individu-

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399. See infra notes 404-09 and accompanying text.
400. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).
402. Id.
403. See generally RAWLS, supra note 270, at 129 (stating that individuals in the original position would have no incentive to propose arbitrary principles).
404. Compare RAWLS, supra note 270, at 129 (stating that individuals in the original position would have no incentive to suggest arbitrary principles or to give special privileges), with *Argyelan II*, 435 N.E.2d at 976 (stating that the distinction lies in the character of the surface water as it enters the adjoining property), and *Argyelan II*, 435 N.E.2d at 989 (Hunter, J., dissenting) (stating the majority arbitrarily defined which invasions warrant relief).
405. See RAWLS, supra note 270, at 11, 123 (stating that it is rational for individuals behind the veil of ignorance to strive to protect their liberties once the veil of ignorance is removed).
406. Compare RAWLS, supra note 270, at 129 (stating that it would be irrational to suggest an arbitrary principle in the original position), with *Argyelan II*, 435 N.E.2d at 989 (Hunter, J., dissenting) (stating the majority arbitrarily defined which invasions warrant relief).
407. See infra notes 411-17 and accompanying text.
409. Currens, 983 P.2d at 631.
als behind the veil of ignorance would not know if they would be advantaged or disadvantaged, they would not assent to a law that would give one the right to damage another.\textsuperscript{410} An arbitrary rule is a rule based on prejudice or preference, rather than reason or fact.\textsuperscript{411} The water law in \textit{Jorgenson}, is arbitrary because it indicates a preference to allow development.\textsuperscript{412} As such, Rawls would consider the law unjust.\textsuperscript{413} Therefore, the diffuse surface water law as applied in \textit{Jorgenson} violates Rawls' theory.\textsuperscript{414}

Additionally, further inequality exists under the modified common enemy doctrines when commercial development injures neighboring properties.\textsuperscript{415} In \textit{Argyelan} and \textit{Jorgenson}, the diffuse surface water drainers were motivated by profit, while the drainage damaged individual homeowners.\textsuperscript{416} The homeowner positions and that of profit seeker inherently possess economic inequalities, which the individuals in the original position would seek to make more equitable.\textsuperscript{417} In the original position, individuals would find it unjust to have a diffuse surface water law that bestowed economic inequalities on neighboring landowners.\textsuperscript{418} In contrast, \textit{Jorgenson} allowed Stephens to economically benefit by not requiring Stephens to install an artificial drain to shed diffuse surface waters from his property, and imposed an economic hardship on Jorgenson to rid herself of the surface waters flowing from Stephens' development.\textsuperscript{419} Therefore, the common enemy doctrine as articulated by \textit{Jorgenson} is unjust because the doc-

\begin{itemize}
\item \textsuperscript{410} See \textit{RAWLS}, supra note 270, at 11, 125 (stating that because no individual behind the veil of ignorance is allowed to know which principle of justice would be to their advantage or disadvantage, the individuals do not seek to impose injuries upon each other).
\item \textsuperscript{411} \textit{BLACK'S LAW DICTIONARY} 112 (8th ed. 2004).
\item \textsuperscript{412} \textit{Compare Jorgenson}, 143 Neb. at 534-35, 10 N.W.2d at 340 (stating that requiring Stephens to install artificial drains to lessen the amount of surface waters which flowed onto Jorgenson's property would be a stumbling block in the path of progress and development), \textit{with BLACK'S LAW DICTIONARY} 112 (8th ed. 2004) (defining arbitrary).
\item \textsuperscript{413} \textit{Compare RAWLS, supra} note 270, at 129 (stating that individuals in the original situation would not accept an arbitrary law), \textit{with Jorgenson}, 143 Neb. at 534-35, 10 N.W.2d at 340 (stating that providing an artificial outlet for surface waters would be a stumbling block to the development of urban lands).
\item \textsuperscript{414} See supra notes 410-16 and accompanying text.
\item \textsuperscript{415} See infra notes 419-27 and accompanying text.
\item \textsuperscript{416} See supra notes 370, 383 and accompanying text.
\item \textsuperscript{417} See infra notes 423, 425 and accompanying text.
\item \textsuperscript{418} \textit{Compare RAWLS, supra} note 270, at 130 (stating it is not rational for an individual in the original position to expect more, or agree to less, than an equal distribution of income and wealth), \textit{with Argyelan II}, 435 N.E.2d at 983-84 (Hunter, J., dissenting) (stating the inappropriateness of requiring homeowners to share indirectly the cost of another's use of commercial property for gain).
\item \textsuperscript{419} See generally \textit{Jorgenson}, 143 Neb. at 534-35, 10 N.W.2d at 340 (stating Stephens cannot be required to install artificial drains which would carry away the surface waters of his development before reaching Jorgenson's land, but Jorgenson can use her own resources to protect her property from Stephens' development's surface waters).
trine allows one landowner to receive the economic benefit of not incurring the cost of constructing artificial drains to the detriment of neighboring landowners. Additionally, Argyelan allowed surface waters to be drained on neighboring properties absent a determination that the surface waters had been collected before discharge. Unlike Argyelan, individuals in the original position would not allow the Argyelans to economically benefit from their commercial development which harmed the Havilands unless the Havilands' position was improved. While the Argyelan court permitted the Argyelans' commercial development to continue to drain surface waters onto the Havilands' property absent proof of collection and discharge, individuals in the original position would have reached the conclusion that if an individual was economically profiting at the expense of another, the profiting individual should have to improve the situation of the other. This decision would ensure that once the individuals in the original position were removed from the veil of ignorance, each would benefit regardless of what position in society the individual ultimately occupied.

To improve the situation of the non-economically benefited landowner, several remedies should be considered. To conform with Rawls' theory, a non-economically benefited landowner's situation could be improved by lessening the volume of diffuse surface water which drained onto the landowner's property, essentially restoring the volume of diffuse surface water drainage to pre-development quantities by installing an artificial drain. Additionally, courts could award the injured landowners their actual damages to comply with Rawls' theory of justice. However, because there are an endless number of potential remedies, the decision-making process should be guided by Rawls' principles of justice.

420. Compare Rawls, supra note 270, at 3 (stating justice denies that sacrifices imposed on a few atone for the advantages enjoyed by others), with Jorgenson, 143 Neb. at 534-35, 10 N.W.2d at 340 (stating that requiring artificial drains to be installed would impose oppressive burdens upon upper properties during development).

421. Argyelan II, 435 N.E.2d at 976.

422. Compare Rawls, supra note 270, at 131 (stating that economic inequities are allowed so long as they improve the least advantaged's situation), with Argyelan II, 435 N.E.2d at 980-81 (Hunter, J., dissenting) (identifying damages the Havilands incurred).

423. Compare Argyelan II, 435 N.E.2d at 976 (stating that the only limitation on the right to drain surface waters upon neighboring properties is that it cannot be collected before being discharged), with Rawls, supra note 270, at 131 (allowing economic inequities so long as they improve the least advantaged's situation).

424. See supra notes 418-26 and accompanying text.

425. See infra notes 429-31 and accompanying text.

426. Compare Rawls, supra note 270, at 131 (stating economic inequities are allowed in the original position so long as the least advantaged individuals' positions are improved), with Armstrong, 120 A.2d at 7, 10 (affirming a decision requiring a developing landowner to pipe surface waters so as to not harm neighboring properties).

427. Compare Rawls, supra note 270, at 131 (stating economic inequities are allowed in the original position so long as the least advantaged individuals' positions are improved), with Powers, 611 P.2d 1073-74, 1077 (affirming a judgment ordering a devel-
number of possibilities to improve the damaged landowner’s situation, individuals in the original position would have agreed that each case of inequality needed to be examined on a case-by-case basis so that the facts of the situation could be dealt with equitably and fairly.\textsuperscript{428} Therefore, modified common enemy doctrine jurisdictions following the due care and collection and discharge exceptions violate a Rawlsian approach to justice because an individual in the original position would not assent to these laws as an improvement of the non-benefited landowner’s position.\textsuperscript{429}

Some may say the existence of the due care and collection and discharge exceptions are evidence that the non-benefited landowner’s position has been improved compared to the traditional common enemy doctrine.\textsuperscript{430} However, individuals in the original position would still not accept such a rule as just.\textsuperscript{431} Under a Rawlsian theory of justice, inequality is just if the non-benefited individual’s situation is improved over that which the individual previously had.\textsuperscript{432} If a static law improved a landowner’s position, each subsequent claim would rationally require further improvement for the non-benefiting landowner to be placed in an improved position.\textsuperscript{433} Thus, courts’ case-by-cases analyses become necessary to ensure that the non-benefited landowner’s situation is improved each time.\textsuperscript{434} Although the non-benefited landowner may not win each diffuse surface water dispute, the fact that the landowner received the chance to argue the facts of the landowner’s case before the judiciary would be an improvement in itself, although an admittedly small one.\textsuperscript{435}

Therefore, under a Rawlsian theory of justice, the various forms of the modified common enemy doctrine as applied in Arkansas, the District of Columbia, Indiana, Montana, Oklahoma, South Carolina, Maine, Nebraska, and Virginia do not adequately serve the notion of oper to compensate a neighboring landowner for damages resulting from diffuse surface water drainage).

\textsuperscript{428} See supra notes 428-30 and accompanying text.
\textsuperscript{429} See supra notes 348-431 and accompanying text.
\textsuperscript{430} See infra notes 435-38 and accompanying text.
\textsuperscript{431} See infra notes 435-42 and accompanying text.
\textsuperscript{432} See Rawls, supra note 273, at 131.
\textsuperscript{433} Id.
\textsuperscript{434} Compare Keys, 412 P.2d at 537 (stating that reasonableness requires courts to consider all the relevant facts of a situation on a case-by-case basis before imposing liability), with Rawls, supra note 270, at 131 (stating inequities are allowed in the original position so long as the least advantaged individuals’ positions are improved).
\textsuperscript{435} Compare Westbury Realty Corp. v. Lancaster Shopping Ctr., Inc., 152 A.2d 669 (Pa. 1959) (stating landowners damaged by surface waters, who were denied the judicial right to a hearing under the civil law rule, should not have been denied the opportunity to proceed with a hearing considering the equities of the case), with Rawls, supra note 270, at 131 (stating economic inequities are allowed in the original position so long as the least advantaged individuals’ positions are improved).
justice as fairness in protecting the rights of landowners who have un-
luckily been subjected to sharing a property line with commercial
neighbors.\textsuperscript{436} Such rules arbitrarily benefit one landowner over an-
other without improving the non-benefiting landowner's situation.\textsuperscript{437} In the original position, individuals behind the veil of ignorance would
only assent to principles of justice which maintained equality.\textsuperscript{438} Because
the modified common enemy doctrine allows one landowner to
gain property rights and economic rewards not enjoyed by all land-
owners equally, the modified common enemy doctrine would only be
seen as just under a Rawlsian view if the non-benefited landowner’s
situation improved.\textsuperscript{439} However, because the non-benefited land-
owner’s situation is not improved under the modified common enemy
document, the modified common enemy doctrine violates Rawls’ theory
of justice as fairness.\textsuperscript{440}

D. Common Enemy Doctrine and Civil Law Rule Jurisdictions
Should Adopt a Reasonableness Exception or the
Reasonable Use Rule in Situations
Concerning Commercial Development
to Adhere to Rawls’ Theory of Justice as Fairness

The current civil law rule, without a reasonableness exception, and
the common enemy doctrine (collectively “Rules”) governing diffuse surface waters violate Rawls’ theory of justice as fairness.\textsuperscript{441} Because the Rules violate Rawls’ theory of justice, states adhering to the
Rules should either adopt a reasonableness exception to the Rules or
replace their respective Rules for the reasonable use doctrine.\textsuperscript{442}

Jurisdictions in Arkansas, the District of Columbia, Indiana, Maine, Montana, Nebraska, Oklahoma, South Carolina, and Virginia currently impose a modified common enemy doctrine in determining liability when commercial developments cause diffuse surface waters to burden neighboring properties.\textsuperscript{443} These states’ adherence to a

\begin{footnotesize}
\textsuperscript{436} See supra notes 348-438 and accompanying text.
\textsuperscript{437} See supra notes 402-09 and accompanying text.
\textsuperscript{438} See Rawls, supra note 270, at 17 (stating that individuals in the original position are equals and thus would assent to principles of justice which advance their interests as equals).
\textsuperscript{439} Compare Argyelan II, 435 N.W.2d at 976 (stating that the only limitation on the right to drain surface waters from commercial developments upon neighboring properties is that the surface waters cannot be collected before being discharged), with Rawls, supra note 270, at 131 (stating that individuals in the original position would accept economic inequities if the least advantaged individual’s position was improved).
\textsuperscript{440} See supra notes 424-26 and accompanying text.
\textsuperscript{441} See supra notes 298-347, 348-443 and accompanying text.
\textsuperscript{442} See infra notes 452-66 and accompanying text.
\textsuperscript{443} See supra notes 348-443 and accompanying text; see also Pirtle, 601 S.W.2d at 266; Ballard, 289 A.2d at 890; Argyelan II, 435 N.E.2d at 976; Greely, 53 Me. at 200;
modified common enemy doctrine has produced results that are unjust under a Rawlsian analysis because individuals placed behind the veil of ignorance would not accept arbitrary and inequitable principles.\textsuperscript{444} Similarly, jurisdictions in Alabama, Colorado, Georgia, Kansas, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Vermont have imposed their respective versions of the modified civil law rule, without regard to reasonableness, in situations where commercial developments have caused diffuse surface waters to burden neighboring properties.\textsuperscript{445} Adherence to the modified civil law rule allowing the acceleration of diffuse surface water upon neighboring properties has produced results in which neighboring landowners are not placed in a position of equality.\textsuperscript{446} Thus, individuals in the original position would consider the modified civil law, which allows for the acceleration of diffuse surface waters, to be unjust.\textsuperscript{447}

However, a legal principle which comports with the Rawlsian ideals of equality and fairness is followed by jurisdictions including Alaska, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin.\textsuperscript{448} These jurisdictions ensure that justice occurs in situations where commer-

\textsuperscript{444} See supra notes 348-443 and accompanying text.

\textsuperscript{445} See supra notes 298-347 and accompanying text; see also Mitchell, 376 So.2d at 696; Calvaresi, 534 P.2d at 655; Gill, 117 S.E.2d at 165; Dougan, 757 P.2d at 275-76; Wood, 313 So.2d at 900; Bennett, 65 N.W.2d at 797; Budagher, 637 P.2d at 550; Garbarino, 330 P.2d at 30; Leiper, 113 A.2d at 150; Bailey, 126 N.W. at 270; Slatten, 124 S.W.2d at 316; Johnson, 15 S.W.2d at 1025; Powers, 553 A.2d at 140.

\textsuperscript{446} See supra notes 327-41 and accompanying text.

\textsuperscript{447} See supra notes 342, 343 and accompanying text.

cial development causes diffuse surface waters to burden neighboring landowners. These jurisdictions ensure fairness by requiring that diffuse surface water cases be examined on a case-by-case basis so that the facts of the case give rise to the right to either drain or stop the drainage of diffuse surface waters. The inequity which results when the judicial decision is made comports with a Rawlsian theory of justice by having improved the non-benefiting individual’s situation by allowing the facts of the case to determine the right instead of an arbitrary rule. Additionally, California, Illinois, Idaho, Iowa, Maryland, and Pennsylvania have adopted a reasonableness exception to the civil law rule to assure that justice, as defined by Rawls, occurs in diffuse water situations. The reasonableness exception requires courts to consider all of the relevant facts of the situation before imposing liability, instead of imposing liability based upon an arbitrary right. By refusing to give an absolute right of diffuse surface water drainage to one landowner, each competing landowner is put into a legal equilibrium until the reasonableness of their actions mandate that one landowner be entitled to an additional right at the expense of the neighboring landowner. While the additional right given to one landowner can be seen as giving an advantage to one landowner, which is a violation of Rawls’ theory, the advantage is justified because the non-benefited landowner is given an opportunity to present the facts of the case. Consideration of the circumstances is an advantage not seen under diffuse surface water rules which do not incorporate a reasonableness element. Therefore, because each landowner receives, to some degree, an advantage under the reasonableness exception to the civil law rule or the reasonable use doctrine, there is no violation of Rawls’ theory.

By adopting either the reasonable use rule, or a reasonableness exception to the civil law rule or common enemy doctrine, jurisdictions can ensure and promote the ideal of justice as fairness. The Rawlsian idea of justice is promoted under a reasonableness exception or

449. See infra notes 475-91 and accompanying text.
450. Heins, 859 S.W.2d at 689.
451. See infra notes 498-504 and accompanying text.
452. See infra notes 505-30 and accompanying text; see also Keys, 412 P.2d at 536, 537; Burgess v. Salmon River Canal Co., 805 P.2d 1223, 1230 (Idaho 1991); Templeton v. Huss, 311 N.E.2d 141, 144, 146 (Ill. 1974); O'Tool v. Hathaway, 461 N.W.2d 161, 163 (Iowa 1990); Whitman v. Forney, 31 A.2d 630, 633 (Md. 1943); Westbury, 152 A.2d at 671-72.
454. See infra notes 540-46 and accompanying text.
455. See infra notes 545, 546 and accompanying text.
456. See supra notes 297-347, 348-443 and accompanying text.
457. See infra notes 498-504, 540-46 and accompanying text.
458. See infra notes 462-66 and accompanying text.
the reasonable use doctrine because under the other diffuse surface water drainage rules, an arbitrary rule either imposes liability upon a landowner or mandates that a landowner accept the diffuse surface waters of another.\textsuperscript{459} Individuals would not accept arbitrary rules in the original position because, behind the veil of ignorance, they have no idea if they would be placed at an advantage or disadvantage by such rules.\textsuperscript{460} However, individuals in the original position would assent to the reasonableness exception or the reasonable use rule because its implementation is not arbitrary and puts individuals in a position of equality.\textsuperscript{461} Additionally, because inequality only exists under the reasonableness exception and reasonable use doctrine after courts have considered all the facts of the case, individuals in the original position would assent to this inequality because the individuals which were not benefited from the judgment were still put into an improved situation because they were guaranteed the right to argue the merits of their case.\textsuperscript{462} Therefore, the reasonableness exception and reasonable use doctrine comply with a Rawlsian theory of justice as fairness.\textsuperscript{463}

E. THE REASONABLE USE DOCTRINE WOULD PROTECT LANDOWNERS FROM COMMERCIAL DEVELOPMENT AND PROMOTE RAWLS' THEORY OF JUSTICE AS FAIRNESS

The reasonable use doctrine complies with Rawls' theory of justice because it keeps equality, with respect to property rights, among all landowners until a determination of the facts requires an inequality.\textsuperscript{464} Though inequality ultimately follows the judicial decision, the right to argue the facts of a case in an effort to secure more property rights places the non-benefited landowner in an improved position

\textsuperscript{459} Compare Rawls, supra note 270, at 130 (stating that the concept of justice has a certain content and excludes arbitrary principles), with Westbury, 152 A.2d at 672 (supporting that a balancing of equities under the reasonableness exception to the civil law rule allows an opportunity to proceed to a hearing which would have been denied under a modified civil law rule prohibiting collection and discharge), and Armstrong, 120 A.2d at 10 (stating that the just and right balancing of conflicting interests according to fairness and equality under the reasonable use doctrine promote the common wellbeing).

\textsuperscript{460} See Rawls, supra note 270, at 129 (stating that behind the veil of ignorance individuals would not suggest arbitrary principles because they could not know if the arbitrary principles would be to their advantage).

\textsuperscript{461} Compare Rawls, supra note 270, at 129 (stating individuals in the original position would not choose arbitrary rules), with Keys, 412 P.2d at 536 (stating the reasonableness exception to the civil law rule does not allow one landowner to injure another arbitrarily).

\textsuperscript{462} See infra notes 498-504, 540-46 and accompanying text.

\textsuperscript{463} See supra notes 451-65 and accompanying text.

\textsuperscript{464} See infra notes 475-504 and accompanying text.
over that which exists under arbitrary diffuse surface water rules. This examination complies with Rawls' theory of justice because while one landowner will ultimately have the right to drain, or stop drainage, of diffuse surface waters, the other landowner would have had the opportunity to present his or her case. This right of presentation is an improved situation from other doctrines which impose arbitrary rules.

Many American jurisdictions, including Alaska, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin, impose the reasonable use doctrine in situations where commercial development causes diffuse surface waters to burden neighboring properties. The reasonable use doctrine allows landowners to develop their property in a reasonable way, even if the development causes harm to a neighboring landowner, but imposes liability when neighboring landowners incur substantial harm from the flow of diffuse surface waters. The reasonable use doctrine mandates that courts consider the facts of each case before establishing an inequality in the landowners' rights. Therefore, the reasonable use doctrine ensures fairness by shifting the costs between landowners as the equities of the situation dictate.

For example, in Armstrong v. Francis Corporation, the Supreme Court of New Jersey affirmed a conclusion that piping diffuse surface waters from a housing development into a lake was the only sensible solution to ensure lower estates would not be subjected to harm resulting from diffuse surface water drainage. In Armstrong, David and Mary Armstrong ("Armstrongs") sought relief from Francis Corporation ("Francis") in the Superior Court of New Jersey, Chan-

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465. See infra notes 498-504 and accompanying text.
466. See infra note 500 and accompanying text.
467. See infra note 501 and accompanying text.
468. Weinberg, 384 P.2d at 452; Page Motor, 438 A.2d at 741; Weldin Farms, 414 A.2d at 505; Westland, 542 So.2d at 962; Rodrigues, 472 P.2d at 516; Klutey, 428 S.W.2d at 769; Tucker, 384 N.E.2d at 1201; Enderson, 32 N.W.2d at 840; Heins, 859 S.W.2d at 688, 691; Powers, 611 P.2d at 1076; Durgue, 51 A. at 913; Armstrong, 120 A.2d at 10; Bohemian, 405 N.Y.S.2d at 926; Pendergrast, 236 S.E.2d at 796; Jones, 153 N.W.2d at 904; McGlashan, 402 N.E.2d at 1200; Butler, 341 A.2d at 740; First Lady, 681 N.W.2d at 98; Sandford, 488 P.2d at 744; Morris, 383 S.E.2d at 774; Deetz, 224 N.W.2d at 416.
469. Pendergrast, 236 S.E.2d at 796.
470. Keys, 412 P.2d at 533; Butler, 341 A.2d at 739.
471. Armstrong, 120 A.2d at 10.
472. 120 A.2d 4 (N.J. 1956).
473. Armstrong, 120 A.2d at 4, 7, 10.
The Armstrongs requested relief from diffuse surface waters that Francis artificially gathered and drained into a brook bordering the Armstrongs' property. Francis built 186 homes upon a forty-two acre tract, known as Duke Estates, Section Two. Additionally, Francis developed an additional two and one-half acres of property, known as Duke Estates, Section One. Francis provided each of the Duke Estate sections with paved roads, ditches, culverts, and catch basins which eventually drained, through an iron pipe, into a natural watercourse that bordered the Armstrongs' property before reaching Milton Lake.

Before Francis installed the drainage pipe, the diffuse surface water drainage across the Armstrongs' property resembled that of a babbling brook. After the drainage pipe's installation, the stream's velocity and volume increased, resulting in the erosion of the Armstrongs' property. The Superior Court ordered Francis to pay all expenses relating to the laying of additional drainage pipe so the pipe would empty into Milton Lake, because the court reasoned that was the only sensible and permanent resolution to the problem. Francis appealed to the Superior Court of New Jersey, Appellate Division, arguing the damages the diffuse surface water caused were non-actionable consequences of development. However, the Supreme Court of New Jersey certified his appeal.

On appeal, the Supreme Court of New Jersey declared that because diffuse surface water law needed to be flexible, each case had to be determined upon its own facts and circumstances. The court adopted the reasonable use rule, reasoning that society had a great interest in the development of property for the greater good. The court stated it was imperative in diffuse surface water cases that the utility of a potential use of the property outweigh the harm which would result from such use if the diffuser was to escape liability. Additionally, the court affirmed the trial court's decision, reasoning that while large scale home building projects, such as the Francis development, were in the social good, no reason existed why the eco-

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474. Id. at 4.
475. Id. at 4, 6.
476. Id. at 5, 6.
477. Id. at 6.
478. Id. at 5-6.
479. Id. at 6.
480. Id.
481. Id. at 7.
482. Id. at 4, 7.
483. Id. at 4.
484. Id. at 4, 10.
485. Id. at 10.
486. Id. at 8.
nomic burdens of the diffuse surface water drainage should be placed on neighboring landowners in every situation.\textsuperscript{487} Instead, in circumstances which landowners engage in development for profit, social progress and the common wellbeing were more adequately served by a balancing of the developer's interests and the neighboring landowners' interests by the customary principles of fairness and common sense which were part of the reasonable use rule.\textsuperscript{488}

Would individuals in the original position, who have no biases or personal interests, perceive the Armstrong decision as fair and just?\textsuperscript{489} Applying a Rawlsian analysis, the answer would be yes.\textsuperscript{490} Individuals in the original position would seek to ensure that society could develop properties to meet community needs while simultaneously not extending an absolute right to developers to burden neighboring properties with diffuse surface water drainage.\textsuperscript{491} The individuals would not assent to an absolute property right to drain diffuse water because, while placed behind the veil of ignorance, each individual would not know if that absolute right would be to the individual's advantage or disadvantage.\textsuperscript{492} Furthermore, because individuals behind the veil of ignorance are in all aspects equals, these individuals would want to assure that they maintained the equality between them.\textsuperscript{493} Therefore, to assure that they would remain equals after the veil of ignorance lifted, no individual would assent to a principle which would disturb this balance.\textsuperscript{494}

In proposing a rule in diffuse surface water situations, individuals in the original situation would place all members of society in the same position, ensuring equality and fairness to all landowners.\textsuperscript{495} The reasonable use doctrine does not bestow an absolute right upon any landowner to drain diffuse surface waters without considering the circumstances of each case.\textsuperscript{496} Following Rawls' theory, these neigh-

\textsuperscript{487}. \textit{Id.} at 10.
\textsuperscript{488}. \textit{Id.}
\textsuperscript{489}. \textit{See infra} notes 494-504 and accompanying text.
\textsuperscript{490}. \textit{See infra} notes 494-504 and accompanying text.
\textsuperscript{491}. \textit{See infra} notes 498-504 and accompanying text.
\textsuperscript{492}. \textit{Compare Rawls, supra} note 270, at 13, 17 (stating that individuals in the original position would require equality in the assignment of rights behind the veil of ignorance because individuals do not know if they will be advantaged or disadvantaged), \textit{with Heins}, 859 S.W.2d at 689 (stating the reasonable use rule does not give specific rights or privileges in regard to surface waters to a diffusing landowner, but leaves courts to decide each case using fairness and common sense).
\textsuperscript{493}. \textit{See Rawls, supra} note 270, at 13 (stating that individuals who are equals would require principles which maintain the individuals' equality).
\textsuperscript{494}. \textit{Id.} at 118, 119, 130.
\textsuperscript{495}. \textit{See infra} notes 499-504 and accompanying text.
\textsuperscript{496}. \textit{Heins}, 859 S.W.2d at 689.
boring landowners are kept in a state of equality. While this equality would not remain in perfect balance as one landowner would, or would not, be allowed to develop his or her property to the detriment of others, the presentation and weighing of the facts by the judicial system would ensure that fairness was applied according to the specific facts and circumstances of each case. Therefore, individuals in the original position would agree that the Armstrong decision was just. Furthermore, the individuals would agree that the reasonable use doctrine conforms with a Rawlsian view of justice.

F. A Reasonableness Exception Would Protect Landowners From Commercial Development and Promote Rawls' Theory of Justice as Fairness

The reasonableness exception to the civil law rule places higher and lower estates in a state of equality because the right to drain diffuse surface waters onto neighboring properties is only allowed when the facts of the situation, as decided by a judicial court, dictate. While the reasonableness exception to the civil law rule ultimately distributes inequitable rights to landowners, it improves the non-benefited landowner's position by allowing the non-benefited landowner's position by allowing the non-benefited landowner's

497. Compare Rawls, supra note 270, at 130 (stating that the principle of justice requires an equal distribution of liberties and opportunities), with Keys, 412 P.2d at 533 (stating that the drainage rights of a landowner are similar to the drainage rights of another landowner and are valueless unless exercised with respect to each other's rights).

498. Compare Rawls, supra note 270, at 213 (stating individuals in the original position may allow inequalities, but aim for the least amount of injustice the conditions allow), with Heins, 859 S.W.2d at 689 (stating the reasonable use rule does not give specific rights or privileges in regard to surface waters to a diffusing landowner, but leaves courts to decide each case using fairness and common sense).

499. Compare Rawls, supra note 270, at 129, 217 (stating that arbitrary principles would not be proposed in the original position and that some basic liberties may depend upon the circumstances), and Heins, 859 S.W.2d at 689 (stating the reasonable use rule does not give specific rights or privileges in regards to surface waters to a diffusing landowner, but leaves courts to decide each case using fairness and common sense), with Keys, 412 P.2d at 535 (acknowledging the civil law rule and common enemy doctrine can be rigid, inflexible, unjust, and inappropriate in modern development).

500. See supra notes 494-502 and accompanying text.

501. See supra notes 494-502 and accompanying text.

502. See infra notes 510-13 and accompanying text.
to argue the facts of the landowner's case instead of being bound by a strict, arbitrary rule.\textsuperscript{503}

The examination of each diffuse surface water case's facts complies with Rawls' theory of justice because while one landowner will ultimately have the right to drain or stop drainage of diffuse surface waters, the other landowner would have had the opportunity to present his or her case.\textsuperscript{504} The landowner's right to present his or her case is an improved situation from other doctrines which impose arbitrary rules.\textsuperscript{505}

Jurisdictions such as California, Illinois, Idaho, Iowa, Maryland, and Pennsylvania have imposed a reasonableness standard upon the civil law rule.\textsuperscript{506} The reasonableness standard requires courts to consider all the relevant facts of a situation, including the amount of harm the development caused, the foreseeability of the harm, and the landowner's motive at the time in which the landowner altered the natural drainage of the diffuse surface waters, before imposing liability or vindicating a landowner from liability.\textsuperscript{507} This results in a determination of whether the utility of the diversion of diffuse surface waters is greater than the harm which is incurred.\textsuperscript{508} Following this analysis, if the utility in altering the drainage of the diffuse surface water is greater than the harm the drainage caused, then the person who altered the drainage has acted reasonably and without liability.\textsuperscript{509} However, if the harm caused is unreasonably severe, then the damages which were incurred because of the alteration of diffuse surface waters must be borne by the landowner who altered the natural drainage conditions.\textsuperscript{510}

In \textit{Westbury Realty Corporation v. Lancaster Shopping Center, Inc.},\textsuperscript{511} the Supreme Court of Pennsylvania determined that a cause of action existed when developers placed a burden of increased diffuse surface water drainage, which occurred from construction, upon neighboring landowners.\textsuperscript{512} In \textit{Westbury}, Lynn Londrey, Bertha Londrey, Wendell Stadel, Bertha Stadel, Alexander Reid, and Thelma Reid ("Neighbors") sought an injunction against Westbury Realty Cor-

\begin{itemize}
  \item \textsuperscript{503} See \textit{infra} notes 545, 546 and accompanying text.
  \item \textsuperscript{504} See \textit{infra} notes 531-46 and accompanying text.
  \item \textsuperscript{505} See \textit{infra} note 546 and accompanying text.
  \item \textsuperscript{506} Keys, 412 P.2d at 536, 537; Burgess, 805 P.2d at 1230; Templeton, 311 N.E.2d at 144, 146; \textit{O'Tool}, 461 N.W.2d at 163; Whitman, 31 A.2d at 633; \textit{Westbury}, 152 A.2d at 671-72.
  \item \textsuperscript{507} Keys, 412 P.2d at 537.
  \item \textsuperscript{508} \textit{Id}.
  \item \textsuperscript{509} \textit{Id}.
  \item \textsuperscript{510} \textit{Id}.
  \item \textsuperscript{511} 152 A.2d 669 (Pa. 1959).
  \item \textsuperscript{512} \textit{Westbury}, 152 A.2d at 669, 672.
\end{itemize}
poration ("Developer") in the Court of Common Pleas of Lancaster County. Because of the Developer's construction of the shopping center, which covered seventeen acres of property with non-porous material and buildings, the Neighbors' homes were constantly flooded. The flooding caused diffuse surface waters to enter the basements of the Neighbors' homes and flood adjoining undeveloped property. The flooding of the undeveloped property rendered the property unfit for construction purposes.

Initially, the Neighbors brought an action to enjoin the Developer from discharging diffuse surface waters onto the Neighbors' properties and to construct an artificial drainage system for the diffuse surface waters to avoid further damage. In response, the Developer filed a demurrer stating that the Neighbors' complaint failed to state a cause of action capable of awarding equitable relief. The Court of Common Pleas found that without a claim of negligence or the construction of an artificial channel in which the diffuse surface water was collected and discharged onto the Neighbors' properties, no cause of action had been alleged in the complaint. However, while sustaining the Developers' objections, the court gave the Neighbors leave to amend their complaint. Realizing they could not establish negligence in construction or artificial channeling of diffuse surface water, the Neighbors appealed the decision to the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania stated that while historically Pennsylvania had followed a modified civil law doctrine in diffuse surface water disputes caused by the development of rural properties, commercial development was not a contemplated use of rural property when Pennsylvania created its water flow law. Therefore, because the court was confronted by a commercial development that, if built in an urban area, would have been required to install a storm sewer system, the court determined there was a need for a new approach to diffuse surface water issues. Thus, the court adopted a standard of reasonableness in circumstances where commercial development

513. Id. at 669.
514. Id. at 670, 672.
515. Id. at 671.
516. Id.
517. Id. at 670.
518. Id. at 671.
519. Id. at 669, 671.
520. Id. at 671.
521. Id. at 669, 671.
522. Id. at 672.
523. Id.
harmed neighboring properties so that courts could examine the equi-
ties of the situation on a case-by-case basis.\textsuperscript{524}

To apply the newly adopted reasonableness standard, the Su-
preme Court of Pennsylvania engaged in an analysis to compare the
Developer's equitable rights against the Neighbors' rights.\textsuperscript{525} The
court stated that because the diffuse surface water problem could
have been lessened or eliminated by the installation of an artificial
drainage system at a rather insignificant cost of $9,600; in light of the
total cost of the shopping center, the Developer's actions were unre-
reasonable.\textsuperscript{526} The court reversed the Court of Common Plea's
decision.\textsuperscript{527}

Would individuals behind the veil of ignorance perceive the
Westbury decision as fair and just?\textsuperscript{528} In one word, the answer is
yes.\textsuperscript{529} When individuals in the original position are placed behind
the veil of ignorance, they become equals.\textsuperscript{530} Behind the veil of igno-
rance, individuals do not know what their social status is or what
their economic circumstances are.\textsuperscript{531} Because these individuals are
unable to know what their life prospects will be outside the veil of
ignorance, they cannot know what principles will be to there advan-
tage or disadvantage.\textsuperscript{532} Therefore, when individuals meet behind
the veil of ignorance as equals to determine the principles that will govern
the rest of their lives, they have an incentive only to assent to fair and
equitable rules that do not favor one class of individuals over another
because they do not know whether such a principle will advantage
them.\textsuperscript{533} Thus, individuals will choose a diffuse surface water law
that is equitable to all parties.\textsuperscript{534} However, if inequality must exist,
individuals in the original position will assent to an inequitable distri-
bution of rights only if the non-benefited individual's situation would

\begin{footnotes}
\item[524] Argyelan II, 435 N.E.2d 973, 986 (Ind. 1982) (Hunter, J., dissenting) (citing
Westbury, 152 A.2d at 669) (stating the modified civil law rule precludes unreasonable
changes in the amount of surface water discharge).
\item[525] Westbury, 152 A.2d at 672.
\item[526] Id.
\item[527] Id. at 669, 672.
\item[528] See infra notes 532-46 and accompanying text.
\item[529] See infra notes 533-46 and accompanying text.
\item[530] See Rawls, supra note 270, at 11 (stating that individuals in the original posi-
tion are in a position of equality).
\item[531] Id.
\item[532] Id. at 11, 13.
\item[533] Id. at 10-11.
\item[534] See supra notes 533-36 and accompanying text.
\end{footnotes}
be somewhat improved. The reasonableness exception encompassed these qualities.

Under the reasonableness exception to the civil law rule, the landowner of a higher estate cannot drain diffuse water onto neighboring lower estates arbitrarily. The landowner’s diffuse surface water drainage is evaluated on a case-by-case basis. In Westbury, the court determined that when the facts surrounding the development of the shopping center were considered, a new approach was appropriate to determine the diffuse surface water drainage rights of each landowner. Rawls’ theory states that to have fair equality of opportunity, some basic liberties depend upon circumstances. Therefore, Westbury conforms to Rawls’ theory. Because each landowner's property rights are determined by the circumstances of each case, equality exists among the landowners until the time of judicial decision. However, because the non-benefited landowner, or the loser of the judicial decision, was afforded a chance to present the facts of the case to a court, the non-benefited landowner’s situation is improved over his or her equivalent situation under an arbitrary rule.

Therefore, a reasonableness standard and the reasonable use doctrine protect landowners from commercial development and promote justice by assuring that property may be fairly developed while not giving a landowner an absolute right to develop property. The adoption of either of the reasonable use doctrine or the reasonableness exception to the civil law rule would not be a stumbling block in the pathway of progress, but would merely prohibit situations where a

535. See Rawls, supra note 270, at 55, 102 (stating that while justice does not limit any certain type of inequality from existing, justice does require every individual’s position be improved if they are adversely affected by the inequality).
536. See infra notes 540-41, 546 and accompanying text.
537. Keys, 412 P.2d at 536.
538. Id. at 537.
539. Westbury, 152 A.2d at 672.
540. See Rawls, supra note 270, at 217-18 (stating that the right to exercise certain basic liberties can depend upon circumstances).
541. Compare Rawls, supra note 270, at 217-18 (stating that injustice can be avoided by recognizing some liberties have to be decided upon circumstances), with Westbury, 152 A.2d at 672 (stating that after evaluating the facts and equities of the case, the lower court erred in denying the plaintiff’s an opportunity to proceed with a hearing).
542. See, e.g., Westbury, 152 A.2d at 669 (determining the equities of a diffuse surface water case require a hearing where a court judges the landowner’s water rights based on the case’s circumstances).
543. Compare Rawls, supra note 270, at 136 (stating that the most extreme inequalities are just if the expectations of the least advantaged are raised in the slightest degree), with Westbury, 152 A.2d at 672 (reversing the lower court’s decision under the civil law rule in favor of balancing the equities of the situation to allow the Neighbors the opportunity to proceed with a hearing).
544. See supra notes 467-504, 505-46 and accompanying text.
commercial developer benefited from an arbitrary diffuse surface water law at the expense of neighboring landowners by determining property rights on a case-by-case basis.  

CONCLUSION

As commercial development has been forced to build in close proximity to residential housing, conflicts over the proper uses of property have increased.\textsuperscript{546} No longer is it adequate to simply balance the interests of private landowners; the interests of society must be considered.\textsuperscript{547} John Rawls' ("Rawls") theory of justice is not met in jurisdictions which refuse to adhere to the reasonable use doctrine or refuse to graft a reasonableness exception to the jurisdiction's diffuse surface water laws.\textsuperscript{548} The ability to pave massive areas of property and drastically alter natural drainage patterns with earth-moving machines, coupled with refinements in the construction industry, have created a landscape dotted with colossal commercial structures, vast shopping malls, and large paved parking lots.\textsuperscript{549} The impermeable surfaces required to serve customers of these establishments lie in a close geographical proximity to residential housing.\textsuperscript{550} Instead of being absorbed into the property, diffuse surface water resulting from rain and melting snow are now cast from vast roof expanses and parking lots onto lower estates through unnatural drainage patterns, causing damage and injury to neighboring landowners.\textsuperscript{551}

Diffuse surface water laws that consider the factual circumstances of each situation on a case-by-case basis conform to Rawls' theory of justice as fairness.\textsuperscript{552} In distributing property rights to landowners after the factual circumstances of each situation are determined, the reasonable use doctrine and the reasonableness exception allow equality to be maintained between competing landowners.\textsuperscript{553} These diffuse surface water laws allow non-benefited landowners to improve their position because the landowners may present the facts of their case instead of following an arbitrary and mandatory diffuse surface water law that imposes or prohibits liability solely upon an arbitrary distinction such as property elevation.\textsuperscript{554}

\textsuperscript{545} See supra notes 499-504, 540-46 and accompanying text.

\textsuperscript{546} Pendergrast v. Aiken, 236 S.E.2d 787, 793 (N.C. 1977).

\textsuperscript{547} See supra notes 444-66 and accompanying text.

\textsuperscript{548} Argyelan v. Haviland (Argyelan II), 435 N.E.2d 973, 987 (Ind. 1982) (Hunter, J., dissenting).

\textsuperscript{549} Id.

\textsuperscript{550} See supra notes 451-66 and accompanying text.

\textsuperscript{551} See supra notes 461-66 and accompanying text.

\textsuperscript{552} See supra notes 498-504, 540-46 and accompanying text.
Therefore, to provide just results under a Rawlsian theory of justice, jurisdictions should adopt a reasonableness exception to their diffuse water laws or adopt the reasonable use doctrine.\textsuperscript{555} In adopting such a law, jurisdictions would ensure that landowners would be continually placed in a position of equality, with no landowner holding an absolute right that another does not also enjoy.\textsuperscript{556} By adopting either of these laws, the states would ensure diffuse surface water laws treated each landowner justly.\textsuperscript{557}

Therefore, states should graft a reasonableness exception to their diffuse surface water laws or adopt the reasonable use doctrine to comply with a Rawlsian theory of justice. Failure to adopt such a law would deny justice to all landowners who are subjected to injury from diffuse surface waters but denied relief simply because an arbitrary law favors one landowner over another without considering the factual circumstances of the development that altered the drainage pattern of diffuse surface waters. When landowners are arbitrarily denied protection from commercial developers, they are denied part of the American dream. The landowners are denied their right to own and enjoy their own private property without harmful diffuse surface water interference caused by neighboring landowners who are solely trying to realize their maximum profit through development before they move to another location and burden another landowner. While a commercial developer reaps all the economic benefits of development, the neighboring landowners bear the economic burden of trying to protect their private property. Instead, the American judicial system should protect neighboring landowners from commercial development and ensure that justice is distributed equally amongst all landowners. By simply adopting a diffuse surface water law that complies with Rawls' theory of justice, the American judicial system could achieve justice for all landowners.\textsuperscript{558}

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\textsuperscript{555} See \textit{supra} notes 467-70, 540-46 and accompanying text.
\textsuperscript{556} See \textit{supra} notes 498-504, 534-46 and accompanying text.
\textsuperscript{557} See \textit{supra} notes 504, 540-46 and accompanying text.
\textsuperscript{558} I acknowledge with gratitude the assistance of P. Brian Bartels during the formation of this Note.