STANSBURY v. MDR DEVELOPMENT, L.L.C.: A UTILITARIAN APPROACH TO THE DOCTRINE OF IMPLIED EASEMENTS BY NECESSITY

In *Stansbury v. MDR Development, L.L.C.*,[1] the Court of Appeals of Maryland considered whether an implied easement by necessity existed to benefit a portion of property that was accessible by navigable waters where the remainder of the property was occupied and accessible by a public roadway.[2] The court held that an implied easement by necessity existed because access by navigable waters was not a reasonable gateway to the property.[3] This determination was proper because all of the requirements for an easement by necessity were met.[4] Furthermore, the utilitarian theory supports this decision in particular and greater flexibility in the application of the doctrine of implied easements by necessity in general.[5] The utilitarian theory, unlike other theories of property law, allows courts to apply the doctrine with more flexibility by considering not only the property owner's right to exclude others from the property, but also the benefit to society for property to be fully utilized.[6]

Applying this broader approach, the court properly rejected the circuit court's balancing approach because it would add confusion to the case law.[7] However, the court should have discussed in greater detail the reasoning behind its disapproval of the circuit court's balancing approach.[8] By failing to do so, the *Stansbury* court left lower courts with little guidance as to whether there are any circumstances when a balancing approach would be appropriate, or whether the method is foreclosed with respect to the doctrine of implied easements.[9]

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1. 390 Md. 476, 889 A.2d 403 (2006).
2. *Id.* at 480, 889 A.2d at 406.
3. *Id.*
4. *See infra* Part IV.A.
5. *See infra* Part IV.B.
6. *See infra* Part IV.B.
7. *See infra* Part IV.C.
8. *See infra* Part IV.C. The *Stansbury* court devoted only one footnote in its decision to the trial court's balancing approach. *Stansbury*, 390 Md. at 479–80 n.1, 889 A.2d at 405 n.1.
9. *See infra* Part IV.C.

I. THE CASE

In 1936, James Edward Stansbury purchased adjoining Lots 178, 179, 9A, and 10A on the Chesapeake Bay in Maryland.[10] Approximately twenty years later, Mr. Stansbury dredged a channel between the four lots in order to access the Chesapeake Bay via Pleasant Lake.[11] He also constructed a footbridge over the channel between Lots 9A and 178 in order to access Lot 179, which adjoined Lot 178.[12]

Mr. Stansbury died in 1977 and left the property to his wife, Laura Stansbury, and his two children, Nancy R. Stansbury and James Elijah Stansbury.[13] Approximately ten years later, Laura Stansbury transferred her share in the property to her children, so that Nancy Stansbury owned Lots 179 and 9A and James Stansbury owned Lots 178 and 10A.[14] In 1995, however, James Stansbury defaulted on a mortgage, which resulted in the foreclosure of Lots 178 and 10A.[15] David and Charlotte Caldwell and James and Margaret Thrift (the Caldwells) purchased the lots at a foreclosure sale and thereafter consolidated the properties into one lot.[16]

Since Lot 10A was surrounded on three sides by water, the Caldwells wanted to use the footbridge from the adjoining lot to access their lot.[17] Nancy Stansbury, however, denied permission.[18] Consequently, the Caldwells proposed building a new footbridge directly connecting Lot 10A to Lot 178.[19] Ms. Stansbury once again rejected this proposal because the footbridge would negatively impact her property running underneath the channel.[20]

In response to Ms. Stansbury's opposition to the new bridge, the Caldwells filed a complaint in the Circuit Court for Anne Arundel County for an implied easement by necessity across part of Lot 9A in order to access Lot 10A.[21] After the initiation of the action, MDR De-

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10. *Stansbury*, 390 Md. at 481–82, 889 A.2d at 406–07. Lots 10A and 179 "shared a common lot line, as [did] lots 178 and 9a." *Id.* at 481, 889 A.2d at 407.

11. *Id.* at 481–82, 889 A.2d at 407. The channel covered the common lot lines. *Id.* at 481, 889 A.2d at 407.

12. *Id.* at 482, 889 A.2d at 407.

13. *Id.*

14. *Id.* at 482–83, 889 A.2d at 407. The Stansbury children divided the lots amongst themselves after they became joint owners of all four of the lots. *Id.*

15. *Id.* at 483, 889 A.2d at 407.

16. *Id.* at 483–84, 889 A.2d at 407–08.

17. *Id.* at 483, 889 A.2d at 408. The adjoining lot was 9A, which Ms. Stansbury owned. *Id.*

18. *Id.*

19. *Id.* at 484, 889 A.2d at 408.

20. *Id.*

21. *Id.*

velopment, L.L.C. (MDR) purchased the lots from the Caldwells, and the court substituted MDR as the plaintiff.[22] The circuit court determined that neither a quasi easement nor an easement by necessity existed over Ms. Stansbury's property.[23] The court denied the existence of a quasi easement because the old footbridge had not provided access between Lots 178 and 10A while unity of title was present.[24] Moreover, the court found that there was no implied easement by necessity because the proposed footbridge would provide access to Lot 10A without entering onto Ms. Stansbury's property.[25] The circuit court, however, allowed MDR to build the new footbridge after balancing the parties' interests and determining that the construction of the footbridge benefited MDR more than it injured Ms. Stansbury.[26]

Both Ms. Stansbury and MDR appealed the circuit court's decision.[27] The Court of Special Appeals vacated the judgment of the circuit court,[28] holding that, because Lot 10A was only accessible by a small boat or crossing the channel by foot at low tide, an easement by necessity existed.[29]

In response, Ms. Stansbury petitioned for a writ of certiorari to the Court of Appeals, and MDR filed a conditional cross-petition.[30] The Court of Appeals granted certiorari to determine (1) whether an easement by necessity existed to provide access to a part of MDR's property when the remaining property was occupied and could be reached by a road; and (2) whether an easement by necessity existed for a part of MDR's property when that portion was accessible by navigable water.[31]

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22. *Id.*

23. Stansbury v. MDR Dev., L.L.C., 161 Md. App. 594, 610, 871 A.2d 612, 621 (2005).

24. *Id.* at 612, 871 A.2d at 622.

25. *Id.* at 616, 871 A.2d at 625.

26. *Id.* In reviewing the parties' interests, the circuit court evaluated: (1) MDR's right to build a footbridge to connect its properties; (2) Ms. Stansbury's right to thwart interference with a portion of her property that is submerged beneath the channel; and (3) public interest in using the channel for fishing and navigation. *Id.* at 609, 871 A.2d at 621.

27. *Id.* at 598, 871 A.2d at 614.

28. *Stansbury*, 390 Md. at 479–80, 889 A.2d at 405.

29. *Stansbury*, 161 Md. App. at 617, 871 A.2d at 625. The court also maintained that the easement had not terminated simply because Ms. Stansbury's brother did not use it. *Id.*, 871 A.2d at 626.

30. *Stansbury*, 390 Md. at 480, 889 A.2d at 405–06.

31. *Id.*, 889 A.2d at 406.

II. LEGAL BACKGROUND

The doctrine of easement by necessity is rooted in English common law.[32] Over time, however, the doctrine has evolved to address concerns that are unique to American society.[33] Particularly, Maryland courts have relaxed the rigid standard once applied by the English courts.[34] At the same time, public policy concerns regarding the full utilization of land have become much more central to the doctrine.[35] This evolution to a more flexible doctrine of easement by necessity is mirrored in a number of other jurisdictions in the United States.[36]

A. The Transplantation of the Easement by Necessity into the American Judicial System

American common law rights are derived primarily from English common law.[37] Under Article 5 of the Maryland Declaration of Rights, Maryland citizens are entitled to the benefit of the English common and statutory law as it existed on July 4, 1776.[38] Accordingly, Maryland courts have recognized the precedential value of English common law cases and relied upon them, especially in areas of law where a strong body of Maryland case law is lacking.[39] The doctrine of easement by necessity is no exception; early Maryland cases often looked to English precedent for guidance.[40]

The doctrine of easements had its origins in English common law,[41] with Maryland courts recognizing the doctrine as early as 1855.[42] Maryland courts define easements as "nonpossessory interest[s] in the real property of another" which arise "through express

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32. *See infra* Part II.A.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* Part II.B.

36. *See infra* Part II.C.

37. *See* Laney v. State, 379 Md. 522, 542, 842 A.2d 773, 785 (2004) (stating that a purchaser's common law right to possess property peacefully without judicial assistance originated from English common law).

38. MD. CONST. DECL. OF RTS. art. 5(a).

39. *See* Mitchell v. Seipel, 53 Md. 251, 264–70 (1880) (discussing the development of the doctrine of easement by necessity in English case law to decide the case at bar); McTavish v. Carroll, 7 Md. 352, 360–65 (1855) (same).

40. *See, e.g., Mitchell*, 53 Md. at 264–70 (devoting much of the opinion to a review of the contemporary English law on implied easements by necessity); *McTavish*, 7 Md. at 360–65 (relying in part on English precedent to conclude that an implied easement can exist where there is a legal necessity).

41. Gillies v. Orienta Beach Club, 289 N.Y.S. 733, 735 (Sup. Ct. 1935).

42. *See McTavish*, 7 Md. at 364–65 (recognizing an implied easement by necessity).

grant or implication."[43] One type of implied easement is an easement by necessity.[44]

In 1880, the Court of Appeals in *Mitchell v. Seipel*[45] summarized the English law pertaining to easements by necessity.[46] According to *Mitchell*, an easement exists if: (1) it is continuous or apparent; (2) necessary for the reasonable enjoyment of the property; and (3) the necessity arose prior to the grant of the property and continues to exist.[47] The court noted that, at the time, other American jurisdictions adhered to the same requirements.[48] The first and third requirements were fairly straightforward for courts to apply.[49] However, the second requirement of necessity was more problematic because different interpretations could be assigned to the word.[50]

During the nineteenth century, the English common law's strict view of the necessity requirement heavily influenced Maryland courts.[51] For example, in *McTavish v. Carroll*,[52] one of Maryland's first cases addressing the doctrine of implied easement by necessity, the Court of Appeals relied primarily upon English precedent.[53] While the *McTavish* court referred to American case law as well, the court's reasoning was structured by the English requirements for finding an easement by necessity.[54] Accordingly, *McTavish* and other Maryland courts required a showing of absolute necessity, not mere inconvenience.[55] As the Court of Appeals noted in *Burns v. Gallagher*,[56] this stringent standard accomplishes the doctrine's purpose of effectuating the intent of the parties.[57] Therefore, according to *Burns*, without an express grant of an easement, the only way to discern the intent of

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43. Boucher v. Boyer, 301 Md. 679, 688, 484 A.2d 630, 635 (1984).

44. *Id.*

45. 53 Md. 251 (1880).

46. *Id.* at 264–70.

47. *Id.* at 269.

48. *Id.* at 270.

49. *See, e.g.*, McTavish v. Carroll, 7 Md. 352, 358–67 (1855) (mentioning in passing the requirements for an easement by necessity, but discussing the necessity prong in detail).

50. For detailed discussions of the necessity requirement see Jay v. Michael, 92 Md. 198, 208–12, 48 A. 61, 63–64 (1900); *Mitchell*, 53 Md. at 272–76; *McTavish*, 7 Md. at 358–67.

51. *See, e.g.*, Burns v. Gallagher, 62 Md. 462, 472 (1884) (following the English rule requiring that the necessity be absolute).

52. 7 Md. 352 (1855).

53. *Id.* at 360.

54. *Id.*

55. *Jay*, 92 Md. at 210, 48 A. at 63; *Burns*, 62 Md. at 472; *McTavish*, 7 Md. at 367.

56. 62 Md. 462 (1884).

57. *Id.* at 472.

the parties with any certainty is to require a showing of strict necessity.[58]

B. *The Relaxation of the Doctrine of Implied Easement by Necessity in Maryland*

Beginning in the later nineteenth century and continuing into the twentieth and twenty-first centuries, the doctrine of implied easements by necessity evolved in Maryland to become more flexible.[59] In part, this evolution grew out of the distinction between implied grants of easements by necessity and implied reservations of easements by necessity.[60] An implied grant of an easement by necessity occurs when a grantor conveys inaccessible property to another.[61] On the other hand, an implied reservation of an easement by necessity is when the grantor retains landlocked property.[62]

Maryland courts have distinguished between these two types of implied easements in terms of the degree of necessity needed to satisfy them.[63] Much stricter necessity, known as absolute necessity, is required for implied reservations,[64] while reasonable necessity is required for implied grants.[65] The reason for the distinction is that, in the case of an implied grant, the grantor can exert control over the terms of the grant and hence cannot derogate from it.[66] Therefore, Maryland courts presume that, where the reservation of an easement is not explicit in the grant, the two parties intended not to reserve an easement.[67] This presumption can be overcome by strict necessity, because it would be unreasonable to presume that the parties intended for the transaction to leave the grantor landlocked.[68]

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58. *Id.*

59. *See* Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964) (resting much of its decision on the modern view that necessity may exist where property is bordered by navigable water); Condry v. Laurie, 184 Md. 317, 322, 41 A.2d 66, 68 (1945) (considering the cost of establishing another access route to the property in determining whether necessity existed).

60. Shpak v. Oletsky, 280 Md. 355, 360–61, 373 A.2d 1234, 1238 (1977).

61. Dalton v. Real Estate & Improvement Co., 201 Md. 34, 47, 92 A.2d 585, 591 (1952).

62. *Id.*

63. *Shpak*, 280 Md. at 360–61, 373 A.2d at 1238.

64. *Id.* at 361, 373 A.2d at 1238 (describing the required necessity as "imperative and absolute").

65. Greenwalt v. McCardell, 178 Md. 132, 138, 12 A.2d 522, 525 (1940).

66. *Dalton*, 201 Md. at 47, 92 A.2d at 591.

67. Slear v. Jankiewicz, 189 Md. 18, 23–24, 54 A.2d 137, 139 (1947) (quoting Burns v. Gallagher, 62 Md. 462, 471–72 (1884)).

68. *Id.*

The *Mitchell* case, decided in the late nineteenth century, best explains this distinction.[69] In *Mitchell*, the Court of Appeals considered whether a property owner had an implied reservation in an alley that ran between two houses.[70] The court determined that there was no implied reservation because the necessity was not absolute.[71] Specifically, the *Mitchell* court observed, there were other means to access the premises and the alley was merely a more convenient access route.[72] In reaching its decision, the court rejected a reasonable necessity standard on the basis that this standard applies only to implied grants, not implied reservations.[73] Furthermore, the *Mitchell* court noted that, at the time of its decision, there was only one decision by an American court of last resort that granted an easement by necessity in an implied reservation case.[74]

The distinction between implied reservations and implied grants has endured in Maryland into the twenty-first century. As recently as 2003, the Court of Appeals recognized the distinction and its importance in *Calvert Joint Venture #140 v. Snider*.[75] In *Calvert*, the court held that an owner of mineral rights did not have an implied reservation of an easement by necessity in the surface because the minerals could potentially be accessed from the owner's adjoining property.[76] Thus, the *Calvert* court found no absolute necessity existed to warrant an implied reservation.[77]

Another way that the doctrine of easement by necessity has evolved is in the leniency with which the Maryland courts have applied some of the doctrine's requirements. Although courts today still require that each element be met, courts are not as strict about analyzing every element.[78] For example, cases merely will mention in passing the requirement that the easement be continuous or apparent.[79] In *Hancock v. Henderson*,[80] the court determined that an ease-

69. Mitchell v. Seipel, 53 Md. 251 (1880).
70. *Id.* at 262–63.
71. *Id.* at 275.
72. *Id.*
73. *Id.* at 264.
74. *Id.* at 271.
75. 373 Md. 18, 816 A.2d 854 (2003).
76. *Id.* at 61, 816 A.2d at 879.
77. *Id.*
78. *See id.* at 47–62, 816 A.2d at 870–79 (focusing much of its discussion on the necessity requirement and assuming that the other requirements are met); Hancock v. Henderson, 236 Md. 98, 102–05, 202 A.2d 599, 601–03 (1964) (primarily discussing the necessity requirement).
79. *See, e.g.*, Condry v. Laurie, 184 Md. 317, 321, 41 A.2d 66, 68 (1945) (discussing the necessity and original unity of title requirements but only briefly mentioning the continuous or apparent requirements).

ment by necessity existed where the owner's property was bordered by a creek on one side and properties owned by the opposing party and others on the remaining sides.[81] The *Hancock* court focused primarily on whether the necessity requirement was met[82] and did not state that the easement had to meet the continuous or apparent requirement as well.

Similarly, in *Shpak v. Oletsky*,[83] the court devoted much of its discussion to whether or not the necessity requirement was fulfilled.[84] The court made only passing mention of the requirement that the easement be continuous or apparent.[85] Thus, Maryland courts have become much less mechanical in applying the doctrine of easement by necessity, focusing solely on the elements that are in dispute.[86]

The doctrine of easement by necessity has further relaxed due to a shift in the underlying public policy justifications. When the Maryland courts first adopted the doctrine, the main purpose was to give effect to the intent of the parties.[87] To determine the parties' intent, courts primarily looked to the deed to see whether the parties meant to create an easement.[88] If the deed was silent, courts inferred that the intent of the parties was not to reserve an easement.[89] Under Maryland property law, a landowner is free to make his property inaccessible if he so wishes.[90] Therefore, in order to overcome the presumption that the parties would have included an explicit easement in the grant if they so intended, courts in early cases required a showing of strict necessity.[91]

Modern case law focuses less on the intent of the parties, and instead emphasizes society's interest in the full utilization of land.[92]

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80. 236 Md. 98, 202 A.2d 599 (1964).

81. *Id.* at 100, 202 A.2d at 600.

82. *Id.* at 102, 202 A.2d at 601.

83. 280 Md. 355, 373 A.2d 1234 (1977).

84. *See id.* at 370–71, 373 A.2d at 1243 (holding that since necessity did not exist at the time of severance, there was no implied easement by necessity).

85. *Id.* at 360, 373 A.2d at 1238.

86. *See supra* notes 33–34 and accompanying text (discussing the evolution of the doctrine from the rigid English standard to a more flexible one).

87. *See, e.g.*, Burns v. Gallagher, 62 Md. 462, 472 (1884) (explaining that strict necessity was required to effectuate the intent of the parties).

88. *E.g.*, Oliver v. Hook, 47 Md. 301, 308 (1877).

89. *E.g.*, *Burns*, 62 Md. at 471–72.

90. *Shpak*, 280 Md. at 365, 373 A.2d at 1240.

91. *E.g.*, *Burns*, 62 Md. at 471–72.

92. *See* Hancock v. Henderson, 236 Md. 98, 103–04, 202 A.2d 599, 602 (1964) (discussing and embracing the modern view that an easement by necessity may exist where water access is available but not suitable to put the property to its reasonable use, and also noting the public interest in full utilization of land); Condry v. Laurie, 184 Md. 317, 321, 41 A.2d

Thus, not surprisingly, Maryland cases have trended away from a requirement of strict necessity to a requirement of reasonable necessity.[93] Reasonable necessity is a more flexible standard since courts consider such variables as the cost of obtaining another way of access[94] and modern notions of reasonableness.[95]

Over the years, Maryland courts have adjusted the definition of "reasonable," giving weight to modern trends.[96] One of the clearest examples is judicial treatment of navigable water in determining whether the necessity requirement is met. In *Woelfel v. Tyng*[97] the Court of Appeals held that access to property by navigable water is not so burdensome as to require an easement by necessity.[98] However, just four years later in *Hancock*, the court distinguished *Woelfel* and gave greater weight to the modern trend that water access is not always reasonable based on the intended use of the property.[99]

Furthermore, while the intent of the parties is still an important inquiry,[100] judicial presumptions about that intent have changed. During the nineteenth century, Maryland courts presumed that, if the deed was silent regarding an easement, the parties intended to reject the easement.[101] Currently, however, the courts read the same silence not as the intent to leave property landlocked, but to convey property fit for occupancy.[102] In *Hancock*, for example, the court relied on this presumption to find an implied easement by necessity even though the property was accessible by water.[103] The *Hancock* court also ac-

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66, 68 (1945) (citing the public policy of full utilization of land as the basis for the easement by necessity doctrine).

93. *See Hancock*, 236 Md. at 103–05, 202 A.2d at 602–03 (finding an easement by necessity even though the property at issue could be accessed by a water route); *Condry*, 184 Md. at 322, 41 A.2d at 68 (noting that, while constructing another access route would be possible, it would require unreasonable expense and therefore justifies a finding of necessity).

94. *Condry*, 184 Md. at 322, 41 A.2d at 68.

95. *Hancock*, 236 Md. at 103, 202 A.2d at 602.

96. *See, e.g., id.* (taking into consideration that under the "modern view," water routes are not always a reasonable means of access depending on the property's intended use).

97. 221 Md. 539, 158 A.2d 311 (1960).

98. *Id.* at 544–45, 158 A.2d at 313–14. The *Woelfel* court rested its decision in part on the fact that the property was marshland that was suitable for ducking or trapping, and was accessible by water from public wharves. *Id.* at 542, 544, 158 A.2d at 312–13.

99. *Hancock*, 236 Md. at 103, 202 A.2d at 602.

100. *Id.*

101. Burns v. Gallagher, 62 Md. 462, 471–72 (1884).

102. *Hancock*, 236 Md. at 103–04, 202 A.2d at 602.

103. *See id.* (citing the modern view that a way of necessity may exist even if a waterway is available). By presuming that the intent of the parties was not to leave property landlocked, the *Hancock* court had a difficult time distinguishing *Woelfel*. In fact, the court dodged the issue by maintaining that the facts were closer to *Jay v. Michael*, 92 Md. 198, 48 A. 61 (1900), where the court found an easement by necessity though the property was

knowledged that the doctrine of implied easement by necessity is based on the public policy of full utilization of land.[104] These two policies motivate Maryland courts to apply the doctrine more flexibly.

Maryland courts' growing emphasis on utility rather than intent reflects the current theoretical trend in property rights.[105] Two important theories in American property law have been the natural rights theory, which prevailed during the country's founding,[106] and the utilitarian theory, which is prominent today.[107] Depending on which theory is applied, the outcome in an easement by necessity case may differ. The natural rights theory supports an absolute view of property rights that allows a property owner to exclude all others from the property.[108] In contrast, the utilitarian theory focuses on property rights as a way to promote the efficient use of resources.[109]

C. *The Doctrine of Easement by Necessity in Other Jurisdictions*

Maryland's trend toward a more flexible concept of necessity is mirrored in other jurisdictions. In particular, jurisdictions that require reasonable necessity have held that available access to one portion of property does not thwart a finding of necessity if the part in question is not reasonably accessible.[110] For example, in *Miller v. Schmitz*,[111] the Appellate Court of Illinois held that, where property was bisected by a creek and only one part was inaccessible, the owner had an easement by necessity over the neighbor's property in order to reach the inaccessible land. The Court of Appeals of Washington reached a similar conclusion in *Beeson v. Phillips*.[112]

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bordered by water. One potentially important factual distinction between *Hancock* and *Woelfel* is that in *Woelfel*, the property was marshland used for duck hunting, while in *Hancock*, the property was used for cutting trees for timber and firewood. However, the *Hancock* court did not note this difference.

104. *Id.* at 104, 202 A.2d at 602.

105. *See* State *ex rel.* Penrose Inv. Co. v. McKelvey, 256 S.W. 474, 477 (Mo. 1923) (en banc) (noting that courts and legislatures predominantly use the utilitarian theory in determining property rights).

106. Cannon v. State *ex rel.* Sec'y of Dep't of Transp., 807 A.2d 556, 566–67 (Del. 2002).

107. *Penrose Inv.*, 256 S.W. at 477.

108. *Cannon*, 807 A.2d at 567.

109. *See* Borough of Westville v. Whitney Home Builders, Inc., 122 A.2d 233, 240 (N.J. Super. App. Div. 1956) (citing the *Restatement of Torts* for the proposition that the utilitarian theory promotes the most beneficial use of water resources).

110. Hedger Bros. Cement & Materials v. Stump, 10 S.W.3d 926, 930 (Ark. Ct. App. 2000); Miller v. Schmitz, 400 N.E.2d 488, 491 (Ill. Ct. App. 1980).

111. 400 N.E.2d 488 (Ill. Ct. App. 1980).

112. 702 P.2d 1244, 1247 (Wash. Ct. App. 1985) (holding that an easement by necessity existed to access the upper portion of the property even though the lower portion was accessible by another route).

In both *Miller* and *Beeson*, the courts determined that access to one portion of property did not negate the reasonable necessity for an easement based on the public policy of full utilization of land.[113] Moreover, in both cases, use of the inaccessible part of the property was hampered because the reachable portion did not provide reasonable means of access.[114] Thus, to enable utilization of the inaccessible portion of property, the courts granted easements by necessity.[115]

III. THE COURT'S REASONING

In *Stansbury v. MDR Development, L.L.C.*, the Court of Appeals affirmed the decision of the Court of Special Appeals and held that an easement by necessity existed over adjoining properties where a portion of one property was inaccessible, except through navigable water.[116] Writing for a unanimous court, Judge Cathell first articulated three prerequisites for the creation of an easement by necessity: (1) original unity of title between the properties in question; (2) "severance of the unity of title" when one parcel of property is conveyed; and (3) the easement is necessary for the owner to be able to access the property, and this necessity must exist both when the title is severed and when the easement is exercised.[117]

Next, the *Stansbury* court specifically addressed the questions it certified for review. First, the court determined that an easement by necessity may exist to reach an otherwise inaccessible portion of property, even though the rest of the property can be reached by a public road.[118] The court deemed it irrelevant to the existence of an easement by necessity that Lots 10A and 178 may have been consolidated after the Caldwells' purchase.[119] Instead, according to the court, the relevant inquiry was whether there was unity of title between Lots 10A and 178, and whether, upon severance, an easement by necessity existed and continued to exist.[120]

The *Stansbury* court answered these questions regarding unity of title in the affirmative.[121] As to the first question regarding the unity of title of the properties, the court concluded that unity of title in the property existed until Ms. Stansbury and her brother divided the

113. *Miller*, 400 N.E.2d at 491; *Beeson*, 702 P.2d at 1246.
114. *Miller*, 400 N.E.2d at 491; *Beeson*, 702 P.2d at 1247.
115. *Miller*, 400 N.E.2d at 491; *Beeson*, 702 P.2d at 1247.
116. *Stansbury*, 390 Md. at 497–98, 889 A.2d at 416.
117. *Id.* at 489, 889 A.2d at 411.
118. *Id.* at 496, 889 A.2d at 415.
119. *Id.* at 492, 889 A.2d at 413.
120. *Id.* at 490–92, 889 A.2d at 412–13.
121. *Id.* at 496, 889 A.2d at 415.

property.[122] Furthermore, the court found that an easement by necessity arose at the time of the severance since Lot 10A became inaccessible except by water or over Ms. Stansbury's property.[123] Also, the court determined that the necessity continued to exist, noting that non-use of the easement by Ms. Stansbury's brother did not by itself extinguish the easement.[124]

Regarding the second question that the court certified for review,[125] the court found that access to Lot 10A via navigable water did not alleviate the necessity.[126] Although Lot 10A could be reached by boat, the court determined that it would be too burdensome for MDR to obtain a boat, go to a public launching ramp, and navigate the Chesapeake Bay in order to access its property.[127] Finally, the court found that construction of a footbridge would have a minimum impact on Ms. Stansbury's property, part of which was submerged under the channel.[128]

IV. ANALYSIS

In *Stansbury v. MDR Development, L.L.C.*, the Court of Appeals held that an implied easement by necessity exists when access to the property by navigable water is not reasonable. The *Stansbury* court applied the doctrine of implied easement by necessity to determine that an easement existed over Stansbury's property.[129] While the court did not explicitly refer to the utilitarian theory of property rights, its language and ideas are associated with the theory.[130] By invoking utilitarian concepts, the court has signaled that it will continue to take a more flexible approach to the doctrine of easement by necessity in the

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122. *Id.* at 490, 889 A.2d at 412.

123. *Id.* at 490–91, 889 A.2d at 412.

124. *Id.* at 491, 889 A.2d at 412. The court also dismissed the argument that an easement by necessity was no longer warranted because MDR could not currently build structures, other than a footbridge, on Lot 10A. *Id.* at 493, 889 A.2d at 413. According to the *Stansbury* court, inability to use the property for building purposes does not negate MDR's necessity. *Id.* Even if the limitation was not lifted in the future, the court reasoned, the property could still be used for other activities. *Id.*

125. Whether an easement by necessity existed for a part of MDR's property when that portion was accessible by navigable water. *Id.* at 480, 889 A.2d at 406.

126. *Id.* at 497, 889 A.2d at 416.

127. *Id.* In a footnote, the court also rejected the argument that Lot 10A could be accessed by walking through the channel because Ms. Stansbury's property would still be traversed in the process. *Id.* at 497 n.11, 889 A.2d at 416 n.11. Furthermore, the court noted that passing through the channel may be extremely difficult depending on weather conditions. *Id.*

128. *Id.* at 497, 889 A.2d at 416.

129. *See infra* Part IV.A.

130. *See infra* Part IV.B.

future.[131] The *Stansbury* court's decision to relax the doctrine was appropriate because of the modern concerns associated with property rights.[132]

Furthermore, the court fittingly refused to supplant the requirements of the doctrine of implied easements by necessity with a balancing approach that would weigh the interests of the involved parties.[133] However, the court should have better explained this particular rejection.[134] A more in-depth discussion of the balancing test would have made the court's decision more comprehensive, providing a better guide for lower courts.[135]

A. *The Court Properly Determined that an Easement by Necessity Existed Because MDR Proved all of the Required Elements*

The Court of Appeals appropriately concluded that MDR met the required elements for an implied easement by necessity.[136] Under Maryland law, MDR was required to prove three elements for an implied easement by necessity: (1) original unity of title—that properties in question were once one parcel; (2) severance of unity of title—that the single parcel was divided into the separate properties that form the dispute; and (3) necessity that arose at the time of severance and continues to exist—that the severance of the parcel created the necessity, and the necessity has been constant.[137] Ms. Stansbury did not contest the first two elements, and MDR clearly met them because Ms. Stansbury's father originally owned all of the lots in question, and Ms. Stansbury and her brother severed the unity of title.[138]

Thus, the only element in dispute was whether necessity existed when the unity of title was severed, and if so, whether the necessity continued to exist.[139] Ms. Stansbury argued that there was no necessity because Lot 10A was surrounded on three sides by navigable water, and because Lot 10A was consolidated with Lot 178, which was

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131. *See infra* Part IV.B.

132. *See infra* Part IV.B.

133. *See infra* Part IV.C.

134. *See infra* Part IV.C.

135. *See infra* Part IV.C.

136. *See Stansbury*, 390 Md. at 497, 889 A.2d at 416 (holding that MDR was entitled to an easement by necessity).

137. McTavish v. Carroll, 7 Md. 352, 360 (1855).

138. *Stansbury*, 390 Md. at 490, 889 A.2d at 412.

139. *Id.* at 480, 889 A.2d at 406.

accessible by a road.[140] However, the court properly dismissed these arguments based on precedent and public policy concerns.[141]

1. *Access to Property by Navigable Water Does Not Automatically Destroy Necessity*

In *Stansbury*, the court prudently followed previous Maryland cases holding that an easement by necessity can exist even though navigable water may provide access to the property.[142] For example, the *Stansbury* court followed *Hancock*,[143] which granted an easement by necessity over appellant's property because the water route was not suitable.[144] Similarly, in *Stansbury*, navigable water bordered Lot 10A.[145] In order to access the lot through the waterways, MDR would have to cross the channel by a small boat or on foot, or purchase a boat and cross the Chesapeake Bay after traveling to a public launching ramp.[146] While both of these methods make access possible, the court correctly determined that under a reasonable necessity standard it would be unreasonable to require MDR to go to such great lengths.[147]

While the court properly adhered to *Hancock*, its reasoning is weakened by a failure to distinguish *Woelfel*, an important case.[148] The court should have made some effort to either distinguish *Woelfel* or overturn it in part, particularly because *Woelfel* directly conflicts with *Hancock*.[149] Instead, the court in *Stansbury* merely mentioned

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140. *Id.* at 486, 889 A.2d at 409.

141. *See infra* Part IV.A.1–2.

142. *See* Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964) (holding that where a water route is unsuitable for the type of use to which the property will be put, an easement by necessity may exist); Jay v. Michael, 92 Md. 198, 210, 48 A. 61, 63–64 (1900) (finding an easement by necessity though the property bordered a creek).

143. *Stansbury*, 390 Md. at 496–97, 889 A.2d at 415–16.

144. *Hancock*, 236 Md. at 103–04, 202 A.2d at 602–03.

145. *Stansbury*, 390 Md. at 481–82, 889 A.2d at 407. Specifically, Lot 10A was bounded by Pleasant Lake, the Chesapeake Bay, and the channel dredged by Ms. Stansbury's father. *Id.* at 481, 889 A.2d at 406.

146. *Id.* at 497, 889 A.2d at 416.

147. *Id.* This proposition is supported by *Hancock*, which allowed an easement by necessity where the water route, while available, was nevertheless unsuitable. *Hancock*, 236 Md. at 103, 202 A.2d at 602; *see also* Hunter Carroll, Recent Development, *Property—Easements by Necessity: What Level of Necessity is Required?*, 19 AM. J. TRIAL ADVOC. 475, 476 (1995) (noting that a property owner is more likely to succeed in obtaining an implied easement by necessity "in a majority jurisdiction, requiring reasonable necessity, than in one requiring strict necessity").

148. *See* Woelfel v. Tyng, 221 Md. 539, 158 A.2d 311 (1960) (holding that access via navigable water renders an easement unnecessary).

149. *Compare id.* at 544, 158 A.2d at 313 (finding that access by water prevents the grant of an easement by necessity), *with Hancock*, 236 Md. at 103–04, 202 A.2d at 602–03 (distinguishing *Woelfel* and holding that in certain factual circumstances, access by navigable water is not a bar to an easement by necessity).

Woelfel[150] without indicating if the instant case and *Hancock* reject the *Woelfel* rule or simply reach different results due to distinguishing facts. The court's failure to do so leaves lower courts with no guidance as to *Woelfel*'s continued significance.

The court's failure to distinguish *Woelfel* is particularly problematic because Lot 10A seems more similar to the *Woelfel* property, which was marshland,[151] than to the *Hancock* property, which was land used for cutting trees for timber and firewood.[152] Access by water is unsuitable when one is hauling trees, but it may be perfectly appropriate when one is using property for duck hunting or walking.[153] Therefore, as in *Woelfel*, MDR would appear to have less necessity for an easement because renting a small boat is arguably not an unreasonable burden.

Despite the court's misstep in failing to distinguish *Woelfel*, public policy reasons dictate that the court made the right decision.[154] Easements by necessity are justified not only by a presumption that the parties intended the party with inaccessible land to have access,[155] but also by a public policy supporting the full utilization of land, which is increasingly critical today.[156] *Woelfel*'s approach would inhibit the latter justification.[157]

To recognize water access as a suitable means of reaching one's property, even when the property is only used for sightseeing, would undermine this public policy because motor vehicles are the most prevalent mode of travel today and most people do not own boats.[158] Requiring a person to purchase or rent a boat solely for the purpose

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150. *Stansbury*, 390 Md. at 496, 889 A.2d at 415.

151. *Woelfel*, 221 Md. at 543, 158 A.2d at 313.

152. *Hancock*, 236 Md. at 100, 202 A.2d at 600.

153. *See id.* at 103–04, 202 A.2d at 602–03 (distinguishing *Woelfel* in order to find that navigable water is not a reasonable route given the uses to which the property in question would be put).

154. *See* Carroll, *supra* note 147, at 476 (public policy supports granting an easement by necessity where the land would otherwise lay useless or underused); Kirstin Kanski, Note, *Property Law—Minnesota's Lakeshore Property Owners Without Road Access Find Themselves up a Creek Without a Paddle*—In re Daniel for the Establishment of a Cartway, 30 WM. MITCHELL L. REV. 725, 752–53 (2003) (maintaining that in view of the growing importance of automotive transportation, Minnesota's cartway statute, which is analogous to the common law doctrine of easements by necessity, should be altered to allow an easement by necessity even though the property is accessible by navigable water).

155. Calvert Joint Venture # 140 v. Snider, 373 Md. 18, 39–40, 816 A.2d 854, 866 (2003).

156. *Hancock*, 236 Md. at 103–04, 202 A.2d at 602; *see also infra* Part IV.B (discussing the issue of population growth and land use in the nation).

157. *See* Kanski, *supra* note 154, at 751–52 (summarizing cases holding that water access is no longer considered a reasonable means of accessing property for certain land uses).

158. Attaway v. Davis, 707 S.W.2d 302, 303 (Ark. 1986).

of reaching his property would impose an onerous burden on landowners.[159] Based on precedent and public policy, therefore, the *Stansbury* court appropriately determined that water access was not a suitable means of accessing Lot 10A.

The court also properly resolved the question of whether an easement over Ms. Stansbury's property was reasonably necessary for MDR to enjoy Lot 10A given that a separate conservation easement prohibited the company from building on the property.[160] The Court of Appeals reasoned that the limitations could be lifted in the future, or at the very least, the property could still be used for walking along the waterfront and using the pier.[161] Thus, the *Stansbury* court aptly recognized that unlike a denial of an easement by necessity, the existing limitations on the property were not permanent and the land could still be used for other purposes.

2. *Consolidation of Lot 10A with Property Accessible by a Public Road Does Not Destroy the Necessity*

The court also properly rejected the contention that necessity ceased to exist because the prior owner consolidated Lots 10A and 179.[162] After the consolidation, the two lots merged into one and a portion of the lot, the former Lot 179, was accessible by a public road.[163] However, the court refused to assign significance to the consolidation because the portion of property that was inaccessible prior to the consolidation remained inaccessible after the consolidation.[164] Thus, the *Stansbury* court fittingly determined that necessity did not cease to exist.[165]

While this issue was one of first impression for the Court of Appeals, a number of other state courts, such as Illinois and Washington, have addressed the question and similarly concluded that an easement by necessity exists even where a portion of the property is accessible.[166] The *Stansbury* court properly aligned itself with these

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159. *Id.*

160. At the time of the lawsuit, a conservation easement prohibited the construction of any structure, except a footbridge, on Lot 10A. *Stansbury*, 390 Md. at 492, 889 A.2d at 413.

161. *Id.* at 493, 889 A.2d at 413–14.

162. *Id.* at 492, 889 A.2d at 413.

163. *Id.*

164. *Id.*

165. *See also* Hedger Bros. Cement & Materials v. Stump, 10 S.W.3d 926, 930 (Ark. Ct. App. 2000) (finding an easement by necessity to exist although part of the property in question was accessible by other means).

166. *See* Michael DiSabatino, Annotation, *Way of Necessity Where Only Part of Land is Inaccessible*, 10 A.L.R.4th 500, 505–06 & supp. at 241 (1981 & Supp. 2006) (making note of

jurisdictions on the issue of consolidation because, like Maryland, these jurisdictions require reasonable necessity, which can exist when only a portion of the property is accessible.[167] In contrast, jurisdictions that use strict necessity often hold that necessity does not exist where a portion of property is accessible.[168] Thus, the court in *Stansbury* correctly determined that consolidation of the properties did not frustrate the necessity because unlike strict necessity, reasonable necessity is more flexible and does not demand impossibility.[169]

Moreover, the Court of Appeals appropriately recognized the utility justification underlying easements by necessity.[170] As Judge Cathell noted, the ability to utilize Lot 10A does not change because of the consolidation since it continues to be impractical for MDR to access Lot 10A without crossing over Ms. Stansbury's property.[171] Even after MDR consolidated its two lots, access to Lot 10A was not improved because a channel separated the two lots and Ms. Stansbury had a property interest in the land under the water.[172] Thus, the court properly concluded that consolidation of the two lots did not diminish the necessity to traverse Ms. Stansbury's property.

B. *The Court Properly Applied the Utilitarian Theory of Modern Property Rights*

Although not explicitly stated, the Court of Appeals harmonized its decision with the utilitarian theory.[173] The court indicated its preference for the utilitarian theory by requiring only reasonable necessity instead of strict necessity.[174] Reasonable necessity is more conducive to full utilization of the land.[175]

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decisions in which courts have held that necessity exists where only a portion of property is inaccessible).

167. *See id.* at 505 & supp. at 241 (listing jurisdictions that have made similar rulings to *Stansbury*).

168. *Id.* at 504–05.

169. *See* Greenwalt v. McCardell, 178 Md. 132, 138, 12 A.2d 522, 525 (1940) (applying the reasonable necessity standard).

170. *See* Hancock v. Henderson, 236 Md. 98, 104, 202 A.2d 599, 602 (1964) (citing the public policy of full utilization of land as justification for granting an easement to property that was accessible by water).

171. *Stansbury*, 390 Md. at 495, 889 A.2d at 415.

172. *Id.* at 492, 889 A.2d at 413.

173. *See id.* at 488, 889 A.2d at 410 (alluding to the utilitarian theory by recognizing that "[t]he doctrine [of easement by necessity] is based upon public policy, which is favorable to full utilization of land," though never expressly mentioning the theory as a basis for its conclusion).

174. *Id.*

175. *See supra* Part IV.A.1.

The *Stansbury* court's decision properly corresponded with the utilitarian theory because the natural rights theory is outdated in twenty-first century property law,[176] particularly in its support of absolute rights. The natural rights theory is based on the accumulation of property through one's labor,[177] and does not take into account how effectively that property is used. Thus, though the natural rights theory allows for limitations on the right to exclude,[178] these limitations are very narrow.[179]

While the right to exclude has many benefits, this right also has a number of drawbacks if left unchecked.[180] Thus, the *Stansbury* court appropriately shaped its decision in accordance with the utilitarian theory, which is best able to duly consider these concerns by allowing for exclusive property rights when it is in the best interest of society.[181] Hence, Ms. Stansbury can have an exclusive right to property if a greater benefit results than if the property were in the commons.[182] However, if exclusivity works to the detriment of society, then it should be limited.[183] One important limitation on the right to exclude is an easement by necessity.[184]

In *Stansbury*, the Court of Appeals properly signaled to lower courts that the right of exclusivity should be limited, particularly in light of the modern concerns of overpopulation.[185] Effective utilization of land is more necessary than ever due to the increasing scarcity of land.[186] When the doctrine of easement by necessity first became prominent in England in the nineteenth century, it arose out of the need for rights of way over privatized land that had once been in the

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176. RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 281 (1951).

177. LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 32 (1977).

178. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 53–54 (2004).

179. *See* Richard A. Epstein, Book Review, *Rights and "Rights Talk,"* 105 HARV. L. REV. 1106, 1110 (1992) (discussing limitations on the right to exclude under the natural rights theory in regard to water rights, which are treated differently from rights associated with land or chattels).

180. *See* Carrier, *supra* note 178, at 29–31 (discussing incompatible uses, wealth inequality, and other potential dangers of an unchecked private property system).

181. *See id.* (discussing the various limitations to the property right of exclusion and the benefits of such limits).

182. *Id.*

183. *See id.* (noting the different limitations on the right to exclude and the benefits society derives from these limitations).

184. *Id.* at 55.

185. *See infra* notes 191–197 and accompanying text (discussing population growth and land utilization in America).

186. *See infra* notes 206–213 and accompanying text (describing the rapidly increasing need for land).

commons.[187] However, the *Stansbury* court recognized that today's crisis in property law with respect to the need for easements resulted from the subdivision of large tracts of property into smaller lots to meet the growing demand for land.[188] The *Stansbury* facts exemplify the subdivision trend because Nancy Stansbury and her brother divided a large tract of land after they inherited it.[189] In subdividing the tract, some property was left landlocked and, without an easement, was useless.[190]

Full utilization of land is increasingly critical due to the growing population and correspondingly increased need for land. Every year in the United States, "1.0 to 1.5 million acres of rural and undeveloped landscape are being converted to urban use."[191] From 1945 to 2002 alone, urban land area quadrupled in size.[192] Moreover, home ownership has risen by over 20% since the beginning of the twentieth century.[193]

America's growing need for land utilization is not surprising given the immense population growth the country has experienced. In 1850, five years before Maryland courts decided the first implied easement by necessity cases, the United States had a population of 23 million people.[194] However, at the turn of the century, the population more than tripled to 76 million.[195] Currently, the population has

187. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 784 (5th ed. 2002).

188. *See* Edward J. Heisel, Comment, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 ECOLOGY L.Q. 229, 231 n.4 (1998) (noting that many large tracts of northeastern forestland have been subdivided for vacation property); Janet Kealy, Comment, *The Hudson River Valley: A Natural Resource Threatened by Sprawl*, 7 ALB. L. ENVTL. OUTLOOK J. 154, 162–63 (2002) (projecting that population growth in the Hudson River Valley would increase the rate of "parcelization"—the subdivision of large parcels of land for development—causing open land to decline from 60% to 30% by 2050); Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 595 (1997) (noting that more and more farmers succumb to the pressure of developers and sell their land for subdivision).

189. *Stansbury*, 390 Md. at 481–83, 889 A.2d at 406–07.

190. *Id.* at 481–84, 889 A.2d at 406–08.

191. G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios*, 8 ALB. L. ENVTL. OUTLOOK J. 37, 44 (2002).

192. RUBEN N. LUBOWSKI ET AL., U.S. DEP'T OF AGRIC., MAJOR USES OF LAND IN THE UNITED STATES 5 (2002), http://www.ers.usda.gov/publications/EIB14/eib14.pdf.

193. U.S. Census Bureau, Historical Census of Housing Tables, http://www.census.gov/hhes/www/housing/census/historic/owner.html (indicating that in 1900, 46.5% of the population owned a home); BUREAU OF THE CENSUS, CENSUS BUREAU REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 4 (2006), http://www.census.gov/hhes/www/housing/hvs/qtr306/q306prss.pdf (showing that by the third quarter of 2006, homeownership rates rose to 69%).

194. U.S. Census Bureau, Population and Housing Unit Counts (1993), http://www.census.gov/population/censusdata/table-2.pdf.

195. *Id.*

risen to over 300 million people[196] and continues to rise at a rate of 0.89% per year.[197]

Utilitarianism is best able to address these modern concerns because of its flexibility in limiting the exclusivity right.[198] In *Stansbury*, the Court of Appeals reached the most efficient end by drawing on utilitarian principles—MDR can now utilize Lot 10A because it is accessible by a footbridge, and Ms. Stansbury's property rights have only been minimally affected because the easement intrudes upon only a small portion of her property that is under water.[199] It is doubtful that the same result would have been reached under the natural rights theory because of the theory's dominant focus on the right to exclude.[200] Thus, the *Stansbury* court properly promoted the utilitarian theory and, in light of this decision, Maryland courts will likely become more sympathetic to landowners who lack reasonable access to their properties, and less concerned about protecting the property right of exclusion.

C. *The* Stansbury *Court Properly Refused to Apply a Balancing Approach Because Easements by Necessity Inherently Consider the Parties' Rights*

The Court of Appeals wisely rejected the circuit court's adoption of a balancing test to resolve whether MDR could build a footbridge over Ms. Stansbury's property. Instead of deciding the issue based on the doctrine of implied easement by necessity, the circuit court allowed MDR to build a footbridge to access Lot 10A after balancing the competing interests of the parties.[201] Both the Court of Special Appeals and the Court of Appeals refused to follow suit, and instead found that an easement by necessity existed.[202] This was the proper result because to do otherwise would wreak havoc on a longstanding doctrine that remains effective.[203] Furthermore, the doctrine of ease-

196. U.S. Census Bureau, Population and Household Economic Topics, http://www.census.gov/population/www/index/html (last visited Sept. 3, 2007).

197. CIA, The World Factbook (2007), https://www.cia.gov/library/publications/the_world_factbook/geos/us.html (last visited Sept. 3, 2007).

198. *See* SCHLATTER, *supra* note 176, at 254 (discussing justifications for the utilitarian theory).

199. *See Stansbury*, 390 Md. at 497, 889 A.2d at 416 (holding that MDR is entitled to an easement by necessity).

200. *See* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 286 (1998) (describing the natural rights theory of property).

201. Stansbury v. MDR Dev., L.L.C., 161 Md. App. 594, 616, 871 A.2d 612, 625 (2005).

202. *Stansbury*, 390 Md. at 479–80, 889 A.2d at 405–06.

203. *See* Schwab v. Timmons, 589 N.W.2d 1, 8 (Wis. 1999) (refusing to adopt a balancing approach because it would overturn settled precedent and conflict with public policy).

ment by necessity already encompasses a balancing of the parties' interests, rendering a separate balancing test unnecessary.[204]

The court properly eschewed a balancing approach because it would unduly infringe upon the property right of exclusion.[205] While implied easements by necessity interfere with this right as well, a balancing approach would give lower courts far more discretion to contravene the property rights.[206] Thus, if the *Stansbury* court had used a balancing test, trial courts would have less guidance in applying the standard and hence be free to ignore the right of exclusion more often.[207]

Another argument against the circuit court's approach is that the doctrine of easement by necessity already has a balancing of rights component.[208] The Court of Appeals expressly weighed the impact of an easement on Ms. Stansbury's property.[209] Moreover, in determining whether MDR had met the necessity requirement, the court looked at the potential use of Lot 10A and whether current access to the lot was reasonably adequate for that use.[210] Other Maryland cases have considered the reasonableness of constructing alternate access in relation to the value of the property.[211] Thus, the Court of Appeals properly rejected a separate balancing test as unnecessary because the doctrine of implied easements already considers the parties' interests.

Had the *Stansbury* court embraced a balancing test, the result could have been confusion in the lower courts regarding the long-standing doctrine of implied easements by necessity.[212] The doctrine of implied easements has been applied consistently by Maryland

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204. *See* Carroll, *supra* note 147, at 476–77 (acknowledging that in determining whether to grant an implied easement by necessity, courts balance the needs and the burdens of the parties under the circumstances at hand).

205. *See Stansbury*, 390 Md. at 480 n.1, 889 A.2d at 405 n.1 (noting the importance of the right of exclusion to a private property system).

206. *See* Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 532 (2006) (noting that a rule-based approach, rather than a balancing test, permits higher courts greater control over inferior tribunals and leaves them less discretion).

207. *Id.*

208. *See* Carroll, *supra* note 147, at 476–77 (explaining that the doctrine of implied easements by necessity encompasses a balancing of the interests of the parties).

209. *Stansbury*, 390 Md. at 497, 889 A.2d at 416 (finding the impact of an easement to be minimal).

210. *Id.*

211. *See, e.g.*, Condry v. Laurie, 184 Md. 317, 322, 41 A.2d 66, 68 (1945) (determining that the cost of constructing alternative access was unreasonable).

212. *See* Schwab v. Timmons, 589 N.W.2d 1, 8 (Wis. 1999) (refusing to overturn the well-established doctrine of implied easement by necessity).

courts from the nineteenth through the twenty-first centuries.[213] While some doctrines become obsolete due to societal changes, easements by necessity have retained their effectiveness because of the flexible way that Maryland courts have applied the doctrine.[214] Thus, there was no need for the Court of Appeals to replace the doctrine because it continues to sufficiently meet contemporary concerns.[215]

Although the court's rejection of the balancing approach was appropriate, it should have more thoroughly discussed its rejection to give more comprehensive guidance to lower courts.[216] Appellate courts have a duty to anticipate the possible effects of their decisions and give guidance as to how decisions should be applied in future cases.[217] Here, the Court of Appeals failed to provide such guidance and left lower courts to guess at whether use of a balancing approach was completely foreclosed or merely circumscribed in easement by necessity cases.[218] Lower courts have only a footnote in the *Stansbury* decision to explain why the balancing test was rejected and in what circumstances.[219]

V. CONCLUSION

In *Stansbury v. MDR Development, L.L.C.*, the Court of Appeals held that an implied easement by necessity existed where a property could not be reasonably accessed through navigable waters.[220] The court properly found that MDR met all of the requirements for an implied easement by necessity, including that the easement was reasonably necessary for the enjoyment of the property.[221] While the court did not explicitly ground its holding on the utilitarian theory, it correctly invoked its principles in light of the modern concerns in property law.[222] Because the utilitarian theory allows greater flexibility in applying the doctrine of easements by necessity, the *Stansbury*

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213. *See* Calvert Joint Venture #140 v. Snider, 373 Md. 18, 40–47, 816 A.2d 854, 866–70 (2003) (reciting the history of the doctrine in Maryland's jurisprudence).

214. *See supra* Part II.B (discussing the evolution of the doctrine of easement by necessity in Maryland).

215. *See supra* Part IV.B (discussing how the *Stansbury* court's decision corresponds with the utilitarian theory and how the theory addresses current public policy concerns).

216. *See* Tiller & Cross, *supra* note 206, at 531 (describing the judicial hierarchy of courts and the importance of higher court precedent in guiding lower courts).

217. *Id.*

218. *See Stansbury*, 390 Md. at 479–80 n.1, 889 A.2d at 405 n.1 (merely stating that the balancing of the parties' rights is irrelevant without explaining why or when).

219. *Id.*

220. *See supra* Part IV.A.

221. *See supra* Part IV.A.

222. *See supra* Part IV.B.

court properly recognized that the balancing test applied by the circuit court was unnecessary to reach the proper conclusion in this case and in future cases.[223]

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223. *See supra* Part IV.C.