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Of Dangers, Conditions, Children, and Maturity: A Plea for a Comprehensible Standard in Long-standing Rules

MAUREEN STRAUB KORDESH[1]

"'Obvious' is the most dangerous word in mathematics."
E. T. Bell

"I just dropped in to see what condition my condition was in."
Kenny Rogers

This Article explores the common law doctrine of attractive nuisance in Illinois and proposes a more detailed explication of the rule. The doctrine lies in the junction between tort and contract, which might account for the incompleteness of its presentation. It argues that because law students are a significant audience for case law, the language of such rules should be as detailed and clear as possible.

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1. Associate Professor of Law, UIC John Marshall Law School. I would like to thank Keri Mikuska for her extensive research assistance on this project. I also am particularly indebted to every single student who has come through my Lawyering Skills course over the last decade and has had to grapple with this doctrine. I have gained much of my insight on this rule in particular—and common-law rules in general—from guiding you through the parsing of, inferring from, and articulation of the doctrine. Thanks also to UIC John Marshall for its support of this project.

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Unlike the majority of graduate professional students, law students come from all walks of life. Medical students and veterinary medicine students always have a science background; at the graduate level, CPAs have a business and accounting background; engineers have a mathematics/power systems background; therapists have a psychology background; and policy analysts have a social science background. Law students may have backgrounds in any of these disciplines, but also in art, music, political science, philosophy, literature, foreign language, social work, or others.

Law students, especially in the first year—when fundamental learning strategies and professional identity formation are happening—thus face professional integration that is diverse and confusing. Whether or not they have extensive backgrounds in critical reading, they have to do it. Whether or not they have extensive backgrounds in argument development, they have to do it. Whether or not they have strong writing backgrounds, they have to do it. Furthermore, law students—especially in the first year—rely on judicial opinions as their primary instructional materials. Being exposed so singularly and exclusively to the appellate opinion shapes a first-year student's expectations about the nature of law school performance: the law is adversarial, inconclusive, and even unrealistic. Not surprisingly, because basic comprehension can be difficult after reading opinions, even after discussing them and further hypotheticals in class, it is no wonder that students seek out the relative security of nutshells, hornbooks, and commercial outlines.

While the practice of law is much less opaque than a course in Torts, one goal of a legal education is to train students (who later will be lawyers) to spot unresolved questions. Depending on the practice a lawyer chooses, there may be few unresolved questions or there may be many. Students read opinion after opinion, teasing out the unresolved question there, learning how the question was resolved, grappling with new unresolved questions left by—or generated by—the resolution to that question, and learning to

articulate the steps of that proposed resolution. This is the core of the first-year curriculum: learning to think like a lawyer.

Students of architecture study, among other things, great architecture. They learn to recognize and describe the differences between good design and bad design. Medical students learn both recognized and failed courses of treatment. They practice on cadavers before being allowed—under supervision—to interact with live humans. Psychologists learn different schools of thought on the approach to the psyche. Law students jump in, essentially as uneducated judges, reading and dissecting and evaluating judicial opinions, sometimes without any context about the subject, and little context about the role of the opinion in the legal profession.

Add to this lack of context that many opinions are poorly written, or underdeveloped, or weakly organized, or inconsistent in language usage. And remember that law students are academically pretty diverse, and that very few of them have a secure grounding in the law. The reality is that law students may struggle so much with what the opinion says, they may never get to what it means. This is a serious problem for them and for those of us who educate them.

However, there is at least one way that the judiciary can be of help to the second-largest market for their written opinions: law students. This article will attempt to illustrate a specific comprehension problem posed by judicial opinions and then offer some suggestions as to its resolution.

The goal of this Article is to analyze why it is so difficult to comprehend the rule of a longstanding area of law, the law of attractive nuisance in Illinois. The Illinois Supreme Court failed to clarify the doctrine with its attractive nuisance decision in *Choate* in 2011.[2] As a lawyer, I am concerned about the law as a learned profession: cases at the supreme court level are decidedly not only about resolving a particular dispute,[3] but rather, providing guidance for the profession and informing decisions that attorneys make about how they will counsel their clients and litigate cases.[4] To some extent, those same decisions also inform the public on how to behave.[5] Therefore, where difficult-to-understand rules serve no purpose to the profession or the public, why leave them difficult to understand? More

2. Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, 980 N.E.2d 58.

3. Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1363 (1988); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1462 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995).

4. Mikva, *supra* note 3, at 1364; Schauer, *supra* note 3, at 1467.

5. Mikva, *supra* note 3, at 1365-66. While this may be true, it is also true that those who are governed by the law will probably never actually read a judicial opinion or a statute. Drury Stevenson, *To Whom is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 105-06, 109 (2003).

importantly for this paper, students are another important audience for case law. They need to learn to manage both lack of clarity and ambiguity, of course, but it is always better when the ambiguity and lack of clarity exist because there is no other recourse: the law is developing rather than unnecessarily incomprehensible.[6] If a rule so written serves no intellectual or legally relevant purpose for being written that way, then there is no reason to leave it that way. For example, the change announced in *Choate*, which purports to create a new bright-line rule in the attractive nuisance doctrine, does not resolve the lack of clarity the doctrine otherwise suffers from.[7] It probably will also fail to stop all of the litigation around train accidents involving children, the subject of that case.

Part I introduces the attractive nuisance doctrine, including a version of the rule that the court actually applies. Part II will analyze the ambiguity generated by certain elements of the rule, namely danger and maturity, along with some observations about the comprehension problem created by its use of the term "obvious" in a way that contradicts an element of the doctrine.

The literature distinguishes between bright-line rules and flexible standards (privity bar, or "spouse" in loss of consortium cases vs. reasonableness, or "significant other" in loss of consortium cases, for example).[8] The last 100 years have seen change, conflict, retreat, and re-balancing among personal injury doctrines. Notwithstanding whatever revolution took place in tort law—and it has been profound—there are some rules that are consistently stated the same way. The attractive nuisance doctrine in Illinois is one of them. An articulated rule that establishes the certain parts of the rule and the uncertain parts would go a long way toward guiding the bench and the bar; setting standards that the public can understand; and fulfilling the needs of the academy, including teachers and, most importantly, law students.[9]

Part III uses the idea that the law is a learned profession to advocate for more careful drafting of opinions that do more than resolve disputes. That is to say, appellate and supreme court decisions are also about framing doctrine, reasoning, and policy for the future, and not merely resolving the

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6. Emerging areas of the law, such as intellectual property, or new legislation, such as the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018, Pub. L. No. 115-264 (2018), are good examples.

7. *See* discussion of Choate v. Ind. Harbor Belt R.R. *infra* notes 35-58.

8. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (overruling the privity bar in cases of negligence and adopting the more flexible reasonable person standard or husband/wife in loss of consortium cases).

9. *E.g.*, *In re* Powell, 839 N.E.2d 1008, 1018-19 (Ill. 2005). While ignorance of the law is no excuse, the average person has to be able to understand what the rule is, were she to actually read it. This is the rule of lenity. *Id.*

particular dispute that engendered the decision.[10] It is no longer about whether a railroad turntable is an inherent danger or whether all six-year-olds have the maturity to comprehend the danger of falling from a height. Drafters should be pragmatic and anticipate the complexities of future dangers or evolving standards for maturity so that a rule can function more effectively and withstand the test of time. It is one thing to give a lawyer a series of less-than-ideally drafted judicial opinions: although not every judge is a great writer, lawyers should have enough knowledge and experience to parse unclear reasoning. Those who draft opinions, knowing that they might be used as teaching tools in the future, should recognize an obligation to the future of the profession and do what is in their power to contribute positively to that education.

Finally, this Article will come back around to the attractive nuisance doctrine to show how clarifying it and removing unnecessary ambiguity aids the law as a learned profession and as a teaching tool for future generations of lawyers.

I. PART I: THE DOCTRINE OF ATTRACTIVE NUISANCE

The attractive nuisance doctrine is generally agreed to have been first recognized in *Sioux City v. Stout*,[11] where the United States Supreme Court identified the "turntable" doctrine.[12] A child was injured on an unlocked railway turntable after having been attracted to play on it.[13] The court reasoned that the defendant could not have an attractive condition on its property and then set up the child's trespass as a defense to liability, knowing that the child would likely trespass to play on it.[14] Illinois also recognized the doctrine[15] and followed it until 1955, when it decided *Kahn v. James Burton Co*.[16]

The first recognized attractive nuisance case in Illinois appears to be *City of Pekin v. McMahon.*[17]

In 1955, the Illinois Supreme Court jettisoned the attractive nuisance doctrine as a distinctive theory of recovery and subsumed landowner obligations to child trespassers under the general law of negligence.[18] Reasoning that the independent doctrine had allowed inconsistent outcomes and

10. Schauer, *supra* note 3, at 1463-67.
11. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 660-61 (1873).
12. *Id.*
13. *Id.*
14. *Id.*
15. St. Louis, Vandalia & Terre Haute R.R. v. Bell, 81 Ill. 76 (1876).
16. Kahn v. James Burton Co., 126 N.E.2d 836 (Ill. 1955).
17. Pekin v. McMahon, 39 N.E. 484 (Ill. 1895).
18. *Kahn*, 126 N.E.2d at 841.

tortured reasoning,[19] the court concluded that the particular relationship between landowner and child trespasser was not so unique as to warrant an independent doctrine. Rather, the legal relationship between landowner and trespassing child would be better served within the category encompassing all of the other civil obligations involving personal injury.[20] There still is an attractive nuisance doctrine, but like other specific doctrines (medical malpractice, which is actionable only between a health care provider and a patient, for example), it exists within that framework among other negligence rules and captures a particular category of negligence.[21]

Since 1955, Illinois courts have decided dozens of cases that include questions of landowner obligation to a trespassing child injured on the premises.[22] In that time, the language of the doctrine has remained relatively unchanged, but its application has been fairly inconsistent.[23] Over these decades, however, the courts' analytical approach has become more difficult to discern, and its outcomes generally justifiable but less explicable.[24]

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19. *Id.*

20. *Id.*

21. Some of the categories of person are, for example, invitee, licensee, adult trespasser, and child trespasser. Corcoran v. Vill. of Libertyville, 383 N.E.2d 177, 180 (Ill. 1978); Rhodes v. Ill. Cent. Gulf R.R., 665 N.E.2d 1260, 1268 (Ill. 1996); Hiller v. Harsh, 426 N.E.2d 960, 964 (Ill. App. Ct. 1st 1981).

22. Searches have discovered approximately twenty-four, although the references to "attractive nuisance" are far more numerous.

23. The rule in cases about children drowning becomes consistent only after the development of the obvious danger doctrine. *Compare* Wood v. Consumers Co., 79 N.E.2d 826 (Ill. App. Ct. 2d 1948) *with* Mt. Zion State Bank & Tr. v. Consol. Commc'ns Inc., 660 N.E.2d 863, 870 (Ill. 1995). But in another case where a child was injured from a fall after riding his bike over a dirt pile, the court determined that a pile of dirt was an obvious danger, yet the injury was foreseeable. Grant v. S. Roxana Dad's Club, 886 N.E.2d 543, 551 (Ill. App. Ct. 5th 2008). *Compare* Devine v. Armour & Co., 159 Ill. App. 74, 79 (1st 1910) ("While such a building in process of destruction may be dangerous, the danger is not hidden from a child of decedent's age, while disclosed to an adult. This lad was not a mere baby. He was at least up to the average of his age. He knew as well as an adult that such a building in such condition and under such handling must fall.") *with* Hootman v. Dixon, 472 N.E.2d 1224 (Ill. App. Ct. 2d 1984) (finding no attractive nuisance when a child was injured by collapsing building that he and others were actively demolishing themselves). *But see Kahn*, 126 N.E.2d at 842 (finding that a child was too immature to know that the pile of lumber he was climbing would collapse, and that he was not actually trying to demolish it at the time).

24. So-called "obvious but obscured" cases, like T.T. *ex rel.* B.T. v. Kim, 662 N.E.2d 561 (Ill. App. Ct. 2d 1998), Trobiani v. Racienda, 238 N.E.2d 177 (Ill. App. Ct. 1st 1968). *See also* Steven R. Splitt, *The Obvious Obscured: Children and the Obvious Danger Defense*, 81 ILL. B.J. 536, 536-40 (1993). Or "recklessness and bravado" cases such as Colls v. City of Chicago, 571 N.E.2d 951, 969 (Ill. App. Ct. 1st 1991) (citing with approval RESTATEMENT (SECOND) OF TORTS § 339 cmt. m, at 204 (AM. LAW. INST. 1965); Matijevich v. Dolese & Shepard Co., 261 Ill. App. 498, 510 (1st 1931).

A. EARLY CASES

The first section of this Article will briefly describe the attractive nuisance doctrine before 1955 and present a framework for understanding the major attractive nuisance cases from 1955 until now, with the most recent decision of *Choate*.[25] The case that is generally considered to have adopted the attractive nuisance doctrine in Illinois is *City of Pekin v. McMahon*.[26] The doctrine was articulated by a later court:

> Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed. Under such circumstances he would have good reason to expect that children, from their well[-]known habits and nature, would be attracted to the dangerous thing, and its maintenance would amount to an implied invitation to them, so that they cannot be regarded as voluntary trespassers.[27]

Thus, the dangerous condition was required to be the condition that actually attracted the child to the trespass.[28] The attractive condition was required to be located in a place that made it visible from a place where a child was expected to be.[29] And, of course, the attractive, dangerous condition was required to be the proximate cause of the injury.[30] This was the general state of the law in Illinois until 1955.

B. POST-*KAHN* CASES

When *Kahn* was decided in the Illinois First District Appellate Court, there were the following bases for reversing the jury verdict in favor of the injured child: as to the contractor, the pile of lumber on private land was not inherently dangerous as a matter of law;[31] as to the lumber supplier, the

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25. Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, 980 N.E.2d 58.

26. City of Pekin v. McMahon, 39 N.E. 484 (Ill. 1895). Earlier cases in Illinois reference the concept, *e.g.*, St. Louis, Vandalia & Terre Haute R.R. v. Bell, 81 Ill. 76 (1976), maybe even Ohio & Miss. Ry. v. Bass, 36 Ill. App. 126 (4th 1889), Clay v. Chi., Burlington & Quincy R.R., 56 Ill. App. 235 (2d 1894), but scholars seem to agree that this is the first Illinois case to adopt the rule. Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75, 166 appx B (2015).

27. McDermott v. Burke, 100 N.E. 168, 170 (Ill. 1912).

28. *Id.*

29. *St. Louis, Vandalia & Terre Haute R.R.*, 81 Ill. 76.

30. Seymour v. Union Stockyards & Transit Co., 79 N.E. 950 (Ill. 1906).

31. Kahn v. James Burton Co., 117 N.E.2d 670, 677 (Ill. App. Ct. 1st 1954).

basis for non-liability is less clear. However, the supplier was found to have properly unloaded the lumber.[32]

In addition to reversing the decision of the First District Appellate Court, the Supreme Court of Illinois adopted the *Restatement (2d) of Torts* section 339[33] in *Kahn* as the standard for determining whether a landowner owes a duty of reasonable care to a child trespasser:

> A possessor of land [owes a duty of reasonable care] to children trespassing thereon caused by an artificial condition upon the land if
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved.[34]

The Illinois Supreme Court recently affirmed its fidelity to this standard in *Choate v. Indiana Harbor Belt Railroad*.[35] It is not always clear what the basis for non-liability is in any given case, and that lack of clarity makes it more difficult to work with the rule. Indeed, *Choate* itself is guilty of sloppy writing when it comes to one of the more-abused concepts in the doctrine. While all opinions save *Choate* have used the label of "attractive nuisance" when discussing this issue while simultaneously affirming their

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32. *Id.* at 673.
33. RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965).
34. *Id.* In *Kahn*, the court explains that "an exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children. In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resu[lt]ling from it." Kahn, 126 N.E.2d at 842.
35. Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, 980 N.E.2d 58.

rejection of that doctrine, this paper will refer to the issue as Landowner Obligation to Trespassing Children (LOTC).

B. The Rule of Landowner Obligation to Trespassing Children

1. Here is the rule that Illinois generally seems to apply:

> An owner or possessor of land owes a duty of reasonable care to trespassing children by an artificial condition upon the land if:
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass; and
> (b) the condition is:
> 1) one of which the possessor knows or has reason to know, and
> 2) one which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children,
> 3) because the condition
> i) is not a non-dangerous one, and
> ii) is not an obvious danger, and
> (c) the condition is one that the children because of
> their youth do not discover or realize the risk involved in intermeddling with it or in coming within
> the area made dangerous by it; and
> (d) the utility to the owner/possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved.[36]

2. How the elements of the rule have been applied:

First, there must be actual or constructive knowledge that children are likely to trespass.[37] The two main categories of facts focus on the likely presence of children[38] or the presence of a condition that likely would attract them.[39] The condition need not itself be attractive; rather, its attrac-

36. *See generally* RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965).
37. Mt. Zion State Bank & Tr. v. Consol. Commc'n., Inc., 660 N.E.2d 863, 868 (Ill. 1995); *Choate*, 2012 IL 112948, 980 N.E.2d 58 (Kilbride, J., dissenting) (critiquing that majority holding attaches a duty only when the landowner possesses actual knowledge).
38. *Kahn*, 126 N.E.2d at 841-42; Guenther *ex rel.* Guenther v. G. Grant Dickson & Sons, Inc., 525 N.E.2d 199, 201 (Ill. App. 2d 1988).
39. *Kahn*, 126 N.E.2d at 842.

tiveness is relevant only to the extent that it would cause children to trespass.[40]

In addition to being aware that children trespass, the owner must know, actually or constructively, that there is a dangerous condition on his property.[41] Sometimes the owner knows there is a condition on the property, but not that it is dangerous.[42] Sometimes the owner actually knows that there is a dangerous condition on the property.[43] Sometimes the owner is charged with constructive knowledge that there is a dangerous condition on the property.[44]

Some conditions cause injuries because the child has acted unpredictably or interacted unpredictably with the condition, or even abused it.[45] For example, a child suffered burns when he was playing on a pile of trash and lit some empty paint and paint remover cans on fire.[46] A child's lighting a trash pile on fire is not predictable conduct, which leads to the conclusion that the owner could not have realized that the condition was a dangerous one.[47] It is not that the owner did not know that a paint can is flammable; indeed, she probably did.[48] Rather, the owner could not predict that a person might light a match near it, causing it to burst into flames.[49] It is not unex-

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40. This is noted in case law as a significant change from the early attractive nuisance doctrine: the lack of an attractive condition is not an automatic bar to a conclusion that the child was owed a duty of reasonable care. *Id.* at 841.

41. Benamon v. Soo Line R.R., 689 N.E.2d 366, 374 (Ill. App. Ct. 1st. 1997); *Kahn*, 126 N.E.2d at 847; Svienty v. Pa. R.R., 132 N.E.2d 83 (Ill. App. Ct. 1st 1956).

42. Kuhn v. Goedde, 167 N.E.2d 805 (Ill. App. Ct. 4th 1960).

43. Dallas v. Granite City Steel Co., 211 N.E.2d 907 (Ill. App. Ct. 5th 1965); *Svienty*, 132 N.E.2d at 83.

44. Owner is charged with constructive knowledge that there is a condition. City of Pekin v. McMahon, 39 N.E. 484 (Ill. 1895); *Benamon*, 689 N.E.2d at 367.

45. Rasimas v. Chi. Rys., 223 Ill. App. 288 (1st 1921); O'Donnell v. City of Chicago, 6 N.E.2d 449 (Ill. App. Ct. 1st 1937); Kalman v. Cohen, 203 Ill. App. 597 (2d 1916); Niemann v. Vermilion Cty. Hous. Auth., 428 N.E.2d 706, 709 (Ill. App. Ct. 4th 1981).

46. Driscoll v. C. Rasmussen Corp., 219 N.E.2d 483, 484 (Ill. 1966).

47. *Id.* at 485 ("[C]ontents splashed on clothing and the clothing later ignited by fire obtained at other places . . . is not the natural and probable consequence of maintaining a trash pile.").

48. *Id.* ("[Paint] is of course combustible, as are any number of other materials ordinarily found on trash piles, and it can be made dangerous if ignited or brought into contact with fire.").

49. *Id.* ("Defendant could hardly have foreseen that cans might be opened, the contents splashed on clothing and the clothing later ignited by fire obtained at other places.").

pected that someone might climb a ladder.[50] It is unexpected that someone might light a match near a paint can.[51]

Third, if there is a legally cognizable danger, there must also be an assessment of the utility of the dangerous condition to the owner balanced against the cost to reduce the risk.[52] On top of that, the cost of the child's injury must be weighed against the utility/cost to the owner.[53] Thus, a very dangerous condition may be very useful to an owner.[54] If the cost to reduce that risk is high,[55] then those factors will weigh against even an expensive injury to a child trespasser.[56] If the utility is high and the cost to reduce the risk is low,[57] then a less costly injury to a child trespasser may give rise to a duty of reasonable care for the owner.[58]

While each of these elements is not always easy to apply, the language used to express them has analogues throughout tort law. There may be differences of opinion about the correct conclusion in particular cases, but there is no real lack of clarity about their meaning or how to apply them.

II. PART II: AMBIGUITIES IN THE ATTRACTIVE NUISANCE DOCTRINE

The real difficulty in the meaning and application of this rule lies in the middle two elements. In their Restatement form, the second element is the "danger" requirement, and the third element is the "maturity" require-

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50. Kahn v. James Burton Co., 126 N.E.2d 836, 840 (Ill. 1955) ("In the case at bar the questions [were] whether the lumber was so piled as to create an unreasonable danger to children playing thereon, and whether it was so attractive to children as to suggest the probability that children would climb onto it.").

51. *Driscoll*, 219 N.E.2d at 485 ("[T]his is an unusual or extraordinary use, which a person cannot reasonably be required to anticipate in the absence of something to put him on notice of such a practice.").

52. *Kahn*, 126 N.E.2d at 842; Dallas v. Granite City Steel Co., 211 N.E.2d 907, 911 (Ill. App. Ct. 5th 1965).

53. *Kahn*, 126 N.E.2d at 842.

54. *See* Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, 980 N.E.2d 58.

55. *Id.* (finding that the cost to reduce the risk to be fencing every mile of the statewide railroad system). Evelyn Atkinson, *Creating the Reasonable Child: Risk, Responsibility, and the Attractive Nuisance Doctrine*, 42 LAW & SOC. INQUIRY 1122 (2017). She notes in her history of the doctrine's development: "Yet to undertake to guard against all trespasser injury themselves, railroads claimed, would involve enormous expense, in many cases equal to or greater than the entire capitalization of the railroads." *Id.* at 1138 (internal quotation marks omitted).

56. *Choate*, 2012 IL 112948, 980 N.E.2d 58. In this case, of course, the Illinois Supreme Court actually went so far as to declare the risks of railroads to be obvious.

57. Pasierb v. Hanover Park Park Dist., 431 N.E.2d 1218 (Ill. App. Ct. 1st 1981) (balancing the high utility of access to a creek in a park covered by ice and snow against low cost of posting warning signs of the location of the snow-covered creek to reduce risk of missing it and falling in and drowning).

58. *Id.* (holding that the low cost of posting warning signs satisfied the test).

ment.[59] In reality, the "danger" analysis is only about whether the condition was a non-danger.[60] The maturity analysis encompasses both the obvious danger analysis and the real maturity analysis, but for different reasons. There, the plaintiff must prove that the condition was not an obvious danger, one that a child allowed to be at large is conclusively presumed to appreciate; and then the plaintiff must prove that the condition was the kind of danger that the particular child was too immature to appreciate.[61] It is incorrect to treat the obvious danger doctrine as the opposite of a dangerous condition.[62]

A. NON-DANGERS:

1. Simply Not Dangerous

Many conditions that cause injury are not actually dangerous conditions. For example, in *Sahara v. Ragnar Benson, Inc.*, a child was injured when another child threw a clod of dirt at him and hit him in the eye.[63] The clod of dirt happened to contain a shard of broken glass, and the shard caused a more severe injury than the clod of dirt would have on its own.[64] However, a clod of dirt is simply not a dangerous instrumentality.[65] Similarly, a stick is not a dangerous instrumentality.[66] That a child was injured when another poked him in the eye with it, does not change that conclusion. A stick is not a dangerous thing.[67]

Under this category of non-dangers are also conditions that are not dangerous, but become dangerous because the child abused them.[68] Unlike a stick, which is not necessarily being abused when a child pokes another in the eye, spray cans with their contents under pressure might become dan-

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59. RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965).

60. Novak v. C.M.S. Builders & Developers, 404 N.E.2d 918, 922 (Ill. App. Ct. 1st 1980); Mt. Zion State Bank & Tr. v. Consol. Commc'ns, Inc., 660 N.E.2d 863, 870 (Ill. 1995); Stevens v. Riley, 580 N.E.2d 160, 164-65 (Ill. App. Ct. 2d 1991).

61. Fuller v. Justice, 453 N.E.2d 1133, 1138 (Ill. App. Ct. 2d 1983).

62. Corcoran v. Vill. of Libertyville, 383 N.E.2d 177, 181 (Ill. 1978); Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, ¶ 32, 980 N.E.2d 58, 66.

63. Sahara v. Ragnar Benson, Inc., 367 N.E.2d 233 (Ill. App. Ct. 1st 1977). *Accord* Donehue v. Duvall, 243 N.E.2d 222 (Ill. 1968). *See, e.g.*, Cole v. Hous. Auth. of La Salle Cty., 385 N.E.2d 382, 386 (Ill. App. Ct. 3d 1979) (finding a metal stake not inherently dangerous); Landman v. M. Susan Assocs., 211 N.E.2d 407, 409-10 (Ill. App. Ct. 1st 1965) (finding sand thrown by a child to be a non-danger).

64. *Sahara*, 367 N.E.2d at 233.

65. *Id.*

66. Niemann v. Vermillion Cty. Hous. Auth., 428 N.E.2d 706, 709 (Ill. App. Ct. 4th 1981).

67. *Id.*

68. Driscoll v. C. Rasmussen Corp., 219 N.E.2d 483, 485 (Ill. 1966).

gerous, but only if they are abused, by being ignited, for example.[69] An empty spray can is not itself dangerous.

2. *Obvious Dangers*

Some conditions are "obvious dangers."[70] While there is ambiguity around the application of this doctrine in Illinois, the judicial definition of "obvious danger" is either: a) a danger that any child old enough to be at large should appreciate, a standard-based approach; or b) the dangers of being burned by fire, drowned in water, of falling from a height, or being hit by a train, a categorical approach.[71] The clearer approach would be to limit obvious dangers to the latter standard of falling, burning, drowning, and being hit by a train. All children injured by fire, water, heights, or trains are conclusively presumed to be old enough to be at large.[72] In general, Illinois follows the categorical approach. Thus, for example, it is appropriate to conclude that the danger was obvious when a child was burned by a candle,[73] or fell into a ditch,[74] or drowned in a pond,[75] or lost a limb falling from a moving train.[76]

"Obvious danger" is a legal conclusion: of course water is in fact dangerous because it poses a drowning risk; of course fire is in fact dangerous because it poses a burning risk; of course heights are in fact dangerous because they pose a falling risk; of course trains are in fact dangerous because they pose an impact risk. However, for policy reasons—including putting responsibility to protect children from these very common risks on the parents[77] and protecting the economy from significant financial pressure be-

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69. *Id.*

70. *See* Pasierb v. Hanover Park Park Dist., 431 N.E.2d 1218 (Ill. App. Ct. 1st 1981).

71. Choate v. Ind. Harbor Belt R.R., 2012 IL 112948, ¶ 32, 980 N.E.2d 58, 66 ("'In Illinois, obvious dangers include fire, drowning in water, or falling from a height.' We observe that this is not an exclusive list. Rather, there are 'many dangers * * * which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large.'") (citation omitted).

72. Hagy v. McHenry Cty. Conservation Dist., 546 N.E.2d 77, 81 (Ill. App. Ct. 2d 1989); Ross v. United States, 910 F.2d 1422, 1427 (7th Cir. 1990); Logan v. Old Enter. Farms, Ltd., 564 N.E.2d 778, 781 (Ill. 1990); Jakubowski v. Alden-Bennett Constr. Co., 763 N.E.2d 790, 795 (Ill. App. Ct. 1st 2002).

73. Sampson *ex rel.* Sampson v. Zimmerman, 502 N.E.2d 846 (Ill. App. Ct. 2d 1986).

74. Corcoran v. Vill. of Libertyville, 383 N.E.2d 177 (Ill. 1978).

75. Cope v. Doe, 464 N.E.2d 1023 (Ill. 1984).

76. *Choate*, 2012 IL 112948, 980 N.E.2d 58.

77. Mt. Zion State Bank & Tr. v. Consol. Commc'ns, Inc., 660 N.E.2d 863 (Ill. 1995).

cause of the commonness of these risks[78]—Illinois has deemed them "obvious dangers" and, therefore, not the types of dangers against which landowners ever owe a duty of reasonable care to protect a child.[79] Therefore, under the law of LOTC, obvious dangers are not "dangers" in the legal sense. Because they are not "dangers," landowners need never wonder whether the condition might injure a child and are obligated only to refrain from willful or wanton injury to children as a result of the presence of such conditions on the land.[80]

Confusion ensues with the doctrine of obvious danger because the Illinois courts use this phrase to mean both "obvious danger" as described above, and also to mean a danger that a child in a particular case should have appreciated. For example, where a ten-year-old boy was electrocuted by a downed wire, the court stated: "In determining whether children, because of their immaturity, will be incapable of appreciating the risk involved in a dangerous condition, it has been held that obvious risks *which children of a similar age and experience* would be expected to appreciate create no duty to remedy the dangerous condition."[81]

Similarly, "as a matter of law, electric power lines have been held to present *an obvious danger to 14–year–olds*."[82] Or: "darkness concealed the open and obvious danger of the power lines."[83]

Even in the case of moving trains, the court states, rather ambiguously:

> Our appellate court long ago held that it was not the duty of a railroad to keep watch and warn boys not to jump onto its cars because jumping from the ground upon a moving freight train is dangerous, and all men and all ordinarily intelligent boys know it to be so.[84]

And furthermore: "The existence of a duty necessarily subsumes the question of whether the danger of a particular condition should be *obvious to children of the plaintiff's age*."[85]

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78. *Choate*, 2012 IL 112948, 980 N.E.2d 58.
79. *Id.*
80. *Id.*
81. Bonder v. Commonwealth Edison Co., 522 N.E.2d 227, 229 (Ill. App. Ct. 1st 1988) (emphasis added).
82. Booth v. Goodyear Tire & Rubber Co., 587 N.E.2d 9, 12 (Ill. App. Ct. 3d 1992) (emphasis added).
83. Hansen v. Goodyear Tire & Rubber Co., 551 N.E.2d 253, 257 (Ill. App. Ct. 3d 1990) (stating power lines have never been held, as a matter of law, to constitute an obvious danger like drowning).
84. *Id.* at 264. *See also* Fitzgerald v. Chi., Burlington & Quincy R.R., 114 Ill. App. 118 (1st 1904) (12-year-old plaintiff); LeBeau v. Pittsburgh, C., 69 Ill. App. 557 (1st 1897) (10-year-old plaintiff).
85. *Choate*, 2012 IL 112948, ¶ 34, 980 N.E.2d at 67 (emphasis added).

While the court does not always use the phrase "obvious danger" when analyzing dangers that are not categorically obvious, it does so often enough to make the term confusing. It is unlikely that the court really means to categorize every single incident of a child being hit by a car, or electrocuted, or injured by a condition in the light of day as "obvious dangers" even though it sometimes describes such events in some cases as "obviously dangerous." What the court appears to mean is that the danger should have been obvious *to that child*: in other words, a child of that age and maturity should have appreciated the risk. By legal definition in Illinois, such a danger is not "obvious."[86]

Obvious dangers, then, are never legally dangerous and cannot lead to a higher duty in the possessor to take reasonable care to prevent injury to trespassing children.[87] Any child who *is* left at large is presumed to be old enough to be left at large[88] and is conclusively presumed to be able to protect himself from such risks.[89]

B. DANGERS THAT A CHILD MAY NOT BE MATURE ENOUGH TO APPRECIATE

The "maturity" question really subsumes the standard-based analysis and asks whether other conditions should have been appreciated by a child at the age of the injured child.[90]

These are the dangers that are the true subject of LOTC.[91] Once it is clear that the condition was not non-dangerous, and that it was not an obvious danger, then it is possible to analyze whether *this* child was mature enough to appreciate *that* risk. The implication is that some children will be mature enough to appreciate a particular risk even as other children are not mature enough to appreciate the same risk. Thus, if a condition is not non-dangerous and is not an "obvious danger," then the analysis can address the child's maturity and the dangerousness of the particular condition that caused the injury. They have to be analyzed together, of course, because a particular risk in this category might not be understood by a seven-year-old but might be very clear to her ten-year-old brother.

For example, an eleven-year-old child was not able to understand the risk of playing on a pile of construction lumber.[92] The lumber was piled

86. Mt. Zion State Bank & Tr. v. Consol. Commc'ns, Inc., 660 N.E.2d 863 (Ill. 1995).
87. Cope v. Doe, 464 N.E.2d 1023 (Ill. 1984).
88. *Id.* at 1027. Stevens v. Riley, 580 N.E.2d 160, 165 (Ill. App. Ct. 2d 1991).
89. *Cope*, 464 N.E.2d at 1027; *Stevens,* 580 N.E.2d at 165.
90. Am. Nat'l Bank & Tr. Co. v. Pa. R.R., 202 N.E.2d 79 (Ill. App. Ct. 1st 1964).
91. Kahn v. James Burton Co., 126 N.E.2d 836 (Ill. 1955).
92. *Id.*

with the lighter boards on the bottom and the heavier boards on top, making the pile unstable and therefore a collapsing risk. The child—at age eleven—would have had to figure out first that the light boards were on the bottom and the heavy ones on the top, which may not have been discernable, and then he would have had to understand that when something heavy is on top of something light, an unstable situation is created and may result in the heavy thing overbalancing and falling from the pile and the pile collapsing. Furthermore, he would also have had to understand how heavy a large piece of construction lumber actually is. That is a lot for a child of eleven to comprehend.[93]

In another case, the ten-year-old child was injured when he struck the concrete foundation at the bottom of an excavation site.[94] He had been playing on a mound of dirt next to the site when he slipped. In order to appreciate the risk of injury, he would have had to realize first that he could slip on the dirt pile and second that, because the dirt pile was so close to the hole in the ground, he might tumble in. Finally, he would have had to know that the bottom of the hole was a concrete foundation and if he did fall, he would be falling onto concrete, a more injurious surface than dirt. There, the court held that the situation was so complicated, a ten-year-old child might not be able to figure it out.[95]

Finally, two very young children were injured when they were caught under a tarpaulin that covered an in-ground pool and nearly drowned.[96] They had been playing on top of it and it collapsed under their weight, tangled them in it, and held them underwater long enough to cause serious injury.[97] While the children nearly drowned, the risk that they were exposed to was not a drowning risk, but rather a suffocation risk caused by the unstable tarp.[98] The children would have had to understand that the tarp, which was dirty and covered with leaves, was positioned over water and not solid ground, and that if it gave way, it would sink and could catch them, pull them under, and cover them as it folded into itself under the weight of the water. They would also have had to understand that the tarp would be difficult to move once it was under the water and they would have a hard time swimming around it to come up for air. At ages two and five respectively, that sort of danger was incomprehensible.[99]

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93. *Id.*

94. Novak v. C.M.S. Builders & Developers, 404 N.E.2d 918, 921 (Ill. App. Ct. 1st 1980).

95. *Id.*

96. T.T. *ex rel.* B.T. v. Kim, 662 N.E.2d 561 (Ill. App. Ct. 2d 1998).

97. *Id.*

98. *Id.*

99. *E.g.*, *id.* This kind of condition has sometimes been termed an "obscured obvious" danger. Splitt, *supra* note 24. Though it seems counter-productive to use this oxymo-

The Illinois Fifth District Appellate Court, in *Mt. Zion State Bank & Trust v. Consolidated Communications*, posited a calculus for determining a child's maturity—particularly the maturity of children under the age of seven:

> The developmental-milestone theory of Jean Piaget, a noted child development expert, provides insight:
>
> Birth-2 years: —the major developmental tasks are coordination of the infant's actions or motor activities
>
> 8-12 months: —children use previous behavioral achievements primarily as the basis for adding new achievements to their expanding repertoire
> —ends and means are differentiated by experimenting
>
> 12-18 months: —discovery of new means through experimentation
> —curiosity and novelty-seeking behavior reasoning comes into play and is developed
> —play is important
>
> 2-7 years: —continuous investigation of one's world develops
> —the child knows the world only as he sees it
> —play occupies most of the waking hours; "how" and "why" becomes a primary tool for adaptation
> —imaginary play is important
> —the child *cannot* merge concepts of objects, space, and causality into interrelationships with a concept of time
> —the first real *beginning* of cognition occurs
> —the child can think of only *one* idea at a time

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ron, the analysis is really about the nature of the risk, not the immediate cause of the injury. The nature of the risk in *T.T.* was that the children might become tangled in the tarpaulin and be subjected to the suffocation risk presented by water. *T.T.*, 662 N.E.2d at 561. In *Cope*, in contrast, the nature of the risk was that the children might fall into the water and be subject to the suffocation risk presented by it. Cope v. Doe, 464 N.E.2d 1023 (Ill. 1984). It is "obvious" that when one stands next to water, one could fall in and drown. It is not obvious to everyone that when one stands on a tarpaulin over a swimming pool that might not even be visible beneath, the tarpaulin could float free and drag one down into the water beneath. Some, maybe even most, adults will understand this situation; young children will not. *Cf.* Corcoran v. Vill. of Libertyville, 383 N.E.2d 177 (Ill. 1978); Kahn v. James Burton Co., 126 N.E.2d 836 (Ill. 1955).

7-11 years: —the child examines parts to gain knowledge of the whole
—perceptions are more accurate
—play is used for understanding the physical and social world

12-15 years: —childhood ends and youth begins
—there is a systematic approach to problems
—there is logical deduction by implication
—the individual thinks beyond the present.[100]

Thus, a child's ability to appreciate a particular risk is a function, *f(x)*, of the complexity of the danger and his own developmental stage. It is like an *x-y* axis: as the child's maturity increases, the complexity of the risk must also increase if a child is to be found incapable of appreciating it. It is not the goal of this paper to propose what the particular maturity/risk calculus should be; rather, it is to propose that the court recognize its own pattern in deciding these cases and clarify the standards to the extent that it has been applying them consistently.

III. PART III: A PLEA FOR A COMPREHENSIBLE STANDARD

A. THE ROLE OF THE JUDICIARY IN LEGAL EDUCATION

Lawyers are bound in every jurisdiction by a code of professional conduct.[101] Although judges do not represent clients, they are lawyers and therefore members of the legal profession.[102] The preamble to the rules of professional conduct states: "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education."[103] While there are many ways that judges serve the public interest and also engage in teaching the public about the law, one way that judges—

100. Mt. Zion State Bank & Tr. v. Consol. Commc'ns, Inc., 641 N.E.2d 1228, 1233-34 (Ill. App. Ct. 5th 1994), *rev'd on other grounds,* 660 N.E.2d 863 (Ill. 1995) (quoting DAVID L. GALLAHUE, UNDERSTANDING MOTOR DEVELOPMENT: INFANTS, CHILDREN, ADOLESCENTS, ADULTS 29-33 (1982)). Judith Olans Brown notes that a "timetable for human development" is a relatively recent concept, originating with Jean Piaget's work. Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1246 (1999). *See also* JEAN PIAGET, THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY (Margorie Gabain trans., 1966).

101. *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR. ASS'N 2019).

102. *Id.*

103. *Id. Accord* Illinois Rules of Professional Conduct of 2010, Court Rules ILCS (West 2019); Rules of Professional Conduct, Ind. Code Ann. § 34 (West 2005).

living and dead—reach beyond the courtroom every day, and in a profound way, is in the law school classroom. In the first year alone, students will read numerous judicial decisions. While these decisions are likely edited for length and content in doctrinal classes so as to focus students on particular substantive content, they are nonetheless judicial writing in the act of deciding disputes.[104] It is primarily through this vehicle that students in their first year will begin to develop their first thinking habits of a lawyer.[105]

B. WHAT DO JUDGES DO WHEN THEY WRITE JUDICIAL OPINIONS?

Judicial opinions are important in legal education. However, judges do not generally, if ever, write opinions with law students in mind. These opinions are prepared in order to decide, to explain and justify, and to guide.[106] In their opinions, judges also lay down rules that must be followed in the future.[107] A given opinion may address only one small part of a larger rule, and many opinions may constitute the full expression of a rule, whether statutory or common law.

However, a rule to be analyzed is—or at least can be—stated consistently the same way at the outset of a judicial opinion.[108] Such commonly stated rules are found not only in judicial opinions, but also in the Restatements, Model Laws, countless headnotes, and opinion syllabi. Referred to by many as "black-letter law," these formulations are frequently and consistently articulated in the same way across the judicial opinions of any jurisdiction. Judges regularly restate these rules in their opinions. Judges, lawyers, and students rely on them as a starting point for the nuanced analysis that will follow to explain and justify the particularized outcome of a dispute. Many of these formulations are necessarily vague: the reasonable person, balancing between the public interest and the individual's rights, or cruel and unusual punishment, as examples. The particular contours of a

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104. Schauer, *supra* note 3, at 1472. While there may be some disagreement as to whether an edited decision is still a piece of judicial writing, there is no question that law students read a lot of judicial writing.

105. Stevenson, *supra* note 5, at 146. Mr. Stevenson does not address law students as a possible audience of the law, although he does discuss lawyers generally as readers of law.

106. Schauer, *supra* note 3 at 1465, 1467.

107. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1246 (2007) (pointing out that judicial decisions now must be written and published in order to be accepted as precedent).

108. For example, the tort of negligence is routinely introduced in case law as requiring duty, breach, proximate cause, and injury. *See, e.g.*, Choate v. Ind. Harbor Belt R.R., 2012 IL 1129418, ¶ 22, 980 N.E.2d 58, 64. A valid contract requires offer, acceptance, and consideration. Consideration is consistently found when there is benefit to the promisor or detriment to the promisee. *See, e.g.*, Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639-40 (Ill. 1977).

rule's interpretation may change over the decades.[109] However, what need never change is a clear articulation of the rule itself (unless, of course the language of the rule must be changed as a result of an opinion or amendment). When a rule is unnecessarily difficult to comprehend, it is a judge who can change that presentation for the better.

Indeed, the Illinois Supreme Court adopted the original iteration of the modern attractive nuisance doctrine in *Kahn*, the language found in the *Restatement (2d) of Torts* section 339.[110] After more than six decades of use, the test that is used in Illinois is more comprehensible in the form and content offered above; the court could use its next opportunity to correct that matter.

The suggestion offered here will not change the current rule as it has been interpreted and applied in the past. The change will make the rule more comprehensible, and it might keep the lines clearer between the elements of the rule. For example, in *Choate*, the court in its reasoning states: "[A] landowner has no duty to remedy a dangerous condition if it presents *obvious risks that children generally of the plaintiff's age* would be expected to appreciate and avoid."[111] Dominic Choate, the boy who was injured, was nearly thirteen years old at the time of the accident. A danger that is "obvious" to a thirteen-year-old is not an obvious danger at all; rather, it is the kind of risk that a child of Dominic Choate's age and maturity

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109. Furman v. Georgia, 408 U.S. 238 (1972) (for example, execution for rape became, in 1972, a violation of the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (execution of juveniles was permissible until 2005). The language of the Amendment has not changed, but certainly the interpretation of its scope has.

110. THE RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965): A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Id.

111. *Choate*, 2012 IL 1129418, ¶ 31, 980 N.E.2d at 66 (emphasis added).

was capable of understanding.[112] Thus, although the court goes on to use other language to define an obvious danger—that "a landowner 'is free to rely upon the assumption that any child old enough to be allowed at large by his parents will appreciate certain obvious dangers'"[113]—its lack of precision at this crucial point in its reasoning creates the kind of confusion that is unwarranted.

There are many explanations for the variable readability of judicial opinions. Judges are reaching decisions, not writing award-winning prose.[114] Judges are extremely busy.[115] Judges have varying levels of experience.[116] Not all judges are good—let alone exceptional—writers.[117] These arguments have been treated elsewhere, and they are all legitimate explana-

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112. *Id.* (this is an issue for the third element of the *Kahn* exception, not the second).

113. *Id.*

114. Elizabeth Mertz, *Undervaluing Indeterminacy: Translating Social Science into Law*, 60 DEPAUL L. REV. 397, 402 (2011). Schauer, *supra* note 3, at 1466 ("[I]t is far from self-evident that a poorly written, inaccessible, unstylistic, and highly complex opinion is any more likely to fail as a piece of legal reasoning than one that is well written, understandable by a wide audience, elegant, and simple.").

115. For example, in 2017, the United States Courts of Appeals (excluding the Federal Circuit) issued 36,992 opinions and orders, 31,758 of which were "opinions and orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based." *U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits*, ADMIN. OFF. U.S. COURTS (Sept. 30, 2017), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2017.pdf [https://perma.cc/L6L4-K2LU] (the Seventh Circuit accounted for 1,694 of those opinions and orders). In 2017 in Illinois, Appellate Courts disposed of 6,300 cases, issuing 4,039 opinions and orders. *Annual Report of the Illinois Courts: Statistical Summary*, ADMIN. OFF. ILL. COURTS, 152 (2017), https://courts.illinois.gov/SupremeCourt/AnnualReport/2018/2017_Statistical_Summary_Final.pdf [https://perma.cc/5FSS-FGK5].

116. For example, Judge Michael Hun Park of the United States Court of Appeals for the Second Circuit has been a judge since May 2019. *History of the Federal Judiciary: Michael Hun Park*, FED. JUD. CTR., https://www.fjc.gov/history/judges/park-michael-hun [https://perma.cc/FVH9-B5RF]. On the other hand, Judge Pauline Newman of the United States Court of Appeals for the Federal Circuit has been a judge since January 1984. *History of the Federal Judiciary: Pauline Newman*, FED. JUD. CTR., https://www.fjc.gov/history/judges/newman-pauline [https://perma.cc/72W9-DWXP].

117. The plethora of writing on this point is proof itself, as is the experience of every lawyer, law student, and other regular reader of judicial opinions. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?),* 62 U. CHI. L. REV. 1421, 1437-43 (1995) (whether they are "bad" or "good" writers can be based on a single opinion); Edward J. Bander, *The Ten Worst Judicial Opinions Ever Written*, 44 CHITTY'S L.J. & FAM. L. REV., no. 2, 1996, at 17 (a disagreed-upon outcome); Stephanie Mencimer, *Sonia Sotomayor's Prose Problem*, MOTHER JONES (June 3, 2009), https://www.motherjones.com/politics/2009/06/sonia-sotomayors-prose-problem/ [https://perma.cc/U9UM-SDVQ]. *Contra* Ross Guberman, *Does Sotomayor Write Well?*, LEGAL WRITING PRO, https://www.legalwritingpro.com/articles/sotomayor-write-well/ [https://perma.cc/U8YL-KVXV].

tions for the variability in the opinions that students read. There are two other possibilities to consider. First, in particular matters of substance, the substantive law itself creates difficulties for the judge to explain a decision. Second, judges do not consider students as an audience for their writing. In the matter of attractive nuisance, the doctrine exists between the clear boundaries of tort and the clear boundaries of property, which are systems of rights that have very different goals.

What is the basic goal of a tort system? It is to protect the bodily integrity of persons.[118] What is the goal of a property system? It is to protect the rights of ownership: the rights to use, exclude, transfer, and destroy.[119] What happens when the protection of bodily integrity crashes into the rights of ownership? One system has to yield to the other. In the arena of attractive nuisance, the right of an owner to maintain her land in any manner she chooses clashes with the protection of a child's bodily integrity.[120]

Most attractive nuisance decisions start with the presumptive rule that a landowner owes no duty to a trespasser—even a child—other than to refrain from willful or wanton harm.[121] That is to say, there is a rebuttable presumption of immunity in the event of an injury.[122] In order to raise the landowner's duty from one to refrain from willful or wanton conduct to that of reasonable care, a child has to prove: first, that the landowner had at least constructive notice of a child's likely presence. Thus, even if the landowner lives on the same road as a school or a park or a library or a basketball court, without proof demonstrating that she should have known children were likely to trespass, she still has the duty only to refrain from willful or wanton action or inaction that results in injury.[123] The artificial condition on the property must be proven to not be a non-danger and also a non-obvious danger. If this is not proven, the landowner still has the duty only to refrain from willful or wanton action or inaction that results in injury.

The child must also prove that the cost to reduce the risk of injury would be low compared to the cost of the actual injury. Thus, if a child breaks his arm, he might not be able to prove the cost equation, whereas a

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118. Mt. Zion State Bank & Tr. v. Consol. Commc'n, 641 N.E.2d 1228, 1234 (Ill. App. Ct. 5th 1994) (quoting William L. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 458 (1959)).

119. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 6 (West Pub. Co., 3d ed. 2000).

120. Robert S. Driscoll, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for its Future*, 82 NOTRE DAME L. REV. 881, 895 (2006).

121. Kahn v. James Burton Co., 126 N.E.2d 836, 841-42 (Ill. 1955).

122. *Id.*

123. The rule of reasonable care is an elements test; therefore, failure to prove any single element will result in the conclusion that the duty is one of willful or wanton disregard for a child's safety. *See, e.g.*, Smith v. Chi. Park Dist., 646 N.E.2d 1330, 1334-35 (Ill. App. Ct. 1st 1995).

child who loses his arm may be able to prove the cost equation, assuming the same condition on the land and the same cost to reduce the risk in both instances. If the cost equation favors the landowner, the landowner still has the duty to refrain only from willful and wanton action or inaction that results in injury. Thus, a landowner has immunity from liability when a condition on the land, even if it is known that children are likely to play there, or an injury has occurred, or the cost to reduce the risk exceeds the cost of the injury, unless all of the other elements of the rule are fulfilled. Given that the law of tort is designed to remediate injury and that, as a remedial response, it is generally read broadly,[124] what might explain what looks on the surface like a dismissive response to personal injuries suffered by children, injuries whose occurrence could be anticipated and whose causation is clear?

There is a conception that private property *is* the right to be free from regulation.[125] This is a powerful idea that carries a tremendous amount of energy in legal discourse. It might even qualify as a myth, not in the sense that it is untrue, but rather that it is an animating energy in the law and in the social order.[126] It is the Blackstonian ideal, accepted as the only reasonable reality:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be

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124. One of the fundamental canons of rule construction is that remedial rules are to be read broadly. Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983) (known as the "Herman rule"); 1 WILLIAM BLACKSTONE, COMMENTARIES *87, https://www.nationallibertyalliance.org/files/docs/Books/Blackstone%20vol%201.pdf [https://perma.cc/F9BZ-9RSL] ("There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy ... [a]nd it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy."). *See also* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983) (arguing that reading statutes broadly undermines the legislature's intent).

125. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1298 (1996) ("Many businesses other than innkeepers and common carriers were thought to be involved in "common callings" or "public employment" -- and were characterized by the adjective "common" in both judicial opinions and treatises in the late eighteenth and early nineteenth centuries -- because they "held themselves out" as ready to serve the public. Only after the Civil War was the presumption created that private property entailed the right to be free from regulation.").

126. JOSEPH CAMPBELL, THE POWER OF MYTH 94-95 (Betty Sue Flowers ed., Doubleday 1988) ("Myth is not a lie . . . it is metaphorical . . . Myths serve basically four functions: … The third function is the sociological one, supporting and validating a certain social order.").

> more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter [internal citation omitted] has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free * customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes [internal citation omitted] it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.
>
> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.[127]

Even with such powerful language, even with the historical record of the colonists' wariness of the power of the Crown to expropriate their land in the New World, however, there is no way to square the modern reality of landowners' responsibility to the rest of the world to adhere to norms that are other than those they might choose themselves. Change in a use of the environment affects the environment elsewhere. Tax incentives to foster development in one state may depress the economy of another. Land use restrictions in one locality could lead to reduced crime there, but increased crime in the neighboring municipality. The era of land management through minimalist private laws like the Common Enemy doctrine, lateral subsidence, and adverse possession has long since yielded to greater community responsibility. Common interest communities generate what are essentially private zoning ordinances. The reciprocal restrictions—often extensive, intrusive, and detailed—offer proof that landowners are keenly interested in

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127. BLACKSTONE, *supra* note 124, at *139.

what their neighbors do with their land and are increasingly willing to be regulated themselves in order to have a say in it.

If increasing private and public imperatives enforcing greater attentiveness to the use and maintenance of land suggest that the Blackstonian view of private property has lost power, the outcomes in injury cases involving children is puzzling. The decisional framework that courts use is based in the language of property rights, not surprisingly, and the desire to bring forward the language—and therefore values—of an earlier era is strong, especially in an area of law governed exclusively by the common law.

Who, owning or using a thing that causes an injury, will not be held to a duty of reasonable care in the adjudication of a claim of negligence? Narrowing the universe of possible injurious conditions to a physical object, under what circumstances is the owner of an object that causes injury not held to a duty of reasonable care when there is a determination of whether the owner was negligent for causing or allowing the injury to occur? Why would there be a distinction in liability based on the instrument that brought about the injury?

In tort law, the focus is on the relationship between the injured party and the owner or user of the instrumentality that caused the injury. If a user of a bicycle runs over a person, the focus is on the user of the bicycle and the injured party. If the instrumentality is a car, or a skateboard, or roller blades, the analysis will be the same: did the user do or fail to do something that he had a duty to avoid or accomplish? What if the instrumentality is an artificial condition on land? Should not the owner or user be scrutinized as to whether she did or failed to do something that she had a duty to avoid or accomplish? The land effectively "committed" a tort.

The starting point of immunity conferred by property ownership leads to a different analysis than the starting point of a landowner with a relationship to the people around her in the world.

If courts were to analyze attractive nuisance as a tort like any other tort and not colored by the instrumentality of the injury, outcomes might not change: that is fine. To view the injury from the lens of property rights needlessly complicates applying the doctrine, however. To use the rhetoric of private property ownership further ignores the changed relationship of modern landowners to the broader community. Both clarity in enunciating the doctrine and realism about where it belongs in the larger context of civil liability would be a great help, both in practice and in the classroom.

As to the second possibility, that courts may not consider law students as readers of their opinions, in the continuing pursuit of improving legal education, the bench could be an extraordinary contributor at the ground level in law schools. Courts affect the quality of lawyers even before they become lawyers; imagine if courts took even more care to draft opinions that are more comprehensible. Such opinions may still leave the law am-

biguous, or its future application unclear, or even its current scope controversial. If, however, it was less burdensome to comprehend what the opinion says, students would have more time and energy to focus on what an opinion means, which is the bread and butter of law practice, and the primary skill that law schools exist to help students develop.