Want Not, Waste Not: Contracting Around the Law of Ameliorative Waste

Introduction

The law of waste is an ancient doctrine that has recently invoked new interest among scholars.[1] Scholars largely focus on one category of waste: ameliorative waste. In short, ameliorative waste occurs when a person who does not own the property—but has a possessory interest in it—makes a significant change to the property that increases the property's value. Scholars discuss ameliorative waste for very different purposes: to understand early American land development,[2] to illustrate economic principles both in theory[3] and for pedagogical purposes,[4] to discuss environmentalist concerns regarding land use,[5] and even to argue for certain tax reforms.[6] No scholar, however, has done anything even close to a comprehensive study of ameliorative waste in the United States. Instead, they all tend to discuss the most famous cases and make gross generalizations based upon them. No scholar's theory, furthermore, has adequately accounted for why ameliorative waste cases only rarely appear in courts today. In fact, one recent scholar argues that the doctrine is still very relevant to our current jurisprudence.[7]

This paper is based on an extensive case study of ameliorative waste and thus departs from all scholarship on the subject. I surveyed how ameliorative waste cases are decided in each state.[8] My research shows that, in thirty-five states, the law of ameliorative waste functions as a contract default *rule* that is relatively easy to apply.[9] This conclusion differs sharply from the most popular understanding on the subject. The fable is that, in England, the law of waste was a strict rule turning on whether the possessory interest made any significant, permanent change to the property without the consent of the remaindermen. Because the United States was a new country that favored development, the strict English rule turned into a mushy standard that would weigh competing concerns: the owner's intent, the nature of the change, the need for industrialization/urbanization, and the changing character of the surrounding property. Out of the fifty states, however, only four states still apply a very broad standard to ameliorative waste cases.[10] Nine states and the District of Columbia have no record of ever dealing with an ameliorative waste case at all. My research shows, therefore, that the prevalent theory that the law of waste went from a strict British rule to a loose American standard is largely incorrect. The

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[1] *See, e.g.*, John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209 (2007); Jebediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653 (2006).
[2] *See, e.g.,* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1979); Purdy, *supra* note 1.
[3] *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).
[4] *See, e.g.*, Lovett, *supra* note 1.
[5] See, e.g., Purdy, *supra* note 1; John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).
[6] Edward J. McCaffery, *Must We Have a Right To Waste*? (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=246407).
[7] Lovett, *supra* note 1.
[8] *See* Appendix A under Economic Value Rule, Effective Economic Value Rule, Implied Economic Value Rule, & Alteration/Change in Character of the Property Rule.
[9] *See* Appendix A under Squishy Standard.
[10] *See* Appendix A under No Ameliorative Waste Case/No Discussion of Ameliorative Waste Found.

fact that states with the strongest history of waste law cases tend to have developed rules is in keeping with contract default rule theory; developing rules requires more work ex ante, whereas a standard requires more work ex post.

The paper proceeds in four Parts. The first Part defines the doctrine of waste, explains the various categories of waste, and describes current state statutes on waste. The second Part illustrates why the scholarship on waste law mischaracterizes the current state of the American law on ameliorative waste. The third Part explains why the law of ameliorative waste most often functions as a contract default *rule*. In that Part, I first describe the results of my survey and then apply the prominent legal theories on contract default rules to my results. The fourth Part supports my conclusion that the law of ameliorative waste functions most often acting as a contract default rule. I explain why trusts and more detailed leases have made ameliorative waste claims largely irrelevant to many persons with future interests in property. Finally, the Appendices include the detailed results of my survey, a summary of those results, a list of states with waste law statutes, and an explanation of my research methodology.

I. What is the Law of Waste?

This Part seeks to give a brief historical background for the law of waste. It then describes the two different categories of waste: permissive waste and affirmative waste. This paper focuses on ameliorative waste, which is a subcategory of affirmative waste.

A. Historical Overview and Definition

The writ of waste originally occurred at or before the middle of the twelfth century in England.[11] Three English statutes developed the law of waste, but the most important was the Statute of Gloucester, enacted in 1278, which provided for forfeiture and treble damages upon waste.[12] Interestingly, however, none of the British statutes defined "waste" within the statute.[13] Rather, it was left to the courts to decide what constituted waste; the statutes just declared that there was a writ and provided for the damages. In the nineteenth century, England also abolished the statutes and left the damages provision also to the courts.[14] The action for waste was historically "the most important cause of action that can be brought by persons who hold nonpossessory interests in property against other owners currently in possession."[15]

The "gist of [the action] is that the holder of the present estate is to a considerable extent inhibited by the law of waste from permanently damaging the land or things on it, i.e. from doing damage that will still be present when the landlord's reversion becomes possessory."[16] Common examples of waste include the cutting of timber from forests,[17] razing buildings, or farming. The action can apply in suits between remainder interests against life tenants, parties with concurrent

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[11] POWELL ON REAL PROPERTY § 56.02.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] THOMAS MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 603 (2007).
[16] WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF REAL PROPERTY 272 (3rd ed. 2000).
[17] *Id.*

interests in ownership, sequential owners, or landlords against tenants.[18] There are also more specialized branches of waste law that involve mineral contracts, mortgages, and trusts. This paper focuses on the most common aspect of waste law, that involving real property split up between owners over time.

B. Categories of Waste

There are two main categories of waste that courts have developed over time: affirmative waste and permissive waste.[19] Permissive waste "occurs when the life tenant fails to take some action with regard to the property and the failure to act is unreasonable and causes excess damage to the reversionary or remainder interest."[20] To determine whether there has been permissive waste, a court would look at what the tenant in possession let happen to the property in comparison to what should have happened.[21] For example, in the case of grapefruit orchards and a vineyard, "defendants failed to cultivate, irrigate, fertilize, fumigate, prune and do all other acts necessary to preserve ... citrus trees and vines."[22] The problem was that they did not take the actions necessary to keep up the orchards and vineyards, so they permitted waste to occur.

Affirmative waste,[23] on the other hand, "occurs when the life tenant takes some affirmative action on the property that is unreasonable and causes 'excess' damage to the reversionary or remainder interest."[24] In order to cause such damage to the reversionary or remainder interest, the tenant must do something that has a substantial effect on the property. A Wisconsin case provides a quite amusing illustration of what is not affirmative waste. In *Bandlow v. Thieme*, the plaintiff alleged that a tenant "wantonly and maliciously, and with ill-will towards the plaintiff . . . threw and daubed upon the walls and windows of the dwelling-house . . . greasy and offensive matter . . . ."[25] Such actions were not waste, however, because the walls "were not destroyed, or materially changed or injured, or removed or deteriorated, but only rendered unseemly and offensive, and their use and enjoyment lessened by their filthy condition."[26] Affirmative waste, therefore, involves an action that has consequences that cannot just be washed away the soap and water.

Ameliorative waste,[27] which is the topic of this paper, is a controversial subcategory of affirmative waste. It is "a type of affirmative act by the life tenant that significantly changes the property, but results in an increase, rather than a diminution, in its market value."[28] *Brokaw v. Fairchild* is one of the most famous examples of ameliorative waste.[29] In that case, the plaintiff asked the court for a declaratory judgment that he could demolish the house he had inherited

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[18] MERRILL & SMITH, *supra* note 15, at 603.
[19] *Id.* at 603-04.
[20] *Id.* at 603.
[21] *Id.*
[22] Hickman v. Mulder, 58 Cal.App.3d 900, 903 (Cal. Ct. App. 1976).
[23] Affirmative waste is also known as voluntary or comissive waste.
[24] MERRILL & SMITH, *supra* note 15, at 604.
[25] 9 N.W. 920, 920 (Wis. 1881).
[26] *Id.* at 921.
[27] Ameliorative waste is also known as meliorating waste or beneficial waste.
[28] MERRILL & SMITH, *supra* note 15, at 604.
[29] Brokaw v. Fairchild, 237 N.Y.S. 6 (N.Y. App. Div. 1929).

from his father and erect a thirteen-story apartment building.[30] The court refused to allow him to do so because he had only a life interest in the house, not in the land.[31] The court said that knocking down the house would be waste—even though the apartment building would be much more profitable—because it was an exercise of ownership and the reminder interests objected to the action.[32]

This paper focuses on ameliorative waste because it is really the most interesting category of waste and the one that has inspired the most scholarly discussion. Ameliorative waste cases require weighing compelling, competing interests: the grantor's wishes, economic efficiency, changing land use, and the remainder interests' rights. The house in dispute in the *Brokaw* case, for example, was on 1 East 79th Street in New York City.[33] Isaac Brokaw built the house "for his own occupancy" in 1887 and then granted George Brokaw a life interest in the house when he died in 1913.[34] At that time, there was "change of circumstances and conditions in connection with Fifth Avenue properties. Apartments were erected with great rapidity and the building of private residences . . . practically ceased."[35] It could not be rented out for a price greater than its upkeep and could be converted into a profitable apartment building that fit into the neighborhood.[36] Should the court be deferent to the dead Isaac Brokaw's wishes? Should the court be reasonable in not expecting the life tenant to upkeep a losing deal? Or should the court consider what would be best for the changing neighborhood overall?

C. State Statutes on Waste Law

Although thirty states have statues on waste, every state except for New York leaves the definition of waste unspecified in the statute.[37] The statutes list the damages for waste, which may include double damages, triple damages, or forfeiture of the property, and sometimes also specify who can bring a waste action. With one exception, states have always left the definition of waste up to courts.[38]

The New York statute is the one exception. The statute was enacted in 1937 as a response to the seemingly harsh decision in *Brokaw v. Fairchild*.[39] It specifically discusses ameliorative waste and creates a five-part test for whether a beneficial change in the property is waste.[40] The test includes whether the change would be one that a prudent owner would make, whether the change would not decrease the economic value of the property, whether the change is not prohibited by contract, whether the possessory interest would have possession for at least five

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[30] *Id.* at 10.
[31] *Id.* at 20.
[32] *Id.*
[33] *Id.* at 14.
[34] *Id.* at 9.
[35] *Id.* at 10.
[36] *Id.*
[37] *See* Appendix C.
[38] *See, e.g.*, Melms v. Pabst Brewing Co., 79 N.W. 738, 739 (Wisc. 1899) ("[I]n order to understand whether a given act constitutes waste or not, recourse must be had to the common law as expounded by the text-books and decisions.").
[39] N.Y. REAL PROPERTY LAW § 803 (Consol. 2009).
[40] *Id.*

years, and whether the person interested in making the change gives notice to the remaindermen.[41] If all of these conditions are met, then the change will not be considered waste.

II. Scholarship on Ameliorative Waste

It is difficult to discuss the scholarship on ameliorative waste in a unified way because scholars have focuses on such different aspects of the doctrine: economic efficiency, land development, environmentalist concerns, and breaking from tradition. In this Part, I want to give an overview of the scholarship on waste that is relevant to my argument.

A. Posner's Economic Efficiency Argument

In his *Economic Analysis of Law*, Richard Posner argues that the law of waste is really about economic efficiency.[42] He explains that shared ownership in land creates inefficiencies because the tenant in possession has little incentive to make long-term improvements, but large incentive to exhaust the land for short-term benefits.[43] The life tenant and the remainderman cannot contract around this situation because "since the tenant and remainderman have only each other to contract with, the situation is . . . one of bilateral monopoly, and transaction costs may be high."[44] Posner also describes other factors complicating contracting: remaindermen being children (or even unborn), life tenants being created by will, and estate holder being unaware of potential conflicts between life tenants and remaindermen.[45] The bilateral monopoly and other complicating factors are not as present in the situation between lessor and lessee "because the terms of a lease are set before the landlord and tenant become locked into a relationship with eachother."[46]

Posner understands the law of waste to have developed to deal efficiently with this unique problem of divided ownership over time. He says that "the common law doctrine of waste . . . mediates between the competing interests of life tenants and remaindermen."[47] He claims that the law of waste reflects the policy that courts should "interpret leases as if the parties' intent had been that the property would be managed by the lessee as if he were the owner."[48]

Although Posner's theory is logical, there are a few problems with it. One, Posner cites to one case. He does not demonstrate that the law of waste actually has developed in such a way.[49] Two, neither the British nor American rules on waste have consistently demonstrated such a position. Sometimes scholars cite Posner as claiming just that courts *should* decide waste cases

[41] *Id.*
[42] POSNER, *supra* note 3, at 83-84.
[43] *Id.* at 83.
[44] *Id.* at 83-84.
[45] *Id.* at 84.
[46] *Id.*
[47] *Id.* at 83.
[48] *Id.*
[49] I did find, however, that Georgia and North Carolina do use a prudent owner inquiry to decide ameliorative waste claims. See Appendix B under Georgia and North Carolina.

by asking whether the tenant in possession made the decision the owner would have made under similar circumstances. That, however, is not what he is claiming; he specifically says that the law of waste "reflects" the policy. Finally, Posner's explanation is way too simple. The law of waste must be studied on a jurisdictional basis, as different jurisdictions apply different default rules.

B. Horwitz's Historical Interpretation

In *The Transformation of American Law: 1780-1860*, Morton J. Horwitz uses waste law as an illustration of how British property law needed to adapt to changing circumstances in nineteenth century America.[50] Specifically, he said that the law of waste had to deal with "an economy of rapidly fluctuating land prices and an increasing rate of development."[51] In England, the possessory interest was liable under waste for any changes in the property's conditions. But, "from the moment of independence from England, . . . American jurists devoted their efforts to modifying or overturning the received common law doctrine."[52] He uses a few cases to illustrate his point.

Horowitz's account may be a bit exaggerated and is surely incomplete. It is exaggerated because, one, England's law of waste was not as uniform as he claims,[53] and, two, a more extensive case analysis does not show that states immediately departed from the rule on owner's intent. His point about nineteenth century jurisdictions modifying or rejecting what he describes as the English rule, however, seems mostly accurate—but it is also a pretty modest point. Finally, Horowitz does not explain that different jurisdictions use different laws on waste and that waste law continues to fuction largely as a default rule.

C. Purdy's Pluralist Perspective

Jedediah Purdy argues that only a pluralistic approach can explain how waste law developed in America.[54] The first part of his article aims to show that the U.S. law of waste developed "from the strict rule of English common law to a flexible standard" in America.[55] He incorrectly believes, like Horwitz, that the English rule loosened only after it was imported to America.[56] In this first part, Purdy also explains how the English law of waste functioned as a contract default rule.[57] For purposes of this paper, it is important to emphasize that he discusses

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[50] HOROWITZ, *supra* note 2, at 54-58.
[51] *Id.* at 54.
[52] *Id.* at 54.
[53] *See, e.g.*, Melms v. Pabst Brewing Co., 79 N.W. 738, 739 (Wisc. 1899) (citing to a British case which allowed ameliorating waste if it were for the betterment of the estate). The court said, "Thus, the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate . . . Again, and in accordance with this same principle, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England." *Id.* (internal citations omitted).
[54] Purdy, *supra* note 1.
[55] *Id.* at 654.
[56] *Id.* at 664.
[57] *Id.* at 665-67.

the law of waste as a contract default *rule* only in England. In America, it became a "broad" standard.[58]

In the second part of his article, Purdy offers his pluralistic interpretation for how the broad American standard of waste developed. He writes,

> I contend that courts created the American law of waste for several reasons: to promote efficient use of resources that the English rule would have inhibited; to advance an idea of American landholding as a republican enterprise, free from feudal hierarchy; and perhaps to advance the belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America.[59]

In making this argument, he relies heavily on just a couple of cases; he did nothing even resembling a case study, so he never comes close to answering what the American gap-filler actually is. Rather, he argues that his list of factors are all relevant in shaping the American law of waste, even if they conflict with each other. He writes, "American waste doctrine embodies the competing values that inform the American relationship to property."[60]

The major problem with Purdy's article is that the American law of ameliorative waste, which is the type of waste his article is really discussing, operates as a broad standard in only four states![61] As the next Part explains, my research shows that in thirty-five of the forty-one jurisdictions that have precedent on ameliorative waste, the law operates as a default *rule*. In nine states, the default rule is no different from the English one that he describes.[62] In twenty-six states, the default rule for ameliorative waste is essentially extremely simple: whether the property's value increased or decreased.[63]

D. Lovett's Pedagogical Summary

John A. Lovett wrote the most recent, published article on waste.[64] His article, however, does not make a theoretical argument about the law of waste. Rather his goals "are to reawaken readers to the importance of waste doctrine, to suggest that the great days of waste may not be completely in the past, to recommend some new uses of waste cases as teaching tools, and generally to urge a renewed appreciation for waste." The bulk of his article, therefore, just explains the doctrine and reiterates the scholarship on waste.

Although Lovett does admit that "alleged instances of voluntary waste are less common today than they used to be," his project is essentially to say why the doctrine matters without saying what the doctrine is.[65] He does not perform a case study. My project, on the other hand, is

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[58] *Id.* at 661.
[59] *Id.*
[60] *Id.* at 697.
[61] *See* Appendix A under Squishy Standard.
[62] *See* Appendix A under Alteration/Change in Character of the Property Rule.
[63] *See* Appendix A under Economic Value Rule, Effective Economic Value Rule, and Implied Economic Value Rule.
[64] Lovett, *supra* note 1.
[65] *Id.* at 1211.

to say what the doctrine actually is and then explain why it does not really matter much to persons who currently share interests in property.

III. Law of Ameliorative Waste Largely Operates as a Contract Default Rule

When deciding whether a possessory interest's beneficial change to the property amounted to waste, courts can focus their inquiry the grantor's intent, on the best interests of the person in possession of the property, on the best interests of the remaindermen, and/or on the best interests of the community. As discussed in the previous Part, commentators have described the framework applied in American courts as a flexible standard, which evolved from the strict English rule that any material, permanent change to the property amounted to waste—even if it increased the property's value. My case study has found that most American jurisdictions do not apply a flexible standard but apply some form of a contract default *rule* to decide ameliorative waste cases. In this Part, I first explain my survey results. I then use the most relevant gap-filling scholarship to explain why thirty-five of the forty-two jurisdictions (fifty states, plus the District of Columbia) with precedent on ameliorative waste are employing contract default rules.

A. Survey Results

Scholars discussing ameliorative waste tend to cite to the same cases and to make gross generalizations about them. No scholar has done anything close to a comprehensive survey on how states decide ameliorative waste cases. I, therefore, undertook that project. Appendix D explains the process I used to obtain my survey results, and Appendix B gives an explanation of each state's law on ameliorative waste and the relevant case citations. This Section, therefore, provides an overview of my survey results. I explain what each category means and use examples from particularly illustrative cases.[66]

1. Economic Value Rule

I classify eighteen states as employing a clear economic value rule to decide ameliorative waste cases. These state courts first engage in the preliminary inquiry of whether there is any contractual provision that prevents a possessory interest from making the change to the property. If there is no contractual provision preventing the change, then the court compares the property's market value prior to the change with the property's market value after the change. If the change has yet to be made, then the court will compare the property's estimated value after the change. If the change increases the property's market value, then the court will not find that the possessory interest committed waste. If the change decreases the property's market value, then the court will find that the possessory interest did not commit waste.

A Hawaii case provides a colorful example of a court employing the Economic Value Rule. In *Pires v. Phillips*, the tenant, Frank Pires, leased seventy-three acres of land on Maui in 1926 for a period of thirty years.[67] A large portion of the land was covered with cacti, and Pires wanted to remove them in order to plant pineapples.[68] The landlord objected, claiming that the

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[66] It is important to note that I decided on the categories only after doing the research. In other words, I let my research dictate the categories.
[67] 31 Haw. 720, 722 (1930).
[68] *Id.*

land had been used as a pasture for cattle for many years and that the cattle needed to feed off of the cacti.[69] The court, however, said that "[t]here is nothing in the lease which binds the lessee to use the premises for any particular purpose. He may therefore use them for any purpose so long as he does not diminish their value to the reversion."[70] In other words, the court first asked whether the contract prohibited removing the cacti and then, after finding that it did not, looked solely to whether the property's economic value would be diminished. Because it was not, the court decided that the change would not constitute waste.

2. Effective Economic Value Rule

The two states (Connecticut and Texas) listed in this category effectively employ the Economic Value Rule. These courts refuse to award damages for waste, even though the alteration in the property technically created waste, because the property's market value increased. Of course, the courts reach this question only after first asking whether any contract provision prohibited the change.

In *Ratner v. Willametz*, the plaintiff claimed that the defendant let a house on the property burn down and then be vandalized, let a driveway become "overgrown," and let a pond "disappear."[71] Although what happened to the pond remains a mystery, all of these actions—if waste—would qualify as permissive waste. The Connecticut court's rule of law, however, applies equally to affirmative waste. The court decided that the "highest and best" use of the land was as a subdivision, not as an idyllic single-family dwelling.[72] In order to convert the land into a subdivision, the house, driveway, and pond would all need to be destroyed anyway. The appellate court, therefore, said that the trial court was right to determine "that because the highest and best use of the property was as a subdivision, the buildings on the property had no value, and that the value of the property lay in the land alone."[73] The court, therefore, found that waste occurred but awarded only $1 in damages for it.[74]

3. Implied Economic Value Rule

In the six states classified under this category, the courts did not specifically state the economic value rule, but implied that waste would occur if the property's value decreased. I listed two types of states under this category. The first type is where there was no case squarely on point but where dicta in other cases indicated that the economic value rule would probably apply to ameliorative waste case. For example, in an old Maine case, a lessee made changes to the store and cellar of the lessor's building.[75] The court first said that the lease allowed such changes.[76] It then went on to say that, even if the lease did not, the changes were not so significant as to change the character of the property[77] and that they improved the property's

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[69] *Id.*
[70] *Id.*
[71] 20 A.2d 621, 631 (Conn. App. Ct. 1987).
[72] *Id.*
[73] *Id.* at 633.
[74] *Id.*
[75] Hasty v. Wheller, 12 Me. 434, 436 (1835).
[76] *Id.* at 437.
[77] *Id.* at 439.

value.[78] Although the court did specifically decide on only value, the market value evaluation seemed to be the critical inquiry.

The second type of state grouped in this category is one that employs a multi-factored test for ameliorative waste, but the Economic Value Rule seems like the key component of the test. New York is in this category because of its statute on ameliorative waste. Wisconsin is also in this category because it employs a multi-factored test for ameliorative waste, and that test makes increased economic value a critical element.

Wisconsin has a very rich history of ameliorative waste and, in fact, supplied one the two most famous cases on ameliorative waste: *Melms v. Pabst Brewing Co*.[79] In that the case, the defendant, who had a life interest in an estate in Milwaukee, destroyed a large dwelling house on the land and graded the land down to street level "in order to make the property serve business purposes.[80] The plaintiffs, the reversionary interests, sued for damages from waste. The court claimed that the defendant's "acts would constitute waste under ordinary circumstances."[81] The court went on to explain that "the ancient English *rule*" regarding waste has been relaxed in both England and the United States.[82] Again citing to English cases, the court said, "it is now well settled that, while any [change in a building upon the premises] may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it."[83] The court noted that "[t]here are no contract relations in the . . . case,"[84] meaning, presumably, that it was free to apply the default rule.

In making its decision, the *Melms* court overturned the definition of waste used in both *Bandlow v. Thieme*[85] and *Brock v. Dole*.[86] The *Bandlow* court defined waste as "any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title."[87] As discussed above, the court also focused on the permanent character of waste; filthy matter strewn on the walls did not constitute waste because it could be washed away with soap.[88] *Brock v. Dole* also espoused a rather strict view of waste, especially given the circumstances of the case. The court granted an injunction to stop a tenant of a store-room from proceeding after he cut a hole in the ceiling in order to build a chimney.[89] The tenant began cutting after the landlord took away the old chimney and would not give him another to heat his room.[90] The court did not find the fact that a new chimney would add value to the property (and presumably keep the defendant warm in the

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[78] *Id.* at 440.
[79] Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).
[80] *Id.* at 739.
[81] *Id.*
[82] *Id.* (emphasis added).
[83] *Id.*
[84] *Id.* at 740.
[85] Bandlow v. Thieme, 9 N.W. 920 (Wisc. 1881).
[86] Brock v. Dole, 28 N.W. 334 (Wisc. 1886).
[87] *Bandlow*, *supra* note 85, at 921.
[88] *See supra* note 25 and accompanying text.
[89] *Brock*, *supra* note 86, at 334-35.
[90] *Id.* at 335.

cold Wisconsin air) convincing. Quoting from an English case, it said, "Any material change in the nature or character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration."[91] *Melms* was obviously a strong departure from this precedent.

I placed Wisconsin within the "Implied Economic Value Rule" category because it now uses a three-part test to decide all waste claims. The court asks whether there is "(1) unreasonable conduct by the owner of a possessory estate, (2) resulting in physical damage to the real estate, and (3) a substantial diminution in the value of the estate in which others have an interest."[92] For an ameliorative waste claim, the first and second elements would seemingly never be met if the third element (decreased value) is not met. In other words, the third element will always be the deciding factor in an ameliorative waste case. For example, in *Manor Enterprises, Inc. v. Vivid, Inc.*, the Wisconsin Court of Appeals ruled that the plaintiff landowner could not bring a waste claim against Vivid who had put up a very large sign on the plaintiff's real estate.[93] Vivid removed the sign but left the fifty-seven posts that had held up the sign in the ground.[94] The plaintiff brought trespass and waste claims because Vivid refused to remove the posts. The court said that Manor Enterprises Inc. ("MEI") could not bring a waste claim because Vivid did not have a possessory interest in the property.[95] Before making that conclusion, however, the court applied the three-part test for waste and said: "There is no evidence of any sort of the value of MEI's property at any time. Construing the evidence of fifty-seven posts protruding from the ground most favorably to MEI, there is no reasonable inference from that fact alone that the posts have substantially diminished the value of MEI's property."[96]

4. Alteration/Change in Character of the Property Rule

Although New York would no longer decide the *Brokaw* case in the same way, it is the classic example of an American court employing the alteration/change in character of the property rule. Like *Brokaw*, the nine jurisdictions within this category primarily look at whether the remainder interests will be able to take possession of the property from the life tenant and have the property be in substantially the same condition as it was when the life tenant took possession. The owner's intent, therefore, is being passed down from grantor to life tenant and then from life-tenant to the remainder interests. Changed circumstances and economic inefficiency are not factors. Some commentators have described this type of evaluation as being "the traditional view."[97] It has probably been deemed so because, as explained above, scholars have considered this strict inquiry into owners intent to be a relic from the doctrine's British past. Scholars do not recognize that nine jurisdictions still employ this rule.

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[91] *Id.* (internal citation omitted).
[92] Manor Enterprises, Inc. v. Vivid, Inc., 596 N.W.2d. 828, 837 (Wis. Ct. App. 1999). *See also* Pleasure Time, Inc. v. Kuss, 254 N.W.2d. 463, 467 (Wis. 1977) ("Waste may be defined as the unreasonable conduct by the owner of a possessory estate that results in physical damage to the real estate and substantial diminution in the value of the estates in which others have an interest.").
[93] *Id.* at 838.
[94] *Id.* at 830.
[95] *Id.* at 838.
[96] *Id.*
[97] *See, e.g.*, MERRILL & SMITH, *supra* note 15, at 604.

A Montana case provides a more current example of employing the change in character rule. In *Turman v. Safeway Stores, Inc.*, the lessor leased a grocery store to the lessee who, after a number of years, converted it into a car sales and garage business.[98] The lessor then brought a claim for waste. The court found that there was no waste, but did so on the grounds that such lessee's change was contemplated by lease.[99] But, if the lease did not govern the change, then the alteration would have been waste: "The doctrine is well established that in the absence of a statutory provision to the contrary, a lessee has no legal right, without the consent of the lessor, to make material changes or alterations in buildings on the leased premises . . . even though it enhances the value of the property and is beneficial to the reversion . . . ."[100]

5. Prudent Owner Inquiry

Two states (Georgia and North Carolina)[101] seem to employ something close to Richard Posner's prudent owner standard for ameliorative waste.[102] In order to decide whether a change to the property was waste, the court asks whether a prudent owner in fee simple would have made the decision. The North Carolina case does not use the phrase "prudent owner," but it essentially describes that type of inquiry.[103] Georgia has a long history of cases that use the phrase "prudent owner" to describe the evaluation needed in ameliorative waste claims.[104]

6. Squishy Standard

The four states in this category ask whether the alteration, given all the circumstances, was reasonable. If it was, then it was not waste. Many scholars have referred to this perspective on waste law as the "American view." For example, Purdy writes, "[i]n the United States, it is generally said that a tenant may 'make changes in the physical condition of the . . . property which are reasonably necessary in order for the tenant to use the . . . property in a manner that is reasonable under all the circumstances.'"[105] "Under all the circumstances" includes changed circumstances; Wisconsin's *Melms* case is the traditional example of a court using this type of inquiry. Because scholars consider this view to be the prevalent American method for assessing ameliorative waste, it is particularly interesting that only four states actually employ it!

7. No Ameliorative Waste Case/Discussion Found

In ten jurisdictions, I could find no ameliorative waste case or even a discussion shedding any light on how a court would decide an ameliorative waste case.

B. Situating My Survey Results Within Gap-Filling Scholarship

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[98] 317 P.2d 302 (Mont. 1957).
[99] *Id.* at 304.
[100] *Id.*
[101] It is important to note that other states use the "prudent owner" inquiry when it comes to permissive waste, but only Georgia and North Carolina use it specifically for ameliorative waste.
[102] *See supra* notes 42-49 and accompanying text.
[103] Temple v. Carter, 165 S.E.2d 541 (N.C. Ct. App. 1969).
[104] *See, e.g.*, Woodward v. Gates, 38 Ga. 205 (1868); Fort v. Fort, 156 S.E.2d 23 (Ga. 1967); Robinson v. Hunter, 562 S.E.2d 189 (Ga. Ct. App. 2002).
[105] Purdy, *supra* note 1, at 658 (quoting the Restatement (Second) of Prop.: Landlords & Tenants § 12.2(1) (1977)).

This Section attempts to apply a theoretical overlay to my research findings. I do not begin by discussing theories of contract default rules, however, because, in order to argue that most states employ contract default rules, I first must discuss how one distinguishes between a rule and a standard.

1. Difference Between a Standard and a Rule

Scholars distinguish between a rule and a standard in different ways. In *An Economic Analysis of Legal Rulemaking*, Isaac Ehrlich and Richard Posner explain that the difference between a rule and standard turns on the degree of precision.[106] The famous example from that article is the distinction between posting a specific speed limit (a rule) versus telling drivers that unreasonable driving is illegal (a standard).[107] A standard takes into consideration more fact-specific factors of a particular situation, whereas a rule is much more limiting. Although the simplicity of Ehrlich and Posner's distinction is appealing, Louis Kaplow's explanation for standards versus rules is more complete.[108] What makes something a rule or a standard is not the degree of precision but *only* "the extent to which efforts to give content to the law are undertaken before or after individuals act."[109] Promulgating a rule requires significant ex-ante costs because the rule-maker must decide what is the best rule to promulgate. A standard, on the other hand, is easy to promulgate because a standard requires an ex ante evaluation of the facts.

It is important to understand that Kaplow's rule versus standard distinction is relative. People frequently incorrectly compare simple rules with complex standards. In reality, there are simple rules, simple standards, complex rules, and complex standards.[110] The appropriate comparison is between rules and standards of the same complexity. Kaplow explains:

> [A]dvance determination of the appropriate speed on expressways under normal conditions, or even the criteria that will be relevant in adjudicating reasonable speed (safety and the value of time but not the brand of automobile or the particular driver's skill), are "rule-like" when compared to asking an adjudicator to attach whatever legal consequence seems appropriate in light of whatever norms and facts seem relevant. Yet the same determination would be "standard-like" when compared to a precise advance determination of what constitutes normal conditions and what constitutes reasonable speed under various exceptional circumstances.[111]

Kaplow's point is very important because the law of waste can still involve an analysis of what is "reasonable" and still be more rule-like. For example, I categorize states using multi-factored tests, like New York's statute, for ameliorative waste under the Implied Economic Value Rule category. The court requires every factor to be met, and some factors include more difficult inquiries, e.g., what would a prudent owner do, but the statute remains rule-like. The state has invested ample ex ante effort into narrowing what interests are most important. Also, in practice, if the property's economic value increased because of the change, then the prudent owner would

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[106] Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).
[107] *Id.* at 257.
[108] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).
[109] *Id.* at 560.
[110] *Id.* at 588-90.
[111] *Id.* at 561.

likely have decided to make the change. The Economic Value Rule category is most like the speed limit because, after making the preliminary inquiry of whether the contract outlaws such a change, the court compares the property's market value before and after the change. It is a relatively simple inquiry.

In my survey, there are only four states under the Squishy Standard category, which essentially amounts to "whatever norms and facts seem relevant." Those are the only states unquestionably employing true standards. The two states under the Prudent Owner Inquiry heading ask simply whether a prudent owner in fee simple would make the alteration. Because there are no other mandatory inquiries, whether those states employ a standard or a rule is a more difficult question. As Kaplow explains, the standard/rule inquiry is relative. I would argue that states employing the Prudent Owner Inquiry for ameliorative waste are more standard-like, but their inquiry is more rule-like than the states in the Squishy Standard category.

2. Default Rule Scholarship

In their seminal article on gap filling, Ian Ayres and Robert Gertner offer an economic theory of default rules.[112] "[D]efault rules," they explain, are "rules that parties can contract around by prior agreement."[113] They juxtapose these against "'immutable' rules that parties cannot change by contractual agreement.[114] They further explain: "[d]efault rules fill the gaps in incomplete contracts; they govern unless the parties contract around them. Immutable rules cannot be contracted around; they govern even if the parties attempt to contract around them."[115] They look to provisions in the Uniform Commercial Code (U.C.C.) as examples of what is a default rule versus what is an immutable rule, but they explain that "common law precedents can also be divided into the default and immutable camps."[116]

Ayres and Gertner's schema of different types of default rules distinguish between defaults based on the contracting parties different incentives:

1) Penalty defaults: they "are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer."[117] Penalty defaults "encourage the parties to reveal information to each other or to third parties (especially the courts)."[118]

2) Tailored Defaults: they attempt "to provide a contract's parties with precisely "what they would have contracted for."[119] These default rules are least likely to incentivize any ex-ante contracting for the default term because the default term is meant to provide what they—in particular—would have wanted.

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[112] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989)
[113] *Id.* at 87.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 88.
[117] *Id.* at 91.
[118] *Id.*
[119] *Id.*

3) Majoritarian or Untailored Defaults:[120] they provide "the parties to all contracts with a single, off-the-rack standard that in some sense represents what the majority of contracting parties would want."[121] They provide more of an incentive for ex-ante contracting because this term supplies what most parties would have wanted. Parties who are in the minority will have an incentive to contract around the default.

In *The Default Rule Paradigm and the Limits of Contract Law*, Alan Schwartz constructs a more detailed schema of default rules than Ayres and Gertner's.[122] His schema includes problem-solving defaults, equilibrium-inducing defaults, information-forcing defaults, normative defaults, transnormative defaults, and structural defaults.[123] All of these defaults—except for structural defaults—are encompassed in Ayres and Gernter's schema; Schwartz's schema is just more specific than Ayres and Gertner's. For the purposes of this paper, though, it is unnecessary to be so specific; the paper does not try to arrive at a comprehensive explanation of why certain jurisdictions pick certain defaults. The point of Schwartz's article is really to explain why constructing default rules is a very difficult task.[124] Again, this paper is focused on the fact that the law of ameliorative waste functions most often as a contract default rule.

Every jurisdiction currently does and has always allowed parties to contract around the law of waste by prior agreement. Both the Restatement (First) of Property law and the Restatement (Second) of Property law explicitly limit the law of waste to situations in which the parties had not already agreed by contract.[125] And, in doing my survey, I did not find one instance of the law of waste taking precedence over any contract provision between the parties. In the context of a leased property, the lease itself is the contract. *Carrano v. Shanor* provides a typical example.[126] The court found that the defendant did not commit waste because of a clause in the lease:

> To carry out the intent of the parties we must construe the term 'waste' as used in the lease, not in the broad common-law sense, but as qualified to the extent that acts which are authorized by express terms of the lease are to be regarded as not constituting waste as that word is used in it.[127]

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[120] In a later article, Ayres and Gertner explain that: "[t]he untailored defaults are sometimes referred to as majoritarian because they refer to the laws that most contractual parties would want." Ian Ayres & Robert Gertner, at 1 (1993).
[121] Ayres & Gertner, *supra* note 112, at 91.
[122] Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993).
[123] *Id.* at 390-91.
[124] "This essay's central theme is that satisfying the two normative constraints is much more difficult to do than is commonly supposed. As a consequence, it is much more difficult to create helpful problemsolving, equilibrium-inducing and normative defaults than is commonly supposed." *Id.* at 393.
[125] The Restatement (First) of Property makes an exception of "language of [the] creating instrument." The Restatement (Second) of Property states "except to the extent that parties to a lease validly agree otherwise." These statements make it very clear that the law of waste serves a gap-filling function.
[126] 171 Atl. 17 (Conn. 1934).
[127] *Id.* at 23.

In the context of a life tenancy, the will functions as a contract between the grantor and the future interests. The life tenant may also contract with the remaindermen when the will itself remains silent, and the parties want to work out an agreement. The New York statute on ameliorative waste provides the typical threshold question courts ask regarding waste in the life tenancy context by requiring "[t]hat the proposed alteration or replacement is not in violation of the terms of any agreement or other instrument regulating the conduct of the owner of the estate for life or for years or restricting the land in question."[128]

My survey results show that the law of ameliorative waste almost always functions as a contract default *rule*. Ten states[129] do not have any law on ameliorative waste, and the two states applying the Prudent Owner Inquiry are within the questionable zone between a rule and a standard. That leaves only four states applying a gap-filling standard.

Although I have not done an extensive study of why certain states apply a specific rule or standard, it does seem as though states with the most jurisprudence on waste law have developed rules. Almost all the states without any precedent on ameliorative waste are newer, western states. For example, Colorado, Idaho, Nevada, Oklahoma, and Wyoming are all in that category. The states employing the squishy standard are not western states (with the exception of Arizona), but two of them—Arizona and Rhode Island—have an extremely small amount of jurisprudence on the doctrine of waste. The fact that, in general, states with little precedent have standards—while the states with lots of precedent—have rules makes sense in light of Kaplow's theory that rules necessitate more ex-ante work. The precedent provides that work. The two exceptions to this general conclusion are New Jersey and South Carolina. The jurisprudence on ameliorative waste in those states developed from a rule into a standard. Those, however, are only two jurisdictions out of fifty-one! That means the typical story of states moving from strict rule to mushy standard is really quite inaccurate.

One must recognize, however, that scholars tend to view the rule from which American jurisdictions departed as the strict alteration of the property rule. My survey found that nine states are still employing this default rule, but the most common default rule is some version of the Economic Value Rule. What this result means is that scholars were right in saying what most American jurisdictions *are not* doing; most of them are not employing the strict alteration of the premises rule. (Nine is a significant number, but a far cry from most.) They are wrong, however, about what states *are* doing.

If we look to Ayres and Gertner's schema, then, what types of default rules are the different states with different default rules applying. Namely, is the Economic Value Rule a majoritarian default rule, a penalty default rule, or tailored default rule? And what about the alteration of the premises default rule? I think that this sort of inquiry is really difficult because it involves postulating what the grantor or lessor desires for the property. On the one hand, in a case like *Brokaw*, the owner really wanted the house to remain a family house. By ruling that any alteration would create waste, the court was setting a tailored default rule if one thinks about the conflict as existing between the grantor's wishes and the remaindermen. If one envisions the

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[128] N.Y. REAL PROPERTY LAW § 803(1)(c) (Consol. 2009).
[129] For simplicity's sake, I am referring to the District of Columbia as a state. The total number of "states," therefore, is fifty-one.

conflict (as the suit actually was) between the possessory interest and the remaindermen, then the court would seem to be applying a penalty default rule. In other words, the court was penalizing the possessory interest from not effectively contracting for the change with the remaindermen. This assessment, however, does not seem entirely fair. If the remaindermen were so obstinate about not converting the house into an apartment complex that they flatly refused to contract, then the possessory interest would have been in a bilateral monopoly situation in which the possessory interest really could not have contracted for the change.

My point is that what *specific* type of default rules these jurisdictions are setting is a really complicated inquiry because so many interests are involved. For example, if one wants to argue that the Economic Value Rule represents a majoritarian default, then one needs to postulate (what is seemingly logical) that most parties with an interest in the property would want the property's value to increase. But, if one imagines that many people are like the grantor in the *Brokaw* case, then applying the Economic Value Rule might be a penalty default. It would be penalizing the grantor for not specifying what should happen if a possessory interest's alteration of the premises would increase the property's economic value. Similarly, setting a majoritarian default rule must include some evaluation of what people *within the court's jurisdiction* would want. Your average lessor or grantor's expectations for property within Montana is probably not the same as your average lessor or grantor's expectations for a property within New York City.

V. Trust and Leases Affecting Waste Actions

Especially in more urban states, the number of cases deciding an issue of ameliorative waste has drastically decreased in recent decades.[130] In the course of composing my fifty-state survey, I paid careful attention to recent cases and found very few of them having to do with ameliorative waste. Unlike what Lovett claims, therefore, the law of waste is not as relevant as ever; in fact, its practical importance is fading.[131] There are fewer cases deciding ameliorative waste claims, especially in states where there is more developed waste law. Parties are using trusts and more detailed leases, so there is less occasion to bring a claim for ameliorative waste. Parties decide ex-ante how much lessee can change the property by using a detailed lease. Trusts, furthermore, replace the complications of willing partial interests in land. Both phenomena indicate that waste law functions as a contract default rule. This Part briefly discusses scholarship on trusts and leases to illustrate why these types of contracts are replacing common law actions for ameliorative waste.

A. Trusts Replacing Life Estates

[130] Permissive waste cases also appear infrequently now, but they appear more often than ameliorative waste cases. I think that the reason for the difference is because permissive waste happens when the possessory interest does not take certain actions to maintain the property. A lessee of a building, for example, might not make necessary repairs on a porch, causing the porch to fall down entirely. The lessor would then sue the lessee both for breach of a lease provision and permissive waste. There is usually some reason why the lessee is not maintaining the property—maybe her economic circumstances have changed, she needed to abandon the property, or she is having some sort of crisis. If she is letting the property go to ruin, then she probably is not paying attention to her lease provisions. If the lessee wants to build a porch, however, then she tends not to be undergoing some sort of problem. She is more apt to consult her lease and negotiate with her landlord.

[131] Pennsylvania, for example, has actually repealed its waste action. *See* Appendix C under Pennsylvania.

John Langbein and other scholars have discussed how "the law of wills and the rules of descent no longer govern succession to most of the property of most decedents . . . ."[132] One of the areas in which there has been significant change has been in trusts replacing life estates. A trust is "almost always preferable to a life estate" because "the law governing trust administration is established and extensive."[133] For example, the law will supply default rules if the trust documents are unclear about the trustee's duties.[134] These default rules "spell out the trustee's duties in managing the trust property and in balancing the interests of life and remainder beneficiaries."[135] Because it just makes more sense to use a trust than a life estate, life estates are much less common. In fact, some states have required the life tenant to act like a trustee,[136] and Pennsylvania has gone so far as to abolish life estates and to convert the life tenant into a trustee.[137]

Another mechanism replacing the probate system is the revocable inter vivos trust.[138] Such trusts "have come into widespread use, particularly among the moderately and very wealthy."[139] These trusts allow the settlor to transfer legal title to property to a trustee "pursuant to a writing in which the settlor retains the power to revoke, alter, or amend the trust and the right to trust assets income during [the settlor's] lifetime."[140] When the settlor dies, the trustee distributes the trusts assets or hold on to them for other beneficiaries.[141] What is particularly notable about the revocable inter vivos trust is that it "is the most flexible of all will substitutes because the donor can draft both the dispositive and the administrative provisions exactly to the donor's liking."[142]

The prevalence of regular trusts and revocable inter vivos trusts has led to there being fewer ameliorative waste cases. Posner explains, "[t]he law of waste has largely been supplanted by a more efficient method of administering property, one that resembles unitization: the trust. By placing the property in trust, the grantor can split the beneficial interest as many ways as he pleases without worrying about divided ownership."[143] As long as the trustee has the proper incentives, he maximizes the property's value and divides the proceeds "among the trust's beneficiaries in the proportions desired by grantor."[144]

Rather than creating a life interest in an estate for one's daughter and a remainder interest in an estate for one's grandchildren, the grantor will create a trust in which the estate is the asset. The trustee will manage the estate, and the grantor's daughter will get a certain percentage and her children will get another percentage of the estate's proceeds. The grantor will

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[132] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).
[133] JESSE DUKMINIER, STANLEY M. JOHANSON, ET AL., WILLS, TRUSTS, AND ESTATES 495 (7th ed. 2005).
[134] *Id.*
[135] *Id.* at 496.
[136] *Id*. at 495.
[137] 20 Pa. Consol. Stat. Ann. § 6113 (2004).
[138] Langbein, *supra* note 132, at 1109.
[139] DUKMINIER, *supra* note 133, at 299.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] POSNER, *supra* note 3, at 84.
[144] *Id.*

decide who gets what and when, and the trustee will manage the estate according to both the grantor's wishes and what will be most beneficial to all parties. Assuming the trustee was doing his job properly, a situation like that in *Brokaw* would not happen because the trustee would be the one making the decision about whether to convert the house into an apartment building. An action for ameliorative waste is unnecessary because the parties dealt with the problem ex ante; they contracted around it.[145]

B. Changes in Leases

Changes in landlord-tenant law have made bringing actions for ameliorative waste against a tenant much less necessary. As in the area of trusts, these trends have essentially resulted in ex ante decision-making regarding what will happen if the tenant wants to make a significant change to the property. Among the most important changes facilitating ex ante decision making are the contractualization of landlord-tenant law,[146] the prevalence of more detailed covenants within leases,[147] and an increased number of state statutes governing leases.

Traditionally, a lease is a conveyance of land subject to property laws, but, in the last few decades, courts have been interpreting leases more like they interpret regular contracts.[148] They focus on the parties' "intent and expectations," rather than on archaic property law doctrines when making decisions.[149] The fact that leases are becoming more detailed and specific facilitates the ease with which a court can determine the parties' expectations. The prevalence of specific statutes and the knowledge that courts will look to parties' expectations means that landlords will have fewer occasions to bring ameliorative waste actions. The lease, like a contract with specific provisions, would have already decided the issue. Parties, especially knowledgeable ones, would understand that a court would be likely to enforce such provisions and would not want to litigate the issue.

Something needs to be said, however, about the large increase in the number of state statutes governing landlord-tenant law.[150] Many of these statutes give tenants rights that specific lease provisions cannot change. For example, many states require a landlord to keep the leased property in habitable condition.[151] One could argue, then, that a case like *Brock v. Dole* would in all likelihood be decided very differently, as not having a source of warmth (the fireplace) would make the property uninhabitable. For the most part, though, I do not think that the statutes giving tenants rights would affect ameliorative waste claims. In other words, it seems unlikely that

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[145] States have developed a different branch of waste law that relates to trusts specifically, but that action is distinct from ameliorative waste occurring on real property.
[146] Korngold, Gerald, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703, 705-06 (1998).
[147] POWELL ON REAL PROPERTY § 16.02 (2003).
[148] "Many of the landmark decisions of the last four decades invoke principles of contract law to reform ancient leasehold rules . . . . It is impossible to deny that a vigorous 'contractualization' of the lease is now well underway in the courts." *Id.* at § 16.01. *See also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970) (stating that a lease "should be interpreted and construed like any other contract").
[149] Korngold, *supra* note 146, at 710.
[150] POWELL ON REAL PROPERTY § 16.01 (2003).
[151] *Id.* at § 16B.05. Part of the contractualization of leases, furthermore, has meant that many courts will interpret a lease to have an implied covenant of habitability. Implying such covenants would make state statutes on the subject unnecessary. *See* John V. Orth, *Leases: Like Any Other Contract?* 12 GREEN BAG 2d 53, 53 (2008).

tenants would be able to defend ameliorative waste claims based upon statutory rights. I have seen no case, furthermore, in which such a situation happened.

Conclusion

It is fairly amazing that scholars have discussed the law of ameliorative waste in the wrong way for decades. No one recognizes that it operates in almost all jurisdictions—not as just a gap-filler—but as a gap-filling *rule*. Scholars have not taken the ample time required to do an extensive case study on ameliorative waste, and so they have relied on gross generalizations based upon a few cases. It is important, therefore, to correct what is a widespread error in the scholarship both in terms of conclusions and methods of studying waste law. My survey shows that the common story of the law of ameliorative waste moving from the strict English rule to loose American standard is terribly under-inclusive at best. My survey also demonstrates why any future scholarship on ameliorative waste must take into account jurisdictional differences; scholars cannot continue to discuss the U.S. law of ameliorative waste as if it were uniform across jurisdictions.

Appendix A: Breakdown of Survey Results

Economic Value Rule: If the change results in an increase in the property's market value and it is not prohibited by contract, then there is no waste.

1) Alabama
2) Arkansas
3) California
4) Hawaii
5) Illinois
6) Indiana
7) Iowa
8) Massachusetts
9) Mississippi
10) New Hampshire
11) Ohio
12) Oregon

13) Pennsylvania (was EVR before waste action was abolished)

14) Tennessee

15) Utah

16) Vermont

17) Virginia

18) Washington

Effective Economic Value Rule: The court will refuse to award damages for waste, even though the alteration technically created waste, because the property's market value increased—as long as the change was not prohibited by contract. These states, therefore, essentially apply the economic value rule.

1) Connecticut

2) Texas

Implied Economic Value Rule: Courts did not specifically state the economic value rule, but they implied that waste would occur only if the property's value decreased.

1) Alaska

2) Maine

3) New Mexico

4) New York

5) South Dakota

6) Wisconsin

Alteration/Change in Character of the Property Rule: These states disregard whether the change increased the property's economic value. Rather, they ask whether the change—if not allowed by contract—was permanent and material.

1) Florida

2) Kentucky

3) Maryland

4) Michigan

5) Minnesota

6) Missouri

7) Montana

8) Nebraska

9) West Virginia

Prudent Owner Inquiry: These courts decide whether a beneficial change is waste by asking, assuming the issue is not governed by contract, whether an owner in fee simple would make the change.

1) Georgia

2) North Carolina

Squishy Standard: these courts look to all the circumstances to determine the equitable result.

1) Arizona

2) New Jersey

3) Rhode Island

4) South Carolina

No Ameliorative Waste Case/Discussion of Ameliorative Waste Found

1) Colorado

2) Delaware

3) District of Columbia

4) Idaho

5) Kansas

6) Louisana

7) Nevada

8) North Dakota

9) Oklahoma

10) Wyoming

Appendix B: Fifty-State Survey on Ameliorative Waste Laws

Alabama: Economic Value Rule

Compton v. Cook, 66 So.2d 176, 180 (Ala. 1953): "We cannot hold that lasting damage has been done to the inheritance by this life tenant or that this value has depreciated when in 1913 the place, with the houses and land in a high state of cultivation, was worth slightly in excess of $2000 and now its value, with poor buildings and land in cultivation, has increased four or five fold."

Alaska: Need Physical Damage and Diminished Value

Sprucewood Inv. Corp. v. Alaska Housing Finance Corp., 33 P.3d 1156, 1165 (Alaska 2001) (internal citations omitted): "'Waste occurs when "the owner of a possessory estate engages in unreasonable conduct that results in physical damage to the [property] and substantial diminution in the value of estates owned by others in the same [property].' Although AHFC was seeking to demolish the buildings when Sprucewood initially asserted waste in its counterclaim, AHFC ultimately did not demolish the buildings and thus did not physically damage the property. Because the property was never physically damaged, Sprucewood's waste claim has been rendered moot."

See also McKibben v. Mohawk Oil Co., 667 P.2d 1223 (1983) (deciding that waste existed over defendant's objection that there was no physical damage to the property).

Arizona: Squishy Standard but Undeveloped Law

Jowdy v. Guerin, 457 P.2d 745 (Ariz. Ct. App. 1969): This Arizona court said that there was no precedent for waste actions in Arizona, so it was forced to look to other authorities. It used AmJur to say that the elements essential to cause of action for waste are: 1) an act constituting waste, 2) that act must have been done by one legally in possession, and 2) that act must be to prejudice of estate or interest therein of another.

Arkansas: Economic Value Rule

Rutherford v. Wilson, 129 S.W. 534 (Ark. 1910):The court found that clearing timber for the sake of preparing the land for cultivation was not waste because such use increased the land's economic value. "Another element of the inquiry is the relative value of the land and the timber. There is nothing to show that this land is chiefly valuable for timber. On the other hand, there is testimony to the effect that the land is not injured by removing the timber and putting it in cultivation, and that it will be a benefit to the freehold, in point of value, to remove the timber and put the land in cultivation. All of the land is tillable, so the witnesses say, and the value of the timber on the 20 or 25 acres was only $104.77."

California: Economic Value Rule

Dieterich Internat. Truck Sales, Inc. v. J. S. & J. Services, Inc., 5 Cal.Rptr.2d 388 (Cal. Ct. App. 1992): Injury to the inheritance, defined as waste, occurs if market value of property is substantially or permanently diminished or depreciated; 'waste' can be proven only by evidence of acts which injuriously affect market value of property, including quantity or quality of estate,

nature and species of property, and relation to property of person charged to have committed wrong.

Colorado: Very Undeveloped Law

Federal Deposit Ins. Corp. v. Mars, 821 P.2d 826 (Colo. Ct. App. 1991) said that waste law applied to an concurrent nonpossessory interest holders to prevent or restrain harm to land by persons in possession, but the cases cited to other jurisdictions.

Connecticut: No Damages for Ameliorating Waste

Ratner v. Willametz, 520 A.2d 621 (Conn. App. Ct. 1987): Court found that defendant committed waste but did not award damages because they looked at the highest and best use of the land, which was as a subdivision. There were no damages, therefore, for the waste of destroying a family dwelling. “We find, therefore, that it was proper for the trial court to consider the highest and best use of the land in determining the value of the property.”

Carrano v. Shoor, 171 Atl. 17, 23 (Conn. 1934): very good example of waste law as default rule. Defendant did not commit waste because of clause in lease: “We must, however, if possible, reconcile them. To carry out the intent of the parties we must construe the term “waste” as used in the lease, not in the broad common-law sense, but as qualified to the extent that acts which are authorized by the express terms of the lease are to be regarded as not constituting waste as that word is used in it.”

Delaware: One Case Using Strict Change in Character Rule

Richards v. Torbert, 8 Del. 172 (Del. Super. Ct. 1865): The court found ameliorative waste in a case about a widow who planted Indian corn on a grassy plot of land. Used the strict rule of changing the character of the land.

District of Columbia: No Ameliorative Waste Cases

Florida: Strict Alteration of Premises Rule

Stephenson v. Nat’l Bank of Winter Haven, 109 So. 124 (Fla. 1926): Lessee of building altered the building. There was no lease provision allowing him to do so, and so the court decided that he had committed waste, regardless of whether the alteration was beneficial to the owner of the reversion. Change in premises rule affirmed in Knabb v. Hill, 149 So. 335 (Fla. 1933). *See also* Sauls v. Crosby, 258 So. 2d. 326 (Fla. Dist. Ct. App. 1972) (holding that it was waste to cut timber because the benefits of the cut timber did not go to the estate).

Note that the Flordia Real Estate Transactions Treatise is wrong about the waste standard, according to the vary cases that it cites. “An ordinary life tenant is responsible to the remainderman for waste [Sauls v. Crosby, 258 So. 2d 326, 327 (Fla. 1st DCA 1962)]. Waste is any act, committed by a person rightfully in present possession, that permanently diminishes the value of the future estate of the reversioner or remainderman [see Stephenson v. National Bank of Winter Haven, 92 Fla. 347, 109 So. 424, 425 (1926)].” 2-18 Florida Real Estate Transactions § 18.08 (2008).

Georgia: Prudent Owner Rule

There is a long history—from 1868 to 2007—of Georgia applying something like Posner's prudent owner standard to ameliorative waste law. All cases, though, involve cutting timber. *See* Woodward v. Gates, 38 Ga. 205 (Ga. 1868); Fort v. Fort, 156 S.E. 2d 23 (Ga. 1967); Robinson v. Hunter, 562 S.E. 2d. 189 (Ga. Ct. App. 2002).

Hawaii: Economic Value Rule

Pires v. Phillips, 31 Haw. 720 (1930): Landlord claimed it was waste to cut or destroy the cacti growing on the premises in order to plant pineapples. The court said that "[t]here is nothing in the lease which binds the lessee to use the premises for any particular purpose. He may therefore use them for any purpose he pleases and may make changes in them that are necessary to adapt them to such purpose so long as he does not diminish their value to the reversion." So there was no waste because no decrease in value.

Idaho: No Ameliorative Waste Case Found

There are many permissive waste cases, but I could no ameliorative waste cases. For example, Consolidated AG of Curry, Inc. v. Rangen, Inc., 912 P.2d 115 (Idaho 1996) confirmed the standard that the tenant must keep a good husbandry standard for agricultural lands or else be open to a waste claim. The court reaffirmed the standard set in Olson v. Bedke, 555 P.2d 156 (1976).

Illinois: Economic Value Rule

Pasulka v. Koob, 524 N.E.2d 1227 (Ill. App. Ct. 1988): "Waste occurs when someone who lawfully has possession of real estate destroys it, misuses it, alters it or neglects it so that interest of persons having subsequent right to possession is prejudiced in some way or there is diminution in value of land being wasted."

Indiana: Economic Value Rule

Foudray v. Foudray, 89 N.E. 499, 501 (Ind. Ct. App. 1909): The Indiana Court of Appeals found that there was no waste on the basis that that value of the property improved: "Appellant alleges the forfeiture of the life estate; the basis of such forfeiture being the commission of waste. The acts constituting such alleged waste are found to have enhanced the value of property $5,000. The finding of facts shows there has been no waste and no forfeiture."

Iowa: Economic Value Rule

Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 (Iowa 2001): Court said that a claim for waste is an action at law brought by a remainderman against a tenant in lawful possession of land who is allegedly using the land in such a way as to diminish its value.

Kansas: No Ameliorative Waste Case Found

There are many oil and gas waste cases in Kansas, as well as cases on permissive waste. The most important case seems to be Moore v. Phillips, 627 P.2d 831 (Kan. Ct. App. 1981). It mentions voluntary waste as a category of waste cases, but the case itself is about permissive waste. Also, Moore does not cite to or has been cited by any ameliorative waste cases.

Kentucky: Change in Character Rule (Very Old Law)

Abel v. Wueston, 143 Ky. 513 (Ky. Ct. App. 1911): The court decided that a lessee who made a movie theater out of a leased building committed waste because he "substantially . . . changed[ed] the character of the building." This case is interesting because it was heard on rehearing. In the first opinion, the court said that there was no waste because the economic value of the building increased.

Note that the Kentucky Real Estate Law & Practice Series seems to be unaware of the *Abel* case. It says, "[a]lthough there is no Kentucky case directly on point, England and most American jurisdictions reject the concept of ameliorating waste in its strict common law form." UK/CLE Kentucky Real Estate Law and Practice § 2.128 (2007).

There are many waste case involving minerals and permissive waste cases.

Louisiana: No Ameliorative Waste Case Found

There are many waste cases involving minerals. I also found permissive waste cases, but no ameliorative waste cases.

Maine: Need Both Changed Circumstances and Economic Value Decrease (Very Old Law)

Hasty v. Wheeler, 12 Me. 434 (Me. 1835): A lessee made changes to the store and cellar of the lessor's building. The court first said that the lease allowed such changes. It then went on to say that, even if the lease did not, then the changes were not so significant as to change the character of the property and that they improved the property's value.

There are many cases from the mid-to-late 1800s about cutting timber. The cases went from the life tenant only being cut as much timber as he needed to live but not injure the inheritance, *see, e.g.*, McKeen v. Gammon, 33 Me. 187 (Me. 1851), to a flexible standard, see, e.g. Drown v. Smith, 52 Me. 141 (Me. 1862) ("to what extent wood and timber may be cut without waste, is a question of fact for the jury; that, by the terms of the agreement recited in the condition of the bond, the defendant was to manage in a prudent and husband-like manner; and, if the cutting and selling of the timber were a violation of this stipulation, it would be a breach of the bond; otherwise, not.")

Maryland: Seems Like a Change in Character Rule

Not much case law on ameliorative waste, but one case says that "when an act of ownership is contrary to the co-tenant[s]' rights in a way that it alters the character of the common property, it typically involves the commission of waste." Beesley v. Hanish, 521 A.2d 1235 (Me. Ct. Spec. App. 1987).

Massachusetts: Economic Value Rule

Pynchon v. Stearns, 52 Mass. 304 (Mass. 1846). A life tenant cleared and changed the land by putting in a public roadway and building a house. All the actions, though, improved the property's value, so the court held that they were not waste. "The general rule of law in respect to waste is, that the act must be prejudicial to the inheritance." The case goes on to discuss how this rule for waste would be helpful for the country's development.

Delano v. Smith, 92 N.E. 500 (Mass. 1910): Interesting permissive waste case involving a building that was leased as a store and then converted to a smallpox hospital. Court found waste, saying: "While the supposed diminution of the value of property, resting on sentimental grounds arising from the dictates of custom or taste cannot constitute waste, yet the infection of a building with smallpox, so that it cannot be used for the purpose intended, will be waste, unless it can be shown that such injury may be obviated by disinfection or otherwise, without material physical change in the building."

Michigan: Material or Permanent Change in Property

Pearson v Sullivan,176 NW 597 (Mich. 1920): Any material change in the nature or character of buildings made by a tenant, the taking down of partitions, the making of two rooms into one, the putting up of permanent partitions, and any change in the structural character of the premises, is waste, even though the value of the property is enhanced by the alterations. Seemed to be affirmed by Michigan v. Smedley, No. 194250, 1997 Mich. App. LEXIS 2233 (Mich. Ct. App. 1997) (citing to Pearson v. Sullivan, the court said, "Moreover, the tenant has no right to make material or permanent alterations in the leased premises without the landlord's consent).

Minnesota: Material or Permanent Change in Property

Rudnitski v. Elizabeth Seely, 452 N.W. 2d 664 (Minn. 1990): Waste is conduct by a person in possession of property that is actionable by another with an interest in that same property to protect the reasonable expectations of the nonpossessing party. This case would not allow waste action after the land owners pursued other remedies: "With this dependent nature of the cause of action for waste between the parties to a contract for deed in mind, we hold that even though the duty to prevent waste is not an express term of the contract, vendors who pursue statutory cancellation to conclusion are barred from bringing subsequent actions for waste occurring while the vendees were in lawful possession. As previously noted, the election of remedies doctrine prevents a vendor from taking action which procures an advantage for the vendor or subjects the vendee to injury and then seeking additional recovery.

Mississippi: Economic Value Rule

Dodds v. Sixteenth Section Development Corp., 99 So. 2d 897 (Miss. 1958): Building a reservoir on land did not constitute waste because it increased the property's value. Affirmed by Chapman v. Thornhill, 802 So.2d 149 (Miss. Ct. App. 2001) (This "cutting down of trees for his mere profit" and is not done for the purpose of opening wild lands for cultivation or to improve the land. A life tenant cannot treat the estate in such a manner as materially to reduce its value below what it otherwise would be. It does not matter that the life tenant argues that "unless he be allowed to take some of the timber, his [life] estate will be of no value . . . . This could not alter the principle.")

Missouri: Material Change in Property But Courts Seem to Try to Avoid Finding a Material Change or Find that Lease Provision Allowed

Sherwood Medical Industries, Inc. v. Building Leasing Corp., 527 S.W.2d 407 (Mo. Ct. App. 1975): Interesting case because rule is material change in property but court goes out on a limb to say that there was no material change.

Southern Real Estate and Financial Co. v. St. Louis, 759 S.W.2d 75 (Mo. Ct. App. 1988): The lessee wanted to pull down a parking garage and make a park. The majority opinion found that the lease allowed the lessee to make such a change. The dissent, however, said that the lease did not allow such a change, and so the action was waste because it directly injured the property.

Montana: Any Material Change in Character, Very Few Cases on Waste

Turman v. Safeway Stores, Inc., 317 P.2d 302 (Mont. 1957): Leasor leased grocery store to lessee who, after a number of years, converted it to a car sales and garage business. The court said that there was no waste because the change was contemplated by the lease, but that it otherwise would have been waste. "The doctrine is well established that in the absence of a statutory provision to the contrary, a lessee has no legal right, without the consent of the lessor, to make material changes or alterations in buildings on the leased premises to suit his own taste, convenience, or need, and that any material alteration or change in the nature and character of a building on the leased premises, even though it enhances the value of the property and is beneficial to the reversion, constitutes waste."

Nebraska: Little Case Law But Material Alteration

Hayman v. Rownd, 118 N.W. 328 (Neb. 1908): Leasor wanted to put up a sign on the leased property, which was a hotel. The court said that putting up such a sign would constitute waste because it would be a material change. “Waste is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate.”

Nevada: No Ameliorative Waste Case Found

Nevada’s has an action for permissive waste and has an accompanying statute regarding damages, but I found no ameliorative waste case.

New Hampshire: Economic Value Rule (Very Old Law)

Old cases say that clearing timber, if for the benefit of the estate by making land able to be cultivated, is not waste. “In this country, where it so often occurs that it is necessary to cut off the wood and timber in order to make the land fit for cultivation, it may be that the inquiry before the master would take a somewhat wider range than in the English practice. In Chase v. Hazelton, 7 N.H. 171, it was held that clearing land, which the jury finds to be bad husbandry, is waste; from which I infer that by the law of New Hampshire the clearing of land may be necessary as a part of good husbandry, and for the benefit of the inheritance.” Bennett v. Danville, 56 N.H. 216 (1875).

17-9 New Hampshire Practice: Real Estate § 9.03 says that waste is “the tenant's covenant not to damage the premises.” I found no recent ameliorative waste case, but an interesting permissive waste case. The case said that removing manure from the property was waste because the manure was part of the land. Perry v. Carr, 44 N.H. 118 (1862).

New Jersey: Evolved from Strict Changed Circumstances to Standard

Crew Corp. v. Feiler, 146 A.2d 458 (N.J. 1958) "Today there undoubtedly is a disposition to relax the concept of waste. Frequently questioned is the proposition that alterations or improvements may constitute waste even though they enhance the value of the property. No authority, however, appears to suggest that the single fact of enhancement in value should warrant any and all changes. Apart from the speculative nature of an inquiry into the value as of the date when the lessee's term will end, it would be unfair and contrary to the reasonable expectation of the parties to deprive the lessor of the specific rental benefit for which he bargained and to force upon him a substituted consideration to which he did not agree. The element of increased value can be but one of the many factors, having its greatest influence in long-term arrangements."

Klie v. Von Broock, 37 A. 469 (N.J. Super. Ct. Ch. Div. 1897) ("An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased. Thus, the converting two chambers into one, or the converting a hand-mill into a horse-mill, or a corn-mill into a fulling-mill, or a malt-mill to a corn-mill, or a logwood-mill to a cotton-mill, have been held to be waste. So, also, the conversion of a private house into a shop is waste. So, also, may the building of a new house where there was one before be waste if it impair the evidence of title.")

New Mexico: Economic Value Rule Implied

I couldn't find any specific ameliorative waste case, but a recent case implies that a decrease in economic value is a necessary element. Mannick v. Wakeland, 117 P.3d 919 (N.M. Ct. App. 2004): "Waste generally has three elements: 1. There must be an act constituting waste. [This means there must be an act constituting the destruction, misuse, alteration, or neglect of premises.] 2. The act must be done by one legally in possession. 3. The act must be to the prejudice of the estate or interest therein of another."

New York: Statute Mandating Economic Value Rule

NY CLS RPAPL § 803 was enacted in 1937 in response to the Brokaw case in order to lessen the harshness of that case's ameliorative waste rule. The statute includes a number of provisions, including that the alterations must not decrease the property's market value and are not barred by contract.

Two Guys From Harrison-N.Y., Inc. v. S.F.R. Realty Associates, 472 N.E.2d 315 (N.Y. 1984): Applied the ameliorative waste statute but said that alterations were waste because the court interpreted the contract to bar structural alterations.

North Carolina: Sounds like Posner's Prudent Owner

Temple v. Carter, 165 S.E.2d 541 (N.C. Ct. App. 1969). "The liability of a life tenant for waste has been very greatly modified in modern times until it has come to be established that such a tenant may, as a general rule, do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality in which the land is situate, having regard, also, to its condition, which do not cause a substantial injury to the inheritance. He may clear land for the proper enjoyment of his own benefit. It may be that the cutting and selling of the timber for the present purpose of making necessary repairs to buildings already on the premises can, at times, be sustained. But the cutting of timber for sale except as

above indicated is doubtless waste -- which waste would not be purged by a subsequent application of the proceeds to repair. To justify a sale of timber for needed repairs, it must appear that it was done with the present view of making needed repairs, that the proceeds were honestly expended for such purpose, that no substantial injury was done to the inheritance, and that what was done was *'most for the benefit of all concerned*.'"

Norris v. Laws, 64 S.E. 499 (N.C. 1909): Court remanded case because lower court did instruct the jury to compare the value of the timber the lessee had cut with the value of the cleared land. Shows that economic value was important.

North Dakota: No Ameliorative Waste Case Found

Meyer v. Hansen, 373 N.W.2d 392 (N.D. 1985): Leaves out ameliorative waste from its definition of waste. "'Waste' may be defined as an unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in a substantial injury; it implies neglect or misconduct resulting in material damage to property, but does not include ordinary depreciation of property due to age and normal use. The court also said that the damages for waste were either the difference between the market value of the property or the cost of repairing the property, whichever was smaller. There was no discussion of what would happen if the value of the property went up.

Ohio: Economic Value Rule

Zywiczynski v. Zywicznski, 80 N.E.2d 807 (Ohio Ct. App. 1947): "The tenant for life is entitled to the full use and enjoyment of the property, the only restriction upon this use being that the estate of those who are to follow him in possession shall not be permanently diminished in value by his neglecting to do that which an ordinarily prudent person would do in the preservation of his own property, or by doing those things which are not necessary to the full enjoyment of the particular estate, and which have the effect permanently to diminish the value of the future estate."

Oklahoma: No Ameliorative Waste Case Found

Have a specific statute dealing with waste of oil in oil production. The cases are almost all about that type of waste, although there are a few on permissive waste in general.

Oregon: Economic Value Rule

Whistler v. Hyder, 879 P.2d 214 (Or. Ct. App. 1994): "Waste occurs when the person in possession of the land, by act or omission, causes the property's value to decrease as the result of abuse or destruction, thereby causing injury to the property and the holders of the legal interests in it."

Pennsylvania: Waste Action Now Abolished, Was Economic Value Rule

In 2004, Pennsylvania abolished the waste action when it changed the Pennsylvania Rules of Civil Procedure. "However, the relief formerly available in that action may be obtained in a civil action seeking equitable relief. Thus, cases involving the former action may still retain some viability insofar as they shed light on similar circumstances under which persons might today

seek relief by means of a civil action.” 1-32t Pennsylvania Real Estate Law Encyclopedia (PLE) § 12.

McCullough v. Irvine's Executors, 13 Pa. 438 (1850): Not waste for a life tenant to tear down a house, a barn, and sell a large about of timber because the land was worth as much or more after the changes.

Rhode Island: Standard Depending on Circumstances, Very Few Cases

Reniere v. Gerlach, 752 A.2d 480 (R.I. 2000): “In Chapman v. Cooney, this Court defined waste as ‘the doing of those acts which cause lasting damage to the freehold or inheritance, or the neglect or omission to do those acts which are required to prevent lasting damage to the freehold or inheritance.’ This Court went on to state that the question as to whether [waste] has been committed in a given case is to be determined in view of the particular facts and circumstances appearing in that case." Although almost a century has passed since the concept of waste was laid out in Chapman, we adhere to it today and conclude that the facts and circumstances of the case before us do not rise to the level of waste.”

South Carolina: From Economic Value Rule to Standard

Wingard v. Lee, 336 S.E.2d 498 (S.C. Ct. App. 1985): “Waste may be committed by acts or omissions which tend to the lasting destruction, deterioration, or material alteration of the freehold and the improvements thereto or which diminish the permanent value of the inheritance. Whether particular acts or omissions constitute waste depends on matters of fact, including: the nature, purpose, and duration of the tenancy; the character of the property; whether the acts complained of are related to the use and enjoyment of the property; whether the use is reasonable in the circumstances; and whether the acts complained of are reasonably necessary to effectuate such use.

If acts which might otherwise amount to waste are expressly or impliedly authorized by the instrument creating the tenancy, a tenancy without impeachment of waste is created. In such cases, the tenant is not liable for waste, as long as he does not act unreasonably, maliciously, or unconscionably to destroy the estate. Similarly, acts which might otherwise amount to waste by a tenant do not constitute waste if the landlord assents to them.”

Lewis v. Virginia-Carolina Chemical Co., 48 S.E. 280 (S.C. 1904): Court said that, if there was no contract provision, no waste claim because value of the remainder was improved. “These facts come near to establishing a case of meliorating waste exempting from damages, as the injury to the inheritance by the unauthorized destruction of timber is more than offset by the saving of timber in other respects, and by the use of the timber cut on the premises in its permanent improvement. But the buildings were to become the property of plaintiffs, without regard to where the lumber came from, and the use of the timber was expressly restricted to the purposes named; so that it was a technical violation of plaintiffs' right to cut and use the timber for an unauthorized purpose, and plaintiffs are entitled to compensation.”

South Dakota: Economic Value Rule Implied

I couldn’t find an ameliorative waste case, but the damages rule implies that a decrease in economic value is a necessary elemet. Regan v. Moyle Petroleum Co., 344 N.W.2d 695 (S.D.

1984): “In an action for waste, this detriment is generally considered the difference between the present value of the property and what it would have been worth had the tenant maintained and repaired the premises as a prudent person would have done under similar circumstances.”

Tennessee: Economic Value Rule

Thompson v. Thompson, 332 S.W.2d 221 (Tenn. 1960): “Then in 37 L.R.A. N.S. 772, on the right hand column at the top are cited several cases holding that the life tenant is entitled to the proceeds of timber cut in good faith for the purpose of putting land into cultivation for the purpose of enhancing the value of the whole farm.”

Texas: Wrongful Requirement for Waste Actions, Changed Circumstances Standard But No Damages for Ameliorating Waste

Hamburger & Dreyling v. Settegast, 131 S.W. 639, 640-641 (Tex. Civ. App. 1910): “It is not necessary that the alteration should diminish the value of the property. It may even enhance its value. This does not affect its character as waste.” The court discussed the Melms case, but said that there were no changed circumstances here. It sounds as though it would be open to departing from the strict view of waste if changed circumstances.

Minns v. Houston Health Health Clubs, Inc., 1989 Tex. App. Lexis 1545 (Tex. App. 1989): Affirmed verdict that defendant lessee committed waste by altering leased building, but affirmed no damages because it was ameliorating waste, which is "an act of lessee, though technically constituting waste, yet in fact resulting in improving instead of doing injury to land."

King's Court Racquetball v. Dawkins, 62 S.W.3d 229 (Tex. App. 2001): Explains “wrongful requirement.” First, it is clear that to constitute waste, the act allegedly causing it must be wrongful . . . . In demolishing the interior of the building, K.C. converted property owned by Dawkins that was once attached to the building. That property consisted of lockers and the materials comprising various of the walls within the building. No one disputes that. Nor can it be disputed that conversion involves an act deemed unacceptable under the law. Thus, some evidence appears of record upon which the trial court could have found that K.C. committed a wrongful act (conversion) resulting in waste.”

Utah: Economic Value Rule

Eleopulos v. McFarland and Hullinger, LLC., 145 P.3d 1157 (Utah Ct. App. 2006): A waste claim requires proof of damages in the form of prejudice to the estate or interest of another. A co-beneficiary of trust that owned gravel pit failed to show an actual loss or damage from dumping of material by lessee of gravel pit that co-beneficiary claimed was toxic, as required to maintain breach of contract and waste claims, even though co-beneficiary alleged that she suffered potential future liability of at least $1.5 million for clean-up costs, given that no clean-up action had been initiated by any agency and no order for clean-up existed and there was no other actual loss.

Vermont: Economic Value Rule; Prudent Owner for Permissive Waste

Kuhn v. Eastman, 11 Vt. 293 (Vt. 1839): “It is not in this state waste, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and

would be according to the rules of good husbandry, taking into view the location and situation of the whole farm."

Harvey v. Harvey, 41 Vt. 373 (1868): Embodies Posner's prudent owner concept. "It is a sufficient compliance with G.S.1863, c. 55, § 13, prohibiting waste by the tenant in dower, if she conducts in relation to the buildings, fences, and lands, as a prudent man would with his own absolutely. She may defer repairs till a decline in the price of materials and labor, provided the estate suffers no immediate and permanent injury thereby."

Virginia: Economic Value Rule

Chosar Corp. v. Beulah Owens, 370 S.E.2d 305 (Va. 1988): Implies that waste would not increase the property's value. "What constitutes waste sufficient to entitle the injured party to injunctive relief depends upon the circumstances of each particular case. For example, the cutting of timber in some instances may constitute waste, while in other cases it may be a benefit."

Washington: Economic Value Rule

Moore v. Twin City Ice & Storage, 159 Pac. 779 (Wash. 1916): The lessee did not commit waste because his acts did not materially lessen the value of the property or harm it in any way. The court rejected the argument of the lessor that the lessee's acts lessened the value of the land, located within city limits, for agricultural purposes. The court found that the lease did not specify the use that the lessee could make of the property.

Graffell v. Honeysuckle, 191 P.2d 858 (Wash. 1948): "Waste is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury." The case also said that "[r]emoval of timber which does not amount to good husbandry of the land, or removal of a substantial amount of timber from land having a value primarily for its timber are classic examples of waste."

West Virginia: Strict Injury to Property Rule Implied (Very Old Law)

I couldn't find an ameliorative waste case, but it seems like a strict injury to the property rule would apply. University v. Tucker, 8 S.E. 410 (W. Va. 1888): Life tenant leased land to brick maker who would take clay out of soil for bricks. Court said that it was waste because "it is taking the very substance of the inheritance. There is no evidence that brick was made on the land in the lifetime of the testator . . . . The life-tenant has the usufruct of the land. He can enjoy the annual produce of the land during life, but he must not do any damage to the absolute property in the remainder-man."

Wisconsin: Three-Part Test Includes Economic Value Rule

Manor Enterprises, Inc. v. Vivid, Inc., 596 N.W.2d 828 (Wisc. Ct. App. 1999): There are three elements to common law waste: (1) unreasonable conduct by the owner of a possessory estate; (2) resulting in physical damage to the real estate; and (3) a substantial diminution in the value of the estate in which others have an interest. The court held that there was no evidence that posts in the ground diminished the estate's value, so there was no waste action.

Wyoming: No Ameliorative Waste Case Found

There seem to be almost no waste cases of any type in Wyoming.

Appendix C: State Waste Law Statutes

Alaska	Alaska Stat. § 09.45.740	Damages for waste
California	Cal Code Civ Proc § 732	Damages for waste
Connecticut	Conn. Gen. Stat. § 52-563	Damages for waste
Delaware	25 Del. C. § 909	Damages for waste
D.C.	D.C. Code § 42-1601-1604, 3211	Damages for waste, who can sue for waste
Idaho	Idaho Code § 6-201	Damages for waste
Iowa	Iowa Code § 658	Damages for waste
Kansas	K.S.A. § 58-2523	Who can sue for waste
Kentucky	KRS § 381.350	Damages for waste
Maine	14 M.R.S. § 7501	Damages for waste, a lease provision is a defense against waste
Maryland	Md. Code Ann., Real Property § 14-102(1)	Damages for waste
Massachusetts	ALM GL ch. 242, § 1	Damages for waste, who can sue for waste
Michigan	MCL § 600.2919	Damages for waste, who can sue for waste
Minnesota	Minn. Stat. § 561.17	Damages for waste, who can sue for waste
Mississippi	§ 93-13-41	Damages for waste
Missouri	§ 537.420 & 537.490	Damages for waste, a lease provision is a defense against waste
Nevada	Nev. Rev. Stat. Ann. § 40.150	Damages for waste
New Jersey	N.J. Stat. § 2A:65-2	Prohibits waste
New York	NY CLS RPAPL § 803, 812	803 sets out specific terms for ameliorative waste--enacted in response to Brokaw
North Carolina	N.C. Gen. Stat. § 1-538	Damages for waste
North Dakota	N.D. Cent. Code § 32-17-22, § 47-04-22, § 47-02-33	Damages for waste, statement that remainderman has cause for action if injury is done to the inheritance, statement that life tenant can use property like owner as long as he doesn't injure the inheritance.

Ohio	ORC Ann. 2105.20	Damages for waste
Oklahoma	52 Okl. St. § 86.2	Concerns waste in oil production only
Oregon	ORS § 105.805	Damages for waste
Rhode Island	R.I. Gen. Laws § 34-14-1	Damages for waste
South Dakota	S.D. Codified Laws § 21-7-1	Damages for waste
Virginia	Va. Code Ann. § 55-211- 55-213	Who can sue for waste
Washington	Rev. Code Wash. (ARCW) § 64.12.020	Damages for waste
West Virginia	W. Va. Code § 37-7-4	Damages for waste
Wisconsin	Wis. Stat. § 844.19	Damages for waste