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Some Preliminary Thoughts on the Law of Neighbors

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SOME PRELIMINARY THOUGHTS ON THE LAW OF NEIGHBORS

*James Charles Smith**

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I. INTRODUCTION

A fundamental characteristic of real property law, one that is definitional in nature, is that its subject matter consists of land parcels. A land parcel, in contrast to an ownership interest such as a fee simple estate, is not an abstraction. Each land parcel has a physical reality, and virtually all land parcels abut other parcels.¹ Each parcel has one particular location, defined by its proximity to other pieces of property. The value of a land parcel depends heavily upon its location, and the nature of neighboring parcels has a major impact in determining that value.

Owners of neighboring parcels have sets of rights, privileges, and duties that define their legal relationships with neighbors. In Anglo-American law, those rights, privileges, and duties are components of real property law, but they are not a recognized category of real property law. Rather, they represent the application of general doctrines and rules to neighbors, instead of a distinct and cohesive body of law of its own. Years ago Professor Jacqueline Hand and I wrote a book with the title *Neighboring Property Owners*.² Another book written by Professors Backman and Thomas has a similar scope in many respects,³ and there are a handful of articles in U.S. law journals dealing with what we might call neighbor law topics.⁴ Such efforts, however, have not had a measurable impact on how the legal community views neighbors. Nevertheless, looking forward we could choose to call the collection of rights, privileges, and duties that applies to neighboring owners and possessors of land parcels the “Law of Neighbors” or “Neighbors Law.” The future might well bring a world in which distinctive law school courses on Neighbors Law are taught and a specialized body of doctrine with regard to neighborly relations emerges. Notably, as

¹ This is true for almost all parcels, the only exception being islands owned by a single owner. In addition, some parcels are separated from other privately owned parcels by roads and other publicly owned corridors. Issues between such “nearly adjoining neighbors” are usually not markedly different than those arising between neighbors who own abutting parcels and thus share a common boundary line.

² JACQUELINE P. HAND & JAMES CHARLES SMITH, *NEIGHBORING PROPERTY OWNERS* (1988); JAMES CHARLES SMITH, *NEIGHBORING PROPERTY OWNERS* (2010).

³ JAMES H. BACKMAN & DAVID A. THOMAS, *A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS* (1989).

⁴ E.g., Terence J. Centner, *Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors Only If They Are Fair*, 12 J. ENVTL. L. & LITIG. 267 (1997); Nathan K. DeDino, *When Fences Aren't Enough: The Use of Alternative Dispute Resolution to Resolve Disputes Between Neighbors*, 18 OHIO ST. J. ON DISP. RESOL. 887 (2003); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987).

we soon shall see, other legal systems have developed distinct bodies of law to govern relations among neighbors. Two such systems, briefly discussed below, are South Africa and Scotland.

A key question to ask is what value, if any, is to be gained by coalescing legal principles and rules that define the rights and obligations of neighbors under a specialized. There are a number of different ways one can think about the possibilities of “added value,” many of which have a utilitarian perspective. Would forging a specialized law of neighbors aid academics, judges, lawyers, and other persons called on to analyze disputes among neighbors? Would it lead to law reform measures that make the law more coherent and just? Would it make the law more accessible to the public? Would there be efficiency gains with respect to legal research and accessing the relevant law?

Any attempt to tackle these questions invites consideration of broader matters of jurisprudence and epistemology. Lawyers and legal academics organize their knowledge by reference to categories or fields. This does not distinguish our discipline from other disciplines. The human mind organizes knowledge by creating organizational and hierarchical structures. This tendency is hard-wired; it is part of our biology. But the creation of information-organizing categories is not easy, and there are no firm consensuses on what subject matters constitute a “legal category” or how to define a legal category. In my view, a good starting point for discovering a legal category is to look for recognition by the legal community of a distinctive subject matter that is worthy of study and mastery. The Anglo-American legal system has long considered the law of real property to be a major category.⁵ Within the real property realm, there are many long-recognized legal categories, or sub-categories. For a long time, the mainstays have included the law of easements, the law of mortgages, and the law of estates in land (including future interests). Legal categories are not static; they evolve. Just as legal content, principles and doctrines evolve. More recently, subjects such as the law of zoning and water rights law have achieved recognition as important real property subcategories.

Legal categories emerge for one of two reasons: the subject matter has practice cohesion, or it has academic cohesion. “Practice cohesion” means that practicing lawyers who represent clients identify the subject matter as an

⁵ This was an innovation, however, that apparently began in the twelfth century. Earlier English law organized knowledge differently and more discretely. See SIR KENELM EDWARD DIGBY, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES* 136–80 (4th ed. Oxford, 1892) (describing the medieval land tenure system).

area of specialization and tend to cluster their own work in that area. In so doing, they gain or attempt to gain comparative expertise in the relevant subject, and market their services to clients accordingly. The law of neighbors or “neighborhood law” is not presently a recognized type of law practice in the United States, and it will not likely become one anytime in the near future.⁶ In part this is the case because neighbor law disputes typically do not involve high financial stakes and resulting incentives for lawyers to market themselves as experts in the area.

“Academic cohesion” means legal scholars and law teachers conceive of the subject matter as a discrete area worthy of analysis and study as a whole. Academic consensus is usually reflected by treatises, casebooks, and law school courses bearing the title of the relevant specialty. In addition, academic organizations and conferences can point toward academic cohesion for a particular subject matter. Of course many legal categories have both practice cohesion and academic cohesion, but the overlap is not complete. For example, several foundational law school courses, such as torts, contracts, and constitutional law, do not translate to practice specializations.⁷

This Article will not explore legal categories as a general matter or even attempt a broad examination of the possible values stemming from the recognition of a U.S. law of neighbors. Instead, this Article suggests that if the field of neighbor law develops in the United States, academics will have to lead the way. I also contend that there may well be academic value to such an enterprise, because it could push along evaluation of disparate rules and doctrines, with an eye toward identifying major principles that are presently hidden or underappreciated. Of even greater importance, such an effort could lead to a salutary simplification of the law of neighbors, built on legal reforms that do away with outmoded legal rules and doctrines.

This Article does three things. First, it introduces the “stranger model” and the “friend model” of neighbors law, using these models as a frame for describing three components of existing U.S. law applicable to neighboring

⁶ One problem is that legal specialization tends to occur separately within the transactional and litigation/dispute resolution spheres. Would neighbors law be litigation (dispute resolution), planning and transactions, or both? If the area is conceived broadly, it would be both, making specialization less likely. New recognized practice areas tend to relate to a specific key legal regime, often grounded on a new statutory or regulatory regime. Examples are antitrust, federal taxation, bankruptcy, and telecommunications law.

⁷ Of course, I am not suggesting that lawyers do not practice what is learned in torts, contracts, or constitutional law courses. I suggest only that practitioners whose specialty falls within one such meta-category usually identify a more specific practice, such as corporate law, personal injury litigation, or appellate advocacy.

landowners. Second, it briefly describes the extent to which South Africa and Scotland have come to describe neighbors law as a discrete legal category, which correlates to the stranger model and friend model. Third, it concludes by making several suggestions on how the models may help in the construction of a coherent law of neighbors.

II. THE STRANGER MODEL

Usually, the U.S. legal system treats neighbors as strangers, subjecting them to the same set of legal rules and norms that apply universally to all persons in general. This is called the “stranger model” of the law of neighbors. Thus, if a person causes injury to her neighbor’s property or person, whether the victim is entitled to relief depends upon the general law of torts, including nuisance, negligence, assault, and battery.

A property owner’s right to exclude others is defined by tort law, more specifically by causes of actions and remedies available to the property owner. When the problem between neighbors involves one person’s entry onto adjoining property, the matter is resolved by resort to the general law of trespass. Unless the intruder has a privilege to enter her neighbor’s land, the entry is actionable. If a privilege exists, it is because the intruder has identified a privilege the general law of trespass recognizes. A neighbor has no more of a privilege to cross the boundary of privately-owned adjoining land than a person who is a total outsider, a stranger. For example, a person whose animal accidentally wanders onto land owned by another person has a privilege to enter to retrieve the animal.⁸ That privilege is not a neighbor’s privilege; it applies no differently whether the animal’s owner lives next to the land where the animal has gone, or whether the animal’s owner lives many miles away.

The stranger model applies not only to tort rules that protect a person’s property and person from a neighbor’s wrongful conduct, but also to other bodies of law. For example, there is no special body of contract law to govern agreements entered into among neighbors. Neighboring owners frequently enter into consensual arrangements, serving various purposes. They may agree to build a fence or plant a hedge, to be located on their common boundary line, and thereafter maintain it jointly. One owner may desire access across her neighbor’s parcel to reach a public street or lake. A homeowner with a tennis court in her back yard may agree to let her

⁸ RESTATEMENT (SECOND) OF TORTS § 198 (1965).

neighbors play there on occasion. With a view to maintaining property values, a group of neighbors may agree to restrict the uses that they may make of their properties, such as allowing residential uses only, promising to landscape their front yards, or agreeing to restrictions on size and placement of signs. All of these examples share a common foundation based on consent. The general law of contract, which applies to strangers as well as to persons who have prior relationships, provides the mechanism for determining whether such agreements or understandings are legally enforceable, and if so, what remedies are available for their breach. A large part of the neighbors' legal relationships are defined by the vast field of contract law, with its multitude of principles, ranging from formation to interpretation to excuse to enforcement. Thus, the law of neighbors adopts the stranger model as its framework for contract matters, just as it does for tort and property matters.

III. THE FRIEND MODEL

The stranger model is the dominant source of the U.S. law of neighbors, but on occasion, U.S. law has developed rules that forge special rights and obligations of neighbors. In the real world neighbors often have distinctive and special relationships. They have some sort of social contact, whether friendly or otherwise. They almost inevitably have mutual interests that stem from their proximity. Mutual interests may focus on the support of local institutions such as schools, churches, civic groups, and sports clubs, and joint participation in activities associated with those mutual interests may well result. Rules that reflect the special relationship between neighbors follow what I call the "friend model" of the law of neighbors. Of course, the word "friend" does not fully reflect the nature of many neighbor-neighbor relationships, for some of those relations are merely civil and some are downright hostile. But even neighbors in these relationships are connected up in meaningful personal ways that sharply differentiate them from strangers. The term "friends," in my view, captures this reality about as well as is possible.

Generally, neighbors treat one another differently because of their status as neighbors. To be "neighborly" is to be kind and friendly; to share; to act so as not to offend others; to be willing to help in times of need, both small and great. Again, such an attitude does not describe all interactions among all neighbors in all settings. If it did, we would live in something quite like a utopia having a society radically different than ours, with human nature itself

transformed.⁹ But “neighborliness” among neighbors is in fact frequent, rather than rare. It is true that today many complaints are heard about the erosion of our sense of community. In many places, however, neighborhoods function well, with positive and harmonious social interactions among residents. Indeed, the rise of the Internet may well be contributing to the healthy functioning of neighborhoods, as members of these communities freely exchange information and concerns about the well being of the neighborhood itself.

The ethic of neighborliness, where it persists, has behavioral consequences. One such consequence is the tendency of legal rules to bend to social norms.¹⁰ For example, in the neighborhood context a landowner may care less about the right to exclude others from entering or using her exterior spaces. Toleration of slight and occasional intrusions promotes good will, and is generally reciprocated.

IV. THE IMPACT OF ADVERSE POSSESSION ON NEIGHBORS’ BOUNDARIES

Every parcel of land is defined by its boundaries. Its value to a significant degree depends upon the owner’s ability to locate her boundaries, thereby determining where her parcel stops and ownership interests of neighbors begin. The precise location of parcel boundaries is difficult, and neighboring owners frequently encounter disputes concerning the proper location of the boundary lines that separate their parcels. Such disputes historically generate large volumes of litigation, and that remains true today. If anything, the incidence of boundary conflicts has risen due to overall population growth and the continual conversion of rural lands to urban and suburban uses. Boundary disputes often have significant economic

⁹ See *PLEASANTVILLE* (New Line Cinema 1998) (depicting the values of the American 1950s). A synopsis of the film:

A brother and sister from the 1990s are sucked into their television set and suddenly find themselves trapped in a 1950s style television show. Here they have loving parents, old fashioned values, and an overwhelming amount of innocence and naiveté. Not sure how to get home, they integrate themselves into this “backwards” society and slowly bring some color to this black and white world. But as innocence fades, the two teens begin to wonder if their 90s outlook is really to be preferred.

Pleasantville, IMDb, <http://www.imdb.com/title/tt0120789/> (last visited Aug. 20, 2011).

¹⁰ See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (describing a study that found farms in Shasta County, California made agreements to exchange property rights when the country changed the law so that liability could be imposed on farmers whose animals trespassed).

consequences to the neighbors, especially when one owner has made valuable improvements on land she does not in fact own.

The U.S. law governing the location of boundaries reflects both the stranger model and the friend model. Adverse possession is the principal body of law that adjusts record boundaries between neighbors. In one primary application, adverse possession applies to parties who are not neighbors.¹¹ A person in possession of a parcel of land may bar the potential claims of non-possessors, provided that the possessor can prove the standard doctrinal elements, such as open, exclusive, and continuous possession for the statutory period.¹² In this context, adverse possession serves the purpose of clearing title to land, a function that generally applies to entire parcels of land.¹³ If the litigation is successful, the present possessor cuts off property claims that usually appear in the record chain of title, often in the distant past.¹⁴ In this context, the parties to litigation are usually strangers to the adverse possession claimant. Those parties are not in possession of the land in question or neighboring land, and if they have even dealt with the land in any tangible physical sense, they have not done so recently.

A second primary application of adverse possession law relates uniquely to neighboring landowners. When one owner makes long-standing use of her neighbor's land, that use may satisfy the elements of adverse possession, which has the consequence of modifying the true boundary line as set forth by deeds or other recorded instruments.¹⁵ When a person establishes adverse possession title to part of her neighbor's land, that adjudication conforms the boundary line to the parties' longstanding actual use and possession of the land lying near the record boundary.¹⁶

Does U.S. adverse possession law operate differently with respect to disputes between neighbors (as to the location of boundaries) than it does with respect to disputes between strangers (when the adverse possessor lays claim to an entire parcel of land)? When one owner asserts title to a strip or part of her neighbor's land under the law of adverse possession, special considerations come into play, which are reflected in several dimensions of

¹¹ See generally HAND & SMITH, *supra* note 2, at 125 (noting that the law of adverse possession strengthens land title by barring potential claims of persons who are not in possession of any land).

¹² *Id.* at 128–29.

¹³ *Id.* at 125.

¹⁴ *Id.*

¹⁵ *Id.* at 125–26.

¹⁶ *Id.* at 126.

adverse possession doctrine. The remainder of this section explores those special considerations, first through the lens of the stranger model and then through the lens of the friend model.

A. Adverse Possession Under the Stranger Model

Under the stranger model of adverse possession, black-letter law resolves disputes between neighbors by applying principles of the law of trespass, taking no account of the parties' status as neighbors. A standard definition of trespass is the intentional, unauthorized entry of a person or a tangible object on the land of another.¹⁷ In this context, "intentional" does not mean that the actor knows she is trespassing, only that she intends to engage in the activity that turns out to constitute the entry. A trespass ensues not only when the actor invades land owned by another person with knowledge that invasion is occurring, but also when the actor mistakenly believes that she owns the land where the entry takes place.¹⁸

Two consequences stem from the application of black-letter trespass law to neighbors' adverse possession disputes; one pertains to the requirement of adverseness, while the second pertains to the requirement of openness. As to the former requirement, countless courts have insisted that the claimant's possession must be "hostile and adverse" in order for the claimant to gain title by way of adverse possession.¹⁹ Under standard doctrine, this requirement merely rephrases the idea that the possessor must be committing a trespass, as opposed to a privileged entry. If the landowner permits the entry, there is no trespass.²⁰ Furthermore, if no trespass occurs, the statute of limitations cannot expire because it never began to run.

¹⁷ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984).

¹⁸ Phillips v. Sun Oil Co., 121 N.E.2d 249, 250–51 (N.Y. 1954) (stating that a trespasser "must intend the act which amounts to or produces the unlawful invasion"); RESTATEMENT (SECOND) OF TORTS § 158 (1965).

¹⁹ See, e.g., Moss v. Woodrow Reynolds & Son Timber Co., 592 So. 2d 1029 (Ala. 1992) (holding that adverse possession is precluded, where the owner who held record title expressly permitted claimant to fence parcel and later the claimant entered into hunting leases with record owner, notwithstanding claimant's use for over thirty years); West Michigan Dock & Market Corp. v. Lakeland Invs., 534 N.W.2d 212 (Mich. Ct. App. 1995) (finding that a pier owner who used part of neighbor's boat slip for dockage for sixty years has no adverse possession claim because use was by neighbor's permission).

²⁰ See, e.g., Hoery v. United States, 64 P.3d 214, 217 (Colo. 2003) ("The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.").

In the context of a neighbors' adverse possession dispute, the practical consequence of the adverseness element is that the true owner often seeks to establish a grant of permission, made either by the owner or the owner's predecessor in title. Under the stranger model, which applies black-letter trespass law to the parties, permission is not presumed.²¹ The owner must prove affirmative acts that demonstrate express or implied permission.²² Typically, when an owner neither objects to a neighbor's entry, nor permits that entry, the entry is deemed trespassory.²³

A second prime element of adverse possession law is that the entry must be open, which courts often elaborate by stating it must be "open and notorious" or "open and visible."²⁴ Unlike adversity and hostility, this element does not proceed from the fundamental nature of trespass. Under the basics of trespass, a secret or hidden (i.e., non-open) unpermitted entry, whatever that may be, is wrongful and tortious. The openness requirement serves a different purpose that is unrelated to the core definition of the tort in question. Instead, openness functions to extend the running of the statute of limitations (and the concomitant transfer of title) in situations in which the victim has not had a fair opportunity to bring an action within the statutory period. Such an extension of the statute of limitations happens with some degree of regularity in transactions where the parties have some type of special relationship, but it is rare in stranger transactions. In the latter category, the law grants statutory extensions in cases where the tortfeasor has engaged in active concealment of the wrong. When the victim fails to discover the wrong or the injury due to active concealment, courts often label the conduct fraudulent to justify the extension of the statute of limitations.

²¹ See, e.g., *Pinewoods Assocs. v. W.R. Gibson Dev. Co.*, 837 S.W.2d 8 (Mo. Ct. App. 1992) (determining that actual possession was presumed hostile to the true owner); *Goss v. Trombly*, 835 N.Y.S.2d 493, 494 (App. Div. 2007) (ruling that hostility was presumed when homeowners regularly maintained and used gravel driveway that encroached on neighbor's land).

²² *Smith v. Hayden*, 772 P.2d 47 (Colo. 1989) (holding that where the owner who held record title made offers to convey the disputed strip of land to the occupying neighbors, and the neighbors made statements that they would continue to use the driveway, the situation did not make the use permissive, and the circumstances were not a concession of record ownership).

²³ *Pinewoods Assocs.*, 837 S.W.2d at 11 (stating that actual possession is presumed hostile to a true owner); *Goss*, 835 N.Y.S.2d at 494 (App. Div. 2007) (stating that hostility is presumed when homeowners regularly maintained and used gravel driveway that encroached on neighbor's land).

²⁴ *Walling v. Przybylo*, 851 N.E.2d 1167 (N.Y. 2006); *Koenig v. First American Title Ins. Co. of Texas*, 209 S.W.3d 870 (Tex. Ct. App. 2006).

The stranger model version of the open possession requirement provides little protection to the true owner who is forced to defend against an adverse possessor's claim. Actual possession is non-open only in cases of the possessor's active concealment, such as removal of an encroachment when neighboring true owner is expected to be present, or when the type of the possession is intrinsically concealed, such as subsurface trespass.²⁵

B. Adverse Possession Under the Friend Model

The stranger model version of adverse possession law operates to the advantage of the adverse possession claimant, compared to alternative rules that have achieved a degree of acceptance in the U.S. law of adverse possession. The alternate rules, which often serve to guard against an owner's loss of title to her neighbor, are grounded upon the friend model. In particular, with respect to adversity in the neighbor law context, courts depart from black-letter trespass law in three ways. The first departure rejects, at least in some settings, the conclusion that an unexplained entry across a boundary line is non-permissive, i.e., wrongful and adverse. A few states depart from the normal presumption of adversity so as to imply permission whenever a person uses part of her neighbor's land.²⁶ Some states generally retain the presumption of hostility (adversity) but reverse it when the neighbors are close relatives. Nebraska presumes possession to be permissive when neighbors are related by blood or marriage.²⁷ Such a presumption based on the neighbors' status as relatives also applies in prescriptive easement cases.²⁸

²⁵ See *Marengo Cave Co. v. Ross*, 10 N.E.2d 917 (Ind. 1937) (stating that the owner of a cave entrance, who took possession of cave and operated it as tourist attraction for forty-six years, cannot gain adverse possession title to portion of cave lying under neighbor's land).

²⁶ See e.g., *Downing v. Bird*, 100 So. 2d 57, 63 (Fla. 1958) (holding that claims of both adverse possession and prescription, possession, or use are presumed subordinate to the title of the true owner and that the claimant must prove adversity "by clear and positive proof"); *Hoffman v. Freeman Land & Timber*, 994 P.2d 106, 110 (Or. 1999) (noting that the law presumes an adverse possession claimant's possession is "in subservience to the legal title" in the absence of proof to the contrary); *Peter H. & Barbara J. Steuck Living Trust v. Easley*, 785 N.W.2d 631, 637 (Wis. Ct. App. 2010) (noting that the presumption is that possession is subordinate to the true owner's rights).

²⁷ *Kraft v. Mettenbrink*, 559 N.W.2d 503 (Neb. Ct. App. 1997) (discussing that a son removed fence, and the son and father farmed neighboring tracts prior to father's conveyance to stranger).

²⁸ *Boldt v. Roth*, 618 N.W.2d 393 (Minn. 2000) (describing that when neighbors are members of same family, permission is presumed, but when family member conveys to

Not all courts have moved toward presuming permission in the neighbor-versus-neighbor content. In fact, there is no discernable trend for movement toward or away from a presumption of permissiveness. In 2000, Massachusetts specifically rejected a presumption of permissive use based on family relationships in *Totman v. Malloy*.²⁹ In *Totman*, the Supreme Judicial Court of Massachusetts reversed a trial court decision, which had presumed permission and thus barred a son and daughter-in-law from gaining adverse possession to a beach area that they had improved, maintained, and used for 37 years.³⁰ The court explained:

In light of our case law and the purposes behind the requirements for establishing adverse possession, we decline to create a presumption or inference of permissive use among “close” family members. Were we to recognize such a presumption, related claimants would be required to provide additional proof beyond that needed for similarly situated unrelated parties. Such a presumption would encourage related claimants to provide evidence of family strife, rewarding those who do by making it more likely that they be granted title by adverse possession. Moreover, such inquiry into “hostile” relationships within a family would necessarily require courts to evaluate a claimant’s state of mind, an evaluation that has been eliminated from the elements of adverse possession. We have long held that the state of mind of a claimant is not relevant to a determination whether the possession of land is nonpermissive.³¹

Some jurisdictions apparently have adopted a middle ground position. Colorado, for example, refused to adopt a presumption of permissive use between neighboring relatives, but required a stronger proof of hostility.³²

The implied permission rules appear to rest upon behavioral assumptions with respect to how neighbors interact. Many landowners tolerate slight

stranger, use of driveway becomes hostile).

²⁹ *Totman v. Malloy*, 725 N.E.2d 1045 (Mass. 2000).

³⁰ *Id.* at 1049.

³¹ *Id.* at 1047–48.

³² *Estate of Qualteri v. Qualteri*, 757 P.2d 1093 (Colo. App. 1988) (discussing that parents conveyed land to a son and daughter-in-law, who fenced part of parents’ retained land and used it with hostile intent, and declining to adopt presumption of permissive use, but requiring “strong proof” of hostility between family members).

physical intrusions onto their land by their neighbors in order to promote good will and avoid bad feelings and confrontations. One manifestation of such toleration of minor incursion is the lack of fences separating residential yards in many neighborhoods, along with lack of “no trespassing” signs in such neighborhoods.³³

Two other departures from the stranger model view of adversity manipulate the intent requirement for trespass. In contrast to the implied-permission rule, which focuses on the victim’s perspective, these departures focus on the intruder’s state of mind. The first modification concerning the intruder’s perspective involves what is called the “Maine rule.”³⁴ The Maine Supreme Judicial Court and a number of other state courts preserved record boundaries between neighbors, despite strong claims of adverse possession, by requiring that the claimant establish a certain state of mind at the time of the entry.³⁵ They developed what came to be known as the Maine rule, which rests on the assumption that one neighbor generally does not subjectively desire to use her neighbor’s land without permission and to take title to that land. This assumption was implemented by a special rule dealing with trespass resulting from a mistake or misunderstanding as to the true location of the record boundary. If the owner did not knowingly trespass, the wrongful use of the neighbor’s land was deemed not hostile in nature.³⁶ The underlying ethic is that a “good neighbor” respects her neighbor’s property, and does not seek to grab it.

The other departure focusing on the intruder’s intent is diametrically opposed to the Maine rule. In several states, the adverse possessor can only gain title if she qualifies as a good faith trespasser, which at a minimum means that the trespasser must have had a mistaken belief that her actions took place on her own land, not across the boundary on her neighbor’s land.³⁷ Thus, if the intruder knowingly trespasses, the claim of adverse

³³ See generally Lindsay Nash, *Mending Wall: Playing the Game of Neighborhood Ordering*, 21 YALE J.L. & HUMAN. 173 (2009).

³⁴ See *Preble v. Maine*, 27 A. 149, 150 (Me. 1893) (setting forth the “Maine rule” that requires a person to be aware that he is trespassing).

³⁵ See, e.g., *McQueen v. Black*, 425 N.W.2d 203, 204 (1988) (holding that the hostility requirement is not met by an owner whose fence lay four feet beyond the true boundary line, when possessor believed that the fence accurately reflected the true line); *Brown v. Clemens*, 338 S.E.2d 338, 339 (S.C. 1985) (holding that an adverse possession claim fails when an encroaching neighbor is under a mistaken belief as to boundary location and therefore lacks intention to dispossess the true owner).

³⁶ *Preble*, 27 A. at 150 (holding that possession of land by mistake up to fence that possessor believes to be located on true boundary is not adverse to the true owner).

³⁷ See, e.g., *Halpern v. Lacy Inv. Corp.*, 379 S.E.2d 519 (Ga. 1989) (explaining that

possession automatically fails. This rule is part of the common law in some states and is embodied in statutes in others. For example, an Oregon law, which became effective in 1990, requires not only entry by a person having “the honest belief that the person was the actual owner of the property” but also that the belief “continued throughout the vesting period,” “[h]ad an objective basis,” and “[w]as reasonable under the particular circumstances.”³⁸ The Colorado and New York legislatures recently modified their adverse possession laws in response to highly publicized court cases that were criticized as making it too easy for an owner to acquire title to her neighbor’s land.³⁹ The new Colorado statute is similar to the earlier Oregon act, requiring that the claimant or a predecessor in interest “had a good faith belief that [she] . . . was the actual owner of the property and [that] the belief was reasonable under the particular circumstances.”⁴⁰ The Colorado statute breaks new ground by authorizing courts to award damages to landowners who lose title to an adverse possessor.⁴¹ The New York

landowners who knowingly added part of neighbor’s parcel to their backyard were precluded from adverse possession title because they lacked claim of right made in good faith).

³⁸ OR. REV. STAT. § 105.620 (2010).

³⁹ See Monte Whaley, *Boulder Neighbors Settle Land Case: A Couple Will Get Part of a Lot Claimed Under a Since-Changed Law*, DENVER POST, Nov. 19, 2008; see also Walling v. Przybylo, 804 N.Y.S.2d 435 (N.Y. App. Div. 2005), *aff’d*, 851 N.E.2d 1167 (N.Y. 2006) (stating that an adverse possessor may obtain a limitation title despite knowledge that another party holds record title). Legislature history criticized existing law:

The effect of cases like Walling v. Przybylo . . . has been to encourage the offensive use of adverse possession. This legislation is all about good faith. A person who attempts to possess land that they know all too well does not belong to them should not be encouraged. If a person desires land, they can buy it. However, if they have a reasonable basis to believe that it is their land then that is exactly the good faith dispute over title to real property for which the adverse possession doctrine was established. Adverse possession should be used to settle good faith disputes over who owns land. It should not be a doctrine which can be used offensively to deprive a landowner of their real property. That only encourages mischief between neighbors and even between families

Governor’s Approval Memorandum, 2008 N.Y. Sess. Laws 1655 (McKinney) (emphasis added). The bill, enacted as 2008 N.Y. Laws 269, amends N.Y. REAL PROPERTY ACTS LAW §§ 501, 511, 512, 521, 522, 531, 541, and 543 (McKinney 2008).

⁴⁰ COLO. REV. STAT. § 38-41-101(3)(b)(II) (2010). The statute also requires a heightened evidentiary standard; to prevail, the claimant must “prove each element of the claim by clear and convincing evidence.” *Id.* § 38-41-101(3)(a).

⁴¹ Damages are based on “the actual value of the property as determined by the county assessor” and may also include all or part of the property taxes paid by the party losing title during the previous eighteen years (which is the Colorado limitations period). *Id.* § 38-41-101(5)(a)(I). The party losing title is not automatically entitled to compensation. The court is

statute, also adopted in 2008, adds a new requirement that the possessor have a “claim of right,” which is defined to mean “a reasonable basis for the belief that the property belongs to the adverse possessor,”⁴² but unlike the Colorado statute the New York measure does not include a method for compensating owners who lose title to adverse possessors.

As described above, modern U.S. law has departed from the stranger model with respect to adversity, permission, and intent to adopt “friend rules” under certain circumstances. A similar move has taken place with respect to the adverse possession element of open possession. In some states, the prescript that the claimant’s possession must be open has evolved from a prohibition of concealment by the possessor to a requirement that the true owner has notice of the wrongful possession.⁴³ In the neighborhood context, an adverse possession claim often involves a relatively small strip or area of land. This gives rise to a notice problem. Modern authorities often justify adverse possession law by the notion that the true owner had notice of the trespass, and thus had a realistic opportunity to assert her rights and stop the trespass during the statutory period, and failed to do so.⁴⁴ Loss of title to the neighbor is a harsh consequence, which is not appropriate if the owner acting with diligence did not perceive the fact of trespass. Only an owner who “slept on her rights” merits the loss of valuable property.⁴⁵

to determine “in its discretion [whether] an award of compensation is fair and equitable under the circumstances.” *Id.* § 38-41-101(5)(a).

⁴² N.Y. Real. Prop. Acts. Law § 501(3) (McKinney 2008).

⁴³ *See, e.g.,* *Cole v. Burleson*, 375 So. 2d 1046, 1048 (Miss. 1979) (holding that possession must give “unmistakable notice of the nature of the occupant’s claim” to the true owner); *Mannillo v. Gorski*, 255 A.2d 258, 263 (N.J. 1969) (concluding that the possession must “afford the true owner the opportunity to learn of the adverse claim and to protect his rights by legal action”); *Moore v. Stone*, 255 S.W.3d 284, 291 (Tex. Ct. App. 2008) (finding that the possession must be “of such a character as of itself will give notice of an actual adverse possession” to the true owner).

⁴⁴ *See, e.g., Mannillo*, 255 A.2d at 263 (holding that the moral justification for loss of title is the true owner’s neglect in asserting her rights for a considerable period of time).

⁴⁵ *See Gorte v. Dep’t of Transp.*, 507 N.W.2d 797, 801 (Mich. Ct. App. 1993) (finding that expiration of the statutory period for adverse possession terminates the title of those who slept on their rights); *Tran v. Macha*, 213 S.W.3d 913, 915 (Tex. 2006) (deciding that adverse possession is a harsh doctrine that is justified only when “the parties’ intentions [are] very clear”).

V. THE SPITE FENCE DOCTRINE AND OTHER SPITE OBJECTS

The spite fence doctrine is a well-established nuisance law rule. As the moniker suggests, a spite fence is one built for the purpose of spiting the neighbor. The infliction of harm is the reason the fence builder constructed the fence. This distinguishes the situation from the more typical one in which an owner builds a fence or makes another improvement for some useful purpose, but as a byproduct the fence or improvement causes harm to the neighbor. Modern courts generally hold that a spite fence is a nuisance, for which the offended neighbor can obtain injunctive relief and damages.⁴⁶ Litigation is complicated because the plaintiff must prove that the defendant acted with malice, and in contested cases the fence builder naturally asserts another purpose.⁴⁷

Although the spite fence doctrine is now widely accepted, its pedigree is not ancient within the field of nuisance liability. The doctrine, which began to emerge in the late nineteenth century,⁴⁸ had to overcome the legal norm that a landowner has a right to build any fence or structure on her land,

⁴⁶ Prosser states,

Today a man's motive may render conduct tortious that would otherwise be entirely lawful. Thus, the erection of a spite fence, with no other purpose than the vindictive one of shutting off [a neighbor's view], or light, or air, is now held by most courts to be actionable as a nuisance [although a similar fence serving some useful purpose would not be].

WILLIAM L. PROSSER, PROSSER ON TORTS 5 (1941).

⁴⁷ See generally discussion of the spite fence doctrine, Melvin A. Bedree, *An Owner of a Solar-Heated Residence Has a Cause of Action Under Wisconsin Private Nuisance Law for an Unreasonable Obstruction of His Access to Sunlight by an Adjoining Landowner's Home*, 52 U. CIN. L. REV. 208 (1983) (describing *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982), and the general doctrine of spite fences); Shawn M. Lyden, *An Integrated Approach to Solar Access*, 34 CASE W. RES. L. REV. 369 (1983) (analyzing *Prah v. Maretti* and proposing a combination of private right of action for nuisance, with an easement statute, and land use controls); Richard T. Drukker, Comment, *Spite Fences and Spite Wells: Relevancy of Motive in the Relations of Adjoining Landowners*, 26 CAL. L. REV. 691 (1938) (concluding that malicious motive is reason that courts rule that spite fences are illegal).

⁴⁸ The first United States case granting relief appears to be *Burke v. Smith*, 37 N.W. 838 (Mich. 1888). During the same decade, several state legislatures passed spite fence statutes, which declared a fence built over a certain height for the purpose of spiting a neighbor to be a nuisance. See, e.g., MASS. GEN. LAWS ch. 348, § 1 (1887) (codified as MASS. GEN. LAWS ANN. ch. 49, § 21 (West 2009)). Earlier common law decisions had refused to grant relief for fences allegedly built in spite. See, e.g., *Metzger v. Hochrein*, 83 N.W. 308 Wis. (1900) (rejecting a claim based on an alleged spite fence; overruled legislatively by WIS. STAT. § 844.10 (2007)). For extensive discussion of the history of the spite fence doctrine in the United States, see *Wilson v. Handley*, 119 Cal. Rptr. 2d 263 (Cal. Ct. App. 2002).

provided the object is not mislocated; in other words, it does encroach across the boundary onto the neighbor's land, thus constituting a trespass.⁴⁹ This norm was reinforced by another rule—that a landowner does not have a right to air and light passing from her neighbor's property, or a right to preserve a favorable view across the neighbor's property.⁵⁰ The spite fence doctrine forges an exception to both general rules.

In most cases the neighbor complains about a *fence* in the traditional sense of the word, but the logic of the underlying principle—that a person should not make a change on her land solely for the purpose of injuring her neighbor—justifies expansion to include other structures as well. Modern cases in several states have extended the spite fence doctrine to other objects, so long as they were constructed or installed for the purpose of irritating, annoying, or causing harm to a neighbor. Several states have granted relief for “spite hedges” when an owner has planted trees along the boundary line, depriving the neighbor of an advantageous view or sunlight.⁵¹ Such vegetation or “green fences” are similar to normal fences in both their impact on the neighbor (blocking air, light, and view) and their value to the installer when in fact they have value (privacy, defining the boundary, reducing likelihood of boundary incursions by animals, children, and other people).

In principle, any structure, improvement, or change in land use could create liability under an expanded spite fence doctrine, provided the court finds malicious purpose. When the object is not a barrier along a boundary that separates neighbors, however, there is an additional doctrinal hurdle,

⁴⁹ At one point in time, the norm was so strong that the California Supreme Court invalidated a state statute that limited a fence or partition wall to ten feet in height unless the owner obtained his neighbor's consent to build higher. *Western Granite & Marble Co. v. Knickerbocker*, 37 P. 192 (Cal. 1894).

⁵⁰ *See, e.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. App. 1959) (“[W]here a structure serves a useful and beneficial purpose, it does not give rise to a cause of action . . . even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.”).

⁵¹ *Wilson*, 119 Cal. Rptr. 2d at 272 (remanding for trial court to determine whether “dominant purpose” for planting row of evergreen trees was to block plaintiffs’ view of mountain or to enhance aesthetic value of defendants’ property and to protect privacy); *Dowdell v. Bloomquist*, 847 A.2d 827 (R.I. 2004) (discussing a homeowner that sought a zoning variance to add second story to his home, which his neighbor opposed because it would partially block the neighbor’s ocean views; homeowner then planted western arborvitae trees, which blocked ocean views; court found defendant planted trees with malicious intent). Both *Wilson* and *Dowdell* interpreted state spite fence statutes, but the same outcome can be reached in states that apply a common law spite fence doctrine.

separate from the two mentioned above, to overcome; namely, the doctrine of aesthetic nuisance. To recover for nuisance, the plaintiff must prove significant *non-aesthetic* harm.⁵² If the plaintiff's loss of use or enjoyment only stems from ugliness, no relief is granted, no matter how obnoxious or hideous the object might be.⁵³ The aesthetic nuisance doctrine amounts to a rule of immunity or non-liability. It is still mainstream U.S. law, but several jurisdictions have begun to question the doctrine.⁵⁴ An example is *Rattigan v. Wile*,⁵⁵ holding that an owner's placement of unsightly objects near his boundary amounted to a nuisance for which the victim obtained an injunction and recovered damages of over \$300,000.⁵⁶ The trial judge found that the neighbor had located the objects near the boundary solely for the purpose of annoying and offending the homeowner.⁵⁷ The appellate court affirmed, stating, "activities on one's property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance."⁵⁸ The holding is not as broad as the court's statement suggests. The *Rattigan* defendant lost because he could not advance a plausible reason, other than annoying his neighbor, for using his property as he did.⁵⁹ The decision is

⁵² See, e.g., *Green v. Castle Concrete Co.*, 509 P.2d 588, 591 (Colo. 1973) (holding that "aesthetic discomfort or annoyance" do not support a nuisance claim).

⁵³ See, e.g., *Wernke v. Halas*, 600 N.E.2d 117 (Ind. Ct. App. 1992) (reversing a trial court judgment for the plaintiffs; toilet seat, orange plastic fencing, and vulgar graffiti cannot constitute nuisance).

⁵⁴ See *Statler v. Catalano*, 521 N.E.2d 565, 572 (Ill. App. Ct. 1988) (concluding that the draining of a lake and dumping of rubbish near the property line gives rise to compensable damages in nuisance); *Mark v. State Dep't of Fish & Wildlife*, 974 P.2d 716 (Or. Ct. App. 1999) (holding that public nudity and sexual activity taking place on neighboring wildlife area constitutes private and public nuisance); *Foley v. Harris*, 286 S.E.2d 186 (Va. 1982) (finding that storage of junked automobiles on nearby property is nuisance).

⁵⁵ 841 N.E.2d 680 (Mass. 2006).

⁵⁶ The *Rattigan* facts display an abundance of spite. The owner of an expensive oceanfront residence was outbid at a foreclosure sale for an adjoining 2.9-acre tract of undeveloped land. The new neighbor planned to build a home. Over a period of seven years, the homeowner brought multiple lawsuits, on various theories, to prevent the neighbor from developing his property. These suits ultimately proved unsuccessful, but the neighbor, fed up, retaliated. Near the boundary he placed stacks of construction debris and unusual objects, including a "gigantic, red, metal ocean [freight] container." He also placed portable toilets near the boundary, where odors interfered with use of the homeowner's swimming pool. He frequently landed his helicopter near the boundary. The helicopter created loud noise and occasionally threw debris on the homeowner's property.

⁵⁷ *Rattigan*, 841 N.E.2d at 684.

⁵⁸ *Id.* at 683.

⁵⁹ *Id.* at 684–85.

best interpreted as simply extending the spite fence doctrine to objects other than fences.

How does the spite fence doctrine relate to the stranger model and friend model of neighbors' law? The competing models raise the core question whether a person has a special obligation to treat her neighbor differently (i.e., better) than an outsider, a stranger. Let us begin with the stranger model. The question to ask is whether spite fence (spite object) liability is consistent with general legal obligations that strangers owe to one another.

The spite fence doctrine cannot be explained as the implementation of a principle of widespread application, which governs persons generally, regardless of their particular relationship. A general principle that would justify the spite fence doctrine is a command that a person should not act to cause injury to another if such action does not benefit the actor. Such a principle, however, is not recognized. Instead, the opposite principle is the norm—a person can take an action that harms another, even if that action does not benefit the actor, provided that the action is not otherwise illegal. For example, a person may terminate a contract pursuant to a condition or an option, even if termination harms the other party to the contract and does not benefit the terminating party.⁶⁰ Likewise, an owner of property can exclude another person from using that property, even if the other person's use would not injure the property or diminish the owner's use and enjoyment.⁶¹ Indeed, the nominal damage rule, which applies both to trespass to land and to breach of contract, reinforces the right to exclude others regardless of benefit for the excluder and the right of contract regardless of harm caused by a contract breacher.

When we turn to the friend model of neighbors law, we can find justification for the spite fence (spite object) doctrine. Normally only neighbors who are immediately proximate, sharing a common boundary, can have a spite fence dispute.⁶² For this reason, the spite fence doctrine can be

⁶⁰ See 3 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 7:13 (4th ed. 2011) (noting that courts allow parties to contract to exercise cancellation clauses, even if such clauses are arbitrary, provided the clause contains some slight restriction upon exercise of the right to cancel and the cancelling party acts in good faith).

⁶¹ See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (holding that landowners have the right to prevent company from crossing their farm to deliver a mobile home to the landowners' neighbor, even though entry causes no physical harm to the farm or any other economic damage).

⁶² All cases involve neighbors with common boundaries, but to the extent jurisdictions extend liability beyond fences and vegetative barriers, one can imagine liability when the parties own nearby but not adjoining parcels. The offending hideous object may be across the

explained in economic terms as a doctrinal attempt to overcome a bilateral monopoly problem. But a bilateral monopoly justification is not inconsistent with the claim that the doctrine creates a special obligation of a landowner to treat her neighbor better than an outsider. The spite fence doctrine reflects a broader principle that a person should not take action that harms another if the purpose is to cause harm, a principle that has cogency in our legal system when the parties are in a special relationship of the nature in which the actor owes heightened duties to the other person. And the sharers of a common boundary are in a special relation precisely because they share the common boundary; that is, they are neighbors.

VI. OWNERSHIP RULES FOR BOUNDARY LINE ASSETS

When a tree or another object, natural or artificial, straddles a boundary line, each neighbor obviously should have some property right with respect to the object. When trees grow on or near boundary lines, often parts of the tree are on both properties. The tree trunk may be wholly on one parcel, but with branches and roots that extend across the boundary onto the neighbor's property. Alternatively, the boundary line may pass through the trunk. In the latter situation, the tree is called a "boundary-line tree" or line tree. Several competing rules have developed to deal with neighbors' claims to boundary-line trees. One rule represents a straightforward application of the doctrine of *cujus est solum ejus est usque ad coelum et ad inferos* ("to whomsoever the soil belongs, he owns also to the sky and to the depths").⁶³ Each owner has unqualified ownership of the entire tree (trunk, branches, leaves, and roots) that lie on her side of the boundary line.⁶⁴ A second rule rejects the *ad coelum* doctrine in the context of boundary-line trees, treating the neighbors as tenants in common with respect to the entire tree.⁶⁵

A recent Alabama decision, *Young v. Ledford*,⁶⁶ illustrates the workings of both rules. In *Young*, a large pine tree grew on the parties' boundary line.⁶⁷ Ledford, concerned that the tree might fall on her home during a

street or otherwise nearby.

⁶³ *Harding v. Bethesda Reg'l Cancer Treatment Ctr.*, 551 So. 2d 299, 302 (Ala. 1989).

⁶⁴ *Id.*

⁶⁵ F.S. Tinio, Annotation, *Rights and Liabilities of Adjoining Landowners As to Trees, Shrubberty, or Similar Plants Growing on a Boundary Line* 26 A.L.R.3d 1372, § 3(a) (1969).

⁶⁶ 37 So. 3d 832 (Ala. Civ. App. 2009).

⁶⁷ *Id.* at 833.

storm, obtained a declaratory judgment authorizing her to remove it.⁶⁸ The trial court opinion stated:

[A] land owner may remove any roots or limbs that protrude onto his property without consequence, even if the tree that the roots and limbs are attached to are located on another's property. Further, a land owner has a right to remove any trees or other growth on his property up to the property line, and this right extends to the center of the earth and into the sky. Thus, without recourse or consequence, [Ledford] could cut into the tree to the property line and then cut from that point to the center of the earth and into the sky. Because 19 inches of the tree's 28-inch diameter measurement is located on [Ledford's] side of the property line, [Ledford], therefore, could completely remove more than one half of the tree up to her property line.⁶⁹

Because removing that much of the tree would probably kill it, the trial court held that Ledford could remove the entire tree.⁷⁰

The *Young* appellate court rejected the trial court's endorsement of the *ad coelum* doctrine, holding that Ledford and Young owned the boundary-line tree as tenants in common, the consequence being that neither owner had the right to remove the tree, or even cut into its trunk, without the consent of the other.⁷¹ To allow one neighbor to hew down her part of the tree would destroy the part belonging to the other neighbor. In *Young*, two concurring opinions recognized that some jurisdictions recognize an exception to the general tenancy-in-common rule when the boundary line tree is a nuisance or poses a danger to one owner's property.⁷²

The *Young* appellate court stated, "[T]here is near uniformity among American jurisdictions" in favor of the tenancy in common rule,⁷³ which

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* The trial court's order departed from the consequences of strict adherence to the *ad coelum* doctrine by authorizing Ledford (or a tree cutter hired by Ledford) to remove the entire tree. Normally any entry across the boundary line, or removal of growth on the other side of the line, is a trespass.

⁷¹ *Id.* at 834–35.

⁷² *Id.* at 835–36. Although Ledford alleged the pine tree was dangerous, she did not prove danger, and the trial court judgment was not predicated on danger.

⁷³ *Id.* at 834.

correctly assesses the state of authority.⁷⁴ This approach dates back to early English common law⁷⁵ and was adopted by the first U.S. courts to address the issue,⁷⁶ but it is not universal. An alternative, minority view of ownership maintains that adjoining landowners of a boundary line tree own in severalty the part of the tree that stands on their side of the line, “with an easement of support from the other.”⁷⁷ More significantly, several states apply the *ad coelum* doctrine unless the neighbors have entered into an agreement with respect to the boundary-line trees.⁷⁸ Such an agreement is

⁷⁴ Ridge v. Blaha, 520 N.E.2d 980, 982 (Ill. App. Ct. 1988); Higdon v. Henderson, 304 P.2d 1001 (Okla. 1956); Happy Bunch v. Grandview N., 173 P.3d 959 (Wash. Ct. App. 2007).

⁷⁵ The seminal case is *Waterman v. Soper*, (1701) 91 E.E. 1393 (1 Lord Raymond’s 737) (Eng.), in which Lord Raymond explained:

if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A.

Waterman treats as common property not only trees with boundary lines passing through their trunks, but also trees with roots on both sides of the boundary. U.S. courts uniformly rejected the “root extension” doctrine. See 2 THOMAS WHITNEY WATERMAN, A TREATISE ON THE LAW OF TRESPASS IN THE TWOFOLD ASPECT OF THE WRONG AND THE REMEDY § 743 (1875):

In the United States, the rule is well settled, that a tree and its product are the sole property of him on whose land it is situated; and that its location is to be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or the branches above it.

⁷⁶ Lyman v. Hale, 11 Conn. 177 (1836) (holding the trunk was solely on one side of boundary; rejecting the English position that extension of roots into neighbor’s soil, from which the tree drew nourishment, made the tree common property); Griffin v. Bixby, 12 N.H. 454 (1841) (“[T]ree[,] standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties[;] and trespass will lie if one cuts and destroys it without the consent of the other.”); Dubois v. Beaver, 25 N.Y. 123, 127 (1862) (holding that boundary line trees are “property of the two in common, and as tenants-in-common”).

⁷⁷ See, e.g., Willis v. Maloof, 361 S.E.2d 512, 513 (Ga. Ct. App. 1987) (quoting Wilensky v. Robinson, 47 S.E. 270, 274 (1948)). Like tenancy in common, this rule forbids each owner from destroying the tree without her neighbor’s consent. *Id.* There is no privilege to withdraw support. *Id.*

⁷⁸ In *Holmberg v. Bergin*, 172 N.W.2d 739, 741 (Minn. 1969), a homeowner planted an elm tree fifteen inches from the boundary line shared with a neighboring homeowner. The tree grew to a trunk size of thirty inches in diameter so that the boundary passed through the trunk. *Id.* The court held that the tree was not a tenancy-in-common boundary tree, but was owned only by owner who planted it. *Id.* at 743. The tree damaged the neighbor’s fence and sidewalk, justifying an order that the planting owner remove it at his sole expense. *Id.* at 745. Accord, *Rhodie v. Keck*, 421 P.2d 729 (Colo. 1966) (landowner planted three trees so that after growth the boundary line passed through trunks; planter’s neighbor is allowed to remove trees without getting neighbor’s consent); *Garcia v. Sanchez*, 772 P.2d 1311 (N.M. Ct. App.

implied if the neighbors jointly planted the trees, cared for them jointly, or treated the tree line as their agreed-upon boundary line.

The two major competing rules for boundary-line trees, the *ad coelum* separate ownership rule and the tenancy in common rule, can be seen as applications of the stranger model and the friend model of neighbors law, respectively. The separate ownership rule in effect treats the neighbors as strangers. Neither one owes a special duty to the other with respect to decisions made about how to use and enjoy their individual property. It follows from the idea that one of the primary “sticks” in the bundle of rights comprising property is the right to destroy. Thus, the owner of a beautiful tree has the right to destroy that tree, no matter how much pleasure that tree may give to pedestrians and other members of the community.⁷⁹ Conversely, the tenancy-in-common rule reflects the ethic that a landowner should not act in a manner that causes injury to her neighbor’s property. Thus, there is a duty to protect the neighbor’s enjoyment of the boundary tree, which stems from the persons’ special relationship as neighbors. The exception to that duty—removal of the tree may be justified by proof of nuisance or danger—is compatible with the general rule. Common ownership of the tree implies consideration of the best interests of the co-owners, and in some cases a fair balancing of competing legitimate wishes will necessitate removal rather than continuation of the tree.

VII. THE NEIGHBOR LAW OF SOUTH AFRICA

South Africa has a discrete body of neighbor law, derived principally from Roman-Dutch law. Under the Roman-Dutch base, “the relations between neighbours were regulated in a peculiarly local way, with local custom, by-laws and a system of interlocking urban and rural servitudes playing a prominent role.”⁸⁰ In developing neighbors’ principles, South African courts relied liberally upon English nuisance cases.⁸¹

1989) (stating that a landowner planted elm trees completely on his property, but then growth trunks encroached on the boundary line; trees are not neighbors’ common property; affirmed the order that the planting owner must periodically trench roots, trim branches, and provide water and nutrients for trees).

⁷⁹ In this context, many local governments have tree ordinances, which modify a tree owner’s common law right to remove healthy, valuable trees.

⁸⁰ *Allaclar Inv. (Pty) Ltd. v. Milnerton Golf Club* 2006 ZAWCHC 36, para. 7 (S. Afr.), available at <http://www.saflii.org/cgi-bin/displ.pl?file=za/cases/ZAWCHC/2006/36.html&Query=%208552/04>.

⁸¹ *Id.* See J.R.L. Milton, *The Law of Neighbours in South Africa*, 1969 CILSA 123, 130–32

South African neighbors law does not rest upon a single unified concept. Rather, it synthesizes South Africa's law of things and law of delict, including nuisance and encroachment doctrines. There are "numerous 'traditional' rules of neighbour law, each with its own restricted field of application and requirements."⁸² The body of law applies to all neighbors of adjoining land, giving them unique duties to each other.⁸³ Owners can do as they please within the boundaries of their own property, provided they respect the right of their neighbors to do the same, do not encroach on their neighbor's property, and generally act in a reasonable.⁸⁴

Although neighbors law represents an amalgamation of discrete rules, courts and scholars have identified underlying rationales. The court in *Waterhouse Properties v. Hyperception Properties*⁸⁵ explained that the general principle of neighbor law is that the entitlements of ownership extend only and as far as there is a duty on a neighbor to tolerate the exercise of the entitlement.⁸⁶ A landowner who exceeds these entitlements has infringed upon her neighbor's ownership rights. The limitations placed upon "entitlements of ownership" are compulsory legal norms, designed to harmonize neighbor relations.⁸⁷ In his article, *The Law of Neighbours in South Africa* Professor Milton describes these limitations as a merger of competing principles:

(explaining how South African courts cited English nuisance decisions as precedents). The extent of the English influence is debatable. *Id.* at 132. *Allaclas*, *supra* note 80, para. 7 (stating that "the notion that the South African neighbour law is based on the English Law was put to rest by Steyn, CJ in *Regal v. African Superslate (Pty) Ltd* 1963(1) SA 102 (A) at 106"); Susan Scott, *Recent Developments in Case Law Regarding Neighbour Law and Its Influence on the Concept of Ownership*, 16 STELLENBOSCH L. REV. 351, 367 (2005) ("Efforts to reconcile English and Roman-Dutch principles are unnecessary" because "existing South African case law provides" a sufficient starting point in a search for authority.).

⁸² P.J. Badenhorst & R. Jordaan, *Recent Case Law: Allaclas Investments (Pty) Ltd v. Milnerton Golf Club (Stelzner and Others Intervening)*, 2007 2 SA 40 (C), 2008 DE JURE 636, 638 (2008).

⁸³ See Milton, *supra* note 81, at 125 ("Between neighbours there has always been some limitation on the uses to which property may be put.").

⁸⁴ Andre Van der Walt, *Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 SALJ 258, 272-73 (2001).

⁸⁵ *Waterhouse Prop. v. Hyperception Prop.*, 2005 CLR 175 at 178 (S. Afr.).

⁸⁶ *Id.* at 178, para. 13 ("The law imposes a duty on the second neighbour to tolerate and to endure to a certain extent the first neighbour's reasonable exercise of his ownership powers or rights. Such an obligatory legal norm primarily limits the second neighbour's right to the full enjoyment of her property. The law also imposes a duty on the first neighbour to exercise his powers within the normal and acceptable limits of reasonableness.").

⁸⁷ *Id.*

The [law of neighbours] . . . is a fundamental principle of the law of property that the right known as ownership has, as part of its content, the privilege of full and unrestricted use and enjoyment of the material object which is the subject of the right. . . . [But] there is a further principle that every owner must use his property in such a manner as not to injure his neighbours, usually expressed in the maxim *Sic utere tuo ut alienum non laedas*. It is this area, where the two principles begin to merge, that is the jurisdiction of the law of neighbours.⁸⁸

A recent case, *Allaclas Investments v. Milnerton Golf Club*,⁸⁹ resolved a dispute in which the owners of a home adjoining a golf course fairway complained that too many badly aimed golf balls struck their property. The trial court held that the frequency of golf ball incursions was not unreasonably high,⁹⁰ but the Supreme Court of Appeal reversed,⁹¹ holding that the number of errant balls was excessive and ordering the golf course to install a system of barriers that the golf course's expert witness had recommended as a possible solution.⁹² The nature of the neighbors' dispute is unexceptional; such disputes come up from time to time in all countries with golf courses. Likewise, the outcome is unexceptional; for example, in the United States either party might prevail based upon the particular facts that are proven.

What is distinctive is the language used by both courts in explaining the South African law of neighbors. The trial court explained that a "dispute between neighbours invariably involves, amongst other things, the question whether there has been an abuse of a right."⁹³ Conduct becomes an abuse of rights if it exceeds the neighbor's "powers of ownership," which takes place "when it ceases to be '*expected in the circumstances*' or when it becomes such that a neighbour need not tolerate it under the principle of '*give and take*' or '*live and let live*.'"⁹⁴ The Supreme Court of Appeal explained:

⁸⁸ Milton, *supra* note 81, at 123.

⁸⁹ *Allaclas Invst. v. Milnerton Golf Club*, 2007 (3) SA 134 (ZASCA) (S. Afr.).

⁹⁰ *Id.* para. 13.

⁹¹ *Id.* para. 20.

⁹² *Id.* para. 25(2)(ii).

⁹³ *Id.* para. 9.

⁹⁴ *Id.*

We are concerned here in the main with what can be called neighbour law. As a general principle everyone can do what he wishes with his property, even if it tends to be to the prejudice or irritation of another but as concerns adjacent immovable property it almost goes without saying that *there is less room for unlimited exercise of rights*. The law must provide regulation of the conflicting proprietary and enjoyment interests of neighbours and it does this by *limiting proprietary rights and imposing obligations on the owners towards each other*.⁹⁵

The rhetoric of both *Allaclas Investments* opinions resonates with the friend model of neighbor law. Even though the two courts disagreed as to how the law should apply to the particular facts, both emphasized that property rights are inherently limited in the context of neighbors' disputes. Both emphasize that the normal rights of property ownership must bend to take account of the neighbor's competing interests. Neither opinion frames the issue as it is framed under the stranger model, which treats the parties as the owners of entitlements whose scope is defined by reference to all other persons (all non-owners). In contrast, both begin the process of reasoning by recognizing that neighbors have a unique relationship stemming from the ownership of adjacent immovable property.

VIII. THE NEIGHBOR LAW OF SCOTLAND

Scottish cases and secondary authorities on occasion refer to the field of neighbor law, or synonyms such as neighborhood law, but not as frequently as in South Africa. At the present time, neighbor law is not a widely used "organizing category,"⁹⁶ even though some secondary authorities describe the subject⁹⁷ and an old Scottish case referred to neighbor law principles as a "distinct chapter of Scottish law."⁹⁸

⁹⁵ *Id.* para. 15 (emphasis added).

⁹⁶ Elspeth Reid, *Questions in Scots Neighbour Law* (Dec. 11, 2009).

⁹⁷ ENID A. MARSHALL, *GENERAL PRINCIPLES OF SCOTS LAW* 525–28 (5th ed. 1991). See Donald W. Large, *The Land Law of Scotland—A Comparison with American and English Concepts*, 17 ENVTL. L. 1, 21 n.77 (1986) ("In Scotland nuisance is part of the 'law of neighbourhood' which also includes rights of lateral and subjacent support, and rights against spite fences." (citing E. MARSHALL, *GENERAL PRINCIPLES OF SCOTS LAW* 457, 462 (4th ed. 1982))).

⁹⁸ *Cameron v. Young*, (1908) S.C.(H.L.) 7, 9 (Scot.):

Scotland has a mixed legal system, with civil law and English common law serving as primary constituents.⁹⁹ This has resulted in a distinctive adaptation and evolution of the civil law doctrine *aemulatio vicini*, translated as abuse of rights.¹⁰⁰ The doctrine “encompasses the general principle that no one should exercise what is otherwise a legitimate right in a way which is solely motivated by the desire to cause annoyance to his or her neighbour.”¹⁰¹ For example, if an owner discovers that a neighbor’s house is served by a water supply pipe leading under his garden, he may not cut off the supply, even in the absence of an easement, when there is no legitimate reason for doing so.¹⁰² Such malice makes the act an abuse of rights. The abuse of rights principle, which Scotland recognizes in the context of neighbor law to a greater extent than in other settings,¹⁰³ recognizes that neighbors owe special duties to each other. Abuse of rights reflects the friend model of neighbors law in its creation of obligations that strangers generally do not owe to other persons.

A second distinctive component of Scottish neighbours law is the “common interest” doctrine. Neighbors may hold a common interest in certain types of property, which include a lane giving access to the properties, a garden, a stairway and other elements within tenement buildings, and a non-tidal loch.¹⁰⁴ The common interest represents a form of

[Neighbour law] principles are embodied in a distinct chapter of Scottish law, and are concerned with what may be called the external or foreign relations of the owner of a house. There he is liable, because the maxim “Sic utere tuo ut alienum non lēdas” necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbour from his house. He must not allow his house to get into such disrepair that it falls down on his neighbour’s house, or injures the passer-by in the street. In all those cases the person injured and claiming damages stands on his own rights; and his relation to the offending or negligent proprietor is not constituted or measured by any voluntary contract.

⁹⁹ John A. Lovett, *Meditations on Strathclyde: Controlling Private Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYRACUSE J. INT’L L. & COM. 1, 3 (2008); Elspeth Reid, *Scotland*, in VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 201 (2001).

¹⁰⁰ Elspeth Reid, *The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*, 8.3 ELECTRONIC J. COMP. L. 2 (2004), available at <http://www.ejcl.org/83/art83-2.html>.

¹⁰¹ *Id.*

¹⁰² *More v. Boyle*, (1967) S.L.T. 38 (Scot.) (recognizing the doctrine of *aemulatio vicini* as part of the law of Scotland in an appropriate case; alleged incident benefit of stopping running of prescriptive period for easement is not sufficient to preclude application of doctrine).

¹⁰³ See Reid, *supra* note 100 (holding that abuse of rights is not a “flourishing doctrine” in legal areas beyond neighbor law).

¹⁰⁴ Douglas J. Cusine, *Common Interest Revisited*, 2 EDIN. L. REV. 315, 316–17 (1998).

property not recognized by Anglo-American property law. It is distinguished from “common property” in the Scottish system, which results when both owners have a title interest in the property, and from servitude, which results from an agreement or grant.¹⁰⁵ The classic definition of common interest labels it as a “species of right . . . [that] takes place among the owners of subjects possessed in separate portions, but still united by their common interest.”¹⁰⁶ For example, the owner of one floor in a tenement owns his wall, but others have a common interest in that wall. This means that

no one having merely a common interest is entitled to break or touch the wall or space which belongs to another; he has only the right to prevent injury and insist on support. But each party may make alterations and changes on his own wall, notwithstanding the common interest which is vested in others, provided he does not endanger that common interest, or expose those who hold it to reasonable alarm.¹⁰⁷

The cornerstone of common interest is reciprocity of obligation. The owner and each neighbor have an interest in the asset, and all are obligated to conduct themselves so as to preserve the use and enjoyment of the others. If activity, or lack of activity, by one owner would “materially or substantially affect the others,” they, or any one of them, may take steps to prevent damage to their property interests.¹⁰⁸ Any one holding a common interest in the property has the right to object to any conduct that would cause material injury or inconvenience.¹⁰⁹ For example, a line of cases dealing with common interest in a lane prevents the owner of the lane from building over the lane.¹¹⁰ The common interest principle, like abuse of rights, rests

¹⁰⁵ *Id.* at 320–26 (exploring the proposition that common interest is an intermediate right between common property and servitude).

¹⁰⁶ GEORGE JOSEPH BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* § 1086, at 681 (William Guthrie ed., rev. 9th ed. 1889). Presently in many nations such issues are resolved by creating condominium regimes, which in addition to defining owners’ respective rights and obligations, provide for centralized management and decision making. The inability of the common interest doctrine to provide for centralized control led to passage of the Tenements (Scotland) Bill (1998). See C.G. Van Der Merwe, *A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems*, 31 GA. J. INT’L & COMP. L. 101, 116, 123 (2002).

¹⁰⁷ BELL, *supra* note 106, at 682.

¹⁰⁸ WILLIAM M. GORDON, *SCOTTISH LAND LAW* 446, para. 15-38 (1989).

¹⁰⁹ Cusine, *supra* note 104, at 315–16.

¹¹⁰ *Id.* at 321–24.

squarely upon the friend model of neighbor law, which posits that property owners owe special obligations to each other solely by virtue of their status as neighbors.

IX. CONCLUSION

The stranger model defines the rights and obligations of neighbors through the application of legal rules and norms that generally regulate the relationships among all members of society. This method of constructing the law of neighbors is true to the classic definition of private property—that is, the right of an owner to exclusive use and possession of the property, with legal protection enforced against all in the world.¹¹¹ The friend model derives from the fact that neighbors by definition are in close physical proximity, with durable relationships that often are long-term for the neighbors who are the present possessors, and necessarily long-term if not perpetual when successive owners are considered. This proximity gives rise to a distinctive and special relationship, which has social aspects and is based on shared interests that the neighbors have in the well-being of their community. The friend model focuses on the effect that neighbors' rules will have on the neighbors' long-term relationships, seeking to develop rules that promote harmony and cooperation.

Comparison of neighbor law rules in the United States, South Africa, and Scotland gives rise to several conclusions. The United States tends to employ stranger model rules more often than South Africa and Scotland; the latter two nations tend to employ friend model rules more often. Although this difference may reflect any number of causes, it is worth noting that U.S. law does not recognize neighbors law as a discrete legal category, whereas South Africa plainly recognizes the neighbors category, and Scotland does at least to some extent. This suggests that when a legal system defines a particular subject matter as a discrete subject matter, analysts are likely to seek to identify one or more overriding general principles, which seek to rationalize the entire field. Although there are certainly a number of possible overriding principles that might be used to analyze neighbors' relations, any such principle probably will be based to some extent on physical proximity (the definition of what it is to be neighbors).

¹¹¹ BLACK'S LAW DICTIONARY 1337 (9th ed. 2009) (defining private property as "[p]roperty—protected from public appropriation—over which the owner has exclusive and absolute rights").

The stranger model and friend model, as I have described them, represent alternative regimes. They offer competing visions of how a legal system may develop and justify neighbors' rights and obligations. Although I hope that the models may have some usefulness, a key point is worth emphasis. The "alternative" nature of the models is a simplification, which might prove misleading. A coherent neighbors law will necessarily have stranger-model elements and friend-model elements; it cannot be otherwise. It is important to consider balance and proportion and, in particular, what outcomes are appropriate from a policy perspective for discrete types of problems. Sometimes the tenets of the friend model will point to a better resolution, but at other times the tenets of the stranger model will do so.

An analogy may illustrate this point: under the law of trusts, one would describe the relationship between beneficiary and trustee as special and distinctive. The fiduciary nature of the trustee's obligation to the beneficiary underscores the specialness. One cannot square the trustee's fiduciary duties with a stranger model of legal relationships. The beneficiary cannot insist that all other persons act as a fiduciary, and such other persons do not have standing to insist that the trustee deal with the trust property as a fiduciary. Yet the law of trusts cannot operate without at least some underlying stranger model rules. For example, whether a trust instrument is enforceable and how it should be interpreted depends upon the law of contracts, which applies as a general matter to strangers who enter into arms-length contractual relationships with one another.¹¹² Similarly, any system of neighbors' law, no matter the extent to which its principles and rules reflect a special reciprocity of obligation and an ethic of cooperation and support, will incorporate baseline legal principles (stranger model rules) for some purposes. For example, the general law of trespass (civil and criminal) will serve perfectly well when an angry person enters her neighbor's yard to destroy her prize-winning rose garden.

¹¹² See RESTATEMENT (SECOND) OF CONTRACTS §§ 2–3 (1981) (defining the core terms "promise," "agreement," and "bargain" as based on manifestations of intentions made by "two or more persons" without regard to the relationships between such persons).