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MY TREE VERSUS YOUR SOLAR COLLECTOR OR YOUR WELL VERSUS MY SEPTIC SYSTEM?—EXPLORING RESPONSES TO BENEFICIAL BUT CONFLICTING NEIGHBORING USES OF LAND

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Abstract: When one neighbor wants to use his land for a lawful purpose, but the neighbor next door wants to do the same so that their beneficial uses conflict, how might these conflicts be resolved? The conventional law of nuisance offers either a rationale based on fault or a general standard of what is “reasonable,” both of which require litigation to apply to a particular context. This Article suggests that resolving conflicts between neighboring beneficial uses of land would be aided by guidelines which might be grounded in some understandable norms to provide such neighbors with a sense that rough justice is being served. Two such norms appear helpful: priority in time and examining which of the two beneficial uses appears to be the more intrusive of the neighboring land. The hope is that such guidelines might facilitate resolution where hard feelings or litigation might otherwise result.

INTRODUCTION

Here’s the problem. Neighbor A wants to use his land for a lawful purpose. Neighbor B next door wants to do the same, but the use which neighbor A wants to make conflicts with the use that neighbor B wants to make. How should they respond?

Consider two examples:

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Case #1: Neighbor A wants to install a solar collector on his land, but Neighbor B has redwood trees that shade his solar collector. Must Neighbor B cut his trees so the sun will shine on Neighbor A's collector? Yes, at least in California in 2008.



Pic 1: Photograph of an aerial view showing the neighboring properties involved in the California tree-solar collector dispute

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Under the California Solar Shade Control Act, a law enacted twenty years ago, shading a solar collector by more than ten percent between ten a.m. and two p.m. became a public nuisance subject to a fine of up to \$1000 a day.¹ In 2008, an owner in Sunnyvale, California had to cut back his neighboring redwood tree to comply.² Here is the result:

¹ Solar Shade Control Act, CAL. PUB. RES. CODE §§ 25980–25986 (West 2007). Enacted in 1978, this law prohibited the placement or growth of trees or shrubs subsequent to the installation of a solar collector if the placement or growth shades more than ten percent of the solar collector between 10:00 a.m. and 2:00 p.m. PST, making such conduct a public nuisance subject to fines of up to \$1000 per day. *Id.* §§ 25982, 25983.

² See *In California, It's Solar Panels vs. Redwoods: Neighbors Fight Over What's Best for the Environment*, ASSOCIATED PRESS, Feb. 20, 2008, <http://www.msnbc.msn.com/id/23258714/> [hereinafter *Solar Panels vs. Redwoods*] (describing how Santa Clara county homeowner invoked the Solar Shade Control Act to compel his neighbors to cut back one of their redwood trees, which predated the installation of the photovoltaic panels involved, but grew to shade the collector).



Pic 2: Photograph of the redwood tree on one property cut back so as to remove all branches from the lower four-fifths to avoid shading the solar collector on the neighboring property, leaving the branches only on the uppermost portion of the tree, resembling a poodle cut.

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As a consequence, the California statute has been amended to protect such pre-existing trees.³

Case #2: Neighbor C wants to dig a well. Neighbor D wants to install a septic system. Local health regulations require water wells and

³ See *infra* notes 114–115 and accompanying text (discussing the 2008 amendment to the Solar Shade Control Act to protect pre-existing trees and other changes to the Act).

septic systems to be at least 100 feet apart. Because of the nature of the lots, the well cannot be installed if the septic system is in place, and the septic system cannot be installed if the well is in place.

Can Neighbor D with the planned septic system prevent Neighbor C from installing his well? Not in West Virginia in 1989. In *Hendricks v. Stalnaker*, the Supreme Court of Appeals of West Virginia decided for the owner who installed his well, reversing the trial court decision that, based on the law of nuisance, held in favor of the owner of the land requiring the septic system.⁴

These examples, discussed in more detail below, raise the question of how to guide neighbors, each of whom is using his land in a lawful way that, but for the incompatible neighboring use, would be deemed harmless and even worthwhile. Most citizens would endorse solar collectors and trees, or wells and septic systems, as assets to a civilized society. Here, both landowners are “good” neighbors. But in the first case it took a legislature, and in the second, litigation to the state’s highest court after an extensive (and presumably expensive) lawsuit, to decide which otherwise benign neighboring land use should prevail over the other.⁵

Those cases raise the question of whether issues like these can be resolved with less difficulty. Is there a better way for neighbors to get along, especially where their respective land uses are simply incompatible rather than offensive? Are there some guiding principles which could be available to neighbors which would allow them to reach a resolution that leaves them both better off with a sense that justice, even if rough, is being done rather than resorting to contentious and expensive litigation?

This article makes the suggestion that there may be such principles which could help neighbors cooperate to find a better solution than these cases might suggest. The recommendation set out below combines some of the principles apparent within the resolutions of these conflicts in California and West Virginia, as well as informal norms of citizen conduct, to offer a set of principled but simple guidelines to facilitate neighbor-to-neighbor negotiation and reconciliation of these incompatible uses.⁶ These guidelines focus on which of the competing

⁴ *Hendricks v. Stalnaker*, 380 S.E.2d 198, 202–03 (W. Va. 1989); see *infra* notes 103–112 and accompanying text (discussing *Hendricks* in more detail).

⁵ See *id.*; *Solar Panels vs. Redwoods*, *supra* note 2.

⁶ See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 649, 653 (1976) (arguing that norms give the parties a baseline from which to work; where there is likely to be an ongoing relationship between

uses was first in time and which of the uses also needed to make some use of the adjacent land to succeed.⁷ The guidelines also fall between relatively bright-line property rules, such as the right to exclude, which most laypeople can understand and apply without litigation, and general standards of reasonable use, such as in the law of nuisance, that require litigation to apply to specific facts.⁸ The hope is that such guidelines will be flexible enough to facilitate a principled resolution between neighbors with conflicting uses of land, but also clear enough to help avoid litigation in order to apply more conventional but general standards of “reasonable use” to resolve their conflict.⁹

But before elaborating on the recommendation, it is important to lay a foundation of background on some basic principles of property law, as well as some of the literature about reconciling conflicting uses through rules, standards and norms.¹⁰ This article will then return to the two original California and West Virginia examples to see how they help inform a possible broader solution.¹¹

I. RESOLVING THE CONFLICT BETWEEN BENEFICIAL NEIGHBORING USES ON A PRINCIPLED BASIS: THE CHALLENGES OF FINDING A WORKABLE GUIDELINE

A. *The Right to Exclude Others Is a Relatively Clear Guide for Issues of Access but Not for Use*

One way to begin to think about benign but conflicting neighboring uses of land may be to examine some of the aspects of property law where rules are more common, and compare those to the law of nuisance. As others have written before, real property has fundamental aspects such as the right to exclude others,¹² which the courts support in an action for trespass against a private party¹³ or inverse condemnation

the parties, there is incentive to consider and respect the norms that underlie an opponent's claim).

⁷ See *infra* Part III.

⁸ See *infra* Part I.

⁹ See *infra* Part III.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part II.

¹² See generally Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985) (discussing the right of exclusion).

¹³ See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 161 (Wis. 1997) (awarding punitive damages against mobile home company for trespass when it delivered mobile home across farmer's property without permission).

against a government.¹⁴ These situations involve the application of a relatively clear rule, made easier by the physical dimensions of a property boundary. And while there are exceptions to the right to exclude, such as providing governmental services to migrant workers¹⁵ or emergency conditions,¹⁶ the rule is relatively clear for adjoining neighbors so long as their property boundaries are apparent to them both.¹⁷ Absent a privilege, if Neighbor F intrudes on the land of Neighbor G, Neighbor F must gain permission, or face a legal action by Neighbor G to exclude Neighbor F, or even extra-legal self-help by Neighbor G.¹⁸

It is this relatively clear right of ownership which enables property to be bought and sold with relative ease because the property takes with it a valuable exclusionary right, or an entitlement, which includes within its scope the capacity to undertake a variety of uses of the land which may not be clear at the outset.¹⁹ Thus when one owner wants to buy access from his neighbor, they can conduct their business in “the shadow of the law” of relatively clear rights.²⁰ Where beneficial uses on neighboring lands conflict, however, the law leaves no such crisp shadow.

¹⁴ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that statute authorizing cable installation on private property constitutes a taking of private property); *United States v. Causby*, 328 U.S. 256, 266–67 (1946) (holding that continuous low-level military flights over private land constitute a taking of private property).

¹⁵ *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) (holding that right to exclude is subordinate to rights of those living on the land to receive necessary services).

¹⁶ See *Plouf v. Putnam*, 71 A. 188, 189 (Vt. 1908) (tying ship to private pier in emergency was permissible).

¹⁷ See Merrill, *supra* note 12, at 14–16.

¹⁸ Indeed, in Massachusetts the rule is that, at least as far as encroaching vegetation is concerned, the remedy is landowner self-help, but not beyond the boundary involved. *Macero v. Busconi Corp.*, 12 Mass. L. Rptr. 521, 522 (2000); see *Michalson v. Nutting*, 175 N.E. 490 (Mass. 1931) (holding that the owner of tree is not responsible for damage its roots caused to sewer pipes on neighboring property, but neighbor’s “right to cut off the intruding boughs and roots is well recognized”); see also *Fick v. Nilson*, 220 P.2d 752, 753 (Cal. Dist. Ct. App. 1950) (allowing neighbor to trim overhanging tree branches to boundary line). See generally *Maddran v. Mullendore*, 111 A.2d 608 (Md. 1955) (allowing reasonable self-help after adequate notice, but with risk of damages for over-reaching, in action involving removal of blockage of an alley needed for deliveries); Jon K. Wactor, *Self-Help: A Viable Remedy for Nuisance? A Guide for the Common Man’s Lawyer*, 24 ARIZ. L. REV. 83, 89–91 (1982) (discussing nuisance cases where courts allowed self-help remedies).

¹⁹ See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 372–73 (2001).

²⁰ See generally Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules . . . give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if

B. *Separating Incompatible Uses Can Help in Some, but Not All Cases*

At the outset it is important to recognize that the avoidance of conflicts between incompatible uses of land explains why we use governmental regulation to separate them. For example, traffic flows much better because we drive on one side of the road and use stop lights than it did before when there were literally no “rules of the road” other than a general obligation of due care. Imagine traffic control by lawsuit as the only form for regulating driver behavior.

Indeed, it is to minimize conflicts between inconsistent (and sometimes harmful) uses of land that has justified separating land uses through zoning.²¹ Part of the rationale for such regulation is that while it limits one landowner’s use of land, it benefits him by limiting the use of land next door in the same way, offsetting collective burdens with collective benefits.²² This principle is called the “average reciprocity of advantage,”²³ and it enables neighbors to make investments in their homes with the expectation that if the neighborhood they choose is residential, it is likely to stay that way.²⁴

C. *Giving Statutory Priority to Uses Resolves Some Conflicts, but It Is Rare*

Zoning is commonplace for separating classes of uses, like homes and industry. It cannot, however, separate all incompatible uses, as the two cases cited at the outset of this article suggest.²⁵ Thus the legislature can, as it did in California, give preference to one land use over another, such as solar collectors over trees.²⁶ This makes a relatively bright (no pun intended) line rule that neighbors can understand even if one of them might not agree (though as discussed above and below, the

no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.

Id. at 968.

²¹ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396–97 (1926) (upholding local ordinance regulating the use of land by creating zones for different kinds of uses).

²² See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

²³ See *id.* (noting that the burden of regulation is offset by benefit of similar regulation of neighboring properties).

²⁴ See generally Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998). The private analogy is a declaration of uniform covenants and restrictions applicable to properties in a “common interest” community. See *id.* at 355–56.

²⁵ See *Hendricks v. Stalnaker*, 380 S.E.2d 198, 203 (W. Va. 1989); *Solar Panels vs. Redwoods*, *supra* note 2.

²⁶ See *Solar Panels vs. Redwoods*, *supra* note 2.

application of the statute involved a protracted dispute).²⁷ Such statutory preferences are the exception rather than the rule, leaving other incompatible neighboring land uses, like the second example involving a septic system and a well, for courts to resolve.²⁸ Unless the legislature is to give priority to specific uses, as occurred in California and other states for solar collectors,²⁹ or in a number of states with “right to farm” statutes,³⁰ or protections for other specific uses against the claim they are nuisances,³¹ how are neighbors to proceed in other circumstances when the nature of the “harm” is reciprocal?

D. *The Reciprocal Nature of the Problem of Conflicting Uses of Neighboring Land*

One of the most cited of all law review articles (written by a non-lawyer Ronald Coase), *The Problem of Social Cost*, recognized the reciprocal nature of many conflicting uses of land:

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong.

²⁷ See *infra* notes 114–115 (discussing 2008 amendment to California’s Solar Shade Control Act).

²⁸ See *Hendricks*, 380 S.E.2d at 203.

²⁹ E.g., FLA. STAT. § 288.0415 (2008) (giving priority to removal of identified barriers to solar energy development); GA. CODE ANN. § 44-9-21 (2002) (acknowledging possibility of future shading and allowing owner to negotiate for assurance of continued use); HAW. REV. STAT. ANN. §§ 196–97 (LexisNexis 2008) (prohibiting unreasonable restrictions rendering solar energy devices more than twenty-five percent less efficient); NEB. REV. STAT. ANN. §§ 66-913 to -914 (LexisNexis 2007) (promoting use of solar and wind energy); TENN. CODE ANN. § 66-9-202 (2004) (acknowledging possibility of future shading and allowing owner to negotiate for assurance of continued use).

³⁰ See Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998). In some cases, such statutes have raised questions whether the neighbors whose rights are foreclosed are entitled to compensation from the state. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 316, 322 (Iowa 1998) (finding nuisance immunity provisions to be an unconstitutional taking of property without compensation). *But see* *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 646 (Idaho 2004) (finding nuisance immunity provisions are not takings).

³¹ E.g., ALA. CODE § 6-5-127 (LexisNexis 2009) (“[No] racetrack for automobiles or motorcycles . . . operated in conjunction with a museum that is owned by a nonprofit organization and has a building and collection on display which together have a minimum value of at least one million dollars . . . or any of its appurtenances or the operation thereof shall be or become a nuisance”); CAL. CIV. CODE § 3482.1 (West 1997) (shooting ranges cannot be nuisances based on noise); IDAHO CODE ANN. § 38-1403 (2002) (logging and reforestation not nuisances); IND. CODE ANN. § 32-30-6-10 (LexisNexis 2002) (declaring public use airports and appurtenant operations not nuisances).

We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?³²

Coase's thesis has been criticized as making reciprocal harm out of true cases of unilateral harm, because "in an everyday sense we do not say that the owners of noses cause punches as much as the owners of the fists that impact them."³³ But that does not detract from his basic point that in the case of incompatible uses, the most efficient allocation of resources will occur if the two users of land are free to bargain between themselves to secure a resolution.³⁴ More specifically, what Coase describes as the efficient allocation of resources occurs as if both parcels were owned by the same owner.³⁵

³² R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Or as Dean Prosser has written:

The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both.

WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 596 (4th ed. 1971) (citations omitted).

³³ Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 70 (2005). Professor Smith has argued that the reciprocity discussed *supra* note 32, is in fact asymmetrical. *See id.* at 70–73. Using the example of the rancher whose cattle are next to a farmer's corn, or the noisy confectioner next to the physician conducting exams, he notes that

[i]f the activity of the farmer or the doctor is going to survive, either liability must be placed on the other party or the person in the position of the farmer or the doctor must take some form of self-help. This self-help can be passive as in building a fence or in soundproofing a party wall, or more active, as in shooting the cattle or smashing the noisy pestle. By contrast, the rancher and the confectioner tend to do better in the state of nature. Putting aside the possibility of "active" self-help on the part of the other party, a situation of no liability would suit the rancher or the confectioner just fine. Cattle will win the competition with crops, and noisy activities like candy-making will win out over medical exams. The entitlement needed to protect these more robust activities is more minimal than the one needed to protect the more vulnerable ones. Thus, there is already an asymmetry in terms of the entitlement needed to protect the conflicting activities in order for them to prevail.

Id. at 72.

³⁴ *See* Coase, *supra* note 32, at 11.

³⁵ *Id.*

Such an owner could make a rational and economically sensible decision by looking at the properties as one. If it is better for him to favor one use over the other—for example, the solar collector over the trees or the well over the septic system—he can make that choice, or try to re-site the particular uses so they are no longer incompatible. That is the efficient outcome, an issue that is easy to resolve in that context of unified ownership where relative values of incompatible uses of land can be easily weighed and decided. Coase argues that two owners will bargain to produce the same result, regardless of the legal rule involved (or, framed more directly, might makes right).³⁶

But a premise of the law instead is that the more valued use will prevail, or that some uses should prevail independent of their relative value, or that right makes might, as in the case of the owner's right to exclude trespassers. In other words, when the parcels are not under unitary ownership, which of them has the primary entitlement in the first place? If that is not clear, how are the parties to bargain even if transaction costs are indeed zero? Of two neighbors using land in incompatible ways, whose use has priority so that they know where to start their negotiation, as they would if a trespass occurred by one neighbor on the land of the other? Coase's article indeed recognizes this problem, stating that "[i]t is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them."³⁷

Coase's article has no easy answer as to how that "initial delimitation of rights" should be done, but focuses primarily on the fact that in a costless bargain the parties would achieve the most efficient allocation of resources regardless of who had the initial entitlement.³⁸ His article goes on to recognize that "it has to be remembered that the immediate

³⁶ See *id.* at 10–13. Sometimes the assistance of a mediator, even an informal one, can help. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 40 (2d ed. 1991). Fisher and Ury give the example of the open window in the library—one patron wanted it open to get fresh air, the other closed to avoid the draft; the solution found was to open a window in the next room. *Id.* Neither of these uses was tortious, as in the case of an objectionable nuisance, but merely incompatible uses of land (which were collaboratively resolved through third-party intervention by the librarian). See *id.* at 40–41.

³⁷ Coase, *supra* note 32, at 8. See generally Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987) (discussing the issue of cross-boundary resolutions between neighbors in areas such as boundary disputes, implied easements, and spite fences).

³⁸ See Coase, *supra* note 32, at 2–13.

question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what.”³⁹

In other words, if two landowners will bargain to an efficient result, will it also be the fair result? In economic terms, the issue is not just the efficient allocation of resources, but also the distribution of wealth. In simple terms, who pays whom? Coase does not offer much help. His article then suggests that “courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions.”⁴⁰

But Coase’s desire for flexibility lies at the core of the problem of choosing “who has the legal right to do what,” illustrated by the California and West Virginia examples.⁴¹ It has earned Coase this critique from Professors Merrill and Smith:

Coase’s analysis generates implications about the desirable features of a system of property rights that are in considerable tension. With no (or low) transaction costs, what matters most is that rights be clearly assigned. This suggests that use rights should be defined by formalistic legal rules that are relatively indifferent to the costs and benefits of individual disputes. With positive (especially high) transaction costs, Coase wants courts to assign use rights in such a way as to maximize the value of production. This, in turn, requires that the courts have discretion to assign rights in accordance with the shifting costs and benefits of particular disputes. Coase thus suggests both that clear rules are desirable (to promote bargaining) and that flexible standards are desirable (when bargaining breaks down) But he offers no suggestion as to how to achieve both flexibility and legal certainty in an area of law such as nuisance.⁴²

Professors Merrill and Smith go on to suggest that “one solution may be to use rules in some areas of the law and standards in others,” citing the work of Professor Louis Kaplow.⁴³ Kaplow in turn suggests that the choice between rules and standards “involve[s] the extent to which a given aspect of a legal command should be resolved in advance or left

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 19.

⁴¹ See *supra* notes 1–5 and accompanying text.

⁴² See Merrill & Smith, *supra* note 19, at 370 n.57.

⁴³ *Id.*

to an enforcement authority to consider.”⁴⁴ His article recommends that rules are helpful when the conduct to be regulated is widespread, like limits on highway speed or taxation of income under the Internal Revenue Code, and that standards are more helpful when the conduct to be regulated is rare, as in the case of the standard of negligence in determining who should bear the loss from an accident.⁴⁵ That implies that if the conduct is rare, such as in the case of competing neighboring uses of land, general standards are to be preferred. But the literature and the case law do not offer much guidance on how owners of two neighboring parcels with irreconcilable but beneficial uses are to bargain in advance of resorting to litigation in order to see how a general legal standard works out in their specific case to resolve their conflict.

The argument for standards to be applied after the fact is that they give judges greater leeway over hard-lined rules which “are crude and inflexible and often seem to produce unfair (or inefficient) results in particular cases.”⁴⁶ Also, there is some argument that, even in advance of litigation, having standards which are unclear before a court applies them to specific facts is better than rules because the uncertainty encourages bargaining:

[M]uddy rules create probabilistic entitlement divisions—the parties are tied together, but neither is certain of the extent of his claim. If either engages in strategic behavior and pushes his luck too far, there is a possibility that the other may choose to seek judicial clarification of the entitlement and could be awarded the entire entitlement. Indeed, the uncertainty itself makes litigation potentially expensive, and so there are incentives to find some other method of clarification.⁴⁷

In other words, some scholars argue that when parties are unclear as to who owns the initial entitlement, as the case generally is under a reasonable use standard, they may in fact be more likely to bargain as neither party will feel endowed with more rights than the other.⁴⁸

⁴⁴ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992).

⁴⁵ *Id.* at 563–64.

⁴⁶ Merrill, *supra* note 12, at 46–47.

⁴⁷ Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 139 (1999) (footnote omitted); see also Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 256–57 (1995); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 100 (2002).

⁴⁸ Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 51–52 (2000).

On the other hand, some recent research indicates that where a norm of self-interest is strong, it will effectively trump a general standard but not a clear rule.⁴⁹ Other evidence exists that once a standard is clarified through a judicial decision providing one neighbor the dominant right of use, post lawsuit bargains do not occur because the litigation involves a process that either reflects, or even effects, antipathy between the parties.⁵⁰ Also, almost by definition, standards require litigation to sort out, which can be less helpful in negotiation before litigation occurs.

There is additional literature arguing for a more rule-based approach. Rules are “a key shorthand method of delineating rights that saves on the transaction costs of delineating and processing information about rights in terms of uses and users.”⁵¹ Security of positions and the unlikelihood of judicial interference may make better conditions for bargaining,⁵² and avoid judicial recourse.⁵³ Moreover, rules are gener-

⁴⁹ See Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81, 89 (2008) (finding rules make for better compliance than standards because rules leave less room than standards for interpretation in favor of one’s self-interest or where social norms conflict); see also Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435, 441 (2000) (noting that emotions occur in nearly every bargaining situation, and economic models that fail to incorporate such emotions into their calculus are flawed).

⁵⁰ Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384 (1999) (finding that nuisance litigants in twenty cases did not bargain after the court determined which neighbor’s use should prevail). “But the manner in which entitlements are created may well affect how readily they are exchanged. If a system assigns rights by inviting the parties to brawl for them, we might think twice before expecting to see much negotiation between the parties after the brawling is over . . .” *Id.* at 412.

⁵¹ Smith, *supra* note 33, at 79.

⁵² Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745 (1976).

⁵³ See Merrill, *supra* note 12, at 14. Also:

[m]echanical rules—such as the law of intentional trespass—are predictable and relatively inexpensive to apply; generally speaking, they can be applied by laymen with little or no input from lawyers or judges . . . In contrast, judgmental rules—such as the law of intentional nuisance—are unpredictable and relatively expensive to apply. Judgmental rules require a large input of legal advice and possibly a judicial trial . . . before the assignment of property rights can be established.

Id. at 23–24; see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 725 (1973) (arguing that simple rules are preferable in nuisance and nuisance-like situations so that the parties will better understand their rights with minimal cost to determine those rights). *But see* Carol M. Rose, *Crystals and*

ally preferred by laymen—regardless of any unintended consequences—due to their ease of application.⁵⁴

These aspects argue for more, rather than less, specificity, and principles for decision which are relatively easy to understand and agree upon. Unfortunately, for the purpose of reconciling competing beneficial uses of land, the general standards which have been applied in the law of nuisance don't seem to offer much help.

E. Prah v. Maretti: *The Example of Solar Rights in Wisconsin*

The California solar collector conflict involved a statute. For an example of a judicial resolution involving the application of a general standard to such a use, it may be helpful to recall the celebrated Wisconsin solar rights case, *Prah v. Maretti*.⁵⁵ This case involved a landowner whose rooftop solar collector for heat and hot water was going to be shaded by a new home erected by his neighbor.⁵⁶



Pic 3: Photograph of the Prah house with solar panels and the adjacent Maretti house.

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According to the case, when the landowner with the solar collector discovered that the new structure, which was to be erected by his neighbor, would shade his collector, he notified him and sought to negotiate a resolution involving moving the new home further from the

Mud in Property Law, 40 STAN. L. REV. 577, 604–05 (1988) (arguing that clear rules are better for dealing with strangers while standards are better for those in long-term relationships).

⁵⁴ Merrill, *supra* note 12, at 47.

⁵⁵ 321 N.W.2d 182, 190 (Wis. 1982).

⁵⁶ *Id.* at 184–85.

lot line.⁵⁷ When this process proved unsuccessful, he sought an injunction to prevent construction of the new home, as well as damages.⁵⁸ The Wisconsin Supreme Court reversed a trial court decision denying relief under nuisance law, and said that because of changing policies designed to encourage solar energy, the law of nuisance, specifically the “reasonable use” doctrine articulated in the *Restatement (Second) of Torts* (the “*Restatement*”), governed the case.⁵⁹ The Court, however, declined to decide whether the plaintiff was entitled to relief.⁶⁰ Instead, it reversed the judgment of the circuit court and remanded it for further proceedings, indicating that the plaintiff had the burden of proving that the elements of actionable nuisance existed and that the defendant’s conduct was unreasonable.⁶¹ In reaching its conclusion, the Court said: “[t]hat obstruction of access to light might be found to constitute a nuisance in certain circumstances does not mean that it will be or must be found to constitute a nuisance under all circumstances. The result . . . depends on whether the conduct complained of is unreasonable.”⁶² The dissent argued that the matter was more appropriate for the legislature to decide.⁶³

In discussing the *Prah* case, Professor Carol M. Rose had the following comment, critical of the use of a general standard rather than a clear rule:

[W]hat seemed to be a workable crystalline rule about sunlight rights—that your neighbor has no right to the sunlight that crosses your lot unless your neighbor has gotten an easement from you—has been transformed into a mud doctrine. Now, if you block the light, your neighbor may have a nuisance action against you—at least in Wisconsin.

⁵⁷ *Prah*, 321 N.W.2d at 184–85.

⁵⁸ *Id.*

⁵⁹ *Id.* at 191.

⁶⁰ *Id.*

⁶¹ *Id.* at 192.

⁶² *Id.*

⁶³ *Prah*, 321 N.W.2d at 195 (Callow, J., dissenting). In his dissent, Justice Callow noted: “[C]ould it be said that the solar energy user is creating the nuisance when others must conform their homes to accommodate his use? I note that solar panel glare may temporarily blind automobile drivers, reflect into adjacent buildings causing excessive heat, and otherwise irritate neighbors.” *Id.* at 195 n.3. The case was never tried on remand, but a resolution was achieved by Maretti paying a portion of the cost of relocating Prah’s solar collector. Telephone Interview with John F. Maloney, Esq., Counsel for plaintiff Glenn Prah (Sept. 8, 2008).

Now, nuisance is one of those extraordinarily shapeless doctrinal areas in the law of property. In *Prah*, the nuisance question hinged on a typically vague formulation: ‘all the underlying facts and circumstances.’ Does it matter that you built first? Could you or your neighbor have adjusted your respective buildings to avoid the problem? How valuable was the sunlight to you, and how valuable to your neighbor? You don’t know in advance how to answer these questions and how to weigh the answers against each other; that is to say, you don’t know whether your building will be found a nuisance or not, and you won’t really know until you go through the pain and trouble of getting a court to decide the issue after you have built it or have had plans drawn up.⁶⁴

F. *Resolving Conflicting Rights of Land Use Tends to Involve the “Muddy” Law of Nuisance in Part Because It Is Grounded in the Law of Torts*

As the Wisconsin case indicates, part of the difficulty in choosing between two uses, each of which seems individually beneficial, lies in the primary conceptual framework by which conflicts in neighboring land uses are resolved when they arise. This is in part because the doctrine of nuisance is grounded in the law of torts, in which the loss caused by a neighbor’s use of his land can be shifted from the aggrieved neighbor back to the neighbor who caused the harm.⁶⁵ Or in

⁶⁴ Rose, *supra* note 53, at 579 (citations omitted).

⁶⁵ See *Von Henneberg v. Generazio*, 531 N.E.2d 563, 567 (Mass. 1988) (holding that nuisance is a tort). The *Restatement (Second) of Torts* states:

[O]ne is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

RESTATEMENT (SECOND) OF TORTS § 822 (1979); see also *id.* §§ 826–831; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 49 (1979) (“Nuisance is a very old branch of the tort law, dating back to the early assizes, and at its core it protects the quiet possession and enjoyment of land.”). Professor Epstein makes the point that the tort law view of nuisance proceeds from an assumption that one landowner has an ownership interest that is interfered with by his neighbor, which tort law itself assumes is decided independently beforehand: “No general theory of tort law, however powerful or profound, can tell us who owns what at the outset.” Epstein, *supra*, at 52. But it is this “initial delimitation of rights,” as Professor Coase wrote, which is the basic issue involved in resolving conflicts between beneficial uses of neighboring land. See Coase, *supra* note 32, at 8.

the words of the *Restatement*, a nuisance is “a nontRESPASSORY invasion of another’s interest in the private use and enjoyment of land.”⁶⁶ Unfortunately, the guidelines it provides for determining what is “reasonable” do not add much to advance clarity or provide guidance in the situation of beneficial but incompatible neighboring uses.

More specifically, the *Restatement* determines the reasonableness of land use by balancing the gravity of harm to the plaintiff against the utility of the defendant’s conduct.⁶⁷ The *Restatement* then elaborates the standards further with more of them in the form of what amounts to “sub-standards.”

The *Restatement* explains that in order to determine the gravity of the harm, certain factors are important, such as the extent and character of the harm, the social value and suitability to the character of the locality of the use invaded, and the burden on the person harmed to avoid the harm.⁶⁸ In terms of the utility of the defendant’s conduct, certain other factors are important, such as the social value of the primary purpose of the conduct, the suitability of the conduct to the character of the locality, and the impracticability of preventing or avoiding the invasion.⁶⁹ After outlining these factors, the *Restatement* then concludes there are no general rules applicable across all cases.⁷⁰

The problem is that these sub-standards may be helpful for impartial decision makers trying to craft a just resolution to a case that goes

⁶⁶ RESTATEMENT (SECOND) OF TORTS § 821D (1979). See generally Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761 (1979) (discussing two early cases highlighting the origins and evolution of the law of nuisance, including the early English view that balancing the social utility of incompatible uses was not appropriate once a nuisance plaintiff had established actionable damages).

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 826 (1979).

An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if: (a) the gravity of the harm outweighs the utility of the actor’s conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Id.; see also PROSSER, *supra* note 32, at 596 (“In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant’s conduct.”) (footnote omitted).

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 827(a)–(d) (1979).

⁶⁹ *Id.* § 828(a)–(c).

⁷⁰ See *id.* § 827 cmt. b (“no general rule as to the relative weight of particular factors”); § 827 cmt. c (in regards to degree and duration of invasion, it can range from slight annoyance to complete interruption and “may be momentary, temporary, recurrent or continuous”); § 828 cmt. b (noting the absence of a uniform scale for social values).

to litigation, but are less likely to be helpful for laypeople attempting to sort out how to get along without a lawsuit but with competing land uses both of which seem reasonable in the context. For example, the factor of the character of the use in the context of the neighborhood can be helpful in certain cases, such as conflicts between residential and non-residential uses,⁷¹ and is analogous to judicial “zoning,”⁷² but unlikely to be of much help if the uses are both appropriate to the area—just incompatible.⁷³ Relying on the relative “social value” of the conflicting uses is not helpful where both are desirable and it would be understandable for each neighbor to prefer his or her own.⁷⁴ Examining the burden of avoidance is not helpful where each neighbor is likely to feel burdened. For example, it is not clear that determining the cost of cutting trees versus building the solar collector elsewhere will be helpful where both the costs are not clear in advance and also there are non-economic issues at stake for the two neighbors.

In light of this lack of clarity, Professor Edward Rabin advocates analyzing nuisance cases by separating what should be done (the effi-

⁷¹ Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1318 (1977) (“Similarly, noise that would be actionable if annoying to an average person in his residence would not be actionable if it occurred in an industrial area. Liability seems to require a breach of a standard of conduct prevailing in a limited geographic area.”); see also *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (describing nuisance as “a pig in the parlor instead of the barnyard”).

⁷² See J. H. Beuscher & Jerry W. Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440, 452 (“[T]he state in nuisance cases is exercising, through the judicial arm, the same basic power of the sovereign that it exercises through the legislative arm in zoning.”). Judging a use based upon the character of the neighborhood is a common factor used in many court decisions on nuisance but suffers from some of the same problems as the *Restatement* test on reasonableness. It may be useful for courts with the time and resources to evaluate proposed or existing uses, but the character of the neighborhood factor is fairly useless for individuals looking to settle a matter between themselves. See *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 712 P.2d 914, 916, 923 (Ariz. 1985) (holding that soup kitchen located in upscale neighborhood was a nuisance); *Abdella v. Smith*, 149 N.W.2d 537, 539 (Wis. 1967) (holding that restaurant owner in rural area could not claim nuisance based on smells from nearby riding stable); *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 233 (App. Div. 1932) (dismissing nuisance suit brought by owner whose grocery store was located in an industrial area). Additionally, a character of the neighborhood factor is best used in unique neighborhoods where a majority of the uses are in common with only one or a few outliers.

⁷³ See generally Ellickson, *supra* note 53 (providing further discussion of the character of the neighborhood standard); J. E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1 (1993) (discussing the character of the neighborhood standard). Professor Richard Epstein criticized the use of the Ellickson standard: “[T]he test of neighborliness . . . demands that we take into account a welter of factors which courts cannot isolate, weigh or generalize.” Epstein, *supra* note 65, at 63.

⁷⁴ See *Prah v. Maretti*, 321 N.W.2d 182, 195 (Wis. 1982) (Callow, J., dissenting).

cient result) from who should pay for it (the fair result), with the latter issue being based on fault.⁷⁵ More specifically,

[t]he procedure here proposed for resolving private nuisance cases involves two steps. The first step would be to determine who is morally more blameworthy for the existence of the conflict. That person should bear the burden of resolving the conflict The second step in the proposed procedure would be to determine how the conflict can be resolved with least expense.⁷⁶

But how is blame to be assigned when the uses are simply incompatible and no one is to blame? On the other hand, relative fault may be helpful in assigning liability to a polluting factory next door to a home, as in *Boomer v. Atlantic Cement Co.*⁷⁷ In this famous New York case, the court found the operation of a cement plant was a nuisance, but declined to issue an injunction, instead awarding damages to the adjoining landowner.⁷⁸ But the rationale of liability based on fault in cases like *Boomer* is of limited value where both neighboring land uses are presumptively equally valid, just incompatible in the circumstances.

Also, standards for allocation of harm such as negligence, or even strict liability for ultrahazardous activity, provide no help in deciding the case of incompatible but beneficial uses.⁷⁹ Instead of a relatively clear rule by which neighboring landowners can make a decision as they do with trespass, there is only the standard that a landowner use

⁷⁵ See Rabin, *supra* note 71, at 1315–17.

⁷⁶ *Id.* at 1309. To be fair to Professor Rabin, in his article he offers a helpful analysis of a principle other than blame—priority of use—to help resolve these issues, while acknowledging the importance of other factors as well, an idea echoed in this Article. See *id.* at 1321–23; *infra* Part III.

⁷⁷ 257 N.E.2d 870, 871 (N.Y. 1970).

⁷⁸ See *id.* at 874–75.

⁷⁹ *Ted's Master Serv., Inc. v. Farina Bros. Co.*, 178 N.E.2d 268, 271 (Mass. 1961).

As we have recently stated in another context: “[t]he term ‘nuisance’ as a ground of liability usually results in confusion and frequently is a method of avoiding precision in analysis” What the plaintiffs in substance have alleged is that there has been an interference by the defendant with their use and enjoyment of land. Liability in such an action, however it may be labeled or designated, should be based upon a determination that the interference is intentional and unreasonable or results from conduct which is negligent, reckless or ultrahazardous.

Id. (quoting *Delano v. Mother's Super Mkt.*, 163 N.E.2d 920, 922 (Mass. 1960) (citations omitted)).

his land in a way that is not unreasonable vis-à-vis his neighbor, or vice-versa, which requires adjudication to sort out.⁸⁰

The situation of “good” neighbors in conflict, instead, more correctly involves reconciling or preferring one of two apparently equal rights, rather than righting an apparent wrong. For instance, it is difficult to imagine in the abstract that growing redwood trees or installing a solar collector, or drilling a well or installing a septic system, would expose either landowner to liability to his neighbor in tort, independent of statutory intervention, as in the California example.

G. *Can Other Areas of Conflict Between Neighbors, Such as the Law of Surface Waters, Not so Grounded in Tort, Provide Helpful Standards?*

Because the law of nuisance is so often framed as a tort—where there is a legal wrong to be righted—and nuisance is an area of law that has been defined by one commentator as an “impenetrable jungle,”⁸¹ it may be useful in cases of incompatible uses to look to the law of the legal rights of landowners to respond to how water flows on or off their property when it rains. This area of law relating to “surface waters” focuses more directly upon making a conscious choice between two legitimate and competing rights.⁸² Yet even that doctrinal area may not be of much help since in modern cases the “common enemy” doctrine, where a landowner had the right to shed surface rainwater to the detriment of his neighbor, has largely been superseded by a standard, as in nuisance

⁸⁰ See discussion, *supra* notes 46–54. Note that this situation is different from the “neighborliness” test that Professor Ellickson discussed, which is recast by Professor Epstein as representing the level of minor nuisances between neighbors. See Ellickson, *supra* note 53, at 731–33; Epstein, *supra* note 65, at 85. Epstein believes that the law often lets such disputes go unaddressed because each neighbor has the chance to do the same to the other, or may over time, in some sense of reciprocity of “live and let live.” Epstein, *supra* note 65, at 85. “Where that invasion falls below some background level—the level of the usual reciprocal risks that good neighbors inflict upon each other—then it is not actionable . . .” *Id.* But as Professor Epstein later points out, such principles are not enough when more than some background level is exceeded in a particular case, or the nature of the circumstances make it clear that reciprocity of opportunity for future harm in return does not exist, as in the case of a hotel which lost business due to construction activity next door. See *id.* at 87. Thus, while one might imagine a court not intervening to stop noise on one neighbor’s land because the other neighbor can do the same later, such judicial forbearance does not offer much help for neighbors trying to sort out the two examples of wells and septic systems, or trees and solar collectors, which exemplify the desirable but incompatible—rather than modestly harmful—uses of adjoining land.

⁸¹ PROSSER, *supra* note 32, at 571.

⁸² See *Westland Skating Ctr. v. Gus Machado Buick, Inc.*, 542 So. 2d 959, 963–64 (Fla. 1989).

law, of reasonable use.⁸³ For example, in *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.* a dispute arose over surface water drainage between a skating rink and an adjacent auto dealer.⁸⁴ The rink owner changed the elevation of his land to prevent water from gathering on it, flooding the dealer's car lot. In deciding which neighbor should prevail, the Supreme Court of Florida adopted a reasonable use standard:

We recognize that the application of the reasonable use rule may make the outcome of certain controversies less predictable. Yet, if the rigidity of the traditional doctrines made cases predictable, it also led to such arbitrary results that the courts began to modify those rules. *Predictability should not be achieved at the expense of justice.* We believe that the rule of reasonable use employs the proper balance and will best enable surface water controversies to be fairly decided.⁸⁵

H. *The Problem of Relying on Standards to Do Justice Before Litigation*

The problem, as Professor Rose has written, is that a reasonable use standard—particularly useful for courts with the resources of counsel to argue the case—may be particularly unhelpful for ordinary citizens trying to sort out what to do when their otherwise benign uses conflict before going to court to get their relative entitlements adjudicated.⁸⁶ In other words, predictability may be an aid to, rather than in opposition to, justice, if justice is also defined as helping neighboring landowners reach a principled accommodation between their uses without resort to litigation in order to have a judge determine how a “reasonable” use standard specifically applies to them. The question, however, is whether it is better to say clearly in advance that no relief short of litigation is possible, or whether there is some guideline that neighbors with desirable but incompatible uses can understand on

⁸³ See *Borchsenius v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 71 N.W. 884, 885 (Wis. 1897) (“Surface water is recognized as a common enemy, which each proprietor may fight off or control as his will or is able . . . even if some injury occurs, causing damage.”). But see *Armstrong v. Francis Corp.*, 120 A.2d 4, 8 (N.J. 1956) (“[E]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability . . .”).

⁸⁴ *Westland Skating Ctr.*, 542 So. 2d at 963.

⁸⁵ *Id.* (emphasis added).

⁸⁶ See Rose, *supra* note 53, at 604.

their own in response to the challenge posed by Professors Merrill and Smith for both “flexibility and legal certainty.”⁸⁷

What then should be done? The bias in the law is in favor of adjudication after the fact based on standards rather than rules. Also, while the literature discussed above suggests that flexible standards can encourage negotiation, they also encourage litigation, and clear rules are easier to administer and bargain around.

Is there some way to manage this tension to assist negotiation with a principle that is more clear than “reasonable use” but less definite than, for example, the right to exclude? In other words, if a bargained for resolution is worthwhile, would there not be value in having some guidelines for such neighbors to consider, before they get to the point of litigation, that would also lead them to make the choices together as they would if they were one owner?⁸⁸ In framing such guidelines, are there social practice norms that might help? Professor Marc Poirier thinks there might be:

Assume Coase is right, that nothing tells us inherently which of two mutually interfering uses is the “harm” and which is not. To tell harm from benefit, one must have a sense where the neutral baseline is. To apply nuisance law thus requires one to refer to a baseline of social practice norms.⁸⁹

I. *What Can Be Learned About Informal Dispute Resolution Using Social Norms?*

This Article began with the assumption that law matters, that the correct legal standard would aid in the resolution of conflict between neighbors, enabling them to bargain “in the shadow of the law” as to which should prevail.⁹⁰ Or in more poetic terms, good legal fences would make good neighbors.⁹¹ But as the discussion above has illus-

⁸⁷ See Merrill & Smith, *supra* note 19, at 370 n.57.

⁸⁸ See *supra* notes 34–35 and accompanying text.

⁸⁹ Poirier, *supra* note 47, at 119.

⁹⁰ See Mnookin & Kornhauser, *supra* note 20, at 968.

⁹¹ Fences themselves are a fascinating subject. See generally MASS. GEN. LAWS ch. 49, §§ 1–21 (2009) (authorizing Massachusetts municipalities to appoint a “fence viewer,” an office dating back to colonial times that in many communities still exists); MASS. GEN. LAWS ch. 249, § 4 (2009) (providing district court jurisdiction for fence viewer matters). It also recalls the celebrated performance design specification for a Texas fence: “horse high, bull strong and pig tight.” See Barry Popik, *Horse High, Bull Strong, and Pig Tight (Qualities of a Texas Fence)*, THE BIG APPLE, Oct. 15, 2006, http://www.barrypopik.com/index.php/texas/entry/horse_

trated, it is difficult to construct a sound legal fence out of “reasonableness” alone.⁹²

Professor Ellickson, however, has suggested the opposite might be true; norms of reciprocity and continuing relationships between neighbors make neighborly disputes ones in which the law rarely intervenes, especially if the stakes are relatively low.⁹³ Also, these occasions may occur rarely because the applicable law is unknown, the cost of attorneys high, no third party insurer exists to pick up the bill, or the formal norms of law are proven less useful than the informal ones that may exist.⁹⁴ Therefore, it may be that good neighbors build good fences and just resolutions occur outside (or rather without) the law. Is it possible to look for some norms that would guide neighbors with conflicting benign uses, just as Professor Ellickson found some norms that appeared to guide the neighbors who were the subject of his research?

While there is much information available on norms relating to disputes over neighboring uses, Professor Ellickson examined other situations where neighbors rarely adopt formal legal rules or methods of intervention to resolve their disputes, but rely instead on informal norms to help shape positive outcomes.⁹⁵

high_bull_strong_and_pig_tight_qualities_of_a_texas_fence/; see also *In re Builders' Lumber Co.*, 148 F. 244, 253 (E.D.N.C. 1906) (describing the definition of a lawful fence).

⁹² See *supra* Part I.E–F.

⁹³ See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (describing, among other things, how ranchers in Shasta County, California build and maintain fences between their properties and others without resort to available rules of law, such as that entitling them to contribution from each other). This echoes the passage from Robert Frost's *Mending Wall*:

I let my neighbor know beyond the hill;
And on a day we meet to walk the line
And set the wall between us once again.
We keep the wall between us as we go.
To each the boulders that have fallen to each.

ROBERT FROST, *Mending Wall*, in *THE POETRY OF ROBERT FROST* 33 (Edward C. Lathem ed., 1969).

⁹⁴ ELICKSON, *supra* note 93, at 283.

⁹⁵ See *id.* at 98.

As prior investigators have found in other contexts, disputants are increasingly likely to turn to legal rules when the social distance between them increases, when the magnitude of what is at stake rises, and when the legal system provides an opportunity for the disputants to externalize costs to third parties To achieve order without law, people must have continuing relationships, reliable information about past behavior and countervailing power.

Id. at 283–84.

Citing examples from cattle ranching to whaling to bees in orchards, Ellickson concluded that at least relatively close-knit societies will prefer simple strict liability rules to ones which involve careful fact-based inquiry of “reasonableness,” because they are easier to understand and administer; for example, in open range situations, he who hits the cow, “buys the cow.”⁹⁶ Professor Ellickson contrasted that with a closed range situation in which the cattle rancher pays, even when the legal rule is much more fact-sensitive because it is based on the relative negligence of the defendant rancher and the plaintiff automobile driver.⁹⁷

Also, his research indicated that neighbors evolved general cooperative models of behavior, such as “fencing in” rather than “fencing out,”⁹⁸ where the cattle rancher routinely installs fencing to prevent neighboring landowners from having their property invaded by his cattle, even though the landowner could erect a fence to defend himself.⁹⁹ While the right to exclude—or “keep out”—is considered one of the core, if not *the* core, element of property, as discussed above, what he saw was the reverse: a duty to “keep in.”¹⁰⁰ Professor Ellickson also indicated that situations where specialized labor was needed, and a norm in which the least cost avoider would do the work and the other neighbor would pay, seemed to work.¹⁰¹ In short, social norms, or what we might call “rules of thumb,” even outside the law, facilitated neighbors getting along.¹⁰² The implication is that for reconciling a conflict between desirable uses of neighboring land, it is useful to explore if a similar rule of thumb might exist, or at least be proposed. But what might be the elements of such a rule of thumb?

⁹⁶ *Id.* at 82.

⁹⁷ *Id.* at 82 & n.1.

⁹⁸ *Id.* at 74–76.

⁹⁹ *Id.* at 187.

¹⁰⁰ ELLICKSON, *supra* note 93, at 187. While “fencing in” and “fencing out” are equally consistent with the exclusionary duty to “keep out,” “fencing in” reflects a cooperative mindset entirely different from that of “fencing out,” evidenced by the affirmative protection of others’ parcels, rather than simply one’s own. In addition, Professor Ellickson found that deviant behavior was generally punished informally by escalating social rather than formal legal sanctions, calling this practice “even-up” rather than “get even,” which had a more vengeful flavor. *See id.* at 225–29.

¹⁰¹ *Id.* at 211.

¹⁰² In addition to their utility in informal dispute resolution, such social norms and customs may ultimately inform legal standards. *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 38–41 (2009) (citing *Miller v. Shoene*, 276 U.S. 272 (1928)) (arguing that Virginia custom preferring more valuable apple trees over cedar trees host to a destructive fungus formed part of the baseline bundle of property rights enjoyed by landowners).

It may be useful to revisit the West Virginia case involving the well and septic system and how it was decided, as well as the California solar case and its aftermath.

II. THE WEST VIRGINIA AND CALIFORNIA EXAMPLES REVISITED TO SEARCH FOR CLUES TO A NORM-LIKE GUIDELINE

A. *Priority in Time*

Recall that in the *Hendricks* case, one West Virginia homeowner got permission to dig a well near his boundary line.¹⁰³ Because of local regulations requiring 100 feet between wells for water and nearby septic systems, he effectively preempted his neighbor from installing and using a septic system on the part of his own property immediately adjacent to the well site. The owner of the septic system sued to have the well declared a nuisance. The trial court agreed, but the appellate court reversed, finding for the well owner.¹⁰⁴ The appellate court reasoned that the well was not negligent, reckless, or abnormally dangerous, but needed to be evaluated in terms of its “unreasonableness,” relying on the *Restatement (Second) of Torts*, determined by “balancing the competing landholders’ interests.”¹⁰⁵

The court noted that each use burdened the adjacent property:

Clearly both uses present similar considerations of gravity of harm and social value of the activity alleged to cause the harm. Both a water well and a septic system are necessary to use this land for housing Neither party has an inexpensive and practical alternative In the case before us, we are

¹⁰³ *Hendricks v. Stalnaker*, 380 S.E.2d 198, 203 (W. Va. 1989).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 200–02; see also RESTATEMENT (SECOND) OF TORTS § 826 (1977); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972) (making the distinction between “property” rules, which require voluntary transfer, with “liability” rules where, in effect, a property interest is transferred in return for payment of damages). In this context of incompatible but desirable neighboring uses, liability rules, which allow the buyer of an entitlement to purchase it for fair value even if the entitlement holder does not wish to sell, are problematic because they require a lawsuit, the avoidance of which is one of the goals of this Article. Property rules, which require the entitlement to be bought from the entitlement holder in a voluntary transaction, however, can be more easily understood in advance of a sale making them more useful in a bargaining context. However, choosing between property rules and liability rules is not yet clear, since it has been argued that in cases of conflicting uses of land whether a property or liability rule is to be preferred is entirely dependent on the individual situation. See Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 167 (2006).

asked to determine if the water well is a private nuisance. But if the septic system were operational, the same question could be asked about the septic system.¹⁰⁶

The court then went on to say that:

Because of the similar competing interests, the balancing of these landowners' interests is at least equal or, perhaps, slightly in favor of the water well. Thus the Hendrickses have not shown that the balancing of interests favors their septic system. We find that the evidence presented clearly does not demonstrate that the water well is an unreasonable use of land and, therefore, does not constitute a private nuisance We find that because the evidence is not disputed and only one interference is reasonable, the trial court should have held as a matter of law that the water well was not a private nuisance.¹⁰⁷

How did the appellate court reach a determination that the well should be preferred as a matter of law, rather than of fact, which would have upheld the trial jury decision for the septic system landowner? What led it to believe that in the balancing of interests the well was "slightly in favor"?¹⁰⁸ Did it all come down to burden of proof? Specifically, the court said: "the Hendrickses have not shown that the balancing of interests favors their septic system."¹⁰⁹ In other words, when incompatible uses are involved, is it that he who sues loses? If that is the situation, it helps to decide lawsuits but gives little useful advance guidance to neighbors. Fortunately, the opinion and briefs of counsel in the case offer clues as to other criteria to explore.

The first clue is that the brief of the well owner indicated that he won a race for relative rights:

The problem in this case is a problem resulting from Health Department rules and regulations controlling property usage. Certainly Stalnaker as the owner of the property upon which his water well was drilled had an absolute right to drill a water well subject only to obtaining a permit therefore under the rules and regulations of the Department of Health; and certainly Hendricks as the owner of the property upon which the

¹⁰⁶ *Hendricks*, 380 S.E.2d at 202-03.

¹⁰⁷ *Id.* at 203.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

septic system was to be constructed had an absolute right to construct the septic system on his property subject only to obtaining a permit therefore under the rules and regulations of the Department of Health. Because of the constraints imposed by the Department of Health rules and regulations, Stalnaker and Hendricks were placed in a competitive position, each needing to act quickly to preserve his right to use his property for absolutely legitimate purposes. Under the rules of the contest, which rules were established independently of either contestant, Stalnaker crossed the finish line first, and thus, is entitled to the benefits which the independently established rules afford to him even though Hendricks, the adjoining property owner, suffers a loss of right which he would otherwise have had. Had Hendricks arrived first with a permit, Stalnaker would have suffered a similar fate.¹¹⁰

Thus, the implication is that priority in time is priority in right.¹¹¹ While there is no explicit reference in the opinion that the court relied on this “permit race” to decide the matter, the court concluded its opinion by citing an article by Professor Edward Rabin on how nuisance cases should be decided: “For an enlightening discussion of . . . the factors to be considered, including priority of use”¹¹²

Priority of time also played a role in the California case, or at least its aftermath. While the facts of the case are complex, it is apparent that the redwoods involved were planted prior to the solar collector being installed, but they grew enough to shade it. It was evidently this situation which led to the amendment of the statute to protect trees planted earlier. Here’s what happened in more detail.

¹¹⁰ Brief for Appellant at 10–11, *Hendricks v. Stalnaker*, 380 S.E.2d 198 (W.Va. 1989) (No. 18489). Note that in the *Hendricks* case, the race for priority was very close, with one landowner obtaining his well permit one day before the other sought the permit for his septic system.

¹¹¹ See *Hendricks*, 380 S.E.2d at 202–03.

¹¹² *Id.* at 203 n.9 (citing Rabin, *supra* note 71). In his article, Professor Rabin suggested rewriting *Restatement (Second) of Torts* § 840D: *Coming to the Nuisance* instead as § 840DA: *Priority of Use*, as follows:

That the activity on defendant’s real property, when it was started, did not interfere with an activity on plaintiff’s real property is not, by itself, sufficient to bar plaintiff’s action. It is a factor, however, suggesting that defendant’s activity is not a nuisance. Similarly, if the activity on plaintiff’s real property existed before the activity on the defendant’s real property was started, this is a factor tending to suggest that defendant’s activity is a nuisance.

Rabin, *supra* note 71, at 1322–23.

The two adjacent landowners were located in two neighboring municipalities in Santa Clara County, California, one in Sunnyvale and the other in Santa Clara. The property line dividing the two parcels also happened to coincide with the municipal boundary. When the Sunnyvale owners bought their land in 1969, the Santa Clara land was an orchard, but was subdivided into house lots in 1993 and sold. Between 1997 and 1999, eight redwood trees were planted on the Sunnyvale parcel. In 2001, the owner of the Santa Clara parcel began the process of constructing approximately 625 square feet of solar modules on a deck and overhanging trellis at the rear of his parcel adjacent to the side yard of the Sunnyvale parcel, having previously installed solar collectors on the main roof. Over the next few years, the solar collector owner sought enforcement of the California Solar Shade Control Act in regards to redwood trees which shaded a portion of his trellis solar collector. After mediation did not succeed, the Santa Clara County district attorney enforced the California Solar Shade Control Act against the neighboring Sunnyvale owners as to four of eight trees (one not affecting the collector and three others having been exempt under the statute since they had cast shadows on the solar collectors when they were installed). At the conclusion of the case, the court determined that two of the remaining trees shaded more than the statutory limit of ten percent of the collectors, and one of them was cut back to comply, as shown at the outset of this article.¹¹³

As a consequence of this result, the California legislature amended the Act, effective January 1, 2009, to clarify the importance of being first in time in order to be first in right in that trees existing prior to the installation of a solar collector on neighboring land are now protected.¹¹⁴ More specifically, the general framework of the Act was re-

¹¹³ E-mail from Valerie Armento, counsel involved in the the Sunnyvale litigation, to R. Lisle Baker, Professor of Law, Suffolk University Law School (Sept. 28, 2008) (on file with author); E-mail from Valerie Armento, counsel involved in the the Sunnyvale litigation, to R. Lisle Baker, Professor of Law, Suffolk University Law School (Sept. 23, 2008) (on file with author); Telephone Interview with Valerie Armento, counsel involved in the the Sunnyvale litigation (Sept. 29, 2008).

¹¹⁴ The revisions occurred when the Sunnyvale owners, whose redwood tree which had to be trimmed back, submitted their situation to democratic state senator Joe Simitian in response to his annual request to his constituents for "there ought to be a law." He was later joined as a co-sponsor by his republican colleague, state senator Tom McClintock, who filed similar legislation. 2008 CAL. LEGIS. SERV. 1399 (West) (describing revisions to California Public Resources Code in amending or adding sections 25981, 25982, 25982.1, 25983, 25984, and 25985); Telephone interview with Edward Randolph, Staff Att'y for the Cal. Assembly, Comm. on Utils. & Commerce (Sept. 29, 2008). *See* John William Gergacz,

tained in that neighboring property owners are not to allow a tree or shrub to shade more than ten percent of the collector between 10:00 a.m. and 2:00 p.m., and local governments are authorized to pass ordinances exempting its jurisdiction from the provisions of the Act. The Act was amended, however, to respond primarily to the Sunnyvale-Santa Clara dispute. The amendments now explicitly exempt trees and shrubs planted prior to the installation of the solar collector, or their replacements if removed for protection of public health, safety, or the environment. The amendment also allows, but does not require, the owner of property where the solar collector is to be installed to give a statutory form of written notice by certified mail to his neighbor within no more than sixty days of collector installation, and for such notice to be communicated to successors to these neighbors. The amendments further specify that to be protected, the collector must not be intended to offset more than the building's electricity demand and must be installed on the roof of a building, unless certain problems with such installation exist requiring it to be mounted on the ground. The amendment also removes the potential for a \$1000 fine and makes the offense a private rather than a public nuisance.¹¹⁵

In effect, the amendments to the California statute echo Professor Rabin's recommendation to examine priority of use.¹¹⁶ Note that this principle is relatively easy to explain and perhaps even to apply. Further, it is consistent with informal norms by which people ordinarily line up in queues, and it is how some state legislatures have shaped their responses to solar collectors.¹¹⁷

The most widely known application of priority of use involves water rights in the West, where "priority, along with anti-waste and anti-speculative rules, limits individual use and produces a relatively broad and stable distribution of water use opportunities."¹¹⁸ In an informal sense, a customary parallel to the first user rule can be found in the

Legal Aspects of Solar Energy: Statutory Approaches for Access to Sunlight, 10 B.C. ENVTL. AFF. L. REV. 1, 26–27 (1982) (anticipating the conflict and its resolution twenty-eight years ago).

¹¹⁵ See 2008 CAL. LEGIS. SERV. 1399 (West).

¹¹⁶ Rabin, *supra* note 71, at 1326 ("By protecting early innocent development from penalty, except for compelling reasons involving the health or comfort of neighbors who are following a well-established neighborhood pattern, the prior use rule encourages useful development of land when that development will not immediately damage neighbors.").

¹¹⁷ *E.g.*, WYO. STAT. ANN. § 34-22-103 (2009) (declaring priority in time the better right); N.M. STAT. § 47-3-4 (1977) (declaring the same).

¹¹⁸ A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 887 (2000); see also Comment, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 U. COLO. L. REV. 421, 436–37 (1976).

adherence to this principle in the allocation of public space to private uses, such as street vendors¹¹⁹ or parking spaces, especially if the space has been cleared as a result of shoveling snow.¹²⁰



Pic 4: Photograph of lawn chair occupying space shoveled out on a Boston Street, Boston, Massachusetts.

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The doctrine of priority in time has been criticized on the grounds that it would allow the first user to “arrogate to himself a good deal of the value of the adjoining land.”¹²¹ Another problem with the doctrine is that it may encourage unnecessary and economically inefficient use of land in order to gain legal advantage over neighboring uses in the

¹¹⁹ Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 200 (2006).

¹²⁰ Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S528–33 (2002); see also Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. L. & ECON. 393, 393–94 (1995) (“[First possession] rules grant a legitimate ownership claim to the party that gains control before other potential claimants . . . [and] have been applied widely in both common and statut[ory] law . . . [and] are tightly woven in the fabric of Anglo-American society . . .”); Brian Ballou, *Digging in on Shoveled Spaces—Residents Ignore City’s 48 Hour Snow Rule on Claiming Parking Spots*, BOSTON GLOBE, Jan. 24, 2009, at B1.

¹²¹ Rabin, *supra* note 71, at 1321 (quoting RESTATEMENT (SECOND) OF TORTS § 840D cmt. b (Tentative Draft No. 16, 1970)).

future.¹²² Also, the doctrine was not sufficient to explain cases where priority in time appeared not to matter, such as the English case, cited by Professor Coase in his article, where a pre-existing confectioner lost out to a late coming physician next door who needed peace and quiet to perform his medical examinations.¹²³ So while the first in time principle may be useful, it may benefit from being complemented by another. Here again, revisiting the *Hendricks* case and the California solar conflict may be helpful.

B. *The Effective Use of the Neighboring Land by the Adjacent Use*

The West Virginia court also noted this distinction between the two uses:

We note that either use, well or septic system, burdens the adjacent property. Under Health Department regulations, a water well merely requires non-interference within 100 feet of its location. In the case of a septic system, however, the 100 foot safety zone, extending from the edge of the absorption field, may intrude on adjacent property. Thus, the septic system, with its potential for drainage, places a more invasive burden on adjacent property.¹²⁴

This language indicates that a second factor that may have played a role in the court's decision was the relative intrusiveness of the two conflicting uses, with the well being less so than the septic system and its field.¹²⁵ Also, Professor Rabin's article discusses the idea that prefer-

¹²² See Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557, 558–61 (1980) (arguing that determining who should have been first on efficiency grounds is a better precondition for imposing liability); see also RICHARD A. EPSTEIN, TORTS § 14.6.2 (1999) (arguing against a "coming to the nuisance" defense based on priority in time, as it would encourage premature development and precipitate unnecessary conflict). *But see* Lueck, *supra* note 120, at 394–95 (suggesting that the law has evolved in a way that anticipates and mitigates the wasteful tendencies of first possession rules).

¹²³ See Coase, *supra* note 32, at 8–10 (citing *Sturges v. Bridgman*, (1879) 11 Eng. Rep. 852 (Ch.D.)). Indeed, Professor Richard Epstein has argued that priority in time is irrelevant in such "coming to the nuisance" cases, which are completely explained by the traditional physical invasion test. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 119–20 (1985); Epstein, *supra* note 65, at 72–73.

¹²⁴ *Hendricks v. Stalnaker*, 380 S.E.2d 198, 202 & n.7 (W. Va. 1989) ("Rules and Regulations of the [West Virginia] Health Department . . . require a recorded easement or authorization for use of or crossing of adjacent property for off lot disposal of sewage or effluent.").

¹²⁵ See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1005 (2004) (noting the durability of variables like physical boundaries and physical

ring one use to the other is the equivalent of imposing a servitude on the adjoining land.¹²⁶

The implication for reconciling incompatible but benign uses is that it is important to acknowledge, when it occurs, that one use will be more “active” than the other, such as the solar collector compared with the tree, or the septic system compared with the well, which the easement analogy helps clarify.¹²⁷ That is a different standard than one focusing on which of the two uses is hypersensitive and arguably not entitled to preference.¹²⁸ For example, the solar collector in Sunnyvale

invasion as important factors in the law of nuisance, despite the growth of the utility-balancing approach to the law of private nuisance). Smith states that “[w]here two owners with rights in nearby parcels come into conflict, the presumption is that there is a violation by the more active party.” *Id.*

¹²⁶ Rabin, *supra* note 71, at 1327.

The drafters of the *Restatement [(Second) of Torts]* . . . were tort lawyers, not property lawyers . . . Perhaps for [this reason] . . . the owner of land who has a good cause of action in nuisance has, in effect, a dominant estate, with the land on which the nuisance exists being the servient estate. That is, the defendant’s land is subject to a servitude in favor of the plaintiff’s land.

Id.

¹²⁷ See Smith, *supra* note 33, at 76. (“When the polluter has an entitlement to pollute, it is either a privilege and not a right, or a separately acquired easement—a right in the lands of another.”). Note that both a well and a septic system use the aquifer, and if the case involved two competing wells, then priority initially would be more important. See Tawny L. Alvarez, Comment, *Don’t Take My Sunshine Away: Right-to-Light and Solar Energy in the Twenty-First Century*, 28 PACE L. REV. 535, 538–43 (2008) (offering an update on statutes relating to solar easements and related local ordinances). Note that if such a statute exists, it may shape the context for neighbor to neighbor resolution.

¹²⁸ Some commentators have suggested using standards for decision such as the hypersensitivity of the use which seeks to be protected. See generally Rose, *supra* note 53. The initial problem with this standard is that it requires, to some degree, a subjective valuation of the nature of the use and/or the surrounding area, while the pre-statement seeks to use factors that are as objective as possible. Sensitivity, in particular, requires an understanding of the circumstances surrounding the use and the user. See *id.* at 577–80; see also Ellickson, *supra* note 53, at 751. Professor Ellickson uses *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948) as an example of the application of a hypersensitive standard because the outdoor theatre lost due to it being a hypersensitive use. Ellickson, *supra* note 53, at 753–54. The *Amphitheaters, Inc.* case can, however, be explained from a standard of intrusiveness as well. In *Amphitheaters, Inc.* the court ruled against the theater because, like the California solar collector, it required something not to occur on the adjoining land (bright light) in order to be operational on its own terms. 198 P.2d at 853. At the same time, not creating a shadow is different from actively intruding into neighboring land, which has a more conventional nuisance-like character to the adjoining landowner. For example, the City of Newton, Massachusetts, has adopted an ordinance providing protection for neighbors from both general light pollution as well as direct “light trespass.” NEWTON, MASS., CODE art. IV, § 20-25 (2007), available at <http://www.ci.newton.ma.us/legal/ordinance/Chapter-20.pdf>. Also, applying the hypersensitivity test to solar energy might well

might be seen as hypersensitive compared to the neighboring tree, but it did not save the tree. The West Virginia well might have been seen as hypersensitive compared to the intrusive septic system, but the *Hendricks* court chose to favor the well as the less intrusive use. These examples may indicate that relative intrusiveness may be more accurate in reflecting experience, and perhaps also easier for lay neighbors to understand and apply as a normative guideline.¹²⁹ While perhaps useful in some litigation contexts, raising the question of which use is more hypersensitive in a conversation between neighbors might appear to be equivalent to blaming the victim. If so, the hypersensitivity guideline would then risk injecting relative fault into a dialogue which is likely to be more productive if focused away from blame and toward resolution on some objective standard that honors the neighbors' sense that each is acting properly, but in a way that is incompatible with the neighboring use.

C. Testing Priority in Time and Effective Use of the Neighboring Land

Assume for the moment that two factors which may have led the *Hendricks* court to prefer the well use to the septic field were priority in time and whether one use potentially intruded into or required the use of neighboring land. How would these factors play out in the California case of the solar collector and the redwoods absent legislative determination?

The trees themselves require sunshine but there is no evidence that they required any sunshine coming over the land of the neighbor with the collector. They were more like the well, not requiring any of the neighbor's land. On the other hand, the solar collector, like the septic system, needed something incompatible not to occur on adjoining land to work, in effect making some collateral use of the neighboring property. Thus one could imagine that if the solar collector landowner had sued the redwood tree landowner in West Virginia, the collector owner would not have prevailed, absent a statute like California's prior to 2008.¹³⁰

unduly chill development and use of that technology. See Shawn M. Lyden, Note, *An Integrated Approach to Solar Access*, 34 CASE W. RES. L. REV. 367, 387–88 (1983–1984).

¹²⁹ See *Sher v. Lederman*, 198 P.2d at 853.

¹³⁰ See *Sher v. Lederman*, 226 Cal. Rptr. 698, 705–06 (Ct. App. 1986) (holding that the California Solar Shade Control Act controlling trees is not applicable to house designed to maximize sunlight use but not to collect it); see also *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359–60 (Fla. Dist. Ct. App. 1959) (shading a hotel pool by adjacent neighboring building is not actionable even if it is spiteful in motive). But see *Rattigan v. Wile*, 841 N.E.2d 680 (Mass. 2006) (holding that activities on one's property

III. A “PRE-STATEMENT” GUIDELINE AS A STARTING POINT

While one can agree or quarrel with the decision of the West Virginia Supreme Court of Appeals or the amendment to the California statute, one important function of both is to decide whose use of land would be preferred. Therefore, assuming for the moment that a definitive determination of whose use should prevail would require judicial or legislative action, is there some simple, workable but principled guideline like a social norm that could assist neighbors with benign but conflicting uses, short of proceeding to litigation or getting a statute amended in your favor? Note that any such guideline would not be the equivalent of a judicial decree or specific legislation and the more tailored justice which they may provide, but such a guideline may facilitate in neighbors enough of a sense of rough justice to avoid litigation in the first place. In other words, can a social norm be created or at least proposed?¹³¹

A. A Possible “Pre-Statement” Guideline to Help Avoid Litigation

Instead of resorting to nuisance litigation, which appears to rely on the *Restatement (Second) of Torts* standard of reasonableness, to resolve their conflict, perhaps neighbors with mutually incompatible uses might negotiate a fair and efficient accommodation between them using a more specific but informal norm. Because it is designed to help them clarify their relative rights as a baseline for negotiation in advance of litigation, perhaps it might be called instead a “pre-statement.”¹³² If

that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance).

¹³¹ Professor Ellickson has argued that, generally, norms arise organically through processes that tend to mirror the free market, but governmental determination can also spur the development of norms due to the inherent weight a governmental decree can carry. See Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 36–42 (2001). An example of this is the well-known broken window scenario where the presence of broken windows in an area leads to the perception that the neighborhood is run down, and where the government or other authority steps in, either through encouragement or direct action to fix the broken windows, the general perception of the neighborhood changes. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L. J. 1165, 1171–73 (1996); see also William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL’Y 447, 448–50 (1995); Carolyn Y. Johnson, *Breakthrough on ‘Broken Windows’ in Lowell*, BOSTON GLOBE, Feb. 8, 2009, at A1; James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 29–38, available at <http://www.theatlantic.com/doc/198203/broken-windows>.

¹³² Private eminent domain offers another potential solution to the problem of neighboring incompatible land uses, at least where the initial entitlement is clear. For example,

so, what would such an informal norm say to be most helpful? While the idea is exploratory, here is one way such a pre-statement might be framed:

When it appears that land uses which independently would be beneficial if conducted on one of two adjoining parcels are so conducted on both properties so that the uses are incompatible, the neighboring landowners are encouraged to collaborate to adjust the location, duration or intensity of the conflicting uses between them as if they owned both parcels together.¹³³ In determining the appropriate allocation of any adjustment of the uses, their location, or the associated expenses between them, it may be helpful for them to give primacy to (1) which neighboring use first occurred, and (2) which neighboring use in effect required something to occur or not occur on the neighboring land for it to take place successfully, while the other use involves only its own land.

To bring the analysis full circle, how does this “pre-statement” guideline, lying between a more specific formal rule (or its equivalent, like the landowner’s right to exclude) and a general standard of mutual “reasonableness” as in nuisance cases, assist in resolving conflicts like the solar collector and the redwoods, or the well and the septic system? It would likely give the entitlement to the owner of the redwoods and the well rather than the owner of the solar collector or the septic system, both in terms of priority of use (since the trees predated the collector, and the well was permitted before the septic system), and also

some states have enacted statutes enabling owners of landlocked parcels to apply for the creation of an easement by necessity over an adjoining parcel in order to gain road access, with compensation to the owner of the land burdened by the easement. JOSEPH W. SINGER, *INTRODUCTION TO PROPERTY* 200 (2d ed. 2005). The problem with applying a similar approach in the case of beneficial but incompatible uses is that it cuts both ways: each landowner in a case like the California dispute involving the solar collector and the trees has a legitimate public policy argument that his or her use should be favored. Thus, while such a private eminent domain solution might help where one beneficial use in effect requires access over neighboring land, it does little to clarify the relative rights of the parties and set up a starting point for negotiations or its exercise in the extreme case.

¹³³ Similar to this idea, Texas courts have proposed a judicial doctrine of “accommodation” to deal with benign, yet incompatible land uses, where the surface and mineral rights are divided between wind power developers and gas and oil prospectors. See Becky H. Diefen, Note, *Energy from Above and Below: Who Wins When a Wind Farm and Oil and Gas Operations Conflict?*, 3 *TEX. J. OIL GAS & ENERGY L.* 240, 246–47 (2008). The accommodation doctrine states that while the mineral owner generally owns the dominant estate, where there is a reasonable alternative for the mineral owner to carry on his activities without interfering with the surface uses, that alternative will be preferred. See *id.*

because, in effect, the solar collector and the septic system required something of the neighboring land to succeed, analogous to an easement by necessity.¹³⁴ Thus, both the well and the trees would prevail under this guideline.

B. *Choosing Between Priority in Time and Effective Use
of the Neighboring Land?*

But what if the pre-statement principles of priority of use and need for the “use” of the adjacent land are not aligned but in conflict? Which principle is the better guide? This is a challenging issue. Suppose the septic system had preceded the well in *Hendricks*, so that the system was first, but the well was the less intrusive use, not requiring the soil on the other parcel to succeed, as might the septic system. Or suppose the solar panel system had preceded the tree, but the tree is the less intrusive use, not needing sunshine passing over the adjacent land to thrive. Should the less intrusive use prevail over the first use or the other way around? If, after all, there is a principle that is supposed to guide landowners, which should it be when the two subsidiary pre-statement principles conflict?

While both have legitimate claims to primacy, it seems that priority in time of use, at least in the case of desirable but incompatible uses, should generally prevail. However, favoring priority of use in all circumstances becomes the sort of rigid rule that many scholars routinely criticize.¹³⁵ Instead, borrowing a principle from nuisance statutes, like the preference for farming over other uses, the intrusiveness of the use could be allowed to control the relative priority in time of the competing uses if the two uses are in conflict, unless and until a use has been in place for a period of time and its priority is well established.¹³⁶ This principle maintains Professor Rabin’s ideal of “protecting early inno-

¹³⁴ Easements by necessity arise not from a pattern or prior use, but from the recognition that without them, a severed parcel would be almost “use-less,” as in the case of a severed parcel landlocked without access to a public road. John W. Weaver, *Easements Are Nuisances*, 25 REAL PROP. PROB. & TR. J. 103, 118–19 (1990). Examples include not only landlocked parcels but others such as utility lines underneath a neighboring parcel. See *Westbrook v. Wright*, 477 S.W.2d 663, 666–67 (Tex. Civ. App. 1972) (granting owners implied easement for sewer lines running across property of neighboring lots); see also *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 979–80 (Vt. 1983) (discussing the policy of easements by necessity to remedy the idleness of land); JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 4:5 (2008); Weaver, *supra*, at 118–19 (noting that easements by necessity arise either from implied intent or public policy favoring the utility of land).

¹³⁵ See Merrill, *supra* note 12, at 47.

¹³⁶ See *supra* notes 29–31 and accompanying text.

cent development from penalty.”¹³⁷ He says that “except for compelling reasons involving the health or comfort of neighbors who are following a well-established neighborhood pattern, the prior use rule encourages useful development”¹³⁸ and “promotes both efficiency and fairness.”¹³⁹ Yet, this principle also prevents the first user from completely arrogating all competing neighboring uses of the land. Finally, such a principle maintains the simplicity of the basic framework of the proposed pre-statement and should be relatively easier for laypeople to understand and to apply, compared to the judicially interpreted general standard of “reasonableness.”

With that in mind, an appropriate revision of the pre-statement would be as follows:

When it appears that land uses which independently would be beneficial if conducted on one of two adjoining parcels are so conducted on both properties so that the uses are incompatible, the neighboring landowners are encouraged to collaborate to adjust the location, duration, or intensity of the conflicting uses between them as if they owned both parcels together. In determining the appropriate allocating of any adjustment of the uses, their location, or the associated expenses between them, it may be helpful for them to give primacy to (1) which neighboring use first occurred, so long as it has been in place for at least a year, and if not, (2) which neighboring use in effect required something to occur or not occur on the neighboring land while the other use involves only its own land.

C. *The Initial Examples Revisited*

How would this “norm” resolve the various cases we have examined?

- *The solar collector versus the tree.*¹⁴⁰ Here the pre-existing tree would have priority, since it had been in place more than a year and the solar collector needed something not to occur on the neighboring land.

¹³⁷ Rabin, *supra* note 71, at 1326.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1328.

¹⁴⁰ *Solar Panels v. Redwoods*, *supra* note 2.

- *The well versus the septic system.*¹⁴¹ Here the well would again prevail. The well occurred first, while the septic system “needed” something not to occur on the neighboring land.
- *The Prah case.*¹⁴² Here the solar collector had been in place before the adjoining building, but also required something not to occur on the adjoining land. Because under this formulation, priority in time, if well-established, “trumps” intrusiveness, then the *Prah* case would come out the same.

D. *Finally, Not All Neighbors Need to Compete*

Note that there is another dimension to this problem. Coase’s model assumes a norm of human behavior that has each neighboring property owner acting in a competitive fashion.¹⁴³ The assumption is that each landowner seeks to maximize his gain, which each then does by trading their respective property entitlements (either consensually or through a liability assignment system, for example, a court), making each relatively better off.¹⁴⁴ But human behavior can include non-competitive conduct. Indeed, it may include cooperative conduct which becomes competitive only as a last resort. This model explains why the prisoner’s dilemma seems inexorable but doesn’t account for the wild card of mutual cooperation even without collusion. Such cooperation is a choice made by some and indeed collectively by all; otherwise, a property regime in which neighbors respected each other’s rights would not be possible.¹⁴⁵ The implication is that rather than hos-

¹⁴¹ *Hendricks v. Stalnaker*, 380 S.E.2d 198 (W. Va. 1989).

¹⁴² *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

¹⁴³ Coase, *supra* note 32, at 2–8.

¹⁴⁴ *See id.*

¹⁴⁵ *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 49–51 (1990) (discussing “prisoner’s dilemma” as illustrating different models of human behavior in which dominant competitive model has been avoided—at least in establishing a regime of private property—in favor of cooperative one). “Even if the property regime is just a matter of customary practices that develop over time, the participants have to cooperate to the extent of recognizing and abiding by the indicia of ownership that their customs set out.” *Id.* at 51; *see also* DAVID A. LAX & JAMES R. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–41, 91–105, 158–66 (1986) (describing “negotiator’s dilemma” as situation where best outcome for one person not necessarily best for both, but if both pursue their best option, they will often both get the worst outcome). *See generally* G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* (2d ed. 2000) (discussing competitive, accommodating, compromising, avoiding, and collaborating negotiation styles); *THE DARK KNIGHT* (Warner Bros. Pictures 2008) (containing a surprise for the Joker when his attempt to invoke defecting behavior in citizens of Gotham City in peril breaks down).

tility, neighbors may wish to cooperate, as Professor Ellickson's research indicated, especially if offered a norm which seems just and fair, indeed even "reasonable," without resort to litigation.¹⁴⁶ Professor Ellickson advised that "lawmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order."¹⁴⁷

CONCLUSION

This article started from the assumption that the rules and standards for solving the problem of beneficial, yet inconsistent land-uses would be indicated through researching cases and other relevant literature. However, examination of the relevant research revealed that the problem of benign, yet inconsistent land uses is not so simple. The current nuisance-tort model is inadequate to deal with land disputes where neither party is at fault. Moreover, the balancing test used in the *Restatement*, while useful for a court trying to find a fair and equitable solution, is insufficiently clear to guide parties who wish to negotiate a solution rather than resort to the court system. This Article offers some simple guidelines built on case and statutory responses instead of social norms, which are not clearly defined in such situations. The hope is that this Article and the solutions it offers can serve as a way to guide negotiations between neighbors by providing a starting point from which negotiations can proceed.¹⁴⁸ Of course, how to approach a neighbor regarding such a dispute and how the conversation proceeds is a problem unto itself.¹⁴⁹ But even with a good process in mind, such

¹⁴⁶ ELLICKSON, *supra* note 78, at 4.

¹⁴⁷ *Id.* at 285–86.

¹⁴⁸ See generally Eisenberg, *supra* note 6 (discussing the importance of rules and norms as a background against which negotiations between parties take place).

¹⁴⁹ Boston mediator David Hoffman tells the story:

A family in a rural Native American village was upset because the incessant barking of their neighbor's dog was keeping them awake. Their neighbor did not ordinarily leave the dog out, but recently the dog had been out every night. The family's complaints to their neighbor produced no response, no change. At their wit's end, they went to the village's chief, a respected elder of the community, and asked for his assistance. He visited the neighbor the next morning. The neighbor was on his front porch, and the chief stepped up onto the porch and sat down. The two men talked about the weather and the crops, but no one said anything about the dog. The morning wore on, and soon the chief left. But he came back the next morning, and the scene was repeated. The chief joined the neighbor on the porch and they talked about one thing and another, but nothing about the dog. This continued each day that week—an unusual number of visits from the chief, who ordinarily would

as articulated in *Difficult Conversations*,¹⁵⁰ it is helpful to know where to begin. It may be that good neighbors make good fences, but even the best-intentioned neighbors need a non-legal “fence” or guideline from which they can effectively, fairly, and quickly deal with their disputes. Perhaps this Article’s pre-statement can help provide one.

be far too busy for so much casual conversation. At the end of the week, the family noticed that the barking had stopped—their neighbor was keeping the dog in at night. After a week of being able to sleep through the night, they visited the village chief and thanked him profusely for solving their problem. He accepted their thanks but said nothing about how he had accomplished the task. For purposes of this inquiry . . . , one of the lessons is that *not* asking for an apology is sometimes the most prudent and effective course for dispute resolution. The neighbor was not able to acknowledge the problem, much less apologize for creating it, when confronted about it by the family. The chief knew that, because of the culture of the village or the character of the neighbor, he would have to accomplish his task by indirection, because a direct request might have undermined the order of the community in a manner even more profound than the discourtesy of leaving a barking dog out at night.

David Hoffman, *The Use of Apology in Employment Cases*, 1 PRAC. DISPUTE RESOLUTION 1, 11 n.15 (1999), available at <http://bostonlawcollaborative.com/blc/77-BLC/version/default/part/AttachmentData/data/2005-07-apology-article.pdf?branch=main&language=default>.

¹⁵⁰ See generally DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS* (2000).