

## TWO HUNDRED YEARS OF SPITE

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**ABSTRACT**—Spite’s role in property law is garnering much academic attention. Yet spite remains strikingly misunderstood. Commentators partaking in the reinvigorated debate over property rights’ nature often point at the law’s prohibition on spiteful uses of property by owners as indicating that property law is sensitive to individuals’ goals and attitudes when distributing powers. This assertion draws on a long line of judicial, legislative, and scholarly pronouncements to the effect that the prohibition on spite is an intent-based, subjective test banning acts whose motivation is malicious. This Article illustrates that this perception is deeply flawed—descriptively and normatively. Exploring the forgotten history of spite law, this Article finds that in practice the spite prohibition never policed mental states. Rather, the spite prohibition was utilized, in different legal subfields and at different times, to stealthily introduce objective public policy limits to curb owners’ freedom of action when property law formally accorded the owners absolute powers. Spite law thereby performed a constant, and exceptionally important, role in the development of American law: it blunted the effect of rules sparing owners the need to consider the impacts of their property uses, and it paved the way for the explicit, and exhaustive, regulation of property uses that eventually dislodged such rules. The Article then proceeds to argue that this choice American law made, to divorce spite’s legal function from the term’s common meaning, is normatively warranted. Fierce scholarly denunciations of acts spitefully motivated ignore the illusory nature of the distinction between spiteful and nonspiteful motivations. This Article demonstrates that, given current property law’s structure and aims, spiteful acts are also, inevitably and always, nonspiteful. Property ownership is inherently spiteful; thus, while certain uses of property can—and must—be deemed unacceptable, property owners’ motivations for picking those uses cannot.

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### INTRODUCTION

In 2013, Alan Markovitz erected a twelve-foot-high, spotlight, bronze statue on his Michigan lakefront property. It faced his neighbor’s windows. That neighbor, Lea Tuohy, was Markovitz’s former wife, and the statue was shaped as a hand with its middle finger raised.<sup>1</sup> Markovitz’s act was undeniably blunt, but it was not distinctive in intent—many other owners before and after have sought to annoy their neighbors.<sup>2</sup> Markovitz’s undertaking was noteworthy, nonetheless: other owners aiming to torment their neighbors normally settle for constructing a fence obstructing those neighbors’ views.<sup>3</sup> Markovitz diverged from this more traditional route

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<sup>1</sup> David Hopkins, *American Directs Large ‘Middle Finger’ Statue at Home of Ex-Wife*, TELEGRAPH (Nov. 18, 2013, 3:04 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10457437/American-directs-large-middle-finger-statue-at-home-of-ex-wife.html> [<http://perma.cc/92WW-6NLH>]; *Update: Orchard Lake Man Erects Giant Sculpture to Flip Off His Neighbor*, DEADLINE DETROIT (Nov. 16, 2013, 8:31 AM), [http://www.deadlinedetroit.com/articles/7248/bloomfield\\_hills\\_man\\_builds\\_giant\\_statue\\_to\\_flip\\_off\\_his\\_ex-wife#.VO97w\\_nF9x0](http://www.deadlinedetroit.com/articles/7248/bloomfield_hills_man_builds_giant_statue_to_flip_off_his_ex-wife#.VO97w_nF9x0) [<http://perma.cc/VX5K-52TV>].

<sup>2</sup> The most extreme cases involve “spite houses” built solely to annoy neighbors or a local government—by blocking roads or views—even though they offer little, if anything, by way of habitability. *See, e.g.*, John Kelly, *Answer Man: In Search of Houses That Spite Built*, WASH. POST (Mar. 26, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/25/AR2006032500903.html> [<http://perma.cc/HD97-3HTZ>].

<sup>3</sup> *See infra* Section II.B.

since he found it too subtle.<sup>4</sup> Unintentionally, however, his choice was also legally sensible. Had he opted for a fence facing Tuohy's windows, the common law could have held him liable.<sup>5</sup> As a legal matter, such a fence could have been deemed motivated by spite and thus a nuisance. Against the statue facing her windows, on the other hand, Tuohy had no viable legal recourse.<sup>6</sup> As a legal matter, a statue—even one shaped as a middle finger—cannot be perceived as motivated by actionable spite.

These contrasting results would strike most observers as somewhat odd. A middle finger statue more easily smacks of spite than a fence, even when that fence intentionally blocks a neighbor's lake views. Apparently, spite in the law does not correspond to the behavior and attitude conventionally associated with the terms "spiteful" or "spite." But if legal spite does not stand for spite, what does it stand for? This Article will, for the first time, answer this question.

The question respecting spite's legal function is exceedingly important because property law's recognition of spite stands out. The prohibition on spite, even if laboriously constrained, eliminates an owner's freedom to engage in activities on her land that are otherwise—as far as the law is concerned—wholly uncontroversial. An owner is normally free, for example, to construct a fence on her land even when that fence interferes with a neighboring property's exposure to light and air,<sup>7</sup> or its aesthetically pleasing environs.<sup>8</sup> This most basic freedom to build the fence is lost, however, if the constructing owner acted on spite. Of course, there are other limits on the owner's freedom: an owner may be barred, for instance, from developing her land in a manner that floods neighboring lands;<sup>9</sup> or she may be prohibited from choosing entrants based on race.<sup>10</sup> But the curb on the owner's freedom instituted here through spite law is still remarkable. When an American court first recognized spite as a limit to an owner's freedom to build, in the case of *Burke v. Smith*, the dissenting judge was

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<sup>4</sup> Markovitz explained that he erected the statue as a message to the man with whom Tuohy was cohabitating: "This is about him. This is about him not being a man.' 'He broke the Man Code.' 'Real men don't do that to another guy.'" Hopkins, *supra* note 1.

<sup>5</sup> See *Burke v. Smith*, 37 N.W. 838, 841–42 (Mich. 1888).

<sup>6</sup> See *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) (finding that "tasteless decoration," specifically, a toilet seat with paint representing excrement mounted on a pole, "is merely an aesthetic annoyance" incapable of giving rise to a legal claim).

<sup>7</sup> 1 AM. JUR. 2D *Adjoining Landowners* §§ 102–103, at 1005–07 (2005). For a comprehensive discussion, see *infra* Section II.B.

<sup>8</sup> *E.g.*, *Oliver v. AT&T Wireless Servs.*, 90 Cal. Rptr. 2d 491, 500 (Ct. App. 1999) ("[T]he unpleasant appearance of neighboring property, in and of itself, does not rise to the level of a nuisance.").

<sup>9</sup> *E.g.*, *Armstrong v. Francis Corp.*, 120 A.2d 4, 10 (N.J. 1956).

<sup>10</sup> 42 U.S.C. § 2000a(a) (2012).

aghast: “[But] the motives of a party in doing a legal act cannot form the basis upon which to found a remedy against such party.”<sup>11</sup> This laconic assertion of an elemental property truism should have sufficed, in the dissenter’s mind, to deflect any legal claim based on spite.

For property law is always agnostic to actors’ intent.<sup>12</sup> None of the other legal checks on an owner’s freedom concerns her motives.<sup>13</sup> Yet the rein spite law places on an owner’s freedom to engage in otherwise legitimate activities appears to be distinctly based on her subjective goals. The majority opinion enjoining the fence the defendant constructed in the pioneering *Burke* case, stated as much:

What right has the defendant, in the light of the just and beneficent principles of equity, to [act on his land] . . . simply to gratify his own wicked malice against his neighbor? None whatever. . . . [N]o man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that . . . he . . . wishes to gratify his spite and malice towards his neighbor.<sup>14</sup>

Thus formulated, spite law illustrates that “the law *does* sometimes care about owners’ reasons for deciding, and this fact . . . provides a crucial insight into the nature of ownership . . . .”<sup>15</sup> The insight is crucial because it inducts a new, and arguably transformational, element into property theory.<sup>16</sup> The major undertaking of the burgeoning scholarship in this field is the isolation of the nature of property as a distinct legal and social institution. This task implies the identification of ownership’s outer ambit. The continued presence of spite doctrine in American law, ostensibly delineating owners’ sphere of action in correspondence to the wholesomeness of their feelings, enriches any such discussion. It points at a

<sup>11</sup> 37 N.W. 838, 845 (Mich. 1888) (Champlin, J., dissenting).

<sup>12</sup> See, e.g., *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 159–60 (Wis. 1997) (ignoring in a trespass case an owner’s reasoning for not allowing an entrant). Arguably, an exception might be the necessity defense to trespass. A trespasser will avoid liability if she can show that she acted to prevent imminent harm. To avail herself of this defense, however, the trespasser must satisfy other requirements as well; for example, she must have chosen the lesser of two evils, she must have reasonably anticipated a direct causal relationship between the trespass and the harm to be averted, and she must have had no legal alternative to trespassing. E.g., *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991). In light of these diverse—and cumbersome—objective conditions that must be met, see David Dana & Nadav Shoked, *Public, by Necessity*, 13 SEATTLE J. FOR SOC. JUST. 341, 366–69 (2014), it is probably inaccurate to characterize the necessity defense as truly intent-based.

<sup>13</sup> Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 641–43 (1988) (listing the curbs the law places on owners’ freedom).

<sup>14</sup> 37 N.W. at 842 (majority opinion).

<sup>15</sup> Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448 (2013).

<sup>16</sup> See *infra* notes 68–76 and accompanying text.

very clear and meaningful limit to ownership that is of a different cast from those limits normally conceded.<sup>17</sup>

This reigning understanding of spite's key normative role hinges on one core assumption: that spite law tackles an owner's animus towards her neighbor. This assumption has never been tested against the actual law and history—as opposed to rhetoric—of American spite. Spite law has been taken at its word. Yet as this Introduction already illustrated in its opening example, that assumption is dubious. If an owner is not allowed to construct a fence facing a neighboring property because of his spiteful motivation, but is allowed to construct a middle-finger statue pointed at that same neighboring property, animated by the same spiteful motivation, spite law attends to something different from plain spite.

And the nonspiteful middle-finger statue is far from the sole inconsistency. Anomalies abound. In 1902, for example, the industrialist and financier Henry Clay Frick insisted that his company's new Pittsburgh headquarters tower over, and constantly shadow, the neighboring skyscraper housing the company of his former partner, now his nemesis, Andrew Carnegie.<sup>18</sup> Still, the project encountered no legal hurdles.<sup>19</sup> In 1959, for another example, Ben Novack, owner of Miami Beach's most glamorous hotel, the Fontainebleau, was constructing an annex along the hotel's property line, thereby blocking sunrays from reaching the adjoining hotel's pool.<sup>20</sup> That adjoining hotel, the Eden Roc, was owned by Novack's former partner, now his nemesis, Harry Mufson; Novack resolved that the addition's wall facing the Eden Roc would be blank, made of concrete, and windowless—other than one small cluster of windows installed in his own private suite so that he could look down at the Eden Roc's shaded pool and gloat.<sup>21</sup> The structure became locally known as “the spite wall”<sup>22</sup> but still, in a famed property law decision,<sup>23</sup> the Florida court dismissed Eden Roc's challenge to it.<sup>24</sup>

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<sup>17</sup> See *infra* Part I.

<sup>18</sup> French Strother, *Frick, the Silent: Successor to Mr. Carnegie, Possible Successor to Mr. Harriman*, in 14 *THE WORLD'S WORK: A HISTORY OF OUR TIME* 8849, 8856 (Walter H. Page ed., 1907).

<sup>19</sup> See *id.*

<sup>20</sup> SETH BRAMSON, *IMAGES OF AMERICA: MIAMI BEACH* 108 (2005); Joseph Brown, *Eden Roc Hotel Miami Beach: A New Tower that Ends the Feud*, *S. BEACH MAG.* (Jan. 9, 2008), <http://www.southbeachmagazine.com/eden-roc-hotel-miami-beach/> [<http://perma.cc/VL4A-6WR6>].

<sup>21</sup> Brown, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). The case features prominently in casebooks, for example, THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY* 1013–16 (2d ed. 2012); JOSEPH SINGER ET AL., *PROPERTY LAW* 367 (6th ed. 2014).

<sup>24</sup> *Fontainebleau*, 114 So. 2d 357.

These examples tentatively indicate the argument that this Article will methodically establish: the prevailing assumption respecting spite's legal nature is flawed. As its American history will make clear, spite, as a limit to ownership, is not, and never was, truly concerned with owners' subjective motivations. Spite law is concerned with something else, something very different from actual spite. Counterintuitively, spite law, I will argue, traffics in objective—not subjective—values. Rather than calling on courts to scrutinize owners' intentions as previous authors assume, spite law has empowered courts to balance the social values of different property uses, thereby subverting property rules that formally granted owners absolute freedom to use their property.

Although when grasped in these terms, spite doctrine ceases to represent the exceptional case where property outcomes revolve around mental states, it remains an exceptionally telling element of property law. Indeed, it emerges from this Article as an even more revelatory common law component than previously believed. Through the two-hundred-year-long-and-counting story of spite, a constant of property law crystallizes: aspirations for absolute protections for owners' autonomy, free from the burden of balancing tests characteristic of other legal fields,<sup>25</sup> uniformly failed. Repeatedly, property rules crafted to bestow on owners an unhindered freedom of action were soon unsettled by judicial action—by judges falling back on a spite test that was seemingly subjective but actually enabled courts to engage in objective balancing of interests before approving an owner's act. Once this crack opened by spite law widened, and the relevant absolute owner freedom rule was formally toppled and replaced by objective balancing tests, the prohibition on spite—which had originally introduced these tests surreptitiously—lost its utility, and as a legal doctrine petered out. It no longer expanded to tackle new factual patterns as they emerged, and thus its reach was irrationally delimited to specific scenarios already covered. Left behind were islands of supposedly prohibited spiteful uses—such as the actionable spite fence—which persist as peculiarities, aberrations given modern property law's overall design.

This development is hardly lamentable. Quite the opposite: it is inevitable and normatively desirable. The descriptive argument made by this Article—that the law never consistently targeted malevolent owners—will be accompanied by a corresponding normative argument: that the law should not target malevolent owners. Jurists and commentators who

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<sup>25</sup> E.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 975–80 (2004) (arguing property law differs from tort law since, while the latter focuses on empowering courts to evaluate “proper use,” property delegates all decisionmaking powers to the owner).

unanimously champion spite doctrine as a tool to incorporate sensitivity to undesirable mental states into property law fail to provide persuasive reasons for their position. Though the prevalent and forceful statements that an owner should not be permitted to satisfy her “malice and wickedness”<sup>26</sup> or “use her position just in order to harm someone else”<sup>27</sup> may appear intuitive and unassailable, they are out of sync with property’s normative goals. Property law is a major tool for facilitating the expression of relative status.<sup>28</sup> Through property, owners convey to others the message that those others do not measure up. Property law could not have banned Frick from shading Carnegie’s Pittsburgh headquarters, since it would not bar Frick from constructing his New York mansion, even after the robber baron allegedly stated that he was doing it to “make Carnegie’s place [located twenty blocks to the north] look like a miner’s shack.”<sup>29</sup> There can be nothing intrinsically wrong with an owner aiming to upset her neighbor when she is completely free to venture to distress her neighbor by flaunting her status, resources, or taste—by flaunting her property—in front of that neighbor. Spitefulness, or at least the possibility thereof, is inherent to ownership, and thus an owner cannot be disciplined for acting on spiteful motivations.

Moreover, any such futile attempt to isolate and chastise spiteful motivations comes at a steep normative cost. It must divert attention away from meaningful cost–benefit analysis and towards irrelevant, and vain, explorations into human motivations. The questions with which property law ought to be occupied are not: “Is Mr. Markovitz bitter?”; “Is Mr. Smith venous?”; “Is Mr. Frick petty?”; or “Is Mr. Novack vindictive?” The question should always be: “Is a statue in Mr. Markovitz’s yard, a fence on Mr. Smith’s property, a tower for Mr. Frick’s headquarters, or a wall for Mr. Novack’s hotel, socially beneficial?”

This Article thus pursues two goals: to undermine the current literature’s assumption that, in American law, spite has operated as a prohibition on malicious motivations, and to challenge the literature’s normative stance against such motivations. The Article establishes these twin contentions as follows. Part I reviews spite doctrine as commonly perceived and explains why writers believe the doctrine is key to

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<sup>26</sup> *Burke v. Smith*, 37 N.W. 838, 840 (Mich. 1888).

<sup>27</sup> Katz, *supra* note 15, at 1451.

<sup>28</sup> See generally Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009) (exploring property’s status-signaling function and that function’s interaction with doctrines of property law).

<sup>29</sup> Christopher Gray, *Carnegie vs. Frick: Dueling Egos on Fifth Avenue*, N.Y. TIMES, Apr. 2, 2000, § 11, at 7.

understanding property rights' nature. In this context the move many make to equate the doctrine with the broader European "abuse of right" principle is surveyed. This dominant descriptive position—that spite represents a rule disallowing certain motives—is discredited in Part II, which comprehensively explores, as never done before, spite's history in American law. It finds that spite has never functioned as a general doctrine comparable to an abuse of right principle. Rather, its domain was always limited to specific subfields. Identifying the disparate property subfields where spite has manifested itself throughout American history—water law, land use, support rights, and restraints on alienation—and chronicling its development in each, Part II finds that in none did the doctrine focus on the owner's animus as commonly assumed. Instead it always performed a different, yet still important, function in the maturation of the legal regime governing the relevant subfield. Part III then makes the normative case supporting property law's refusal to focus on mental states. To refute the dominant position advocating the interdiction of spiteful acts, Part III highlights the illusory distinction between a motivation solely to harm another—a spiteful motivation—and a motivation to derive a benefit—a nonspiteful motivation. The problem is identified through cases involving neighbors who are business competitors—mostly found in signage law—and then generalized, engendering the conclusion that property law must rely on objective tests of means and effects, rather than subjective tests of motive.

#### I. THE CURRENT UNDERSTANDING OF SPITE'S PLACE IN PROPERTY LAW

In a world where space is finite, owners are always surrounded by other owners. Consequently, there are hardly any activities an owner may engage in on his land that will not affect other owners. If he constructs a building, other owners' adjacent lands may lose their exposure to sun or their soil's support. If he operates a business, those lands may be saddled by noise or concomitant traffic. If he drills for oil, those lands may be deprived of oil or exposed to toxic fumes. Therefore, one of property law's most important tasks is to regulate the relationship between neighboring owners.

Spite doctrine performs this role: it deigns illegitimate certain owner activities that detrimentally affect a neighboring owner. Hence it is of undeniable practical significance. It is of even greater normative interest on account of its relationship to other elements of property law. The juxtaposition of spite with those other legal components highlights spite's alleged uniqueness, but also points at its potential centrality for the



operation of property law. Therefore, after introducing spite doctrine as commonly read, this Part will explore the work of the many recent writers who claim that spite law—due to that current reading—represents a much broader principle inherent to the common law’s idea of ownership. In this way, this Part sets the stage for the next parts of the Article, which cast doubt over this understanding of spite and of its theoretical import.

#### A. *Spite Law as Commonly Read*

Spite’s role in property law appears straightforward. Though in both popular imagination and much philosophical thinking property ownership is associated with freedom,<sup>30</sup> in practice property law cannot afford owners anything resembling absolute freedom, due to the inevitable conflicts between owners that will ensue.<sup>31</sup> Hence property rules are often mainly concerned not with the freedom of the owner, but rather with setting that freedom’s contours. They define property rights and place limits on their exercise to forestall or settle conflicts between owners. Property rules may prevent the owner from operating a business or drilling for oil; or they may regulate his capacity to do so by instituting allowable hours of operation, permissible volume of oil to be pumped, etc. These and similar tasks in other cases are performed by diverse property doctrines, including nuisance law, rules respecting the acquisition of property rights, environmental regulations, and zoning ordinances. Spite is one of these many doctrines that help draw the sphere of an owner’s freedom: It prohibits the owner from exercising his freedom in certain ways to protect others.

The substance of the prohibition—the specific owner acts marked out for censure by spite law—also appears plain and intuitive. As quoted in the Introduction, when first recognizing spite as a basis for challenging an owner’s act, the Michigan court unequivocally announced in *Burke v. Smith* that nobody has a right to erect a structure for the purpose of injuring his neighbor.<sup>32</sup> Other courts have used similar terms, forcefully depicting the spite prohibition they thereby introduced as based, as its name implies, on the owner’s motivation—prohibiting behavior intended solely to annoy a neighbor.<sup>33</sup> That notion of spite doctrine has since become dogma. The

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<sup>30</sup> See Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 446–53 (2014).

<sup>31</sup> See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 16–18 (2000).

<sup>32</sup> 37 N.W. 838, 842 (Mich. 1888).

<sup>33</sup> E.g., *Hutcherson v. Alexander*, 70 Cal. Rptr. 2d 366, 369 (Ct. App. 1968) (“[E]ven a lawful use of one’s property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property.”); *Hornsby v. Smith*, 13 S.E.2d 20, 24 (Ga. 1941) (“Thus it is our opinion that malicious use of property resulting in injury to another is never a ‘lawful use,’ but is in every case unlawful. . . . When one acting solely from malevolent motives does injury to his neighbor, to call such conduct the exercise

leading treatise states as much,<sup>34</sup> and so do the Restatement<sup>35</sup> and the American Law Reports.<sup>36</sup> Scholars of all methodological and normative stripes concur: spite is a prime example of the law “mak[ing] the entitlement to engage in a behavior depend on one’s reason for wishing to engage in it,”<sup>37</sup> of the law “treat[ing] an act not otherwise wrongful as wrongful when it is motivated by enmity.”<sup>38</sup> Writers conceive spite doctrine as straightforward: it applies a “motive test,” striking down acts prompted by disfavored intentions.<sup>39</sup>

Yet it is this straightforward nature of the doctrine that also renders it unique among the doctrines employed to arbitrate conflicts between neighbors. Other such doctrines detail attributes a party’s act must count—for example, adverse possession grants title to that party which possessed land openly, continuously, exclusively, and adversely for a statutorily set period of time.<sup>40</sup> Or they appraise the harm the act inflicts; for example, nuisance law bars a party from substantially and unreasonably interfering with another’s use of land.<sup>41</sup> Such doctrines might, on occasion, inquire into the actor’s knowledge of his act or its harms—for example, some jurisdictions require that the adverse possessor mistakenly believe the land to be his,<sup>42</sup> and negligence liability requires actionable harm to be

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of an absolute legal right is a perversion of terms. . . . The use of one’s own property for the sole purpose of injuring another is not a right that a good citizen would desire nor one that a bad citizen should have.”).

<sup>34</sup> 9 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 64.03[4], at 64-20 (Michael Allan Wolf ed., 2000) (“Where the defendant’s conduct is motivated solely by malice, the use is deemed unreasonable . . .”).

<sup>35</sup> RESTATEMENT (SECOND) OF TORTS § 829 (AM. LAW INST. 1979) (“An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor’s conduct is (a) for the sole purpose of causing harm to the other; or (b) contrary to common standards of decency.”).

<sup>36</sup> Deborah Tussey, Annotation, *Fence as Nuisance*, 80 A.L.R.3d 962, § 2[a], at 967 (1977) (“The importance of the factor of malicious motive in the erection of a fence which harms or harasses a third party, usually an adjoining landowner, has caused much litigation and given rise to a diversity of viewpoints among courts of different jurisdictions. . . . The courts in other jurisdictions have adopted the view, which seems to be emerging as the dominant one, that fences which are erected from malicious motives are subject to abatement or other appropriate remedies where they cause injury.”).

<sup>37</sup> Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1454 (2009).

<sup>38</sup> Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 234 (2002).

<sup>39</sup> See, e.g., Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 97 (1979); Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1667–68. (2011); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 448 (1992); Lee J. Strang, *Damages as the Appropriate Remedy for “Abuse” of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law*, 15 GEO. MASON L. REV. 933, 960 (2008).

<sup>40</sup> E.g., *Snook v. Bowers*, 12 P.3d 771, 781–82 (Alaska 2000).

<sup>41</sup> E.g., *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 696–97 (Cal. 1996).

<sup>42</sup> E.g., *Carpenter v. Ruperto*, 315 N.W.2d 782, 786 (Iowa 1982).

predictable.<sup>43</sup> But the focus of all these doctrines is always the act and its harm.

The act's motivation is never considered. For determining an actor's liability in private litigation, intentions are supposedly irrelevant. A famous maxim of the common law holds that "[m]alicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful."<sup>44</sup> Property law is even more sanguine in its refusal to ponder motives. As Justice Holmes once explained, while in many legal fields an act's legitimacy may depend on the actor's goal, that is not the case where the act challenged is a use of land.<sup>45</sup>

The doctrine of spite, grounded as it seemingly is in a motive test, plainly flies in the face of this assertion. It is thus a conspicuous exception to the general patterns of property law. As such, it has always induced scholarly interest.

This inevitable attention the doctrine of spite garners has recently grown further still, thanks to developments in the theoretical literature. Influential authors have begun to argue that spite must be conceived as more than mere exception to the overall structure and priorities of property law. Instead, they find it emblematic of that structure and those priorities. If property law's logic is accurately perceived, they argue, spite, as a doctrine explicitly relying on a motive test, is not unique but pivotal. For them spite represents a broader, indeed all-encompassing, restriction on owners' rights. That restriction is the principle of abuse of right.

### *B. Spite and the Abuse of Right Principle*

The abuse of right principle is best illustrated by a celebrated French case.<sup>46</sup> Adolphe Clément-Bayard and Jules Coquerel were neighbors.<sup>47</sup> Clément-Bayard constructed on his land a hangar to store his airship.<sup>48</sup> Coquerel constructed on his land tall iron spikes to interfere with Clément-Bayard's attempts at flying.<sup>49</sup> When Clément-Bayard sought to have them

<sup>43</sup> RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (AM. LAW INST. 1965) ("In order that an act may be negligent it is necessary that the actor should realize that it involves a risk of causing harm to some interest of another . . .").

<sup>44</sup> THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 690 (Chicago, Callaghan & Co. 1879); *see also* *Allen v. Flood*, [1898] AC 1 (HL) 92 (appeal taken from Eng.) ("[T]he existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due.").

<sup>45</sup> *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904).

<sup>46</sup> *Cour de Cassation [Cass.] [Supreme Court for Judicial Matters]*, Aug. 3, 1915, D.P. I 1917, 79.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

removed, Coquerel argued that the spikes merely expressed his right to use his own land.<sup>50</sup> Nonetheless, the French court ruled against him in 1915.<sup>51</sup> It reckoned that by building a structure whose purpose was to injure his neighbor, Coquerel abused his property right.<sup>52</sup> And no property owner, proclaimed the court, is entitled to abuse his property right.<sup>53</sup>

Since the early twentieth century,<sup>54</sup> the doctrine announced in this case has been ingrained into civil systems' property law.<sup>55</sup> European officials still argue that it plays a basic, and vital, role in private law by assuring that law dispenses "true justice."<sup>56</sup> For all its centrality in European law, however, the doctrine has never been endorsed by an American lawmaker.<sup>57</sup> A staple of civil law thinking, it remains markedly absent from the common law thinking. This contrast constitutes a key distinction between the idea of property in the common law and the civil law's notion of property.<sup>58</sup>

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<sup>50</sup> See *id.* This right was based on Articles 544 and 552 of the Code civil. CODE CIVIL [C. CIV.][CIVIL CODE] arts. 544, 552 (Fr.).

<sup>51</sup> Cour de Cassation [Cass.][Supreme Court for Judicial Matters], Aug. 3, 1915, D.P. I 1917, 79.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The doctrine can be traced to two cases decided almost at the same time by two different French courts, Cour d'appel [CA] [regional court of appeal] Colmar, 1e civ., May 2, 1855, D.P. II 1856, 9 (regarding the matter of Doerr against Keller), and Cour d'appel [CA] [regional court of appeal] Lyon, 1e civ., Apr. 18, 1856, D.P. II 1856, 199 (regarding the *commune* of Saint-Galmier in the matter of Badoit against André).

<sup>55</sup> See, e.g., CODICE CIVILE [C.c.] [CIVIL CODE] art. 833 (It.), translated in 3 THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION 5 (Mario Beltramo et al. trans., 2007) ("The owner cannot perform acts that have no other purpose than that of harming or causing annoyance to others."); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], AUG. 18, 1896, § 226 (Ger.), translated in THE GERMAN CIVIL CODE: TRANSLATED AND ANNOTATED WITH AN HISTORICAL INTRODUCTION AND APPENDICES 51 (Chung Hui Wang trans., 1907) ("The exercise of a right which can only have the purpose of causing injury to another is unlawful."); BURGERLIJK WETBOEK [BW] [CIVIL CODE] art. 3:13(1) (Neth.), translated in THE CIVIL CODE OF THE NETHERLANDS 435 (Hans Warendorf et al. trans., 2009) ("The holder of a right may not exercise it to the extent that its exercise constitute an abuse."). See generally Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 MCGILL L.J. 389 (2002) (examining the doctrine's origin and significance).

<sup>56</sup> See Catherine Lalumiere, Sec'y Gen. of the Council of Eur., Speech at the Nineteenth Colloquy on European Law (Nov. 1989), in ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS 9, 10 (Council of Eur. ed., 1990).

<sup>57</sup> See Byers, *supra* note 55, at 395. Louisiana, a civil law system, may count as an exception. A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New* . . . , 54 LA. L. REV. 1173, 1173 (1994). The common law case usually cited as rejecting the theory is *Mayor of Bradford v. Pickles*, [1895] AC 587 (HL) (appeal taken from Eng.). For a discussion of the case, see *infra* note 102 and accompanying text.

<sup>58</sup> See H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 30, 43–44 (1933); Richard O'Sullivan, *Abuse of Rights*, 8 CURRENT LEGAL PROBS. 61, 65, 71–73 (1955) ("In France, it seems that the doctrine of *Abus des Droits* finds its model if not its source in the *détournement de pouvoir* of French administrative law. It is not politic in England to waste too much sympathy on public local authorities and ministerial departments.").

Unless, that is, the contrast is mere formality. And for many recent authors, that is precisely its nature—due to the doctrine of spite. While American law, unlike its European counterpart, never explicitly adopted the doctrine of abuse of right, it has, they argue, imported it under a different label: spite law.<sup>59</sup> Judicial pronouncements give credence to this claim. Although American judges scrupulously refrained from referring to the abuse of right doctrine by name, the early courts recognizing spite repeatedly cited the practices of European jurisprudence as models for prohibiting misuses of an owner’s freedom. In *Burke v. Smith*, the judges instituting the spite rule asserted that the civil law’s approach should inspire the common law since it recognizes in this regard the “moral law.”<sup>60</sup> Another court adopting spite doctrine two decades later went further to claim that it was banning spite to bring to these shores a European doctrine, for:

On this subject, if need be, we will do better to follow the pandects of the heathen Romans, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified, than to be governed by the principles of the common law as expounded by some Christian courts and text writers.<sup>61</sup>

Thereafter, for more than a hundred years now, American spite has supposedly amounted to the “functional equivalent” of the European abuse of right doctrine.<sup>62</sup> So much so that some contend that though originating in the civil law, the abuse of right doctrine “took root in the common law legal systems.”<sup>63</sup> The prohibition on spite embodies, we are told, the wider civil law category of abuse of right—of actions normally permitted but

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<sup>59</sup> Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 40 (1995); James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT’L & COMP. L. 757, 775–76 (2011).

<sup>60</sup> 37 N.W. 838, 839–40 (Mich. 1888).

<sup>61</sup> *Barger v. Barringer*, 66 S.E. 439, 442 (N.C. 1909).

<sup>62</sup> Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 696 (2010).

<sup>63</sup> E.g., Amnon Lehari, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81, 136 (2010). Commentators argue that the same process took place in other common law systems. In England, spite supposedly served as a replacement for abuse of right in late nineteenth-century common law. See MICHAEL TAGGART, PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND 65 (2002); G.H.L. Fridman, *Motive in the English Law of Nuisance*, 40 VA. L. REV. 583, 586 (1954) (noting that intentional nuisance is central to the discussion of abuse of rights in the common law). The same has been said in Canada. Hamar Foster, Note, *Abuse of Rights—Civil Law—Legal Reasoning: Bradford v. Pickles Revisited*, 8 U. BRIT. COLUM. L. REV. 343, 348–50 (1973) (“[I]n so far as a malicious or improper motive is relevant to the determination of a legal right in our law, we probably will now reach the same result as those jurisdictions which have the doctrine [of abuse of rights].”).

prohibited when motivated by malice alone.<sup>64</sup> Spite explicitly and directly targets “animus” situations and hence it has proven a convenient, and uncontroversial, conduit for injecting the abuse of right doctrine into the common law.<sup>65</sup> Consequently, as one scholar observed, the common law lacks the proclamations against unjust abuse of rights typical of continental codes, yet “it should not be thought that the common law provides no remedy for such wrongs. There is ample provision in the present law . . . for the control of activities envisaged by the continental codes.”<sup>66</sup> Similarly, a recent, and prominent, article argues that while the common law formally spurned the European general tort of abuse of right, “[w]hat we see instead is a role for a *principle* of abuse of . . . right.”<sup>67</sup>

The presence of this principle, expressed and enforced by the spite prohibition, is important not merely because it bridges the gap between common law jurisprudence and civil law jurisprudence. For many writers it is key because it unveils a fundamental quality of property in American law.<sup>68</sup> The legal system’s recognition of a principle of abuse of right implies a certain view of the powers of the owner, a view deviating from that traditionally ascribed to the common law. The common law has always been associated with an expansive reading of the owner’s powers.<sup>69</sup> While English adages celebrating the owner as holder of absolute powers were pronounced outdated more than a century ago,<sup>70</sup> many still believe that in

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<sup>64</sup> Strang, *supra* note 39, at 960.

<sup>65</sup> See, e.g., Lee Anne Fennell, *Property and Precaution*, J. TORT L., Oct. 2011, art. 3, at 61, [http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/\\$002fj\\$002fjtl.2011.4.2\\$002fjtl.2011.4.2.1114\\$002fjtl.2011.4.2.1114.pdf?format=INT&t:ac=j\\$002fjtl.2011.4.2\\$002fjtl.2011.4.2.1114\\$002fjtl.2011.4.2.1114.xml](http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/$002fj$002fjtl.2011.4.2$002fjtl.2011.4.2.1114$002fjtl.2011.4.2.1114.pdf?format=INT&t:ac=j$002fjtl.2011.4.2$002fjtl.2011.4.2.1114$002fjtl.2011.4.2.1114.xml) [<http://perma.cc/QVU5-P7BS>].

<sup>66</sup> Fridman, *supra* note 63, at 586. Some argue that results reached elsewhere through the abuse of right doctrine are accomplished in American law through tools beyond spite, such as equity or, in some states, prima facie torts. See, e.g., Henry E. Smith, *Rose’s Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1049–51 (2011) (discussing equity); Farnsworth, *supra* note 38, at 235–36 (discussing prima facie torts).

<sup>67</sup> Katz, *supra* note 15, at 1449. For a persuasive critique of this attempt to extend the abuse of right principle beyond “animus” (or spite) situations, see Fennell, *supra* note 65, at 61.

<sup>68</sup> See, e.g., Katz, *supra* note 15, at 1448.

<sup>69</sup> Julio Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965, 967 (1975) (“In England and the United States, a different attitude has prevailed. What may be called rather a strict interpretation of ownership and contractual rights has led the courts to accept, and to provide judicial protection to, actions taken by owners . . .”).

<sup>70</sup> The most famous adage was made by Blackstone, who defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES \*2. With the rise of realism, this position was just as famously critiqued by Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913). During the twentieth century, Hohfeld’s theory became conventional wisdom. See Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

the common law, those powers that the owner does hold are interpreted broadly.<sup>71</sup> Hence once an owner has a property right respecting others, he can enforce that right against all others.<sup>72</sup> That is, he need not explain to others his reasons for using his right.<sup>73</sup>

The existence of an abuse of right principle undermines this traditional argument about American property law. By imposing such a principle through spite doctrine the law clearly states that the holder of a right is not automatically entitled to use it for any purpose he desires. As the right cannot be abused, the owner may only use it for certain reasons: those the law recognizes as legitimate.<sup>74</sup> In the eyes of many, this requirement that the owner's goals correspond to the goals the law has set for ownership complicates the common law's notion of property. It transforms, so it has been argued, ownership into a form of office holding.<sup>75</sup> Alternatively, and perhaps more modestly, it has been characterized as concretizing an anti-opportunism norm affixed into property law.<sup>76</sup>

The specific details of these innovative accounts of property raise engrossing philosophical and normative questions, many of which will be engaged later in Part III, where the justifications for condemning spite will be examined—and challenged. Regardless of their substantive merit, however, these new descriptions of ownership have amplified the significance of the legal category of spite for theoretical discussions of property. These works revise our understanding of property because they judge spite to incarnate, or at least manifest, a broader principle of abuse of right. Once the role of that principle in the law is acknowledged, these writers explain, the legitimacy of an owner's act can no longer be imagined as derived only from his powers as owner. It is also tied to the legitimacy of his motives.

Always a source of fascination as an exception to the general patterns of property law, the role spite plays in debates over property theory has thereby expanded now that it is fashioned as outlining those patterns. This transformation in scholarly attitude has been reached following a

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<sup>71</sup> See, e.g., J.W. HARRIS, PROPERTY AND JUSTICE 29–30, 34, 65–66 (1996); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 737 (1996).

<sup>72</sup> For a discussion of the in rem nature of property rights, see Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

<sup>73</sup> Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402, 403 (2014).

<sup>74</sup> See Katz, *supra* note 15, at 1450–51.

<sup>75</sup> Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2043–45 (2012).

<sup>76</sup> See Smith, *supra* note 66, at 1050 (arguing that through equity the common law imposes the anti-opportunism norm, which in the civil law is embodied in the abuse of right concept).

reevaluation of the patterns of property law—not of spite law. The reading of that doctrine has remained constantly stable. Indeed, it is this traditional story of spite that makes the doctrine’s current equation with an abuse of right principle tenable. New commentators and old commentators, judges and thinkers, have always concurred: spite introduces a subjective test, scrutinizing the owner’s goal before condoning his act. Unfortunately, as will be established next, they are all simply wrong.

## II. AMERICAN SPITE: SPITE’S ACTUAL HISTORY AND ROLE IN AMERICAN LAW

Part I reviewed the current understanding of spite, highlighting its theoretical prominence. As seen, spite is perceived as a prohibition against owners acting on their lands to aggrieve their neighbors rather than to benefit themselves. Any act an owner may otherwise engage in on her land will be banned if her motive for engaging in the act is deplorable. This reading consists of two elements: (1) the prohibition on spite is *general*, and (2) it revolves around *mental states*.<sup>77</sup> This Part will investigate the history and function of spite in American law and conclude that neither of these two elements survives scrutiny.

The current reading’s first element—the assertion some make to the effect that the prohibition on spite is general—is disproved by the fractured American story of spite. As reported in Part I, commentators and courts have been prone to majestic pronouncements to the effect that “malicious use of property resulting in injury to another is never a ‘lawful use.’”<sup>78</sup> Such rhetoric has never been backed, however, by legal action. When deciding cases where owners maliciously used property resulting in injury to another, courts generally ruled for the offending owners, stating repeatedly that a counterparty’s motives cannot form the basis for founding a right.<sup>79</sup> Thus, in examples spanning the centuries, courts refused to find a cause of action when owners placed cameras to survey and annoy neighbors;<sup>80</sup> sealed emergency exits and disconnected water lines supplying

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<sup>77</sup> *E.g.*, *Hornsby v. Smith*, 13 S.E.2d 20, 24 (Ga. 1941) (“We know of no statute or other rule of law in this State that confers upon an individual a right to *maliciously* injure another, *regardless of what method* may be employed to inflict such injury.” (emphasis added)).

<sup>78</sup> *Id.*

<sup>79</sup> *See, e.g.*, *Kuzniak v. Kozminski*, 65 N.W. 275, 276 (Mich. 1895); *Allen v. Kinyon*, 1 N.W. 863, 865 (Mich. 1879); *Hunt v. Simonds*, 19 Mo. 583, 591 (1854); *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 471 (1874); *S. Royalton Bank v. Suffolk Bank*, 27 Vt. 505, 508 (1854).

<sup>80</sup> *Schiller v. Mitchell*, 828 N.E.2d 323, 325–26 (Ill. App. Ct. 2005). *But see Blevins v. Sorrell*, 589 N.E.2d 438, 439–40 (Ohio Ct. App. 1990) (appearing to find a cause of action in a similar situation, but not detailing that cause or a reasoning).



neighbors' sprinkler system to force them to sell;<sup>81</sup> cut off neighbors' gas supply wantonly;<sup>82</sup> or, in myriad cases, constructed buildings to spite their neighbors in varied ways,<sup>83</sup> sometimes keeping the building in a vile state,<sup>84</sup> at other times erecting it at an objectionable size,<sup>85</sup> or with a cheap character,<sup>86</sup> and at still other times endowing it with a particularly offensive design element.<sup>87</sup> In all these instances affronted neighbors' lawsuits failed. Throughout the last two hundred years courts would only penalize a malicious property use if that type of use fell into one of the very few categories of uses to which spite law applied.

Spite is recognized, or was recognized at some time, in four lone property law subfields as grounds for enjoining a property use: water law (the "spite well"), land use (the "spite fence"), support rights, and restraints on alienation. This Part will review the history of spite in each of these four subfields in this order, which corresponds to the chronological sequence of spite's legal appearance. The subfields of support rights and restraints on alienation will be discussed jointly since, in both, references to spite rarely went beyond dicta.

The findings will show that in the two subfields where spite did play a major role—water law and land use—spite followed similar paths. It was introduced by courts (or, on rarer occasions, legislatures) struggling with a common law rule affording the owner absolute freedom of action. Courts grew doubtful of that rule's wisdom, but, for diverse practical reasons, were first unwilling to renounce it. Hence they maintained the rule, but supplemented it with a spite exception. Though nominally entailing an examination of the owner's intent when acting, in reality this exception inserted into legal analysis an objective balancing of the costs and benefits of the owner's act. In this manner, the spite exception served to spell the demise of the absolute-owner-freedom rule and to announce the arrival of a balancing test. Once, in due course, such a test was fully instated in the relevant subfield—water law or land use—the spite exception lost its utility, and, as a legal doctrine, fizzled out. In the other two subfields—support rights and restraints on alienation—where, to begin with, spite amounted to merely a minor legal element, it inevitably followed a more attenuated version of this pattern. But there, too, it never instituted a

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<sup>81</sup> *Randall v. Federated Retail Holdings, Inc.*, 429 F.3d 784, 786, 788–89 (8th Cir. 2005).

<sup>82</sup> *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 524 (1862).

<sup>83</sup> *E.g.*, *Biber v. O'Brien*, 32 P.2d 425, 428–29 (Cal. 1934); *Kuzniak*, 65 N.W. at 276.

<sup>84</sup> *White v. Bernhart*, 241 P. 367, 368 (Idaho 1925) (the spiteful moving of a dilapidated building).

<sup>85</sup> *Falloon v. Schilling*, 29 Kan. 292, 295–96 (1883).

<sup>86</sup> *Id.*

<sup>87</sup> *Hawkins v. Sanders*, 8 N.W. 98, 98 (Mich. 1881) (discussing an awning).

meaningful motive-based criterion to assess owners' activities. This common characteristic of the four histories of spite to be unraveled now upends the second element in spite law's conventional reading: the maxim that spite has served to inject a subjective test into property law by prohibiting owners from acting when their intent is solely to harm others.

#### A. *Spite in Water Law*

Water law was the first property subfield to carve out a special rule for spiteful acts. Specifically, spite became a meaningful category in nineteenth-century cases stipulating landowners' rights to percolating waters.<sup>88</sup> These waters are located underneath the land and, since they represent a valuable resource, the landowner often seeks to pump them.<sup>89</sup> Until the nineteenth century's middle decades, the common law lacked rules regulating owners' rights to these desirable waters. The lacuna is surprising, since the nature of underground water renders conflicts over its use inevitable.<sup>90</sup> As one of the first courts to confront a percolating waters problem explained, "[W]ater, like air, is of such a nature that no one can have an exclusive right in it. . . . The right of each is more or less dependent upon that of his neighbour."<sup>91</sup> Like air, water travels. If an owner digs a well on her land and pumps water, her neighbor will have less water flowing under her land, and thus a lessened ability to pump water herself. Water is also hardly traceable. Since the water located under the owner's land today was under her neighbor's land yesterday, and will be under another neighbor's land tomorrow, declaring the landowner the water's owner is pointless.<sup>92</sup> Law thus never consistently assigned property rights in percolating waters in this fashion.<sup>93</sup> Instead, it regulated owners' ability to

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<sup>88</sup> Other cases covered by water law are those involving streams and surface water.

<sup>89</sup> Due to early and unsophisticated science, underground water fell into one of two categories in the common law. Waters either formed part of underground known streams, whence they were subject to the legal regime applicable to surface streams, or their underwater source was unknown, in which case they were defined as percolating and were governed by the rules discussed here. *Nourse v. Andrews*, 25 S.W. 84, 86 (Ky. 1923). The presumption was that underground waters are percolating, unless shown to be supplied by a known stream. *Barclay v. Abraham*, 96 N.W. 1080, 1081 (Iowa 1903).

<sup>90</sup> As late as 1902, the California court incredulously complained that the doctrine had not developed much and that not enough had been written about percolating water in casebooks. *Katz v. Walkinshaw*, 70 P. 663, 665 (Cal. 1902), *rev'd on reh'g*, 74 P. 766 (Cal. 1903). A year later a treatise writer also observed that, "The law with respect to rights in percolating waters was not developed until a comparatively recent period." 3 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 935, at 2710 (1903).

<sup>91</sup> *Wheatley v. Baugh*, 25 Pa. 528, 533 (1855).

<sup>92</sup> *See Canada v. City of Shawnee*, 64 P.2d 694, 699 (Okla. 1936).

<sup>93</sup> The terminology courts historically used is slightly more nuanced. Since the common law prioritized possession over ownership, the landowner would be treated as the water's owner if she possessed it. The landowner could not be viewed as possessing the water underneath her soil until she

draw such waters.<sup>94</sup> That is, rather than deigning the landowner as the owner of the water underneath her land, the law designated the landowner who brought water to the surface as the owner of the withdrawn waters. Hence, the legal question in percolating water law is this: to what extent does a landowner hold the right to withdraw waters from underneath her land so as to thereby become their owner?

The common law's original answer was simple: to a limitless extent. The first English court to adjudicate such a dispute stated, in the 1843 case of *Acton v. Blundell*,<sup>95</sup> that the landowner enjoyed an absolute privilege to draw water, regardless of any interference with other landowners' ability to draw water.<sup>96</sup> The decision was almost immediately quoted in approval by American courts.<sup>97</sup> Indeed, the Massachusetts court had reached the same conclusion even earlier, in 1836.<sup>98</sup> The rule became known as the Acton Rule, and for a few decades, its application or wisdom was hardly questioned.<sup>99</sup> The rationale cited was underground waters' singularly opaque character.<sup>100</sup> Unlike water flowing through streams, the source and path of water percolating underground were unknowable.<sup>101</sup> Hence, unlike rules governing surface stream waters, which required courts to intervene and fairly distribute use rights between neighbors, the rule respecting percolating waters could do no more than leave each owner free to pump.

As any regulatory scheme for underground water was unworkable, the Acton Rule could admit no exceptions. The English courts clarified as

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actually physically took possession by pumping it. Hence the landowner did not hold ownership in the water, but rather, by reason of her ownership of land touching the water, she held rights of *use*, which, as against those not owning such land, are in large measure exclusive. See the discussion in 1 SAMUEL WIEL, *WATER RIGHTS IN THE WESTERN STATES* §§ 711–12, at 779–81 (3d ed. 1911).

<sup>94</sup> For example, the Idaho statute adopted in 1899 provides that the right in water acquired by appropriating water is “[t]he right to the use.” Act of Feb. 25, 1899, H.B. No. 183, § 2, 1899 Idaho Sess. Laws 380 (codified as amended at IDAHO CODE § 42-103 (2015)). The code also provides “the right to the use of . . . waters . . . shall not be considered as being a property right in itself . . .” IDAHO CODE § 42-101 (2015).

<sup>95</sup> (1843) 152 Eng. Rep. 1223; 12 M. & W. 324.

<sup>96</sup> *Id.* at 1235; 12 M. & W. at 353–54.

<sup>97</sup> See, e.g., *Hanson v. McCue*, 42 Cal. 303, 309–10 (1871); *City of Greencastle v. Hazelett*, 23 Ind. 186, 189 (1864); *New Albany & Salem R.R. v. Peterson*, 14 Ind. 112, 114 (1860); *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861), *overruled by* *Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984); *Wheatley v. Baugh*, 25 Pa. 528, 532–34 (1855). Nineteenth-century treatise writers listed the rule as a given. See, e.g., COOLEY, *supra* note 44, at 690; JOHN GOULD, *A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND* § 280 (Chicago, Callaghan & Co. 1883); JOHN B. MINOR, *3 INSTITUTES OF COMMON AND STATUTE LAW* 18 (Richmond, 2d ed. 1876).

<sup>98</sup> *Greenleaf v. Francis*, 35 Mass. 117, 123 (1836).

<sup>99</sup> See *Roath v. Driscoll*, 20 Conn. 533, 541–43 (1850); *Ellis v. Duncan*, 21 Barb. 230, 235 (N.Y. Gen. Term 1855); *Haldeman v. Bruckhart*, 45 Pa. 514, 519 (1863).

<sup>100</sup> E.g., *Roath*, 20 Conn. at 541; *Frazier*, 12 Ohio St. at 311; MINOR, *supra* note 97, at 18.

<sup>101</sup> *Haldeman*, 45 Pa. at 519.

much in the *Mayor of Bradford v. Pickles* case,<sup>102</sup> where a landowner sunk a shaft to divert water away from springs on which the neighboring city relied.<sup>103</sup> His goal was to force the city to buy his land or pay him for the water.<sup>104</sup> Still, the English court decided that, because the Acton Rule was absolute, Pickles's malicious—or extortionist—intent was irrelevant.<sup>105</sup>

But while, as noted, American courts had almost unanimously adopted the Acton Rule,<sup>106</sup> most rejected the *Mayor of Bradford* holding.<sup>107</sup> They thereby created, for the first time in American law, a spite-based exception to a property rule. Yet the momentous arrival of spite on the scene of American law had surprisingly little to do with spite, and much to do with water law. The reasoning courts employed for introducing the spite exception evinces that the exception can only be understood against the broader context of courts' growing disaffection with the rule granting owners an absolute privilege to draw percolating waters, rather than disaffection with malevolent well diggers.<sup>108</sup>

As the nineteenth century progressed, more and more American courts were struck by the Acton Rule's rigidity. The rule was exceptional: in all other property law subfields—including other elements of the law governing water—an owner's right could be adjusted to protect neighbors.<sup>109</sup> Such adjustments were necessary, the Pennsylvania court explained in a percolating water case, since:

The beneficent Being who created the earth, and gave man dominion over it, imposed on him the duty of doing to others as he would that they should do to him. Upon this high moral obligation rests the legal one which requires every

<sup>102</sup> [1895] AC 587 (HL) (appeal taken from Eng.). For a discussion of the case's importance, see TAGGART, *supra* note 63.

<sup>103</sup> [1895] A.C. at 589.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 591–92.

<sup>106</sup> New Hampshire represented the exception. See *infra* note 150 and accompanying text.

<sup>107</sup> See, e.g., *Brown & Bros. v. Illius*, 27 Conn. 84, 96 (1858); *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74, 82 (1895); *Smith v. City of Brooklyn*, 46 N.Y.S. 141, 144–45 (App. Div. 1897); *Wheatley v. Baugh*, 25 Pa. 528, 535–36 (1855).

<sup>108</sup> See W.L. Summers, *Property in Oil and Gas*, 29 YALE L.J. 174, 175 (1919) (noting courts' disaffection with the Acton Rule they were applying). An early twentieth-century treatise writer also noted as much. 3 HENRY FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 935, at 2710–13 (1903).

<sup>109</sup> See *Katz v. Walkinshaw*, 70 P. 663, 666 (Cal. 1903) (“Proprietary rights are limited by the common interests of others . . . . This proposition is generally recognized, but for some reason has not always been recognized by the courts when considering the subject of percolating water, although all rights in respect to water are peculiarly within its province.”), *rev'd on reh'g*, 74 P. 766 (Cal. 1903); *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569, 575 (1862) (“[T]he injury [in both surface water and percolating water cases] is the same, produced in the same general way, and by the same cause, because of a difference, not in the nature or effects of the water, but merely in its immediate and not necessarily its ultimate source? Such distinctions and such results do not commend themselves to our judgment.”).

one so to use his own privileges as not to injure the rights of others. In all the relations of social life, it is the interest and duty of each to respect the privileges of others.<sup>110</sup>

The Acton Rule was this duty's opposite. And yet, unwillingly, the Pennsylvania court had to follow it, not for principled reasons, but for reasons of "public convenience."<sup>111</sup> The practical rationale behind the rule was irrefutable: "[T]he difficulty in ascertaining the fact of [a] violation [of the neighbor's right to percolating water], as well as the extent of it, would be insurmountable."<sup>112</sup>

Percolating waters' ways remained mysterious. The Pennsylvania court, alongside its peers, thus found itself in a predicament: it was enforcing a rule of whose fairness it entertained grave doubts, but whose practical underpinnings were undisputable.<sup>113</sup> The specific problem presented by the English *Mayor of Bradford* case offered a convenient way out. While subterranean waters' unknowable nature necessitated the otherwise unfortunate absolute privilege rule set in cases like *Acton*, it did not necessitate the refusal to recognize an intent-based exception in cases like *Mayor of Bradford*. Courts could not discern the nature and flow of underground percolating waters; they supposedly could, however, discern the nature and flow of owners' motives.<sup>114</sup> Through this reasoning, most, though not all,<sup>115</sup> American courts instituted a spite exception to the Acton Rule.<sup>116</sup>

For the first time, spite was recognized as carrying legal repercussions in American property law. As formally announced, the malicious intent exception to the Acton Rule would bar an owner from digging a "spite well": a neighbor, normally powerless to stop the owner from drawing water, could halt her if the owner dug the well with the specific purpose of harming that neighbor. The spite exception was to oblige courts to

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<sup>110</sup> *Wheatley*, 25 Pa. at 535.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 532.

<sup>113</sup> *E.g.*, *Ellis v. Duncan*, 21 Barb. 230, 234–35 (N.Y. Gen. Term 1855); *see also* *Wiggins v. Brazil Coal & Clay Corp.*, 452 N.E.2d 958, 966 (Ind. 1983) (explaining that by the late nineteenth century the only remaining rationale for the rule was "to relieve courts of the responsibility of decision making during an era when there was little scientific knowledge regarding hydrology").

<sup>114</sup> *See* *Wheatley*, 25 Pa. at 535.

<sup>115</sup> A few courts insisted on spite's irrelevance. *E.g.*, *Frazier v. Brown*, 12 Ohio St. 294, 311–12 (1861), *overruled by* *Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984); *Chatfield v. Wilson*, 28 Vt. 49, 57 (1855); *Huber v. Merkel*, 94 N.W. 354, 356 (Wis. 1903), *overruled by* *State v. Michels Pipeline Constr., Inc.*, 217 N.W.2d 339 (Wis. 1974).

<sup>116</sup> *See* *Summers*, *supra* note 108, at 175–76 (noting that spite became the rule's most prominent exception). By analogy, one court applied this approach to disputes over oil, banning a spite oil well. *Higgins Oil & Fuel Co. v. Guar. Oil Co.*, 82 So. 206, 211–12 (1919).

investigate the digging owner's motivations. Yet from the time of its introduction, courts did not actually treat the exception as opportunity to engage in such analysis. Other than in one case, findings about the owner's intent never grounded a ruling respecting a well's spiteful nature.<sup>117</sup> Instead, a court's conclusion that spite was present in, or absent from, the defendant's decision to dig was reached following a comparison of the social utility of the defendant's use of the water to the social utility of the plaintiff's use. The Pennsylvania ruling first instituting the spite exception is illustrative. Rather than exploring the defendant mining company's subjective motivations, it compared mining's social worth to the social worth of the plaintiff's use of the disputed waters for his tannery business.<sup>118</sup>

Such sidestepping of intent tests is most glaring in cases where subjective spite's presence was unquestionable. In one Virginia case, the litigants were neighbors operating competing resorts.<sup>119</sup> They had previously been embroiled in lengthy and acrimonious boundary disputes, focusing on a water source straddling their lots' border.<sup>120</sup> After courts had ruled that the source belonged to the plaintiff, the defendant decided to draw the water away through a pump interfering with the water's course.<sup>121</sup> The court accepted the plaintiff's evidence that the defendant was motivated by malice when installing the pump;<sup>122</sup> still it ruled that the Acton Rule's spite exception was of no avail. The findings respecting the defendant's actual spite were "irrelevant."<sup>123</sup> The only finding that mattered was that he was not wasting the water.<sup>124</sup>

In another extreme case,<sup>125</sup> where the plaintiff actually prevailed, the analysis proceeded similarly. The defendant had placed a pump on land adjoining his former employer's land.<sup>126</sup> He instructed the installers, "I want you to get me a good pump and put in there, and I will sink old Pluto [his neighbor's spring] to hell."<sup>127</sup> Once the pump was in place, and after he had learned that the plaintiff's spring had ceased to flow, the defendant

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<sup>117</sup> The sole exception is *St. Amand v. Lehman*, 47 S.E. 949 (Ga. 1904). But the case dealt with streaming water not subject to the Acton Rule to begin with.

<sup>118</sup> *Wheatley*, 25 Pa. at 535-36.

<sup>119</sup> *Miller v. Black Rock Springs Imp. Co.*, 40 S.E. 27, 27 (Va. 1901).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 29.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 32.

<sup>125</sup> *Gagnon v. French Lick Springs Hotel Co.*, 72 N.E. 849 (Ind. 1904).

<sup>126</sup> *Id.* at 850.

<sup>127</sup> *Id.* at 851.

rejoiced, “We have got her down; she has gone to hell,” and thereafter announced to the plaintiff, “We are pumping you dry. We will make you break your back dipping after that water.”<sup>128</sup> In the ensuing litigation, the Indiana court ruled for the plaintiff relying on the spite exception to the Acton Rule, but it did not base the decision on the defendant’s spiteful statements; rather the determinative factor was the finding that the defendant was drawing waters “without a real necessity therefor.”<sup>129</sup>

In other cases as well, the subjective inquiry into the owner’s intent that the spite exception supposedly mandated was transformed into an objective exploration into the social worth of the owner’s use of the contested waters. Ostensibly employing the spite exception, courts diverged from the strict Acton Rule to block owners from pumping water and selling it,<sup>130</sup> putting the water to “artificial” rather than “natural” uses,<sup>131</sup> or exhausting all the water from land in the vicinity.<sup>132</sup>

Most commonly, as in the Virginia and Indiana cases cited, spite was invoked to stop owners from digging wells and wasting the water procured.<sup>133</sup> Indeed, in the era’s decisions, the term *spite* subtly morphed into the term *waste*.<sup>134</sup> As one court announced in a case where the defendant diverted water from underneath her neighbor’s land into an unused creek: “[T]he intent with which [the act was] exercised would be immaterial. . . . The important intimation to which we wish to direct attention is that with respect to the beneficial use.”<sup>135</sup> Similarly, when a plaintiff was denied waters he had used to quench the city’s needs, the court, in reliance on the spite exception, ruled against the defendant who diverted said waters into a sewer, but not before announcing that the decision was made “irrespective and independent of [the defendant’s] motive.”<sup>136</sup> The defendant’s motive—which the court admitted could easily be described as malicious<sup>137</sup>—was immaterial. What mattered was that the defendant wasted the water while the plaintiff was trying to put it to a

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 852.

<sup>130</sup> *Smith v. City of Brooklyn*, 46 N.Y.S. 141, 144, 148 (App. Div. 1897).

<sup>131</sup> *Willis v. City of Perry*, 60 N.W. 727, 729 (Iowa 1894).

<sup>132</sup> *Forbell v. City of New York*, 58 N.E. 644, 645–46 (N.Y. 1900).

<sup>133</sup> *E.g.*, *Stillwater Water Co. v. Farmer*, 93 N.W. 907, 908–09 (Minn. 1903).

<sup>134</sup> *See Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74, 82 (1895); *Pence v. Carney*, 52 S.E. 702, 705 (W. Va. 1905).

<sup>135</sup> *Barclay v. Abraham*, 96 N.W. 1080, 1082 (Iowa 1903).

<sup>136</sup> *Stillwater*, 93 N.W. at 909.

<sup>137</sup> *Id.*

valuable use.<sup>138</sup> The spite exception to the Acton Rule was indifferent to the owner's mental state; the owner "has no right to waste [the water], *whether through malice or indifference*."<sup>139</sup>

In disputes over percolating waters, the late nineteenth- and early twentieth-century courts, having introduced—for the first time in American history—spite as a meaningful legal category, developed a legal idea of spite sharing little with the common notion of spite, or with the spite exception's purported goal. So much so that one lower court was scolded for basing an actionable spite finding on the defendant's intent and his fraught relationship with the plaintiff.<sup>140</sup> In accordance with the nature of the Acton Rule's spite exception as explicated in previous cases, which never, the higher court insisted, were concerned with subjective spite, the lower court should have considered general social welfare, and "for reasons of public policy the plaintiff was precluded from asserting an act to be maliciously done."<sup>141</sup>

Such rulings came close to an overt avowal that spite law did not relate to spite, and one court indeed proceeded to affirm as much. Unable to ignore the reality, as opposed to the rhetoric, of prior decisions, the Iowa court in 1920 reached a startling—and for this Article's discussion, remarkable—conclusion. It proclaimed that in law, spite did not mean spite. The court distinguished "express malice" from "malice in the law"; for the latter to exist, the former need not be present. Reading cases from Iowa and elsewhere, the court noted:

That malice in law is referred to rather than express malice is made clear because, for instance, the diversion [of percolating water] has been held to be actionable where the harm was caused by negligence . . . . And [another case] strongly indicates that the fact that waste is being committed to the injury of another will of itself invoke the powers of the chancery court.<sup>142</sup>

Due to this distinction, the Iowa court deemed the well it confronted in that case a spite well, despite malice's absence.<sup>143</sup> The defendant was using the water "to supply his hogs with drink and wallowing places, while the

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<sup>138</sup> *Id.* at 908–09; *see also Springfield Waterworks*, 62 Mo. App. at 82–85 (enjoining the defendants from releasing water in order to make repairs to their pond, since those repairs could have been made at a different time at which the release of water would not divert a significant source of the plaintiff's spring, used to provide the city of Springfield with water).

<sup>139</sup> *Sycamore Coal Co. v. Stanley*, 166 S.W.2d 293, 294 (Ky. 1942) (emphasis added); *see also Ryan v. Quinlan*, 124 P. 512, 516 (Mont. 1912) (explaining that a landowner can use water as he sees fit but "the use must be without malice or negligence").

<sup>140</sup> *Chesley v. King*, 74 Me. 164, 169, 175–76 (1882).

<sup>141</sup> *Id.* at 173.

<sup>142</sup> *De Bok v. Doak*, 176 N.W. 631, 634 (Iowa 1920) (citations omitted).

<sup>143</sup> *Id.*



plaintiff is . . . urging his needs in supplying human beings with water.”<sup>144</sup> “The relative need and use” of the water, rather than the defendant’s intent, was spite’s test.<sup>145</sup>

The attitude evinced by prior rulings led the Iowa court to question the soundness of the literal reading of the Acton Rule’s spite exception.<sup>146</sup> Elsewhere, that prevailing attitude led courts to question the soundness of the Acton Rule itself. In contrast to its notional basis, in practice the spite exception was a means of introducing into water allocation decisions a comparison of the social value of competing water uses. But if a balancing test was necessary in such decisions, why adhere to a rule granting the owner absolute freedom—the Acton Rule—and then subject it to an exception only furtively introducing such balancing?

Unsurprisingly, for many, the spite qualification of the absolute ownership theory could not allay criticisms of the Acton Rule.<sup>147</sup> Back in 1862, the New Hampshire court had found the spite exception insufficient to remedy the Acton Rule’s injustice—a ban on spite wells, it reasoned, “seems anomalous under the theory [courts] adopt [i.e., the Acton Rule].”<sup>148</sup> The New Hampshire court thus spurned the Acton Rule altogether. It instituted a reasonable use standard: an owner did not have the absolute right to use percolating waters, only the right to use them in a reasonable manner, accounting for neighbors’ interests.<sup>149</sup> At the time, as explained above, other courts shared the New Hampshire court’s concerns regarding the Acton Rule’s fairness, but they were reluctant to forthrightly adopt this alternative theory, judging themselves unqualified to balance different owners’ interests due to the limited understanding of percolating waters’ ways.<sup>150</sup>

But science was not standing still. By the turn of the century the knowledge about natural forces, such as water, had progressed

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 633–34 (first citing *Gagnon v. French Lick Springs Hotel Co.*, 72 N.E. 849 (Ind. 1904); then citing *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74 (1895); then citing *Pence v. Carney*, 52 S.E. 702 (W. Va. 1905); then citing *Barclay v. Abraham*, 96 N.W. 1080 (Iowa 1903); and then citing *Stillwater Water Co. v. Farmer*, 93 N.W. 907 (Minn. 1903)).

<sup>147</sup> *Summers*, *supra* note 108, at 175.

<sup>148</sup> *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569, 575 (1862).

<sup>149</sup> *Id.* at 577.

<sup>150</sup> *See supra* notes 111–12. The New Hampshire court was unimpressed by “the alleged difficulty of determining the direction and extent of percolation and drainage.” *Bassett*, 43 N.H. at 574. Instead, it thought “[i]n a large number of cases no such difficulty exists, and the remainder may be provided for consistently, and in accordance with settled legal principles.” *Id.*

dramatically.<sup>151</sup> The judicial refusal to regulate percolating waters' use was no longer easily justifiable by lack of expertise. Judges could now be furnished with data regarding the location and amount of percolating waters as necessary for fairly allocating those waters.<sup>152</sup> Moreover, the absence of legal regulation was threatening social welfare, since the nation's expanding population and incessant development generated acute water shortages, particularly in the arid west.<sup>153</sup> Consequently, in state court after state court, the Acton Rule gave way to the New Hampshire reasonable use rule,<sup>154</sup> which eventually became the majority rule—christened the American Rule.<sup>155</sup>

With the Acton Rule's demise, the spite exception's logic won the day. The exception itself, though, inevitably became superfluous. The exception, as seen, was premised not on the advisability of a mental state test, but on the desirability of the balancing of utilities. Once the rule for allocating water rights itself became reasonable use—i.e., the balancing of all owners' interests—the need for a balancing-based exception to the rule ended. Accordingly, references to a spite exception disappeared from American water law by the twentieth century's second quarter. Although officials were complaining that owners were drilling spite wells to harm

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<sup>151</sup> *State v. Michels Pipeline Const., Inc.*, 217 N.W.2d 339, 345 (Wis. 1974) (“Even in 1903 . . . , the awe of mysterious, unknowable forces beneath the earth was fast becoming an outmoded basis for a rule of law.”); see also *Katz v. Walkinshaw*, 74 P. 766, 768–69 (Cal. 1903) (describing the physical condition of the state in explaining why the reasons for the Acton Rule no longer apply). Compare CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION § 49, at 70–71 (Washington, D.C., W.H. Lowdermilk & Co., 1894) (arguing earlier that the percolating water percolated through the ground in unknown channels), with FARNHAM, *supra* note 108, at 2711 (noting the difficulty in discerning the progress of underground water as the traditional explanation for the lack of regulation in the field, but concluding, in 1904, that “[t]here is no reason why the use of such water should not be brought within definite rules the same as any other class of property”). For an example of a contemporary court relying on expert opinions to settle a dispute over percolating water, see *Tampa Waterworks Co. v. Cline*, 20 So. 780, 785 (Fla. 1896).

<sup>152</sup> *Meeker v. City of East Orange*, 74 A. 379, 384 (N.J. 1909) (arguing that courts justify the Acton Rule citing a difficulty to ascertain facts respecting underground water, but this difficulty is readily solved through expert evidence).

<sup>153</sup> See *Katz*, 74 P. at 768–69.

<sup>154</sup> *E.g., id.* at 773; *Cason v. Fla. Power Co.*, 76 So. 535, 536 (Fla. 1917); *Schenk v. City of Ann Arbor*, 163 N.W. 109, 114 (Mich. 1917); *Erickson v. Crookston Waterworks Power & Light Co.*, 117 N.W. 435, 441 (Minn. 1908); *Meeker*, 74 A. at 385; *Nashville, Chattanooga, & St. Louis Ry. v. Rickert*, 89 S.W.2d 889, 896–97 (Tenn. Ct. App. 1935); *Patrick v. Smith*, 134 P. 1076, 1079 (Wash. 1913); see also WIEL, *supra* note 93, at § 1041, at 973 (“There is a steady trend of decision in America away from the English rule . . .”). The reasonable use test varied between states. Mostly, it meant a prohibition on waste. Some used a correlative rights test, which one author argued was meaningfully different. Marion Rice Kirkwood, *Appropriation of Percolating Water*, 1 STAN. L. REV. 1, 6–8 (1948).

<sup>155</sup> *Midway Irrigation Co. v. Snake Creek Mining & Tunnel Co.*, 271 F. 157, 162–63 (8th Cir. 1921) (“The rule . . . may be said to be the American . . . rule.”); *Horne v. Utah Oil Ref. Co.*, 202 P. 815, 820 (Utah 1921) (“[W]hat is now known as the ‘American doctrine’ [is] the doctrine of ‘reasonable use.’”).

neighbors as late as in 2011,<sup>156</sup> courts no longer even mention spite as relevant to water disputes.

This inaction is hardly surprising, as the presence of actual spite was never a real concern of courts; instead, courts were troubled by the presence of a water law rule thwarting the appraisal of water uses' usefulness. By and large, that rule is no longer present in America. Thus from the late 1920s until this Article was written, spite, as a potential consideration in percolating waters disputes, was alluded to by only two state courts<sup>157</sup>—both members of the tiny minority of states still following the Acton Rule.<sup>158</sup> Interestingly, in neither of these cases is spite seriously analyzed. Having rejected the American Rule's balancing of utilities test, these state courts are apparently disinclined to engage in spite analysis, seeing that in water law, such analysis has always entailed not intent tests, but the balancing of utilities.

Spite, as a meaningful legal category, enjoyed a brief heyday in water law. Unheard of before, and dormant thereafter, it was discussed in a flurry of decisions during the roughly three decades surrounding the twentieth century's dawn. The rise and fall of the prohibition on spite wells shadows the rise and fall of the Acton Rule—the rule allowing owners free license to draw water regardless of effects on neighbors. Courts that were unhappy with that rule, but hesitant to formally opt for another due to the time's scientific limitations, turned to a spite exception: an exception grounded in supposedly discernable intent, but in fact used to introduce the balancing of interests. Once scientific advances enabled courts to proceed to formally adopt a balancing rule, the need for this exception vanished. Importantly, throughout, the law of spite in the subfield of water law never concerned itself with mental states. This detachment set the pattern for spite's function in other property subfields, as shall be seen next.

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<sup>156</sup> VT. TECH. ADVISORY COMM., A REVIEW OF THE “OVERSHADOWING” OF WATER SUPPLY–WASTEWATER SYSTEM ISOLATION DISTANCES 19, 23 (2010), <http://drinkingwater.vt.gov/rotac/pdf/2011.01.15.tacovershadowingrep.pdf> [<http://perma.cc/R33U-R5BN>]; Me. Dep't of Health and Human Servs., Position Paper: Maine Subsurface Wastewater Disposal Rules 10-144 CMR 241 (Jan. 18, 2011), <http://www.maine.gov/dhhs/mecdc/environmental-health/plumb/documents/rules/swd-rules-position-paper.doc> [<https://perma.cc/DNV8-BSGH>].

<sup>157</sup> See *Maddocks v. Giles*, 728 A.2d 150, 152 n.4 (Me. 1999); *Fain v. Great Spring Waters of Am., Inc.*, 973 S.W.2d 327, 328–29 (Tex. App. 1998).

<sup>158</sup> Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 IDAHO L. REV. 265, 274 (2013) (“[The absolute dominion rule] perhaps survives to any real degree only in Indiana, Maine, and Texas.”). The Texas court has recently adopted the extreme position that the owner's right to percolating waters is a property right, whose regulation may amount to an unconstitutional taking. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012).

*B. Spite in Land Use Law*

Water law's restriction on spite wells was the first instance where American courts relied on spite to determine the rights of bickering neighbors, but the most prominent and commented upon instance is land use law's restriction on malicious structures.<sup>159</sup> Indeed, the example launching this Article broached spite in land use law. Unlike in water law, in land use the spite prohibition is still invoked today. Nonetheless, as this Section will show, spite in land use law followed the same trajectory as its counterpart in water law. Here too, the exception first emerged when the law afforded the owner absolute freedom of action. It permitted courts to moderate this freedom to account for public policy considerations, while still nominally adhering to the absolute freedom rule whose rationale persisted. As was the case in water law, once conditions changed in the late nineteenth and early twentieth centuries unsettling this rationale, the absolute freedom rule was displaced; and thus, the spite exception that had before tempered owners' absolute freedom lost its role and ceased to evolve. In fact, spite's story in land use exemplifies even more vividly than its water law peer this Part's thesis that spite doctrine did not deal with subjective intent, but rather introduced objective restraints when the law formally afforded the owner absolute freedom. For in land use, spite went through a prehistory, during which courts explicitly denied that spite could carry legal weight—up until the moment when an absolute owner freedom rule was set in place.

Disputes over structures owners build on their lands are some of the most common conflicts between neighbors. In the typical case, an owner builds a structure on her land that, since it is visible from her neighbor's land, affects the latter's views: limiting exposure to sun and vistas, or adding aesthetically unpleasing sights. Such disputes multiply as the environment grows crowded and as construction technologies improve. Hence, disputes over structures became a staple of American property law in the teeming nineteenth century.

At first, when courts were faced with such disputes, they adopted an approach starkly different from the Acton Rule, the absolute owner privilege rule applied to water. The English common law settled land use disputes through the doctrine of "ancient lights."<sup>160</sup> A doctrine whose origins were murkier than often assumed, it held that an owner had the

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<sup>159</sup> *E.g.*, JESSE DUKEMINIER ET AL., PROPERTY 785 (8th ed. 2014); JOSEPH WILLIAM SINGER, PROPERTY 139 (4th ed. 2014).

<sup>160</sup> See Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 26 (1910).

right to the continued flow of light and air over neighboring land if he had been enjoying such exposure in the past.<sup>161</sup> Originally this meant enjoyment since time immemorial<sup>162</sup> (or from the time of Richard I, whichever came last),<sup>163</sup> but later courts settled on the somewhat less prolonged period of twenty years.<sup>164</sup> Thusly formulated, the rule dictated that if an owner created an opening for a window twenty or more years ago, her neighbor could not block that window's views: through the passage of time, the owner had gained an easement for the passage of light and air over the neighbor's land.<sup>165</sup> If, on the other hand, windows were in existence for

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<sup>161</sup> It was often claimed that the doctrine of “ancient lights” was formally adopted by the King’s Bench in the case of *Darwin v. Upton*, (1786) 85 Eng. Rep. 922, 927–28; 2 Wms. Saund. 172, 174 n.(2), though beforehand it might have been a London custom. *E.g.*, *Parker v. Foote*, 19 Wend. 309, 318 (N.Y. 1838) (“[T]he doctrine [of ancient lights] was not sanctioned . . . until 1786, when the case o [sic] *Darwin v. Upton* was decided by the K[ing’s] B[ench].”); EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 492 (Philadelphia, George W. Childs 1863) (“And it is said that, as a rule of law, [the right to light resulting from long enjoyment] never became settled in Westminster Hall until 1786 . . .”). Presumably that late eighteenth-century decision reversed a centuries-old decision, *Bury v. Pope*, (1587) 78 Eng. Rep. 375; Cro. Eliz. 118, which had rejected the doctrine. But the decision in *Darwin v. Upton* is nowhere to be found, and references to it have always cited a later case, *Yard v. Ford*, (1669) 85 Eng. Rep. 922; 2 Wms. Saund. 172, which mentioned and summarized the ruling while addressing a different doctrinal issue. Moreover, it is unclear whether the case supposedly reversed by *Darwin v. Upton* actually rejected the doctrine of ancient lights. *Bury v. Pope* does state that “lights [that] have continued by the space of thirty or forty years” can be blocked by a neighbor. (1587) 78 Eng. Rep. 375, 375; Cro. Eliz. 118, 118. This result and reasoning did not necessarily foreclose on the possibility that lights that had continued for a period of time longer than thirty or forty years—namely, since time immemorial—could not be blocked. And indeed, the same case was also reported in another version, under the title *Bowry v. Pope*, (1587) 74 Eng. Rep. 155; 1 Leo. 168, where the court explicitly stated that lights enjoyed through “an antient [sic] window time out of memory” could not be impaired. *id.* at 155; 1 Leo. 168. In this version of the case, the plaintiff’s claim was still denied, but not because owners had no right for the maintenance of ancient lights, but rather since that plaintiff’s window dated solely to the time of Queen Mary, still very much in memory during the reign of Queen Elizabeth (her successor) when the *Bowry* suit reached the court. I am particularly grateful to Peter Nascenzi, of the *Northwestern University Law Review*, for his help in conducting research for this note.

<sup>162</sup> Early cases apparently interpreted *Bury v. Pope*, discussed *supra* in note 161, as implying that ancient lights will be protected, if they have been enjoyed since “time out of mind.” *See, e.g.*, *Rosewell v. Prior* (1696) 91 Eng. Rep. 396, 397; 2 Salkeld 459, 460 (holding that ancient lights “imports usage time out of mind”); *Villers v. Ball* (1689) 89 Eng. Rep. 412, 412 n.(a); 1 Show. K.B. 7, 7 n.(a); *Newal v. Barnard* (1612) 80 Eng. Rep. 812, 812–13; 1 Bulstrode 116, 116–17; *Bland v. Moseley* (1587) 77 Eng. Rep. 817, 817 n.(B); 9 Co. Rep. 58a, 58a n.(B).

<sup>163</sup> Isaac F. Redfield, *Recent English Decisions Upon Leading Questions*, 11 AM. L. REG. 522, 523 (1863).

<sup>164</sup> *See* *Cross v. Lewis* (1824) 107 Eng. Rep. 538, 538; 2 B. & C. 686, 686–87; *Daniel v. North* (1809) 103 Eng. Rep. 1047, 1047–48; 11 East. 372, 372–73; *Yard v. Ford* (1669) 85 Eng. Rep. 922, 932–33 n.(2)(d); 2 Wms. Saund. 172, 175 n.(2)(d). Courts were influenced by an Act of Parliament from 1623 setting the prescription period at twenty years. *See* *Gwathney v. Stump*, 2 Tenn. (2 Overt.) 308, 313 (1814) (describing the influence of acts of Parliament on the shortening of the time required for finding a prescriptive easement); *Cunningham v. Dorsey*, 3 W. Va. 293, 306 (1869) (same).

<sup>165</sup> The English courts struggled to define the legal basis for the doctrine. *E.g.*, *Blanchard v. Bridges* (1835) 111 Eng. Rep. 753, 759–61; 4 Ad. & E. 176, 190–95. The acquisition of the easement for light and air through the ancient lights doctrine could not coherently be attributed to traditional prescription principles, since by continuously enjoying access to light and air over her neighbor’s land

only less than twenty years, the neighbor was free to construct any structure, regardless of its effects on the owner's access to light and air. The ancient lights doctrine thus balanced neighbors' competing interests in land use through a bright-line timing test.

Because this test was formally adopted in England only after the colonies had broken away, American courts later in the nineteenth century would deny that it ever held sway here.<sup>166</sup> But the historical record shows that when relevant disputes initially occurred in America in the 1830s and 1840s, all courts considering the issue applied the ancient lights doctrine,<sup>167</sup> or at least assumed its authority.<sup>168</sup>

Against this doctrinal background, the problem of spite structures—more specifically, spite fences—first arose. Under the ancient lights doctrine, an owner was free to erect any structure, regardless of its effect on neighboring windows, for the first two decades following the windows' opening. Was this also true if the structure erected during those early years was motivated by spite? In 1836, a New York court affirmed that it was. The court declared in *Mahan v. Brown*<sup>169</sup> that the owner was free to construct a spite fence blocking a neighbor's views as long as it was built within the

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the owner was not engaged in an activity adverse to the rights of that neighbor, as is required for acquiring rights through adverse possession or prescriptive easement theories. The ancient lights rule's theory was thus the lost grant—the easement's long use was evidence of an earlier grant of said easement—which has since been lost or forgotten. See *Bedle v. Beard* (1607) 77 Eng. Rep. 1288, 1289; 12 Co. Rep 4, 5 (“God forbid that ancient grants and acts should be drawn into question, although they cannot be shewn . . .”); Note, *Doctrine of Lost Grant*, 16 HARV. L. REV 438, 438 (1903) (“At first, immemorial use was held to be necessary . . . This unsatisfactory rule was later modified by the doctrine of lost grant.” (citation omitted)). A separate theory allowed for the recognition of a similar right to continued enjoyment of exposure to light and air even if that enjoyment did not date to ancient times. In the absence of prescription, a landowner's right to light and air could still be protected if both neighboring lands—the land enjoying the light and air and the adjacent land whose owner was now blocking said light and air—were originally owned by the same person. *Palmer v. Fletcher* (1662) 83 Eng. Rep. 329, 329; 1 Lev. 122, 122; WASHBURN, *supra* note 161, at 493–97. This doctrine is known today as easement implied by prior use. *E.g.*, *Granite Props. Ltd. P'ship v. Manns*, 512 N.E.2d 1230, 1236 (Ill. 1987). This doctrine of implied easements—which is no longer applied by American courts to easements for light and air—is grounded in the presumption that when the owner of both lots originally conveyed one of them, the intent was to convey or preserve an easement allowing one lot to continue enjoying rights over the other.

<sup>166</sup> *E.g.*, *Wheatley v. Baugh*, 25 Pa. 528, 532–33 (1855).

<sup>167</sup> *Manier v. Myers*, 43 Ky. (4 B. Mon.) 514, 520 (1844); *Story v. Odin*, 12 Mass. (11 Tyng) 157, 160 (1815); *Robeson v. Pittenger*, 2 N.J. Eq. 57, 64 (Ch. 1838) (explicitly rejecting the claim that conditions in the state differ from those in England so as to justify a refusal to apply the doctrine); *McCready v. Thomson*, 23 S.C.L. (Dud.) 131 (1838) (same); *Shreve v. Voorhees*, 3 N.J. Eq. 25, 32–33 (Ch. 1834).

<sup>168</sup> *Ray v. Lynes*, 10 Ala. 63, 66 (1846); *State v. Mayor & Aldermen of Mobile*, 5 Port. 279, 302 (Ala. 1837); *Ingraham v. Hutchinson*, 2 Conn. 584, 597–98 (1818); *McDonogh v. Calloway*, 7 Rob. 442, 444 (La. 1844); *Campbell v. Smith*, 8 N.J.L. 140, 148 (1825); *Cooper v. Smith*, 9 Serg. & Rawle 26, 33 (Pa. 1822); *Lining v. Geddes*, 6 S.C. Eq. (1 McCord Eq.) 304, 309 (1826).

<sup>169</sup> 13 Wend. 261 (N.Y. Sup. Ct. 1835).

ancient lights' allowable period of time.<sup>170</sup> Indeed, it was that doctrine's presence that persuaded the court to refrain from banning the spiteful fence.<sup>171</sup> Since the owner would lose his right to block the neighbor's views if he failed to build within twenty years, fairness required that he enjoy full liberty until that period had passed.<sup>172</sup>

This early move lends support to this Part's argument. The New York court refused to assign legal significance to spite when there was no rule affording owners absolute freedom; that is, when no attenuating of a privilege rule was necessary. Through its timing test the ancient lights doctrine already balanced neighboring owners' interests, and hence courts perceived no need to introduce a spite exception to perform that same function. The next stage in land use law's development validates again that this—not the policing of mental states—has indeed been spite's consistent function in American law. For after courts switched the governing rule in land use, turning a balancing rule into an owner's absolute freedom rule, the prohibition on spiteful fences was reconsidered.<sup>173</sup>

In New York, the switch of general rules in land use came briskly. Three years after the *Mahan* decision, New York courts rejected the ancient lights doctrine, freeing owners to erect structures at any time no matter the effect on neighbors' longstanding exposure to light.<sup>174</sup> The ancient lights doctrine's reign in New York was particularly brief, but throughout the country, courts dismissed that English (and formerly American) doctrine in the 1850s and 1860s.<sup>175</sup> The rejection was ascribed to the drastically differing physical conditions prevalent in England—the doctrine's

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<sup>170</sup> *Id.* at 263.

<sup>171</sup> H.H. Rumble, *Limitations on the Use of Property by Its Owner*, 5 VA. L. REV. 297, 307–08 (1918).

<sup>172</sup> *Mahan*, 13 Wend. at 263.

<sup>173</sup> See *Horan v. Byrnes*, 54 A. 945, 947 (N.H. 1903) (explaining that *Mahan*'s denial of a spite prohibition became irrelevant once the view of land use law it stood upon was abandoned).

<sup>174</sup> *Parker v. Foote*, 19 Wend. 309, 317–19 (N.Y. Sup. Ct. 1838). The court later stressed that the easement for light and air could similarly not be acquired through the doctrine of easement implied from prior use (i.e., even in cases where both lands were originally held by a common owner). *Myers v. Gemmel*, 10 Barb. 537, 545–46 (N.Y. Gen. Term. 1851).

<sup>175</sup> See, e.g., *Ward v. Neal*, 37 Ala. 500, 501–02 (1861); *Gerber v. Grabel*, 16 Ill. 217, 223 (1854); *Pierre v. Fernald*, 26 Me. 436, 440–41, 443–44 (1847); *Cherry v. Stein*, 11 Md. 1, 21–23 (1858) (rejecting the ancient lights doctrine, but refusing to opine on the possibility that the easement for light and air could be acquired as an easement implied from prior use); *Napier v. Bulwinkle*, 39 S.C.L. (5 Rich.) 311, 316, 319–23 (1852) (same); *King v. Miller*, 8 N.J. Eq. 559, 559 (Ch. 1851); *Klein v. Gehrung*, 25 Tex. 232, 242 (Supp. 1860); *Cunningham v. Dorsey*, 3 W. Va. 293, 307 (1869). The first to appear hostile to the doctrine was the Massachusetts court. In dictum in a percolating water case, it declared: “[T]he proprietor . . . may consult his own convenience in his operations above or below the surface of his ground. He may obstruct the light and air above, and cut off the springs of water below the surface.” *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 123 (1836).

birthplace—and the New World.<sup>176</sup> In a new land where cities were frenetically growing, the ancient lights doctrine carried worrisome antidevelopmental consequences.<sup>177</sup> First, and most troubling, it aggressively limited construction. It prioritized pleasing views, which were now an indulgence, at the expense of new structures, which were a necessity.<sup>178</sup> Second, it compelled empty lots' owners to build on them immediately or risk losing the right to build, thereby hampering orderly development.<sup>179</sup> For some courts, these reasons merely warranted limiting the doctrine's reach in urban centers.<sup>180</sup> But most courts forwent gradualism: they found the prodevelopment rationale so compelling that they renounced the ancient lights doctrine altogether, inaccurately denying ever recognizing it.<sup>181</sup> The move formed part of the marked prodevelopment slant of American land law of the mid-nineteenth century. As prominent historians have noted in other contexts, to enable dynamic economic growth, the American law of the time broke with static property precepts that were characteristic of English law.<sup>182</sup>

As the second half of the nineteenth century progressed, little doubt remained that the ancient lights doctrine was wholeheartedly repudiated.

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<sup>176</sup> The technical rationale for the rejection was that, in its contemporary incarnation, the English doctrine, awarding the right after twenty years of continued enjoyment, was inspired by a statute of limitations not adopted in the colonies or states. Hence American courts argued that that doctrine did not form part of the common law applicable here. *Cunningham v. Dorsey*, 3 W. Va. 293, 306 (1869). Furthermore, and in the absence of statutory support, American courts stressed that the normal method for prescription's operation was irrelevant to light and air as explained *supra* in note 165. A prescriptive right to continue an activity is gained after the landowner refrains from taking legal action to stop said activity for the statutory period of time. But the owner through whose land another receives light and air never had a legal right to stop the other from consuming the light and air. *Cunningham*, 3 W. Va. at 306; *King*, 8 N.J. Eq. at 559. In most states the denial of the English statute of limitations thus led to the flat out rejection of the ancient lights doctrine. But for the Illinois court it was grounds for reverting to the original ancient lights doctrine. In Illinois, a right to continued access to light and air could only be acquired if the plaintiff had been enjoying it since time out of mind. *Gerber v. Gabel*, 16 Ill. 217, 221–22 (1854).

<sup>177</sup> *Parker*, 19 Wend. at 318 (“[T]he modern *English* doctrine on the subject of lights . . . may do well enough in *England* . . . . But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences.” (emphasis added) (citation omitted)); WASHBURN, *supra* note 161, at 497–98. The South Carolina court listed as factors distinguishing America from England and necessitating the abandonment of the doctrine not only the wider spaces and more rapid development found here, but also “the less jealous habits of our people.” *Napier*, 39 S.C.L. at 322–23.

<sup>178</sup> See Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 4 (1894).

<sup>179</sup> See *Hoy v. Sterrett*, 2 Watts 327, 331 (Pa. 1834).

<sup>180</sup> *E.g.*, *Fifty Assocs. v. Tudor*, 72 Mass. (6 Gray), 255, 259–60 (1856); see also 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*448 (acknowledging the application of the ancient lights doctrine in the United States, but presuming that it does not apply to narrow urban lots).

<sup>181</sup> *E.g.*, *Haverstick v. Sipe*, 33 Pa. 368, 371 (1859); *Parker*, 19 Wend. at 316–18.

<sup>182</sup> See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 31–54 (1977).



Unlike in England, in America an owner was free to build as she pleased.<sup>183</sup> The absolute privilege rule for land use was of the same cast as the contemporaneous absolute privilege rule for percolating waters. And as was the case with the Acton Rule, in due course, the absolute privilege rule for structures would strike courts and commentators as too strict, and exceptions—particularly, a spite exception—would emerge.

The push to authorize courts to regulate owners' land uses through balancing tests surfaced gradually as ideas about property evolved. A full account of the reinvention of property in the late nineteenth and early twentieth centuries extends beyond this Article's scope, and I have elaborated on the topic elsewhere.<sup>184</sup> A brief summary should suffice. As noted above, the ancient lights doctrine was unequivocally rejected during the middle decades of the nineteenth century—an era of fledgling economic development with a legal regime facilitating growth.<sup>185</sup> But by century's end, physical and economic conditions were changing drastically. The western frontier had closed,<sup>186</sup> and the nation was rapidly urbanizing. In accordance, the impulse to facilitate development at all costs was easing. Furthermore, conflicts between owners, now living in much closer vicinity to each other than ever before, were intensifying. In the newly cramped settings of the built environment of the era, an owner needed a greater degree of protection against neighboring development that might threaten her well-being—even at the inevitable cost of a decrease in her own legal freedom to develop her land.

This demand for protection translated into legal reforms. Water law, as seen earlier, was transformed;<sup>187</sup> elsewhere, an aggressive nuisance jurisprudence developed to limit certain owner activities;<sup>188</sup> new statutes barred other land uses;<sup>189</sup> and tenement acts, launched by New York in

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<sup>183</sup> See *Sher v. Leiderman*, 226 Cal. Rptr. 698, 702 (Ct. App. 1986) (explaining that a reason for the ancient lights' rejection in the middle of the nineteenth century was that "a landowner's rights to use his land were virtually unlimited; it was thought that he owned to the center of the earth and up to the heavens").

<sup>184</sup> See Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91 (2011).

<sup>185</sup> See *supra* notes 181–82 and accompanying text.

<sup>186</sup> On the significance of the disappearance of the "unsettled" West, see FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* 1 (Penguin Books 2008) (1893).

<sup>187</sup> See *supra* Section II.A.

<sup>188</sup> *E.g.*, *McMorran v. Fitzgerald*, 64 N.W. 569, 569–70 (Mich. 1895) (enjoining the operation of a machine and blacksmith shop in an area otherwise devoted to residences). See generally Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986) (exploring the history of American nuisance law, which limits owners' certain uses of land).

<sup>189</sup> See, *e.g.*, *In re Hang Kie*, 10 P. 327, 328–29 (Cal. 1886) (approving statute limiting laundries); *Cronin v. People*, 82 N.Y. 318, 322–23 (1880) (approving statute limiting slaughter houses).

1867, set minimum standards for rental units.<sup>190</sup> As part of this mounting wave of land use regulation, the prohibition on spite fences, rejected decades earlier in the *Mahan* decision discussed above, was reappraised.

The tale of the case reevaluating the prohibition is emblematic of the evolving conditions and legal demands of the American-built environment of the late nineteenth century. In the already mentioned 1888 case of *Burke v. Smith*, the Michigan court was faced with a neighbors' dispute from Kalamazoo.<sup>191</sup> Originally a village, Kalamazoo graduated into cityhood less than five years before the dispute.<sup>192</sup> The dispute arose when one owner, Burke, took advantage of the locale's swift development by subdividing his lot into rental units.<sup>193</sup> Unpleased with the project, a neighbor named Smith erected a fence blocking light from reaching one of the units.<sup>194</sup> The court enjoined this fence, holding that the rule affording Smith the right to build as he pleases—i.e., the denial of the ancient lights doctrine—must admit an exception for structures motivated by spite, such as Smith's fence.<sup>195</sup>

The treatment of that Kalamazoo spite fence set the tone for fences elsewhere. In the succeeding years, many courts followed *Burke*,<sup>196</sup> and concurrently, the 1880s and the ensuing decades witnessed a spate of statutes specifically barring spite fences.<sup>197</sup> By and large, the earlier New York decision of *Mahan* was no longer the law of the land.<sup>198</sup> Like the digging of spite wells discussed earlier, the erection of spite fences ceased to count among an owner's prerogatives.

On its face, the prohibition on spite fences—whether originating in judicial or legislative act—trafficked in mental states. As explained in *Burke*, an owner was proscribed from acting for “a wicked purpose . . . to gratify his spite and malice towards his neighbor.”<sup>199</sup> Yet almost immediately after spite's introduction, the test changed. Two years after *Burke*, the Michigan court transformed the question, “Was the fence

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<sup>190</sup> LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 25–39 (1968).

<sup>191</sup> 37 N.W. 838, 838 (Mich. 1888).

<sup>192</sup> An Act to Re-incorporate the Village of Kalamazoo, and to Repeal All Inconsistent Acts and Parts of Acts, No. 337, 1883 Mich. Pub. Acts 667 (incorporating the village of Kalamazoo as the city of Kalamazoo).

<sup>193</sup> *Burke*, 37 N.W. at 838.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 839–40.

<sup>196</sup> POWELL, *supra* note 34, at § 62.05, at 62–45 n.4 (explaining that the decision represented a turning point for many other states).

<sup>197</sup> *See infra* notes 210–15.

<sup>198</sup> In New York, a court found the “old” *Mahan* precedent irrelevant since the legislature adopted a spite fence statute. *Saperstein v. Berman*, 195 N.Y.S. 1, 2 (Sup. Ct. 1922).

<sup>199</sup> 37 N.W. at 842.

builder's purpose wicked?" into the question, "Does the fence serve a 'useful or needful purpose?'"<sup>200</sup>

When determining whether a fence was spiteful, courts in Michigan and the other states asked whether it served a useful purpose. The precise role assigned to this question was not always clear. The question could sometimes be read as the evidentiary tool through which spite's presence was discerned.<sup>201</sup> More often, it was posed as the substantive test for spite: a spiteful fence was a fence lacking a useful purpose.<sup>202</sup> Either way, this, and not the question respecting the builder's actual mental state, was the inquiry courts preferred to contemplate when debating the existence of spite. Such invocation of a usefulness standard inexorably shifted spite law's focus away from its alleged subjective interest.<sup>203</sup>

One court appears to have sensed this shift and could not square it with the reasoning leading to the spite prohibition.<sup>204</sup> The Alabama court thus insisted that a plaintiff actually prove the defendant's malicious intent to injure him.<sup>205</sup> The plaintiff in that case provided evidence that the fence was useless, but the court would not equate uselessness with malice, or infer the latter from the former.<sup>206</sup> Yet the Alabama court was an outlier. Elsewhere, courts could readily announce: "Even though it should be held that defendants did not intend to injure plaintiff's business, yet, since their acts brought about such a result, with no profits or benefits to themselves, the legal effect of their action is the same as if they had purposely intended the result."<sup>207</sup> Accordingly, it became clear that a spiteful fence could be found in actual spite's absence,<sup>208</sup> and that a fence motivated by actual spite could be deemed nonspiteful.<sup>209</sup>

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<sup>200</sup> Flaherty v. Moran, 45 N.W. 381, 381 (Mich. 1890).

<sup>201</sup> *E.g.*, Hibbard v. Halliday, 158 P. 1158, 1159 (Okla. 1916).

<sup>202</sup> *E.g.*, Parker v. Harvey, 164 So. 507, 512 (La. Ct. App. 1935); Metz v. Tierney, 83 P. 788, 788 (N.M. 1906); Bush v. Mockett, 145 N.W. 1001, 1002 (Neb. 1914); Barger v. Barringer, 66 S.E. 439, 442 (N.C. 1909); Racich v. Mastrovich, 273 N.W. 660, 663 (S.D. 1937).

<sup>203</sup> Perhaps for this reason, one early twentieth-century writer actually referred to the early spite fence cases as "apply[ing] the doctrine of reasonable use in cases involving unnecessary obstruction of light and air." Rumble, *supra* note 171, at 308. The author concludes that the cases should be read as instituting a principle that "[a] use which is inspired by malice and which is injurious to others than the owner, in order to be lawful, must be reasonable." *Id.* at 314 (emphasis removed).

<sup>204</sup> Norton v. Randolph, 58 So. 283, 285 (Ala. 1912).

<sup>205</sup> *Id.* at 286.

<sup>206</sup> *Id.*

<sup>207</sup> Parker, 164 So. at 512.

<sup>208</sup> *E.g.*, *id.*

<sup>209</sup> Stroup v. Rauschelbach, 261 S.W. 346, 347 (Mo. Ct. App. 1924); Green v. Schick, 153 P.2d 821, 822 (Okla. 1944).

Courts thus incorporated a usefulness requirement into precedents prohibiting spite fences, lessening their subjective slant. Where the prohibition was instituted through statute, there was much less need for such judicial moves as, in the first place, most legislatures set objective standards for their statutes' application. Some statutes did not even require spite when enjoining "spite" fences. The 1885 California law required an adjoining landowner's consent for the construction of any fence exceeding ten feet in height.<sup>210</sup> New York's 1922 law declared all such fences blocking a neighbor's light and air nuisances.<sup>211</sup> Other statutes that did require spite supplemented the spite requirement with other, objective prerequisites. The fence not only had to be spitefully motivated, but it also had to exceed a certain height (generally, six feet), and most prominently, be "unnecessary."<sup>212</sup> In other words, under the statutes, not all spite fences were spite fences for legal purposes: a low fence could never be actionable, and a tall fence could not be barred if it were in some way necessary.

Courts regarded the unnecessariness requirement as vital. When the Massachusetts spite fence statute's constitutionality was challenged, Justice Holmes implied that it would not have been upheld had its ambit not been qualified through the unnecessariness requirement: "If the height above six feet is really necessary for any reason, there [must be] no liability, whatever the motives of the owner in erecting it."<sup>213</sup> Likewise, in Washington and Connecticut, two of only three states whose statutes merely required malicious intent to render a fence actionable,<sup>214</sup> courts

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<sup>210</sup> Act of Mar. 9, 1885, ch. 39, 1885 Cal. Stat. 45.

<sup>211</sup> Act of Mar. 30, 1922, ch. 374, 1922 N.Y. Laws 795 (applicable to fences over ten feet).

<sup>212</sup> Act of May 28, 1913, ch. 197, 1913 Cal. Stat. 342 (codified as amended at CAL. CIV. CODE § 841.4 (Deering 2014)) (ten feet) (adopting a second spite fence law after the scope of the first one was drastically narrowed by the court in *Granite & Marble v. Knickerbocker*, 37 P. 192 (Cal. 1894)); Act of Mar. 7, 1893, ch. 188, 1893 Me. Laws 205 (codified as amended at ME STAT. tit. 17, § 2801 (2014)) (eight feet; amended to six feet by Act of Mar. 26, 1903, ch. 153, 1903 Me. Laws 119); Act of June 2, 1887, ch. 348, 1887 Mass. Acts 971 (codified as amended at MASS. GEN. LAWS ch. 49, § 21 (2014)) (six feet); Act of Oct. 25, 1887, ch. 91, 1887 N.H. Laws 469 (codified as amended at N.H. REV. STAT. ANN. § 476:1 (2014)) (five feet); Act of June 22, 1917, ch. 213, 1917 Pa. Laws 621 (codified as amended at 53 PA. STAT. AND CONS. STAT. § 15171 (West 2014)) (four feet); Act of May 4, 1909, ch. 416, 1909 R.I. Pub. Laws 148 (codified as amended at 34 R.I. GEN. LAWS § 34-10-20 (2014)) (six feet); Act of Nov. 19, 1886, ch. 84, 1887 Vt. Acts & Resolves 59 (codified as amended at VT. STAT. ANN. tit. 24, § 3817 (2014)) (six feet; amended to no height restriction by Act of Dec. 11, 1912, ch. 154, 1913 Vt. Acts & Resolves 185); Act of Apr. 20, 1903, ch. 81, Wis. Sess. Laws 121 (repealed by Act of Apr. 24, 1974, ch. 189, § 11, 1974 Wis. Sess. Laws 595) (six feet) (overruling *Metzger v. Hochrein*, 83 N.W. 308 (Wis. 1900), where the court refused to adopt the spite fence doctrine).

<sup>213</sup> *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889).

<sup>214</sup> The third state was Minnesota. See Act of Apr. 24, 1907, ch. 387, 1907 Minn. Laws 545 (codified as amended at MINN. STAT. § 561.02 (2014)). However, it was not until 2009 that a nuisance case was decided in reference to the statute. See *Gelao v. Coss*, No. A08-1725, 2009 WL 2745833, at \*7-8 (Minn. Ct. App. Sept. 1, 2009).

added the requirement that the fence be unnecessary.<sup>215</sup> The Connecticut court explained that although the statute solely required malicious intent, “intention relates to the thing done and its purpose and effect, and does not depend on the existence or nonexistence of personal spite or ill will.”<sup>216</sup> Accordingly, the court concluded that the degree to which the defendant in the case at bar shared his spouse’s enmity towards the plaintiff was of limited importance to a spite finding.<sup>217</sup> The determinative question was whether the fence he had built was of any use.<sup>218</sup>

In a process mirroring the one Section II.A detected in water law, the adjective *spiteful* in land use law was reimagined as meaning *useless* or *unnecessary*. A term relating to subjective personal intent was replaced with one reflecting objective social worth.<sup>219</sup> This development did not render the doctrine less innovative for its time; if anything, it made spite more revolutionary. Spite doctrine measured a structure’s social value before condoning an owner’s decision to build. It thence turned into a tool for regulating land uses—into one of the first legal instruments empowering public decisionmakers to design the physical environment in a socially beneficial manner. The equation of spitefulness with uselessness did so almost explicitly: the criterion for spite was that a fence generate harm to one piece of land without generating a benefit to another.<sup>220</sup> As courts stated, this was at heart a reasonableness, or proportionality, test.<sup>221</sup> One court clarified that the “evil” spite fence laws were intended to remedy was not

the bickerings, spite, and hatred arising from neighborhood quarrels. It is difficult for any legislation to remedy such evil. Plainly, the real evil consists in the occasional subjection of a landowner to the impairment of the value of his land by the erection of a structure which substantially serves . . . no purpose . . . .<sup>222</sup>

Similarly, for Justice Holmes the spite fence prohibition was a constitutional exercise of the police power since “it simply restrains a noxious use of the owner’s premises”<sup>223</sup> and “limit[s] the use of property in

<sup>215</sup> *Whitlock v. Uhle*, 53 A. 891, 892 (Conn. 1903); *Karasek v. Peier*, 61 P. 33, 36 (Wash. 1900).

<sup>216</sup> *Whitlock*, 53 A. at 892.

<sup>217</sup> *Id.* at 893.

<sup>218</sup> *Id.* at 892.

<sup>219</sup> The modern doctrine of spite was said to be “based on the rule of reason.” Rumble, *supra* note 171, at 315.

<sup>220</sup> *Whitlock*, 53 A. at 892.

<sup>221</sup> *E.g.*, *Bush v. Mockett*, 145 N.W. 1001, 1002 (Neb. 1914); *Horan v. Byrnes*, 54 A. 945, 948–49 (N.H. 1903); *Karasek v. Peier*, 61 P. 33, 36 (Wash. 1900).

<sup>222</sup> *Whitlock*, 53 A. at 892.

<sup>223</sup> *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889).

ways which greatly diminish its value.”<sup>224</sup> Spite law did not strive to proliferate common decency values; it endeavored to stimulate property values.

As in water law, the prohibition on spite in land use burgeoned from a realization that unbridled owner freedom may no longer be easily justified, and thus the value of the use an owner chooses for her property should sometimes be assessed. Spite was therefore a step away from the existing regime monopolizing power in the owner. But as was the case in water law, it was merely a first step—a timid and cautious one. Needs and ideas had changed, but not far enough to fully undermine the prodevelopment policies that engendered the rejection of the ancient lights doctrine. The prohibition on spite fences did not posit too great of a threat to these values.<sup>225</sup> It singled out the construction of fences—and only fences—for special treatment. This feature encapsulated the prohibition’s special appeal. For jurists commencing to register the risk of unchecked development but still queasy about full-blown land use regulation, a prohibition applicable to fences alone was a confined, and therefore attractive, rule.<sup>226</sup> It was a convenient way station along a still tentative course away from the absolute owner freedom regime.

Especially in retrospect, this guarded prohibition materializes as harbinger of broader rules yet to come for thorough collective design of the built environment. For example, statutes regulating spite fences towering beyond a fixed height served as precursors to modern regulations capping all structures’ heights. Or consider the Pennsylvania spite fence statute, which held sway only in “suburban” areas.<sup>227</sup> Its mode of operation was that of future zoning laws, which would divide space into districts and enforce different regulations in each.

As in water law, the exception from the owner privilege rule carved out for spitefully motivated acts in land use announced the upcoming general shift from a regime premised on the owner’s right to act as she

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<sup>224</sup> *Id.* at 393.

<sup>225</sup> For some courts this was cause enough to decline the prohibition on spite fences. Since an owner would be allowed to construct any other structure causing the same effects, there was no reason to block him from constructing a fence. *See, e.g.*, *Giller v. West*, 69 N.E. 548, 549 (Ind. 1904); *Saddler v. Alexander*, 56 S.W. 518, 519 (Ky. 1900); *Bordeaux v. Greene*, 56 P. 218, 219 (Mont. 1899); *Letts v. Kessler*, 42 N.E. 765, 766 (Ohio 1896).

<sup>226</sup> Thus, for example, some courts stubbornly questioned local governments’ power to refuse building permits, *State v. Tenant*, 14 S.E. 387, 388 (N.C. 1892), to prohibit some businesses, *City of St. Louis v. Dorr*, 46 S.W. 976, 977 (Mo. 1897) (en banc), or to zone, *Spann v. City of Dallas*, 235 S.W. 513, 514–15 (Tex. 1921).

<sup>227</sup> Act of June 22, 1917, ch. 213, 1917 Pa. Laws 621 (codified as amended at 53 PA. STAT. AND CONS. STAT. § 15171 (West 2014)).

pleases to one steeped in public regulation.<sup>228</sup> The objective balancing approach that spite applied to fences would shortly expand through varied legal means to cover all land use decisions. As seen, courts and legislatures rediscovered the spite prohibition in the late 1880s. Almost immediately thereafter, in the final decade of the nineteenth century, legislatures began adopting general height regulations (laws restricting the height of all buildings in a city or part thereof).<sup>229</sup> In the next decade, opening the twentieth century, they enacted rules respecting buildings' bulk (laws establishing setbacks, minimum lot sizes, and lot coverage limitations).<sup>230</sup> In the century's second decade, zoning laws (laws limiting the size, location, and use of buildings in a city or part thereof) were introduced and rapidly spread.<sup>231</sup> Within a very short span of time, the meaning of property in American law had shifted. Property law was no longer first and foremost dedicated to the owner's freedom to set the agenda for her land's use. Rather, it was committed to orderly growth and to protecting owners from rampant development.<sup>232</sup> Owners were now subject to onerous restrictions and conditions aimed at safeguarding public benefits whenever they sought to construct a building on their lands. The logic animating the spite exception was generalized. Universal laws now achieved directly the goals of social balancing and regulated development that the spite exception pursued indirectly.

Inevitably, though, the need for a spite exception to the rule privileging owners' right to build disappeared alongside that privilege

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<sup>228</sup> See ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 549 (4th ed. 2013) (noting "spite fence doctrine" was one of the "earliest [principles] to evolve" in "American nuisance law").

<sup>229</sup> Massachusetts enacted height regulations for Boston in 1891–1892. The restriction was upheld in *Welch v. Swasey*, 214 U.S. 91 (1909).

<sup>230</sup> *E.g.*, *Wulfsohn v. Burden*, 150 N.E. 120, 121, 125 (N.Y. 1925) (upholding the constitutionality of Act of 1909, ch. 26, 1909 N.Y. Laws 15).

<sup>231</sup> The first comprehensive zoning ordinance was adopted by New York City in 1916. It divided the city into use districts, area districts, and height districts. The state court approved the ordinance in *Lincoln Trust Co. v. Williams*, 128 N.E. 209 (N.Y. 1920). A few years before, in 1909, Los Angeles approved an ordinance establishing "industrial districts" and declaring the remainder of the city to be a "residence district," where certain occupations, including laundries, were prohibited. The court approved in *Ex parte Quong Wo*, 118 P. 714 (Cal. 1911). In 1910, Los Angeles further excluded brick factories from some of the industrial districts. The Supreme Court upheld the move. *Hadacheck v. Sebastian*, 239 U.S. 394, 404, 413 (1915). By 1926, all but five of the states had adopted zoning enabling acts, and 420 municipalities had zoning ordinances. Brief for National Conference on City Planning et al. as Amici Curiae Supporting Appellants, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (No. 31), reprinted in ALFRED BETTMAN, *CITY AND REGIONAL PLANNING PAPERS* 157–93 (Arthur C. Comey ed., 1946).

<sup>232</sup> See Shoked, *supra* note 184, at 142–45.

rule.<sup>233</sup> The same occurred, as should be recalled, in water law. The law moved away from using the owner's freedom as the baseline and towards defaulting to objective regulation of her activity's social costs and benefits. Once that transformation was complete, the spite prohibition, always concerned with that same form of objective regulation rather than with motive tests, ceased to develop and withered away.<sup>234</sup> Spite fence statutes remained on the books, and precedents invalidating spite fences stood undisturbed, but courts were unwilling to broaden them beyond their existing, and highly qualified, scope.<sup>235</sup>

Most prominently, when solicited to apply spite prohibitions—particularly, though not only, those found in statutes<sup>236</sup>—courts from the second quarter of the twentieth century onwards asserted that the only structures that could ever be enjoined were fences, the subject matter of the old cases and statutes.<sup>237</sup> Hence, often spite law cases came to hinge on one question: what structures counted as fences? The litigated issue was whether the contested structure was close enough to the property line to constitute a fence,<sup>238</sup> and whether it was in the “character” of a fence. Thus, dilapidated houses could not be enjoined as spiteful,<sup>239</sup> but a sign could.<sup>240</sup> A

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<sup>233</sup> Cf. Kelly, *supra* note 39, at 1661 (noting that once zoning laws separated residential from commercial and industrial parcels, litigation over nuisances created to force the disturbed party to buy out the disturbing parties subsided).

<sup>234</sup> Sometimes the power to prohibit spite fences was inserted into a general authorization to regulate the height of fences. *E.g.*, Act of Mar. 12, 1909, ch. 31, ch. 6, § 23, 1909 Tex. Loc. & Spec. Laws 227, 272 (incorporating in the special charter granted to the city of Fort Worth the “power to regulate the height and character of fences on private property . . . , and to prohibit the erection or maintenance of ‘spite fences’”).

<sup>235</sup> *E.g.*, Cohen v. Perrino, 50 A.2d 348, 350–51 (Pa. 1947).

<sup>236</sup> Courts used spite fence statutes to actually limit the reach of the doctrine in other ways as well. For example, one court refused to apply the judicial doctrine to instances excluded from the state's fence law, which only applied to fences of six feet or more. *Musumeci v. Leonardo*, 75 A.2d 175, 177–78 (R.I. 1950).

<sup>237</sup> Even in the three states whose spite fence laws explicitly state their application to all structures, courts have been reluctant to deal with non-fences. CONN. GEN. STAT. §§ 52-480, 52-570 (2014); MINN. STAT. § 561.02 (2014); WASH. REV. CODE § 7.40.030 (2014). Only in one case has a court exhibited a willingness to do so. *See Piotrowski v. Esparo*, No. CV084008715, 2009 WL 962694, at \*1–3 (Conn. Super. Ct. Mar. 16, 2009) (finding the moving of a hangar, which was useful in itself, to abut neighboring land was spiteful). In all other cases the claim has been adamantly rejected. *E.g.*, *Gundstrom v. Zweifel*, No. A08-2259, 2009 WL 2747249, at \*2–3 (Minn. Ct. App. Sept. 1, 2009) (refusing to apply the statute to an unsightly mound of dirt). In Washington, the court held early on that a literal interpretation of the statute, empowering courts to block all structures and not just fences, would be unconstitutional. *Karasek v. Peier*, 61 P. 33, 36 (Wash. 1900). Hence the court later held that a garage could not be covered. *Jones v. Williams*, 106 P. 166, 168–69 (Wash. 1910).

<sup>238</sup> *See, e.g.*, *Deraismes v. Ferguson*, No. WC 2007-0040, 2011 WL 997145, at \*11–12 (R.I. Super. Ct. Mar. 18, 2011).

<sup>239</sup> *White v. Bernhart*, 241 P. 367, 369 (Idaho 1925).

<sup>240</sup> *Sundowner, Inc. v. King*, 509 P.2d 785, 787 (Idaho 1973).



row of trees<sup>241</sup> or a pile of logs<sup>242</sup> could be enjoined, but an elevator enclosure could not.<sup>243</sup>

In addition, after having determined that the disputed structure was indeed a fence, twentieth-century courts in spite cases insisted, even more forcefully than their predecessors, that the criterion for an actionable fence was whether its harms exceeded its benefits; malice-based tests, they explained, were outdated.<sup>244</sup> They became outdated when property law explicitly espoused the public policy oriented limits to owners' freedom the doctrine had introduced under the guise of those malice-based tests. At that point, spite doctrine in its entirety could be deemed outdated, and accordingly courts grew reluctant to resort to it at all. Any social ill previously addressed by spite fence jurisprudence was currently addressed by zoning laws. Courts were disinclined to employ the spite prohibition to supplement these laws, even when the owner inarguably acted spitefully. In the *Fontainebleau* case, mentioned in the Introduction, Novack's malicious intent in blocking the Eden Roc's pool owned by his former partner was indubitable. The Florida court still refused to enjoin the spite wall. As it explained, if Eden Roc were correct in arguing that there were good policy reasons to halt the wall, it should have persuaded the Miami Beach zoning authorities to act.<sup>245</sup> In Miami Beach, as elsewhere in the twentieth century, local authorities were constantly balancing competing land uses' utilities. There was therefore no need—indeed, there was no justification—for courts to resort to a spite doctrine that, always caring very little about actual spite, had allowed such objective balancing when no other authority was engaged in planning.

In these ways, the spite prohibition in land use was sidelined during the twentieth century. The authors wedded to the notion of abuse of right, whose work was reviewed in Part I, ignore this current reality and overstate spite's importance in twentieth- and twenty-first-century land use law. At the same time, paradoxically, they understate spite's importance to the emergence of twentieth- and twenty-first-century land use law. The reason spite occupies a marginal position in the law today—applied, if at all, to fences alone—is that its true rationale has permeated all aspects of land use law. Spite was introduced when the law was premised on an owner's

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<sup>241</sup> *Dowdell v. Bloomquist*, 847 A.2d 827, 830 (R.I. 2004).

<sup>242</sup> *Dunbar v. O'Brien*, 220 N.W. 278, 279 (Neb. 1928).

<sup>243</sup> *Blair v. 305-313 E. 47th St. Assocs.*, 474 N.Y.S.2d 353, 356 (Sup. Ct. 1983).

<sup>244</sup> *See, e.g., Webb v. Lambley*, 148 N.W.2d 835, 837-38 (Neb. 1967); *Hay v. Stevens*, 530 P.2d 37, 40 (Or. 1975); *Schork v. Epperson*, 287 P.2d 467, 470-71 (Wyo. 1955).

<sup>245</sup> *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 360 (Fla. Dist. Ct. App. 1959).

freedom to build. The spite prohibition moderated that freedom through a requirement that the structure built be socially useful. The prohibition did not serve to punish ill-meaning owners; it served to enable land use regulation in an era that knew little such regulation. As the concept of property evolved, and as spite doctrine's idea—the idea that social regulation is imperative—overthrew land use law's devotion to owners' freedom, spite doctrine itself became an afterthought. A doctrine that had heralded property's redefinition in American law became, due to its success, a body of law dedicated to divining what is a fence.

*C. Spite in Support Rights and in Restraints on Alienation*

In water and land use law, a legal category of spite, albeit hardly ever correlating to the lay category of spite, has played a major role in the law's development. In two other property law subfields—support rights and restraints on alienation—spite technically formed at times part of the law, but it did not actually play any role in its operation. Lawmakers' eschewal from relying on the formally available spite category in these subfields unsettles the first element of the reigning reading of spite's function, reviewed in Part I, which holds that spite is a meaningful, broad concept restraining owners. Furthermore, the circumstances surrounding the judicial inaction on spite in these subfields aid in upending that reading's other element: that spite regulates mental states. The legal nonintervention in these subfields reinforces this Part's thesis that the spite prohibition was used to introduce objective, not subjective, balancing into property law when the law lacked such balancing. The law governing support and restraints on alienation already, in and of itself, limited the owner's freedom of action through objective balancing—and hence in neither did courts experience an impulse to avail themselves of the spite prohibition.

The first-ever judicial declaration that an act spitefully motivated is actionable was made not in a water or land use dispute, but in a conflict over support for soil. Yet not in that case, nor in any other support conflict that followed, was that prohibition enforced. In their factual underpinnings, such quarrels over support are reminiscent of those revolving around underground water. As with conflicts over percolating waters, conflicts over soil support arise when one owner digs on her land. In debates over percolating waters, reviewed in Section II.A, the neighbor's attendant harm is the resultant lost ability to withdraw water from her land; in debates over support rights, the harm is the resultant loss of support for her land and its subsidence or even collapse. Unlike its indifference, expressed through the Acton Rule, towards neighbors' complaints over lost percolating waters, however, the common law never granted the owner the freedom to

excavate with disregard to such harms. Rather, it has historically held that a neighbor has a “right to have the soil in its natural condition supported by the soil of adjoining land.”<sup>246</sup> Thus all owners are subject to a strict liability duty not to remove support for their neighbors’ lands.<sup>247</sup> The rule clearly limits an owner’s freedom of excavation, but its phrasing strictly delineates that limit. The owner will be liable, always, if she excavates and removes support for her neighbor’s land in its *natural conditions*.<sup>248</sup> Ergo the rule does not apply if the owner removes support for her neighbor’s *structures*.<sup>249</sup>

Still, as the New York court clarified early on, in 1819, the fact that the owner is not automatically liable for an excavation removing support for her neighbors’ structures does not intimate that she can never be found liable. She will be liable if she acted maliciously.<sup>250</sup> The ruling thus included the first statement in American law that “[i]n the exercise of a lawful right, a party may become liable to an action, where it appears that the act was done maliciously.”<sup>251</sup> Dramatic as the statement might have been, however, the ruling also assured that it would carry little effect: the court added that a defendant charged for removal of support for structures could also be found liable in malice’s absence—if she acted negligently.<sup>252</sup>

The move to equate spite with unreasonableness, accomplished only gradually and implicitly in water law and land use law, was completed immediately and explicitly upon the introduction of the spite prohibition into support law. Courts experienced none of the circumspection evident in those other subfields because, unlike in water law and land use law, the rule governing support rights never awarded owners absolute freedom; from the outset, the owner’s right was limited as she could not remove support for neighboring land in its natural conditions. Some degree of interest balancing between neighbors was always present, and never questioned, in support law. Forthrightly expanding such balancing was therefore uncontroversial and could proceed directly rather than obliquely under the pretense of spite analysis.

Consequently the prohibition on malicious motives, formally recognized in New York and elsewhere, has not played any role in support

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<sup>246</sup> 8 THOMPSON ON REAL PROPERTY, § 69.01 (David A. Thomas ed., 2d Thomas ed. 2015), LexisNexis TORPTE.

<sup>247</sup> *Tunstall v. Christian*, 80 Va. 1, 3 (1885).

<sup>248</sup> See *Wyatt v. Harrison* (1832) 110 Eng. Rep. 320, 322; 3 B. & Ad. 870, 874–76.

<sup>249</sup> See *Thurston v. Hancock*, 12 Mass. 220, 229 (1815).

<sup>250</sup> *Panton v. Holland*, 17 Johns. 92, 98 (N.Y. Sup. Ct. 1819).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 99.

law. Courts have continued throughout the centuries to list “improper motive” as a circumstance potentially generating liability for removal of lateral support for structures.<sup>253</sup> However, since they have also acknowledged negligence as basis for liability,<sup>254</sup> these statements have amounted to little; no case has ever turned on improper motive, and, moreover, no court has ever investigated an excavator’s motive.<sup>255</sup>

The spite prohibition met a similar insipid fate in the property law subfield of restraints on alienation. This body of law limits an owner’s ability to restrict future transfers of her land. Through a restraint on alienation, an owner attempts, by terms of her land’s conveyance, to eliminate successors’ power to transfer the property, or to “lessen the likelihood of their exercise of this power by stating adverse consequences of an attempt later t[o] transfer.”<sup>256</sup> Due to the social interest in land’s alienability, English common law held such restraints void as “repugnant” to the fee.<sup>257</sup> In the nineteenth century, American courts adopted this rule.<sup>258</sup> Yet it was soon qualified to apply only to *unreasonable* restraints.

The decisive factor in determining a restraint’s reasonableness was its extent: whether it was absolute or partial (i.e., qualified in its duration, in the class of people to whom it bars transfers, etc.).<sup>259</sup> Still, courts<sup>260</sup> and the original Restatement<sup>261</sup> also listed as unreasonable restraints that were “capricious” or “imposed for spite or malice.” An example of a restraint struck down as imposed for spite is found in the Arkansas case *Casey v.*

<sup>253</sup> *E.g.*, *Winn v. Abeles*, 10 P. 443, 447 (Kan. 1886); *McGuire v. Grant*, 25 N.J.L. 356, 361 (Sup. Ct. 1856); *Schultz v. Byers*, 22 A. 514, 514–15 (N.J. 1891).

<sup>254</sup> *E.g.*, *Conboy v. Dickinson*, 28 P. 809, 810 (Cal. 1891); *City of Quincy v. Jones*, 76 Ill. 231, 241 (1875). Courts have stressed that the negligence standard applied in these cases may not be as taxing as in other cases. *E.g.*, *Charless v. Rankin*, 22 Mo. 566, 574 (1856).

<sup>255</sup> RESTATEMENT (SECOND) OF TORTS § 819 cmt. e (AM. LAW INST. 1979) (stating that strong dicta supports the proposition that an excavation is itself unreasonable when made for the sole purpose of harming another’s premises); F.E.M., Annotation, *Liability of One Excavating on His Own Premises for Resulting Injury to Adjoining Building*, 50 A.L.R. 486, § 1(c), at 498 (1927) (“Though there appears to be no case wherein liability has been actually imposed on this ground, obiter statements to that effect may be found in a number of decisions.”).

<sup>256</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS pt. 2, intro. note, at 143 (AM. LAW INST. 1983).

<sup>257</sup> *See* JOHN CHIPMAN GRAY, RESTRAINTS ON ALIENATION §§ 18–19, at 9–10 (2d ed., Boston, Bos. Book Co. 1895) (1893).

<sup>258</sup> *E.g.*, *Mandlebaum v. McDonell*, 29 Mich. 78, 107 (1874); *De Peyster v. Michael*, 6 N.Y. 467, 505 (1852). For an overview, see generally Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373 (1935).

<sup>259</sup> *See, e.g.*, *Lawson v. Lightfoot*, 84 S.W. 739, 740 (Ky. 1905); *Munroe v. Hall*, 1 S.E. 651, 653 (N.C. 1887).

<sup>260</sup> *See, e.g.*, *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 729 (1915); *Lawson v. Redmoor Corp.*, 679 P.2d 972, 974 (Wash. Ct. App. 1984).

<sup>261</sup> RESTATEMENT (FIRST) OF PROP. § 406 cmt. i (AM. LAW INST. 1944).

*Casey*,<sup>262</sup> where a testator devised land to his son subject to the condition that the son would lose the land if he ever attempted to transfer it to his daughter (the testator's granddaughter) or allowed her to stay therein for more than one week per year.<sup>263</sup> Other than in that sole case, however, no court passing judgment on the reasonableness of a restraint on alienation ever addressed the caprice and spite factors listed in the early version of the Restatement, and accordingly they disappear from subsequent Restatements.

In light of this Part's findings with respect to other property subfields, the paucity of cases dealing with spiteful restraints on alienation is readily explicable. As shown, spite was used to introduce objective interest balancing where such balancing was missing. The unreasonable restraints on alienation doctrine always invited courts to engage in an objective balancing of the competing interests of the owner drafting the restraint and those affected. There was no need for a spite exception to stealthily open the door for such balancing. Reasonableness was incorporated into the doctrine; indeed, into its name. Spite was important in property subfields where an owner enjoyed uninhibited freedom of action—in water law and land use law where the Acton Rule and the rejection of the ancient lights doctrine, respectively, isolated owners from regulation. The appeal to spite empowered courts to engage in regulation. Once the absolute rule was replaced with a balancing rule—reasonable use in water law, zoning in land use—the spite exception faded away. In subfields where the rule always placed a balancing-based limit to owners' freedom—in support law and restraints on alienation—spite was a feeble element of the law throughout.

#### *D. Summary: The Nature of American Spite*

Invariably, whether playing a meaningful role in a subfield—by announcing the demise of absolute freedom rules—or amounting to a mere trifle in a subfield—where such rules never ascended—at no time did spite target deplorable mental states. Spite tells us much about ideas of property in American law, but the lesson it teaches is disconnected from that read by current commentators. The latter contend, as seen in Part I, that spite is a general restraint on ownership instituting a mental-state-based test for judging owners' acts. Yet the two centuries of American spite, explored in this Part, illustrate that mental states never set property rights' boundaries—definitely not in general, but also not in the specific property law subfields where a spite prohibition was recognized at some point.

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<sup>262</sup> 700 S.W.2d 46 (Ark. 1985).

<sup>263</sup> *Id.* at 47, 49.

Legal spite in America has had nothing to do with spite; rather, for centuries it incarnated the irresistible yearning for an assessment of property uses' social costs and benefits.

### III. WHAT IS WRONG WITH SPITE? SPITE'S NORMATIVE STANDING

Why did courts consistently refrain from employing the spite prohibition as a mental state test? Was it a justified normative decision or a mistake? Part II debunked the scholarly consensus that spite is a property doctrine blocking owners from acting in pursuit of certain desires. It thereby explained why American law does not investigate or censure Mr. Markovitz's motive in erecting the middle-finger statue that launched this Article. Still, the claim promoted by the many commentators whose work was reviewed in Part I is not solely descriptive. They insist that property law bans spite and that it *should* ban spite. This final Part will argue that this normative component of the conventional story of spite is as flawed as its descriptive component: property law not only refrains from prohibiting spite, it also cannot, and should not, prohibit spite. The law, that is, must remain indifferent to Mr. Markovitz's pettiness.

The assertion thus to be made is that spite's evolution in water law and land use law, whereby lawmakers transformed the subjective exploration of owners' motives into objective analysis of their acts' utility, is inevitable and desirable. Property law must be concerned not with intentions, but with effects. The alternative is logically incoherent and normatively incompatible with property law's goals.

The normative argument of commentators embracing that alternative—i.e., the subjective spite prohibition—is straightforward: the law ought not empower an owner to act solely to harm another. This contention's starting point is the conviction that sometimes an act's legality must hinge on the actor's motivation. As Mitchell Berman succinctly put it: "Reasons matter."<sup>264</sup> The explanations anti-spite writers provide for why reasons matter, and more specifically, for why spiteful reasons must be disqualified, are diverse. Some argue that since the purpose for which society recognized private ownership is effective use of land, an owner's decision to do something with land must be guided by an informed judgment respecting the land's desirable use.<sup>265</sup> Others contend that since, in a social system, harms inflicted on others must be morally justified, an owner knowingly inflicting harm must sincerely believe that there are good

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<sup>264</sup> Mitchell Berman, *Abuse of Property Right Without Political Foundations*, 124 YALE L.J. FORUM 42, 52 (2014).

<sup>265</sup> E.g., Katz, *supra* note 15, at 1450.

moral reasons backing him.<sup>266</sup> Still others employ a Kantian argument: an owner should not set out to exploit another's psychic vulnerability, thereby appropriating that person's existence, making himself better off than he would have been had that other person not existed.<sup>267</sup> Finally, some rely on economic analysis to conclude that a spiteful decision is unlikely to augment overall welfare.<sup>268</sup> True, the spiteful owner derives enjoyment from his victim's suffering,<sup>269</sup> but such subjective enjoyment is hard to assess. Hence it is impossible to determine whether it outweighs the loss of enjoyment the victim experiences.<sup>270</sup> Even if it does, the costs of precautions all owners will undertake if spiteful acts are legalized, added to the costs of the ensuing retaliatory cascade, should prove higher than whatever enjoyment an owner derives from witnessing his neighbor's plight.<sup>271</sup>

On account of these diverse reasons, commentators believe that an action motivated by spite alone should be banned. This is an intuitively attractive rule. It sets, based on moral grounds, a clear line demarcating the permissible in neighbors' interactions. Appealing as it may be in the abstract, however, in actuality the rule is inoperable. The attempt to decide property cases in correspondence to an owner's motive, separating "good" or acceptable reasons for action from "bad" or unacceptable ones, is doomed to fail. It is doomed to fail because bad or spiteful motivations are inseparable from good or nonspiteful motivations.

This argument, to be established in this Part, topples the normative case for prohibiting acts motivated by spite alone. It is distinct from two other claims or problems that merely stress the difficulty in applying the spite prohibition, but do not render it inoperable or illusory. First, by stating that spiteful motivations are inseparable from nonspiteful motivations, I am not simply rehashing the claim made by others that the presence of spite—a subjective element—in a given case is tough to ascertain.<sup>272</sup> The analysis in this Part assumes throughout that the owner's spite is incontestable. Second, my claim that spiteful motivations are inseparable from nonspiteful motivations is dramatically different, and more daring, than the

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<sup>266</sup> *E.g.*, Berman, *supra* note 264, at 53.

<sup>267</sup> Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1845–46 (1997) (book review).

<sup>268</sup> Farnsworth, *supra* note 38, at 224–25.

<sup>269</sup> See Mitchell Berman, *The Evidentiary Theory of Blackmail*, 65 U. CHI. L. REV. 795, 850 (1998).

<sup>270</sup> See Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1864 (1993).

<sup>271</sup> Farnsworth, *supra* note 38, at 224–25.

<sup>272</sup> *E.g.*, Epstein, *supra* note 39, at 97; Farnsworth, *supra* note 38, at 235.

acknowledged practical problem presented by the owner motivated both by spiteful and nonspiteful intentions.<sup>273</sup> In the cases to be discussed here, the owner is undeniably solely seeking to harm his neighbor, but that harm itself also, inherently, delivers to the owner benefits beyond his satisfaction at the neighbor's suffering. The nonspiteful motivation is not an additional, independent motivation. It is part of the spiteful motivation.

Disputes involving business competitors should render this inelegant pronouncement intelligible and, more importantly, compelling. Hence this Part will initially develop the argument through those cases. It will then generalize the argument to all neighbors' disputes. The distinction between spiteful and nonspiteful motives will emerge as a formalistic illusion, diverting legal analysis from its true normative concern: a social assessment of an act's effects. This finding's ramifications for property theory debates will be addressed in this Part's closing section.

#### A. *Spite's Nonspiteful Benefits: The Competition Cases*

As advocated by most writers, the prohibition on spite mandates, and is dependent upon, the singling out of owners acting on spite alone. This Part of the Article argues that this latter endeavor is forlorn and hence the normative case for the spite prohibition is hollow. The futility of the endeavor is most readily apparent in cases where the owner and his spited neighbor are competitors. Therefore, I will lay the foundation for this Article's normative thesis through an examination of those cases.

Many of the spite disputes from water law and land use law reviewed in Part II involved neighbors who were competitors. For example, the protagonists of disputes analyzed there counted owners of adjoining resorts desiring the same percolating waters;<sup>274</sup> neighboring owners both seeking to pump water for sale;<sup>275</sup> the hotel owner blocking sunrays from reaching another hotel's pool;<sup>276</sup> and the shopping center's owner building a fence to curtail access to the adjacent shopping center.<sup>277</sup> The most common spiteful conflicts between neighboring competitors, however, which will be reviewed for the first time now, are disputes over signs. The scenarios in all these disputes are almost identical. An owner erects on his land, where he

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<sup>273</sup> Most courts will refuse to find an act spiteful when it is motivated by both spiteful and nonspiteful motivations. A few will still enjoin the act—if the spiteful motivation was dominant. *E.g.*, *Hunt v. Coggin*, 20 A. 250, 250 (N.H. 1890).

<sup>274</sup> *Miller v. Black Rock Springs Imp. Co.*, 40 S.E. 27 (Va. 1901).

<sup>275</sup> *Stillwater Water Co. v. Farmer*, 99 N.W. 882 (Minn. 1904).

<sup>276</sup> *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fla. Dist. Ct. App. 1959).

<sup>277</sup> *In re Cross County Square Assocs.*, 133 B.R. 569 (Bankr. S.D.N.Y. 1991).



operates a store, service station, restaurant, or motel, a large advertising sign whose purpose is to limit passersby's view of his neighbor's property, where the same business is conducted.<sup>278</sup> Or the sign's purpose is to cover that neighbor's billboard,<sup>279</sup> or to obstruct entrances to his premises.<sup>280</sup> Alternatively the owner may place a large showcase blocking pedestrians' ability to notice goods displayed in the neighboring competitor's windows.<sup>281</sup>

Although the cases are indistinguishable in their material facts—in all, the owner acted solely to harm his neighbor's business—they have met contradicting legal fates. Some courts enjoin the “spite signs.”<sup>282</sup> Others do not.<sup>283</sup> This attitudinal difference does not owe itself to disagreement over the apposite rule. Since the late nineteenth century, when such disputes arose alongside consumer society, practically all courts have applied to signs the rule developed in land use, as reviewed in Section II.B.<sup>284</sup> Given that a sign is a structure, and one resembling a fence, the consensus view is that while normally a sign decreasing neighbors' exposure to light and air is not actionable, it becomes actionable if motivated by spite alone.<sup>285</sup> Thus both the sign conflicts' relevant facts and the rule to which they are subject are common across cases. Yet courts part ways in their appraisal of the facts' ability to meet the rule; courts diverge on whether a sign erected solely to harm a competitor counts as motivated by spite alone.

While hardly elaborated upon, the underlying problem generating this disagreement is symptomatic of the inescapable weakness, which this Part aims to pinpoint, of the normative grounding routinely provided for the spite prohibition. Specifically, the cases are afflicted by the problem of the

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<sup>278</sup> *E.g.*, *Hutcherson v. Alexander*, 70 Cal. Rptr. 366, 369 (Ct. App. 1968); *Parker v. Harvey*, 164 So. 507, 508 (La. Ct. App. 1935); *44 Plaza, Inc. v. Gray-Pac Land Co.*, 845 S.W.2d 576, 578 (Mo. Ct. App. 1992).

<sup>279</sup> *E.g.*, *Campbell v. Hammock*, 90 S.E.2d 415, 415 (Ga. 1955); *Scharlack v. Gulf Oil Corp.*, 368 S.W.2d 705, 706 (Tex. Civ. App. 1963); *Rogers v. Scaling*, 298 S.W.2d 877, 878 (Tex. Civ. App. 1957).

<sup>280</sup> *E.g.*, *Parker*, 164 So. at 508; *Green & Green Co. v. Thresher* 83 A. 711, 712 (Pa. 1912); *Maxwell v. Lax*, 292 S.W.2d 223, 225 (Tenn. Ct. App. 1954).

<sup>281</sup> *E.g.*, *Gallagher v. Dodge*, 48 Conn. 387, 389 (1880); *Hallock v. Scheyer*, 33 Hun 111, 111–12 (N.Y. Gen. Term 1884).

<sup>282</sup> *E.g.*, *Hutcherson*, 70 Cal. Rptr. at 373; *McClosky v. Martin*, 56 So. 2d 916, 918 (Fla. 1951); *Sundowner, Inc. v. King*, 509 P.2d 785, 787 (Idaho 1973); *Parker*, 164 So. at 512; *Hallock*, 33 Hun at 112–13; *Rogers*, 298 S.W.2d at 880.

<sup>283</sup> *E.g.*, *In re Cross County Square Assocs.*, 133 B.R. 569, 574 (Bankr. S.D.N.Y. 1991); *44 Plaza*, 845 S.W.2d at 580; *Scharlack*, 368 S.W.2d at 707.

<sup>284</sup> *E.g.*, *Gallagher*, 48 Conn. at 392–94; *Sundowner*, 509 P.2d at 787; *Hunt v. Coggin*, 20 A. 250, 250 (N.H. 1890).

<sup>285</sup> J.W. Thomey, Annotation, *Billboards and Other Outdoor Advertising Signs as Civil Nuisance*, 38 A.L.R.3d 647, § 2[a], at 650 (1971).

inseparability of competitive motivations from spiteful motivations, which renders the term spiteful useless.

Owners in signage cases are unquestionably acting to harm their neighbors: the spite sign is planted with the sole purpose of impeding patrons from entering the neighbor's business, thereby harming the neighbor's well-being. Yet the patron impeded from entering the neighbor's business will be more likely to patronize the erecting owner's business. Any harm to the neighbor represents a benefit to the owner, given that the two are competitors thrust in a zero-sum game. The benefit experienced by the owner harming his neighbor through a spite sign is not, therefore, merely subjective satisfaction from his neighbor's distress—a benefit, which, as explained above, many argue must be omitted from legal analysis.<sup>286</sup> The benefit the owner obtains from the spite sign is indisputably pecuniary: the potential for increased business. Still, that benefit is generated solely from the harm to the neighbor—from the neighbor's potential loss of business. Can the owner thus be characterized as acting upon spite alone? Upon, that is, a desire to harm without intent to procure a benefit?

One early court, concluding that the answer must be no, identified spite's logical incoherence in this context, but, beholden to limiting legal theories of the time, only accentuated the problem this Section seeks to highlight. In 1880 the Connecticut court explained:

So far as [the owner's showcase blocking the neighboring window display] was intended to annoy the [neighboring] store it was not so much from malice, as we ordinarily understand that term . . . as from a spirit of competition in business—of ill will perhaps—yet not so much against the object of it as an individual as against him as a rival in business.<sup>287</sup>

The difficulty in applying the term malice to the owner's behavior in this case, and all competition cases, was impossible to ignore. However, the solution the court provided—the hair splitting between “malice” and “ill will,” between the neighbor as “an individual” and as “a rival in business”—only compounded it.

This fine distinction, professing to insulate malice from other akin intentions, was characteristic of the era's formalist legal reasoning.<sup>288</sup> Similar technical differentiations, which the classical legal thinkers of the

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<sup>286</sup> See *supra* notes 269–71 and accompanying text; see also *Rattigan v. Wile*, 841 N.E.2d 680, 687 (Mass. 2006) (stating that the law does not recognize any utility the actor derives from annoying his neighbor); RESTATEMENT (SECOND) OF TORTS § 829 (AM. LAW INST. 1979) (same).

<sup>287</sup> *Gallagher*, 48 Conn. at 394–95.

<sup>288</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 17–19 (1992).

day readily drew, led Oliver Wendell Holmes in 1894 to author his groundbreaking article<sup>289</sup> denigrating judicial reliance on motive in torts. Holmes's polemic underlined the meaninglessness of the term spite in the context of competitive relations and hence it merits attention here.<sup>290</sup> Holmes claimed that purported questions about intent reduce to nothing more than questions of public policy.<sup>291</sup> Holmes's celebrated hypothetical was of the man who sets up a shop in a small village which can support but one of the kind, intending to ruin the shop of a deserving widow established there already.<sup>292</sup> The man's subjective intent is spiteful and supposedly reproachable, yet no court would enjoin him. The reason, Holmes argued, was the strong public policy endorsing competition.<sup>293</sup> "[I]n all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."<sup>294</sup>

Holmes admitted that perhaps there were instances where the competitor's harmful act could not be said to foster competition.<sup>295</sup> There, where the only potential public policy backing the act is the freedom to spite, motive-based restrictions may become sensible, but "[s]uch a case I find hard to imagine . . . [thus] there is no need to stay in such thin air."<sup>296</sup> Surprisingly, however, precisely such a case—where the competitor's spite could not be said to promote competition—did, at least arguably, materialize fifteen years later. But even there, the deplorable motive did not dictate the result—policy considerations did. Hence the case spotlights the pointlessness of motive explorations.

In 1909 a Minnesota court held liable an affluent banker, entertaining no particular interest in hairstyling or the financial potentialities thereof, when he opened a barbershop solely to drive the town's only barber, whom

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<sup>289</sup> Holmes, *supra* note 178.

<sup>290</sup> For more on the debate over the definition of legitimate competition that Holmes was engaging, see Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989).

<sup>291</sup> See Holmes, *supra* note 178, at 3.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* Courts have consistently held that "lawful competition must be encouraged, fostered, and protected." *Gieseke v. IDCA, Inc.*, 844 N.W.2d 210, 218 (Minn. 2014); see also, e.g., *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

<sup>294</sup> Holmes, *supra* note 178, at 9.

<sup>295</sup> *Id.* at 5. Holmes's iconoclastic theory generated an exchange with James Barr Ames, who believed that intent is relevant to torts. Ames specifically argued that cases exist where the defendant's act could not be viewed as serving the interest of competition. J.B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 420 (1905).

<sup>296</sup> Holmes, *supra* note 178, at 5–6.

he despised, out of business.<sup>297</sup> Nonetheless, this deplorable motive was not the court's governing concern. Grading motivations among competitors was an idle exercise, reckoned the court, which was clearly heavily influenced by rising realist thinking.<sup>298</sup> "We do not intend to . . . become entangled in the subtleties connected with the words 'malice' and 'malicious.'" <sup>299</sup> The failing of the banker's act was, the court explained, not its motive.<sup>300</sup> It was that inasmuch as the banker was ready to quit the market after ruining the barber, his opening of the barbershop defeated the public interest in competition.<sup>301</sup>

Even in this, the most extreme of cases, Holmes's insight regarding the unsuitability of motive tests for the competition torts proved irresistible.<sup>302</sup> It should also inform the evaluation of property disputes such as those over spite signs. In cases involving competitors, the term *malice* or *spite*, understood as the intent to inflict harm to another without generating benefits to the perpetrator, is meaningless.<sup>303</sup> Competition is always deliberate, and it is always malicious: "Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money."<sup>304</sup> The actor seeks to harm his neighbor and competitor towards whom he harbors deep hostility. Concurrently, that wanton harm inflicted on the neighbor will generate an unquestionably tangible benefit to the owner. Consequently, it is impossible to ever identify him as motivated by malice alone—i.e., as spiteful. If some competitive practices—say, certain signs—are to be prohibited, it thus cannot be due to their objectionable, spiteful motivations. The inquiry into the objectionable nature of the competitive practice—here, the sign—must become an inquiry into what counts as a reasonable competitive practice—in this instance, what counts as a reasonable sign (in terms of size, design, etc.) in the relevant

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<sup>297</sup> Tuttle v. Buck, 119 N.W. 946, 946, 948 (Minn. 1909).

<sup>298</sup> The court made the quintessentially realist observation: "[G]eneralizations are of little value in determining concrete cases." *Id.* at 947.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 948.

<sup>301</sup> *Id.*

<sup>302</sup> The relevant tort was interference with contractual relations.

<sup>303</sup> The Restatement notes that "cases recite, mostly in dicta, that one who engages in competition solely or primarily for the purpose of causing harm to another is subject to liability." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. b (AM. LAW INST. 1995). In antitrust law, intent is irrelevant. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) ("[W]hat has become an antitrust commonplace, that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant.").

<sup>304</sup> *Olympia Equip.*, 797 F.2d at 379.

geographical area.<sup>305</sup> Analyses of “subtleties” associated with the term *spite*, such as distinctions between “malice” and “ill will,” merely conceal the actual policy analysis. They camouflage the task the courts are really assuming: setting contours for acceptable competitive relations.<sup>306</sup>

Spite analysis breaks down in cases where neighbors are competitors since any harm to one is by definition a benefit to another. Intent to solely inflict harm is also intent to derive a competitive advantage and thus it is a nonexistent category. The spite sign cases are good examples of this phenomenon since the contending parties are formally competitors. But many other disputes reviewed in Part II, where the neighbors were not identified as business competitors, also implicate—if not overt, then at least latent—competitive relations.<sup>307</sup> They hence suffer from the same analytical flaw. The owner pumping water away from his neighbor may be harming his neighbor to improve his own standing in the market for water.<sup>308</sup> The owner blocking her neighbor’s lake views with a spite fence may be increasing her own property’s value by reducing the supply of desirable lake houses.<sup>309</sup> In all these cases, the insight stands: any settlement of the dispute cannot be guided by an appraisal of the spitefulness of the actor’s motive since that motive is always concurrently spiteful and nonspiteful.

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<sup>305</sup> See, e.g., *Hullinger v. Prah*, 233 N.W.2d 584, 585–86 (S.D. 1975).

<sup>306</sup> Competition may have costs and is therefore subject to regulation. For example, the concept of “wasteful competition” refers to cases where competition leads to duplicate services, reduced safety standards, etc. The argument that the particular characteristics of an industry might make competition undesirable will not lead a court to reject an antitrust claim. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687–96 (1978). The reason, however, is not that these claims are always factually untrue or normatively unacceptable, but rather that such a determination was for Congress to make, not the courts. *Id.* at 692. And indeed, as administrative law drastically expanded during the New Deal and thereafter, Congress enabled anticompetitive arrangement designed to combat wasteful competition. An example is the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938). This act directed the Civil Aeronautics Authority to approve agreements between carriers “relating to the establishment of transportation rates, fares, charges or classifications . . . or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition” if “it does not find [the agreement] to be adverse to the public interest.” *Id.* § 412, 52 Stat. 1004. Another example of the relevance of wasteful competition concept to legal regulation is found in patents. See Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 316–18 (1992).

<sup>307</sup> Another way of thinking of some of these cases, which also questions the soundness of deploring spite, is as cases where one owner had produced a positive externality from which a neighbor has benefitted without paying (since property law does not mandate payment for such externalities, such as the ability to enjoy the trees planted on a neighbor’s land or the light coming through it) and is now, by blocking the neighbor’s access to such benefits, trying to assure payment. For the argument that moves to contain or reduce beneficial externalities by their producer, though seemingly spiteful and inefficient, may “serve as precursors to contracts with other benefited parties that will realign the production of benefits with the receipt of proceeds,” see Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1452 (2007).

<sup>308</sup> See, e.g., *Stillwater Water Co. v. Farmer*, 93 N.W. 907, 907–08 (Minn. 1903).

<sup>309</sup> See, e.g., *Holbrook v. Morrison*, 100 N.E. 1111, 1111–12 (Mass. 1913) (involving two competing real estate developers).

Courts resolve these conflicts through an appraisal of the social desirability of the specific competitive practice. They reach policy determinations, not intent findings.

*B. Neighbors as Competitors: Ownership, Status, and Spite's Ubiquity*

As the previous Section established, spite is a meaningless legal category in cases involving business competitors. But can it still perhaps carry normative weight in regulating the relationship between those owners who are not business competitors—for example, the Introduction's Mr. Markovitz and Ms. Tuohy? This Section will argue that it cannot realistically be expected to perform even this more modest task—not as long as property law takes for granted all owners' ability to engage in some form of competitive relations. As shall be seen, owners who, unlike the owners in the preceding Section, are not partaking in competition over clients may still be, or choose to be, interlocked in competition over status. Like business competition, status competition is premised upon the benefits derived from harming others, and, also like business competition, current law legitimizes it. Ultimately, this Section will argue, all owners are competitors—or, more accurately, all owners are free to view themselves as competing with other owners—and thus no owner can be reprimanded for being spiteful.

To understand why, we must revisit property theory's first principles, and specifically, the general rationales backing the owner's freedom to act on his property—for example, to build an elaborate structure thereon.<sup>310</sup> Such freedom of action promotes overall welfare by incentivizing efficient development<sup>311</sup>: individuals may enjoy living in elaborate structures and thus their construction enhances efficiency. Such freedom of action also serves individual rights through an expanded realm for autonomy and self-expression<sup>312</sup>: individuals may develop their identities through their choice of elaborate structures. But beyond these utilitarian and right-based goals, the freedom to use property serves another aim.<sup>313</sup>

One of property law's key functions, as Nestor Davidson recently reminded us, is to enable people to communicate their standing in

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<sup>310</sup> See generally Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 446–52 (2014) (reviewing the diverse normative reasons for property law's privileging of the owner's freedom).

<sup>311</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348–49 (1967).

<sup>312</sup> See Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1264–69 (2014).

<sup>313</sup> On the distinction between utilitarian and right-based arguments for property, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 79–87 (1988).

society.<sup>314</sup> The idea that property confers on its holder a status and social power is intuitive and hardly controversial.<sup>315</sup> In a landmark article, Morris Cohen memorably characterized property as state-delegated power: “[T]he law thus confers on me [the owner] a power, limited but real, to make [my neighbor] do what I want.”<sup>316</sup> The freedom to own and use property permits the owner to convey a message to his neighbor and others respecting his omnipotence and standing vis-à-vis those others.<sup>317</sup> In other words, an owner can build an elaborate structure to keep up with the Joneses, or to one-up the Joneses.<sup>318</sup>

While this signaling function of property may not be a good in and of itself, it is presumed to advance property’s utilitarian and right-based functions.<sup>319</sup> Overall welfare is normally served when people are motivated to work to improve their relative standing.<sup>320</sup> Furthermore, status pursuit can be an important component of individual autonomy and self-expression.<sup>321</sup> Of course, the social desirability of reliance on power relations and hierarchical structures has always been subject to fierce debate.<sup>322</sup> That debate, touching upon broad themes pertaining to the value of consumerism—and of capitalism itself<sup>323</sup>—falls far beyond our discussion’s reach. The debate’s basic premise, shared by all factions, suffices: the current social and legal system prioritizes individuals’ ability to pursue status and power through ownership of material goods. A cause for concern or celebration, this is a fact of modern law. Adam Smith thus

<sup>314</sup> Davidson, *supra* note 28, at 760.

<sup>315</sup> *Id.* at 775–78 (reviewing property’s history as an institution for the “constant process of competition and status anxiety” and listing works of thinkers commenting on this fact).

<sup>316</sup> Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

<sup>317</sup> See Edward K. Sadalla et al., *Identity Symbolism in Housing*, 19 ENV’T & BEHAV. 569, 572–73, 583–86 (1987).

<sup>318</sup> See CONSTANCE PERIN, EVERYTHING IN ITS PLACE 81–128 (1977) (arguing that home ownership in a “nice” neighborhood is often perceived as the top rung in the long climb up the social ladder).

<sup>319</sup> See Davidson, *supra* note 28, at 791; Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157, 2163–64 (2012).

<sup>320</sup> Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1074 (1999).

<sup>321</sup> See Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117, 118–19 (1954).

<sup>322</sup> See, e.g., ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 136–37 (1985); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 819 (2010); Luis Rayo & Gary S. Becker, *Peer Comparisons and Consumer Debt*, 73 U. CHI. L. REV. 231, 231 (2006).

<sup>323</sup> See TIM KASSER, THE HIGH PRICE OF MATERIALISM 87–95 (2002); KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY 85–86 (Jeffrey C. Isaac ed., Yale Univ. Press 2012) (1848); THORSTEIN VEBLÉN, THE THEORY OF THE LEISURE CLASS 16–17, 21–27 (Martha Banta ed., Oxford Univ. Press 2007) (1899).

wrote of the “poor man’s son” who in a capitalist system is free to work more and amass more goods than he truly needs or desires, just to become visible to others.<sup>324</sup> Comparably, in such a system, a Mr. Markovitz is free to build a large lake house he has no intention to inhabit or to sell for profit, just to bolster his stature through pressing his ex-wife, a Ms. Tuohy, to regret jilting him in favor of another who cannot afford such an abode. He may proceed even in the hypothetical case where in his mind his sole intent is to pain her through envy, with no regard to his own stature.<sup>325</sup> Ownership encompasses—or maybe is—the power to make others jealous.

Property law empowers an owner to build a fancy mansion to announce his arrival in the neighborhood and entice envy among neighbors.<sup>326</sup> It enables owners to maintain a golf course in their community though they do not intend to use it, but want to exude prestige and social exclusivity.<sup>327</sup> Governments sell “vanity plates,” signs meant to adorn personal properties (cars) catering to one want: the owner’s, well, vanity.<sup>328</sup> All these activities are geared towards assuaging the owner’s ego or prestige—often at the expense of others’ ego or prestige. An owner undertaking any such activity may be driven by pure desire to harm others by downplaying their importance, success, or affluence. But through such downplaying, the owner boosts his own importance. Status and power are relative.<sup>329</sup> An individual enjoys status by towering over others; power is wielded over others. Accordingly, an individual’s status and power are augmented when others’ status and power are denigrated.

In a property system tolerating—indeed embracing—status competition, the category of spiteful motivations collapses. Intent to harm another—to lower another’s status—is also intent to benefit the owner—to increase the owner’s status. In his own eyes, and in those of other public members, the owner’s stature might improve thanks to the knock sustained

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<sup>324</sup> ADAM SMITH, *THEORY OF MORAL SENTIMENTS*, pt. IV, ch. I, para. 8, at 211–14 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

<sup>325</sup> An argument has been made that while some tend to assess their wealth and happiness in relative terms, others tend to do so in absolute terms. For the latter, a decrease in the wealth or happiness of others will not, arguably, augment their own wealth or happiness. Strahilevitz, *supra* note 319, at 2159. The facts of the actual incidence, as described in note 4, *supra*, indicate that Mr. Markovitz was probably no stranger to relative preferences.

<sup>326</sup> See, e.g., Adam Nagourney, *In Los Angeles, Vintage Houses Are Giving Way to Bulldozers*, N.Y. TIMES, Feb. 8, 2015, at A15.

<sup>327</sup> See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 468–76 (2006).

<sup>328</sup> See Tex. Div., *Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 390–91 (5th Cir. 2014), *rev’d sub nom. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

<sup>329</sup> J. Sabini & M. Silver, *Envy*, in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 167, 172 (Rom Harré ed., 1986).



by that other. Thus an owner obtains a benefit from such an act in addition to any subjective enjoyment he derives from witnessing the other's distress. As in business competition over clients, in status competition over standing, an act solely aimed at harming one's adversary inherently benefits the actor. The owner may derive personal satisfaction from his neighbor's suffering, but the act's utility for him extends beyond that to include the permissible benefits of status signaling. An owner's act can thence never be said to be motivated by a desire to harm—by spite—alone, as the supposed prohibition on spiteful acts requires. Therefore, the regulation of spiteful acts cannot be a regulation of spite. It must be a regulation of acts.<sup>330</sup>

Concretely, the legitimacy of an act meant to magnify the owner's relative status must revolve around the reasonableness of the means he chooses and the harm he inflicts—not around his subjective intent. The *Casey* case—which, as presented in Section II.C, cannot, by any stretch, be described as a case of business competition—nicely exemplifies this inevitable, and desirable, result general to all owners' relationships. In *Casey*, a court struck down as a spiteful restraint on alienation a testator's order that his son lose land devised to him if he transferred possession to his daughter (the testator's granddaughter).<sup>331</sup> Had this result actually owed to the restraint's motivation, it would have been baffling given other elements of the law. In American law, testators are under no obligation to leave property to their offspring; through property, owners can air their rancor and domineer family members even posthumously.<sup>332</sup> Accordingly, the *Casey* testator was free to completely disinherit his son if he were upset over his relations with the granddaughter. While the devise to the son accompanied by the restraint on alienation was struck down,<sup>333</sup> such disinheritance of the son would have been upheld.

Why should the disinheritance be deemed less reprehensible than the restraint? Like the restraint on alienation, the disinheritance would have been inspired by the testator's attitude towards his son and granddaughter.

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<sup>330</sup> In an important article, Richard McAdams explained that the satisfaction of relative preferences—preference for status or prestige—might sometimes, but not always, lead to efficiency losses. Hence, though no judgment is passed on the merits of relative preferences, the effects and potential results of the race for status they induce in specific cases must be regulated. Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 48–70 (1992).

<sup>331</sup> 700 S.W.2d 46, 47, 49 (Ark. 1985).

<sup>332</sup> *JESSE DUKEMINIER ET AL., WILLS, TRUSTS, & ESTATES* 556 (9th ed. 2013). The sole exception is Louisiana, which, as a civil law state, provides a forced share of an inheritance to certain children. *Id.*; see also LA. CONST. art. XII, § 5 (“The legislature shall provide for the classification of descendants . . . as forced heirs.”).

<sup>333</sup> *Casey*, 700 S.W.2d at 49.

The acts did not differ in their motivation. They did differ, however, in the means employed to serve that motivation and in their effects—and it is that difference that dictates the diverging results.<sup>334</sup> The restraint on alienation troubled the court since it pressured the son to cut ties with his daughter, and as the court explained,

For public policy reasons, some cases have held that provisions by which the acquisition or retention of property interests was made to depend on the separation of parent and minor child were illegal conditions. “A broader objection has appeared on occasion against any provision which tends to disrupt or interfere with family relations.”<sup>335</sup>

Had the testator simply disinherited his son, this consideration would have vanished. True, the son would have been punished for his relationship with the granddaughter. But he would not have been spurred to terminate it, and thus the public policy against interferences with familial relations would not have provided reason to eliminate the spiteful act. The objection to the spiteful restraint on alienation was not an objection to the testator’s spiteful intent, but rather to the specific means through which he expressed it. An owner cannot be sanctioned for lording it over others because that is an inherent power accompanying ownership. An owner can be sanctioned, however, when the particular way in which he flaunts his power generates harms that are judged, on objective policy grounds, unacceptable.

Property enables competition. It allows owners to view other owners as competitors and to have society appraise their own standing and worth in relation to the standing and worth of those others. As long as private property is recognized as a weapon—perhaps the paramount weapon—in the social competition over status and power, spite, or at least the possibility thereof, is built into property. Courts cannot accuse owners, in such an environment, of engaging in activities whose sole purpose is to degrade others or lower their standing. By definition, those activities may also elevate the owner and increase his own standing. Courts will intervene when the specific activity, or the harm it wreaks, is objectively deplorable. Since the power to spite is inherent to ownership—since as an owner Mr. Markovitz is free to build a mansion to display his superiority to his neighbors or to simply make them jealous—spite is irrelevant as a test to

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<sup>334</sup> It is possible to argue that in the second scenario the son suffered no harm—he was simply denied a benefit. The distinction may hold analytical and philosophical strength, *see* 1 JOEL FEINBERG, HARM TO OTHERS 31–36 (1984), but it is lacking in practical terms. In both cases the son ends without land he would have held had the testator not resented his relationship with the granddaughter. Regardless, even under the alternative account, the reason only one of the acts is censured is not the distinct motivation, but rather the presence of harm.

<sup>335</sup> *Casey*, 700 S.W.2d at 49 (quoting 6 AMERICAN LAW OF PROPERTY § 27.19, at 671 (A. James Casner ed., 1952)).

settle property disputes; it cannot determine Mr. Markovitz's right to erect a fence or a statue. The experience of American law, reviewed in Part II, bears out this normative conclusion.

### C. *The Spitefulness of Ownership and Property Theory*

The disconnect between American law's spite prohibition and actual spite, revealed in Part II, and actual spite's normative impotence, established in this Part, discredit the prevailing assertion, reviewed in Part I, that spite law performs the supposedly momentous task of regulating owners' intentions. Spite law does not, and cannot, represent an idea of abuse of right; it does not, and should not, ply motives to draw the perimeters of ownership's reach. Does this imply that it is unimportant, that spite does not merit theoretical attention? Once spite sheds its illusory garb of an exception to property law's objective underpinnings, it comes across as less conspicuous. Still, paradoxically, when accurately conceived as substantiating—rather than subverting—those underpinnings, spite becomes more significant for the study of American property law. Specifically, it lends credence to one of the two central property theories embroiled in a debate over the essence of property. These concluding paragraphs will explain why, and thereby will employ this Article's insights respecting the inherent spitefulness of ownership to refine our understanding of property as an institution.

For the past two decades, a reinvigorated American property literature has been cleaved between two competing property conceptions. One loosely grouped camp of writers, which can be titled “exclusion theorists,”<sup>336</sup> affirms that the heart of property is the owner's power. Conversely, a second loosely grouped camp, “relational theorists,” conceives social relations as constituting property's nucleus.

Exclusion theorists' main contention is that property has a unitary essence. For many of these theorists, that essence is the owner's right to exclude others—property's *sine qua non*.<sup>337</sup> Others emphasize the owner's right to use his property, for which a right to exclude is prerequisite.<sup>338</sup>

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<sup>336</sup> See also HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 37–40 (2011) (characterizing such theories as “exclusion-centric”).

<sup>337</sup> E.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998).

<sup>338</sup> E.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (defining “the right to property” as “a right to exclude others from things which is grounded by the interest we have in the use of things”); Adam Mossoff, *What Is Property?: Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 439 (2003) (defining property as comprising “the exclusive rights to acquire, use and dispose of one's possessions”); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle*, 32 SEATTLE U. L. REV. 617, 618 (2009) (book review) (“Others of us sympathetic to property's exclusive tendencies prefer to conceive of property as a right exclusively to determine a thing's use.”).

According to exclusion theorists, property has good reasons to stress the right to exclude. The right facilitates an owner's ability to make choices respecting his land, which satisfies a "robust interest in autonomy."<sup>339</sup> It also serves as an effective notice system facilitating a market's existence<sup>340</sup>: since the right to exclude protects all the varied actions the owner can pick, it spares society the costly need to specify them.<sup>341</sup>

Relational theorists remain unpersuaded. They refuse to accord primacy to the owner's dominium over an external thing and his attendant right to exclude others from it.<sup>342</sup> The theories addressed here collectively as relational are diverse—they include progressive property,<sup>343</sup> social obligation,<sup>344</sup> human flourishing,<sup>345</sup> civic republicanism,<sup>346</sup> objective wellbeing,<sup>347</sup> and more.<sup>348</sup> In one way or another, however, they all build on the basic realist notion that property rights are not unitary, absolute rights over things, but rather bundles of legal relationships between people.<sup>349</sup> Current relational theorists supplement this metaphor with a normative argument. Property rights are about relationships, and their goal is to promote certain relationships—those deemed socially desirable.<sup>350</sup> Hence, property law often limits owners' freedom in order to empower others to

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<sup>339</sup> PENNER, *supra* note 338, at 49; Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 24 (2011) (book review).

<sup>340</sup> See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1704 (2012).

<sup>341</sup> See *id.* at 1702–03.

<sup>342</sup> See, e.g., C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742–44 (1986).

<sup>343</sup> Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009).

<sup>344</sup> Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009).

<sup>345</sup> Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089, 1089 (2011).

<sup>346</sup> William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1336 (1991).

<sup>347</sup> Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1672–73 (2003).

<sup>348</sup> E.g., Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 654–58 (2006).

<sup>349</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913).

<sup>350</sup> E.g., Eduardo M. Peñalver, *Property As Entrance*, 91 VA. L. REV. 1889, 1938 (2005) (arguing for "an understanding of ownership, not primarily as a means of separating individuals off from each other, but of tying them together into social groups").

sustain meaningful relationships.<sup>351</sup> Examples include public accommodations law<sup>352</sup> and nuisance law.<sup>353</sup>

Exclusion theorists relegate these and similar elements of the law to the periphery.<sup>354</sup> For them property's core is, as it must be, the trespass tort, anointing the owner the land's sole gatekeeper.<sup>355</sup> Thus, as befits a theoretical dispute about the essential quality of property, the debate between relational and exclusionary theories boils down to a controversy over the proper location in the law of limits affixed to an owner's freedom so as to promote desirable social relationships: Are such doctrines a peripheral afterthought or property law's core?<sup>356</sup>

It is precisely in answering this key question that the legal standing of spite can interfere in the debate. At first glance, the traditional reading of spite's role in the law, presented in Part I, jells well with relational theories. A limit placed on ownership and driven by the owner's intentions serves the relational account of property even better than other deviations from the owner's freedom, such as public accommodations or nuisance, since it is explicitly grounded in the sentiments the owner feels towards his neighbors—that is, in the relationship between an owner and others. For similar reasons, the abuse of rights principle, which loudly declares that the owner's right is not absolute, and that its core is not freedom but acceptable attitudes towards others, forcefully resonates with relational sensibilities.

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<sup>351</sup> SINGER, *supra* note 159, at 12.

<sup>352</sup> *E.g.*, Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (showing how the history of public accommodations law suggests that there are substantial limitations to the classical conception of property as ownership).

<sup>353</sup> *E.g.*, ERIC T. FREYFOGLE, *THE LAND WE SHARE* 20 (2003) (arguing that owners are always confronted with nuisance law as a constraint on their ability to freely use their lands).

<sup>354</sup> *E.g.*, Epstein, *supra* note 39, at 74–79 (arguing that nuisance law merely introduces nonexclusionary considerations for extreme cases); Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 502 (2009) (arguing that public accommodations laws are located on the law's edges).

<sup>355</sup> See Merrill, *supra* note 337, at 734–35.

<sup>356</sup> Compare Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 971–88 (2009), with Gregory S. Alexander, Reply, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1063–68 (2009). See also Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1858 (2012) (arguing that “the right to exclude can no longer be considered the core of private ownership” in light of the prevalence of governance property); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1419 (2012) (“This strategy [i.e., exclusionists’ confinement of nonexclusionary rules to the periphery] is doomed to fail because the doctrines that do not comply with the exclusion principle are in fact not marginal or peripheral to the life of property but deal instead with some of our most commonplace human interactions regarding resources.”); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L. Rev. 1849, 1891 (2007) (arguing that “[t]he law of nuisance, landlord–tenant, future interests, servitudes, trusts, private contracting, and regulation” are “refinements outside of the core of property”).

This reflexive appeal of the abuse of right principle to relational-minded commentators might partially account for the intensifying efforts to equate spite with an abuse of right principle, as reported in Part I, and to admonish spite, as outlined in the opening paragraphs of this Part. Therefore, the failure of both endeavors, as established in this Article, might strike some as serving to bolster exclusion theories. But in fact, paradoxically, the exposure of deplorable mental states as a meaningless legal category in property law, serves, I believe, as strong reinforcement for relational theories.

Tying an act's legitimacy to the owner's attitude towards his neighbor might come across as the ultimate tool for enforcing a relational approach. Yet this allure of the spite prohibition for relational theorists is superficial. A mental-state criterion dictating allowable acts actually avoids the general practices and aims that relational theories champion. These are consequentialist theories.<sup>357</sup> They are concerned with social values—with designing property rules that occasion a healthy social system.<sup>358</sup> In contrast, as a motives test, the spite prohibition is backward-looking and consequence-indifferent.

By definition, a mental-state-based prohibition curtails the role of the social, objective assessment of property uses' effects. Often the spite test is explicitly offered by antirelational, exclusion commentators as a way to evade policy analysis and the promotion of social well-being through legal regulation. Richard Epstein endorses it because

[t]he motive test (whatever its weakness) has an apparent dual advantage [in spite fence cases]: it avoids the open-ended and explicit comparisons of costs and benefits that are everywhere the bane of the legal system; and it removes the need to make specific collective determinations about height, shape, color, and the like, which are again difficult to generate through common law decisions.<sup>359</sup>

Other nonrelational scholars, too, argue for the replacement of flexible policy analysis with clear rules tethering legal results to owners' mental states.<sup>360</sup> The form of analysis these commentators strive to displace is

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<sup>357</sup> Gregory S. Alexander, *The Public Use Requirement and the Character of Consequentialist Reasoning*, in *CONTEXT, CRITERIA & CONSEQUENCES OF EXPROPRIATION* (B. Hoops et al. eds., forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2517595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517595) [<http://perma.cc/L8ZB-BC3K>] (explaining that human flourishing is a consequentialist theory); Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 *BERKELEY TECH. L.J.* 229, 245 (2014) (arguing that such “democratic” and “distributive” theories are consequence-sensitive).

<sup>358</sup> See *supra* notes 343–51 and accompanying text.

<sup>359</sup> Epstein, *supra* note 39, at 97.

<sup>360</sup> *E.g.*, Strahilevitz, *supra* note 319, at 2186–87.

precisely that coveted by relational theories.<sup>361</sup> Relational writers normally believe that property law must always discharge public policy judgments grounded in social cost–benefit analysis because property is unfailingly social.<sup>362</sup> Land, they explain, is a limited resource registering all activities owners make and thereby setting the contours for others’ interactions.<sup>363</sup>

Emphasizing the reasoning leading an individual owner to pick an activity, rather than the activity’s effects on land and on others, ignores property’s special nature. In a different context, Hannah Arendt once noted “[t]he reality and reliability of the human world rest primarily on the fact that we are surrounded by things more permanent than the activity by which they were produced, and potentially even more permanent than the lives of their authors.”<sup>364</sup> A focus on the author–actor, which may be normatively requisite in other legal fields,<sup>365</sup> ignores this special nature of property law’s subject matter.<sup>366</sup> This focus’s deficiencies are sometimes practical and easy to discern. Since the actor may not last as long as his activity’s effects, the intent behind the activity may recede into the shadows, while its effects endure. For example, the owner who built a fence spitefully motivated may be gone, replaced by an owner rather fond of his neighbor, yet the fence remains. Can it still be removed as a spite fence? Does spite “run with the land”?<sup>367</sup> As legal realism’s progeny, relational theories would discard this metaphysical question, preferring instead a concrete evaluation of the fence’s everlasting objective harms and benefits.<sup>368</sup>

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<sup>361</sup> See Nadav Shoked, Response, *Property’s Perspective (or of Whom To Be Jealous)*, 161 U. PA. L. REV. ONLINE 118, 130 (2013).

<sup>362</sup> E.g., Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014) (“Property institutions not only regulate the complexity of human interaction, but also *shape the character of those interactions*. Property is not only about the allocation of scarce resources, the management of complex information, or the coordination of land use among competing users; it is about our *way of life*. . . . Property is about the social order . . .”).

<sup>363</sup> E.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829–32 (2009).

<sup>364</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 95–96 (2d ed. 1998).

<sup>365</sup> For an argument that motives should be considered in criminal law, see Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012).

<sup>366</sup> See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 126–27 (2003) (explaining that claims for property rights are unique among rights claims, such as freedom of speech, because they tend to involve the use or control of physical, external, finite things, and hence they do not enjoy the same presumptive power across a broad swath of cases as other rights claims do).

<sup>367</sup> Running with the land means that the right or obligation passes automatically to successive owners. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(1)(a), at 8 (AM. LAW INST. 2000).

<sup>368</sup> The most famous realist assault on such questions is Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

The fact that spite doctrine concerned itself with this form of analysis throughout American legal history, as seen in Part II, thus reinforces relational theories. It proves that property law is about ownership's social nature, and not about the individual owner—neither his mental states, nor his freedom of action cherished by exclusion theories. American spite serves as factual testimony to the relational claim that legal decisions respecting property rights involve a calculation of costs and benefits. Exclusion theorists may plausibly persist in the stance that the interest balancing introduced through spite in the nineteenth century merely represented peripheral “refinements” to the general owner freedom rules respecting water law and land use at the time.<sup>369</sup> Still, the fact that in different subfields—water law, land use, support rights, restraints on alienation—whenever the law heroically attempted to concentrate decisionmaking powers in the owner, it always eventually had to retreat and introduce refinements—through spite doctrine or otherwise—incarnates the irresistible draw of interest balancing. In this story of spite, we find vindication for relational theorists' normative claim that the owner's freedom must be limited.

In addition, our exploration of spite supplies this normative stance with yet another, new rationale. Property, as seen in this final Part of this Article, always contains the seed of spitefulness. Harms to others, as well as a desire to harm others, may accompany all and any acts of the owner. This observation does not, of course, provide reason to ban all owners' acts. It does, however, press the need for close monitoring of the social costs and benefits of those acts. The American law of spite embodies the realization that spite towards others is an inherent component of property in a capitalist society. But while it would be counterproductive therefore to ban malicious motives, it would also be dangerous to let owners do as they please with the limited, shared resource that is land. Owners' conduct must be regulated—but in accordance with the marks that that conduct leaves on the outside world, not in accordance with the owners' motivations.

The exploration of American spite law's history and logic confirms that property law rejected both an emphasis on the owner's freedom and on his subjective mindset. It always tamed rules privileging the owner's freedom through the introduction of social considerations—as relational property theories command.

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<sup>369</sup> “Refinement” is the role to which these theorists confine balancing. Merrill & Smith, *supra* note 356, at 1891.



## CONCLUSION

Is there something wrong with the middle-finger statue Mr. Markovitz erected? And had he alternatively opted to erect a fence, should there have been something wrong with that fence? The answers may be debatable, but this Article shows that there could be no debate that they must have nothing to do with Mr. Markovitz's wretched motive—whether it gave rise to a statue or to a fence. The law on the books often suggests otherwise, and so do legal commentators, but American property law in action never targeted spiteful acts on account of their motives.<sup>370</sup> Spite did play a constitutive part in the emergence of modern property law in the nineteenth century—across different key subfields such as water and land use—but not as a subjective test. Rather, spite was a beachhead for objective balancing tests assessing the reasonableness of means employed by owners to exercise their rights. Such balancing is normatively indispensable, whereas a subjective test is normatively wanting. There might be good reasons to hold that an owner such as Ms. Tuohy should not be exposed to aesthetic harms,<sup>371</sup> or that she should be able to continuously enjoy exposure to light and air.<sup>372</sup> But these reasons are grounded not in a judgment respecting acceptable and unacceptable individual motives for action, but rather in a judgment respecting acceptable and unacceptable social harms. The tastelessness of Mr. Markovitz's motive is legally, and normatively, irrelevant. The tastelessness of Mr. Markovitz's structure might be legally, and normatively, relevant.

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<sup>370</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (“[D]istinctions between law in the books and law in action . . . will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”).

<sup>371</sup> For arguments supporting the recognition of aesthetic nuisances, see Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141 (1987).

<sup>372</sup> See, e.g., *Prah v. Maretti*, 321 N.W.2d 182, 184–85 (Wis. 1982).

