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## The Definitive Guide to Tree Disputes in California

Ellis Raskin

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## The Definitive Guide to Tree Disputes in California

*Ellis Raskin\**

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### **I. Introduction**

Every naturalist knows that trees are a critical part of the fabric of many American urban and suburban ecosystems. The American ethos has been shaped by a love for trees and forests and our forests have played an essential role in the growth and success of America.<sup>1</sup> Given our communal affinity for trees, it is no surprise that property disputes involving trees are common. All across this country, neighbors fight to let trees grow, to cut trees down, or simply to decide who owns the trees in the first place. These disputes are messy, costly, annoying, and can even turn deadly.

The true cost of tree disputes is best measured by the fact that at least four people have been killed over the last two years in tree-related property disputes. In March 2012, a neighbor shot and killed Dennis E. Liller of

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1. ERIC RUTKOW, AMERICAN CANOPY: TREES, FORESTS, AND THE MAKING OF A NATION 5–9 (2012).

Maryland in a dispute over who owned three trees.<sup>2</sup> One year later, in March 2013, Emmy Award-winning film director John Upton was shot during a dispute when his neighbor attempted to cut down trees that provided shade to Upton's property.<sup>3</sup> One month later, Gary Stocks and Daniel Kirchner of North Carolina were killed in an alleged tree dispute between neighbors.<sup>4</sup>

Even though most tree disputes do not end with bloodshed, tree battles can be extraordinarily costly. DreamWorks co-founder David Geffen won a landmark \$1.2 million Superior Court verdict in 1995 when a neighbor cut down eight pines and four eucalyptus trees that were on Geffen's property.<sup>5</sup> In another extreme case, software magnate Larry Ellison offered \$15 million to buy the property of his downhill neighbors so that he could cut down trees that blocked his views of the San Francisco Bay.<sup>6</sup> Ellison and his neighbors ultimately signed an undisclosed settlement, and the downhill neighbors agreed to remove the trees.<sup>7</sup>

These stories are not unique—Californians have been fighting about trees since the dawn of statehood.<sup>8</sup> However, tree law in California has

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2. Peter Hermann, *Neighbor Kills Neighbor in Dispute Over Trees*, THE BALTIMORE SUN, Mar. 29, 2012, [http://articles.baltimoresun.com/2012-03-29/news/bal-neighbor-kills-neighbor-in-dispute-over-trees-20120329\\_1\\_trees-dispute-neighbor](http://articles.baltimoresun.com/2012-03-29/news/bal-neighbor-kills-neighbor-in-dispute-over-trees-20120329_1_trees-dispute-neighbor).

3. Tony Perry, *Director John Upton Killed by Neighbor During Dispute, Police Say*, L.A. TIMES, Mar. 30, 2013, <http://articles.latimes.com/2013/mar/30/local/la-me-ln-director-john-upton-shot-by-neighbor-during-dispute-police-say-20130330>; see also Frank Elaridi et al., *Family, Friends Search for Answers in Neighborly Dispute that Ended in Death*, ABC NEWS, Sept. 19, 2013, <http://abcnews.go.com/US/family-friends-search-answers-neighborly-dispute-ended-death/story?id=20306848>.

4. *Man Reportedly Kills Neighbors After Dispute Over Trees In Yard*, CBS CHARLOTTE, Apr. 2, 2013, <http://charlotte.cbslocal.com/2013/04/02/man-reportedly-kills-ighbors-after-dispute-over-trees-in-yard/>.

5. Bob Pool, *City Smart/How to Thrive in the Urban Environment of Southern California*, L.A. TIMES, Nov. 24, 1995, [http://articles.latimes.com/1995-11-24/local/me-6652\\_1\\_tree-law](http://articles.latimes.com/1995-11-24/local/me-6652_1_tree-law).

6. Jim Carlton, *Lots of Green Is at Stake in This San Francisco Spat: Oracle's Larry Ellison Views Less of the Bay, So He Hires a Tree Attorney*, WALL ST. J., May 28, 2011, <http://online.wsj.com/articles/SB10001424052702303654804576343763766328484>.

7. Matt Hickman, *Billionaire Magnate Larry Ellison Settles With Neighbors in Bizarre Tree Lawsuit*, FORBES, June 2, 2011, <http://www.forbes.com/sites/economics/2011/06/02/billionaire-magnate-larry-ellison-settles-with-neighbors-in-bizarre-tree-lawsuit/>.

8. See, e.g., *Buckelew v. Estell*, 5 Cal. 108, 108 (1855) (upholding an injunction to stop a neighbor from cutting down trees involved in a boundary dispute); see also *Chipman v. Emeric*, 3 Cal. 273, 275 (1853) (involving a claim that the defendant cut down five hundred oak trees that belonged to the plaintiff).

undergone a radical transformation in the last decade.<sup>9</sup> Property owners used to have broad ranging rights to remove encroaching trees or trees that obstructed views, but California law now requires property owners to take extreme precautions before relying on self-help to resolve tree disputes.<sup>10</sup> Additionally, municipalities now have broad ranging power to dictate how property owners should care for and maintain trees located on private property.<sup>11</sup>

The primary goals of this note are to provide a summary of current trends in tree law in California and serve as a resource for practitioners who are currently engaged in tree disputes. This note will provide a summary of California laws on tree encroachments, obstructions, and municipal ordinances that regulate tree growth. Although every tree dispute is unique, this note will provide general guidelines for how tree disputes can be resolved successfully in California.

Another goal of this note is to provide policy recommendations for the future development of tree law in California. Ninety-five percent of Californians live in urban areas<sup>12</sup> and municipalities are committed to developing vibrant urban forests.<sup>13</sup> Consequently, courts and lawmakers should encourage property owners to be responsible stewards of trees they care for to prevent potential injuries to neighbors and to their communities. Additionally, courts and lawmakers should encourage municipalities to take a proactive role in regulating the growth and development of privately owned trees in urban environments. The best way to achieve these goals is for local communities and municipalities to utilize adaptive co-management strategies when balancing public and private interests to ensure sustainable growth for urban forests. Our laws should encourage respect for trees and

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9. Compare *Bonde v. Bishop*, 245 P.2d 617, 621 (Cal. Ct. App. 1952), with *Booska v. Patel*, 30 Cal. Rptr. 2d 241, 244–45 (Cal. Ct. App. 1994). See also *Rony v. Costa*, 148 Cal. Rptr. 3d 642, 647–48 (Cal. Ct. App. 2012).

10. *Booska*, 30 Cal. Rptr. 2d at 244–45 (internal citations omitted); see also *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1128 (Cal. 1981) (holding individuals have a duty to act reasonably when managing property if injury to others is foreseeable).

11. See, e.g., *Echevarrieta v. City of Rancho Palos Verdes*, 103 Cal. Rptr. 2d 165, 174 (Cal. Ct. App. 2001) (affirming a “view protection ordinance” that forced property owners to cut back the height of trees located on private property).

12. *Growth in Urban Population Outpaces Rest of Nation*, *Census Bureau Reports*, U.S. CENSUS BUREAU (Mar. 26, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-50.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html) (“Of the 50 states, California [is] the most urban, with nearly 95 percent of its population residing within urban areas.”).

13. See, e.g., *San Francisco Urban Forest Plan: Phase One, Street Trees* (Jan. 2014), SAN FRANCISCO PLANNING DEP’T, [http://www.sf-planning.org/ftp/files/plans-and-programs/planning-for-the-city/urban-forest-plan/Urban\\_Forest\\_Plan\\_Draft-01-15-14.pdf](http://www.sf-planning.org/ftp/files/plans-and-programs/planning-for-the-city/urban-forest-plan/Urban_Forest_Plan_Draft-01-15-14.pdf).

should provide incentives for private citizens to support the health of urban forests.

## **II. Boundary Disputes and Encroachments**

The stereotypical tree dispute is a case of nuisance, where branches or roots from one neighbor's tree extend into another neighbor's property. While researching this note, dozens of friends and colleagues shared stories of problems they have had with neighbors and how they wished they could cut off offending branches. They all asked the same question: could they cut off the branches without incurring liability? The short answer is no. Although California courts once recognized an absolute right to cut off encroaching branches, property owners can now be held liable for harming their neighbor's tree, even if they only cut the part of the tree that extends onto their own property.<sup>14</sup> But before property owners can take action to resolve disputes, they must first determine who actually owns the offending tree.

### **A. Determining Tree Ownership**

In California, trees belong exclusively to the owner of land where the trunk of the tree is located, even if the tree's roots or branches extend into another person's property.<sup>15</sup> However, to the extent that they grow into or above a neighbor's property, encroaching branches and roots belong to the individual upon whose land they encroach.<sup>16</sup> If a tree's trunk is located on a boundary line, where the trunk is located partly on the land of two or more coterminous owners, the tree belongs to all of them in common.<sup>17</sup> If a tree splits into two trunks, with one trunk growing on one side of the property line and another trunk growing on the other side of the property line, the *entire* tree belongs to both neighbors in common as long as the point at which the tree grows out of the ground lies on both sides of a property line.<sup>18</sup> Even if the neighbors construct a fence or boundary over the middle of the tree, the entire tree still belongs to both neighbors in common.<sup>19</sup>

When awarding damages for harm to trees that are co-owned by neighbors, courts may prorate damages according to a co-owner's

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14. *Booska*, 30 Cal. Rptr. 2d at 244–45.

15. CAL. CIV. CODE § 833 (2013).

16. *See infra* Part II.B (discussing overhanging branches).

17. CAL. CIV. CODE § 834 (2013); *see also* *Scarborough v. Woodill*, 93 P. 383, 384 (Cal. Ct. App. 1907) (referring to such trees as “line trees”).

18. *Kallis v. Sones*, 146 Cal. Rptr. 3d 419, 420–22 (Cal. Ct. App. 2012).

19. *Id.* at 420–22.

proportional interest in a tree.<sup>20</sup> Additionally, co-owners of trees that grow on boundary lines can obtain injunctive relief to prevent other co-owners from harming the tree.<sup>21</sup> In fact, courts have granted injunctions to protect trees growing on boundary lines when the trees serve as a shelter or windbreak for one owner, even though the presence of the trees damages the land of other co-owners.<sup>22</sup> Generally, if there is any dispute over the ownership of a tree, property owners should contact a surveyor to determine where the tree is located in relation to property boundaries.

In addition to trees that are physically located within the boundaries of the land they own, property owners maintain a “qualified” or “limited” interest in trees that grow in a public right of way in front of privately owned land.<sup>23</sup> However, this interest is subordinate to the rights of municipalities to “trim or remove them whenever the public interests require such action.”<sup>24</sup> These rights are also subordinate to other private easements in or along the public right of way, such as sidewalks and driveways.<sup>25</sup> Nevertheless, property owners do have the right to sue for harm caused to trees situated in front of their property.<sup>26</sup>

### **B. Overhanging Branches**

When the trunk of a tree grows entirely on one side of a property line, but the branches cross over the boundary line and into the property of another, the portion of the branches that cross over the boundary line belong to the individual who owns the property upon which the branches encroach.<sup>27</sup> In the past, property owners had an “absolute right” to utilize

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20. See *infra* Section IV.

21. *Anderson v. Weiland*, 55 P.2d 1242, 1242–43 (Cal. Ct. App. 1936).

22. *Scarborough*, 93 P. at 383–84.

23. *Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35, 36–37 (Cal. Ct. App. 1917); see CAL. CIV. CODE § 831 (2013) (“An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.”); see also *infra* Section V.B (regarding care for publically owned trees).

24. *Altpeter*, 164 P. at 36–37.

25. *Id.* at 36.

26. *Id.* (“[I]f a person injures such trees without lawful right or authority, such owner may maintain an action for damages for the injury so inflicted and recover such damages as he may be able to show that he has suffered by reason of any depreciation in the value of his property which has been occasioned by such injury . . .”).

27. *Grandona v. Lovdal*, 21 P. 366, 368–69 (Cal. 1889); see also CAL. CIV. CODE § 829 (2013) (“The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.”).

self-help to cut off encroaching branches.<sup>28</sup> A property owner could “take the law into [their] own hands” and cut off encroaching branches on their own, as long as they did not trespass across their neighbor’s boundary line or cut off any part of the tree that was located on their neighbor’s property.<sup>29</sup> The antecedents of these rules are derived from English Common Law<sup>30</sup> and “as a matter of historic tradition, courts have simply treated trees growing on or near borders as unique conditions and provided adjoining landowners with absolute protection from damage that arises from their natural encroachment.”<sup>31</sup>

However, this “absolute right” is no longer recognized in California.<sup>32</sup> Instead, the right to cut encroaching branches is constrained by a duty to act reasonably.<sup>33</sup> Individuals who cut encroaching branches may now be liable for causing foreseeable injuries to the health, aesthetics, or functionality of the tree they cut.<sup>34</sup> If the branches are a nuisance, then property owners can go to court to ask for an injunction,<sup>35</sup> but property owners cannot unilaterally cut off encroaching branches without assessing whether the

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28. *Bonde*, 245 P.2d at 621 (Cal. Ct. App. 1952); *see also Grandona*, 21 P. at 368–69 (holding that a property owner may cut off encroaching branches “at his pleasure”).

29. *Bonde*, 245 P.2d at 620; *Grandona*, 11 P. at 624 (“[H]e may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil.” (citations omitted)).

30. Glenn A. McLeary, *The Possessor’s Responsibilities as to Trees*, 29 MO. L. REV. 159, 162–66 (1964).

31. *Lussier v. San Lorenzo Valley Water Dist.*, 253 Cal. Rptr. 470, 474 n.5 (Cal. Ct. App. 1988).

32. *Booska v. Patel*, 30 Cal. Rptr. 2d 241, 244–45 (Cal. Ct. App. 1994).

33. *Id.* at 245 (citing *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1128 (Cal. 1981)); *see also* WILLIAM LLOYD PROSSER & W. PAGE KEETON, *TORTS* § 57 (5th ed. 1984) (explaining that property owners must not cause “unreasonable risks of harm to others in the vicinity”); *see also* 2 C.J.S. *ADJOINING LANDOWNERS* § 23 (2013) (“Each owner of adjoining land may trim on his or her own side trees and plants standing on the boundary line provided he or she does so without unreasonable injury to the interest of his or her neighbor . . . . However, the rule is qualified by the right of an abutting owner to use its realty in a reasonable way.”).

34. *Booska*, 30 Cal. Rptr. 2d at 244–45 (citing *Parks v. Atwood Crop Dusters, Inc.*, 257 P.2d 653, 655–56 (Cal. Ct. App. 1953)); *Rony v. Costa*, 148 Cal. Rptr. 3d 642, 647–48 (Cal. Ct. App. 2012) (citing *Heninger v. Dunn*, 162 Cal. Rptr. 104, 108–09 (Cal. Ct. App. 1980)); *see also* CAL. CIV. CODE § 3502 (2013) (“A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, *without committing a breach of the peace, or doing unnecessary injury.*” (emphasis added)).

35. *See Bond*, 245 P.2d at 621.

cutting will harm the rest of the tree on the other side of the fence. Consequently, property owners should exercise extreme caution before cutting off any encroaching branches to make sure they are not liable for any harm to their neighbors' trees.

In some circumstances, property owners may be able to also pursue civil action to force neighbors to cut off encroaching branches.<sup>36</sup> If encroaching branches constitute a nuisance, injunctive relief may be available to abate the nuisance.<sup>37</sup> In fact, in cases where encroaching branches *do* constitute a nuisance, courts recommend that injunctive relief is a preferable and “more orderly” remedy than self-help.<sup>38</sup> However, in situations where encroaching branches do not constitute a nuisance, injunctive relief is not available to abate the encroachment.<sup>39</sup>

In general, anything that “interfere[s] with the comfortable enjoyment of life or property” is a nuisance.<sup>40</sup> California courts have interpreted this provision narrowly when examining whether tree branches constitute a nuisance. Consequently, encroaching branches only constitute a nuisance when they injuriously affect the health, safety, or property of another—the mere encroachment of branches into a neighbor’s airspace is not, *ipso facto*, a nuisance.<sup>41</sup> Furthermore, the branches will only constitute a nuisance if the encroachment interferes with economic interests that exist at the time of the encroachment.<sup>42</sup> Encroaching branches that interfere with future or prospective interests are not likely to constitute a nuisance.

In most circumstances, falling leaves and branches will constitute a nuisance.<sup>43</sup> Courts have found that leaves and branches that fall off encroaching trees can constitute a nuisance when this debris clogs storm drains and litters a neighbor’s property.<sup>44</sup> For example, in *Bonde v. Bishop*, the California Court of Appeal held that a “continual dropping of branches”

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36. *Booska*, 30 Cal. Rptr. 2d at 244–45 (internal citations omitted); CAL. CIV. CODE § 3501 (2013).

37. *Grandona*, 21 P. at 368; *accord Bonde*, 245 P.2d at 621 (holding that an individual can obtain an injunction after proving a nuisance).

38. *Bonde*, 245 P.2d at 621.

39. *Grandona*, 21 P. at 368–69.

40. CAL. CIV. CODE § 3479 (2013).

41. *Grandona*, 21 P. at 368–69.

42. *Id.*

43. *Parsons v. Luhr*, 270 P. 443, 444 (Cal. 1928) (holding that falling branches and leaves constituted a nuisance because they littered gutters and caused the aggrieved party to fear for their safety and granting an injunction to abate such nuisance); *accord Bonde*, 245 P.2d at 618–19, 621.

44. *Parsons*, 270 P. at 444; *accord Bonde*, 245 P.2d at 618–19, 621.



constituted a nuisance.<sup>45</sup> It is not clear if *fear* or *apprehension* of falling branches alone can constitute a nuisance, but the facts of *Bonde* suggest that well-founded fear of harm can constitute a nuisance.<sup>46</sup> The court in *Bonde* noted that the plaintiffs were “afraid of the overhanging limbs and because of them [were] afraid to leave their baby out in the patio.”<sup>47</sup> There, the plaintiffs’ fear of falling branches interfered with their free use and enjoyment of their property, and this was one contributing factor for why the overhanging branches constituted a nuisance.<sup>48</sup>

Nuisances may also exist when trees interfere with utility easements. California courts recognize the right of utility companies to cut off branches of privately owned trees that interfere with electrical wires owned by the utility companies.<sup>49</sup> However, utility companies cannot cut more than is necessary—utility companies can only cut branches that interfere with the “proper and efficient use” of the wires.<sup>50</sup> If a utility company does cut more than is necessary, or “wantonly and unnecessarily cuts or mutilates the trees,” the utility company will be liable for damages caused to the owner of the property in front of which the trees are located.<sup>51</sup> As long as the cutting is necessary, property owners cannot bring a cause of action, even if the cutting of the trees depreciates the value of the property in front of which the trees are located.<sup>52</sup>

Property owners who control encroaching trees need not be the actual or proximate cause of the nuisance to be held liable.<sup>53</sup> For example, in *Mattos v. Mattos*, the California Court of Appeal held that a property owner was liable for abating a nuisance even though the nuisance was not caused by any intentional or negligent act or omission on the part of the property owner.<sup>54</sup> In *Mattos*, a storm blew down eucalyptus trees growing on the

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45. *Bonde*, 245 P.2d at 618 (“It is almost a daily chore to clean the debris from the tree.”).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35, 36–37 (Cal. Ct. App. 1917); *see also* *S. Bell Tele. & Tele. Co. v. Constantine*, 61 F. 61 (5th Cir. 1894) (holding that a telegraph company was not liable for trespass when it cut trees that interfered with the company’s poles and wires).

50. *Altpeter*, 164 P. at 37–38 (noting that utility companies owe a duty of “efficient performance” to the public).

51. *Id.*

52. *Id.* at 38.

53. *Mattos v. Mattos*, 328 P.2d 269, 270 (Cal. Ct. App. 1958).

54. *Id.* at 269–70.

defendant's property.<sup>55</sup> The trees covered a substantial area of the plaintiff's land and restricted the plaintiff's ability to use the land for grazing purposes, "to which [the land was] normally devoted."<sup>56</sup> Even though the defendant did not cause the nuisance through any affirmative act or omission, the defendant was still liable for the nuisance.<sup>57</sup>

Although some jurisdictions recognize an "act of God" defense when unusually strong weather or unanticipated events cause trees to fall,<sup>58</sup> California courts have been hesitant to endorse this defense.<sup>59</sup> Rather, California courts have held that unusually strong storms do not constitute acts of God<sup>60</sup> and property owners have an affirmative duty to guard against potential damage that could be caused by falling trees.<sup>61</sup> Property owners should be aware that they might be liable for damage caused by falling trees in extreme weather events and tree owners should consult arborists to minimize potential liability.

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55. *Mattos*, 328 P.2d at 270.

56. *Id.* at 269–70.

57. *Id.*

58. See, e.g., *Brown v. Sandals Resorts Int'l*, 284 F.3d 949, 954 (8th Cir. 2002) (upholding an act of God defense when a palm tree fell on a hotel guest on an "extremely windy" night); *Rector v. Hartford Accident & Indemnity Co.*, 120 So.2d 511, 512, 522 (La. 1960) (holding that a strong windstorm that blew down a decayed tree was an act of God).

59. *Mattos*, 328 P.2d at 270 ("[A]t most this storm was of somewhat more than average intensity, warrants the implied finding that the falling of the trees was not within the category of an act of God."); *Mitchell v. City of Santa Barbara*, 120 P.2d 131, 133–34 (Cal. Ct. App. 1941) (citing *S. Pac. Co. v. City of Los Angeles*, 55 P.2d 847, 849 (Cal. 1936)) ("[A] rainstorm which is merely of unusual intensity is not . . . [an] act of God."); *Smith v. San Joaquin Light & Power Corp.*, 211 P. 843, 844 (Cal. Ct. App. 1922) (stating that a wind that blew down a tree onto a power line was not an act of God).

60. *Mitchell*, 120 P.2d at 133–34.

61. *Irelan-Yuba Gold Quartz Mining Co. v. Pac. Gas & Elec. Co.*, 116 P.2d 611, 615 (Cal. 1941) ("If a tree is in such close proximity to a pole line that wind may cause it to fall across the wires, the failure to provide against such eventuality is negligence . . ."); *Smith*, 211 P. at 844 ("[I]f the palm tree stood in such a position as to endanger the defendant's wire, the defendant should have properly protected its wire therefrom, and in failing to do so the omission was an act of neglect on the part of the defendant . . .").

### **C. Encroaching Roots**

If the trunk of a tree is situated on one side of a property line, but roots encroach across the boundary, property owners can seek injunctive relief to abate encroaching roots when the roots constitute a nuisance.<sup>62</sup> However, property owners may not enter their neighbor's property to cut down trees that are the source of encroaching roots.<sup>63</sup> Just like encroaching branches, encroaching roots only constitute a nuisance when they injuriously affect the property of another.<sup>64</sup> Compensatory damages may also be available if the encroachment damages the plaintiff's property.<sup>65</sup>

California courts used to allow property owners to utilize self-help to abate encroaching roots.<sup>66</sup> In *Stevens v. Moon*, the California Court of Appeal wrote that when encroaching roots constitute a nuisance, property owners may "[dig] into the ground, intercept and destroy the roots."<sup>67</sup> However, property owners are no longer permitted to utilize self-help to cut off encroaching roots when harm to the tree is a foreseeable result of the cutting.<sup>68</sup> In the landmark tree law case *Booska v. Patel*, the California Court of Appeal rejected the notion that property owners have an absolute right to cut encroaching roots when damage to the tree is a foreseeable result.<sup>69</sup> In *Booska*, the defendant hired a contractor to excavate and sever encroaching roots at a depth of three feet.<sup>70</sup> This caused the tree to become unsafe, "unable to support life," and had to be removed at the expense of the tree's

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62. *Stevens v. Moon*, 202 P. 961, 963–64 (Cal. Ct. App. 1921).

63. *Fick v. Nilson*, 220 P.2d 752, 753–54 (Cal. Ct. App. 1950).

64. *Crance v. Hems*, 62 P.2d 395, 367–97 (Cal. Ct. App. 1936) (holding that encroaching roots from athel trees "killed, strangled, and completely destroyed" pecan trees on the property onto which the roots encroached); *see also Grandona v. Lovdal*, 21 P. 366, 368–69 (Cal. 1889) (holding that encroaching roots did not constitute a nuisance because they did not prevent the plaintiff from cultivating his land).

65. *Stevens*, 202 P. at 963–64.

66. *Id.* at 962–63; *see also Grandona*, 21 P. at 369 (holding that encroaching trees "in so far as they were on or over [the plaintiff's] land, belonged to the plaintiff, and he could have cut them off, or trimmed them, at his pleasure").

67. *Stevens*, 202 P. at 962–63.

68. *Booska v. Patel*, 30 Cal. Rptr. 2d 241, 243 (Cal. Ct. App. 1994) ("[The plaintiff] constructs an absolute right to do whatever he likes *on* his property, without regard to its impact on his neighbors. This is not the law."); *see also CAL. CIV. CODE* § 3514 (2013) ("[A property owner] must so use his own rights as not to infringe upon the rights of another.").

69. *Booska*, 30 Cal. Rptr. 2d at 243.

70. *Id.* at 242–43.

owner.<sup>71</sup> The court held the defendant was liable for damaging the tree and that property owners have a duty to act reasonably to avoid foreseeable harm to their neighbors' property.<sup>72</sup> Since healthy roots are essential to the continued strength and vitality of trees, property owners should consult professional arborists before touching encroaching roots.

Tree roots that encroach underneath sidewalks and other publicly accessible walkways are a common source of liability. If property owners maintain control or care over a tree, then they may be liable for injuries proximately caused by the negligent care of that tree,<sup>73</sup> including slip-and-fall accidents caused by encroaching roots.<sup>74</sup> Absent a local ordinance to the contrary,<sup>75</sup> a municipality assumes liability for damages caused by trees which it maintains on publically controlled land.<sup>76</sup>

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71. *Booska*, 30 Cal. Rptr. 2d at 242–43.

72. *Id.* at 244–45.

73. *Moeller v. Fleming*, 186 Cal. Rptr. 24, 25–26 (Cal. Ct. App. 1982); *see also* *Alpert v. Villa Romano Homeowners Assn.*, 96 Cal. Rptr. 2d 364, 375–76 (Cal. Ct. App. 2000).

74. *Alpert*, 96 Cal. Rptr. 2d at 773–74 (internal citations omitted); *see also* CAL. STS. & HIGH. CODE § 5610 (2013).

75. *See e.g.*, S.F., CAL., PUB. WORKS CODE art. 16 § 805 (2010) (creating a cause of action for injuries caused by improper maintenance of trees and establishing the process by which the city may relinquish maintenance responsibilities to private property owners); *Tree Maintenance Transfer Plan*, SAN FRANCISCO PUBLIC WORKS (2014), <http://sfdpw.org/index.aspx?page=1478> (last visited Oct. 30, 2014) (outlining the city's current plan to transfer responsibility and liability for maintenance to private property owners); *see also infra* Part V (discussing municipal ordinances regulating tree growth).

76. *Alpert*, 81 Cal. App. 4th at 374–75 (citing *Williams v. Foster*, 265 Cal. Rptr. 15, 22 (Cal. Ct. App. 1989)) (“Where a particular abutter does not possess or own the street easement, and does not undertake maintenance of it, we see no legal basis for imposing liability for failure to properly maintain the sidewalk or planting strip in the absence of statute or ordinance.”); *Jones v. Deeter*, 199 Cal. Rptr. 825, 829 (Cal. Ct. App. 1984) (“[I]n localities where the city has habitually maintained the surface of the parkway, it is solely the city's duty to keep this surface area safe for pedestrians; hazards on such areas are not attributable to abutting owners.”).

### III. Obstructions of Light and Air

Unlike falling debris, the obstruction of light shining into a neighbor's property is not an actionable nuisance and injunctive relief is not available when trees obstruct light and air.<sup>77</sup> Absent any municipal ordinances that guarantee otherwise, property owners do not have the right to light and air unobstructed by trees.<sup>78</sup> The only exceptions are when the blockage of sunlight is malicious<sup>79</sup> or if the trees obstruct a solar easement granted under the Solar Shade Control Act.<sup>80</sup>

In the landmark case *Sher v. Leiderman*, the California Court of Appeal reaffirmed that the obstruction of sunlight is not an actionable nuisance.<sup>81</sup> There, the plaintiff sued when trees located on the defendant's property grew over a period of ten years and ultimately obstructed sunlight to the plaintiff's house.<sup>82</sup> Shadows cast by these trees made the plaintiff's home "dark and dismal" and adversely affected the home's thermal performance.<sup>83</sup> Following the precedent established in *Haehlen v. Wilson*,<sup>84</sup> the court held that this obstruction was not an actionable nuisance.<sup>85</sup> Furthermore, the court noted that the defendant did not act maliciously because the defendant did not intend to deprive the plaintiff of sunlight at the time at which the trees were originally planted.<sup>86</sup> Consequently, the court declined to grant a private nuisance for the obstruction of the sunlight.<sup>87</sup>

The court in *Sher* also limited the scope of the Solar Shade Control Act to "active solar collectors" designed for the purposes of "(1) water heating, (2) space heating or cooling, and (3) power generation."<sup>88</sup> The court specifically rejected the plaintiff's assertion that the Act provided a solar

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77. *Haehlen v. Wilson*, 54 P.2d 62, 64 (Cal. Ct. App. 1936); *accord* *Taliaferro v. Salyer*, 328 P.2d 799, 802–03 (Cal. Ct. App. 1958) (holding that a neighbor's obstruction of light and air is not an actionable nuisance).

78. *See* *Venuto v. Owens-Corning Fiberglass Corp.*, 99 Cal. Rptr. 350, 357–58 (Cal. Ct. App. 1971) (holding that obstructions of light and air are not, per se, a nuisance); *Haehlen*, 54 P.2d at 64 (holding that the doctrine of "ancient lights" does not apply in California).

79. *Haehlen*, 54 P.2d at 64.

80. CAL. PUB. RES. CODE §§ 25980, 25981 (2013).

81. *Sher v. Leiderman*, 226 Cal. Rptr. 698, 704–05 (Cal. Ct. App. 1986).

82. *Id.* at 700–01.

83. *Id.*

84. *Haehlen*, 54 P.2d at 64 (Cal. Ct. App. 1936).

85. *Sher*, 226 Cal. Rptr. at 703, 704–05.

86. *Id.* at 700–01, 704–05.

87. *Id.* at 703–04.

88. *Id.* at 705, 706–07 (citing CAL. PUB. RES. CODE § 25981).

easement for “passive solar collectors” like south-facing windows that warm buildings by letting in more sunlight.<sup>89</sup> The mere fact that windows and skylights “take in” light does make these windows “active solar collectors” under the terms of the act. Therefore, property owners cannot rely on the Solar Shade Control Act to remove trees that obstruct sunlight to windows and skylights.

When a group of trees is planted in a row and the row of trees obstructs the view of a neighbor, the individual whose view is obstructed may be able to obtain injunctive relief to remove the obstruction under California’s “spite fence” statute.<sup>90</sup> The “spite fence” statute protects adjoining landowners from fences and other structures “unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property.”<sup>91</sup> These spite fences constitute a private nuisance.<sup>92</sup> In *Wilson v. Handley*, the California Court of Appeal held that a row of trees planted to “annoy” a neighboring landowner could in fact constitute a “spite fence.”<sup>93</sup> The court noted that a row of trees could violate the spite fence statute if they only block light and air, as long as the obstruction satisfies all other statutory requirements.<sup>94</sup> However, if the trees had been planted to maintain aesthetic qualities or to protect the defendants’ privacy, the row of trees would not fit the definition of “spite fence” under the statute.<sup>95</sup> In *Vanderpol v. Starr*, the court affirmed that a row of trees could fit the definition of a “spite fence,” but the court clarified that relief is only available under the statute when an obstruction injures “comfort or enjoyment” of property.<sup>96</sup> Subsequently, the California Court of Appeal held that courts can look to

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89. *Sher*, 226 Cal. Rptr. at 882 (noting the plaintiff’s interpretation of the Act would extend “the scope of the Act to absurd proportions”); *see also* CAL. PUB. RES. CODE § 25986 (2013) (allowing limited exemptions for passive solar collectors); *Zipperer v. County of Santa Clara*, 35 Cal. Rptr. 3d 487, 493–94 (Cal. Ct. App. 2005) (citing CAL. PUB. RES. CODE § 25985 (2013)) (upholding the validity of a provision in the Solar Shade Control Act that allows municipalities to “opt out” of the Act’s requirements by majority vote).

90. *Vanderpol v. Starr*, 123 Cal. Rptr. 3d 506, 512 (Cal. Ct. App. 2011) (“[A] row of trees, as opposed to a single tree, could constitute a ‘structure’ within the meaning of [the statute.]”); *Wilson v. Handley*, 119 Cal. Rptr. 2d 263, 269 (Cal. Ct. App. 2002) (citing CAL. CIV. CODE § 841.4 (2013)).

91. CAL. CIV. CODE § 841.4 (2013).

92. *Id.*

93. *Wilson*, 119 Cal. Rptr. 2d at 269–70.

94. *Id.* at 370–71 (internal citations omitted).

95. *Id.* at 269–70.

96. *Vanderpol*, 123 Cal. Rptr. 3d at 512.

either the subjective intent of the individual who built the fence *or* to objective or circumstantial evidence of intent when determining whether the “dominant purpose” of the fence was malicious.<sup>97</sup>

Neither the spite fence statute nor case law specify the number of trees required for a row of trees to constitute a fence. In *Vanderpol*, the defendants planted a row of at least twenty pine trees and at least sixty-five Italian Cypresses.<sup>98</sup> In *Wilson*, the fence contained at least seventeen Leland cypress trees<sup>99</sup> and the court found it relevant that the row of trees had “fence-like” qualities.<sup>100</sup> Therefore, if even a small group of trees planted along a property line obstruct light or air, property owners may be able to utilize the spite fence statute to remove the obstruction. Alternatively, property owners who use rows of trees to demarcate property boundaries should be aware that the row of trees might be vulnerable under the spite fence statute.<sup>101</sup>

#### **IV. Calculating Damages for Tortious Harm to Trees**

The standard measure for damages caused by tortious injury to property is “the amount which will compensate for all the detriment proximately caused thereby.”<sup>102</sup> There is no fixed rule for how courts should calculate damage to trees.<sup>103</sup> Courts generally consider diminution in value of the tree as well as restoration costs.<sup>104</sup> However, plaintiffs may only recover “reasonable costs of replacing destroyed trees with identical or substantially similar trees.”<sup>105</sup> Some courts recommend awarding costs for

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97. *Vanderpol v. Starr*, D062350, 2014 WL 1624069, at \*10–12 (Cal. Ct. App. Apr. 24, 2014) (unpublished opinion).

98. *Id.* at 3.

99. *Wilson*, 119 Cal. Rptr. 2d at 265.

100. *Id.*; *see Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 810 P.2d 27, 30–31 (Wash. Ct. App. 1991) (holding that a row of trees planted along a property line can be considered a fence).

101. *Wilson*, 119 Cal. Rptr. 2d at 269 (explaining that a fence-like structure designed to demarcate a property boundary “does not need to be more than 10 feet high to serve that purpose”).

102. CAL. CIV. CODE § 3333 (2013).

103. *Kallis v. Sones*, 146 Cal. Rptr. 3d 419, 422–23 (Cal. Ct. App. 2012).

104. *Id.*; *see also Hammond v. United States*, 246 F. 40, 49 (9th Cir. 1917) (holding that courts should assess the value of timber at the place it was cut, and should not discount for the cost of manufacturing the wood into lumber).

105. *Heninger v. Dunn*, 162 Cal. Rptr. 104, 108–09 (Cal. Ct. App. 1980).

the planting of saplings and immature trees, rather than mature trees of similar condition to the ones that were damaged or destroyed.<sup>106</sup>

When assessing the value of trees, some courts have looked at the diminution of value to the entire property on which the trees grew, rather than the intrinsic value of the trees themselves.<sup>107</sup> In *Kolberg v. Sherwin-Williams Co.*, the plaintiff applied a defective anti-scale spray made by the defendant to his trees, destroying his orchard.<sup>108</sup> The California Court of Appeal held that damages should be assessed according to the diminution of value of the entire orchard, rather than to individual trees.<sup>109</sup> This principle was affirmed in *Rony v. Costa*, when the court held that damages should be determined by “the difference between the value of the property before and after the injury.”<sup>110</sup>

However, diminution of the market value of trees is not “an absolute limitation” when assessing damages.<sup>111</sup> Courts have also considered the “personal” value of trees.<sup>112</sup> For example, in *Kallis v. Sones*, the California Court of Appeal for the Second District noted that an Aleppo pine provided “personal value” because it shaded a playhouse that was constructed for the

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106. *Heninger*, 162 Cal. Rptr. at 108–10 (holding that a \$241,257 cost of replanting mature trees was unreasonable when saplings could be planted for \$19,610).

107. *Roche v. Casissa*, 316 P.2d 776, 778 (Cal. Ct. App. 1957) (evaluating “the true measure of damages to be the damage to the freehold, rather than the value of the trees themselves . . . and not with respect to any intrinsic value of the trees as so much wood”).

108. *Kolberg v. Sherwin-Williams Co.*, 269 P. 975, 976 (Cal. Ct. App. 1928).

109. *Id.* at 977 (“[T]he damages awarded were intended to cover the damage to the land, and not that suffered by the separate trees.”); *see also* *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.*, 105 Cal. Rptr. 2d 856, 861–62 (Cal. Ct. App. 2001) (holding that courts may look at lost profits when analyzing the value of trees on a pistachio farm).

110. *Rony v. Costa*, 148 Cal. Rptr. 3d 642, 647 (Cal. Ct. App. 2012); *see also* RESTATEMENT (SECOND) OF TORTS: HARM TO LAND FROM PAST INVASIONS § 929 cmt. f (1979) (“For the destruction of or damage to . . . mature timber trees that have a market value or a value distinguishable from the value of the land, the owner can, at his election, recover for the loss or diminution of the value of the thing injured or destroyed, in substitution for the diminution in value of the land as a whole.”).

111. *Rony*, 148 Cal. Rptr. 3d at 647 (citing *Heninger*, 162 Cal. Rptr. at 106–07).

112. *Kallis v. Sones*, 146 Cal. Rptr. 3d 419, 423–23 (Cal. Ct. App. 2012); *see also* *Heninger*, 162 Cal. Rptr. at 107–08 (citing RESTATEMENT (SECOND) OF TORTS: HARM TO LAND FROM PAST INVASIONS § 929 cmt. b (1979)) (stating that restoration costs that exceed the diminution in fair market value may be awarded when the plaintiff has personal reasons for restoring the property to its original condition).



plaintiff's children and grandchildren.<sup>113</sup> California courts have also considered the aesthetic value of trees when assessing damages.<sup>114</sup> In *Rony v. Costa*, the court provided the plaintiff for his "loss in aesthetic pleasure."<sup>115</sup> Similarly, in *Baker v. Pierce*, the court considered "ornamental and shade value" when calculating damages for trees that were negligently removed by construction workers.<sup>116</sup> Calculating lost aesthetic value is necessarily a subjective inquiry, but property owners can take proactive steps to document the aesthetic value of their trees by taking pictures or videos of the trees. Tree owners can also take proactive steps to appraise the value of their trees; some tree appraisal services are even available online.<sup>117</sup>

California courts have recognized that trees can be injured in many different ways and courts have held that damages are available for a wide range of potential injuries. Property owners may collect damages when their trees are cut, uprooted, or trampled and may even collect damages for trees where the injury is proximately caused by a fire.<sup>118</sup> Damages are also available when trees are poisoned by a third party. In *Santa Barbara Pistachio Ranch v. Chowchilla Water District*, the court awarded damages when the plaintiff damaged his trees after irrigating them with contaminated water provided by the defendant.<sup>119</sup> Likewise, in *Kolberg v. Sherwin-Williams Co.*, the court held that damages were available when the plaintiff's trees were poisoned by a defective insecticide.<sup>120</sup>

When assessing damages to trees that grow on a boundary line, courts may prorate damages according to the injured party's proportional interest

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113. *Kallis*, 146 Cal. Rptr. 3d at 422–23.

114. *Rony*, 148 Cal. Rptr. 3d at 647–48 (quoting *Heninger v. Dunn*, 162 Cal. Rptr. at 108–09 ("[T]he landowner may recover the value of the trees or shrubbery, either as timber or for their aesthetic qualities . . .").

115. *Id.* at 647–48.

116. *Baker v. Pierce*, 223 P.2d 286, 287–288 (Cal. Ct. App. 1950).

117. *Tree Protection Toolkit: Appraisal Calculators*, AMERICAN FORESTS, <http://www.americanforests.org/bigtrees/tree-protection-toolkit/calculate-the-value-of-your-tree> (last visited Oct. 30, 2014).

118. See, e.g., *Kelly v. CB & I Constructors, Inc.*, 102 Cal. Rptr. 3d 32, 48–49 (Cal. Ct. App. 2009); *Kennedy v. Minarets & W. Ry. Co.*, 266 P. 353, 360 (Cal. Ct. App. 1928) ("[D]anger from fires in a dry country like California is so great as to justify the police power of the state in imposing treble damages . . .").

119. *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.*, 105 Cal. Rptr. 2d 856, 858–59 (Cal. Ct. App. 2001).

120. *Kolberg v. Sherwin-Williams Co.*, 269 P. 975, 976 (Cal. Ct. App. 1928).

in the tree.<sup>121</sup> However, courts can compensate co-owners for the value of the entire tree if one of the owners benefits from the use of the entire tree.<sup>122</sup> For example, if the canopy of the entire tree provides shade for one co-owner, that co-owner can recover for damage to the entire tree, even if part of the tree that provides shade is located on their neighbor's property.<sup>123</sup>

When damage to trees is willful or intentional, plaintiffs *may* collect damages equivalent to three times the value of the actual detriment, but courts *must* award damages equal to twice the sum of the actual detriment.<sup>124</sup> If the trespass is casual, involuntary, or if the trespasser was mistaken about the ownership of the tree, courts must award damages equivalent to twice the value of the actual detriment.<sup>125</sup> Subsequent case law has upheld the validity of the double and treble damage provisions in the Civil Code,<sup>126</sup> but courts have held that double and treble damages for

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121. *Kallis v. Sones*, 146 Cal. Rptr. 3d 419, 421–22 (Cal. Ct. App. 2012) (citing *Happy Bunch, LLC v. Grandview North, LLC*, 173 P.2d 959, 965–66 (Wash. Ct. App. 2007)).

122. *Kallis*, 146 Cal. Rptr. 3d at 421–22.

123. *Id.*

124. CAL. CIV. CODE § 3346 (2013); CAL. CODE CIV. PROC. § 733 (2013) (providing treble damages for trespasses that cause damage to trees); *Baker v. Ramirez*, 235 Cal. Rptr. 857, 866 (Cal. Ct. App. 1987) (citing *Drewry v. Welch*, 46 Cal. Rptr. 65, 78 (Cal. Ct. App. 1965)) (“Under this section, if the trespass is found to be willful and malicious, the court *may* impose treble damages but *must* impose double damages.”); *see also* *Heninger v. Dunn*, 162 Cal. Rptr. 104, 110–11 (Cal. Ct. App. 1980) (“Statutes providing for recovery of double or treble damages for injuries to trees are intended to make timber appropriation unprofitable.”); *cf.* A.B. 2071, Cal. State Assembly, 2011–2012 Reg. Sess. (Cal. 2012) (unpassed bill that would have amended section 3346 of the Civil Code to provide double damages for individuals who were harmed by trespassers who intended to make commercial use of the wood).

125. CAL. CIV. CODE § 3346(a) (2013); *Baker*, 235 Cal. Rptr. at 866 (citing *Drewry*, 46 Cal. Rptr. at 78) (“[I]f the trespass is found to be casual and involuntary or under a mistake of fact, the court *must* impose double damages.”); *cf.* *Heninger*, 162 Cal. Rptr. at 111 (stating that courts should “exercise broad discretion in determining what amount will achieve just and reasonable compensation” when calculating damages).

126. *See, e.g.*, *Ostling v. Loring*, 33 Cal. Rptr.2d 391, 401–02 (Cal. Ct. App. 1994) (holding that defendant’s due process rights were not violated when property owner’s complaint did specify that doubling of damages was possible under the statute); *Ghera v. Sugar Pine Lumber Co.*, 36 Cal. Rptr. 305, 307 (Cal. Ct. App. 1964) (holding that the statute should be strictly construed).

injuries to trees are penal and punitive rather than remedial.<sup>127</sup> Consequently, when courts award double or treble damages, they are not permitted to grant exemplary damages under section 3294 of the California Civil Code.<sup>128</sup> An additional award of exemplary damages would, in effect, punish the defendant twice, and would not achieve the policy goals underlying section 3294 of “educating blunderers . . . and discouraging rogues.”<sup>129</sup> In any case, citizens should be aware that there is a high price to pay for causing willful damage to trees.

## **V. Municipal Ordinances Regulating Tree Growth**

Many municipalities in California have adopted complex regulatory frameworks for the growth, care, and removal of trees. San Francisco’s Public Works Code provides strict guidelines for the growth and care of trees.<sup>130</sup> One notable aspect of San Francisco’s ordinance is that it is unlawful to injure or destroy a “significant tree” or a landmark tree.<sup>131</sup> Some tree ordinances restrict the extent to which trees can obstruct views. For example, Berkeley’s Solar Access and Views Ordinance has the stated goal of “[restoring] access to light and views from the surrounding locale.”<sup>132</sup> Other ordinances require property owners to conserve energy by using trees to create shade. In Los Angeles, applications for landscape approval must contain “a proposal for shading of walls of structures.”<sup>133</sup>

Municipalities may also unilaterally compel the removal of unwelcomed trees.<sup>134</sup> If trees obstruct “sidewalks, parkings, or streets,” municipalities can require the removal of these trees and “make the cost of

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127. *Baker*, 235 Cal. Rptr. at 866 (citing *Helm v. Bollman*, 1 Cal. Rptr. 723, 725–26 (Cal. Ct. App. 1959)); *Drewry*, 46 Cal. Rptr at 72–73 (citing *Caldwell v. Walker*, 27 Cal. Rptr. 675, 678 (Cal. Ct. App. 1963)).

128. *Baker*, 235 Cal. Rptr. at 866.

129. *Id.*; see also *Kelly*, 102 Cal. Rptr. 3d at 45, 48–49 (holding that mandatory double damages under section 3346 of the Cal. Civil Code are not precluded by section 13007 of the Cal. Health and Safety Code, which provides damages for property destroyed in a fire).

130. S.F., CAL., PUB. WORKS CODE, art. 16 (1995).

131. *Id.* § 808.

132. BERKELEY, CAL., HEALTH & SAFETY CODE, ch. 12.44 et. seq. (2012), available at <http://codepublishing.com/ca/berkeley/html/pdfs/Berkeley12.pdf>.

133. LOS ANGELES, CAL., MUNI. CODE, § 12.42(A)(2) (1996), available at <http://www.amlegal.com/library/ca/losangeles.shtml>.

134. CAL. GOV’T CODE § 39501 (2013) (permitting the removal of “weeds” and “rank growths”); see also CAL. HEALTH & SAFETY CODE § 14876 (2013) (“Weeds may be declared a public nuisance and may be abated.”).

removal a lien upon the abutting property.”<sup>135</sup> Similarly, municipalities may also require the removal of trees that are “dangerous or injurious to neighboring property.”<sup>136</sup> Municipalities can also regulate the growth of weeds when offending plants constitute a public nuisance.<sup>137</sup> States may legitimately exercise police powers to advance aesthetic values,<sup>138</sup> so municipalities could potentially force the removal of trees that offend public aesthetics. Property owners should be mindful of the fact that municipalities have broad ranging police powers to regulate tree growth. Property owners should also do their part to ensure that trees do not cause harm to others, such that a municipality would feel compelled to take action and remove the tree.

### **A. Challenges to Municipal Tree Ordinances**

As a general principle, a land use ordinance is only unconstitutional when “[its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>139</sup> In some jurisdictions, exhaustion of administrative remedies is a pre-requisite to judicial action challenging planning decisions.<sup>140</sup> Courts have held that land use regulations on landscaping are a valid police power<sup>141</sup> and consequently, facial challenges to municipal tree ordinances must overcome significant hurdles.

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135. CAL. GOV'T CODE § 39502(a) (2013); *see also* *Altpeter v. Postal Telegraph-Cable Co.*, 164 P. 35, 36–37 (Cal. Ct. App. 1917) (“[W]here trees so grown are cut, trimmed, or removed by the city or town for the purpose of facilitating the use of the street in a legal manner by the public, then the damage resulting from such cutting or removal to the owner of the property in front of which such trees are standing is *damnum absque injuria* . . .”).

136. CAL. GOV'T CODE § 39502(b) (2013).

137. *See, e.g.*, *Thain v. City of Palo Alto*, 24 Cal. Rptr. 515, 523–34 (Cal. Ct. App. 1962).

138. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *see* *Metromedia Inc., v. City of San Diego*, 610 P.2d 407, 414 (Cal. 1980) (holding that aesthetics alone justify the use of municipal police power), *rev'd on other grounds*, 453 U.S. 490 (1981).

139. *Associated Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473, 486 (Cal. 1976).

140. *San Franciscans Upholding the Downtown Plan v. City & Cnty. of San Francisco*, 125 Cal. Rptr. 2d 745, 766 (Cal. Ct. App. 2002).

141. *Echevarrieta v. City of Rancho Palos Verdes*, 103 Cal. Rptr. 2d 165, 169–70 (Cal. Ct. App. 2001) (citing *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996)); *see also* *Kucera v. Lizza*, 69 Cal. Rptr. 2d 582, 589 (Cal. Ct. App. 1997) (“It is not

For example, in *Kucera v. Lizza*, a property owner challenged a Tiburon, California ordinance that regulated tree growth after he was ordered to cut down trees that obstructed a neighbor's view of San Francisco Bay.<sup>142</sup> The California Court of Appeal ruled that the ordinance was a valid exercise of the municipality's police power because it advanced the city's aesthetic values.<sup>143</sup> The court held that the preservation of sunlight was a valid "police power purpose" and that the ordinance was analogous to restrictions on the height of buildings or fences.<sup>144</sup> Additionally, the court noted that ordinances that regulate views and sunlight do not have to comply with formal easement law.<sup>145</sup>

Do municipal restrictions on tree growth constitute a taking under the terms of the Fifth Amendment? The Court of Appeal did not discuss the takings issue directly in *Kucera v. Lizza*, but the court did note in dicta that "it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking."<sup>146</sup> Four years later, in *Echevarrieta v. City of Rancho Palos Verdes*, the Court of Appeal held that limitations on the height of pre-existing foliage "[are] a legitimate exercise of police power which does not rise to the level of a taking."<sup>147</sup> The court noted that the plaintiff could not demonstrate that they had a vested right to own foliage of a certain height and that these kinds of restrictions on tree height were a legitimate exercise of the city's police power.<sup>148</sup>

In *Echevarrieta*, the Court of Appeal distinguished the facts of that case from *Lucas v. South Carolina Coastal Council* and rejected the notion that the plaintiff had "reasonable investment backed expectations" to maintain trees of a certain height.<sup>149</sup> The court noted that restrictions on tree height did

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irrational for a community to plan its physical surroundings in such a way that unsightliness is minimized . . .").

142. *Kucera*, 69 Cal. Rptr. 2d at 588; cf. TIBURON, CAL., MUNICIPAL CODE ch. 15, § 15-3 (1968) (granting persons "the right to preserve and seek restoration of views or sunlight which existed at any time since they purchased or occupied a property, when such views or sunlight are from the primary living area or active use area, and have subsequently been unreasonably obstructed by the growth of trees").

143. *Kucera*, 69 Cal. Rptr. 2d at 588 (citing *Metromedia Inc.*, 610 P.2d at 414).

144. *Id.* at 588–89, 591 (citing *Pacifica Homeowners Ass'n v. Wesley Palms Retirement Cmty.*, 224 Cal. Rptr. 380, 382 (Cal. Ct. App. 1986)).

145. *Id.* at 1152.

146. *Kucera*, 69 Cal. Rptr. 2d at 592.

147. *Echevarrieta v. City of Rancho Palos Verdes*, 103 Cal. Rptr. 2d 165, 171–72 (Cal. Ct. App. 2001).

148. *Id.*

149. *Id.* at 170–71 (distinguishing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007–09 (1998)).

not deprive the plaintiff of “of any significant economically beneficial use of his land.”<sup>150</sup> Like restrictions on building heights, restrictions on tree heights “do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.”<sup>151</sup> Following the Court of Appeal’s precedent in *Echevarrieta*, it is unlikely that courts will find restrictions on tree height to be an unconstitutional taking.

### **B. Duties and Obligations when Caring for Trees Planted by a Municipality**

Many property owners take responsibility for watering, trimming, pruning, and caring for publically owned trees.<sup>152</sup> In these situations, citizens assume certain duties when they provide care for publically owned trees. Regular trimming or sweeping of leaves from a publicly owned planting strip does not establish a duty to warn bystanders about potential dangers that exist on that planting strip.<sup>153</sup> However, a duty to warn will arise when property owners exert a “notorious and open display of control” over publicly owned trees where members of the public “might reasonably rely on the *apparent* owner to warn or protect them from known hazards thereon.”<sup>154</sup> Citizens who care for publicly owned trees should also be aware that constructing a fence around a strip of publicly owned land can function as adverse possession, thereby conveying the land for the “exclusive use and enjoyment” of the adverse possessor.<sup>155</sup> Although private citizens may have the best interests of their neighborhood at heart when they care for publically owned trees, these citizens should be aware that they assume a large degree of liability by providing care for these trees.

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150. *Echevarrieta*, 103 Cal. Rptr. 2d at 171

151. *Id.* (citing *Elrich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996)).

152. Some municipalities do not permit private citizens to trim publically owned trees without first obtaining a permit. *See, e.g., Culver City Tree Maintenance Frequently Asked Questions*, CULVER CITY, <http://www.culvercity.org/Government/PublicWorks/MaintenanceOperations/TreeMaintenance.aspx>.

153. *Contreras v. Anderson*, 69 Cal. Rptr. 2d 69, 76 (Cal. Ct. App. 1997) (citing *Alcaraz v. Vece*, 929 P.2d 1239, 1249–50, 1253 (Cal. 1997)); *cf.* RESTATEMENT (SECOND) OF TORTS: NATURAL CONDITIONS § 363 cmt. e (requiring property owners who control trees next to public highways to take reasonable steps to prevent harm when they are aware of the dangerous condition of the tree).

154. *Contreras*, 69 Cal. Rptr. 2d at 76 (citing *Husovsky v. United States*, 590 F.2d 944, 953 (D.C. Cir. 1978)).

155. *Lofstad v. Murasky*, 91 P. 1008, 1010 (Cal. 1907).

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## **VI. Policy Recommendations**

When formulating tree law and policy, lawmakers must balance public, social, and environmental interests against private property rights.<sup>156</sup> Effective tree laws must therefore respond to the normative conflicts inherent within these divergent interests. The development of urban forests requires the full participation of citizens and local governments, where control of urban forests is focused at the local level.<sup>157</sup> Lawmakers should favor policies that facilitate the development of sustainable urban forests and laws should encourage private citizens to participate in the active management of both public and privately owned trees.

The best framework for resolving these normative conflicts is to utilize adaptive co-management strategies. Under this framework, policies for tree management are formulated by local communities (rather than state agencies), where policy makers continually reevaluate strategies according to the latest scientific knowledge and the needs of communities.<sup>158</sup> Local communities should have flexibility to develop tree laws that respond to the unique needs of their community, as well as unique ecological challenges that may not exist on a statewide level. In some respects, the many varied local tree ordinances in California represent an adaptive co-management system that is already in place.<sup>159</sup> San Francisco and Los Angeles, for example, have responded to the individual needs of their communities in unique ways by instituting urban forest management plans that respond to

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156. See, e.g., Keith H. Hirokawa, *Sustainability and the Urban Forest*, 51 NAT. RES. J. 233, 236 (2011) (“Urban forestry requires an investigation into the ties between the community’s environmental, economic, and social needs.”).

157. Janet A. Choi, Note, *Cultivating Urban Forests Policies in Developing Countries*, 11 SUSTAINABLE DEV. L. & POL’Y, 39, 39–40 (2010); cf. Edward J. Sullivan & Alexia Solomou, “Preserving Forest Land for Forest Uses” – *Land Use Policies for Oregon Forest Lands*, 26 J. ENVTL. L. & LITIG. 179, 246–47 (2011) (arguing that the best way to manage forest resources is through state agencies, rather than local land use regulation).

158. Jonathan Liljebld, *Adaptive Co-Management Thresholds: Understanding Protected Areas Policy as Normative Conflict*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 231, 236 (2013) (noting that vesting decision-making power in local communities “will alleviate conflicts between the natural ecosystem and human interests”); see also Fikret Berkes, *Devolution of Environment and Resources Governance: Trends and Future*, 37 ENVTL. CONSERVATION 489, 489–90 (2010); Lisen Schultz, et al., *Participation, Adaptive Co-Management, and Management Performance in the World Network of Biosphere Reserves*, 39 WORLD DEV. 662, 662–63 (2010); cf. Kai Chan et al., *When Agendas Collide: Human Welfare and Biological Conservation*, 21 CONSERVATION BIOLOGY 59, 60 (2007) (criticizing the strategy of vesting decision-making power in local communities).

159. See *supra* Parts II.C, IV.

the different social, ecological, and economic circumstances in each city.<sup>160</sup> Consequently, state agencies and the legislature should be careful to not divest decision-making authority from local communities.

Lawmakers should also provide incentives to private citizens to care for publically owned trees. Under the current state of the law, when private citizens provide care for publically owned trees, those citizens might assume liability for foreseeable harm proximately caused by those trees.<sup>161</sup> Instead, liability should remain with the municipality or agency that originally planted the trees.<sup>162</sup> Private citizens should not be penalized for openly watering and pruning trees—these good Samaritans should instead receive government subsidies for taking care of their local environment and improving their neighborhoods.

A successful tree policy should prioritize preserving the life of trees above expedient resolutions to tree disputes. Consequently, courts should continue to discourage the use of self-help when resolving encroachment disputes between neighbors.<sup>163</sup> The value of trees extends to society as a whole<sup>164</sup> and courts must weigh the value of a tree to an entire community against the nuisance caused by the encroaching tree.<sup>165</sup> If property owners took the law into their own hands to resolve tree disputes, this could undermine the goals of adaptive co-management strategies that attempt to satisfy the needs of all citizens in a community.

Trees provide ecological, aesthetic, and social benefits to all members of the community in which the trees grow.<sup>166</sup> Even privately owned trees provide benefits to the community at large. Therefore, courts should provide standing to citizens to sue for harms to any tree that provides an ecological, social, or aesthetic benefit to their community.<sup>167</sup> Building

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160. See *supra* note 75 and accompanying text.

161. See *supra* Part V.B.

162. Of course, liability should remain with private citizens when the care of trees is negligent and falls below reasonable standards of care.

163. See *Booska v. Patel*, 30 Cal. Rptr. 2d 241, 242–43 (Cal. Ct. App. 1994) (holding that property owners do not have an absolute right to cut off encroaching branches and roots).

164. See *Choi, supra* note 158, at 39.

165. In rare circumstances where trees or tree branches pose an imminent danger of falling and damaging a neighbor's property, the neighbor *should* be able to utilize self-help to protect themselves from the immediate danger.

166. See *Choi, supra* note 158.

167. In *Sierra Club v. Morton*, Justice Douglas' dissenting opinion argued that trees should have standing. 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (“[C]oncern for protecting nature's ecological equilibrium should lead to the



successful urban forests is a collaborative effort that requires the participation of all members of a community. Thus, lawmakers should provide remedies for harm to shared resources, including publicly owned trees that are utilized and enjoyed by all people.

Although it is important to protect shared resources, it is also important for lawmakers to strike an appropriate balance between public and private interests. Trees are simultaneously vital ecological resources and economic commodities—these definitions are not necessarily mutually exclusive.<sup>168</sup> Timber,<sup>169</sup> fruit,<sup>170</sup> and nuts<sup>171</sup> are essential components of our state and national economy and it is important to protect reasonable economic uses of trees. Consequently, publically owned trees on state and federal land should be held in public trust,<sup>172</sup> but trees situated on private property should still be considered *private* property.<sup>173</sup> This way, private citizens can bring a tort claim if they are directly harmed by the misuse or

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conferral of standing upon environmental objects to sue for their own preservation.”).

168. Urban forestry contributes billions of dollars in sales to the California economy. See Scott R. Templeton & George E. Goldman, *Urban Forestry Adds \$3.8 Billion in Sales to California Economy*, 50 CAL. AGRIC. 6 (1996), <http://ucanr.edu/repositoryfiles/ca5001p6-69747.pdf>.

169. In 2011, California's timber industry was valued at \$51.8 billion. CALIFORNIA AGRICULTURAL STATISTICS REVIEW: 2012–2013, CAL. DEP'T OF FOOD & AGRIC. 19 (2013), [www.cdffa.ca.gov/statistics/pdfs/2013/FinalDraft2012-2013.pdf](http://www.cdffa.ca.gov/statistics/pdfs/2013/FinalDraft2012-2013.pdf).

170. In California, the production of fruits and nuts is an \$18.7 billion industry, and California accounts for forty-two percent of national citrus production. USDA, CALIFORNIA AGRICULTURAL STATISTICS: 2012 CROP YEAR, 38 (2013) [http://www.nass.usda.gov/Statistics\\_by\\_State/California/Publications/California\\_Ag\\_Statistics/Reports/2012\\_cas-all.pdf](http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2012_cas-all.pdf).

171. California produces eighty percent of the world's almonds and around forty percent of the world's pistachios, while ninety percent of the United States' tree nuts come from California. *Id.*

172. Cf. JAMES L. HUFFMAN, PRIVATE PROPERTY AND THE CONSTITUTION: STATE POWER, PUBLIC RIGHTS, AND ECONOMIC LIBERTIES 100–01 (2013) (“Governments' legal interest [in public lands] is no different from that of any other proprietor . . . . The public right with respect to public property is only the political right . . . to demand different policies of their elected representatives or to replace those representatives with different people.”).

173. Some scholars advocate for a broad application of the public trust doctrine to all privately held resources, and that “certain resources never actually were subject to private usurpation, or never should have been.” David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and The Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711, 761 (2008).

mismanagement of privately owned trees, but private citizens still retain primary decision-making authority to manage the use of privately owned trees.<sup>174</sup>

Most importantly, tree law should attempt to foster an ethos of *respect* and *mindfulness* for the gifts of nature with which we have been blessed. Every tree is a miracle of life and our laws should encourage citizens to treat trees with dignity. Lawmakers must strike a careful balance between private property rights on one hand and public interests in ecology, social utility, and aesthetics on the other hand. This balance will not be easy to achieve, but the best outcomes will blend idealism with pragmatism.

## **VII. Conclusions**

Tree disputes can be costly and annoying, but many can be avoided with proper precautions. Property owners should never cut encroaching trees if injury to the tree is a foreseeable result. If encroaching trees pose a danger or constitute a nuisance, property owners can apply for injunctive relief to remedy the offending branches or roots. However, injunctive relief is not available to remove trees that obstruct light or air. Property owners should also be aware of applicable municipal ordinances, as these often present a unique array of requirements for individuals who own, manage, and care for trees.

Trees are valuable shared resources that provide benefits to all members of a community. As tree law develops over the next few decades, lawmakers should create laws that provide incentives to individuals to care for the health and welfare of trees. Additionally, lawmakers should utilize adaptive co-management strategies to empower local communities to create policies for tree management that change according to the evolving social, economic, and ecological needs of the community. In doing so, lawmakers should carefully balance public and private interests in the ownership and management of trees. Finally, the concept of trees as private property should not be eliminated entirely.

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174. It is important to consider that "Citizen A" can retain a property interest in a tree that grows on "Citizen B's" land, and the concept of ownership does not necessarily follow land ownership.

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