

## RADICAL JURISPRUDENCE

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### I. INTRODUCTION

A neighbor digs a ditch on his side of a property line, exposing root systems from two of the adjoining landowner's trees. The neighbor then cuts off the exposed roots, leaving the trees unsupported and in danger of falling onto the house of their owner. Is the root cutter liable to the owner of the tree?

The Washington Court of Appeals recently answered this question in *Mustoe v. Ma*.<sup>1</sup> The *Mustoe* Court held that when a root-cutting neighbor removed encroaching tree roots, he owed no duty to the tree owner "to act in good faith and to act reasonably so as not to prevent damage to the trees."<sup>2</sup> And so the root cutter could not be held liable for that damage.

This holding, though perhaps trivial-seeming, turns out to have troubling consequences. On a practical level, it gives the malicious a powerful weapon to wield against their neighbors. On the level of legal doctrine, the court's analysis unsettles Washington's law of nuisance.

In what follows, I will summarize the facts of the case and the court

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1. 193 Wash. App. 161, 371 P.3d 544 (2016).

2. *Id.* at 165, 371 P.3d at 546.

of appeals' holding,<sup>3</sup> and then turn to how and why the court of appeals got the case wrong.<sup>4</sup> I will close with some suggestions about how the court of appeals should have decided the case.<sup>5</sup>

## II. *MUSTOE V. MA*

### A. *The Facts*

The court of appeals gave a terse account of the facts behind *Mustoe*. The plaintiff, Jennifer Mustoe, owned land in Rainier, Washington.<sup>6</sup> She had two large Douglas fir trees on her property, both located only a couple of feet from the property line.<sup>7</sup> Mustoe's neighbor, Xiaoye Ma, owned the adjoining property, and Anthony Jordan lived on it with her.<sup>8</sup>

One day, Jordan dug a ditch near, but on his side of, the property line.<sup>9</sup> The ditch exposed roots from Mustoe's two Douglas firs—roots that Jordan then cut off with a chainsaw.<sup>10</sup> Jordan ended up severing nearly half of the trees' roots, leaving the trees at high risk of falling over onto Mustoe's home.<sup>11</sup> The trees, valued at more than \$16,000, had to be removed at a cost of about \$4,000.<sup>12</sup>

The court of appeals said nothing about *why* Jordan dug the ditch and cut off the protruding tree roots. Still, the record in the case does contain some suggestions.

Mustoe testified that after she moved in, Jordan, who was already living next door, approached her, saying that he wanted to help fix up her house.<sup>13</sup> His attentions made Mustoe uneasy, and he spent what Mustoe thought was too much time in her front yard.<sup>14</sup> To gain some privacy, Mustoe built a fence between the properties.<sup>15</sup> After that, Jordan "became increasingly hostile" to her.<sup>16</sup>

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3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* Part IV.

6. *Mustoe*, 193 Wash. App. at 163, 371 P.3d at 545.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; Clerk's Papers at 31, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-I).

11. *Mustoe*, 193 Wash. App. at 163–64, 371 P.3d at 545.

12. See *id.* at 164, 371 P.3d at 545.

13. See Clerk's Papers at 44, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-I).

14. See *id.* at 44–45, 155.

15. See *id.* at 44.

16. *Id.* at 155.

Another neighbor, Michael Cameron, had a conversation with Jordan just before he dug the ditch and cut off the tree roots. According to Cameron, Jordan claimed that Mustoe's two Douglas fir trees were "damaged and diseased."<sup>17</sup> Jordan, Cameron testified, said that he wanted to build "a structure to protect his house. He said he wanted the tree [sic] to fall on Jennifer Mustoe's house. . . . Mr. Jordan said he was doing [the] structure to 'piss off' Jennifer Mustoe."<sup>18</sup>

If the testimony of Mustoe and Cameron is true, it suggests that Jordan resented Mustoe for rejecting his attentions. He then dug the ditch, hoping the trees would fall on Mustoe's house.

### B. *The Court of Appeals' Decision*

Mustoe sued Jordan and Ma.<sup>19</sup> She asserted a nuisance claim, as well as a claim under Washington's timber-trespass statute.<sup>20</sup> She also alleged that Jordan had "negligently, recklessly or intentionally" harmed the Douglas fir trees.<sup>21</sup> The superior court dismissed all of Mustoe's claims on summary judgment, and she appealed.<sup>22</sup>

The court of appeals affirmed. Its opinion answered three questions. First, did Jordan, the root cutter, owe Mustoe, the tree owner, any duty of care in removing the tree roots? Second, could Mustoe bring a nuisance claim for the removal? Third, could she bring a claim under Washington's timber-trespass statute?

*No duty of care.* In deciding the duty-of-care issue, the court relied heavily on *Gostina v. Ryland*.<sup>23</sup> In *Gostina*, where branches from a neighbor's trees protruded into another landowner's lot,<sup>24</sup> the Washington State Supreme Court held that the owner of that lot had the right to cut the branches back to the shared property line.<sup>25</sup> *Gostina*, the *Mustoe* Court said, "neither asserts nor implies" that, in removing

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17. *See id.* at 137. An arborist later testified that there was no evidence of disease. *Id.* at 67–68.

18. *Id.* at 137.

19. Mustoe sued Ma on the theory that she knew or should have known that Jordan was removing the tree roots, and that she should have stopped him. *See id.* at 248–49 (citing RESTATEMENT (SECOND) OF TORTS § 318 & cmts. a–b (AM. LAW INST. 1965)). Whatever the merits of that theory, this Article will be focusing solely on whether Jordan, or a landowner who does what Jordan did, should be held liable.

20. *See Mustoe v. Ma*, 193 Wash. App. 161, 168, 170, 371 P.3d 544, 547, 548 (2016).

21. Clerk's Papers at 7, 30, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-1).

22. *See id.* at 473–77.

23. 116 Wash. 228, 199 P. 298 (1921).

24. *Id.* at 229, 199 P. at 299.

25. *See id.* at 234, 199 P. at 300–01.

protruding branches or roots, a “landowner owes a duty to act in good faith or reasonably to prevent damage to the trees” from which the branches or roots come.<sup>26</sup> The court also rejected Mustoe’s analogies to precedents that recognized duties to prevent the spread of forest fires or unwanted surface water.<sup>27</sup> Adhering to what it believed was the majority rule from other jurisdictions, the court declined to recognize any duty of care in removing tree roots or branches.<sup>28</sup>

*No nuisance.* The court also rejected Mustoe’s nuisance claim. While it seemed to recognize that otherwise lawful uses of one’s own property can be actionable as nuisances when they unreasonably interfere with others’ use of their property, it believed that Mustoe’s nuisance claim merely duplicated her “negligence claim.”<sup>29</sup> And because Washington does not allow otherwise unsuccessful negligence claims to be dressed up as nuisance claims, Mustoe’s nuisance claim must fail.<sup>30</sup>

*No timber trespass.* Mustoe had also asserted a claim under Washington’s timber-trespass statute, which creates a civil cause of action against anyone who shall “cut down, girdle, or otherwise injure, or carry off any tree, . . . timber, or shrub on the land of another person, . . . without lawful authority.”<sup>31</sup> The court of appeals affirmed the dismissal of this claim, too, because—given what the court had already decided—Jordan had not removed the roots “without lawful authority.”<sup>32</sup>

### III. HOW THE COURT GOT IT WRONG

The court of appeals’ decision has troubling practical and legal consequences. These consequences might be excusable if binding precedent compelled the decision, but it did not. To the contrary, *Gostina v. Ryland*—the Washington precedent on which the court most heavily relied—can easily be read to impose some limits on neighbors’ ability to remove protruding branches and roots. More broadly, the court of appeals’ reasoning unsettles Washington nuisance law.

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26. *Mustoe*, 193 Wash. App. at 165, 371 P.3d at 546.

27. *See id.* at 165–67, 371 P.3d at 546–47.

28. *See id.* at 168, 371 P.3d at 547.

29. *See id.* at 169–70, 371 P.3d at 548. I put the phrase “negligence claim” in scare quotes because Mustoe asserted that Jordan had also acted “recklessly or intentionally.” Clerk’s Papers at 7, 30, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-1).

30. *See Mustoe*, 193 Wash. App. at 170, 371 P.3d at 548.

31. WASH. REV. CODE § 64.12.030 (2017).

32. *See Mustoe*, 193 Wash. App. at 170, 371 P.3d at 548.

A. *The Decision Has Worrying Practical Consequences*

The court of appeals' decision has disturbing practical consequences. To see why, consider a hypothetical case. Suppose that much of a large tree's root system happens to protrude into adjoining land. And suppose that a malicious neighbor who occupies that adjoining land excavates it and cuts off the protruding roots. The unsupported tree then falls into the home of its owner just a few hours later, destroying the dwelling and killing the owner. Under the court of appeals' holding, the owner's estate would have no civil remedy against the malicious neighbor, because the neighbor owed the tree's owner no duty of care enforceable either in nuisance or in tort law more generally. And this is true even though the neighbor likely committed manslaughter,<sup>33</sup> or perhaps even murder.<sup>34</sup>

Note that this hypothetical case is only *barely* hypothetical. In *Mustoe*, if the plaintiff's evidence is believed, the root cutter said that he wanted the two Douglas fir trees to fall onto the tree owner's house.<sup>35</sup> The principal difference between *Mustoe* and the hypothetical would then be that the hypothetical tree fell down. But that difference is a matter of time and chance. If a powerful windstorm had come upon the trees in *Mustoe* before their owner had the opportunity to remove them, they might well have fallen.

The court of appeals' decision also gives malicious neighbors a powerful weapon to wield against other landowners. If spiteful neighbors do not want adjoining landowners to repaint their house in a different color, or put up a fence, or keep a dog, they may now use the roots and branches that extend into their land as hostages. They may now threaten wholesale destruction of those roots or branches, even if that destruction would render a tree dangerous to its owner or to valuable structures on the owner's property. By arming malicious landowners with credible threats of physical harm and financial injury, the court of

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33. The malicious neighbor caused the tree owner's death at least with criminal negligence, and more likely with recklessness. See WASH. REV. CODE § 9A.32.070(1) ("A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person."); *id.* § 9A.32.060(1) (first-degree manslaughter includes "recklessly caus[ing] the death of another person"); *id.* § 9A.08.010(1)(c), (d) (defining the mental states of recklessness and criminal negligence).

34. If the root cutter merely expected the tree to fall over, the crime would likely be manslaughter. See *supra* note 33. If the root cutter expected the tree to fall over, knowing that it might well kill the neighbor, the crime would likely be murder. See WASH. REV. CODE § 9A.32.030(1)(b).

35. See Clerk's Papers at 137, ¶ 3, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-1).

appeals' decision allows them to keep their neighbors under their thumb.

Malice, moreover, does not arise in a social vacuum. In *Mustoe*, for example, if the plaintiff's evidence is believed, the root cutter's actions were motivated at least in part by gender—by Jordan's resentment that Mustoe, a woman, had rejected his romantic attentions.<sup>36</sup> As the record in *Mustoe* suggests, malice may often stem not only from individualized ill-will, but also from a more general kind of animus. To empower malicious neighbors, as *Mustoe* did, is necessarily to empower that kind of animus as well.

### B. *Precedent Did Not Force the Court's Hand*

Precedent did not make *Mustoe's* result inevitable. The court itself never pointed to any binding precedent that compelled its conclusion; at most, it pointed to a *lack* of precedent that compelled an *opposite* conclusion.<sup>37</sup> And Washington precedent can easily be read to impose reasonable limits on a landowner's power to remove protruding tree roots.

*Mustoe* relied most heavily on *Gostina v. Ryland*, which held that protruding branches can constitute a nuisance as long as they cause some minimal amount of damage—shedding leaves onto a neighbor's lawn, for example.<sup>38</sup> *Gostina* also held that when branches protrude into another's property, the adjoining landowner may exercise self-help by cutting back the branches to the property line.<sup>39</sup>

But *Gostina* also included an important proviso: in trimming protruding branches and roots, the landowner may not remove the tree itself.<sup>40</sup> Quoting a then-contemporary treatise with approval, *Gostina* said that a landowner may cut off branches that extend over his land,

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36. See *supra* notes 13–18 and accompanying text.

37. See *Mustoe*, 193 Wash. App. at 165, 371 P.3d at 546 (“We . . . decline to extend Washington law as *Mustoe* proposes.”); *id.* (precedent “neither asserts nor implies” limits on a landowner’s ability to remove encroaching roots and branches); *id.* at 165–66, 371 P.3d at 546 (rejecting an analogy to the duty to prevent the spread of fire); *id.* at 167, 371 P.3d at 547 (deeming “inapt” an analogy to the “common enemy” doctrine, which concerns surface water); *id.* at 167–68, 371 P.3d at 547 (examining precedent from other jurisdictions for guidance).

38. See 116 Wash. 228, 233–34, 199 P. 298, 300 (1921).

39. In *Mustoe*, there was no evidence that the tree roots were causing Jordan's property any damage at all. While Jordan told his neighbor that the trees were diseased, an arborist testified that there was no evidence of disease. Clerk's Papers at 67–68, *Mustoe*, 193 Wash. App. 161, 371 P.3d 544 (No. 74166-7-1). In litigation, Jordan also claimed (without providing physical evidence) that the tree roots were damaging his house's foundation, but a structural engineer retained by the plaintiff called this claim “specious and without any merit.” *Id.* at 150.

40. See 116 Wash. at 232, 199 P. at 300.

“but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil.”<sup>41</sup>

*Gostina*’s proviso can be read to prohibit exactly what the root cutter in *Mustoe* did. *Gostina* recognized a duty not to “cut down the tree” itself.<sup>42</sup> This duty ought to include a subsidiary duty not to remove so many branches or roots that the tree stands a high risk of falling over. Otherwise, a neighbor, while prohibited from cutting down a tree directly, could cut the tree down indirectly by removing its roots or branches.<sup>43</sup>

The point is not that this reading of *Gostina* is logically inescapable. The point is that this reading is *reasonable*—the court of appeals, consistently with *stare decisis*, could have adopted it. *Mustoe*’s holding was, in that sense, an unforced error.

Oddly, at the same time as the *Mustoe* Court read Washington precedent narrowly, it read *Alvarez v. Katz*,<sup>44</sup> a nonbinding case, broadly. In *Alvarez*, the Vermont Supreme Court held that landowners had the right to remove half the roots and branches from a tree whose trunk stood on the adjoining lot—even though the removal would result in the tree’s premature death, “perhaps within five years and probably within ten.”<sup>45</sup> *Mustoe* relied heavily on this holding.<sup>46</sup> *Alvarez* gives no hint, though, that the tree’s premature death would endanger person or property (beyond the tree itself, of course). Because the cutting in *Alvarez* did not create any risk of personal injury or property damage, it did not raise the question whether landowners owe their neighbors a tort duty to prevent certain risks when they cut back protruding roots or branches. That is perhaps why *Alvarez* stressed that questions of tort duty were not before it: “[p]otential limitations requiring that such removal”—i.e., the removal of trees or branches—“be done reasonably and not negligently are not before the Court here.”<sup>47</sup> Whatever else *Alvarez* may stand for, it does not directly support *Mustoe*’s holding that neighbors owe no duty of care when they remove protruding tree

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41. See *id.* (quoting HORACE WOOD, THE LAW OF NUISANCES § 108 (3d ed. 1893)).

42. *Id.*

43. Cf. *Herring v. Pelayo*, 198 Wash. App. 828, 839, 397 P.3d 125, 130 (2017) (“We discern no meaningful distinction between cutting down a tree and trimming a tree in a manner intended to kill the tree.”). For more on this decision, see *infra* notes 63–64 and accompanying text.

44. 124 A.3d 839 (Vt. 2015).

45. *Id.* at 841.

46. *Mustoe v. Ma*, 193 Wash. App. 161, 168, 371 P.3d 544, 547 (2016) (citing *Alvarez*, 124 A.3d at 843).

47. *Alvarez*, 124 A.3d at 845.

branches or roots.

C. *The Decision Distorts the Law of Nuisance*

The court of appeals' decision also departed from foundational principles of nuisance law.

In discussing Mustoe's nuisance claim, the court first concluded that because Mustoe had "no legally recognized right" to the removed tree roots, she necessarily had "no action for nuisance."<sup>48</sup> The meaning of this statement is not entirely clear. On one possible reading, the court is begging the question—asserting that Mustoe had no nuisance claim because Jordan had not invaded her right to be free from nuisance. On a more charitable reading, the court may be saying that Mustoe could not assert a nuisance claim because the tree roots were no longer on her property, having protruded into somebody else's. Mustoe, the court said, could not complain about "the lawful removal of the roots *on Ma's property*."<sup>49</sup> But the roots' location should not have precluded a nuisance claim. Their location was the essence of a nuisance claim. A nuisance claim, by its nature, operates outside my land, and asserts that I have the right to stop you from using your land in a way that unreasonably interferes with my enjoyment of mine.<sup>50</sup>

Puzzlingly, the court of appeals *did* seem to recognize that an otherwise lawful use of one's own land can become a nuisance if it unreasonably interferes with others' use and enjoyment of their property.<sup>51</sup> But it rejected Mustoe's nuisance claim because, it said, one cannot disguise an unsuccessful negligence claim in the garb of nuisance.<sup>52</sup> This reasoning ignores the nature of Mustoe's allegations, which, as the court had already recited, asserted that Jordan had acted with recklessness and maliciousness—not merely with negligence.<sup>53</sup>

Still, the court of appeals was right to see a conceptual connection between Mustoe's nuisance claim and its ruling on her negligence claim.

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48. *Mustoe*, 193 Wash. App. at 169, 371 P.3d at 548.

49. *Id.* (emphasis added).

50. See, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1464 (1996) ("Nuisance doctrine expressly qualifies property rights by reference to their effects on other property owners and on the public at large. It is premised on the notion that any action, if taken to the extreme, may become unlawful.").

51. See *Mustoe*, 193 Wash. App. at 169, 371 P.3d at 548 ("Mustoe correctly argues, however, that even if Jordan acted lawfully in severing the tree roots, however, he may still commit a nuisance if in so doing he unreasonably interfered with her use and enjoyment of her property.").

52. *Id.* at 169–70, 371 P.3d at 548.

53. *Id.* at 164, 371 P.3d at 545.



By holding that someone who removes protruding tree roots or branches has no duty of care to the owner of the tree, the court of appeals necessarily held that such actions are off-limits to a nuisance claim. Jordan, the court was saying, owed *Mustoe* no duty to act reasonably in removing the tree roots.<sup>54</sup> And if removing tree roots cannot be legally unreasonable, then their removal can never make out a claim for nuisance, which requires proof that the conduct allegedly constituting the nuisance is unreasonable.<sup>55</sup> The *Mustoe* Court thus categorically excluded the removal of protruding roots and branches from the reach of nuisance law.

Washington's law of nuisance, though, categorically excludes very few, if any, uses of property from its reach. Washington has codified nuisance in what its highest court has called an "expansive[]" definition<sup>56</sup> that does not explicitly exclude any conduct, use, or activity from its reach. Instead, it reaches any "act or omission" that "annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, . . . or in any way renders other persons insecure in life, or in the use of property."<sup>57</sup> It is this hitherto broad definition of nuisance that *Mustoe* unsettles.

While *Mustoe* does muddle Washington's law of nuisance, it is still too early to tell how great a threat it poses to the overall structure of that law. Perhaps the decision's analytical shortcomings and the case's unusual facts will limit its influence.

In fact, there is some reason to think—or at least to hope—that other Washington courts may curb *Mustoe*'s reach. In the relatively short time since its issuance, it has been cited only twice. A federal district court, in an unpublished order, cited it in passing for its general (and uncontroversial) definition of nuisance.<sup>58</sup> The other citation came in

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54. See *Bodin v. City of Stanwood*, 130 Wash. 2d 726, 733, 927 P.2d 240, 244 (1996) ("For conduct to be negligent, it must be unreasonable in light of a recognizable danger."); *id.* at 735–36, 927 P.2d at 245–46 (recognizing that negligence is the failure to exercise of reasonable care).

55. *Lahey v. Puget Sound Energy, Inc.*, 176 Wash. 2d 909, 923, 296 P.3d 860, 867–68 (2013). Of course, while nuisance more often refers to a lawful but unreasonable use of property, it also includes a narrow category of "nuisance per se." Nuisance per se, as its name indicates, "is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance." *Tiegs v. Watts*, 135 Wash. 2d 1, 13, 954 P.2d 877, 883 (1998). *Gostina* teaches, however, that there are plenty of circumstances in which it can be reasonable to remove protruding roots and branches, so nuisance per se does not apply here.

56. *Moore v. Steve's Outboard Serv.*, 182 Wash. 2d 151, 155, 339 P.3d 169, 171 (2014).

57. WASH. REV. CODE § 7.48.120 (2017). Washington has another definition of nuisance at Washington Revised Code section 7.48.010. These definitions are apparently complementary. See *Goodrich v. Starrett*, 108 Wash. 437, 440, 184 P. 220, 221 (1919).

58. See *City of Everett v. Purdue Pharma L.P.*, No. C17-209RSM, 2017 WL 4236062, at \*8

*Herring v. Pelayo*,<sup>59</sup> a decision from Division II of the Washington Court of Appeals.<sup>60</sup>

*Herring* was about a “boundary tree”<sup>61</sup>—a tree whose trunk stands directly on the property line between adjoining landowners, who thereby own the tree in common.<sup>62</sup> The *Herring* Court, though it distinguished *Mustoe* by noting that it did not involve a boundary tree, held that a boundary tree’s co-owner has no right to trim its branches in a way that he knows will kill the tree.<sup>63</sup> This is a promising doctrinal development, one that may presage a gradual erosion of *Mustoe*.<sup>64</sup> If, as *Herring* holds, “trimming a tree in a manner intended to kill the tree” is no different from cutting it down altogether,<sup>65</sup> and if, as the Washington State Supreme Court has held, a landowner may not cut down a tree growing on his neighbor’s land,<sup>66</sup> then, despite *Mustoe*, there may be some limits on how landowners may trim protruding roots and branches.

#### D. *Why Did the Court of Appeals Err?*

How did the court of appeals go wrong in *Mustoe*? Its opinion gives a clue. At one point, as we have seen, the court seems to assert that *Mustoe* has no nuisance claim because the tree roots were no longer on her property when they were cut off and removed.<sup>67</sup> Although the court then beats a hasty semi-retreat from that assertion,<sup>68</sup> the assertion itself is telling.

The assertion suggests that that the court was conceiving of the case using the old *ad coelum* doctrine, under which landowners own everything below and above their land.<sup>69</sup> Because the roots had left

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(W.D. Wash. Sept. 25, 2017).

59. 198 Wash. App. 828, 397 P.3d 125 (2017).

60. *Mustoe v. Ma*, 193 Wash. App. 161, 371 P.3d 544 (2016), by contrast, was issued by Division I of the Court of Appeals. See generally *In re Personal Restraint of Arnold*, \_\_ Wash. 2d \_\_, 410 P.3d 1133, 1138–41 (2018) (holding that the different divisions of the court of appeals should give respectful consideration to, but are not bound by, each other’s decisions).

61. Also called a “bounded tree.” *Bounded Tree*, BLACK’S LAW DICTIONARY (10th ed. 2014).

62. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wash. App. 81, 93, 173 P.3d 959, 965 (2007).

63. *Herring*, 198 Wash. App. at 835–37, 397 P.3d at 128–30.

64. See *id.* at 839, 397 P.3d at 130 (“We discern no meaningful distinction between cutting down a tree and trimming a tree in a manner intended to kill the tree.”).

65. *Id.*

66. *Gostina v. Ryland*, 116 Wash. 228, 232, 199 P. 298, 300 (1921).

67. See *supra* notes 48–49 and accompanying text.

68. See *supra* note 51 and accompanying text.

69. *Ad Coelum Doctrine*, BLACK’S LAW DICTIONARY, *supra* note 61.

Mustoe's property, Mustoe had lost her rights in them. Having protruded under the land of Mustoe's neighbor, they had become the neighbor's property, and the neighbor had the absolute right to do what he wished with them. This included the right to exclude them from the property altogether by cutting them back to the property line. In conceiving of the case this way, the court of appeals may have been influenced by *Gostina v. Ryland*, which cited the *ad coelum* doctrine to support the notion that a landowner may cut protruding tree branches back to the property line.<sup>70</sup>

To the extent the court of appeals was relying on the *ad coelum* doctrine, its reliance was misplaced. The *ad coelum* doctrine is limited by so many exceptions and qualifications that it no longer truly exists.<sup>71</sup> For example, if landowners owned all the space above their land, they could prevent planes from invading that space. That, of course, is not the law.<sup>72</sup>

More fundamentally, the mere fact of ownership—whose physical bounds the *ad coelum* doctrine, if applicable, is meant to determine—does not give landowners the right to do whatever they like with their property. The whole point of nuisance law is that your neighbors have some right to dictate what you do with your property.<sup>73</sup> This foundational principle is what *Mustoe* ignored.

#### IV. SOME CONCLUDING SUGGESTIONS

Anyone criticizing an opinion ought to give an alternative rule of decision. My suggested alternative is easy to state in broad outline: the court of appeals should have applied traditional nuisance law. It should have recognized that an adjoining landowner's removal of protruding roots or branches, like any other activity on the land, can qualify as a nuisance if it substantially and unreasonably interferes with the tree owner's enjoyment of her property. And a tree that poses physical danger to people or structures seems, rather self-evidently, to interfere substantially and unreasonably with the enjoyment of one's property. It is therefore a nuisance to remove a tree's protruding roots or branches

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70. 116 Wash. at 232, 199 P. at 300. As this Article has mentioned, however, *Gostina* nowhere intimates that this right is unqualified—i.e., that the branch clipper owes no duty to the owner of the tree. See *supra* notes 41–42 and accompanying text.

71. See *Lord v. Pierce County*, 166 Wash. App. 812, 825, 271 P.3d 944, 951 (2012) (rejecting “a return to the ancient common law doctrine of *cujus est solum ejus est usque ad coelum*”).

72. *Cheskov v. Port of Seattle*, 55 Wash. 2d 416, 421–23, 348 P.2d 673, 676–78 (1960).

73. See *supra* note 50 and accompanying text.

when it makes the tree physically dangerous.

In my view, this rule should apply even if the removal of roots or branches is occasioned by, say, the construction of a useful building and not malice. An activity that causes a tree to become physically dangerous ought to internalize the cost of removing the tree or otherwise making it safe. It seems inevitable that *someone* will have to pay to remove such a tree, and that cost ought to fall upon the person who makes the tree dangerous. If the costs of removing the tree outweigh the benefits of the activity that would cause the tree to become dangerous, that activity is probably not socially useful.<sup>74</sup>

Under that rule, Jordan's actions in *Mustoe* would have constituted a nuisance. The rule also forestalls the potentially disastrous consequences of *Mustoe*'s holding. It means that a neighbor who commits manslaughter-by-tree will not be immune from civil liability.<sup>75</sup>

Suppose, however, that protruding roots or branches are causing some amount of damage to a neighbor's land. Now suppose that the neighbor cuts those roots or branches back to the property line, causing the tree to become physically dangerous. Who is liable to whom, and for what? We know from *Gostina v. Ryland* that protruding roots or branches become a nuisance if they cause even minor damage.<sup>76</sup> I have also argued that, to avoid repugnant consequences, *Gostina* is best read to make it a compensable nuisance to remove protruding roots and branches if that removal renders the tree physically dangerous.<sup>77</sup> Hence, in these circumstances, there are two separate nuisances, one arising from the protruding roots or branches, and another arising from the physically dangerous tree. Recognizing both, and offsetting the resulting damages against each other, is consistent with *Gostina* and avoids the flaws of *Mustoe*.

While this two-nuisance situation is intellectually attention-grabbing, the chance seems low that it would actually materialize—at least in the

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74. I am assuming that the tree owner will receive damages but will not be entitled to an injunction against the construction of the building. This assumption is in keeping with Washington law, which will deny an injunction even in a nuisance case when it would be inequitable. The case law suggests that an injunction is inequitable when it would prevent a use of property that, though it causes compensable harm to a neighbor, is socially useful. See, e.g., *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 512–13, 282 P. 848, 851 (1929) (awarding damages to neighboring property owner, but not an injunction, in a nuisance action against a nearby sawmill, due to the economic importance of the lumber industry). In the absence of unusual circumstances, therefore, courts would be unlikely to enjoin the construction of a useful building.

75. See *supra* section III.A.

76. 116 Wash. 228, 234–35, 199 P. 298, 300–01 (1921).

77. See *supra* notes 42–43 and accompanying text.

absence of a malicious neighbor. It is easy to imagine circumstances in which protruding roots or branches may cause damage to a neighbor. Roots may begin to invade a neighbor's concrete foundation. Branches may begin to block the sun from shining on a neighbor's vegetable garden. It is comparatively difficult to imagine why fixing that sort of problem would require a rational person to remove so many roots or branches that a tree becomes physically dangerous.

But what if removal of roots or branches does not render a tree physically dangerous to life, limb, or buildings? What if it merely kills or damages the tree? Mere harm to a tree, without more, resembles the kind of aesthetic harm that Washington courts have been wary of recognizing as a nuisance.<sup>78</sup> The outright death of a tree may be different, but even here a court would have to balance the value of the tree against the value of whatever activity led the neighbor to remove the roots or branches.<sup>79</sup> I do not mean to suggest a particular outcome for these cases, which lie outside the scope of this Article. I do suggest that they can be resolved by applying traditional principles of nuisance law.

Finally, I should acknowledge that the precise rule of legal liability between neighbors *usually* will not matter. Most neighbors make some effort to get along with each other. To these neighbors, the precise rule of legal liability will be mostly irrelevant, not only because most people have imprecise legal knowledge, but also because most neighbors are not Holmesian "bad men."<sup>80</sup> Rather than figuring out what they can get away with, they will reach an accommodation with their neighbors that will be shaped more by extralegal norms than by legal rules.<sup>81</sup>

By contrast, the rule *will* matter where one neighbor hates another. There, applying the traditional rules of nuisance in the way I have suggested here will at least remove one weapon from a malicious

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78. See *Collinson v. John L. Scott, Inc.*, 55 Wash. App. 481, 483–88, 778 P.2d 534, 536–38 (1989) (holding that new condominiums that blocked the neighbors' view did not constitute a nuisance). *Collinson* shows that certain *harms* may fall categorically outside the realm of nuisance law, but it does not hold that certain *activities* fall categorically outside the realm of nuisance law. It thus does not support *Mustoe's* holding that the removal of protruding roots can never be a nuisance.

79. See *Lahey v. Puget Sound Energy, Inc.*, 176 Wash. 2d 909, 923, 296 P.3d 860, 868 (2013) (whether an activity is a nuisance is determined "by weighing the harm to the aggrieved party against the social utility of the activity"). In principle, even the manslaughter-by-tree case would require a court to "balance" the tree owner's death against the value of whatever activity led the neighbor to remove the tree roots. But it seems safe to assume that in such a case the balance would always tip against the root cutter.

80. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

81. See generally Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

neighbor's armory.