

Order without Law

How Neighbors Settle Disputes



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The Resolution of Cattle-Trespass Disputes

Trespass by cattle, the subject of Coase's Parable of the Farmer and the Rancher, is a common event in ranching country. A complex body of law, much of it of unusually ancient lineage, formally applies to these occurrences. In Shasta County, the rules of trespass law vary between open- and closed-range districts, and the location of district boundaries has been the focus of intense political controversy. Nevertheless, it turns out, perhaps counterintuitively, that legal rules hardly ever influence the settlement of cattle-trespass disputes in Shasta County.¹

Animal Trespass Incidents

Each of the twenty-eight landowners interviewed, including each of the thirteen-ranchette owners, reported at least one instance in which his lands had been invaded by someone else's livestock. Hay farmers grow what cattle especially like to eat and can thus expect frequent trespasses. For example, John Woodbury, an alfalfa grower, suffered almost weekly incursions in 1973. Woodbury's situation later improved when many traditionalist cattlemen declined to renew their grazing leases on mountain forest,² but he was still experiencing a couple of cattle trespasses a year in the early 1980s. Another hay farmer, Phil Ritchie, could identify six neighbors whose cattle had trespassed on his lands in recent years. Owners of large ranches are also frequent trespass victims because they cannot keep their many miles of aging perimeter fence cattle-tight. Thus, when

1. My field research relied heavily on face-to-face interviews. In all, seventy-three interviews were conducted, most of them in the summer of 1982. They were arranged with two sorts of people: landowners in the Oak Run-Round Mountain area, and a somewhat larger number of specialists—such as attorneys, claims adjusters, and government employees—thought likely to be knowledgeable about how rural residents resolve stray-cattle disputes. Various government records were also consulted, partly to have a cross-check on the landowners' version of history. The techniques used are more fully described in the Appendix.

2. See *infra* Chapter 6, text following note 9.

a rancher gathers his animals on his fenced pastures each spring, he is hardly startled to find a few head carrying a neighbor's brand.

Because beef cattle eat feed equal to about 2½ percent of their body weight each day,³ a trespass victim's vegetation is always at risk. Nevertheless, a victim usually regards the loss of grass as trivial, provided that the animals are easy to corral and the owner removes them within a day or two. Trespassing livestock occasionally do cause more than nominal damage. Several ranchette owners reported incidents in which wayward cattle had damaged their fences and vegetable gardens; one farmer told of the ravaging of some of his ornamental trees.

The most serious trespasses reported were ones involving at-large cattle or bulls. A ranchette owner described how mountain cattle had once invaded his house construction site, broken the windows, and contaminated the creek. The part-time horsebreeder Larry Brennan told of buying seven tons of hay and stacking it on an unfenced portion of his fifty-acre ranchette, where it was then eaten by cattle that Frank Ellis had let roam free.

Rural residents especially fear trespasses by bulls. In a modern beef cattle herd, roughly one animal in twenty-five is a bull, whose principal function is to impregnate cows during their brief periods in heat.⁴ Bulls are not only much more ornery but also much larger than other herd animals. A Hereford bull has a mature weight of 2000 pounds. By contrast, a mature Hereford cow weighs only 1100–1200 pounds, and Hereford steers (castrated males) are typically slaughtered when they weigh between 1000 and 1150 pounds.⁵ Several ranchers who were interviewed had vivid memories of bull trespasses. A farmer who owned irrigated pasture was amazed at the depth of the hoof marks that an entering bull had made. A ranchette owner and a rancher told of barely escaping going while attempting to corral invading bulls.⁶ Because an alien bull often enters in pursuit of cows in heat, owners of female animals fear illicit couplings that might produce offspring of an undesired pedigree. Al-

3. Division of Agric. Sci., Univ. of Cal., Leaflet No. 21184, *Beef Production in California* 12–13 (Nov. 1980).

4. Cf. Cal. Agric. Code §16803 (West 1968) (cattlemen grazing herds on open range must include at least one bull for every thirty cows). The refinement of artificial insemination techniques has enabled some ranchers to increase the ratio of cows to bulls in herds kept behind fences.

5. *Beef Production in California*, *supra* note 3, at 3, 5.

6. None of the landowners interviewed mentioned an instance in which trespassing cattle had caused personal injury. Two insurance adjusters, who frequently had been called upon to settle dog-bite claims, could remember, between them, only one personal-injury claim arising from cattle—an instance in which a cow had stepped on someone's foot.

though no cow owner reported actual damages from misbreeding, several mentioned that this risk especially worried them.

Animal Trespass Law

One of the most venerable English common law rules of strict liability in tort is the rule that an owner of domestic livestock is liable, even in the absence of negligence, for property damage that his animals cause while trespassing. In the memorable words of Judge Blackburn:

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.⁷

This traditional English rule formally prevails in the closed-range areas of Shasta County.⁸ In the open-range areas of the county—that is, in the great bulk of its rural territory—the English rule has been rejected in favor of the pro-cattleman “fencing-out” rule that many grazing states adopted during the nineteenth century.⁹

7. *Fletcher v. Rylands*, 1 L.R.-Ex. 265, 280 (1866) (dictum) (Blackburn, J.). See also 3 William Blackstone, *Commentaries* *211 (“A man is answerable for not only his own trespass, but that of his cattle also”). This rule was established in England by 1353 at the latest. 1 *Select Cases of Trespass from the King's Courts, 1307-1399* lxxviii (Morris S. Arnold ed. 1985). The details of animal-trespass law are explored more fully in Ellickson, “Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County,” 38 *Stan. L. Rev.* 623, 659-667 (1986).

8. See, e.g., *Montezuma Improvement Co. v. Simmerly*, 181 Cal. 722, 724, 189 P. 100, 101 (1919). A trespass victim's own misconduct, such as failing to close a cattle gate or breaching a contractual duty to build a fence, may diminish or bar his recovery. See *Glanville L. Williams, Liability for Animals* 178-181 (1939). In California, misconduct by a plaintiff does not typically operate as a complete defense in a strict liability action. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (products liability case).

9. Many authorities assert that the western states have been the chief followers of “fencing-out” rules. See, e.g., 2 Fowler V. Harper and Fleming James, *The Law of Torts* §14.10 (1956). Nineteenth-century treatises on fence law reveal, however, that in that era, fencing-out was the dominant rule throughout the United States, particularly in the northern states. See W. W. Thornton, *The Law of Railroad Fences and Private Crossings* §§8-10 (1892) (identifying thirteen states following the English rule and twenty-one states having fencing-out regimes);

In 1850, just after California attained statehood, an open-range rule was adopted for the entire state. In that year the legislature enacted a statute that entitled a victim of animal trespass to recover damages only when the victim had protected his lands with a “lawful fence.”¹⁰ This pro-cattleman policy grew increasingly controversial as California became more settled and field crops became more common. During the latter part of the nineteenth century, the California legislature enacted a series of statutes effectively closing the range in designated counties, thereby granting more protection to farmers who had not built fences.¹¹

The closed-range exceptions eventually began to swamp California's traditional open-range rule and triggered a comprehensive legislative response. In the Estray Act of 1915,¹² the legislature adopted for most of California the traditional English rule that the owner of livestock is strictly liable for trespass damage.¹³ This statute, however, retained the open-range rule in six counties in the lightly populated northern part of the state, where the tradition of running cattle at large remained strong. The six counties were Shasta, Del Norte, Lassen, Modoc, Siskiyou, and Trinity.¹⁴

Ransom H. Tyler, *The Law of Boundaries, Fences, and Window Lights* 361-512 (1874) (state-by-state review of fence law, indicating, at 451, that Michigan, for example, enacted a fencing-out statute in 1847).

10. 1850 Cal. Stat., ch. 49, §131. See *Cornford v. Dupuy*, 17 Cal. 308 (1861); *Waters v. Moss*, 12 Cal. 535 (1859) (dictum). Because lawful-fence rules draw brighter lines than do negligence rules, they tend to be easier to apply. Lawful-fence statutes are consequently suited to enforcement by lay “fence viewers,” described *infra* note 27. For a more extended analysis of the merits of alternative rules of cattle-trespass liability, see *infra* Chapter 11, text accompanying notes 3-11.

11. See Note, “Torts: Trespass by Animals upon Unclosed Lands in California,” 7 *Cal. L. Rev.* 365 (1919).

12. 1915 Cal. Stat. 636 (current version at Cal. Agric. Code §§17001-17128 (West 1968 & Supp. 1986)).

13. Although the 1915 statute nominally dealt only with a trespass victim's rights to take up estrays (strays), California case law has consistently held that a statutory right to seize estrays on unfenced land carries with it the right to recover trespass damages under the traditional common law rule of strict liability. See, e.g., *Montezuma Improvement Co. v. Simmerly*, 181 Cal. 722, 189 P. 100 (1919); *Williams v. Goodwin*, 41 Cal. App. 3d 496, 116 Cal. Rptr. 200 (1974) (dictum).

14. 1915 Cal. Stat. 636 (current version at Cal. Agric. Code §§17123-17126 (West 1968)). Subsequent amendments repealed the exemptions applicable in all of Del Norte County, and in parts of Shasta and Trinity counties. See Cal. Agric. Code §§17123-17126 (West 1968). Cal. Agric. Code §17124 (West 1968) authorizes the board of supervisors of any county to convert closed-range areas to open range. Responding in part to lobbying efforts by local cattlemen's associations, an increasing number of California's foothill counties have “opened” parts of their mountain forest. See, e.g., *Amador County, Cal.*, Ordinance 590 (Apr. 26, 1977); *Placer County, Cal.*, Ordinance 2017-B (June 29, 1976).

In 1945 the legislature enacted two amendments that dealt exclusively with Shasta County, the least rural of the six exempt counties. The first stated that a prime agricultural area just south of Redding was "not . . . devoted chiefly to grazing"—a declaration that the legislature had decided to close the range in that small area of the county.¹⁵ The second amendment empowered the Board of Supervisors of Shasta County to adopt ordinances designating additional areas of the county as places no longer devoted chiefly to grazing. A board action of this sort would make cattlemen strictly liable for trespass damage occurring in those locations.¹⁶ Between 1945 and 1974 Shasta was the only California county to possess this special authority.¹⁷ As a result Shasta County today has a crazy quilt of open- and closed-range areas that no other California county can match.¹⁸

The distinction between open range and closed range has formal legal significance in Shasta County trespass disputes. In closed range, the English rule governs and an animal owner is strictly liable for trespass damage to property.¹⁹ In open-range areas, by contrast, even a livestock owner²⁰ who has negligently managed his animals is generally not liable for trespass damage to the lands²¹ of a neighbor.

15. 1945 Cal. Stat. 1538-39 (current version at Cal. Agric. Code §17126 (West 1968)).

16. 1945 Cal. Stat. 1539 (current version at Cal. Agric. Code §17127 (West 1968 & Supp. 1986)).

17. In 1974 the state legislature granted similar authority to the Board of Supervisors of Trinity County, Shasta's neighbor to the west. 1974 Cal. Stat. 409 (current version at Cal. Agric. Code §17127 (West Supp. 1986)). A number of other western states that generally adhere to an open-range regime also authorize subordinate entities to "close" parts of their range. See, e.g., *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978) (describing Idaho procedure through which landowners can petition to close range on a district-by-district basis); Wash. Rev. Code Ann. §16.24.010 (1962) (counties without townships granted power to close range).

18. A map issued by the Shasta County Department of Public Works in 1981 showed twenty-eight separate areas the Board of Supervisors had closed by ordinance since 1945. Although most of the closed areas were located near Redding, there were areas of closed range in the hinterland in every direction from the city.

19. Defenses based on the trespass victim's misconduct are discussed *supra* note 8.

20. Persons other than the animal's owner could conceivably be held liable for an animal's damage. The California courts (at least until the late 1980s) were as expansive as any state's in imposing tort liability. They would have been likely to hold a landlord who had leased land for grazing liable were he negligently to have abetted trespasses by a lessee's livestock. Cf. *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975) (residential landlord who knew of tenant's vicious dog and had the power to have it removed owed a duty of care to tenants' invitees and could be liable for negligence to dog-bite victim). But cf. *Blake v. Dunn Farms, Inc.*, 274 Ind. 560, 413 N.E.2d 560 (1980) (landlord not liable for damages stemming from escape of tenant's horse that he knew little about).

21. Other rules may apply when livestock have caused personal injury or damage to chattels. In closed range, a cattle owner is strictly liable for foreseeable personal injuries that his

Even in open range in Shasta County, however, an animal owner is legally liable for animal-trespass damages of three significant sorts. First, owners of goats, swine, and vicious dogs are strictly liable for trespass throughout Shasta County.²² Second, when a cattleman's livestock have trespassed in the face of a "lawful fence" that entirely enclosed the victim's open-range premises, the cattleman is also strictly liable.²³ (A California statute, unamended since 1915, defines the technological standard that a fence must meet to be "lawful.")²⁴ Third, common law decisions make a livestock owner liable for *intentional* open-range trespasses. Thus when Frank Ellis actively herded his cattle across the unfenced lands of his neighbors, he was legally liable for trespass. According to some precedents, he would also have been liable had he merely placed his cattle on his own lands in a way that would make it substantially certain that they would venture onto his neighbors' pastures.²⁵

livestock have caused. See *Williams v. Goodwin*, 41 Cal. App. 3d 496, 116 Cal. Rptr. 200 (1974). But cf. *Restatement (Second) of Torts* §504 (1977) (denying possessor of unfenced land in open-range recovery for personal injuries on a strict liability theory). In both open and closed range, the owner of a trespassing animal would be strictly liable if that animal were to kill animals belonging to the owner of the premises invaded. See Cal. Civ. Code §3341 (West 1970).

22. See Cal. Agric. Code, §17128 (West 1968) (excepting owners of "goats, swine, or hogs" from benefits of open-range rule); Shasta County Ordinance Code §3306 (declaring it "unlawful" to permit "any vicious dog or other dangerous animal" to run at large).

23. Section 17122 of the Agricultural Code reads: "In any county or part of a county devoted chiefly to grazing and so declared pursuant to this article, a person shall not have the right to take up any stray animal found upon his premises, or upon premises to which he has the right of possession, nor shall he have a lien thereon, *unless the premises are entirely enclosed with a good and substantial fence.*" Cal. Agric. Code §17122 (West 1968) (emphasis added). Judicial decisions construe this sort of provision as also denying a person without such a fence the right to recover damages for cattle trespass. See *supra* note 13.

24. "A lawful fence is any fence which is good, strong, substantial, and sufficient to prevent the ingress and egress of livestock. No wire fence is a good and substantial fence within the meaning of this article unless it has three tightly stretched barbed wires securely fastened to posts of reasonable strength, firmly set in the ground not more than one rod [16½ feet] apart, one of which wires shall be at least four feet above the surface of the ground. Any kind of wire or other fence of height, strength and capacity equal to or greater than the wire fence herein described is a good and substantial fence within the meaning of this article. . . ." Cal. Agric. Code §17121 (West 1968). This statutory definition of a lawful fence has remained essentially unchanged since 1919. Compare 1919 Cal. Stat. 1150. The definition is technologically obsolete because, at least in Shasta County, cattlemen customarily use at least four strands of barbed wire in their boundary fences. California's statutory definitions of lawful fences before the invention of barbed wire are described in R. Tyler, *supra* note 9, at 482-484 (some samples: stone walls 4½ feet high; rail fences 5½ feet high; a 5-foot-high hedge).

25. In some states an open-range cattleman has been held liable for the trespass damages only when he has deliberately driven his livestock onto the lands of another. See, e.g., Garcia

When the law of either open or closed range entitles a trespass victim to relief, the standard legal remedy is an award of compensatory damages.²⁶ (In part because evidence of damage to forage is fleeting, some states, although currently not California, authorize the appointment of disinterested residents of the area to serve as "fence viewers" to assess the amount of the damages.)²⁷ A plaintiff who has suffered from continuing wrongful trespasses may also be entitled to an injunction against future incursions.²⁸ California's Estray Act additionally entitles a landowner whose premises have been wrongly invaded by cattle to seize the animals as security for a claim to recover boarding costs and other damages. A trespass victim who invokes this procedure must provide proper notice to the state director of agriculture; if certain statutory requirements are met, the animals can be sold to satisfy the claim.²⁹

v. Sumrall, 58 Ariz. 526, 121 P.2d 640 (1942); Richards v. Sanderson, 39 Colo. 270, 89 P. 769 (1907). In other states, the entry of a cattleman's livestock has also been regarded as intentionally tortious when he has left them on a range from which it was substantially certain that they would enter the plaintiff's lands. See, e.g., Lazarus v. Phelps, 152 U.S. 81 (1894); Mower v. Olsen, 49 Utah 373, 164 P. 482 (1917). Two reported California decisions deal with the issue of intentional trespass by livestock owners; in both, applicable statutes prohibited the "herding" of livestock on the lands of others. The more recent decision, Cramer v. Jenkins, 82 Cal. App. 269, 255 P. 877 (1927), supports the proposition that leaving animals in a range from which they are substantially certain to trespass constitutes tortious misconduct. But cf. Logan v. Gedney, 38 Cal. 579 (1869) (implying that active herding may be required). The California Supreme Court's pro-plaintiff predilections during the early 1980s would have inclined it to follow the Cramer approach.

26. Some early California statutes authorized cattle-trespass victims to recover double damages in certain situations. See, e.g., 1850 Cal. Stat. 131 (victim enclosed by lawful fence can recover double damages for defendant's second offense). See also Nev. Rev. Stat. Ann. §569.440(1) (1986) (entitling trespass victim situated behind a lawful fence to recover double damages for second offense if the animal owner had been negligent).

27. See, e.g., Wash. Rev. Code Ann. §16.60.015 (Supp. 1989) ("damages [shall be] assessed by three reliable, disinterested parties and practical farmers, within five days next after the trespass has been committed . . ."). See generally 35 Am. Jur. 2d Fences §24-32 (1967). The practice of delegating valuation issues to fence viewers was widespread in the nineteenth century and before. See R. Tyler, supra note 9, at 395, 399, 459, 476 (describing statutes in New York, Maine, Wisconsin, and Kansas); William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* 135 (1983) (colonial Massachusetts). At least one of the early California fence statutes provided for the appointment of fence viewers. See 1860 Cal. Stat. 142 (viewers' role is to assess the contributions that each adjoining landowner should make to build a sufficient partition fence).

28. See Montezuma Improvement Co. v. Simmerly, 181 Cal. 722, 189 P. 100 (1919); Blevins v. Mullally, 22 Cal. App. 519, 135 P. 307 (1913).

29. See Cal. Agric. Code §817041, 17042, 17091-17095, 17122 (West 1968 & Supp. 1986). The animal owner may contest the propriety of the victim's invocation of this self-help remedy. See Yraceburn v. Cape, 60 Cal. App. 374, 212 P. 938 (1923) (victim wrongly invoked

The formal law provides trespass victims with only limited self-help remedies. A victim can use reasonable force to drive the animals off his land,³⁰ and is arguably privileged to herd them to a remote location he knows is inconvenient for their owner.³¹ In addition, as just noted, a trespass victim willing to give the animals proper care can seize strays and bill the costs of their care to their owner. But a victim is generally not entitled to kill or wound the offending animals. For example, a fruit grower in Mendocino County (a closed-range county) was convicted in 1973 for malicious maiming of animals when, without prior warning to the livestock owner, he shot and killed livestock trespassing in his unfenced orchard.³² In this respect, as we shall see, Shasta County mores diverge from the formal law.

The distinction between open range and closed range has formal relevance in public as well as private trespass law. Shasta County's law enforcement officials are entitled to impound cattle found running at large in closed range, but not those found in open range.³³ Brad Bogue, the county animal control officer, relies primarily on warnings when responding to reports of loose animals. Regardless of whether a trespass has occurred in open or closed range, Bogue's prime goal is to locate the owner of the livestock and urge the prompt removal of the offending animals. When talking to animal owners, he stresses that it is in the owner's self-interest to take better care of the livestock. When talking to ranchette owners living in open range who have called to complain about trespassing mountain cattle, Bogue informs them of the cattleman's open-

power to seize animals). The distraint procedure also poses potentially thorny state action and due process issues. Cf. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's sale of entrusted goods). The "right to distraint animals damage feasant" has deep roots in the English common law. See 3 William Blackstone, *Commentaries* *211; G. Williams, supra note 8, at 7-123.

30. People v. Dunn, 39 Cal. App. 3d 418, 114 Cal. Rptr. 164 (1974) (dictum).

31. On the issue of whether this represents a reasonable exercise of self-help, compare Gilson v. Fisk, 8 N.H. 404 (1836) (trespass victim who drove herd three miles away held liable in damages for death of eight sheep), with Wells v. State, 13 S.W. 889 (Tex. Ct. App. 1890) (victim of intentional trespass did not violate criminal statute when he drove cattle three to four miles afield). Shasta County trespass victims sometimes adopt this time-honored self-help strategy. See infra note 56.

32. People v. Dunn, 39 Cal. App. 3d 418, 114 Cal. Rptr. 164 (1974). See also Annot., 12 A.L.R.3d 1103 (1967) (liability for accidentally or intentionally poisoning trespassing stock). But see Hummel v. State, 69 Okla. Crim. 38, 99 P.2d 913 (1940) (rancher was privileged to castrate a bull that threatened to impregnate pure-bred cows grazing on open range).

33. See Shasta County Ordinance Code §3306 (habitual animal trespasses declared to be a public nuisance, "provided that this section shall not apply to livestock upon the open range").

range rights. He asserts that this sort of mediation is all that is required in the usual case. In most years, Bogue's office does not impound a single head of cattle³⁴ or issue a single criminal citation for failure to prevent cattle trespass.³⁵

Knowledge of Animal Trespass Law

The Shasta County landowners interviewed were quizzed about their knowledge of the complex legal rules of animal trespass law reviewed above. The extent of their knowledge is relevant for at least two reasons. First, Coase's parable is set in a world of zero transaction costs, where everyone has perfect knowledge of legal rules. In reality, legal knowledge is imperfect because legal research is costly and human cognitive capacities are limited. The following overview of the working legal knowledge of Shasta County residents provides a glimpse of people's behavior in the face of these constraints. Data of this sort have implications for the design of legal rules to achieve specific instrumental goals, because rules cannot have instrumental effects unless they are communicated to the relevant actors. Second, my research revealed that most residents resolve trespass disputes not according to formal law but rather according to workaday norms that are consistent with an overarching norm of cooperation among neighbors. How notable this finding is depends in part on how many residents know that their trespass norms might be inconsistent with formal legal rules.

Lay Knowledge of Trespass Law

To apply formal legal rules to a specific trespass incident, a Shasta County resident would first have to know whether it had occurred in an open-range or closed-range area of the county. Ideally, the resident would

34. The Shasta County Animal Control Office's Monthly Reports for 1980-1982 indicate that the office impounded one "bovine" during that period—a stray animal that Bogue said had been found within one block of the office's animal shelter. This figure understates the number of public impoundments because the brand inspector occasionally hauls stray cattle to the Cottonwood Auction Yard, which is better equipped than the animal shelter to board livestock.

35. Robert Baker, the county district attorney from 1965 to 1979, could not recall a single criminal prosecution for cattle trespass on private lands. Gary Glendenning, the livestock specialist in the detective's division of the county sheriff's office, affirmed that criminal trespass actions were "never" brought. Criminal proceedings have been initiated against owners of stray livestock, however, when the stray animals have repeatedly posed serious risks to motorists. See *infra* Chapter 5, note 41.

either have or know how to locate the map of closed-range areas published by the county's Department of Public Works. Second, a legally sophisticated person would have a working command of the rules of trespass law, including how they vary from open to closed range.

I found no one in Shasta County—whether an ordinary person or a legal specialist such as an attorney, judge, or insurance adjuster—with a complete working knowledge of the formal trespass rules just described. The persons best informed are, interestingly enough, two public officials without legal training: Brad Bogue, the animal control officer, and Bruce Jordan, the brand inspector. Their jobs require them to deal with stray livestock on almost a daily basis. Both have striven to learn applicable legal rules, and both sometimes invoke formal law when mediating disputes between county residents. Both Bogue and Jordan possess copies of the closed-range map and relevant provisions of the California Code. What they do *not* know is the decisional law; for example, neither is aware of the rule that an intentional trespass is always tortious, even in open range. Nevertheless, Bogue and Jordan, both familiar figures to the cattlemen and (to a lesser extent) to the ranchette owners of rural Shasta County, have done more than anyone else to educate the populace about formal trespass law.

What do ordinary rural residents know of that law? To a remarkable degree the landowners interviewed *did* know whether their own lands were within open or closed range. Of the twenty-five landowners asked to identify whether they lived in open or closed range, twenty-one provided the correct answer, including two who were fully aware that they owned land in both.³⁶ This level of knowledge is probably atypically high.³⁷ Most of the landowner interviews were conducted in the Round Mountain and Oak Run areas. The former was the site in 1973 of the Caton's Folly closed-range battle. More important, Frank Ellis' aggressive herding had provoked a furious closed-range battle in the Oak Run area just six months before the landowner interviews were conducted. Two well-placed sources—the Oak Run postmaster and the proprietor of the Oak Run general store—estimated that this political storm had caught the attention of perhaps 80 percent of the area's adult residents. In the summer of 1982, probably no populace in the United States was more

36. Eleven correctly stated they lived in open range; eight correctly stated they lived in closed range; one gave a flatly wrong answer; one, a partially wrong answer; and two "didn't know."

37. Two interviewees involved in open-range politics had obtained copies of the Department of Public Works' closed-range map.

alert to the legal distinction between open and closed range than were the inhabitants of the Oak Run area.³⁸

What do laymen know of the substantive rules of trespass law? In particular, what do they know of how the rules vary from open to closed range? Individuals who are not legal specialists tend to conceive of these legal rules in black-and-white terms: either the livestock owners or the trespass victims "have the rights." We have seen, however, that the law of animal trespass is quite esoteric. An animal owner in open range, for example, is liable for intentional trespass, trespass through a lawful fence, or trespass by a goat. Only a few rural residents of Shasta County know anything of these subtleties. "Estray" and "lawful fence," central terms in the law of animal trespass, are not words in the cattlemen's everyday vocabulary. Neither of the two most sophisticated open-range ranchers interviewed was aware that enclosure by a lawful fence elevates a farmer's rights to recover for trespass. A traditionalist, whose cattle had often caused mischief in the Northeastern Sector foothills, thought estrays could never be seized in open range, although a lawful fence gives a trespass victim exactly that entitlement. No interviewee was aware that Ellis' intentional herding on his neighbors' lands in open range had been in excess of his legal rights.

As most laymen in rural Shasta County see it, trespass law is clear and simple. In closed range, an animal owner is strictly liable for trespass damages. (They of course never used, and would not recognize, the phrase "strict liability," which in the law of torts denotes liability even in the absence of negligence.) In open range, their basic premise is that an animal owner is never liable. When I posed hypothetical fact situations designed to put their rules under stress, the lay respondents sometimes backpedaled a bit, but they ultimately stuck to the notion that cattlemen have the rights in open range and trespass victims the rights in closed range.

Legal Specialists' Knowledge of Trespass Law

The laymen's penchant for simplicity enabled them to identify correctly the substance of the English strict-liability rule on cattle trespass that formally applies in closed range. In that regard, the laymen outperformed the judges, attorneys, and insurance adjusters who were interviewed. In two important respects the legal specialists had a poorer working knowledge of trespass and estray rules in Shasta County than did the lay land-

owners.³⁹ First, in contrast to the landowners, the legal specialists immediately invoked *negligence* principles when asked to analyze rights in trespass cases. In general, they thought that a cattleman would not be liable for trespass in open range (although about half seemed aware that this result would be affected by the presence of a lawful fence), and that he would be liable in closed range *only when negligent*. The negligence approach has so dominated American tort law during this century that legal specialists—insurance adjusters in particular—may fail to identify narrow pockets where strict liability rules, such as the English rule on cattle trespass, formally apply.⁴⁰

Second, unlike the lay rural residents, the legal specialists knew almost nothing about the location of the closed-range districts in the county.⁴¹ For example, two lawyers who lived in rural Shasta County and raised livestock as a sideline were ignorant of these boundaries; one incorrectly identified the kind of range in which he lived, and the other admitted he did not know what areas were open or closed. The latter added that this did not concern him because he would fence his lands under either legal regime.

Four insurance adjusters who settle trespass-damage claims in Shasta County were interviewed. These adjusters had little working knowledge of the location of closed-range and open-range areas or of the legal significance of those designations. One incorrectly identified Shasta County as an entirely closed-range jurisdiction. Another confused the legal designation "closed range" with the husbandry technique of keeping livestock behind fences; he stated that he did not keep up with the closed-range situation because the fence situation changes too rapidly to be worth following. The other two adjusters knew a bit more about the legal situation. Although neither possessed a closed-range map, each was able to guess how to locate one. However, both implied that they would not bother to find out whether a trespass incident had occurred in open or closed range before settling a claim. The liability rules that these adjusters apply to routine trespass claims seemed largely independent of formal law.⁴²

39. This finding can be attributed to the fact, documented below, that trespass and estray claims are virtually never processed through the formal legal institutions of Shasta County.

40. Some legal specialists may also believe that the negligence principle is in every application normatively superior to the principle of strict liability.

41. In addition, neither of the two fence contractors interviewed had any notion of these boundaries. The county tax assessor assigned to the Oak Run-Round Mountain area was also unfamiliar with the closed-range map.

42. In his study of the settlement of automobile-liability claims, Ross found the law in action to be simpler and more mechanical than the formal law, but he did not find it to be

38. However, of eleven respondents asked, only three stated that they had known when buying their land what kind of "legal range" it lay in.

The Settlement of Trespass Disputes

If Shasta County residents were to act like the farmer and the rancher in Coase's parable, they would settle their trespass problems in the following way.⁴³ First, they would look to the formal law to determine who had what entitlements. They would regard those substantive rules as beyond their influence (as "exogenous," to use the economists' adjective). When they faced a potentially costly interaction, such as a trespass risk to crops, they would resolve it "in the shadow of" the formal legal rules. Because transactions would be costless, enforcement would be complete: no violation of an entitlement would be ignored. For the same reason, two neighbors who interacted on a number of fronts would resolve their disputes front by front, rather than globally.

The field evidence casts doubt on the realism of each of these literal features of the parable. Because Coase himself was fully aware that transactions are costly and thus that the parable was no more than an abstraction, the contrary evidence in no way diminishes his monumental contribution in "The Problem of Social Cost." Indeed the evidence is fully consistent with Coase's central idea that, regardless of the content of law, people tend to structure their affairs to their mutual advantage. Nevertheless, the findings reported here may serve as a caution to law-and-economics scholars who have underestimated the impact of transaction costs on how the world works.⁴⁵

Norms, Not Legal Rules, Are the Basic Sources of Entitlements

In rural Shasta County, where transaction costs are assuredly not zero, trespass conflicts are generally resolved not in "the shadow of the law" but, rather, *beyond* that shadow. Most rural residents are consciously com-

quite as disconnected as animal-trespass law is in Shasta County. See H. Laurence Ross, *Settled Out of Court* 134-135, 237-240 (rev. ed. 1980).

43. The scholars involved in the Civil Liability Research Project have attempted to standardize the vocabulary of dispute resolution. They use "grievance" to describe a perceived entitlement to pursue a claim against another, "claim" to describe a demand for redress, and "dispute" to describe a rejected claim. See, e.g., Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 *Law & Soc'y Rev.* 525, 527 (1980-81). The usage in this book is not as precise.

44. This now-familiar phrase originated in Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale L.J.* 950 (1979).

45. Law-and-economics scholars often employ models that explicitly assume that actors have perfect knowledge of legal rules. See *infra* Chapter 8, text accompanying notes 10-13.

mitted to an overarching norm of cooperation among neighbors.⁴⁶ In trespass situations, their applicable particularized norm, adhered to by all but a few deviants, is that an owner of livestock is responsible for the acts of his animals. Allegiance to this norm seems wholly independent of formal legal entitlements. Most cattlemen believe that a rancher should keep his animals from eating a neighbor's grass, regardless of whether the range is open or closed. Cattlemen typically couch their justifications for the norm in moral terms. Marty Fancher: "Suppose I sat down [uninvited] to a dinner your wife had cooked?" Dick Coombs: It "isn't right" to get free pasture at the expense of one's neighbors. Owen Shellworth: "[My cattle] don't belong [in my neighbor's field]." Attorney-rancher Pete Schultz: A cattleman is "morally obligated to fence" to protect his neighbor's crops, even in open range.

The remainder of this chapter describes in greater detail how the norms of neighborliness operate and how deviants who violate these norms are informally controlled. The discussion also identifies another set of deviants: trespass victims who actually invoke their formal legal rights.

Incomplete Enforcement: The Live-and-Let-Live Philosophy

The norm that an animal owner should control his stock is modified by another norm that holds that a rural resident should put up with ("lump") minor damage stemming from isolated trespass incidents. The neighborly response to an isolated infraction is an exchange of civilities. A trespass victim should notify the animal owner that the trespass has occurred and assist the owner in retrieving the stray stock. Virtually all residents have telephones, the standard means of communication. A telephone report is usually couched not as a complaint but rather as a service to the animal owner, who, after all, has a valuable asset on the loose. Upon receiving a telephone report, a cattleman who is a good neighbor will quickly retrieve the animals (by truck if necessary), apologize for the occurrence, and thank the caller. The Mortons and the Shellworths, two ranching families in the Oak Run area particularly esteemed for their neighborliness, have a policy of promptly and apologetically responding to their neighbors' notifications of trespass.⁴⁷

46. Although the rural landowners were emphatic about the importance of neighborliness and could offer many specific examples of neighborly behavior, they never articulated a general formula for how a rural resident should behave. Chapter 10 puts forward the hypothesis that the norms they honored served to maximize their objective welfare.

47. A trespass victim who cannot recognize the brand of the intruding animal—a quarry more common for ranchette owners than for ranchers—may telephone county authori-

Several realities of country life in Shasta County help explain why residents are expected to put up with trespass losses. First, it is common for a rural landowner to lose a bit of forage or to suffer minor fence damage. The area northeast of Redding lies on a deer migration route. During the late winter and early spring thousands of deer and elk move through the area, easily jumping the barbed-wire fences.⁴⁸ Because wild animals trespass so often, most rural residents come to regard minor damage from alien animals not as an injurious event but as an inevitable part of life.

Second, most residents expect to be on both the giving and the receiving ends of trespass incidents. Even the ranchette owners have, if not a few hobby livestock, at least several dogs, which they keep for companionship, security, and pest control. Unlike cattle, dogs that trespass may harass, or even kill, other farm animals. If trespass risks are symmetrical, and if victims bear all trespass losses, accounts balance in the long run. Under these conditions, the advantage of reciprocal lumping is that no one has to expend time or money to settle disputes.

The norm of reciprocal restraint that underlies the "live-and-let-live" philosophy also calls for ranchers to swallow the costs of boarding another person's animal, even for months at a time. A cattleman often finds in his herd an animal wearing someone else's brand. If he recognizes the brand he will customarily inform its owner, but the two will often agree that the simplest solution is for the animal to stay put until the trespass victim next gathers his animals, an event that may be weeks or months away. The cost of "cutting" a single animal from a larger herd seems to underlie this custom. Thus, ranchers often consciously provide other people's cattle with feed worth perhaps as much as \$10 to \$100 per animal. Although Shasta County ranchers tend to regard themselves as financially pinched, even ranchers who know that they are legally entitled to recover feeding costs virtually never seek monetary compensation for boarding estrays. The largest ranchers northeast of Redding who were interviewed reported that they had never charged anyone or been charged by anyone for costs of that sort. Even when they do not know to whom a stray animal belongs, they put the animal in their truck the next

ties. Calls of this sort are eventually referred to the brand inspector or animal control officer, who then regards the main priority to be the return of the animal to its owner.

48. One rancher reported that during the winter he expects to find thirty to forty deer grazing in his hayfield each night. The owner of a particularly large ranch estimated that about five hundred deer winter there, a condition he welcomes because he regards deer as "part of nature." John Woodbury, a key lobbyist for the passage of the Caton's Folly ordinance, stated that elk and deer had eaten more of the grass in his alfalfa field than mountain cattle ever had.

time they take a load of animals to the auction yard at Cottonwood and drop it off without charge so that the brand inspector can locate the owner.⁴⁹

Mental Accounting of Interneighbor Debts

Residents who own only a few animals may of course be unable to see any average reciprocity of advantage in a live-and-let-live approach to animal trespass incidents. This would be true, for example, of a farmer whose fields frequently suffered minor damage from incursions by a particular rancher's livestock. Shasta County norms entitle a farmer in that situation to keep track of those minor losses in a mental account, and eventually to act to remedy the imbalance.

A fundamental feature of rural society makes this enforcement system feasible: Rural residents deal with one another on a large number of fronts, and most residents expect those interactions to continue far into the future. In sociological terms, their relationships are "multiplex," not "simplex."⁵⁰ In game-theoretic terms, they are engaged in iterated, not single-shot, play.⁵¹ They interact on water supply, controlled burns, fence repairs, social events, staffing the volunteer fire department, and so on. Where population densities are low, each neighbor looms larger. Thus any trespass dispute with a neighbor is almost certain to be but one thread in the rich fabric of a continuing relationship.

A person in a multiplex relationship can keep a rough mental account of the outstanding credits and debits in each aspect of that relationship.⁵²

49. Brand Inspector Bruce Jordan estimated that ranchers drop off approximately three hundred head of stray livestock at the auction yard each year, and that these ranchers typically decline to seek compensation from the owners of the strays.

50. See Robert L. Kidder, *Connecting Law and Society* 70-72 (1983). The phrase *multiplex relationship* was first coined in Max Gluckman, *The Judicial Process among the Barotsi of Northern Rhodesia* 19 (1955).

51. The law-and-society literature has long emphasized that law is not likely to be important to parties enmeshed in a continuing relationship. For example, Marc Galanter has observed: "In the American setting, litigation tends to be between parties who are strangers. Either they never had a mutually beneficial continuing relationship, as in the typical automobile case, or their relationship—marital, commercial, or organizational—is ruptured. In either case, there is no anticipated future relationship. In the American setting, unlike some others, resort to litigation is viewed as an irreparable breach of the relationship." Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society," 31 *UCLA L. Rev.* 4, 24-25 (1983). See also *infra* Chapter 10, text at notes 35-49 (discussion of close-knit groups).

52. Cf. Arthur J. Vidich and Joseph Bensman, *Small Town in Mass Society* 34 (rev. ed. 1968): "To a great extent these arrangements between friends and neighbors have a reciprocal character: a man who helps others may himself expect to be helped later on. In a way the

Should the aggregate account fall out of balance, tension may mount because the net creditor may begin to perceive the net debtor as an over-reacher. But as long as the aggregate account is in balance, neither party need be concerned that particular subaccounts are not. For example, if a rancher were to owe a farmer in the trespass subaccount, the farmer could be expected to remain content if that imbalance were to be offset by a debt he owed the rancher in, say, the water-supply subaccount.⁵³

The live-and-let-live norm also suggests that neighbors should put up with minor imbalances in their aggregate accounts, especially when they perceive that their future interactions will provide adequate opportunities for settling old scores. Creditors may actually prefer having others in their debt. For example, when Larry Brennan lost seven tons of baled hay to Frank Ellis' cattle in open range, Brennan (although he did not know it) had a strong legal claim against Ellis for intentional trespass. Brennan estimated his loss at between \$300 and \$500, hardly a trivial amount. When Ellis learned of Brennan's loss he told Brennan to "come down and take some hay" from Ellis' barn. Brennan reported that he declined this offer of compensation, partly because he thought he should not have piled the bales in an unfenced area, but also because he would rather have Ellis in debt to him than be in debt to Ellis. Brennan was willing to let Ellis run up a deficit in their aggregate interpersonal accounts because he thought that as a creditor he would have more leverage over Ellis' future behavior.

The Control of Deviants: The Key Role of Self-Help

The rural Shasta County population includes deviants who do not adequately control their livestock and run up excessive debts in their informal accounts with their neighbors. Frank Ellis, for example, was notoriously indifferent about his reputation among his neighbors. In general, the traditionalists who let their animals loose in the mountains during the summer are less scrupulous than the modernists are in honoring the norms of neighborliness. This is likely due to the fact that traditionalists

whole system takes on the character of insurance. Of course some people are more conscious of their premium payments than others and keep a kind of mental bookkeeping on 'what they owe and who owes them what,' which is a perfectly permissible practice so long as one does not openly confront others with unbalanced accounts.

53. See Oliver E. Williamson, *Markets and Hierarchies* 256-257 (1975) (a participant in a continuing relationship seeks to achieve a favorable balance in the overall set of interactions, not in each separate interaction).

have less complex, and shorter-lived, interrelationships with the individuals who encounter their range cattle.

To discipline deviants, the residents of rural Shasta County use the following four types of countermeasures, listed in escalating order of seriousness: (1) self-help retaliation; (2) reports to county authorities; (3) claims for compensation informally submitted without the help of attorneys; and (4) attorney-assisted claims for compensation. The law starts to gain bite as one moves down this list.

Self-help. Not only are most trespass disputes in Shasta County resolved according to extralegal rules, but most enforcement actions are also extralegal. A measured amount of self-help—an amount that would serve to even up accounts⁵⁴—is the predominant and ethically preferred response to someone who has not taken adequate steps to prevent his animals from trespassing.

The mildest form of self-help is truthful negative gossip. This usually works because only the extreme deviants are immune from the general obsession with neighborliness. Although the Oak Run-Round Mountain area is undergoing a rapid increase in population, it remains distinctly rural in atmosphere. People tend to know one another, and they value their reputations in the community. Some ranching families have lived in the area for several generations and include members who plan to stay indefinitely. Members of these families seem particularly intent on maintaining their reputations as good neighbors. Should one of them not promptly and courteously retrieve a stray, he might fear that any resulting gossip would permanently besmirch the family name.

Residents of the Northeastern Sector foothills seem quite conscious of the role of gossip in their system of social control. One longtime resident, who had also lived for many years in a suburb of a major California urban area, observed that people in the Oak Run area "gossip all the time," much more than in the urban area. Another reported intentionally using gossip to sanction a traditionalist who had been "impolite" when coming to pick up some stray mountain cattle; he reported that application of this self-help device produced an apology, an outcome itself presumably circulated through the gossip system.

The furor over Frank Ellis' loose cattle in the Oak Run area induced area residents to try a sophisticated variation of the gossip sanction. The ranchette residents who were particularly bothered by Ellis' cattle could see that he was utterly indifferent to his reputation among them. They thought, however, that as a major rancher, Ellis would worry about his

54. Even-Up strategies are discussed infra Chapter 12, text accompanying notes 39-48.

reputation among the large cattle operators in the county. They therefore reported Ellis' activities to the Board of Directors of the Shasta County Cattlemen's Association. This move proved unrewarding, for Ellis was also surprisingly indifferent to his reputation among the cattlemen.⁵⁵

When milder measures such as gossip fail, a person is regarded as being justified in threatening to use, and perhaps even actually using, tougher self-help sanctions. Particularly in unfenced country, a victim may respond to repeated cattle trespasses by herding the offending animals to a location extremely inconvenient for their owner.⁵⁶ Another common response to repeated trespasses is to threaten to kill a responsible animal should it ever enter again. Although the killing of trespassing livestock is a crime in California,⁵⁷ six landowners—not noticeably less civilized than the others—unhesitatingly volunteered that they had issued death threats of this sort. These threats are credible in Shasta County because victims of recurring trespasses, particularly if they have first issued a warning, feel justified in killing or injuring the mischievous animals.⁵⁸ Despite the criminality of the conduct (a fact not necessarily known to the respondents), I learned the identity of two persons who had shot trespassing cattle. Another landowner told of running the steer of an uncooperative neighbor into a fence. The most intriguing report came from a rancher who had had recurrent problems with a trespassing bull many years before. This rancher told a key law enforcement official that he wanted to castrate the bull—"to turn it into a steer." The official replied that he would turn a deaf ear if that were to occur. The rancher asserted that he then carried out his threat.

It is difficult to estimate how frequently rural residents actually resort to violent self-help. Nevertheless, fear of physical retaliation is undoubtedly one of the major incentives for order in rural Shasta County. Ranchers who run herds at large freely admit that they worry that their tres-

55. See *supra* Chapter 2, note 14.

56. Two residents stated in interviews that they had done this. For some scattered precedents on the legality of this practice, see *supra* note 31.

57. Cal. Penal Code §597(a) (West Supp. 1989); *People v. Dunn*, 39 Cal. App. 3d 418, 114 Cal. Rptr. 164 (1974).

58. Violent self-help—occasionally organized on a group basis as vigilante justice—was a tradition in the nineteenth-century American West. "The laws [in Wyoming] appeared to require that a farmer fence his land to keep cattle out, but many a farmer preferred to save the cost of a fence, then wait until cattle came in his land, and with a shot or two secure a winter's supply of beef." Daniel J. Boorstin, *The Americans: The Democratic Experience* 30 (1973). See also Ernest Staples Osgood, *The Day of the Cattleman* (1929), at 157-160 (lynching of horse thieves); at 242 (killing of trespassing cattle); and at 252-253 (describing how large cattle companies mobilized an army to invade Johnson County, Wyoming, to prevent small ranchers from using violent self-help against the companies' cattle).

passing cattle might meet with violence. One traditionalist reported that he is responsive to complaints from ranchette owners because he fears they will poison or shoot his stock. A judge for a rural district of the county asserted that a vicious animal is likely to "disappear" if its owner does not control it. A resident of the Oak Run area stated that some area residents responded to Frank Ellis' practice of running herds at large by rustling Ellis' cattle. He suggested that Ellis print tee shirts with the inscription: "Eat Ellis Beef. Everyone in Oak Run Does!"

Complaints to public officials. The longtime ranchers of Shasta County pride themselves on being able to resolve their problems on their own. Except when they lose animals to rustlers, they do not seek help from public officials. Although ranchette owners also use the self-help remedies of gossip and violence, they, unlike the cattlemen, sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem.⁵⁹ These calls are usually funneled to the animal control officer or brand inspector, who both report that most callers are ranchette owners with limited rural experience. As already discussed, these calls do produce results. The county officials typically contact the owner of the animal, who then arranges for its removal. Brad Bogue, the animal control officer, reported that in half the cases the caller knows whose animal it is. This suggests that callers often think that requests for removal have more effect when issued by someone in authority.

Mere removal of an animal may provide only temporary relief when its owner is a mountain lessee whose cattle have repeatedly descended upon the ranchettes. County officials therefore use mild threats to caution repeat offenders. In closed range, they may mention both their power to impound the strays and the risk of criminal prosecution. These threats appear to be bluffs; as noted, the county never impounds stray cattle when it can locate an owner, and it rarely prosecutes cattlemen (and then only when their animals have posed risks to motorists). In open range, county officials may deliver a more subtle threat: not that they will initiate a prosecution, but that, if the owner does not mend his ways, the Board of Supervisors may face insuperable pressure to close the range in the relevant area. Because cattlemen perceive that a closure significantly diminishes their legal entitlements in situations where motorists have collided with their livestock, this threat can catch their attention.⁶⁰

59. The role of complaints to public officials is explored in M. P. Baumgartner, *The Moral Order of a Suburb* 80-82 (1988) (New York suburb), and David M. Engel, "Cases, Conflict, and Accommodation: Patterns of Legal Interaction in an American Community," 1983 *Am. J. Found. Research* J. 803, 821 (rural Illinois county).

60. See *infra* Chapters 5 and 6.

A trespass victim's most effective official protest is one delivered directly to his elected county supervisor—the person best situated to change stray-cattle liability rules. Many Shasta County residents are aware that traditionalist cattlemen fear the supervisors more than they fear law enforcement authorities. Thus in 1973 the alfalfa farmer John Woodbury made his repeated phone calls about mountain cattle not to Brad Bogue but to Supervisor John Caton. When a supervisor receives many calls from trespass victims, his first instinct is to mediate the crisis. Supervisor Norman Wagoner's standard procedure was to assemble the ranchers in the area and advise them to put pressure on the offender or else risk the closure of the range. Wagoner's successor, Supervisor John Caton, similarly told Frank Ellis that he would support a closure at Oak Run unless Ellis built three miles of fence along the Oak Run Road. If a supervisor is not responsive to a constituent's complaint, the constituent may respond by circulating a closure petition, as Doug Heinz eventually did in Oak Run.

The rarity of claims for monetary relief. Because Shasta County residents tend to settle their trespass disputes beyond the shadow of the law, one might suspect that the norms of neighborliness include a norm against the invocation of formal legal rights. And this norm is indeed entrenched.⁶¹ Owen Shellworth: "I don't believe in lawyers [because there are] always hard feelings [when you litigate]." Tony Morton: "[I never press a monetary claim because] I try to be a good neighbor." Norman Wagoner: "Being good neighbors means no lawsuits." Although trespasses are frequent, Shasta County's rural residents virtually never file formal trespass actions against one another. John Woodbury, for example, made dozens of phone calls to Supervisor John Caton, but never sought monetary compensation from the traditionalists whose cattle had repeatedly marauded his alfalfa field. Court records and conversations with court clerks indicate that in most years not a single private lawsuit seeking damages for either trespass by livestock or the expense of boarding estrays is filed in the county's courts.⁶² Not only do the residents of the Northeastern Sector foothills refrain from filing formal lawsuits, but they

61. Norms against litigation are discussed more generally *infra* Chapter 14, text accompanying notes 36–43.

62. In the Central Valley Justice Court, no small claims for the August 1981 to June 1982 period were provoked by animal trespass, and the civil clerk who had worked there for eleven years could not remember any. The court's index of defendants for the 1975–1982 period indicated that Frank Ellis had been the only large rancher to become the target of any kind of legal action. In the Burney Justice Court, the small-claims files for 1980 showed no animal trespass cases, and the clerks could recall no such cases in their four years on the job.

are also strongly disinclined to submit informal monetary claims to the owners of trespassing animals.⁶³

The landowners who were interviewed clearly regard their restraint in seeking monetary relief as a mark of virtue. When asked why they did not pursue meritorious legal claims arising from trespass or fence-finance disputes, various landowners replied: "I'm not that kind of guy"; "I don't believe in it"; "I don't like to create a stink"; "I try to get along." The landowners who attempted to provide a rationale for this forbearance all implied the same one, a long-term reciprocity of advantage. Ann Kershaw: "The only one that makes money [when you litigate] is the lawyer." Al Levitt: "I figure it will balance out in the long run." Pete Schultz: "I hope they'll do the same for me." Phil Ritchie: "My family believes in 'live and let live.'"

Mutual restraint saves parties in a long-term relationship the costs of going through the formal claims process. Adjoining landowners who practice the live-and-let-live approach are both better off whenever the negative externalities from their activities are roughly in equipoise. Equipoise is as likely in closed range as in open. Landowners with property in closed range—the ones with the greatest formal legal rights—were the source of half of the quotations in the prior two paragraphs.

When a transfer is necessary to square unbalanced accounts, rural neighbors prefer to use in-kind payments, not cash. Shasta County landowners regard a monetary settlement as an arms' length transaction that symbolizes an unneighborly relationship. Should your goat happen to eat your neighbor's tomatoes, the neighborly thing for you to do would be to help replant the tomatoes; a transfer of money would be too cold and too impersonal.⁶⁴ When Kevin O'Hara's cattle went through a break in a fence and destroyed his neighbor's corn crop (a loss of less than \$100), O'Hara had to work hard to persuade the neighbor to accept his offer of money to compensate for the damages. O'Hara insisted on making this payment because he "felt responsible" for his neighbor's loss, a feeling that would not have been in the least affected had the event occurred in open instead of closed range. There can also be social pressure against offering monetary settlements. Bob Bosworth's father agreed many decades ago to pay damages to a trespass victim in a closed-range area just

63. There were several reports that others had informally settled claims for the costs of boarding estrays. Only one rancher told of paying such a claim; he regarded the claimant's pursuit of the money as a "cheap move."

64. This pattern poses a puzzle for transaction-cost economists, because in-kind transfers tend to be more costly to effect than cash transfers. But see *infra* Chapter 13, text accompanying notes 14–17 (in-kind exchange among members contributes to a group's cohesion).

south of Shasta County; other cattlemen then rebuked him for setting an unfortunate precedent. The junior Bosworth, in 1982 the president of the Shasta County Cattlemen's Association, could recall no other out-of-pocket settlement in a trespass case.

Trespass victims who sustain an unusually large loss are more likely to take the potentially deviant step of making a claim for monetary relief. Among those interviewed were adjusters for the two insurance companies whose liability policies would be most likely to cover losses from animal trespass. The adjusters' responses suggest that in a typical year these companies receive fewer than ten trespass damage claims originating in Shasta County. In the paradigmatic case, the insured is not a rancher but rather a ranchette owner, whose family's horse has escaped and trampled a neighboring homeowner's shrubbery. The claimant is typically not represented by an attorney, a type of professional these adjusters rarely encounter. The adjusters also settle each year two or three trespass claims that homeowners or ranchette owners have brought against ranchers. Ranchers who suffer trespasses virtually never file claims against others' insurance companies. An adjuster for the company that insures most Shasta County ranchers stated that he could not recall, in his twenty years of adjusting, a single claim by a rancher for compensation for trespass damage.

Attorney-assisted claims. The landowners, particularly the ranchers, express a strong aversion to hiring an attorney to fight one's battles. To hire an attorney is to escalate a conflict. A good neighbor does not do such a thing because the "natural working order" calls for two neighbors to work out their problems between themselves. The files in the Shasta County courthouses reveal that the ranchers who honor norms of neighborliness—the vast majority—are not involved in cattle-related litigation of any kind.

I did uncover two instances in which animal-trespass victims in the Oak Run–Round Mountain area had turned to attorneys. In one of these cases the victim actually filed a formal complaint. Because lawyer-backed claims are so unusual, these two disputes, both of them bitter, deserve elaboration.

The first involved Tom Hailey and Curtis McCall. For three generations, Hailey's family has owned a large tract of foothill forest in an open-range area near Oak Run. In 1978 Hailey discovered McCall's cattle grazing on some of Hailey's partially fenced land. Hailey suspected that McCall had brought the animals in through a gate in Hailey's fence. When Hailey confronted him, McCall, who lived about a mile away, acted as if the incursion had been accidental. Hailey subsequently found

a salt block on the tract—an object he could fairly assume that McCall had put there to service his trespassing herd. Hailey thus concluded that McCall had not only deliberately trespassed but had also aggravated the offense by untruthfully denying the charge. Hailey seized the salt block and consulted an attorney, who advised him to seek compensation from McCall. The two principals eventually agreed to a small monetary settlement.

Hailey is a semi-retired government employee who spends much of his time outside of Shasta County; he is regarded as reclusive and eccentric—certainly someone outside the mainstream of Oak Run society. McCall, a retired engineer with a hard-driving style, moved to Shasta County in the late 1970s to run a small livestock ranch. The Haileys refer to him as a "Texan"—a term that in Shasta County connotes someone who is both an outsider and lacks neighborly instincts.

The second dispute involved Doug Heinz and Frank Ellis. As described in Chapter 2, Heinz had the misfortune of owning a ranchette near Ellis' ranch. After experiencing repeated problems with Ellis' giant cattle herds, Heinz unilaterally seized three animals that had broken through his fence. Heinz boarded these animals for three months without notifying Ellis. Heinz later asserted he intended to return them when Ellis next held a roundup. According to Heinz, Ellis eventually found out that Heinz had the animals and asked for their return. Heinz agreed to return them if Ellis would pay pastureage costs. When Ellis replied, "You know I'm good for it," Heinz released the animals and sent Ellis a bill. Ellis refused to pay the bill, and further infuriated Heinz by calling him "boy" whenever Heinz brought up the debt.

On January 8, 1981, Heinz filed a small-claims action against Ellis to recover \$750 "for property damage, hay and grain ate [*sic*] by defendant's cattle, boarding of animals."⁶⁵ Acting through the attorney he kept on retainer, Ellis responded eight days later with a separate civil suit against Heinz.⁶⁶ Ellis' complaint sought \$1,500 compensatory and \$10,000 punitive damages from Heinz for the shooting deaths of two Black Brangus cows that Ellis had pastured on Bureau of Land Management lands; it also sought compensation for the weight loss Ellis' three live animals had sustained during the months Heinz had been feeding them. The two legal actions were later consolidated. Heinz, who called Ellis' allegation that he had killed two cows "100 percent lies" and "scare tactics," hired an attorney based in Redding to represent him. This attorney threatened

65. Heinz v. Ellis, No. 81 SC 7 (Cent. Valley Just. Ct., filed Jan. 8, 1981).

66. Ellis v. Heinz, No. 81 CV 6 (Cent. Valley Just. Ct., filed Jan. 16, 1981).

to pursue a malicious prosecution action against Ellis if Ellis persisted in asserting that Heinz had slain the Black Brangus cows. In December 1981, the parties agreed to a settlement under the terms of which Ellis paid Heinz \$300 in damages and \$100 for attorney fees. Ellis' insurance company picked up the tab. By that time Heinz was spearheading a political campaign to close the range Ellis had been using.

The Heinz-Ellis and Hailey-McCall disputes share several characteristics. Although both arose in open range, in each instance legal authority favored the trespass victim: Hailey, because McCall's trespass had been intentional; and Heinz, because Ellis' animals had broken through an apparently lawful fence.⁶⁷ In both instances the victim, before consulting an attorney, had attempted to obtain informal satisfaction but had been rebuffed. Each victim came to believe that the animal owner had not been honest with him. Each dispute was ultimately settled in the victim's favor. In both instances, neither the trespass victim nor the cattle owner was a practiced follower of rural Shasta County norms. Thus other respondents tended to refer to the four individuals involved in these two claims as "bad apples," "odd ducks," or otherwise as people not aware of the natural working order. Ordinary people, it seems, do not often turn to attorneys to help resolve disputes.⁶⁸

67. Heinz had technically imperiled his statutory claim for damages under the Estray Act when he failed to notify the proper public authorities that he had taken up Ellis' animals. See Cal. Agric. Code §§17042, 17095 (West 1967 & Supp. 1986).

68. See also William E. Nelson, *Dispute and Conflict Resolution in Plymouth Colony, Massachusetts, 1725-1825* (1981) (Plymouth's particularly litigious individuals during the 1725-1774 period tended to be people who were poorly socialized); Harry F. Todd, Jr., "Litigious Marginals: Character and Disputing in a Bavarian Village," in *The Disputing Process: Law in Ten Societies*, 86, 118 (Laura Nader and Harry F. Todd, Jr., eds. 1978) (socially marginal people were disproportionately represented in civil and criminal litigation).

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Who Pays for Boundary Fences?

As Robert Frost recognized in his poem "Mending Wall," boundary fences can be a source of low-level drama in life among neighbors. In the language of economics, a boundary fence is a public good. When a landowner on one side of a boundary bears the entire cost of building or maintaining a boundary fence, that effort benefits the neighbor on the other side. Therefore each adjoining landowner may selfishly delay fence work in the hope of free-riding on efforts of the other.¹ As Frost saw, this strategically tricky situation can reveal much about both the character of individual neighbors and the organization of social life.

Fencing costs are a significant budget item for most Shasta County ranchers. Although many of the ranches in the grassy plains and foothills of the Northeastern Sector were first fenced over a half century ago, new fences nevertheless continue to appear as ranchette owners with orchards or hobby livestock enclose their lands. In 1982, new barbed-wire fences cost a total of about \$1 per linear foot.² For landowners whose perimeters are already enclosed, fencing costs consist of the considerable time and money spent on the annual repair and the periodic replacement of existing structures.³

California law provides some formal rules on how neighbors should split the cost of building and maintaining boundary fences. Shasta County landowners tend to ignore these legal rules when settling fence disputes, just as they typically disregard trespass law when settling trespass disputes. The parties to disputes over fence costs are immediate neighbors and thus, more invariably than parties to cattle-trespass dis-

1. See Philip B. Heymann, "The Problem of Coordination: Bargaining and Rules," 86 *Harv. L. Rev.* 797, 819-820 (1973) (fence-finance example used to illustrate the general problem of coordination); Irwin Lipnowski and Shlomo Maital, "Voluntary Provision of a Pure Public Good as the Game of 'Chicken,'" 20 *J. Pub. Econ.* 381 (1983).

2. See supra Chapter 1, notes 34-35 and accompanying text.

3. There is something "that doesn't love a wall, that wants it down." Robert Frost, "Mending Wall," in *Complete Poems of Robert Frost* 47-48 (1949).