Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors Only If they Are Fair

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Abstract:

Conflicts between persons engaged in animal husbandry and their neighbors have given legislative bodies many challenges in responding to competing equities. One set of rules has concerned the enclosure of domestic livestock, and legislative bodies have adopted assorted fence rules to resolve competing interests associated with grazing by domestic animals. Alternative fence-out legislation still exists in some jurisdictions for open range and very rural areas. Under fence-out legislation, ranchers do not have to build fences to confine their animals; rather, persons who want to keep out stray livestock have the burden of putting up a fence. Economists have given considerable attention to the externalities posed by livestock and the economic consequences of fence-in and fence-out rules, but have not considered the entire spectrum of scientific knowledge regarding the selection of a preferred rule. This paper addresses recent agro-research strategies and the comparison of property versus liability rule protection.

Key Words: due process, entitlements, fence law, open range, property rights

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I. INTRODUCTION

Conflicts between persons engaged in animal husbandry and their neighbors have provided considerable work for attorneys and courts over the centuries,² and have given legislative bodies many challenges in responding to competing equities. One set of rules has concerned the enclosure of domestic livestock,³ and legislative bodies have adopted assorted fence rules to resolve competing interests associated with grazing by domestic animals.⁴ While most American states have embraced the traditional English rule⁵ that livestock owners (hereafter called ranchers) are liable for damages their livestock cause to other property owners under fence-in legislation, this was not always true.⁶ Moreover, alternative fence-out legislation still exists in some jurisdictions for open range and very rural areas.⁷ Under fence-out legislation, ranchers do not have to build fences to confine their animals; rather, persons who want to keep out stray livestock have the burden of putting up a fence. Many states with fence-out rules also have fence-in rules for municipalities and other locales that prefer the traditional English rule.

Economists have given considerable attention to the externalities posed by livestock⁸ and the economic consequences of fence-in and fence-out rules,⁹ but have not considered the entire spectrum of scientific knowledge regarding the selection of a preferred rule. Specifically, economists have not considered recent agro-research strategies nor the comparison of property versus liability rule protection.

This Article addresses these two additional issues. Part II describes fence law entitlements to establish a foundation for an analysis of fence law provisions. Given the different

interests that may be legislatively assigned by fence rules, what do the rules mean today and are they consistent with current events? This includes consideration of changes in circumstances, agro-research strategies, and fence cost options. The third Part examines property rights protection under property and liability rules, and reviews economic considerations involving efficiency concepts to advocate a preference for a certain fence option.

With this foundation, legal issues concerning limitations of the police power are analyzed in Part IV. An analysis of the legitimacy of the public purpose, changes in conditions affecting the legitimacy, and the appropriateness of the means of achieving the public purpose reveals that some cost provisions of fence laws may violate a property owner's substantive due process rights. Part V integrates the findings concerning fence entitlements and constitutional parameters to suggest that selected fence-out and cost-sharing provisions may need reforming. Given changed circumstances, agro-research strategies, and economic efficiency criteria, there may exist a justification to move from a fence-out to fence-in rule for some areas, or to alter unfair cost-sharing provisions. Drawing on economic criteria, it may be concluded that some historic allocations of fence-law entitlements by various state legislatures do not provide a preferred solution. If a state is interested in overall economic efficiency, or wants to safeguard additional private property rights, its legislative body may need to eliminate some fence-out and cost-sharing provisions.

II. FENCE LAW ENTITLEMENTS

Sir James Dyer reported a sixteenth century case in which owners of straying cattle incurred liability for the waste of another's property. Blackstone reported this fundamental common law concept in his *Commentaries* by maintaining that cattle entering on another's soil

commit a trespass.¹¹ The term "fence-in" is used to describe this rule by which owners of livestock are liable for damages if their animals trespass on another's property. In some areas of the United States, such a rule may exist because of a statutory command. Under fence-in, neighbors have the right to be free of interference by others' livestock, and ranchers must build a barrier to keep livestock from entering the property of neighbors. Ranchers thereby incur costs for fences and incur liability if their livestock trespass on another's property.

Although English common law was brought to the United States, many states adopted fence-out rules to establish rules more appropriate for the vast areas of open grazing space. Some states adopted fence-out rules through legislative action. In other states, fence-out became the rule due to custom at the time of settlement and subsequent legislative enactments. At least one state limited common law to the extent that "it is consistent with and adapted to the natural and physical conditions of this state."

With the adoption of a fence-out rule, ranchers can allow their livestock to roam, and may receive the benefit of forage grown by neighbors. Moreover, neighbors may suffer harm when others' livestock enter their property, and may even be liable for injuries to animals that break through an insufficient fence. Given population growth and the demise of livestock production in some areas, many states have subsequently retreated from their fence-out provisions.¹³

Fence-out rules generally include an additional provision concerning the construction of a lawful fence by a neighbor. Persons with lawful fences have a right to be free of livestock, and if livestock break through a lawful fence, the fence owner may collect monetary compensation.

Thus, fence-out rules present neighbors with the option of doing nothing and incurring harm from trespassing livestock, or expending funds to build a lawful fence. Once a neighbor has

constructed a lawful fence, ranchers have no choice in the extinguishment of previous rights or the loss of grazing rights.

A. The Allocation of Entitlements

Differences in grazing regimes that exist under a fence-out rule as opposed to a fence-in rule present an opportunity to illuminate advantages of a particular fence rule. Historically, the allocation of rights and interests under fence-in and fence-out entitlements were explained through distributional goals. Competing interest groups struggled to adopt or maintain selected fence rules, as ranchers preferred a fence-out rule to encourage the use of the natural land resource for grazing. Fence-out rules were often based on an assumption that constructing fences to enclose livestock was more expensive than building fences to exclude livestock from areas where they were not wanted. As the presumed cheaper cost-avoider, fence-out jurisdictions saddled neighbors with the cost of precluding roaming livestock.

While various reasons may have led to the legislative adoption of a jurisdiction's fenceout rule, a distributional rule that favors producers in derogation of common law may no longer
be desired, even if it is cost-efficient. In addition, the use of the land resource for livestock
production may be viewed as less important than when the fence-out legislation was adopted.

Rather, a majority may favor traditional property rights by which ranchers pay for livestock
production costs, including fencing, and neighbors can use their property unfettered by
trespassing livestock. Moreover, with the renewed interest in private property rights and a
willingness of the people to take their grievances to the legislature, fence-out rules may be topic
for legislative change.

Although the economic justifications for a fence-out rule may be questioned, a more pertinent question is whether fence-out is valid for a jurisdiction today. A number of authors have commented on historical developments that precipitated or accompanied a change from fence-out back to a fence-in rule, 15 but little research addresses this issue based on contemporary conditions. Due to our increased scientific knowledge and new technology, does a fence-out rule make economic sense for a particular jurisdiction? Two major developments may mean that considerations supportive of fence-out rules no longer apply in some areas where livestock production is the dominant activity.

1. Changes in Circumstances.

Changes in population, technology and an economy may alter the welfare consequences of available fence-out rules. The most obvious change may be an increase in the value or intensity of agricultural cultivation under which the efficiency reasons for selecting fence-out legislation diminish or cease to exist. Moreover, an increase in nonranching land uses may create a situation under which an existing fence-out rule may no longer be preferable.¹⁶

Emerging land-use demands, including recreation and ecological concerns, may favor fence-in.¹⁷ As recreational activities and ecological concerns become more prevalent, sometimes even providing income opportunities for property owners, the new interdependencies among actors may support an alternative allocation of rules.¹⁸ Recreational activities by neighbors may be dependent on the control and exclusion of livestock, which supports a preference for a fence-in rule. Fence-out rules generally condone the destruction of vegetation by meandering livestock near water sources that adversely affects the quality of fish habitats and sport activities.

As recreational activities become more prevalent and provide income to property owners, previous assumptions dependent on the cheapest cost-avoider may no longer be true.

2. Agro-Research Strategies.

More significant, however, may be developments involving agro-research information on range management, new scientific management techniques, or options for alternative land uses. ¹⁹ Livestock and plant populations may need to be managed to maximize animal production, and management may be dependent on the use of fencing. Common strategies to enhance grazing resources include rotation with the timing of grazing, management of stocking rates, distribution of grazing to manage plant species, breeding programs involving access to selected male animals, and soil protection through the preclusion of grazing. If agro-research or changes in circumstances mean that the value of open grazing under a fence-out jurisdiction has declined relative to other land-dependent activities, there may no longer exist an economic preference for fence-out in terms of total welfare.

An initial management tool may be to preclude overgrazing that depletes or harms the grazing resource.²⁰ This problem may be controlled by a rotation program or by management of the timing or season of grazing. Next, range management is used to increase the quantity and quality of herbage for livestock.²¹ Research shows that selected herbage may result in less efficient conversion of feed into an animal product.²² Herbage quality is linked to an animal's intake that, in turn, is linked to animal production.²³ Moreover, a reduced intake of feed due to a decrease in the amount of available feed can limit the rate of growth of animals such as cattle.²⁴

Along with increased productivity, secondary benefits of range management practices may include control of poisonous plants and increased water availability for herbaceous plants.²⁵

Although many secondary benefits of range management practices are possible under both fence-in and fence-out rules, a fence-in rule may be accompanied by greater financial incentives to the land owner. Under a fence-out rule, a neighbor's animals may appropriate some benefits that accompany a landowner's management practice. Thus, fence-in may offer a preferred strategy to encourage management improvements involving the exclusion of livestock.

Fence-in accompanied by appropriate management techniques may assist in the control of weeds²⁶ and the preservation of native vegetation and habitats.²⁷ Also, more active management under a fence-in rule may prevent the destruction of vegetation by meandering livestock near water sources and adverse effects of livestock on fish habitats and sport activities. The establishment of a management practice to increase productivity of a range may require protection from grazing for six months to a year to be effective.²⁸

B. Fence Cost Provisions

As expected, responsibilities for building a fence and maintaining fences vary among jurisdictions and over time. Due to the costs associated with the enclosure of lands, various rules were developed in an attempt to provide a manageable and equitable policy. While the general rule under a common-law fence-in rule required ranchers owning livestock to pay for the costs of a fence, this was not the only rule adopted by various jurisdictions. Especially significant were cost-sharing rules that attempted to preclude persons from receiving gratuitous benefits due to the construction of a fence by one landowner that would then be used by neighboring landowners.

Four major cost options may be observed. As already noted, ranchers generally must pay for fences under fence-in, while neighbors generally incur the costs for fences to exclude

livestock under a fence-out rule. The third option incorporated in some fence-in laws requires neighboring ranchers, but not nonranchers, to share fence costs.²⁹ This cost-sharing option may be described as a device under which persons benefiting from a fence equitably share in the fence's costs. A common provision declares that whenever an adjoining property owner begins to use a fence previously constructed by a neighbor, this adjoining property owner must pay a proportionate share of the current value of the fence.

A fourth option requires a neighbor and rancher to contribute to the cost of a fence to control the rancher's livestock, generally one-half of the cost of a fence, regardless of need.

Mandatory cost-sharing despite one's need has been adopted by one or more jurisdictions with fence-in or fence-out rules. For jurisdictions with a fence-in rule, instead of a rancher paying the entire cost of a fence on the boundary of property next to a neighbor, the rancher may only need to pay one-half of the cost; the neighbor is obligated to pay the other one-half.³⁰ Under cost-sharing regardless of need, as defined by some fence-out laws, whenever a neighbor is willing to expend one-half of the funds to build a fence, adjacent ranchers are burdened with an equivalent cost.³¹ A variation of this payment regardless of need is a levy of an annual property tax to pay for the construction and maintenance of fencing.³²

Cost sharing may prevent strategic behavior by requiring adjoining ranchers to contribute to the expense of a fence and may operate to reduce transaction costs. However, in an economy where many property owners do not need a fence, a statutory provision delineating an obligation to pay one-half of the cost of a non-needed fence may be burdensome or oppressive.³³ Although courts may have upheld cost-sharing provisions as serving a public purpose despite the inequity

to one landowner, such provisions raise a political issue that could be addressed by a state legislature to provide a more equitable resolution for landowners who do not want fences.

III. USING FENCE LAWS TO PROTECT PROPERTY RIGHTS

Fence law provisions have been a major topic in the economic debate of preventing harmful externalities and protecting private property rights. Economic, social, and equity issues associated with changes in land use and competing interests among persons due to the ownership of livestock have led to the adoption of diverse provisions.³⁴ Institutions known as property, liability, and inalienability rules have developed to resolve conflicts and regulate externalities. Legislative assignments of property rights create entitlements, and such entitlements may be enhanced or denigrated by a property or liability rule. The relationships of different entitlements with externalities and transaction costs are an important topic of the externality literature. A brief examination of these institutions may offer further insights on embracing a fence rule for a given jurisdiction.

A. The Institutions

A property rule provides an entitlement holder exclusive right in the use, control, and enjoyment of some resource, and interference with the entitlement may be enjoined through a legal proceeding.³⁵ An entitlement protected by a property rule can be transferred only through a voluntary exchange involving *ex ante* compensation.³⁶ By that, the entitlement owner establishes the price before the transfer of the entitlement; the entitlement is transferred only after the owner is willing and agrees to depart with rights. Property rules are appropriate to provide for the protection of possessory rights in things. This follows the fundamental aspect of

property ownership that owners have the right to prevent others from taking their property. This would include the right not to have uninvited domestic livestock on one's property.

Alternatively, under a liability rule, an entitlement owner has rights in the use, control, and enjoyment of some resource, but transfer rights and transaction costs are distinct from those under a property rule. Under a liability rule, others may infringe upon or appropriate an entitlement without permission and the owner does not determine the timing of the expropriation. An entitlement owner protected by a liability rule is entitled to compensation, but the amount is established by an independent third party, such as a jury, rather than the entitlement holder. Liability rules are appropriate to use in responding to harmful externalities.

The third rule of entitlement, an inalienability rule, involves societal preconditions for the transfer or sale of a property interest. This could involve the preclusion of sale of an interest, an injunction based on policy grounds, or a constitutional preclusion of certain assignments of property interests. Substantive due process constitutes an inalienability rule that precludes governments from unduly interfering with certain rights held by property owners.

B. Livestock Trespass

Characteristics related to livestock straying onto the property of neighbors suggest that animal trespass involves two aspects that are important to a discussion of property rights. First, the trespass results in a violation of the possessory rights of the property owner upon which the trespass occurs. Second, the trespass is a harmful externality rather than a taking of a thing due to the absence of a transfer of possessory rights in a physical object. Moreover, no component of common value exists between the two individuals. Although a rancher may view trespassing livestock as taking forage from another, the person whose property is entered often experiences

the destruction of a crop or a ravaged property interest. There is no common value in the ruined object, and no object exists to be returned to the second party. By that, the independence of injurer benefit and victim harm shows trespass as an externality.

Two other characteristics of animal trespass may be significant. First, damages to neighbors may involve idiosyncratic values or situational values. Residential property owners may place a higher value on their specific property than others so that the idiosyncratic value is underestimated. Or, trespassing livestock may preclude property owners from enjoying their property at a specific needy moment. Due to the existence of idiosyncratic values and situational values, there exists imperfect information about the harm due to trespassing animals. Second, liability for trespass damages does not involve bargaining with each other; neighbors must seek compensation for harm that has occurred and accept whatever payment is offered by the tortfeasor or the court.

C. Considerations for a Preferred Fence Rule

Given knowledge about property and liability rules and the characteristics of livestock trespass, can suggestions on preference for fence rules for certain situations be discerned?

Drawing on the literature, three concepts may be advanced to support the choice of a particular fence rule: economic optimization, fairness, and extraordinary damages.

1. Optimization of Possessory Rights

The economic literature examining property and liability rules suggests that possessory interests are generally best protected by a property rule.³⁷ Given our society's views of real property, a possessory property right includes being able to prevent trespass so that a property rule rather than a liability rule should be employed to protect these rights. Moreover, in order to

be free of trespassing livestock, property owners should not have to build a fence. A fence-out rule that abrogates possessory property rights normally enjoyed by property owners may not be economically efficient. This could be due to imperfect information of the value of the property to the owner, or due to unsuccessful bargaining between parties. Of course, this general rule may not be preferred if a significant exception applies, and rural areas where an overwhelming use of the land is for grazing purposes may provide an exception to justify a fence-out rule.

2. Fairness in Internalizing Production Costs

Concepts of fairness incorporated in property law and common law may constitute a second reason to recommend a particular fence rule.³⁸ Given common law property assumptions, fences to keep animals off neighboring property are a part of the production of livestock. Fairness recommends that ranchers pay for fences to preclude their animals from intruding upon property of others. If livestock production is the major use of property in a locale, fences may not be needed so that fairness may recommend a fence-out rule.

Fence law decisions from New York³⁹ and Vermont⁴⁰ reflect a notion of fairness in requiring ranchers to internalize their costs of production. Neighbors' right of quiet enjoyment should only be infringed by an obligation to pay for fence construction costs if there exists sufficient justification. Moreover, the holdings in the New York and Vermont fence cases suggest that Virginia and other states with fence provisions that place costs on nonrancher neighbors may need to adjust their regulations as areas experience changes in property use. The addition of recreational uses, structures, or the demise of livestock production may mean that a statutory provision placing costs on nonranchers is no longer related to a substantial public interest.

3. Extraordinary damages.

The third reason for advocating a certain fence rule is related to the extraordinary damages associated with infringements of trespassing livestock. Entitlements created by fence-in and fence-out legislation are subject to derogation whenever livestock unlawfully enter the property of another. Under fence-out laws, entitlements are infringed by ranchers whenever cattle unlawfully break through a fence; under fence-in laws, entitlements are infringed whenever cattle escape from their owner. The tortious appropriation of a property right that accompanies a trespass by livestock may result in the defendant paying the plaintiff ordinary damages that do not cover the complete loss experienced by the plaintiff. If the plaintiff's property right is worth more via a transfer pursuant to a property rule than lost under a liability rule, recovery under a liability rule may leave a plaintiff under compensated and provide a defendant a windfall.⁴¹

Ellickson's research in Shasta County suggests that this may apply to livestock disputes due to social reasons and inconveniences of attempting to collect damages. 42 Moreover, idiosyncratic and situational values accompanying livestock trespass suggest that damages may be underestimated. Thereby, extraordinary damages support the use of a property rule to protect neighbors' entitlements with respect to trespassing livestock.

IV. CONCLUDING COMMENTS

Legislatures and courts have employed available information regarding fence rules to respond to the issues under consideration. While the legislative provisions and judicial pronouncements have reacted to various historical, political, financial, land use, and constitutional issues, many of the declarations were made some time ago. Recent technological changes and new information seem to imply that the issues may have changed so that historic

consideration about what was fair may no longer be valid. Given the inequities that exist under some fence law provisions, legislative and judicial challenges may be expected.

While the findings of this Article support revisions of fence-out and cost-sharing provisions, and show that some provisions probably offend substantive due process, a more important finding may be that existing fence rules are inefficient. In a society where efficiency of production is critical, it is not clear that a jurisdiction should want to continue to support an outdated and inefficient solution to conflicting property rights regarding livestock. Although a coalition of persons supporting ranching and domestic livestock production may have the political influence to prevent legislative changes, the findings of this Article should, hopefully, give them pause to reconsider their self-centered agenda.

Historic cost-sharing and fence-out provisions may come under additional scrutiny given increased public attention that arises from disputes such as reported in the *Holly Hill Farm* case. Furthermore, the private property rights legislation being advanced in Congress and state legislatures discloses a resurgence of interest in legislation derogating property rights. A public desirous of safeguarding private property rights may find that legislation foisting fence costs on neighbors without livestock is an example of excessive governmental interference in private property. By challenging specific fence-out and fence cost-sharing provisions that favor ranchers, neighbors may be able to regain the common law property right of enjoyment to be free of others' livestock that was denigrated by fence-out legislation over the past three centuries.

Notes

- 1. "Good Fences make good neighbors" comes from the poetry of Robert Frost. ROBERT FROST, *Mending Wall*, in COMPLETE POEMS OF ROBERT FROST 42 (1962).
- 2. The earliest Anglo-American case of this may be a short synopsis reported by James Dyer in 1592. 3 Eng. Rep. 372b.
- 3. For example, "Cattle, Cornfields, [and] Fences" rated a separate section in the report of the *Colonial Laws of Massachusetts*. Colonial Laws of Massachusetts. Colonial Laws of Massachusetts 17-20 (City Council of Boston 1887) (1672) [hereafter Colonial Laws].
 - 4. See COLONIAL LAWS, supra note 3, at 17-20.
 - 5. 3 Eng. Rep. 372b.
- 6. See John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 HARV. L. REV. 1252, 1263-64 (1996).
 - 7. See TEX. AGRIC. CODE ANN. § 143.001 (West 1982).
- 8. See Daniel W. Bromley, Property Rules, Liability Rules, and Environmental Economics, 12 J. Econ. Issues 43, 50-51 (1978); J. M. Buchanan, The Coase Theorem and the Theory of the State, 13 NAT. RESOURCES J. 579, 581-83 (1973); Ronald H. Coase, The Problem of Social Cost, 3 J. Law and Econ. 1, 2-8 (1960); Robert C. Ellickson, Order Without Law 1-286 (1991); Carlisle Ford Runge, Common Property Externalities: Isolation, Assurance, and Resource Depletion in a Traditional Grazing Context, 63 Amer. J. Agric. Econ. 595, 595 (1981); Kenneth R. Vogel, The Coase Theorem and California Animal Trespass Law, 16 J. Legal Stud. 149, 157-86 (1987)).
- 9. See Michael A. Taylor & L. Leon Geyer, Land: Issues and Problems, Virginia Cooperative Extension, No. 79, January 1993 (performing a benefit-cost analysis of fence provisions).
 - 10. 3 Eng. Rep. 372b.
 - 11. 3 WILLIAM BLACKSTONE, COMMENTARIES *211.
 - 12. Carrow Co. v. Lusby, 804 P.2d 747, 751 (Ariz. 1990).
- 13. See J. Crawford King, The Closing of the Southern Range: An Exploratory Study, 48 J. Sou. Hist. 53 (1982).

- 14. E.g., "[i]t was more convenient for our ancestors to enclose their cultivated fields than their pastures." Studwell v. Ritch, 14 Conn. Rep. 291, 295 (1841).
- 15. See Shawn Everett Kantor, The Economic and Political Determinants of Fence Reform in Postbellum Georgia, 150 J. INSTITUTIONAL & THEORETICAL ECON. 486 (1994)).
- 16. E.g., Robert C. Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 STAN. L. REV. 623, 660-61 (1986).
 - 17. See ROBERT E. RICKLEFS, THE ECONOMY OF NATURE 443 (1993).
- 18. E.g., JOHN F. VALLENTINE, RANGE DEVELOPMENT AND IMPROVEMENTS 40-41(1989).
- 19. E.g., M. Hams, Pasture Management and Productivity in Practice: The Rangelands 132, in Pasture Management (David R. Kemp & David L. Michalk, eds., 1994).
 - 20. Id. at 131.
 - 21. C.J. Pearson & R.L. Ison, Agronomy of Grassland Systems 81-83 (1987).
 - 22. Id. at 82-84.
 - 23. Id. at 92.
 - 24. *Id.* at 87.
 - 25. VALLENTINE, *supra* note 18, at 7-8.
 - 26. See Hams, supra note 19, at 133; VALLENTINE, supra note 18, at 4.
 - 27. See PEARSON & ISON, supra note 21, at 102.
 - 28. Vallentine, *supra* note 18, at 3.
 - 29. E.g., 765 ILCS 130/3 (West's Smith-Hurd 1993).
 - 30. E.g., Mo. ANN. STAT. §§ 272.010, .020, .060 (Vernon 1993).
 - 31. E.g., COLO. REV. STAT. ANN. §§ 35-46-112, -113 (West 1989).
 - 32. IDAHO CODE § 25-2401 (Supp. 1996).

- 33. See Sweeney v. Murphy, 334 N.Y.S.2d 239, 242 (N.Y. App. Div. 1972), aff'd, 294 N.E.2d at 855 (1973); Choquette v. Perrault, 569 A.2d 455, 460 (Vt. 1989).
- 34. See Guido Calabresi and A. D. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 715 (1996).
 - 35. Kaplow & Shavell, id. at 723.
- 36. See David D. Haddock & Fred S. McChesney, Do Liability Rules Deter Takings?, in The Economic Consequences of Liability Rules 29-53 (Roger E. Meiners & Bruce Yandle, eds., 1991).
- 37. See Kaplow & Shavell, supra note 34, at 758 (explaining this preference for a property rule over a liability rule).
- 38. See Vogel, supra note 8, at 152; see also Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 152 (1973).
- 39. See Sweeney v. Murphy, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), aff'd, 294 N.E.2d at 855 (1973).
 - 40. See Choquette v. Perrault, 569 A.2d 455 (Vt. 1989).
 - 41. See Haddock & McChesney, supra note 36, at 30.
 - 42. Ellickson, *supra* note 16, at 686.
 - 43. Holly Hill Farm Corp. v. Rowe, 404 S.E.2d 48, 48-49 (Va. 1991).
- 44. See Miss. Code Ann. §§ 49-33-1 to 49-33-17 (Supp. 1996); Mont Code Ann. §§ 2-10-101 to -105 (1995); North Dakota Laws of 1995, ch. 312, SB 2388, § 3 (to be codified as N.D. Cent. Code § 28-32-02.5); Tex. Gov. Code Ann. §§ 2007.001 to .045 (West Supp. 1996); Utah Code Ann. §§ 78-34a-1 to 78-34a-4 (1994); Wyo. Stat. §§ 9-5-301 to -305 (1995). note 18 (listing of property rights legislation).