Cows in the Corn, Pigs in the Garden, and "the Problem of Social Costs": "High" and "Low" Legal Cultures of the British Diaspora Lands in the 17th, 18th, and 19th Centuries

Peter Karsten

Economist Ronald Coase's famous theorem regarding the ways that neighboring property owners bargain "around" law and government has been refined by Robert Ellickson, who studied the ways ranchers and their ranchette neighbors resolve problems of fencing and animal trespass. Both Coase and Ellickson rely on rational actor models of Economic Man in predicting and explaining human behavior and dispute resolution. Both offer animal trespasses as the prime illustrations. Both models are flawed.

Ellickson asked what might one learn by mining historical sources to reconstruct "bargaining" between ranchers and farmers, but he found the task daunting.

In the course of research into the "high" (formal) legal cultures and the "low" (informal) legal cultures in the lands of the British diaspora, 1630–1910, I gathered information on just such interactions (over fencing and animal trespass), and in this article I put Coase's and Ellickson's models to the test of the historian's laboratory. While Ellickson's model has significant power in predicting the behavior of *mature* British settlements where the neighbors were of the same core culture, it is not as effective in predicting dispute resolutions in *frontier* conditions and is of little use in predicting the interactions of Puritans and Algonquins, Pakehas and Maoris.

In 1837 a Maori Bay of Islands chief asked missionary Samuel Marsden to "give us a Law" on a number of disputes common to Maori *runanga*s (dispute settlement forums). He described four such issues. Fighting, adultery, and master-slave relations were three of these, but the first mentioned, and the one the chief devoted the most attention to, was the problem of trespassing pigs. "My Law is . . . that the Man who kills Pigs for trespassing on his Plantation, having neglected to fence, had rather pay for the Pigs so killed. . . . Fenced Cultivations, when trespassed on, should be paid for" (Ward 1973:27, 50).[1]

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[1] On more recent evidence that trespassing pigs in the gardens of South Pacific Islanders was (along with women stealing and rape) a major cause of warfare (this time in New Guinea villages), see Rappaport 1967:110; see also Wynne-Edwards 1962.

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That, in any event, was the way Marsden represented this Bay of Islands chief's views of Maori law regarding animal trespasses. On the face of it, this rule does not seem terribly different from English law. But some of the other Maori and English rules regarding animal trespasses and fencing differed sharply, and these differences amounted to what economists call high transaction costs. Could they have prevented the two cultures from reaching the sorts of "rational" agreements that members of the same culture often managed when faced with legal rules inconsistent with their mutual interests?

The enumerating of animal trespass disputes as a leading cause of disputes by Marsden's Maori chief might be attributable to differences between Maori culture and that of the British settlers. But that remains to be seen. So does the answer to a related question: How uncommon were disputes over animal trespasses among participants in the British diaspora themselves—that is, among settler neighbors in North America and the Antipodes who shared the same "high" (formal) and "low" (informal) legal cultures during the 17th, 18th, and 19th centuries? These questions do not seem to possess any obvious significance, however intrinsically interesting they might be, but they have become so because of the way that animal trespass law and human behavior have been linked by Law & Economics analysts. So we begin with a consideration of what these analysts have had to say.

The Law & Economics Model: Coase, Ellickson, and Cattle in the Corn

Animal trespass disputes were, and still are, generally settled "out of court," according to customary norms (what I call "low" legal culture here), rather than by the formal letter of the law. Legislatures, municipal councils, and courts (creators of "high" legal culture) have decided what "the law" with regard to animal trespasses is, but the ways that people have resolved disputes over such trespasses have often not corresponded to the letter of that law. Courts can and will enforce animal trespass statutes and ordinances when matters are brought before them, but, as Ronald Coase has argued in his famous essay "The Problem of Social Costs" (1960), those who suffer a loss of property due to a breach in a fence shared with a neighbor need not, indeed generally do not, turn to the courts for relief. Instead, Coase tells us, the two parties will bargain to terms reflecting the relative value each places on the property at stake in the dispute. The Coase theorem assumes that ranchers and graziers will negotiate with farmers as rational profit maximizers, factoring the relevant legal rule extant on their lands into the bargaining like any other cost of doing business, and the one will buy out the other's legal entitlement at a figure that allows both to benefit financially. "If it is

inevitable that some cattle will stray," he writes, "an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops." The rancher "will pay the market price for any crop damaged" (Coase 1960:4; cf. Landes & Posner 1987:110–11 for their economic analysis of fencing law).

Robert Ellickson (1991) has put Coase's theorem to the test by observing actual rancher-nonrancher behavior regarding animal trespasses in modern Shasta County, California. Most of Shasta County is subject to an open or "range" law, allowing ranchers to graze their cattle freely and requiring farmers and others who do not want damage to their crops, shrubs, or gardens to fence cattle out. But two significant portions of it, constituting about 60 square miles, have been zoned "closed," subject to "herd" law, which requires ranchers to fence their animals in to avoid liability. Hence this county served as an ideal test for Coase's prediction that ranchers and farmers would take the applicable rule of law into account and bargain as rational actors.

Ellickson found rancher-other bargaining of sorts but in forms that did not correspond to Coase's model. First, ranch and ranchette owners (there were few farmers) simply split the costs of most animal trespasses and of any fencing constructed in the open, "range law" areas. Second, where ranchers fenced their cattle out of ranchette owners' shrubs and gardens in land zoned closed, the rancher paid all the cost. Third, the costs of repairing the boundary fences were never billed, even though the two parties rarely made the repairs together; they simply did what they felt ought to be done and assumed a reciprocal act would in time be forthcoming. Finally, ranchers whose property was located in the open areas nevertheless acted quickly to remove their cattle from the property of a ranchette owner who had called them and often provided labor and equipment to replant or otherwise undo the damage. Thus one of Ellickson's findings was that the parties almost invariable behaved the same in both open and closed areas, as if the rule privileging one or the other party did not exist. Indeed, in one instance, after a heated political effort had resulted in the closing of a large tract of range to free-roaming cattle, the ranchette owners behaved as they had before they had gained this legal entitlement. This he attributes in part to their overestimation of the transaction costs of litigation. But he also points to a second finding, a kind of cultural norm: being a "good neighbor." "Being good neighbors" was very important, one resident told him, and that meant cooperating, accommodating, and, above all, "no lawsuits" (Ellickson 1991:60, 72–77).

Ellickson explains this cooperative behavior with a rational-actor model he calls "welfare-maximizing." Thus he relies on Law & Economics methodology and assumptions while displaying great sensitivity to actual on-the-ground facts of life. But in the

process, he dismisses anthropological and sociological models of human behavior and dispute resolution. His book has been widely acclaimed by Law & Economics scholars as well as some of their counterparts in Law & Society, but some legal anthropologists and legal sociologists have criticized elements of his research methodology and dispute resolution model (see Yngvesson 1993; Cooney 1993; Kornhauser 1992).

While some neighbors follow Coase's bargaining model and others behave as did Ellickson's Shasta County folk, that may still not exhaust the universe of experience or of models of that experience. Ellickson's neighbors were, first and foremost, modern Euro-Americans, and we will have to see how animal trespass and fencing matters were dealt with when and where the parties were not of similar cultural background. Moreover, his subjects were ranch and ranchette owners, not ranchers and farmers, and it is entirely possible that farmers using land for income crops might deal with animal trespasses in a manner more consistent with Coase's theorem. Ellickson wondered about this, and at one point he sought aid from the historical record. But he reports that his "search for evidence of animal trespass norms in the nineteenth century proved to be unavailing." Evidence about the norms that prevailed in the past "is inherently difficult to obtain." Nevertheless, for those inclined to try, he suggests that "old diaries, letters and newspaper stories may contain aspirational statements, descriptions of practices, and accounts of self-help enforcement" (Ellickson 1991:187, 188 n.). He is right.

I cannot report that I took this suggestion and ran with it. In fact, I came across Ellickson's advice to historians quite recently. But in the course of a separate study of "high" and "low" legal cultures in the lands of the British diaspora, 1630–1910, I had coincidentally collected a considerable body of evidence relevant, I think, to the analyses of Coase and Ellickson. So I decided to try to put these analyses to a kind of test in the historical laboratory.

I first summarize the "formal" law of legislatures, councils, and courts with regard to animal trespass and fencing in the lands of the British diaspora. Then I describe the informal norms people actually used in these matters, distinguishing between settler-settler disputes, on the one hand, and native-settler disputes, on the other.

"The Law": "High" Legal Culture

Fencing laws varied from region to region over the course of time. Early (pre-Norman) English law favored animal husbandry over mere cultivators and put the burden of fencing animals out on the cultivator ("range" law). By 1600, however, the developed English agricultural world had shifted the legal burden of fenc-

ing cattle out onto the owner of the animals ("herd" law); New Englanders and most other colonists, favoring animal husbandry in the first stages of settlement, returned the burden of fencing cattle out onto the cultivator.[2] The destructive pig was treated differently. Pigs were allowed to fodder on the waste and commons ("the woods" in America; the "bush" in the Antipodes) but were to be yoked or ringed, and as early as 1633 a Massachusetts ordinance stipulated that "it shalbe lawfull for any man to kill any swine that comes into his corne."[3]

Photo 1. On the frontiers in North America and the Antipodes, settlers of the British diaspora grazed their animals on partly cleared but unfenced land, as shown in this photograph of such a range in Muskoga, Ontario about 1910. (Archives of Ontario)

The same fencing was not required of indigenous herdsmen. The Plymouth and Massachusetts governments and the Virginia House of Burgesses, for example, required settlers either to keep their hogs and cattle away from the unfenced crops of the natives or to help natives who were without tools and skills "in feling of Trees, . . . sharpning railes, and holing of posts" for fencing. In exchange, natives so protected would maintain the fence and

[2] The issue and its solution were the same in the Mississippi French community of St. Genevieve. When Charles Valle's oxen trampled M. Peyroux's garden in 1792, that neighbor's note to Valle, complaining of the damages, presumed Valle's obligation to fence out the animals under the custom of the region (Banner 1996:57).

[3] Where statutory duties were ambiguous or parties preferred other arrangements, neighbors sometimes recorded agreements regarding fencing with the town clerk, as in 17th-century Hingham, Mass. The pig-trespass ordinance of 1633 was inspired by the killing of such animals by native American neighbors of Puritan farmers. See Allen 1981:76, 43, 49, 50, 56, 158, 221; Cronon 1983:135–37; Carroll 1973:63. See also Peters 1990; Kawashima 1994; *Cole v. Tucker* 1851; *Aylesworth v. Herrington* 1868; *Cameron v. Reed* 1871; *Wellis v. Beal* 1872.

surrender the right to sue for damages to their corn unless they could establish that the animal trespass had come through no fault of theirs. Some laws held the towns in which such animal owners resided to be responsible for securing compensation.[4] The seasonally mobile Algonquins had little experience with such tame herbivores; hence this rule *seemed* a sensible way to keep peace.

In some regions of North America by the 19th century the rule was that animals should be fenced in, and there natives who had acquired herds of their own, used to letting those animals forage on the vast "commons" that surrounded their campsites, were called to task, as in British Columbia, where Nicola tribesmen suffered "heavy fines" in 1871 when their cattle pillaged a British settler's grainfield, and in Oklahoma in the early 20th century, where Creek animals trespassing on the fields of nonnative farmers were subjected to impoundment (Potter 1993:196; Harring 1994:96–97; Fisher 1977:200).

In the early 19th century the Massachusetts Supreme Judicial Court had rediscovered English common law rules that weakened the ordinances favoring herdsmen. But while Massachusetts was closing the range, the South's antebellum courts continued to uphold as constitutional those ordinances and statutes requiring landowners to fence animals out. The southern range was not closed to the herdsman's wandering cattle until legislatures, voters, and county officials changed the rules in the late 19th century (Hahn 1982, 1983; Kantor & Kousser 1983a, 1983b; Brown 1990:3; *Cantrell v. Adderholt* 1858; Brown 1989.

Courts in Ontario, Quebec, New South Wales, and New Zealand heard a number of cases involving fencing, animal trespasses, and the misuse of turbary, or *vaine pâture,* as the right to graze animals on the unfenced fallow of others after harvest and before planting was known in Quebec.[5] In New South Wales, before the creation of "Responsible" government, the governors

[4] See, e.g., Anderson 1994:608, 611. Thus in 1662 the Virginians ordered the Rappahannocks and their white neighbors to maintain one hog keeper on each side to reduce that source of friction (Morgan 1989:28).

[5] *Firth v. Martin* 1858:2 (damages for cow trespassing); *Challoner & Another* v. *McPhail & Another* 1877 (trespass by sheep during drought the cause of the death of 2,000 sheep); *Mackay Bros. v. Wellington–M. Ry.* 1887 (stock lost, statute imposed obligation on railway to fence but a mutual obligation to maintain fence; plaintiffs negligent in failing to help maintain fence); *Malone v. Faulkner* 1853 (defendant obstructed new drain; fence-viewers called in by plaintiff; jury awards 6*p.* to plaintiff); Dechêne 1992:176n177 (pigs); *Les Curé et Marguilliers de l'OEuvre et Fabrique de l' Isle Perrot v. Ricard* 1864 (no prescriptive right created by fence on neighbor's land for some 40 years with his acquiescence); *Ricard v. La Fabrique de la paroisse St. Jeanne* 1868 (reversing *Les Curé v. Ricard;* prescriptive right created by such a fence; "*Ricard II*"); *Martin v. Jones* 1869, Martin, J. (Court of Review, Montreal: relying on plaintiff's having "acquised in, and even highly approved of" the defendant's construction of a boundary fence and his promise "to pay half the price of building it . . . operated as a kind of *fin de non recevoir* against the plaintiff"); *Pattenaude v. Charron* 1870 (same, citing *Ricard II*); *Whitman v. Corp. of Town of Stanbridge* 1881, Cross, J., at 147 (Queen's Bench, Montreal: The Civil Code required proprietors "to make, in equal portions or at common expense, between their respective lands, a fence . . . according to

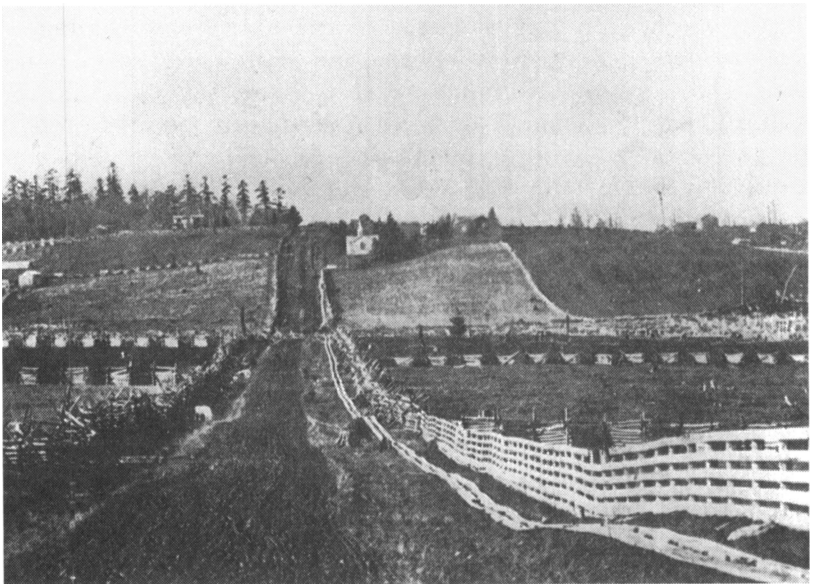

Photo 2. Because many settlers grazed their cattle on unfenced land, frontier farmers often had to fence their crops in, until the fencing in of cattle was mandated by provincial assembly or county council. Much labor and lumber was spent on erecting and maintaining such fences, as shown in this photograph of "worm" fences in Bond Head, Beeton Road, in Simcoe County, Ontario. (Archives of Ontario)

of this penal colony often created ordinances by proclamation, but when Governor Lachlan Macquarie decided in 1817 that farmers were to fence cattle out of their crops, the colony's Supreme Court Justice Barron Field objected to this very un-English decree and secured its recission (Bennett 1971:103). Similarly, during the British settlement of New Zealand, in 1842, the colony's Legislative Council created a Cattle Trespass Ordinance requiring the fencing in of crops. The Crown's appointed "Protector" of the rights and interests of the native Maori, the Rev. George Clarke, reported to the Council that the Maoris rarely fenced their land and that consequently the cattle of British settlers were doing considerable damage to their crops, while trespassing Maori hogs were being killed at will by these same settlers. As this struck both Clarke and the Council as unfair and impolitic, the Council amended the ordinance to the Maoris' advantage, as their predecessors had in Massachusetts (Adams 1977:222).

Unringed and uncollared pigs were the subject of many lawsuits in 17th- and 18th-century Montreal. One ordinance in that city, as in its southern New England counterparts, allowed one who found a pig on her field at an unsanctioned time of year to

the custom . . . of the locality," but the fencing of a municipality's front road was entirely at the expense of the private landowner, a "most economical" practice).

kill the animal. Several *habitants* having taken full advantage of that recourse, their swine-owning neighbors angrily objected, and in 1687 a new ordinance forbade them from "killing more than one pig at a time." Later, the government sought to reduce the problem by encouraging the fencing of fields. Any *habitant* could "ask that a fence and a ditch be built at his and his neighbor's expense," Louise Dechêne (1992:177) tells us. If the latter refused, "he was forced to repay his share." But this process "advanced extremely slowly," and the local court continued to honor the *vaine pâture* communal grazing right long after it had been abolished by decree in 1725.

The "Low" Legal Culture in North America and the Antipodes

Evidence of "Rational" Behavior

We begin in Upper Canada/Ontario. By the 1830s and 1840s many, if not most, of Ontario's settlers appear to have been "rational welfare-maximizers" when it came to animal trespasses. John Malloch, an attorney/farmer from the Bathurst area in the early 1840s, was immediately prepared to control his newly acquired oxen when "Cpt. McMillan sent his man down with the oxen tonight, saying they were breechy—Had broken into his oats." So was Walter Hope of Sydenham, whose cow had "begun to go with Malcolm's Cattle" in May of 1848.[6] John Galbraith, a farmer in Blenheim, often recorded "much provoking abuse" that he had received in the 1830s from neighbors; one "cut a fine sugar tree" on his property; another "twice took horse & sleigh without my consent or privilege." A third was asked to keep his horses "out of my orchard"; a fourth was asked "to take [his] Calves out of the Orchard after they had done considerable injury," something that the neighbor did quite reluctantly ("Got Mackenzie against the grain"). Galbraith made no further mention of any of these disagreeable moments, and my comparison of this fact with the evidence available in the many other farm diaries from this region in these years tells me that Galbraith, like the majority of his fellow Ontario settlers, was of a conciliatory disposition, predisposed to organize and participate in barn-raisings, threshing bees, and the like. He may have expressed annoyance from time to time to his diary, but that was where he felt such annoyance belonged, in a private, personal corner of his life and world.[7]

[6] Malloch kept them "in the yard all night" and "mended" his fences. Judge John Malloch Journal, June 14 & 15, 1841, MS. Diaries, MI 842, Archives of Ontario; Walter Hope Diary, entries for June 17 & June 19, 1848, MS. 338, Archives of Ontario.

[7] John Galbraith Diary, entries for Dec. 26, 1834, Aug. 19, 1836, Sept. 3, 1836, Dec. 17, 1836, MS. 450, Archives of Ontario.

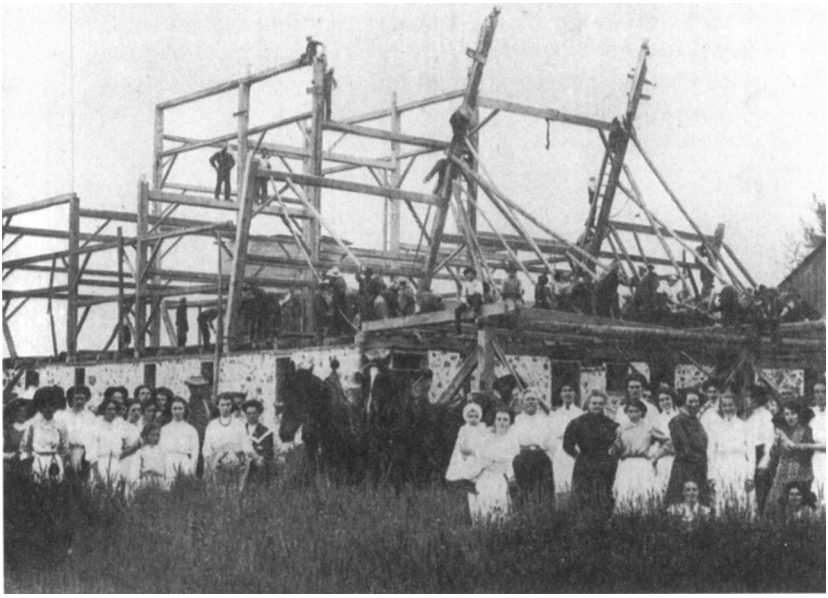

Photo 3. Neighbors and fellow parishioners in mature British diaspora settlements engaged in such cooperative activities as the barn raising in Kincardine, Ontario, and were often capable of similar neighborliness in cases of animal trespass. (Archives of Ontario)

Galbraith may well have been the great-grandfather of economist John Kenneth Galbraith, who wrote of farm society in his ancestral homeland of western Ontario: "Men stuck to their bargains and negotiated their disputes. . . . A man would have been excluded [from society] if he had shown himself to be unneighborly. . . . The Common law on these matters was clear and well enforced. A man was obliged to put his neighbor's need ahead of his own and everyone did. . . . No one ever declined. . . . The social penalty would have been too severe" (Galbraith 1964:47–48).

Conciliatory acts also appear to have been seen as less expensive, more neighborly, and more likely to produce reciprocal behavior in Australia[8] and New Zealand. They may have been more common in the latter. Yvonne du Fresne (1989:140) of the North Island of New Zealand recalled one such moment in her autobiography. A neighbor, one Major Gore, trotted up to her Danish Grandmother Westergard's home and announced, with his polite but formally firm English manner:

See also Wynne 1992:294–97 for a good account of the cooperative behavior of farmer John Murray and his neighbors near Pictou, Nova Scotia. And see Vickers 1994:60–61, 237–40, 299, on cooperative labor exchanges between farm families.

[8] See Clark 1978:166 (on some farmers and pastoralists sharing seed, machinery, workers, and ideas in mid-century); Taylor 1988:75 (on station run neighbors fighting fires on one another's land for two or three days running in the 1840s).

> Just thought I'd let you know that one of your heifers wandered down the road. Ha ha! Been in my maize patch all morning. Ha ha! One of my chaps is bringing it back now.

Her grandmother responded:

> "Thank you. Your fences are a disgrace; therefore my poor old heifer goes into your maize patch." But not in English she spoke. Nej. She spoke in . . . the Danish of a frost-droning. We were saved by dear [father]. He strolled up. . . . "Good heavens," he said. "That stupid old heifer again? I will come down in a tick and see to your fence."

The diaries of Oraru Gorge sheep-station owner Charles Tripp in the 1860s, 1870s, and 1880s are evidence of a somewhat less generous behavior when it came to fencing disputes than that of Yvonne du Fresne's father, but Tripp's was no less successful, and his may well have been the way that most owners of New Zealand sheep runs managed to persuade recalcitrant neighbors to share the costs of fencing and the like. In 1867 Tripp was having difficulty in arranging with a fellow rancher and neighbor, a Captain Jollie of Peel Forest, to fence their boundary. On December 19 (early summer Down Under) Tripp wrote Jollie rather sharply: "I now make this formal application to you to join me in fencing the boundary where sheep are likely to cross." All told, Tripp would have to erect some 60 miles of fencing to bound his 7,000 acres. Jollie's boundary was the most extensive of those he bordered, and Tripp was clearly apprehensive. But Jollie had similar prospects, and on Christmas Day Tripp received Jollie's agreement to cooperate. Tripp immediately responded, on December 26, with relief, and a friendlier tone: "I think I can make the [fencing] trip pleasant & agreeable for you. . . ."

Several years later the problem was rabbits, not the fences that many of these prolific nibblers of green pastures bounded over or through. New Zealand's sheep graziers were devoting substantial resources to rabbit killing. Each run dispatched its own rabbit-killing parties; but cooperation was important here as well. Another of Tripp's neighbors, J. M. Barker, had put in the field some men with dogs but without mules. One or more of these fellows had come upon one of Tripp's boundary huts, built for shepherds and rabbit killers to take refuge. A mule was tethered to the hut, left by someone on a chore in the bush, and one of Barker's people decided the hut was on Barker's land and proceeded to kill the mule and burn the hut. Tripp's reaction to this, while cool (indeed, sarcastic), was conciliatory. "You will oblige me by saying where your rabbit-killers *are* living," he asked. If, as reported, they were sleeping several miles from the infested area, the dogs would have too great a distance to travel to be of much use. Wouldn't Barker's man like the use of Tripp's boundary huts and mules, for greater mobility? "All I ask is, if you *will*

Photo 4. In Australia and New Zealand, fencing was needed to keep rabbits out of the pastures. The above photograph shows a rabbit-proof fence in Western Australia. (Rabbit Proof Fence no. 1, Western Australia, 1926. The long road looking south. Photograph by Mr. F.H. Broomhall in the Pictorial Collection, National Library of Australia)

kill another mule or burn the hut again, to share with me the cost of replacing it, as mules & huts cost money."[9]

[9] Charles G. Tripp of Oraru Gorge, Canterbury, Letters, Dec. 19, 1867, Dec. 26, 1867, Feb. 1874, June 18, 1881, MSS. Div., Turnbull Library, Wellington (originals in Canterbury Museum archives, New Zealand, but originals for 1867 missing). But see Miles Fairburn's (1989:170 ff.) persuasive argument that few New Zealanders before the 1890s behaved in reciprocal ways with neighbors with regard to fencing, harvesting, or other activities.

Tripp's experience was echoed in the diaries for 1898 and 1899 of Duncan McRae, Jr., of Wyndham Station, South Island:

> Mar. 17, 1898—Sent a letter to Murray demanding £3.15.0 for clearing boundary line & damages for trespassing . . .
>
> Sept. 12, 1898—Went & mended Beange's Fence up at the young grass. . . .
>
> Oct. 18, 1898—Gave Colin McPhail a hand with the garden fence.

Entries for November 14 and December 1 report the damage done by the McRae horse and buggy to neighbor James Foster's gate and the arrival of Mr. Foster at the McRae house "to settle with uncle." Duncan McRae Diaries, MSS. #1391, Alex. Turnbull Library, Wellington.

And, of course, Tripp's experience was also echoed in the diaries of Ontario farmers. For example, from Thomas Thompson Diary, Tullamore, MSS. Diaries Collection, MU 871, Archives of Ontario:

> May 1, 1885—Fixing Fence in Bush Between Sargent and us. . . .
>
> May 19—Fixing fence Between Bob Sargent and us. . . .
>
> April 27—Fixed Fence Between McCagherty and us. . . .
>
> Aug. 14—Put up wire Fence along orchard.

John Galbraith Diary, MU 450, Archives of Ontario:

> Sept. 12, 1836—Forenoon fencing the west orchard. . . .
>
> Sept. 13—fixing fences. . . .

Robert Ellickson would recognize many of these settler-settler "bargains" as "welfare-maximizing" ones, and I would agree with such a characterization. Indeed, his "neighborly" norm may also have been a standard for many in the United States. In "Mending Wall" Robert Frost has his New Hampshire neighbor tell him, as they rebuild their border-wall each spring, "Good fences make good neighbors." Frost found this aphorism to be inane, given that "my apple trees will never get across/And eat the cones under his pines," but it was a maxim that had made much common sense when animal husbandry had been prevelant in New England. Nevertheless, I detected considerable evidence, for each of the lands settled by the British diaspora, that "irrational" behavior was *not* uncommon.

Evidence of "Irrational" Behavior

The problem with the Coase/Ellickson models is that few of the early colonists (outside of first-generation colonists in New England and Pennsylvania) were neighborly most of the time, and some were not very rational or neighborly *any* of the time, as John Demos (1982) and David Konig (1979) have demonstrated for late 17th-century New England and as Sean Cadigan (1995) and Tina Loo (1994) have for 19th-century Newfoundland and Vancouver Island.[10] Consider the case of John Conklin's slander suit in 17th-century New Haven against one who had called him "a neighboure not fitt for an Indian to live by" in front of "the greater part" of the local militia company because he had killed one of his neighbor's hogs (Dayton 1995:296). Or consider the account offered by Sarah Holton of Salem Village in 1692 regarding the behavior of Rebecca Nurse in or about 1689:

> Rebecca Nurse came to our house & fell a railing at [my husband] because our pigs got into her field, tho our pigs were sufficiently yoaked & their fence was down in several places, yet all we could say to hir could no ways passife her, but she continued Railing & scolding a grat while together calling to hir son Benj. Nurs to go & git a gun & kill our piggs & let non of them goe out of the field.

Inasmuch as the Holtons and Nurses were either unable or unwilling to litigate this dispute, it simmered. Sarah Holton believed that Rebecca Nurse had called upon the Devil to punish

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Sept. 22—mending fences [due to trespasses by horses and calves of Thomas Mackenzie]

Walter Hope of Sydenham Diary, MU 338, Archives of Ontario:

May 8, 1848—Split a few rails and began a fence between McCallem & me. . . .

June 17—cow arrived. . . .

June 19—the cow has begun to go with Malcolm's cattle.

[10] And see Kawashima 1994:63 for an earlier example and Prucha 1962:158 for a later example.

her husband, Benjamin, and when he became blind and then died, she accused Goody Nurse of witchcraft. What may have happened was that Rebecca Nurse had, indeed, prayed that Benjamin Holton be punished; but she probably prayed to God, not the Devil. Be that as it may; whichever supernatural power she turned to, it was not a temporal, judicial one.

Neither was Sarah Cole's. She "thretened" John Browne "for medling" after he had served as an arbitrator to "adjust sum Damages Don by said Sarah Coles hogs . . . to Abraham Welman['s crops]," saying to Browne "he had better not to have done" the awarding of damages. Later, when he asked Sarah Cole to make "an Indian puding," she produced one that "was red like a blud puding w'ch he believes was done by Sarah Cole" to punish him. Similarly, Edward Hooper reported that he went with John Neal to the home of Dorcas Hoar "when the s'd. neal brought a [hen] of the s'd whors which he had kiled doing damagee in his master witedg's Corn," whereupon "the s'd whore [*sic*] did say then to the s'd John Neall that he should be never the beter for it before the weak was out." Another complainant, John Louder, deposed to the same Court of Oyer and Terminer investigating the charges of witchcraft in Salem Village in 1692, that he had "had some Controversy with Bridgett B[i]shop . . . aboute her fowles that used to Come into our orchard or garden." "Some little tyme after" this meeting, Louder awoke "aboute the dead of the night" oppressed by a "Beast" that looked like Bridget Bishop and "choaked" him (Boyer & Nissenbaum 1977:vol. 1:99, 231; vol.2:399–400, 430).[11] As late as 1692, fencing and animal trespass disputes could lead in the American colonies to accusations of witchcraft if they were not successfully arbitrated or adjudicated.

By the 18th and 19th centuries, animal trespasses no longer led to charges of witchcraft, but some resulted in the same peremptory killing of the animal, be it a transient longhorn that might carry splenic fever, a horse, a mule, a ram, or, more commonly, a pig. Neither statutory threats of triple damages nor more open-ended punitive damages served to curb these acts completely. Once hogs had rooted under one's garden enclosure, they were hard to dissuade in the future, and a breakdown in what one jurist called "the offices of good neighborhood" could result in "bad feelings" between neighbors. Horses or cattle straying into a neighbor's pasture in the event of a downed fence led to trouble when the aggrieved farmer took "self-help," maiming the animal or cutting the mane of a trespassing horse as a warning to its owner of more serious measures that might be taken the next time. We can find evidence of what might happen "the next time" in many crannies of the historical record, as in

[11] See also *Bliss v. Dorchester* 1653; Smith 1961:230.

Tidewater Virginia when Edward Pridham shot a horse belonging to "Parson Giberne" in September 1772. The animal had encroached on Pridham's cornfield after a storm caused a breach of the Giberne-Pridham fence (Greene 1965:vol. 2:732). (The parson sued.)

When the fence was a "bad" one, inadequate to the task, it "often" became "the means of the most unhappy disputes and downright quarrels amongst neighbors, from which have flowed assaults, batteries, lawsuits, and ill-will for life, and after—for the quarrel has often been entailed with the property to the son—amongst those who would otherwise have lived . . . friendly . . . all their days," as the *Farmer's Cabinet & American Herd Book* put it in 1841.[12] Lawsuits for recovery of losses to crops generally "had little chance before a jury," or so one 19th-century observer maintained. Only about one in 20 suits ever resulted in any recoverable damages. According to the *Farmer's Review* (1882), "only in rare cases" did the owners of trespassing animals "ever offer to make good the loss occasioned by them" (cited in Hayter 1963:12).

This may have been the jaundiced view of an advocate for cultivators, but it sounds plausible: Trespassor-defendants would have known that they might convince a jury that the plaintiff's own fence was in disrepair, and that the plaintiff's court costs might well exceed his recoverable damages. In any event, as late as 1903 a state representative told his colleagues in the Alabama legislature that "shotguns were playing an important part" in the resolution of animal trespass controversies in his district (Brown 1990:18; see also Hahn 1982 and Kantor & Kousser 1983a). And, of course, it is well known that in the American West both county adoptions of herd laws and seasonal cattle drives sometimes resulted in the cutting of fences despite statutes prohibiting this behavior and court decisions enforcing those statutes. Cattlemen, sheep graziers, and "homesteaders" there had different notions of land use, and these were often profound enough to lead to violence rather than accommodation.[13]

Similarly, many neighbors in both the Canadian and Atlantic Maritime provinces and the Antipodes appear to have squandered their scarce resources and poisoned their relationships over the occasion of animal trespasses. Thus when James Coun-

[12] *Farmer's Cabinet & American Herd Book,* vol. 6 (Phila. 1841), 59, noted in Hayter 1963.

[13] See Kawashima 1994; *Cole v. Tucker* 1851; *Champion v. Vincent* 1859:817; *Fugate v. Smith* 1894; Sitton 1995; McMath 1985:216; Dykstra 1968:301–2.

Rural fencing disputes over animals were the most important ones in 19th-century America, but "spite" fences, built by urbanites to harass their neighbors, are also worthy of note. The most famous of these may have been the one, 30 feet high, erected by San Francisco railroad plutocrat Charles Crocker around three sides of a neighbor's property to induce him to sell out. Deverell 1994:44.

For evidence of fencing and boundary disputes in working-class neighborhoods in Massachusetts in the 1980s, see Merry 1990:42–46.

sell's pig got into Catherine Callahan's garden at Conception Bay, Newfoundland, in 1836, she yoked and retained it, and threatened Counsell's wife, Mary, with a beating if she tried to reclaim the animal. Later, in Harbour Grace, Thomas Pine killed the trespassing goat of George and Sophie Heater when the animal plundered his garden. Two brothers began slugging it out in the same year at Broad Cove when one's horse was discovered in the other's potato garden. Their wives joined in; one knocked the other down with a spade. A third brother exercised remarkable restraint; watching all of this impassively, he called to his wife to assist her downed sister-in-law "while he returned to digging his potatoes."[14]

On Vancouver Island a political confrontation of sorts began with another case of trespassing pigs. Robert Staines, the Hudson Bay Company's chaplain for that island, sent his bailiff to the estate of William Tolmie, the Company's local surgeon, when he discovered that Tolmie's bailiff was holding a number of his pigs. Staines's bailiff returned with two, but claimed that several others were being wrongfully detained. Later in the week Staines descended on the Tolmie property himself, armed with a warrant and several employees, in a "wrathy" mood. He left with five more hogs. Tolmie then sued Staines, complaining that the warrant Staines had obtained from magistrate Thomas Shriner lacked the "forms prescribed by the Law" in that there had been no hearing before its issuance. The Island's recently appointed chief justice, David Cameron, agreed, and Chaplain Staines was as a consequence briefly detained by order of the court. Upon his release the outraged chaplain initiated countercharges of theft against Tolmie and his bailiff and organized a petition objecting to Justice Cameron's action. This prompted others to rise to Cameron's defense. The story, complicated and embellished by the political positions of the litigants and their supporters regarding the monopolistic Company, is well told by Tina Loo (1994:45–47). I retell to it here as another example of the many ways that stray porkers could lead to trouble between neighbors.

Animal trespasses raised hackles in early Ontario as well. John Thomson of Burford complained to the local magistrate in 1839 that Allan Muir and William Cruden had "removed a fence so that a young orchard on my Farm was exposed to the depredations of Crudens cattle." Thomson had purchased his farm from Cruden, but Cruden persisted in the use of its barn and meadow for his animals, destroying Thomson's gates and locks in the process, and the local magistrate was unable to stop this behavior.

[14] Eight years later, at Marshall's Folly, Rebecca and Ann Slade were cited for poking each other over "a fowl laying an egg in the garden" (Cadigan 1995:76, 78; *McGill v. Morley* 1850). The defendant learned little from this, for she appealed, winning a new trial on a pleading error of the plaintiff that could only have resulted in an even greater award for the plaintiff on retrial. See also *Curtiss v. Townsend* (1857), a case with similar facts.

The rule of law and the arbitration process were only so strong in early rural Ontario as its inhabitants allowed, or so Susan Lewthwaite (1994:353, 359) has argued. My reading of the diaries of early 19th-century Ontario farmers confirms this view. Example: When William Oliver of Drummond, in Eastern Ontario, quarreled in July of 1842 with "one Toomy" on Toomy's farm "about some cattle," the results were tragic. As John Malloch, a neighboring farmer, noted in his diary: "Toomy took a gun from the house & told Oliver to keep off or he would shoot—Oliver advanced . . . the other shot him [;] died on the spot."[15]

One who chose to take the sort of preemptive action John Neal had taken in Salem Village, action sanctioned by ordinance in Montreal until 1687 and in Sydney briefly in the 1790s, might find himself in court with all the attendant costs. Bruce Kercher, J. F. Nagle, and Paula Byrne have offered numerous examples in the early history of New South Wales of trespassing goats and pigs rooting in a neighbor's garden that led those displaying negativism to experience costly fights in court. Three will have to suffice here:

1. Gregory Blaxland's sow had repeatedly invaded John Bennett's crops in Sydney throughout 1806 and 1807 until Bennett shot the animal. Blaxland sought damages. Bennett explained to the court that he had had no other recourse, inasmuch as the cost of suing for the damages in any single incident had not been "worth the trouble" and that he had warned Blaxland that he would take "self-help" were the sow to trespass again. The Court of Civil Jurisdiction awarded Blaxland the value of the sow, but then creatively deducted from it the damages done over the course of time to Bennett's crops (Kercher 1996:108–10).[16]

2. In 1790 Surgeon John White's goat invaded the vegetable garden of convict-carpenter John Fuller in Sydney; unable to obtain satisfaction from either White or other "Gentlemen whose Goats had strayed and broken into" his garden, Fuller sued for damages. Magistrates David Collins and Augustus Alt turned him away, his "Hedge being proved not sufficient to keep any Animals such as Hogs or goats out," a central condition of the law. Thus Fuller lost; but the magistrates went on to appeal to White and the other unnamed "Gentlemen" to provide Fuller with "some Satisfaction equal to the Loss he has sustained by their Goats, either in a daily Allowance of Vegetables, or by new stocking his Garden, or assisting him in new fencing it." After all, they argued, convict-carpenter Fuller was "very much employed for the

[15] Judge John Malloch Journal, entry for July 19, 1842, MSS. Diaries Collection, MU 842, Archives of Ontario.

[16] The Blaxland-Bennett decision was hailed by the Sydney *Gazette* as "highly consequential" to the future of such animal trespass disputes, and has been legitimately styled by Kercher (1996:108) as "a characteristically creative" decision of this somewhat innovative early New South Wales judiciary. Kercher 1995:46, 127; 1996:108–10.

Publick" and thus had "not much Time to work for himself." He had "therefore . . . made the best Fence in his Power" and ought to be accommodated by his more powerful free neighbors (Nagle 1996:164–65).

3. In 1824 William Hovell's cattle invaded the wheat field of a "ticket-of-leave" convict, Robert Brierson. Only two years before, Hovell had expressed outrage to one of the Minto magistrates, a man named Howe, whose "cattle destroyed my wheat." Consequently in 1824 he offered Brierson the equivalent of the fine he would have to pay the magistrates for his cattle's trespass, a "welfare-maximizing" measure. "I am no poundkeeper!" Brierson replied and caused Hovell to be brought before the magistrates (Byrne 1993:222–24). (He might have added "I am no brother's keeper.")

On the vast tracts of grazing land in southeastern Australia, the need for fencing only arose "when my flocks met those of my neighbors in the bush." Even then there was "time enough to move on the matter" in the first few decades of pastoral expansion. But by 1840 there were some 673 such runs in New South Wales with 350,000 cattle and 1.25 million sheep. Furthermore, these "squatter"-station owners soon learned (during the region's Gold Rush) that with a wire fence there was no further need of costly outstations, each with two shepherds and a hutkeeper. So they fenced their runs and formed vigilante associations in an effort to deal with both the persistence of sheep and cattle rustling and the lack of sympathy displayed by settler and emancipist-dominated juries (Taylor 1988:32, 34, 35; Roberts 1935:26, 53–55, 78). Throughout the 19th century in Australia and New Zealand, as in North America, squatter-pastoralists and farmer-selectors fought over trespassing herbivores until fences criss-crossed the land (a comparativist's celluloid dream that would have starred John Wayne and Paul Hogan).

In New Zealand there were more than a few moments in which settlers proved to be unable to accept "the law" with regard to such trespasses. W. M. Smith wrote in the *New Zealand Gazette & Wellington Spectator* in January 1843 of "experiencing the grossest outrage which has yet been committed in the name of the law." What was this? "The chickens of a Mrs. Wakefield repeatedly injured plants" in Smith's garden. "Finding complaint of no avail," he "shot some of them." But this "led her to apply to her solicitor." Smith had to turn to one himself, and the upshot was that the resident magistrate found for Mrs. Wakefield and ordered Smith to pay £2 10*s.*[17]

[17] *New Zealand Gazette & Wellington Spectator,* No. 214, Jan. 25, 1843, p. 3. Similarly, Dunedin businessman William Cullen was summoned to court in 1858 for letting his dairy cows "vegetate feed and fatten" on his neighbor's "rich cabbage gardens," to his regret (Hill 1986:542).

Such behavior was not only expensive, it was divisive. For some 40 years in late 19th-century New Zealand, two South Island families, the Shands and the Deans, treated each other with sullenness and incivility. According to a Mrs. Foster, a descendant of one of these families, the cause of this feud was not unlike that which had separated Mr. Smith of Wellington from several pounds and his dignity: "The Deans' pig had crossed over from their farm and the gardener had reported that he was eating the vegetables." The gardener was told "to get a gun and shoot." This he did "promptly" and "too successfully." Time and the lapse of memories eventually healed the wound. Three generations later, when members of the Shand and Dean families greeted one another, according to Mrs. Foster:

> [T]he remark is often heard: "Did you shoot the pig or did we?" amid laughter. In those days a pig must have been quite an item of capital stock. [As, indeed, it was.][18]

Another example of a less than productive dispute resolution technique was recorded in the early 1870s in Pukaki, South Island. Edward Dark of Glentanner Run became angered when rams from Henry Dawson's adjacent run breached the boundary fence and socialized with Dark's ewes. Dark's reaction was to challenge Dawson to a fistfight; the result was that Dawson darkened Dark's lights (Pinney 1971:95). All in all, Smith, Shand, Dean, and Dark had opted for actions that left them worse off than they had been when the conflict surfaced.

The Native-Settler Cultural Impasse over Animal Trespasses

In Colonial America

The rule requiring white settlers to fence animals away from native crops, as I have said, *seemed* a sensible way to keep the peace, but it was widely ignored by those at whom it was aimed. In the early days of British settlements, when the settler diaspora was made up primarily of minority communities, the unfenced field crops of aboriginals were provided with some protection from marauding animals owned by the interlopers. Thus in 1632 Sir Richard Saltonstall was ordered by Massachusetts Bay authorities to give "Saggamore John a hogshead of corne for the hurt his cattell did him in his corne." In 1656 the townfolk of Rehoboth, Plymouth colony, constructed an extensive fence along the town's border (Anderson 1994:608, 610). And further south, in 1725 Carolina's Indian Trade Commissioner, Colonel George

[18] Shand-Dean Papers, Alexander Turnbull Library, Wellington, N.Z. See Weber (1976:401 n.) for evidence as late as the 1890s of similar feuds (*faires des reproches*) in the Loire Valley over "the loss of a sow, or a boundary dispute."

Chicken, promulgated an "Order to all White men Traders and Men in the Cherokee Nation" to stop their horses from foraging on the unfenced crops of the Cherokee, he "having given the Indians a particular Charge to Shoot any Such Horses as may at any time hereafter be seen in their Cornfields."[19]

But when colonial authorities called for joint use of "unimproved" (and thus unfenced) land that had been acquired from native communities, they intended for the settlers' cattle, sheep, goats, and hogs forage on the same "waste" that the natives treated as their hunting grounds. And this soon led to trouble. Some natives feared the spiritual nature of cattle;[20] all feared their voracious appetites and destructive propensities. John Easton of Rhode Island noted in 1675 that "when the English [bought] land of them," the Wampanoags and Narragansetts expected "that they would have kept their catell upone ther owne land," and were increasingly alienated from their new neighbors due to the damage done by the ranging "English catell and horses" (Anderson 1994:621).

In Cherokee country, Commissioner George Chicken told natives with whom he conferred at the Ellijay Council in 1725 that "the English did not Suffer" persistent ravaging of their crops by a neighbor's horses, and if the horses belonging to Carolina traders continued to consume their crops, "they would take more care of them in the future" if the Cherokee "would Shoot some." And we have just seen that he was true to his word in warning all colonial British traders to this effect.[21] But at this point in their relations with the British, the Cherokee were disinclined to take such a self-help measure as to kill "any White Man's horse." John Phillip Reid (1976:185–86) argues that the Cherokee viewed such a drastic act as being unacceptable behavior, disruptive to the "harmonious relations" they sought in their lives and their towns. And this sounds right. Similarly, "praying" Indians in the town of Okommakamesit, some 30 miles from Boston, simply abandoned some 150 acres to English settlers: "It brings little or no profit to them, nor is it ever like to do[,] because the Englishmen's cattle, &c. devour all in it, because it lies open and unfenced." Virginia Anderson (1994:611) writes that these natives "clearly expected no redress." Thus, like the Cherokee, these Algonquins engaged in no real "bargaining" with British colonists; they simply accommodated them silently and unilaterally.

English settlers understood property rights to encompass the "improving" of land "by enclosing and peculiar manurance," in the words of Governor John Winthrop of the Massachusetts Bay

[19] George Chicken Journal, 12 Oct. 1725, cited in Reid 1976:191–92.

[20] See Kugel 1994 on Minnesota territory in 1871.

[21] George Chicken Journal, 12 Oct. 1725, cited in Reid 1976:191–92.

colony. Winthrop faulted the native inhabitants: "They inclose no ground; neither have they cattell to maintain it." This need for cattle to plow and fertilize settler fields, as well as to provide them with dairy products, meat, and hides, led settlers to seek new, inland towns as the meadows of the first communities became overcrowded. "No man now thought he could live except he had cattle and a great deal of ground to keep them," Plymouth's Governor William Bradford complained in 1632 (Morrison 1952:253).

New England natives were "not willing" to enclose their corn, as the missionary to them, John Eliot, put it in the 1640s, "because they have neither tooles, nor skill, nor heart to fence their grounds. . . . And if it be not well fenced, their Corne is so spoyled by the English Cattell . . . that its a very great discouragement to them" (O'Brien 1997:28). Nantucket Indians complained of English sheep in their cornfields (Anderson 1994:608). In Maryland, a native appealed to the General Assembly in the 1690s: "Your hogs & Cattle injure Us. We can fly no farther[;] let us know where to live & how to be secured for the future from the Hogs & Cattle" (Calloway 1995:4). And that was not all. In 1642 the Narragansett sachem Miantonomo complained that settlers' "hogs spoil our clam banks, and we shall be starved" (Mandell 1996:23).

From the settlers' perspective, the sharing of unenclosed land by foraging animals and hunting natives also proved to be less than satisfactory. Horses and cattle were injured in Indian deer traps (Anderson 1994:608) or "torn by their dogs" (Mandell 1996:34). From the Indians' perspective, hogs consumed the nuts, wild tubers, and clams that served to supplement native diets, and cattle depleted the forage that sustained deer populations and frightened the deer off (Mandell 1996:13).

Both cultural groups eventually acted to defend their own notion of what was fair and right. In 1636 Massachusetts Bay commissioners in Saco made the killing by angry Abenakis of "any swyne of the Inglishe" a capital offense. Abenakis were killing pigs; Shawomets, cattle, when complaints of the animals' destructive behavior went unheeded in 1688. Both sides then began to seize hostages, and in short order the "Eastern" front of King William's War had opened (Anderson 1994:612; Morrison 1984:113). Rhode Island and Nantucket natives seeking to graze their hogs and cattle on various town commons were turned away in the 1660s and thereafter. Virginia DeJohn Anderson has aptly observed that "no problem vexed relations between settlers and Indians more frequently in the years before King Philip's War [1675–76] than the control of livestock," and she points out that in the course of that brief war Indian forces ruthlessly killed some 8,000 head of English cattle (Anderson 1994:602, 622; Mandell 1996:74).

This cultural conflict over animals and crops was not limited in time and place to the seaboard colonial world, of course. I offer one example of its existence in 19th-century Illinois: In the early 1820s, Black Hawk, the war leader of the Sauks, recalled white settlers "beating me with sticks. . . . They accused me of killing their pigs." He told of "another time" when "one of our young men was beaten with clubs by two white men" over a breach in a fence. "His shoulder blade was broken, and his body badly bruised, from which he soon after died" (Cronon 1983; Morgan 1989:28; Jackson 1964:97, 102).

Maoris and Pakehas:[22] *The Cultural Impasse in New Zealand*

Perhaps nowhere in the British colonies were tensions over pigs and herbivores more pronounced than in New Zealand. The problem was that while Maoris generally found ways to resolve such disputes with fellow Maoris, and Pakehas with fellow Pakehas, the cultural barriers between the two peoples were such that few surmounted them.

Trespassing pigs were a constant source of trouble. Where Maoris were in the minority, as in the South Island, whalers and settlers shot native pigs with relative impunity, and Maoris had to appeal to British magistrates for redress; whereas where the Maoris predominated, throughout most of the North Island for the first 30 or so years of interaction and colonization, their *runanga*s functioned, and native police (*karere*) and assessors fined Pakeha runholders and farmers for killing native pigs. In 1835 the two North Island cultures engaged in what was styled "the battle of the pork"; Pakehas in that year seized crop-damaging native pigs at Hokianga. Within a decade Hone Heke and his men engaged in the first formal acts of resistance to the imposition of British sovereignty—the stealing and killing of Pakeha pigs in the Bay of Islands (Hill 1986:74, 152, 839, 882–83; Ward 1974:27, 50, 79, 80; Wards 1968:102).

At least as serious a problem was the resolving of disputes flowing from the importation of British cattle. On the issue of trespasses to crops by cattle, the two cultures were poles apart, one favoring "range" law, the other "herd" law. As magistrate John Gorst put it in 1842, "so long as Europeans and Maoris continue to farm on antagonistic principles—the one fencing their crops and letting their cattle run at large, the other tying up their cattle or driving them to other regions, and leaving their crops exposed—there will be disputes whenever the two races come in contact."

The early governors and their councils, you will recall, sought to accommodate this difference by requiring settlers to fence *Ma-*

[22] *Pakeha* is the Maori word for "foreigner" and is the accepted way to refer to a European settler in New Zealand when speaking to a Maori.

ori animals out of their crops *and* requiring settlers to pay damages to Maoris when unfenced *settler* cattle ruined unfenced Maori field crops.[23] But this meant that Pakehas settled adjacent to Maori land might have to pay the full cost of the fencing, a condition foreign to their customs and offensive to their pride. Some Maoris must have offered to contribute some of the costs or labor necessary for the construction of their Pakeha neighbor's fence, but the behavior commonly reported was otherwise. Minister for Lands C. W. Richmond described the "daily provocations" British colonists faced in 1860: "His cattle . . . stray from his paddock; he follows them to a neighboring *pa*, and is compelled to redeem them by an exhorbitant payment. . . . On the other hand should he try the experiment of driving Native cattle to the public pound for trespass on his cultivations, a strong party of Maoris, with loaded muskets, breaks down the pound and rescues them. He has to maintain party fences without contribution from his Maori neighbor." Moreover, "redress in the Courts of Law is not to be attained because it would be dangerous to the peace of the country to enforce the judgement," while "Natives freely avail themselves of their legal remedies against Europeans."[24] Similarly, Resident Magistrate Herbert Wardell claimed, regarding the entire East Coast region in 1856, that the Maoris "did not recognize the authority of [British] law, & yielded obedience or refused it as suited their purpose," while noting particularly that they "helped themselves" to his own cattle after their *runanga* decided that his distraint of some of their cattle had been improper (Wards 1968:290; Hill 1986:423, 426, 462, 828).

That was the Pakeha view. The first speech delivered by a Maori legislator before his colleagues in the General Assembly, that of Tareha Te Moananui of Hawkes' Bay in 1868, offered the opposite perspective: The Native Land Court, he explained, had impounded his cattle for trespasses, yet when he impounded Pakeha cattle on his land, he was "taken to court." When the unfenced cattle of Pakeha settlers at Kaiwharawhara destroyed crops belonging to Ngati Tamas in the 1840s, this band of Maoris, unable to obtain relief or redress, moved en masse away from the four-legged plunderers.

What happened when those pushed preferred to shove back? In 1852 a settler in Taranaki named Bayley tried to get his Maori neighbors to split the cost of his fencing. When they refused, he simply left his wheat unprotected. Bayley "wouldn't fence for na-

[23] Ward 1974:50; Hill 1986:226 (Governor Hobson ordering M. de Thierry to pay damages in Hokianga).

[24] Ward 1974:119–20. Richmond may simply have been alluding here to the Maoris' occasional use of the resident magistrates; or he may have been referring to their use of *runanga*s to fine Pakehas, to *utu* or even *muru* (retributive plundering), for Maoris did indeed depasture or impound pakeha cattle and sheep throughout the North Island. I noted evidence of this at Porirua in 1847, Poverty Bay in 1856, Taranaki in 1857, and Hawkes' Bay in 1861.

Photo 5 Alexander Turnbull Library, National Library of New Zealand, Te Puna Mātauranga o Aotearoa

Photo 6 Alexander Turnbull Library, National Library of New Zealand, Te Puna Mātaurango o Aotearoa

Photos 5 & 6. Aboriginal people often had different norms regarding the fencing in of crops and the fencing out of the British diaspora's unfamiliar animals. Photograph 5, an illustration taken from a story on "The Impact of Sanitary Advice," in the *Illustrated New Zealand News* (1883), depicts a "modern" Maori community, complete with fenced yards that kept pigs out. The reality was closer to what is shown in photograph 6, a view of a Maori settlement in Urewera, with unfenced yard and free-roaming pigs.

tives," as he later explained. When the crop was ravaged by native cattle, he took "self-help" by injuring some of the trespassing beasts. Their owners sought compensation, and when Bayley refused to pay, they seized some of his household goods in *muru,* depositing them with a Maori assessor. The matter was finally pleaded before Resident Magistrate Joseph Flight, who awarded Bayley ten shillings, to go along with the lasting enmity both he and his neighbors had already earned for one another. Cattle, then, were a constant source of problems and tensions, rarely solved by compromise. Stubborn behavior like Bayley's and that of his Maori neighbors helped bring the two peoples to war in Taranaki within a decade (Ward 1974:79, 221; Wards 1968:224).

Cattle and Negativism: A Note on Animal Trespasses as Public Nuisances

All the examples of disputes over animal trespasses described here thus far concerned trespasses onto private property. What of public trespasses, "nuisances"? Each diaspora community created ordinances regarding the "public nuisance" committed by animals trespassing in public places, which were then, at times, invoked against those who allowed their pigs or cattle to wander in towns and settled communities. Let New Zealand serve as an example: In one year in the early 1870s, some 84 of 110 convictions before the resident magistrate's court in New Plymouth, Taranaki, were for allowing cattle to be at large. Another way to put this is to say that a full generation after the first settlers and their cattle had appeared on the scene, wandering herbivores were still the greatest public problem in the towns. Conversely, in the city of Auckland, Mayor P. A. Philips remarked in the same year (1871) that the Impounding Act was "almost a dead letter," largely unenforced by the Armed Constabulary who served in that era as its police force.[25] All of this sounds similar to Dirk Hartog's (1985:899) description of the inability of New York City's authorities to keep pigs off the streets in the first half of the 19th century. And it is, but there was a cultural dimension to animal trespasses in New Zealand, as we have just seen, that caused these scenes of popular disregard for the formal law to assume tragic dimensions at times.

[25] Hill 1989:188, 246. See also the Wellington police report in 1851 indicating that wandering cattle were "one of the greatest nuisances in this Town" (p. 387). And see the evidence that a prosecution for infanticide of a young Hawera woman in the 1880s failed because "pigs ate the corpse" (p. 306).

Conclusion

Those who did behave in conciliatory ways fared better than those who went to private law or private war, but that social fact did not prevent some members of the British diaspora from taking costly or violent measures when trespassed upon. In the first stages of frontier life, when neighbors were not well known to one another, where those on the two sides of a boundary fence were not yet likely to be the offspring of established members of the community or church, the sort of social isolation that Lois Carr (1977:41 ff.) and Miles Fairburn (1989) detected in the first generation of Maryland's and New Zealand's settlers could get in the way of accommodation and cooperation. But eventually social bonds developed, and the relatively equal resources and claims of the parties in the inevitable disputes over animal trespasses lent themselves to informal, "neighborly" adjustments, just as Robert Ellickson had found in modern Shasta County, California.

But there was less willingness to accept either the "high" or "low" law when the trespass involved members of such strikingly different peoples as aboriginals and British diaspora immigrants. Settlers could not easily assume the costs of fencing both their own animals out of Maori crops and their own crops in from Maori animals, and in any event, they refused to do so. These different cultures were often unable to accommodate one another's claims because their differing perceptions of the proper rules regarding the fencing in or out of crops and animals, on the one hand, and the low opinion of natives held by most British settlers in both North America and the Antipodes (and of settlers by aboriginals in those regions), on the other, led to widespread ignoring of "the law" and to the imposition by both of an often bloody "informal" law.

It seems clear from this comparative look at animal trespasses that the bargaining process described by Ronald Coase often did not take place.[26] James Heckman, a University of Chicago Law & Economics scholar, recently observed that the "separation of efficiency and equity" by neoclassical economists "creates a void that often leads to the neglect of the distribution/redistribution question entirely. This analytical separation may amount to a . . . blind spot in neoclassical theory because it encourages concentration on the piece of the analysis that one can be clear about as an economist, rather than the piece that one cannot" (1997: 332). Heckman's words seem to apply well to our story.

[26] To be fair, Coase (1960) does allow (but only in a catch-all phrase of his final page) that "all spheres of life should be taken into account" in Law & Economics analysis, not simply those "comparisons of the value of production as measured in the market" (p. 43). The problem with this qualification is that it is just that: a hedge offered, as if in passing, not the major premise repeated throughout the essay.

One problem is that Law & Economics theory employs an amorphous catch-all term, "transaction costs," to capture every and all intervening variables interfering with the smooth flow of "rational" economic exchanges. To Law & Economics folk the term "transaction costs" usually means the costs of obtaining information in the bargaining process as well as those associated with the actual negotiation or litigation. But where cultural barriers are high, the term also has to be used to refer to the costs needed to surmount those barriers of language, symbols, meaning, and values. Using the term to "capture" these costs amounts to a rather clumsy way of establishing that cooperation is difficult to arrange when the parties come to the issues wearing different cultural glasses. Law & Economics theorists can claim that they can "account for" those differences and all they entail in calculating the bargaining process or the transaction costs, but the accounting may not be as useful as they would like to believe.

Robert Ellickson's findings and model were much better predictors of past behavior and norms in the lands of the British diaspora than Coase's. His analysis of several of the levels of informal dispute resolution are powerful: He explains two-party agreements and third-party organizational controls quite well; but his analyses of self-enforcing personal ethics and informally enforced community norms, while enlightening, are, I fear, inadequate. As we have seen, "irrational" behavior sometimes prevented rational bargaining and neighborly sharing of costs in the British diaspora. Law & Economics theory does not work well when neighbors are simply "irrational" (or "abnormal" as the psychologist would have it). One of this journal's anonymous readers suspected that my evidence of irrational behavior, being anecdotal, was not terribly significant: After all, "economic theory predicts that some fraction of 'desirable' bargains will fail to occur when there is asymmetric information." But the fact is that I did not detect "some" failed bargains; rather I found very little bargaining at all when it came to native-settler interactions, and very many failed bargains when it came to settler-settler interactions during the first generation or two of settlement. The percentage of "irrational" folk in the frontier lands of the British diaspora of the past was not insignificant.

That ought to signal to us that rational-actor models of dispute resolution should be supplemented with those of anthropology, psychology, and sociology. Such theory also does not work very well to explain behavior when the parties to a dispute were from strikingly different cultures, since such theory does not give sufficient weight to ordinary perceptions of "fairness," a crucial motivating force that can get in the way of "logical" solutions to disputes. Those of the Law & Economics persuasion can claim to accommodate such cultural collisions as those of Algonquins and Puritans, Maoris and Pakehas, but only by insisting on inappro-

priate language and terms. They must make room for both the psychologist's concept of abnormal behavior and the anthropologist's concept of culture and for what they represent—the "irrational" and less-than-pecuniary domains of personality traits, norms, symbols, and values. I leave the task of determining exactly how that is to be done to those smarter than I am.[27]

References

Adams, Peter (1977) *Fatal Necessity: British Intervention in New Zealand, 1830–1847.* New York: Oxford Univ. Press.

Allen, David Grayson (1981) *In English Ways: The Movement of Societies and the Transformation of English Local Law and Custom to Massachusetts Bay in the 17th Century.* Chapel Hill: Univ. of North Carolina Press.

Anderson, Virginia DeJohn (1994) "King Philip's Herds: Indians, Colonists, and the Problem of Livestock in Early New England," 51 *William & Mary Q.* 601–24.

Banner, Stuart (1996) "Written Law and Unwritten Norms in Colonial St. Louis," 14 *Law & History Rev.* 33–80.

Bennett, J. M. (1971) "The Day of Retribution: Commissioner Bigge's Inquiries in Colonial New South Wales," 15 *American J. of Legal History* 85–100.

Black, Donald (1990) "The Elementary Forms of Conflict Management," in *New Directions in the Study of Justice, Law and Social Control.* Tempe: School of Justice Studies, Arizona State Univ.

Boyer, Paul, & Steven Nissenbaum, eds. (1977) *The Salem Village Witchcraft Papers: Verbatim Transcripts of the Legal Documents of the Salem Witchcraft Outbreak of 1692.* 3 vols. New York: De Capo Press.

Brown, R. Ben (1989) *"Let Us Go Down and There Confound Their Language": The Multiplicity of Legal Discourses in the Antebellum United States.* American Bar Foundation Working Paper 8901. Chicago: American Bar Foundation.

——— (1990) *Closing the Southern Range: A Chapter in the Decline of Southern Yeomanry.* American Bar Foundation Working Paper 9020. Chicago: American Bar Foundation.

Byrne, Paula J. (1993) *Criminal Law and Colonial Subject: New South Wales, 1810–1830.* Sydney: Cambridge Univ. Press.

Cadigan, Sean (1995) *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland, 1785–1855.* Toronto: Univ. of Toronto Press.

Calloway, Colin (1995) *The American Revolution in Indian Country.* New York: Cambridge Univ. Press.

Carr, Lois (1977) "The Development of the Maryland Orphan's Court, 1654–1715," in L. Carr & A. Land, eds., *Law, Society and Politics in Early Maryland.* Baltimore: Johns Hopkins Univ. Press.

Carroll, Charles (1973) *The Timber Economy of Puritan New England.* Providence, RI: Brown Univ. Press.

Clark, C. M. H. (1978) *A History of Australia,* vol. 4: *The Earth Abideth Forever, 1851–1888.* Carlton, Vic., Australia: Melbourne Univ. Press.

Coase, Ronald (1960) "The Problem of Social Costs," 3 *J. of Law & Economics* 1–44.

Cooney, Mark (1993) "Why Is Economic Analysis So Appealing to Law Professors?" 45 *Stanford Law Rev.* 2211–30.

[27] A few candidates: For one whose views on dispute resolution do not presume the superiority of Economic Man and a rational-actor model based on Him, see Black 1990:40–56. See also Harris (1979) for a defense of functionalist anthropology, a powerful way of comprehending the origins, purposes, and force of customs and norms.

Cronon, William (1983) *Changes in the Land: Indians, Colonists and the Ecology of New England.* New York: Hill & Wang.

Dayton, Cornelia H. (1995) *Women before the Bar: Gender, Law and Society in Connecticut, 1639–1850.* Chapel Hill: Univ. of North Carolina Press.

Dechêne, Louise (1992) *Habitants and Merchants in 17th Century Montreal.* Montreal: McGill–Queen's Univ. Press.

Demos, John (1982) *Entertaining Satan: Witchcraft and the Culture of Early New England.* New York: Oxford Univ. Press.

Deverell, William (1994) *Railroad Crossing: Californians and the Railroad, 1850–1910.* Berkeley: Univ. of California Press.

Dykstra, Robert (1968) *The Cattle Towns.* New York: Atheneum.

Ellickson, Robert (1991) *Order without Law: How Neighbors Settle Disputes.* Cambridge: Harvard Univ. Press.

Fairburn, Miles (1989) *The Ideal Society and Its Enemies: The Foundations of Modern New Zealand Society, 1850–1900.* Auckland, NZ: Auckland Univ. Press.

Fisher, Robin (1977) *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890.* Vancouver: Univ. of British Columbia Press.

Fresne, Yvonne du (1989) *The Bear from the North: Tales of a New Zealand Childhood.* London: Women's Press.

Galbraith, John Kenneth (1964) *The Scotch.* Boston: Macmillan.

Greene, Jack P., ed. (1965) *The Diary of Colonel Landon Carter [J.P.] of Sabine Hall, 1752–1778,* ed. Jack P. Greene, vol. 2. Charlottesville: Univ. Press of Virginia.

Hahn, Stephen (1982) "Hunting, Fishing and Foraging: Common Rights and Class Relations in the Postbellum South," 26 *Radical History Rev.* 37–64.

——— (1993) "A Response: Common Cents or Historical Sense," 59 *J. of Southern History* 243–58.

Harring, Sidney (1994) *Crow Dog's Case.* New York: Cambridge Univ. Press.

Harris, Marvin (1979) *Cultural Materialism: The Struggle for a Science of Culture.* New York: Random House.

Hartog, Hendrik (1985) "Pigs and Positivism," 1985 *Wisconsin Law Rev.* 899–935.

Hayter, Earl (1963) "Livestock-Fencing Conflicts in Rural America," 37 *Agricultural History* 11–20.

Heckman, James J. (1997) "The Intellectual Roots of the Law & Economics Movement," 15 *Law & History Rev.* 327–34.

Hill, Richard (1986) *Policing the Colonial Frontier,* vol. I, pt. 2: *The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867.* Wellington: Historical Publications Branch, Dept. of Internal Affairs.

Hill, R. (1989) *The Colonial Frontier Tamed: New Zealand Policing in Transition, 1867–1886.* Wellington, NZ: G. P. Books.

Jackson, Donald, ed. (1964) *Black Hawk: An Autobiography.* Urbana: Univ. of Illinois Press.

Kantor, Shawn, & Morgan Kousser (1983a) "Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South," 59 *J. of Southern History* 201–42.

——— (1983b) "A Rejoinder: Two Visions of History," 59 *J. of Southern History* 259–66.

Kawashima, Yasuhide (1994) "Fence Laws on the Great Plains, 1865–1900," in Elizabeth Cawthon & David Narrett, eds., *Essays on English Law and the American Experience.* College Station: Texas A&M Univ. Press.

Kercher, Bruce (1995) *Unruly Child: A History of Law in Australia.* St. Leonards, NSW, Australia: Allen & Unwin.

——— (1996) *Debt, Seduction and Other Disasters: The Birth of Civil Law in New South Wales.* Sydney: Federation Press.

Konig, David (1979) *Law and Society in Puritan Massachusetts: Essex County, 1629–1692.* Chapel Hill: Univ. of North Carolina Press.

Kornhauser, Lewis (1992) "Are There Cracks in the Foundations of Spontaneous Order?" 51 *New York Univ. Law Rev.* 647–73.

Kugel, Rebecca (1994) "Of Missionaries and Their Cattle: Ojibwa Perceptions of a Missionary as Evil Shaman," 41 *Ethnohistory* 227–44.

Landes, William, & Richard Posner (1987) *The Economic Structure of Tort Law.* Cambridge: Harvard Univ. Press.

Lewthwaite, Susan (1994) "Violence, Law and Community in Rural Upper Canada," in Jim Phillips et al., eds., *Essays in the History of Canadian Law,* vol. 5. Toronto: Univ. of Toronto Press.

Loo, Tina (1994) *Making Law, Order, and Authority in British Columbia, 1821–1871.* Toronto: Univ. of Toronto Press.

Mandell, Daniel (1996) *Behind the Frontier: Indians in Eighteenth Century Eastern Massachusetts.* Lincoln: Univ. of Nebraska Press.

McMath, Robert (1985) "Sandy Land and Hogs in Timber: Farmers Alliance in Texas," in Jonathan Prude & Stephen Hahn, eds., *The Countryside in the Age of Capitalist Transformation.* Chapel Hill: Univ. of North Carolina Press.

Merry, Sally Engle (1990) *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans.* Chicago, Univ. of Chicago Press.

Morgan, Gwenda (1989) *The Hegemony of the Law: Richmond County, Virginia, 1692–1776.* New York: Garland.

Morison, Samuel Eliot, ed. (1952) *Of Plymouth Plantation, 1620–1647.* New York: Alfred A. Knopf.

Morrison, Kenneth (1984) *The Embattled Northeast: The Elusive Ideal of Alliance in Abenaki-Euramerican Relations.* Berkeley: Univ. of California Press.

Nagle, J. F. (1996) *Collins, the Courts and the Colony: Law and Society in Colonial New South Wales, 1788–1796.* Sydney: Univ. of New South Wales Press.

O'Brien, Jean (1997) *Dispossession by Degrees: Indian Land and Identity in Natick, Massacusetts, 1650–1790.* New York: Cambridge Univ. Press.

Parsons, T. G. (1985) "Was John Boston's Pig a Political Martyr? The Reaction to Popular Radicalism in Early New South Wales," 71 *J. of the Royal Australian Historical Society* 170.

Peters, Alvin (1989) "Posts & Palings, Posts & Planks," 12 (Winter) *Kansas History* 222–31.

Pinney, Robert (1971) *Early South Canterbury Runs.* Wellington, N.Z.: Reed.

Potter, Stephen (1993) *Commoners, Tribute and Chiefs: Algonquians in the Potomac Valley.* Charlottesville: Univ. Press of Virginia.

Prucha, Francis Paul (1962) *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780–1834.* Cambridge: Harvard Univ. Press.

Rappaport, Roy (1967) *Pigs for the Ancestors: Ritual in the Ecology of a New Guinea People.* New Haven, CT: Yale Univ. Press.

Reid, John Phillip (1976) *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact.* University Park: Penn State Univ. Press.

Roberts, Stephen (1935) *The Squatting Age in Australia, 1835–1847.* Melbourne: Melbourne Univ. Press.

Sitton, Thad (1995) *Backwoodsmen: Stockmen and Hunters along a Big Thicket River Valley.* Norman: Univ. of Oklahoma Press.

Smith, Joseph H., ed. (1961) *Colonial Justice in Western Massachusetts, 1639–1702: The Pyncheon Court Record.* Cambridge: Harvard Univ. Press.

Taylor, Peter (1988) *Station Life in Australia: Pioneers and Pastoralists.* Sydney: Allen & Unwin.

Vickers, Daniel (1994) *Farmers and Fishermen: Two Centuries of Work in Essex County, Massachusetts, 1630–1850.* Chapel Hill: Univ. of North Carolina Press.

Ward, Alan (1974) *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand.* Canberra: Australian National Univ. Press.

Wards, Ian (1968) *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852.* Wellington: Historical Publications Branch, Dept. of Internal Affairs.
Weber, Eugen (1976) *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914.* Stanford, CA: Stanford Univ. Press.
Wynne, Graeme (1992) "Ideology, Society and State in the Maritime Colonies of British North America, 1840–60," in A. Greer, ed., *Colonial Leviathan: State Formation in Mid-19th Century Canda.* Toronto: Univ. of Toronto Press.
Wynne-Edwards, V. C. (1962) *Animal Dispersion in Relation to Social Behavior.* Edinburgh: Oliver & Boyd.
Yngvesson, Barbara (1993) "Beastley Neighbors: Continuing Relations in Cattle Country," 102 *Yale Law J.* 1787–1801.

Cases

Aylesworth v. Herrington, 17 Mich. 416 (1868).
Bliss v. Dorchester, J.P. Ct., Springfield, Mass., March 2, 1653.
Cameron v. Reed, 2 Mich. Nisi Prius (Brown) 150 (1871).
Cantrell v. Adderholt, 28 Ga. 239 (1858).
Challoner & Another v. McPhail & Another, NSW SCR (Knox) 157 (1877).
Champion v. Vincent, 20 Tex. 812 at 817 (1859)
Cole v. Tucker, 6 Texas 266 (1851).
Les Curé et Marguilliers de l'OEuvre et Fabrique de l' Isle Perrot v. Ricard, 9 Lower C.J. 99 (1864)
Curtiss v. Townsend, 6 UCCP 255 (1857)
Firth v. Martin, Nov. 1858, Wellington, N.Z., Magistrate's Court, reported in *N.Z. Spectator,* Nov. 13, 1858, p. 2.
Fugate v. Smith, 4 Col. App. 201, 35 Pac. 283 (1894)
Mackay Bros. v. Wellington–M. Ry., 6 N.Z.L.R. (C.A.) 185 (1887).
Malone v. Faulkner, 11 U.C.Q.B. 116 (1853).
Martin v. Jones, 15 Lower C. J. 6 (1869)
McGill v. Morley, 3 Newf. R. 146 (1850).
Pattenaude v. Charron, 17 Lower C. J. 85 (1870).
Ricard v. La Fabrique de la paroisse St. Jeanne . . . (unreported, Q.B. Montreal, 1868).
Wellis v. Beal, 9 Kans. 406 (1872).
Whitman v. Corp. of Town of Stanbridge, 26 Lower C.J. 144 (1881).