EXAMINING THE VIABILITY OF ANOTHER LORD OF YESTERDAY: OPEN RANGE LAWS AND LIVESTOCK DOMINANCE IN THE MODERN WEST

BY
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In this comment, the author explores the development of open range laws in Oregon and other western states and argues such laws should be abolished or drastically amended. Common law requires ranchers to fence livestock in or face liability for damages caused by strays. However, historical customs and practices of Western states were shaped by vast open lands and sparce populations, leading to open range customs which required a landowner to fence "out" livestock to protect their property. This comment focuses on the case of Dr. Patrick Shipsey, an Oregon landowner convicted of shooting cattle that wandered onto his land. Through this discussion, the viability of open range statutes is discussed and the ongoing debate exposed. Policy alternatives are proposed that reflect modern demographic changes and a re-balancing of the economic and environmental burdens of ranching practices.

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I. INTRODUCTION

On October 13, 1996, Dr. Patrick Shipsey, a resident in a rural Eastern Oregon community, gunned down eight cattle that repeatedly broke through his fencing and trespassed on his property.[1] For most ranchers, slaughtering cattle is an integral part of livestock operations in an industry dedicated to putting beef on the dinner table of the American consumer. However, Dr. Shipsey is not a rancher, and his shooting of livestock wandering from his neighbor's ranching operation infuriated the ranching community, which branded him a cold-blooded murderer.[2] Shipsey's act of frustration towards trespassing livestock on his property ignited the latest round in the great Western "open range" war and intensified the debate over the present-day validity of ancient customs drawing roots from the frontier days of the old West.

Under Oregon's open range statute, like most state statutes in the West, ranchers are not required to fence in their livestock, but instead cattle can roam free, grazing almost wherever they choose.[3] This statute reflects a custom common in many Western states, that dates back to nineteenth-century pioneers exploiting the West's natural resources in an effort to conquer it for the nation.[4] Unlike the West, Eastern states do not permit open ranges, adhering mostly to the old English common law requiring ranchers to fence cattle in and holding livestock owners strictly liable for damages caused by stray cattle.[5] However, early settlers to the West found drastically different and harsher environmental conditions, and political leaders had to implement new policies to coax people west. Thomas Jefferson envisioned Western expansion for the nation and encouraged Congress to provide generous grants of land to "yeomen" (and liberal use of public lands allowing settlers to survive in the more arid, harsher climes of the western half of the continent) to encourage Western settlement.[6]

From this paradigm of the old West evolved many ideas, policies, and laws governing the use of natural resources including forests, rangelands,

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[1] Tom Kenworthy, *In War Over Western Range, Killing Stray Cows Crosses a Line*, WASH. POST, Mar. 26, 1997, at A1.

[2] *Id.*

[3] OR. REV. STAT. § 607.005(6) (1997).

[4] *See infra* Part II.

[5] *See infra* Part V.A. "Estray means livestock of any unknown person . . . found to be trespassing on land enclosed by an adequate fence." OR. REV. STAT. § 607.007 (1997).

[6] GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW 80-81 (1993).

fisheries, water, minerals, and public lands.[7] In his book, *Crossing the Next Meridian: Land, Water, and the Future of the West*,[8] Charles Wilkinson referred to these customs as the "lords of yesterday," suggesting that nineteenth-century federal programs and policies may have been proper for that era, but are "radical and extreme by modern lights."[9] Wilkinson argued that laissez-faire management of Western natural resources under the "lords of yesterday" perceived no need for environmental protection or resource preservation, because the resources seemed abundant and limitless.[10] Lack of foresight and long-range resource management has squandered a once pristine ecosystem. Today, Western policymakers wrestle with problems of waning resources and environmental degradation, and they struggle to cope with these "lords of yesterday."[11] Wilkinson offered alternatives to old laws in an attempt to redefine the social compact between neighbors, both new and old, and create a new paradigm for the American West.[12]

This comment argues that open range laws constitute a "lord of yesterday" not specifically addressed by Professor Wilkinson. Open range represents a custom unfit for a society in transition from a rural ranching hegemony to one that mixes newcomers from both Eastern states and Western urban areas with these rural ranchers hanging on to livestock operations passed down from generation to generation.[13] Ranching operations can continue to exist in a new modern Western culture, but perhaps the rules of the game require retooling. In Oregon, the changing landscape is dramatic. Cattle ranching once dominated the moist Willamette Valley in the western region of the state, but now ranching has been supplanted by urban populations and other agricultural operations.[14] Ranchers moved into the more arid, eastern part of the state, making use of the approximately thirty million acres of federal range lands managed by the Forest Service and Bureau of Land Management.[15] Today, even these rural com-

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7 CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST xii (1992).

8 *Id.*

9 *Id.* at 19. Wilkinson lists five lords of yesterday: the Hardrock mining Law of 1872, public rangelands, public forests, dams and other water projects crippling Pacific Northwest salmon and steelhead runs, and the prior appropriation doctrine for use of surface waters. *Id.* at 20-21.

10 *Id.* at 18.

11 WILKINSON, *supra* note 7, at 20.

12 *Id.* at xi-xii. Wilkinson's ideas include: 1) reforming the Mining Act of 1872 to protect legitimate mining operations, but do away with non-miners and opportunists; 2) timing livestock grazing during the year to take advantage of the best grasses, while not depleting the resources of the range and prohibiting grazing from grasslands that simply cannot support continued grazing; 3) reducing the amount of timber cut to sustainable levels; and 4) reducing consumption and diversion of water from Western rivers. *Id.* at 74, 105, 112, 173, 288.

13 For example, in Oregon almost 63% of the state population lives in non-rural areas. John A. Tanaka et al., The Oregon Beef Cattle Industry 27 (Oct. 17, 1996) (unpublished report prepared for the Oregon Beef Council) (on file with author).

14 *Id.*

15 *Id.* at 2, 5, 6.

munities are feeling the pressure from development, reducing the lands available for open-range style ranching still further.[16]

Part II of this comment provides a background to the development of customs and practices of the early settlers that later became codified in state statutes across the West. In the modern West, open range customs perpetuate an agrarian system of land management that is out of step with many Western communities faced with increased populations, urbanization, and technological industrialization. Open range customs also present issues of how a community can or should spend its public resources. The public may see easily identifiable costs associated with ranching including building fences to fence cattle in or out of an area,[17] protecting and repairing riparian areas, and treating water quality problems resulting from cattle use of streambeds.[18] However, some resource costs are harder to economically value, such as lost recreational opportunities, aesthetic values of the landscape, and biodiversity. As the modern West continues to grow and change, citizens and policy makers must decide who should bear the burden of these costs. Continued open range customs can become another form of publicly subsidized welfare to the ranching interests, shifting financial burdens associated with ranching impacts to other local residents and the population in general. Policy makers must decide if current priorities in a community continue to justify open range practices. Part III explains the current law in Western states and the trend towards limiting open range practices that are similar to restrictions imposed in Eastern states.

Part IV focuses on the Shipsey case unfolding in Oregon. Shipsey, as a non-resource extractive newcomer to a small western community, reached the end of his rope over repeated intrusions of his neighbor's unfenced cattle into ecologically sensitive streambeds Shipsey was trying to restore.[19] Under Oregon's open range statute, Shipsey had little recourse to the livestock trespass on his property simply because he did not fence the livestock "out" of his lands, a statutory requirement that effectively shifted the financial onus of livestock control onto him.[20] Part IV studies the social dynamics that led to the dispute between Dr. Shipsey and his neighbor and explores possible legal responses Dr. Shipsey could have pursued rather than shooting the cattle. The section also examines the responses to the dispute of a community in transition. This type of conflict demonstrates that open range laws are indeed "lords of yesterday," out of step with modern trends of Western land use. Part V analyzes the modern Oregon open range statute and discusses judicial treatment of the law in specific disputes.

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16 *Id.* at 2.

17 These costs can easily run a dollar per foot of fence, which adds up quickly. Telephone Interview with Mark Haneberg, Chief Petitioner of 1996 Ballot Initiative to Close the Public Range (Apr. 13, 1998) [hereinafter Haneberg Interview].

18 Alec Brownlow, Economics of Banning Livestock Grazing in Riparian Areas Critical to Salmon Production as Called for in Measure Thirty-Eight 1 (1996) (on file with author).

19 Kenworthy, *supra* note 1, at A1.

20 OR. REV. STAT. § 607.300 (1997).

Times have changed since ranching was the predominant economic enterprise in the West and ranchers outnumbered urban residents. Changing attitudes, economic development and the advent of the modern highway systems bring urban dwellers into direct conflict with these old range practices. While ranchers still hold a large amount of political power in Western states, change is under way. In light of the modern trend towards limiting open range, Part VI of this comment presents and discusses statutory and policy alternatives that Oregon and other open range states could employ to address the changing face of Western communities. These policy alternatives attempt to reflect modern values regarding economic burden shifting of ranching practices, natural resource protection, land use, tort law, and private property rights.

II. THE CUSTOM OF OPEN RANGE IN THE WEST

Bernhard Grossfeld suggested that although the roots of American jurisprudence derive from old English common law, many areas of the law experienced a metamorphosis when brought across the Atlantic.[21] He attributed these changes in law to several factors, including "the natural environment (particularly the geographical situation of a country), the climate, population density, and language and religion."[22] North America is of course drastically different geographically than England, and the western United States are also sparsely populated in comparison.

In a well-settled, densely populated country, agricultural and societal needs dictate that ranchers fence in their cattle to avoid becoming a nuisance to everyone else.[23] At least as far back as the mid-nineteenth century, tort law in England held owners of livestock strictly liable for damage caused.[24] Strict liability doctrines and laws requiring livestock to be fenced in made sense in England, where there is very little open land, few loose cattle, and horses are dangerous to the community at large.[25] However, the North American continent provided a wholly different landscape, calling for new customs and practices. Many traditional English common laws were ill-suited to North American realities of geography and culture, and American independence from England in 1776 provided the opportunity to shed these old common laws. Shedding the "lords of yesterday" in Western states has proven more difficult because the socio-political climate has been dominated by ranching interests since European settlers first arrived.

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21 Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1513 (1984).

22 *Id.* at 1511.

23 *Id.* at 1516.

24 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 538-41 (5th ed. 1984).

25 *Id.*

A. *Court Acknowledgment of Open Range Customs*

The Illinois Supreme Court set the stage for abrogation of the English "fencing in" common law, stating that it never applied in the state.[26] The rationale used by the court in 1848, and later by the ranchers who moved into the Western territories, was that range cattle required enormous amounts of open range, open prairies were plentiful, and the materials did not exist to adequately fence in such large quantities of land.[27]

In 1890, in *Buford v. Houtz*,[28] the U.S. Supreme Court first acknowledged the abrogation of English common law in the West. The Court held that there was an implied license to graze cattle on unfenced federal public lands as a result of congressional inaction in the face of many years of this customary practice.[29] The Court noted the unique situation in Western land ownership as a result of land grants to railroad companies resulting in ownership of odd-numbered sections of townships (thirty-six square miles) in private hands and even-numbered tracks held as public lands. The cattle ranchers in *Buford*, owning many of the private sections, wanted to enjoin the sheep herders (and over 200,000 sheep) from crossing their private lands to reach the public tract to graze the sheep—in effect, appropriating all of the federal public lands for the ranchers' uses.[30] The Court would have none of it, requiring the ranchers to allow free range through their lands. Ironically, the Court said that the *ranchers* wanted to impose the English common law principle that, "every man must restrain his stock within his own grounds."[31] Rejecting that argument, the Court went on to hold that "it has never been understood that in those regions and in this country . . . that a man was bound to keep his cattle confined within his own grounds, or else would be liable for tres-

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[26] Seeley v. Peters, 10 Ill. (5 Gilm.) 130, 143 (1848). The court noted that:

> [h]owever well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common law rule prevails now, it must have prevailed from the time of the earliest settlements in the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them and adopted as applicable to their condition a rule of law, requiring each one to fence up his cattle; that they designed the millions of fertile acres stretched out before them to go ungrazed, except as each purchaser from government was able to enclose his part with a fence? This State is unlike any of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth sufficient for thousands of cattle must be suffered to rot and decay where it grows, unless the settlers upon their borders are permitted to turn their cattle upon them.

Id. at 142; *see also* Kerwchaker v. Cleveland, Columbus & Cincinnati R.R. Co., 3 Ohio St., 172 179 (1854) (Ohio has always allowed livestock to run at large); Comerford v. Dupuy, 17 Cal. 579 (1861); Logan v. Gedney, 38 Cal. 579 (1869).

[27] *Id.* at 143; Valerie Weeks Scott, *The Range Cattle Industry: Its Effects on Western Land Law*, 28 MONT. L. REV. 155, 168 (1967).

[28] 133 U.S. 320 (1890).

[29] *Id.* at 326.

[30] *Id.* at 325.

[31] *Id.* at 326.

passes upon the unfenced grounds of his neighbors."[32] Therefore, the Court affirmed the custom of open range as a legitimate common law of Western states.

The *Buford* court did not reach the issue of whether the private land owner was due compensation for the allowed "trespass" of sheep across the private land. The Eighth Circuit addressed the issue twenty-four years later in *Mackay v. Uinta Development Co.*,[33] holding that the private landowner was entitled to no compensation from a nomadic sheepherder for the damages done by his sheep as they crossed the same type of checkerboarded private lands to reach grazing areas on public land.[34] Judge Miller held that it was not unconstitutional to allow this uncompensated trespass, even "though it lessens in a moderate degree what are frequently regarded as absolute rights of private property."[35] Judge Miller's reasoning found its way into the jurisprudence of the Oregon Supreme Court a few years later: in 1911, Oregon held that the open range law did not eliminate trespass, it just did away with a monetary remedy.[36]

The presence of public lands seems to have played a large part in the rationale of early courts to allow open range customs. The *Buford* court reasoned that the federal branches gave large discretion to private individuals to use the Western public lands, at least up until 1891,[37] and encouraged liberal use of the vast prairie by industrious ranchers.[38] The privilege of a rancher to graze wherever he pleased seemed absolute.

B. Early Limits on Unrestricted Open Range

Just four years after *Buford*, the U.S. Supreme Court, in *Lazarus v. Phelps*,[39] placed some limits on the discretion of ranchers to use the public lands as they saw fit. While upholding the general principle that the owner of unenclosed land has no right to compensation for the intrusion of livestock, Justice Brown did not condone an intentional trespass with the "deliberate intent to obtain the benefit of another's pasturage."[40] Justice Brown recognized that an increasing amount of land in Western states was moving from public to private ownership through various federal disposition laws and, while the Court did not see fit to dispense with the custom of open range, perhaps there were limits to the imposition on a neighbor's property that a rancher and his cattle could inflict.[41]

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32 *Id.* at 328.

33 219 F. 116 (8th Cir. 1914).

34 *Id.* at 120.

35 *Id.* at 119.

36 Todd v. Pacific Ry. & Navigation Co., 59 Or. 249, 253 (1911).

37 In 1891 Congress passed the General Revision Act (or Forest Reserve Act) which authorized the President to set aside lands as reservations from the general or uncontrolled use by the public. 16 U.S.C. § 471 (1994). Congress authorized protective management of the forest reserves by passage of the Organic Act of 1897, 16 U.S.C. §§ 473-81 (1994).

38 Budford v. Houtz, 133 U.S. 320, 326-27 (1890).

39 152 U.S. 81 (1894).

40 *Id.* at 85.

41 *Id.*

Property ownership includes the right to exclude others from property.[42] Open range law diminishes the right to exclude by allowing accidental trespass without compensation if a landowner did not properly fence out intruding livestock. But in *Lazarus*, the Court acknowledged that, even in open range states, a rancher "will not be permitted thus to ignore the truth that every one [sic] is entitled to the exclusive enjoyment of his own property."[43] The Court revealed limits to the privilege of open range, putting ranchers on notice that they cannot intend to trespass and still escape liability.[44]

The Court moved to further restrict open range grazing privileges in *Light v. United States*.[45] In *Light*, the federal government sought to regulate and manage Colorado ranchers grazing livestock on lands placed in a forest reserve by the President and managed by the Department of Agriculture through a permit system.[46] The Court validated the right of the federal government to revoke the implied license to graze livestock on the public domain and act as any other landowner to resist trespass to its lands.[47] The defendant rancher argued that the presence of his cattle on the public lands should not be a trespass to federal lands because Colorado was an open range state, and therefore a property owner, including the United States government, had an affirmative duty to fence out livestock.[48] The Court did not address to what extent the federal government was required to fence land in compliance with open range law, because it found that the rancher purposely turned his cattle out on the federal lands.[49] Instead, the Court held that the government has rights incident to proprietorship, and like any private owner, regardless of fencing, was entitled to protection against a willful trespasser.[50] This theory, in conjunction with the *Lazarus* holding,[51] could be interpreted to imply that open range laws protect the rancher against liability only in the instance of the occasional, accidental escape of livestock from the rancher's own property. These were the last United States Supreme Court cases to address this issue; therefore, the extent to which open range laws have been further limited has been left up to the states and lower federal courts.[52]

III. Open Range Laws and the Modern West

Open range laws are as much a part of the character of past Western culture as the Hardrock Mining Law of 1872 and the prior appropriation

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42 Roger A. Cunningham et al., The Law of Property § 7.1 (2d ed. 1993).

43 *Lazarus*, 152 U.S. at 86.

44 *Id.* at 85-86.

45 220 U.S. 523 (1911).

46 *Id.* at 534-38.

47 *Id.* at 536-37.

48 *Id.* at 526.

49 *Id.* at 538.

50 *Light*, 220 U.S. at 537.

51 Lazarus v. Phelps, 152 U.S. 81, 86-87 (1894).

52 *See infra* Part III.

doctrine governing surface water extraction.[53] As many as nine western states still adhere to some form of open range laws.[54] Following is a brief survey of the evolution of those laws with a comparison to the development of the law in eastern states.

A. Western States

With the advent of barbed wire in the 1870s, it became possible for the first time to fence large areas of the open range.[55] In addition to removing one of the rationales for allowing the custom of open range, cheap fencing led to new conflicts between ranchers on the frontier.[56] Ranchers themselves started erecting fences on both private and public land in an effort to enclose range for their exclusive use.[57] Congress interceded with the passage of the Unlawful Inclosures Act of 1885 (the Act).[58] The Act prohibited the construction of any fence that prevented the lawful use by others of the public domain.[59] In *Camfield v. United States*,[60] the Supreme Court held that the Act also prohibited the construction of fences on private lands if the effect would be to limit access to public lands.[61]

Even though ranchers showed increased willingness to fence rangeland to keep for themselves the benefits of public and private grazing opportunities, the custom of open range continued into the twentieth century. One explanation might be that open range customs are beneficial to ranchers when the offending cattle stray onto private lands and "help themselves" to someone else's forage. But ranchers have shown no reluctance to use fences when the opportunity presented itself to close off public lands and take advantage of excluding others from public rangelands.[62] The federal government might have inadvertently prolonged open range customs by declaring fencing illegal in the case of public lands.[63] Ranchers could assume that the government continued to endorse open range practices by allowing cattle to graze wherever they found the best resources. A survey of western states shows open range laws remain alive and well, although under attack for many of the same reasons present in Oregon. In varying degrees, Idaho, Washington, California, Montana, Utah, New Mexico, Texas, Arizona, and Wyoming all have open range provisions.[64]

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53 WILKINSON, *supra* note 7, at 20-21.

54 *See infra* note 64.

55 Scott, *supra* note 27, at 168.

56 *Id.* at 169.

57 COGGINS ET AL., *supra* note 6, at 151.

58 43 U.S.C. § 1061 (1994).

59 COGGINS ET AL., *supra* note 6, at 157.

60 167 U.S. 518 (1897).

61 *Id.* at 524-25.

62 *See id.* at 519.

63 These cases from the late 1800s were not the end of ranchers' efforts to circumvent the law and fence in large areas of rangeland. For a discussion of the rancher's use of fraudulent entrymen to acquire large homestead rights, see Scott, *supra* note 27, at 171-74.

64 IDAHO CODE § 25-2118 (1997) (open range in all unenclosed lands outside of cites, villages, and herd districts); WASH. REV. CODE ANN. § 16-24 (West 1997) (allowing stock re-

The Idaho statute makes all unenclosed lands except for cities and "herd districts" (similar to livestock districts in Oregon which designate areas where it is unlawful for livestock to graze at large)[65] subject to the open range.[66] Ranchers have no duty to keep animals off highways in public ranges: the statute specifically says, "[the livestock owner] shall not be liable for damage to any vehicle or for injury to any person riding therein."[67] Even when an animal causes an accident on a roadway not within an open range, there is no strict liability—only an inference of negligence by the animal owner which they can rebut by showing that he took reasonable efforts to keep his livestock contained.[68] Idaho counties have the option of closing the open range through creation of "herd districts." Motorists in one rural Idaho county were involved in a string of fatalities and injuries within a few weeks in 1997 as a result of striking stray cattle on the roadways, prompting the county's commissioners to propose closing the range.[69]

Other Western states have encountered similar opposition to the open range "lord of yesterday." Citizens in Utah and New Mexico are calling for repeal of open range laws on the local level and insisting on better fencing to keep livestock out of neighbor's yards and off of roadways.[70] Suburbanization can be a motivating force to close livestock ranges as some Arizona ranchers are subdividing their property and developing it for new housing communities.[71] When communities are in transition from ranching to suburban housing there is great potential for conflict between the remaining ranchers who wish to continue open range practices and the new residents who have no experience with it and want to change over to closed ranged communities. Montana ranchers fear a similar fate may await them as more "newcomers" come to this once wide open range.[72]

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stricted areas by local election); CAL. AGRIC. CODE §§ 16801(b), 17122-17123, (West 1997) (any county designated as "devoted chiefly to grazing" is considered an open range area); MONT. CODE ANN. § 81-4-203 (1997) (defining all lands not enclosed by fencing as open range); UTAH CODE ANN. § 4-24-10 (1997) (simply requiring livestock grazing on open range to bear a brand of ownership); N.M. STAT. ANN. § 77-14 (Michie 1997); TEX. AGRIC. CODE ANN. § 143 (West 1997); ARIZ. REV. STAT. ANN. § 3-1427 (West 1997). Wyoming courts have applied the customs of the state to declare that Wyoming has always been an open range state. Garretson v. Avery, 176 P. 433 (Wyo. 1918); Stilwell v. Nation, 363 P.2d 916 (Wyo. 1961).

65 OR. REV. STAT. § 607.005 (1997).

66 IDAHO CODE § 25-2118 (1997).

67 *Id.*

68 Griffith v. Schmidt, 715 P.2d 905, 914-15 (Idaho 1985); *see also* RESTATEMENT (SECOND) OF TORTS § 504 (1977).

69 *Car-Cow Collisions Closing Southern Idaho's Open Range*, IDAHO FALLS POST REG., Dec. 10, 1997, at A9 [hereinafter *Car-Cow Collisions*].

70 Nicky Tixier, *For Environmentalists, It'll Be the Year of the Cow*, THE SANTA FE NEW MEXICAN, Dec. 30, 1994, at A7; Dave Anderton, *Newcomers Must Fence Out Cows*, SALT LAKE TRIB., Oct. 25, 1997, at B1.

71 Carol Ann Bassett, *Where Bulldozers Are Replacing Bulls*, ARIZONA TREND, Aug. 1987, at 44.

72 James Trefil, *Mending Fences in Montana*, SMITHSONIAN, Aug. 1992, at 22.

B. Western States Moving Away from Open Range

Several Western states have passed statutes abolishing open range or further restricting its use.[73] For example, in 1967, California repealed all fence laws except in six counties, thereby effectively restoring the English common law.[74] California even required ranchers to exercise ordinary care with their cattle in the six counties that are still open range.[75]

The trend in Western states towards more restrictions on the open range follows a similar trend underway for the last century in Eastern states and requires Oregon's attention. In the next section, this article discusses the specifics of how the Shipsey conflict arose and what legal alternatives could have been employed to resolve the dispute peaceably.

IV. The Shipsey Case

If the Shipsey case arose in the Eastern United States, courts would apply a different set of common law principles governing livestock and fencing obligations. Eastern common law notions of a closed range include the right to exclude others from real property, placement of financial burdens on parties causing harms, and providing effective legal avenues for redress in the court system by the aggrieved landowner.[76] The following brief discussion of Eastern common law discusses these closed-range principles which Dr. Shipsey tried to convey in the drastic action of shooting his neighbor's cattle.

A. Eastern Common Law

Most Eastern states have always held the owner of cattle strictly liable for trespasses and damages done to a neighbor's property.[77] These states incorporated English common law principles requiring cattle to be fenced in, into their common law tort principles.[78] However, during the nineteenth century, as many as five Eastern states dispensed with the English common law and practiced open range doctrine similar to what later blossomed as the law of the land in the West.[79] State legislatures found

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[73] New Mexico holds the livestock owner liable for damages if he negligently allows estrays onto the highway, even in open range areas. N.M. Stat. Ann. § 77-12-11 (Michie 1993). Southern Idaho counties are using state law to create "herd districts" which will close a large portion of the open range in Idaho. *Car-Cow Collisions*, *supra* note 69.

[74] 1967 Cal. Stat. § 15.

[75] *Id.*

[76] Brad Knickerbocker, *Oregon's Open-Range Ranching Spurs Battle Over Bovine Control*, The Christian Sci. Monitor, Oct. 30, 1996, at 3.

[77] Stackpole v. Healy, 16 Mass. 33 (1819); Angus v. Radin, 5 N.J.L. 815 (1820); Page v. Hollingworth, 7 Ind. 317 (1855); McKee v. Trisler, 143 N.E. 69 (Ill. 1924).

[78] *See, e.g.*, Ala. Code § 3-5-2 (1996).

[79] *See, e.g.*, Tennessee, Alabama & Georgia Ry. Co. v. Andrews, 159 S.E.2d 460, 462 (Ga. Ct. App. 1968) (discussing the history of Georgia's open range custom that was abolished by the Georgia Legislature in 1953); McKee v. Trisler, 143 N.E. 69, 71 (Ill. 1924) (the rule of law in the Illinois allowed open range until the Legislature restored English common law in 1871); Hansen v. Kemmish, 208 N.W. 277, 280 (Iowa 1926) ("We very early adopted the rule applicable to our habits, conditions, and necessities that cattle were free commoners.");

that sparse populations and large amounts of open range made the custom of open range possible.[80] But these states were the exception in the East, and the legislature in each state east of the Mississippi River eventually did away with open range in favor of a return to the old English common law.[81] Many Eastern states cited population increases, economic sectors shifting away from agriculture, and agriculture becoming generally less economically important as reasons for eliminating open range.[82]

Midwest states also struggled with the common law-open range law dilemma. The Iowa Supreme Court noted in 1856 that livestock were free to roam at large because Iowa contained extensive prairies, and those grasses would go to waste if cattle were not permitted to roam free in search of food.[83] The court stated, "[p]erhaps there is no principle in the common law so inapplicable to the conditions of our country and the people, as the one which is sought to be enforced now."[84] But even here community conditions changed, and eventually so did the law. In 1924, the Iowa Legislature required all livestock to be fenced in, thus reverting to old English common law.[85]

Both Eastern and Midwestern states experimented with varying degrees of open range, but eventually decided that it made more sense to return to a closed range, requiring ranchers to fence in all livestock. Legislatures acted in response to social factors such as population densities, land use, farming practices, and changing ideas about recreational activities and environmental preservation. It is worth keeping these policy issues in mind during the following discussion.

B. Neighbors Collide

Charles Wilkinson wrote that the traditional conception of the range is that of a "place to graze cows."[86] But he argued that this attitude is a "lord of yesterday" and that the range is much more than that a feedlot. "It houses animals: elk, antelope . . . [that] also have grazing needs; trout require clean, cool streams; and wildfowl must have nesting places in green

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Wood v. Snider, 79 N.E. 858, 860 (N.Y. 1907) (explaining that New York allowed certain free range practices until legislative changes in 1890); Zarbaugh v. Ellinger, 124 N.E. 68, 68 (Ohio 1918) ("In the early days, farmers were permitted to allow their stock to run at large. A farmer was obliged to fence out live stock in order to protect his crops.").

80 *See* Jeffrey Brainard, *Barthle Takes a Bit of Local History with Him*, ST. PETERSBURG TIMES, Nov. 12, 1996, at Pasco Times Section 1 (discussing open range law in Florida until abrogated by the Florida Legislature in the 1930s).

81 *Id.*

82 *See, e.g., Tennessee, Alabama & Georgia Ry. Co.* 159 S.E.2d, at 464 (noting that Georgia abolished open range laws in 1955 because "there has occurred . . . rapid development of the various commonwealths by increase of population and extension of [non-livestock] agriculture . . . [such that] conditions and habits of the people" justifying open range have disappeared).

83 Wagner v. Bissel, 3 Iowa 396, 405 (1856).

84 *Id.*

85 IOWA CODE ANN. § 188.2 (West 1997); Marsha K. Ternus, *Liability for the Escape of Animals*, 30 DRAKE L. REV. 257, 259-60 (1980).

86 WILKINSON, *supra* note 7, at 113.

marshlands."[87] Dr. Patrick Shipsey, a non-rancher, embodies this changing attitude toward the old West that threatens the ranching status quo.

Shipsey, a family practice physician, is a self-described environmental activist who moved to a small ranching and timber community and has lived with a different ethic than his neighbors.[88] Shipsey bought 960 acres of property abutting a small creek and spent a few years attempting to restore the creek bed after years of degradation from overgrazing.[89] Aware of Oregon's open range law, Shipsey also built five miles of fencing around his property to keep the livestock of neighboring ranchers from continuing to despoil the sensitive creekbed.[90]

Robert Sproul, an 83-year-old rancher, was Shipsey's neighbor and represents the traditional open range rancher that at one time dominated the western landscape.[91] Sproul and his family ranched their land for seventy years prior to Shipsey moving in, and they plan to continue for as long as possible.[92] Sproul claims that he tries his best to contain his cattle on his own property, but when they wander, it has always been just a simple task of going and fetching the cattle.[93] According to Sproul, none of his neighbors minded the intrusions onto their lands until Shipsey moved in and started complaining.[94]

During the several years Shipsey owned his Grant County property, he claims cattle wandered onto his land roughly fifteen times.[95] The first time Shipsey complained about Sproul's cattle getting onto his property, Sproul sent one of his ranch hands to remove them.[96] Sproul subsequently sent workers to remove cattle on several other occasions before he finally told Shipsey to move them himself.[97] On at least one occasion Shipsey hired someone to move the livestock back onto Sproul's property.[98] Sproul also made at least one trip to Shipsey's office to discuss the continued dispute, with no resolution.[99]

On October 23, 1996, Shipsey reached the end of his patience with the continued intrusions of Sproul's cattle when he found eight more cows grazing near the fragile stream. That afternoon he took his target rifle and

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87 *Id.*

88 *National Digest—Man Eager to Test Oregon Open Range Law*, THE FORT WORTH STAR-TELEGRAM, Oct. 23, 1997, at 6 [hereinafter *Man Eager to Test Oregon Open Range Law*].

89 *Id.* Dr. Shipsey was also a prime sponsor of the Oregon Clean Streams initiative, defeated in a statewide November 1997 election, which would have required ranchers to build fences to keep livestock away from sensitive streams and rivers that do not meet state water quality standards. Kenworthy, *supra* note 1, at A1.

90 Kenworthy, *supra* note 1, at A1.

91 Janet Stevens, *Anti-Cattle Crusader Shatters Peace on the Prairie*, THE BULLETIN, Oct. 24, 1997, at A6.

92 *Id.*

93 *Id.*

94 *Id.*

95 Steve Lundgren, *Rural Doctor Not Cowed by Trial*, THE BULLETIN, Aug. 1, 1997, at A1.

96 Stevens, *supra* note 91, at A6.

97 Lundgren, *supra* note 95, at A1.

98 *Id.*

99 Stevens, *supra* note 91, at A6.

shot all eight of Sproul's Hereford cows.[100] Shipsey was arrested, charged, and convicted of eleven class C felony counts of criminal mischief in the fall of 1997.[101] While Shipsey could have received a very lengthy prison sentence he ended up only serving two weeks, which he completed in February of 1998.[102] This explosive confrontation is only the latest in the continuing friction between "newcomers" to rural areas and the long-time inhabitants of those areas who depend on cattle as a major source of employment.[103]

C. *Legal Alternatives*

Shipsey had other options available to him besides shooting the trespassing cattle, but other than moving away from open range ranching communities (as he did in January 1997),[104] Shipsey's alternatives were limited under Oregon law. He could have filed a trespass action against Robert Sproul, over his cattle's trespass, under two different theories. First, Oregon's version of the open range law allows a landowner to collect damages for trespass if the landowner has constructed and adequately maintained a proper fence.[105] Shipsey had in fact constructed five miles of fence around his property, although he claimed migrating elk occasionally broke down the fence.[106] If Shipsey could show that he exercised due care in maintaining the fence, Sproul could be held liable for damages due to trespass by his livestock.

Second, regardless of whether Shipsey had any fence at all, he might have used the holdings of the U.S. Supreme Court cases, *Lazarus v. Phelps*[107] from 1894, and *Light v. United States*[108] from 1911, to support a trespass claim at common law.[109] In those cases, both in open range areas, the Court held that when it appeared the rancher turned out his cattle with an intent to have them graze on neighboring property, the Court would find a willful trespass and hold the rancher liable, despite the custom al-

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100 Kenworthy, *supra* note 1, at A1. Apparently Shipsey shot three other trespassing cattle sometime in 1995; however, they were not discovered until the later shooting spree. Stevens, *supra* note 91, at A6.

101 *Man Eager to Test Oregon Open Range Law*, *supra* note 88, at 6. In an interesting side note, 43 years earlier in 1954, Robert Sproul was the defendant in a murder trial, the end result of an open range law dispute with his brother-in-law, Harland Williams. Sproul claimed he had the right to bring cattle across his brother-in-law's property. The dispute ended when Sproul emptied eight 9mm slugs into Williams, killing him. The jury found that Sproul acted in self-defense and acquitted him. Kenworthy, *supra* note 1, at A6.

102 Haneberg Interview, *supra* note 17.

103 Greg Bolt, *There's Trouble on the Range; A Rural Way of Life is Threatened by Grazing Opposition*, THE BULLETIN, Oct. 26, 1997, at A1.

104 Kenworthy, *supra* note 1, at A6.

105 OR. REV. STAT. § 608.015 (1997).

106 Kenworthy, *supra* note 1, at A6.

107 Lazarus v. Phelps, 152 U.S. 81 (1894).

108 Light v. United States, 220 U.S. 523 (1911).

109 *Lazarus*, 152 U.S. at 87 (finding an implied contract); *Light*, 220 U.S. at 537 (under a property right concept that a landowner has the right to resist willful trespass). *See infra* notes 39-50 and accompanying text for more complete discussion on the trespass issue.

lowing such a trespass if it was not willful.[110] The Oklahoma Supreme Court also found that a landowner was not under a duty to construct a fence against a continuous and wrongful trespass by a rancher's cattle.[111] The numerous trespasses of Sproul's cattle may have been used as evidence of Sproul's intent to let the cattle graze on Shipsey's property. Some residents believed Sproul did have that intent, although legal proof of it would be difficult.[112]

Shipsey also could have employed an Oregon statute that allows the landowner suffering livestock trespass to "take up" the livestock as "estrays."[113] He then could have notified Sproul that the Department of Agriculture would sell the estrays at auction unless he claimed the animals back and paid for all costs Shipsey incurred.[114] Perhaps if Shipsey forced Sproul to keep spending money to retrieve his cattle, he would have been less likely to allow the intrusions in the first place.

Unfortunately, these alternatives do not appear satisfactory in resolving concerns of property owners suffering livestock trespass. First, suing for trespass damages is an after-the-fact cause of action, brought only after the damage to personal property (and personal privacy) has already occurred. A damages claim does not provide the injunctive relief most land owners are seeking. Many residents in rural communities also simply have an aversion to suing their neighbor.[115] It is not a palatable option to residents who want to continue living peaceably in a community. For example, the Oregon Department of Agriculture receives four to five complaints each week about trespassing livestock; however, almost no cases are brought in court each year.[116] Finally, if the resident, like Shipsey, lives in an open range area, he also bears the burden of proof to show that his fencing was adequate to keep livestock out, and that the rancher had the requisite intent to drive livestock onto the property, both difficult hurdles.[117] Landowners faced with a very real chance of losing in court on the trespass claim—and alienating their neighbors in the process—generally do not bring legal claims for damages.

Bringing an estray auction for the trespassing livestock is also an unattractive alternative. The land owner must have the means to retain the livestock. It is safe to assume that few non-ranchers will have the physical ability, financial resources, or the facilities to contain, house, and feed cattle while waiting for the state to sell them at auction. Examples in Oregon

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110 *Lazarus*, 152 U.S. at 87; *Light*, 220 U.S. at 537.

111 Shannon v. McNabb, 120 P. 268, 270 (Okla. 1911).

112 Haneberg Interview, *supra* note 17.

113 OR. REV. STAT. § 607.303 (1997).

114 *Id.* § 607.304.

115 Haneberg Interview, *supra* note 17.

116 Telephone Interview with Becky Colquit, Office of Department of Agriculture, State of Oregon (Apr. 14, 1998) [hereinafter Colquit Interview].

117 OR. REV. STAT. § 607.300 (1997). The federal common law requires an intent to drive livestock onto another's property. *Lazarus*, 152 U.S. at 87 (1894). However, it may be that under the statutory law in Oregon, Shipsey does need to prove intent by the rancher, only that the livestock is an estray. OR. REV. STAT. § 607.007 (1997).

bear this out. Land owners only bring about ten to twelve auctions per year.[118]

Shipsey chose a violent, illegal method for dealing with the natural consequences of open range laws in the West. While such vigilantism may be abhorrent, it may be at least understandable in light of the limited legal options available for a non-rancher living under this "lord of yesterday."

D. Community Responses

The dispute between Shipsey and his ranching neighbor struck a raw nerve in rural Oregon communities. Shipsey's shooting spree provided grist for the editorial mill of open range law proponents and a view into the type of community uproar that occurs when open range laws come under attack. While painting Shipsey as an extremist, newspaper editorials took pains to argue that the current open range law is still "fundamentally sound."[119] They claimed valid reasons for open range areas still exist because of the huge expense ranchers would be required to bear if they were forced to fence all of their grazing lands. Proponents of the open range law also argued that free-roaming livestock present only a small danger to public safety.[120] For example, one editorial for a rural community newspaper said that between the years of 1988 and 1996, only five people died in automobile collisions with livestock in Oregon[121] while twenty-four road deaths involved collisions with wildlife during the same period.[122] The attitude of at least some rural communities seems to be that such fatalities, while tragic, are acceptable risks in ranching communities.

Many members of the rural Grant County community also had strong feelings towards Shipsey's actions and graphically expressed the punishment they would mete out to him. One resident alluded to taking care of things the "Old West" way, by the end of a rope.[123] The deputy editor of *The Bulletin*, a newspaper published in Bend, the largest city in Oregon east of the Cascades, wrote, "I cannot put into polite language the punishment I believe would be just for the man."[124] The deputy editor went on to liken Shipsey's actions to "wanton murder."[125] Such strong remarks illustrate the deep division of attitudes between ranchers and newcomers to their communities. From an animal rights perspective, its rings hollow to hear Shipsey accused of "wanton murder" of cattle, since the ranchers

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118 Colquit Interview, *supra* note 116.

119 *Look Out for Bambi and Bossy*, THE BULLETIN, Nov. 2, 1997, at F2.

120 *Id.*

121 *Id.*

122 *Id.* The editorial goes on to suggest sarcastically that the death of "hapless animals" should prompt minor changes to the open range law such as lighted sneakers for deer and orange reflective vests for livestock. *Id.* While the editorial writer may have been joking, it is no joke that highway collisions occur as a result of open range laws. Animal rights advocates, who are equally concerned with the deaths of human and non-human animals, might want to take the newspaper editorial writer up on his feigned concern for these animals.

123 Kenworthy, *supra* note 1, at A1.

124 Stevens, *supra* note 91, at A6.

125 *Id.*

themselves eventually intend to take the very same cattle to slaughter.[126] Even more disturbingly, a local rancher in the John Day River area said that, while it was always unacceptable to shoot trespassing livestock, it was "custom and culture" to shoot your neighbor's dog if it comes onto your property, because it might harass your livestock.[127] Such comments reflect the schism between the old ranching community customs and modern urban beliefs which place great emotional value on dogs and other companion animals.

E. Grazing Conflicts: An Oregon Tradition

Today, conflicts over Western range lands center around non-extractive practices, such as Shipsey's conservation effort, and ranching practices. But controversies between uses of the open range have raged for over a hundred years. In the 1890s, some large ranching interests in Eastern Oregon formed the Oregon Sheep Shooters Association (Association) to keep sheep from grazing on the same lands as cattle.[128] The Association sought to exert exclusive control over public lands in the Cascade Forest Reserve and warned the Woolgrowers of Eastern Oregon (Woolgrowers) to stay out of their range. In one year alone, the Association shot over 8,000 sheep, warning the Woolgrowers not to protest too much because "dead men tell no tales."[129] It was unclear whether any sheep herders were also shot during this confrontation.

Ironically, the ranchers were protesting the open range grazing of sheep on lands ranchers used for cattle grazing, quite similar to Shipsey's protest of open range cattle grazing on lands he used for environmental purposes. The Association shot sheep, he shot cows; yet the Association

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126 Shipsey's slaughter of the 11 cattle raises a dilemma for animal rights advocates who may support the end of open range laws, but may not support the "martyrdom" of 11 cows in this struggle. For a comprehensive discussion of the moral dilemma of condoning mistreatment of some livestock in the hopes that livestock in the future may be freed from oppression, *see generally* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996).

127 Kenworthy, *supra* note 1, at A1. The political power of the livestock community in Oregon is evident in other state laws authorizing the death of any dog found to be engaged in "killing, wounding, injuring or [even] chasing livestock." OR. REV. STAT. § 609.155 (1997). This law includes dogs "chasing" cattle that have wandered onto the dog owner's land. The situation could arise where a dog owner could tie the dog up in the yard, a neighbor's cow could break through the fenced yard and get bit by the dog, and the dog would be killed, no exceptions. If the dog is loose and goes onto the neighbor's property, the neighbor is authorized to kill the dog immediately. OR. REV. STAT. § 609.150(1) (1997). For discussion on Oregon dog laws, see Christopher C. Eck & Robert E. Bovett, *Oregon Dog Control Laws and Due Process: A Case Study*, 4 ANIMAL L. 95 (1998). For the 60% of the American population who have pets, it may seem contradictory to place more importance on livestock than on a pet who is considered a member of the family. The Oregon case of the dog, Nadas, placed on "death row" for allegedly running in an fenced field with a horse, received national attention. Roach v. Jackson County, 949 P.2d 1227 (Or. 1997); Kim Murphy, *Oregon Dog's Chase Ends on Death Row*, L.A. TIMES, Feb. 12, 1998, at A1.

128 WILKINSON, *supra* note 7, at 85.

129 *Id.* at 86 (quoting from a Sheep Shooter Association member's letter to the editor in the *Oregonian*).

urged the Governor to "observe the customary laws of neutrality"[130] in the dispute, while in the Shipsey case ranchers pushed for full prosecution under the state felony laws. In fact, the Association's rationale for shooting livestock in the 1890s was perhaps less tenable than Shipsey's, since the ranchers sought to exclude the sheep from public lands, not private property.[131]

F. Economic Considerations in Oregon

Ranchers and environmentalists agree that economics play a big part in the allocation of scarce western resources. In Oregon, a recent study prepared for the Oregon Beef Council touted the cattle ranching industry as an important component to the statewide economic framework.[132] Environmentalists, on the other hand, argue that the damage done by cattle to riparian areas outweighs any economic benefit because of the precipitous decline of salmon and other fish species dependent on Oregon rivers and streams.[133] In a study prepared as part of the failed 1996 Clean Streams Ballot Initiative, which would have required fencing of over 20,000 miles of sensitive streams at a cost of around $60 million, Alec Brownlow argued that long-term economic benefits in the fishing industry far outweigh the fencing costs.[134] The Brownlow study at least makes a strong argument for more careful consideration of the costs open range ranching practices impose on local and state economies, including losses endured by other non-ranching industries in subtle ways.

V. THE OREGON OPEN RANGE STATUTE

A. Open Range Areas

Oregon's original statute governing livestock range practices was enacted in 1870 when the Legislature abrogated old English common law and created an open range by requiring a fence be built to certain specifications to keep livestock off of property.[135] In 1889, in *Bileu v. Paisley*,[136] the Oregon Supreme Court, while upholding the validity of the open range law, discussed at length the purposes of the old English common law as incident to a landowner's fundamental "right to enjoy his property free from molestation or interference by others . . . ."[137] The court found that a legislature could never legalize a trespass onto another's private property, but it could, and did, deny the harmed landowner of a financial remedy

130 *Id.* (in other words, asking the state to look the other way while the ranchers committed felony mischief).

131 *Id.*

132 Tanaka et al., *supra* note 13, at 41-45.

133 Brownlow, *supra* note 18, at 1-2.

134 *Id.* at 2.

135 1870 Or. Laws, General Law Regulating Enclosures (amended by the General Enclosure Act of 1870) (repealed 1957).

136 18 Or. 47 (1889).

137 *Id.* at 52.

when such a trespass occurred.[138] While it may be some comfort to the invaded landowner to know that a legal trespass occurred, it is cold comfort, because he cannot recover damages wrought on his property without proving the adequacy of his fencing.[139]

In 1957, the Oregon Legislature passed the modern open range statute (1957 Act) that defines the open range as "an area wherein livestock may lawfully be permitted to run at large."[140] Perhaps this statute was passed in recognition of the changing demography of the state, closing more areas to open range and providing a mechanism for local communities to vote for closure of the public range.[141] In open range areas, a landowner can collect livestock trespass damages in a civil action only if he can show that he has lawfully enclosed his property with a proper fence, and the trespass occurred anyway.[142] When the adequacy of the fence is an issue in a case, the statute determines adequacy based on "reference to the customs and practices of good husbandmen in the particular area with reference to fences."[143] The Oregon State Department of Agriculture sends an agent to the property to determine the adequacy of the fence;[144] however, usually the Department hires a local cattleman to examine the fence.[145] Not surprisingly, the inspector rarely finds a fence adequate because most fences will have a weak point somewhere that violates the legal requirement.[146] Short of a rancher intentionally driving livestock onto someone's private property, it would seem that the fence *must* have been inadequate simply because the cattle in fact trespassed.[147] The adequacy of a fence is an issue of fact to be determined by a jury (with the burden on the plaintiff); however, the jury may be swayed greatly by the testimony of the fence inspector.[148]

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138 *Id.* In holding that the invasion of cattle onto a neighbor's property *had* to be a trespass, Judge Thayer wrote:

> In a sparsely-populated section of country, where there are extensive open commons, and stock-raising is an important industry, it might be judicious to adopt such a regulation; but to hold that one man has a right to permit his stock to go upon the lands of another, if not protected by a material inclosure [sic], would be holding, in effect, that a man did not own what belonged to him.

Id.

139 The Oregon Supreme Court subsequently reinforced *Bilue*'s interpretation of Oregon statutory law creating open ranges which allows damages only when there is an adequate fence erected. Strickland v. Geide, 49 P. 982 (Or. 1897); Pacific Live Stock Co. v. Murry, 76 P. 1079 (Or. 1904); Hall v. Marshall, 27 P.2d 193 (Or. 1933).

140 OR. REV. STAT. § 607.005(6) (1997). The full House and Senate passed the legislation without debate on the floor. 1957 OREGON JOURNALS OF THE SENATE AND HOUSE 1075. Before passage of the law, all of Oregon was considered open range except for three towns.

141 *See infra* Part V.B.

142 OR. REV. STAT. § 608.015(2) (1997).

143 *Id.*

144 Colquit Interview, *supra* note 116.

145 Haneberg Interview, *supra* note 17.

146 *Id.*

147 *Id.*

148 OR. REV. STAT. § 608.015(2) (1997). Whether Shipsey, an outsider to the Eastern Oregon ranching community, would have received a fair trial had it gone to a jury, is questionable. Although Shipsey's trial was conducted by the judge without a jury, a jury pool was

When the 1957 open range statute was first passed, it provided for a fine up to $500 or imprisonment up to six months when a landowner suffering the trespass violated certain statutory provisions.[149] If the landowner "took up" trespassing livestock but did not notify the actual owner or the state within five days, penalties would accrue.[150] Conversely, the actual owner of the livestock could not be assessed any penalty simply for allowing livestock to escape. While there is no legislative history explaining this dichotomy, it would appear that ranching interests were well represented in the Oregon Legislature. Ten years later, in 1967, the Legislature repealed these penalties, imposing instead a misdemeanor for a violation of any provision of the open range statute.[151] However, the State Department of Agriculture claims that it still has no authority to administratively impose fines on owners of estray livestock.[152]

There is very little case law in Oregon involving livestock trespass to private property in open range areas, similar to the Shipsey incident, since passage of the 1957 Act. As noted above, this might be because of a general reluctance of neighbors to sue neighbors.[153]

A more actively litigated area under the modern open range statue involves tort actions arising from automobile collisions with livestock on roadways. In 1960, in *Kindle v. Curl*,[154] the Oregon Supreme Court ruled that the owner of a horse was not liable for damages when a motorist hit his horse on a highway, even though the highway was fenced, because the road was in an open range area.[155] The court did not even entertain the possibility that the horse owner owed a duty of reasonable care to keep the horse from that roadway, stating that since the open range law allowed the horse to roam at large, the horse owner had no duty to the motorist, and therefore was not at fault.[156] In 1974, in *Turrini v. Gulick*,[157] the Oregon Court of Appeals relied on *Kendall* to find a livestock owner not liable for personal injuries suffered when an auto stuck a cow on a state highway.[158] The court determined that the state owed no duty to keep livestock off highways in open range areas.[159]

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assembled. One of the potential jurors, a rancher, was quoted as saying that the open range law wasn't broken and didn't need fixing, perhaps revealing a bias shared by many in the ranching community. Bolt, *supra* note 103, at A1.

149 1957 Or. Laws 604 § 24 (codified at OR. REV. STAT. § 607.990) (repealed 1967).

150 *Id.*

151 1967 Or. Laws 113 §§ 2-3 (repealing OR. REV. STAT. § 607.990). This reversal in favor of less "rancher friendly" penalty schemes could be due in part to reapportionment in Oregon which gave more power to urban areas, as a result of a landmark Supreme Court case. Baker v. Carr, 369 U.S. 186 (1962) (striking down an apportionment scheme for the Tennessee legislature under the Fourteenth Amendment).

152 Colquit Interview, *supra* note 116.

153 *See infra* notes 115-17 and accompanying text.

154 353 P.2d 227 (Or. 1960).

155 *Id.* at 231.

156 *Id.* at 230-31.

157 517 P.2d 1230 (Or. Ct. App. 1974).

158 *Id.* at 1231.

159 *Id.* at 1232. Oregon statutes restrict livestock from running at large on many state highways. OR. REV. STAT. § 607.505-27 (1997). *But cf. Turrini*, 517 P.2d at 1231-32 (Or. Ct.

The federal government had less luck in arguing that it had no duty to remove livestock from private property in an open range area. In the 1978 case of *Roaring Springs Associates v. Andrus*,[160] the government attempted to use the Oregon open range law to deny any duty under the federal Wild Horse and Burrow Act[161] to remove wild horses from private property because the private land was within an open range area, and the property was not fenced.[162] The federal district court did not accept this reasoning, holding that Congress could not have intended the Wild Horse and Burrow Act to be applied differently from state to state based on prevailing open range laws.[163] Therefore, although federal law preempted Oregon's open range statute, the case does not mean that the federal government has a general duty to remove livestock from unfenced private property within open range areas, only wild horses and burrows.

This line of Oregon case law reveals a strong presumption against rancher liability, especially in open range areas. Because of a combination of factors, including the burden of proving the adequacy of fencing and the presumption that a rancher does not have a positive duty to keep livestock off roadways, it seems doubtful that non-ranching members of the Oregon community will ever have much success bringing trespass and damages claims in open range areas. The motorist should be extra cautious because the state does not even have a program for placing open range warning signs along roadways through such areas.[164]

B. Livestock Districts

Oregon law provides an opportunity for a community to abolish open range law and return to the old English common law requiring a rancher to fence in his livestock.[165] The creation of a "livestock district" makes it unlawful to allow specified livestock to run at large.[166] All incorporated cities are designated by state statute as livestock districts.[167] Anyone wishing to create a livestock district in any other community in state must collect signatures from registered voters *who are also landowners* in the proposed livestock district[168] and submit that petition to the county court

App. 1974) (holding that the state had no duty to remove cattle that had wandered onto highways in designated open range areas).

160 471 F. Supp. 522 (D. Or. 1978).

161 16 U.S.C. §§ 1331-1340 (1994).

162 *Id.* at 524. The federal government has a duty to remove animals from private property under this Act. 16 U.S.C. § 1334 (1994).

163 *Roaring Springs Assoc.*, 471 F. Supp. at 524.

164 Colquit Interview, *supra* note 116. One would hope that at least local communities would post such signs.

165 *See infra* note 77-78 and accompanying text.

166 OR. REV. STAT. § 607.005(5) (1997).

167 OR. REV. STAT. § 607.008 (1997).

168 OR. REV. STAT. § 607.010(2) (1997). Requiring petition signators to be owners of real property may raise federal Constitutional issues. The Supreme Court has applied the strict scrutiny standard in finding that voting on a bond issue should not be restricted to only property owners. City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970); *see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (finding that requiring voters to be property

or board, which must then hold a local election.[169] If the referendum passes, liability will shift to livestock owners for the trespass of their cattle on to neighboring lands.[170]

Defendant ranchers within livestock districts have unsuccessfully argued that even when liability might apply, criminal negligence must be proved before damages could be awarded. For example, in *Schwerdt v. Myers*,[171] a rancher's cattle escaped from his property, damaging a neighboring commercial nursery.[172] The Oregon Supreme Court rejected the rancher's argument that criminal negligence was the evidentiary standard, noting that the livestock district statute created civil liability, not criminal; therefore, simple negligence was the proper standard of care.[173] Meeting the evidentiary burden, the nursery owner recovered damages for trespass to his land.[174]

In *Schwerdt*, the court did not address liability to damage caused by livestock collisions on roadways, but it seemed to indicate that if common negligence was proved, the rancher would be liable.[175] However, four years after *Schwerdt*, in *Dunlap v. Dickson*,[176] the Supreme Court held that simple negligence is not the appropriate standard to apply because the livestock district statute was designed to protect landowners, not motorists.[177] The applicable standard for civil liability under the Oregon livestock district statute states that

> [a] person shall be liable to the owner or lawful possessor of *land* if the person permits an animal of a class of livestock to run at large upon such land and the land is located in a livestock district in which it is unlawful for such class of livestock to be permitted to run at large.[178]

But the *Dunlap* court found that "[b]ecause plaintiff is not a member of the class ORS 607.044 is designed to protect, nor are plaintiff's injuries the kind of harm the statute is designed to prevent, we conclude that plaintiff cannot recover under ORS 607.044."[179] Therefore, a driver seeking damages for a collision with estray livestock, must bring a common law

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owners or have children in order to exercise their voting rights, it violated the U.S. Constitution's Equal Protection Clause).

169 *See infra* note 142.

170 *Id.* § 607.044. Even then a rancher will not be prohibited from driving livestock on a public road. *Id.* § 607.045 (1997).

171 683 P.2d 547 (Or. 1984).

172 *Id.* at 547.

173 *Id.* at 549.

174 *Id.* at 550.

175 *Id.* at 548. The court noted, "[c]ommon law negligence, therefore, is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do under the same or similar circumstances." 683 P.2d at 548.

176 765 P.2d 203, 205 (Or. 1988).

177 *Id.* at 205-06. Other states have found that similar statutes were designed to protect property owners, not travelers on the highway. Bolton v. Barkhurst, 319 N.E.2d 376, 379 (Ohio Ct. App. 1973).

178 OR. REV. STAT. § 607.044 (1997) (emphasis added).

179 *Dunlap*, 765 P.2d at 205.

negligence action to recover against the cow owner.[180] This standard is weaker than the Oregon statutory liability standard because under the common law standard for negligence, the livestock owner will only be found liable "under such circumstances that the owner could reasonably foresee that some injury would probably result from the animal being at large on a county public road."[181] So, under Oregon law, landowners can find livestock owners liable for damages if they show the rancher simply "permitted" the livestock to trespass on their lands, while unsuspecting motorists must show that the rancher "could reasonably foresee" the harm that befell the motorist.

Compared to open range areas of the state, the Oregon Livestock District statute provides more protection for landowners. A landowner within such a district is not required to build a fence to keep cattle off his property, and he can collect trespass damages by a showing of simple negligence on the part of the rancher. However, motorists within livestock districts do not receive any benefits from the statute unless they are driving on roads designated as livestock restricted.[182] Unfortunately, not all roads in livestock districts are livestock restricted, and the potential for a rancher to escape liability caused by his livestock remains high.

Oregon is at a crossroads as it develops into a thriving community for the twenty-first century. The next section discusses alternatives Oregon can use to address future public policy issues, including population growth, urban boundary shifts, changing agricultural uses, recreational uses, and environmental preservation. Within this framework a decision must be made as to whether open range practices should continue into the next millennium.

VI. Alternatives to the Unrestricted Open Range

Open range laws are in retreat in most states across the country.[183] Eastern state legislatures entirely repealed open range laws, ushering in a return of old English common law, and Western state legislatures have created mechanisms to close some parts of the state to open range through "livestock district" laws.[184] Oregon is a state at the crossroads. The Shipsey dispute is an example of the continuing conflict between the old ranching practices and new ideas of how Western resources should be

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180 *Id.* at 206. In a similar case, the federal District Court of Oregon found a government employee negligent in failing to use reasonable care to prevent a pack horse from entering a highway located in a national forest. Bilderback v. United States, 558 F. Supp. 903, 910-12 (D. Or. 1982). The court also held that national forests were not open range under Oregon law because federal law governing the forests preempted state law. *Id.* at 906.

181 Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4TH 445 (1981) (citing George v. Perkins, 221 So. 2d 717 (Miss. 1969)).

182 OR. REV. STAT. § 607.505-27 (1997).

183 *See infra* notes 73, 79-82, 85 and accompanying text.

184 *See infra* note 73 and accompanying text; *see also infra* Part V.B. (describing Oregon's livestock district statute).

managed. Below are several alternatives Oregon could pursue as it positions itself to enter the twenty-first century.

A. *Retain the Current Law*

Ranchers have argued that the law is not broken and does not need fixing.[185] Current Oregon open range law enables landowners to protect their land through proper fencing or through creation of livestock districts. If a community shifts from a sparsely populated, livestock industry-dominated community to one based on farming or non-extractive industry, a livestock district can be established by local election to eliminate open range practices.[186]

Unfortunately, the current system in Oregon does not address the financial inequities inherent in requiring a non-rancher to pay for ranch fencing so he may enjoy the private use of his property. Oregon's Judge Thayer said over a hundred years ago that such a landowner has not been deprived of peaceful enjoyment of private property,[187] and that continues today.

As noted earlier,[188] opportunities to create livestock districts also do not solve the threat of livestock trespass for a resident who has moved into a predominantly livestock-dominated community because that person may stand little chance of changing the legal status of the area to a livestock district. If the non-ranching voters opposed to open range laws are in a minority to the ranching community, or at least to the residents who don't oppose open range practices, some landowners will continue to be required to fence cattle out of their property at their own personal expense or suffer a non-compensable trespass.[189]

B. *Abolish Open Range Law Entirely*

In early 1998, a group from Ashland, Oregon began gathering signatures for a ballot initiative that would abolish the current open range law in the state.[190] Dr. Shipsey, a supporter of the initiative, believes that it will have better success than the failed clean streams initiative because

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185 Bolt, *supra* note 103, at A1.

186 OR. REV. STAT. § 607.008-45 (1997).

187 Bileu v. Paisley, 18 Or. 47, 52 (1889).

188 *See infra* note 168 and accompanying text.

189 County commissioners also have the discretion to rework petitions for livestock districts and can remove from the plan any area they feel appropriate leaving many landowners outside potential districts (assuming the district would pass a vote). Haneberg Interview, *supra* note 17.

190 *See* Bolt, *supra* note 103, at A1. The summary of the ballot initiative reads:

> Amends constitution. Currently, under Oregon's "open range" system, livestock may lawfully run at large on non-federal land, including private land, except in livestock districts or incorporated cities. Livestock herded or grazing along public highways currently have right of way over motor vehicles, except on interstate highways. Measure prohibits livestock from entering or occupying private land, unless landowner consents.

Talena Ray, Oregon Office of the Secretary of State News Release for Draft Ballot Title for Initiative Petition No. 49, at 1 (Sept. 4, 1997) (on file with author).

more urban voters will see open range laws as a rancher subsidy that is unfair in a free market economy.[191]

Some ranchers argue that if the open range law is abolished, they would be forced out of business.[192] Environmentalists argue that if a business is unprofitable, the public should not be subsidizing its continue existence.[193] Perhaps ranching in the West really is a "lord of yesterday" and deserves to be eliminated from the Western landscape. Western ranchers currently monopolize 258 million acres of public rangeland in eleven Western states, yet livestock production on those public lands comprises a mere two percent of the national total.[194] The ballot initiative did not make the Oregon ballot for 1998, but will likely resurface as an issue for the 2000 election.[195]

C. Liability Reform

Under current Oregon law, landowners must build and pay for a proper fence to keep livestock off their property.[196] Ranchers are not responsible for the costs of a neighbor's fencing. Also, a livestock owner owes only a common law duty of reasonable care in keeping livestock off roadways where they may cause auto accidents.[197] Liability is only imposed if it can be proved that the "owner could reasonably foresee that some injury would probably result from the animal being at large on a county public road."[198] If this duty of reasonable care is satisfied,[199] not only is the rancher not liable for damages to the motorist, he may also recover for the value of the animal struck by the auto. Reform of the liability law could take several forms: 1) make the livestock owner responsible for the costs of fencing either his own property or the property of neighbors who request fencing "protection," or 2) hold the livestock owner strictly liable for any damages resulting from roadway accidents with livestock.

1. Ranchers Assume Some Costs and Some Liabilities

Making the livestock owner at least partially responsible for either fencing his own land to keep animals in, or paying for a neighbor to fence his property to keep livestock out would help balance the economic equities of the ranching industry and foster cooperation between neighbors. Making livestock owners pay for costs associated with fencing animals

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191 *Id.*

192 *Id.*

193 *Id.*

194 WILKINSON, *supra* note 7, at 81. Western private grazing lands produce only 17% of the national livestock total. *Id.*

195 Haneberg Interview, *supra* note 17.

196 OR. REV. STAT. § 608.015 (1997).

197 *See infra notes* 175-81 and accompanying text.

198 Annotation, *supra* note 181, at 445.

199 The Oregon Supreme Court held that the duty includes an actual or constructive knowledge that the defendant's livestock could have gotten on roadway. Schwerdt v. Myers, 683 P.2d 547, 549 (Or. 1984).

either in or out of property would shift the financial burden from the general public (in the case of highway fences) and neighboring landowners to the business entity making fencing necessary: the ranch operator.

Some ranchers argue that a shift of financial burden would be prohibitive, driving them out of business.[200] However, other ranchers believe the cost of fencing is already an integral part of their ranching operations, even in open range areas, noting that "a huge part of their business expense is fixing and repairing wire fences that can run well over a hundred miles on the bigger spreads."[201] Therefore, the issue is not whether ranchers have to pay for any fencing, but whether they have to pay for *all* of the fencing. When ranchers abut other ranchers, a deal is usually worked out where each party pays for half of the expenses for building and maintaining fences. This seems to work well when all of the neighbors are also ranchers—after all, there is a mutual interest in keeping livestock separated from neighboring livestock, and each rancher helps pay for these mutual fences. But when a non-rancher moves in next to a livestock operation, like in the case of Dr. Shipsey, there is no mutual benefit in building a fence, at least in terms of the business of ranching. The non-ranching neighbor probably would have no interest in fencing except for keeping cattle off of his property. For that matter, the rancher probably has less interest in fencing because he would not necessarily face the worry of his cattle mixing with other cattle—in fact, the rancher may wish to take advantage of lush grazing on a neighboring property that does not run cattle. While both the rancher and non-rancher may not want to pay for any fencing, one solution would be for the parties to share the cost of fencing as occurs now between neighboring ranchers. The non-ranching neighbor would at least have the advantage of keeping livestock off his property, assuming the wind or snow does not blow it down.

The state also could reform liability law for livestock trespass, allowing more flexible solutions between ranchers and their neighbors. Oregon law in open range areas currently only awards trespass damages to landowners that can prove that they lawfully enclosed their property with fencing and that cattle trespassed on their land anyway.[202] While not entirely gutting open range, an alternative approach could put greater liability on a rancher allowing livestock to roam at large. Under this approach, the presumption would be that the livestock are trespassing, absent an agreement with neighboring land owners to opt out of the fencing requirement. For example, a rancher could be given the option to negotiate with all adjoining land owners regarding the need for fences. Some neighbors may not mind the occasional intrusion of livestock in the form of an easement, and therefore, no action would be necessary between the two parties. But, if some neighbors wished to keep livestock off their property, the rancher could decide whether it was more cost effective to pay for the fencing of just those properties, or to just entirely fence his own property

200 Bolt, *supra* note 103, at A1.

201 *Id.*

202 OR. REV. STAT. § 608.015(2) (1997).

and keep all the cattle in. It may be more economical for the rancher to fence the small properties instead of his entire ranch. The rancher could also enter into easement agreements with neighbors allowing livestock access to neighbors' property. The easements could be bought and sold between landowners. In this way, an incoming landowner has notice of likely cattle intrusions and must make a determination before purchasing property whether he is agreeable to that, or whether he wants to buy back the easement. This flexible approach to fencing would allow rural communities without fences that entirely support ranching operations to continue open range practices, while providing a pressure valve for transitional communities. Underneath this entire analysis, as noted above, there would still be the issue of whether the rancher would pay for all the fencing costs or whether they would share the costs with the neighbors. Legislation could be drafted with either the rancher paying the entire cost or with some sort of sliding scale cost-sharing between ranchers and neighboring land owners.

2. Strict Liability for Roadway Accidents with Livestock

A second liability reform suggestion would make a livestock owner more responsible for damages caused by his animals in auto collisions. If a rancher chooses not to fence his property, he would be held strictly liable for all damages that result from auto collisions with his livestock. However, if he fences his property, he could avoid liability by showing that he used reasonable care in maintaining fencing, and that the escape of the livestock was not within his control. A state like Oregon may find such a provision easier to enact because of the balancing of concessions. Ranchers would be encouraged to fence their property, thus providing a benefit to neighbors and motorists, by the prospect of avoiding liability through a good faith showing that they used all reasonable care to fence the cattle.

D. Change the Presumption of Open Range

As another reform option, Oregon (and other open range states) could revise the presumption that all rural communities are open range until an election is held to restrict livestock in districts. Instead, the state could create a presumption that all of Oregon was a "livestock district." Communities wishing to reestablish "open range" practices would have to hold an election. Even this suggestion poses difficulties for non-ranching landowners comprising a minority of the voting public in a particular community because they may be outvoted and be placed back in an open range area against their will. However, they would at least be no worse off then they are under the current law.

Addressing the minority non-rancher issue, the legislature could require a two-thirds majority vote to recreate an open range area. Requiring a "super majority" vote further protects the non-ranching interests.

E. *Lords of Yesterday*

Wilkinson has argued for better range management on Western public lands to improve the health of the natural systems. His suggestions stress that current uses of Western lands are not incompatible with ecosystem improvement, but instead require careful choices by land managers.[203] Managers must decide which acres are best suited for continued grazing activities, and which acres are better left to other non-extractive activities.[204] States could take a similar approach with private ranching interests throughout the West. State planners could develop plans outlining the best areas to graze at certain times of the year, and the state could also provide financial incentives for ranchers to either modify their grazing practices or perhaps cease such practices. The state could also subsidize fencing costs to help ranchers fence their property.[205]

Passage of initiatives similar to the failed 1997 Oregon Clean Stream Initiative or a potential Closed Range Initiative would directly address some of the burden shifting problems of the open range "lord of yesterday." If the livestock industry fence cattle out of pristine streams (either paid for by themselves or through state subsidies), there are several benefits. First, it is not a direct financial burden on the non-ranching landowner because it shifts the costs either to the rancher or at least the state government as a whole. Second, as noted above,[206] there might be a huge economic benefit to the state of Oregon if streambeds and riparian areas are allowed to recover from livestock damage and return to a more productive state.

VII. Conclusion

Western states will continue to grapple with the problems of the open range in the decades to come. As populations increase and the available resources of the West decrease, there will be more conflict over the customs, policies, and ideals that should guide natural resource uses in the next millennium. The Shipsey case from Oregon serves as a reminder to Western states of the dichotomy between the evolving socio-political landscape and the tired laws of a wilder era in the West. Open range laws appear to be another "lord of yesterday," an outdated concept of land use that has lost its value in a modern society, yet they persist in state statute books and court rulings. Indeed, history has shown that from time to time, ranchers have been the strongest advocates for enclosing livestock with fences, when it suited their interests in exploiting the rangeland.[207]

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203 Wilkinson, *supra* note 7, at 111-13.

204 *Id.*

205 This proposition is not without precedent. When Ohio first eliminated open range customs, the state partially subsidized the costs of fence building by paying one-half of the costs. Zarbaugh v. Ellinger, 124 N.E. 68, 68 (Ohio 1918).

206 *See infra* Part IV.D.

207 Buford v. Houtz, 133 U.S. 320, 325 (1890) (cattle ranchers wanted to restrict sheep from their lands under the English common law rule requiring livestock to be fenced in);

Perhaps it is time for all Western states to follow the path of Eastern states and return to English common law principles requiring livestock to be fenced in. In light of the Shipsey dispute and others like it that will surely follow, it may be time to move forward with a modern vision of Western society that places emphasis on resource preservation and recovery, and sustainable use of existing resources, while redistributing the financial burden for ranching activities to those who benefit most from it—the ranchers themselves. Legislatures must provide for the needs of an evolving society, and therefore they should throw open range laws on the scrap heap of history.

WILKINSON, *supra* note 7, at 85 (noting that cattle ranchers wanted sheep kept off lands they used for cattle grazing).