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# Neighbors in American Land Law

Stewart E. Sterk

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## INTRODUCTION

Most allocation of land in this country started with division of surface area into discrete parcels separated by rigid boundary lines.[1] Doctrinal rules embodying the familiar maxim that whoever owns the soil owns from the heavens to the depths of the earth have extended these discrete parcels into three dimensions.[2] Whoever is allocated an ownership right to one of these discrete parcels is largely free to do with it as he sees fit, to use it to pursue his private preferences, either through personal use or through market exchange.

Rules that reduce uncertainty to a minimum, like this rigid, "geometric-box" allocation of rights, have been championed as an ideal mechanism for facilitating market exchange.[3] Rules that promote certainty assure that when more than one individual values a particular right, all will know who has the right to sell it. The individual who values it most, at least so long as we equate value with willingness to pay, is likely to emerge with the right.

In a number of instances, American land law departs from the geometric-box allocation. The private preferences of individual landowners, as expressed both in market transactions and the absence of market transactions, are not permitted to govern. Many of these instances involve externalities, where the transaction costs of accounting for all those with interests in promoting or preventing a particular land use are high. In these instances, the market is an unreliable guide to the value, measured by willingness to pay, that all interested parties collectively attach to a particular land use. Thus, for instance, nuisance rules,

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1. Other allocation systems coexist with the rigid division of land into discrete parcels. Examples of communal ownership include riparian water rights and, within a more limited scope, concurrent tenancies. Underground rights have long been separated from surface rights by the terms of mineral leases; more recently, the advent of transferable development rights has spawned more frequent separation of air rights from surface rights.

2. *Cujus est solum, ejus est usque ad coelum et ad inferos* (To whomsoever the soil belongs, he owns also to the sky and to the depths). Black's Law Dictionary 341 (5th ed. 1979).

3. See, e.g., Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. Cal. L. Rev. 1353, 1363, 1366 (1982); cf. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. Legal Stud. 13, 24–26 (1985) (mechanical rules which afford little discretion facilitate market exchange only when transactions costs are low).

zoning controls, and even rules governing removal of servitudes depart from the geometric-box allocation and substitute some form of public intervention.[4]

American land law also departs from the geometric-box allocation even when there are no externalities and hence no difficulties with multiple-party transactions. The departures come in two principal forms. First, rights are sometimes allocated across boundary lines, giving one landowner the right to use his neighbor's land without an express agreement with his neighbor. Examples of such allocations are the doctrines that award easements by estoppel, prescription, implication, and necessity. Second, landowners are sometimes required to sell rights initially allocated to them even if they would prefer not to sell at the stipulated price.[5] Examples include "innocent" border encroachment cases in which the record owner is left to damage relief and denied the right to remove the encroachment.[6]

These departures from the geometric-box allocation require exploration. Much academic work, particularly the law and economics literature, has assumed that in two-party situations where "transaction costs" are low, private bargaining would produce efficient results however rights are allocated initially.[7] The geometric-box allocation, then, would be desirable because it would establish a definite framework for negotiation, thus increasing the chances for bargaining.[8] Why, then, depart from the geometric-box allocation? The law and economics literature has not accorded that question the attention it deserves.

The primary justification advanced in the decided cases, especially those involving easements and boundary disputes, is that allocation across boundary lines is most faithful to the intention of the parties in dispute. That is, even if the parties have not complied with the formalities required for transfer—there has been no writing, or perhaps even no express agreement—basic agreement may be inferred from the con-

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4. See Merrill, supra note 3, at 25–26 (suggesting that courts apply judgmental entitlement-determination rules in nuisance cases, where the barriers to private transactions would be relatively high, while they apply mechanical entitlement-determination rules that facilitate private bargaining in trespass cases, where barriers are relatively low).

5. In other words, landowners are sometimes protected only by a liability rule, not by a property rule. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972), made the property rule/liability rule terminology a staple in the legal literature.

6. See, e.g., Arnold v. Melani, 449 P.2d 800 (Wash. 1969); see also Cal. Civ. Proc. Code §§ 871.1–871.7 (West 1980) (defining rights and liabilities of "good faith improver of property owned by another").

7. See, e.g., R. Posner, Economic Analysis of Law 7 (3d ed. 1986); Calabresi & Melamed, supra note 5, at 1094; Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960); Merrill, supra note 3, at 21.

8. On the advantages of clear background rules as an aid to negotiation, see Merrill, supra note 3, at 23–26; see also Epstein, supra note 3, at 1363, 1366 (rigid rules about terminating easements would ease renegotiation).

duct of the parties. For example, if a landowner, having once given his neighbor oral permission to use a pathway across his land, fails to object as the neighbor makes substantial expenditures in reliance on a continued right to use the pathway, a court might find an easement by estoppel, indicating that the neighbor's failure to object constituted implicit assent to his neighbor's acquisition of a right to continued use of the land.

There is reason to commend the intent-based justification for departures from the geometric-box allocation. But a justification of cross-boundary allocations that focuses exclusively on party intent raises at least two issues. First, every time the legal system introduces a formality—the statute of wills or the consideration requirement for contracts, for example—it indicates willingness to sacrifice intent in particular cases to other objectives.[9] But if courts do and should sacrifice intent effectuation to other objectives with some frequency, why not when a landowner who has failed to obtain a written grant seeks a cross-boundary allocation?

Second, a justification of cross-boundary allocations that concentrates on party intent assumes that conduct provides a reliable guide to state of mind. The relationship between state of mind and particular conduct, however, is determined not by logic, but by culture. To say that a particular act or omission indicates a particular state of mind is to make a statement about a society's behavioral norms.[10] Because not every member of the society will be identically socialized, a rule that presumes intent from conduct will frequently sacrifice intent to other objectives—reinforcement of social norms, or the efficiency-related goal of effectuating party intent in the greatest number of cases. Thus, the quest for the imperfectly expressed intention of the parties is incomplete as a justification for doctrinal departures from the geometric-box allocation.

Economic analysts frequently justify some doctrinal rules that depart from the geometric-box allocation, particularly nuisance rules, as attempts to reduce transaction costs by initially allocating rights to those landowners who otherwise would negotiate for them.[11] However, when two-party transactions are involved, this justification is problematic—at least so long as we hypothesize that transaction costs are already low.

The market structure confronting a landowner seeking to buy a right held by his neighbor, however, belies the assumption that two parties negotiating over land-use rights face few obstacles. A landowner who wishes access to a lake or road may find that only one neighbor can provide him with access, or that only that neighbor can do so at

9. See infra note 43–44 and accompanying text.

10. See infra note 46 and accompanying text.

11. See, e.g., Calabresi & Melamed, supra note 5; Merrill, supra note 3.

reasonable cost. The neighbor, on the other hand, may find that the only prospective purchaser of an access right is the landowner without access from his own lot. The result is a bilateral monopoly: the seller faces a market with only one buyer and the buyer faces a market with a single seller. Our system of servitudes, cotenancies, and estates provides countless such illustrations in which two parties hold unique rights that are of greater value joined together than they would be if held separately.

If in practice strategic bargaining impedes agreement in bilateral monopoly situations, doctrinal rules that operate generally to allocate rights to their highest valuing users, thereby overcoming the need for strategic bargaining, might be more desirable than if the market structure posed no obstacles to negotiation. And, in fact, most of the land law rules that depart from the geometric-box allocation operate largely in situations of bilateral monopoly.

When two parties are involved, however, much academic work has largely ignored strategic bargaining problems and assumed that bargaining between the parties would produce the efficient result—that failure to join separately held rights establishes that the parties value the rights separately as much or more than either of them value the rights together.[12] The literature has thus assumed that private agreement would efficiently resolve bilateral monopoly problems however the legal system chooses to allocate the rights in question. The power of the Coase Theorem rests in large measure on this assumption. If one assumes that bilateral monopoly poses obstacles to private agreement, the Coase Theorem is less useful as an evaluative tool to the extent that bilateral monopoly is prevalent in existing and potential transactions.[13] To the extent that bilateral monopoly situations are accompanied by high strategic bargaining costs, the efficiency justification for departures from the geometric-box allocation becomes more plausible. This Article argnes that even then, the strength of the justification varies with the social milieu. The efficiency of any particular allocation can be evaluated only against a particular set of norms governing behavior among neighbors. The cross-boundary allocations in American land law are generally efficient only if one assumes a societal norm that, broadly described, constrains pursuit of self-interest and personal autonomy by expecting limited cooperation and interdependence be-

12. See, e.g., Calabresi & Melamed, supra note 5 (focusing largely on exclusion of freeloaders and holdouts as impediments to exchange); Note, Injunction Negotiations: An Economic, Moral, and Legal Analysis, 27 Stan. L. Rev. 1563, 1573–74 (1975).

13. The Coase Theorem, in one of its many formulations, asserts tbat "the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work witbout cost." Coase, supra note 7, at 8. As discussed more fully below, even the examples Coase uses to elaborate the theorem present bilateral monopoly situations. If one assumes that bilateral monopoly poses obstacles to private agreement, the Coase Theorem is less useful as an evaluative tool to the extent that bilateral monopoly is prevalent in existing and potential transactions.

tween neighboring landowners.[14]

This Article focuses on three areas of American land law—easements, boundary disputes and spite fences—because these areas are most likely to involve two-party disputes.[15] What emerges from examination of these doctrines is a perspective on what it means to be a neighbor in the contemporary United States. Easement controversies, boundary disputes, and spite fence cases all involve the breakdown of relations between neighbors. By examining the way in which the legal system treats these breakdowns, we can learn a great deal about the expectations of neighborly behavior in our society.[16]

## I. An Outline of the Doctrines

Before examining the doctrinal departures from the geometric-box allocation as a group, it is useful to review the doctrines themselves.

### A. *Easements*

A landowner seeking access from his own land to utility lines, to roads, or to water may find that a neighbor, because of the proximity of his parcel to the landowner's own, can provide that access at a significant cost advantage over all other potential providers. If the neighboring landowners reach an agreement to permit one to use the other's land, and if they memorialize the agreement, they may create an express easement. But easements in American land law may arise in a number of ways other than by express agreement. They may arise by necessity, implication, estoppel, or prescription. Moreover, easements

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14. For example, the existing allocation may not be efficient in a society that places a greater emphasis on personal autonomy, or in a society that values cooperation and interdependence more highly.

15. By contrast, nuisance law, zoning, and other public regulatory schemes generally involve externalities and attendant transaction costs. Similarly, a number of estates law rules, particularly the rule against perpetuities, can be rationalized as devices to reduce the number of parties necessary to complete a transaction, or as a desire to protect future generations. See, e.g., Restatement of Property 2129–30 introductory note to Part I (1944) [hereinafter Restatement]; 6 American Law of Property § 24.4 (1952) [hereinafter Am. L. Prop.].

16. Neither legal doctrine nor norms of social interaction remain static as time passes. Any examination of social norms through the lens of legal doctrine runs the risk of exalting better documented outdated norms over emerging norms that have not yet been fully elaborated in the caselaw.

While the doctrines discussed in this Article are not of recent origin, they show no discernible sigus of disappearing from the legal landscape, as the number of citations to recent cases should indicate. An historical study of the development of cross-boundary allocations would, perhaps, shed even more light on changes in social norms of neighborliness. That study is, however, beyond the scope of the present effort. The persistence of the doctrines that serve as the focus of examination, however, may suggest substantial stability in social norms of neighborliness, at least over the course of the last several decades.

explicitly created may be terminated without express agreement to terminate them.

The doctrines recognizing easements by necessity and by implication are closely related. Both permit a landowner to use his neighbor's land in circumstances deemed "necessary" to the enjoyment of his own land. To establish an easement by implication, however, a landowner must establish that the dominant estate and the servient estate were once held in common ownership, and that at the time of severance, the common owner did in fact make "apparent" use of the servient estate for the purpose the dominant owner now seeks to establish as a legal right.[17] In doctrinal terms, the dominant owner must establish that a quasi-easement existed at the time of severance. By contrast, to establish an easement by necessity, a landowner need not establish prior use of the easement, but the stricter construction of the necessity requirement than is common with easements by implication generally limits easements by necessity to cases involving landlocked owners.[18]

Even in cases where there has been no unity of title between neighboring parcels, a landowner may acquire, without a writing, an easement to use his neighbor's land. First, in many but not all states, when a neighbor gives a landowner oral permission to use the neighbor's land for a particular purpose, the landowner will acquire an easement by estoppel if he makes substantial expenditures in reliance on that permission without objection from the neighbor.[19] Second, even if there has been no oral or written agreement between the parties, a landowner who uses his neighbor's land for a substantial period of time, without comment by the neighbor, may acquire an easement by prescription.[20] If the landowner has received his neighbor's express or implied permission, he is precluded from acquiring an easement by prescription, but the permission may strengthen his case for an easement by estoppel.

The doctrines that terminate servitudes by estoppel and by adverse use parallel closely the doctrines establishing easements by estoppel and prescription respectively.[21] Easements may also be terminated by

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17. See, e.g., Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938); Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943). See generally 2 Am. L. Prop., supra note 15, §§ 8.37, 8.42 (use must be apparent upon inspection).

18. See 2 Am. L. Prop., supra note 15, §§ 8.38, 8.43.

19. See, e.g., Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976). But see Crosdale v. Lanigan, 129 N.Y. 604, 29 N.E. 824 (1892) (license to build wall on neighbor's property is revocable). See generally 2 Am. L. Prop., supra note 15, § 8.116 (easement only extends as far as is necessary to protect licensee's previous expenditures).

20. See generally 2 Am. L. Prop., supra note 15, §§ 8.44–8.63 (discussing historical requirements of adverse possession).

21. See, e.g., Goff v. Shaw, 223 Cal. App. 2d 174, 178, 35 Cal. Rptr. 595, 597 (Ct. App. 1963) (estoppel); Popovich v. O'Neal, 219 Cal. App. 2d 553, 556, 33 Cal. Rptr. 317, 318 (Ct. App. 1963) (prescription). See generally 2 Am. L. Prop., supra note 15, §§ 8.99–8.102 (discussing termination of easements due to changed conditions).

abandonment. Traditional statements of abandonment doctrine provide for termination only when nonuse of an easement is accompanied by an act that demonstrates an intent to abandon.[22] A few courts, however, have been exceedingly liberal in finding such an act where nonuse has continued for a sufficiently long period.[23]

B. *Boundary Disputes*

Record title to a boundary strip does not guarantee the record owner a right to remove his neighbor from the strip. A variety of doctrines adjust record boundaries to physically apparent boundaries. Some of those doctrines are allocational in nature, awarding title to a long-time user rather than to a record owner. Most prominent among these are the related doctrines of adverse possession, acquiescence, estoppel and agreed boundaries. The agreed-boundaries doctrine gives effect to an oral agreement to establish a boundary line where neighbors are uncertain about the actual boundary.[24] But the agreement is recognized only if subsequent conduct by the parties—acquiescence—confirms it.[25] Sometimes, however, even in the absence of express oral agreement courts imply agreement from long-time acquiescence.[26] And courts that invoke estoppel to justify retaining apparent boundaries do so when some event—frequently oral agreement—induces expenditures for improvements that are made without prompt objection from the holder of record title.[27] Finally, courts appear inclined to invoke any of these doctrines in cases of long-time use where a state statute forecloses adverse possession of the boundary strip because the long-time user has not paid taxes on it.[28]

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22. See, e.g., Carr v. Bartell, 305 Mich. 317, 9 N.W.2d 556 (1943). See generally 2 Am. L. Prop., supra note 15, §§ 8.96–8.97 (termination of easement by abandonment requires intent).

23. See, e.g., United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 278–80, 101 N.W.2d 208, 212 (1960); see also Hicks v. City of Houston, 524 S.W.2d 539, 544 (Tex. Civ. App. 1975) (court suggests that nonuse alone creates inference of intention to abandon).

24. See, e.g., Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 336 P.2d 525 (1959); Madera School District v. Maggiorini, 146 Cal. App. 2d 390, 303 P.2d 803 (Ct. App. 1956). See generally Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487, 491–93 (1958) (uncertainty about record boundary necessary pre-condition to agreed-boundaries doctrine).

25. Browder, supra note 24, at 493–95 (citing nineteenth-century cases that suggest acquiescence may not have been necessary in a few states).

26. See, e.g., Lake v. Crosser, 202 Okla. 582, 216 P.2d 583 (1950).

27. See, e.g., Turner v. De Priest, 205 Ala. 313, 87 So. 370 (1921); Hart v. Worthington, 238 Iowa 1205, 30 N.W.2d 306 (1947).

On occasion, however, courts appear willing to use "laches" or "estoppel" to bar a record owner's claim even without oral agreement of any sort. See, e.g., Malchow v. Tiarks, 122 Ill. App. 2d 304, 258 N.E.2d 811 (App. Ct. 1970).

28. See, e.g., Peters v. Straley, 306 So. 2d 588 (Fla. Dist. Ct. App. 1975); see also Minn. Stat. Ann. § 541.02 (West Supp. 1987) (payment of taxes not required when boundary dispute doctrines are involved). See generally Note, Boundary Litigation in

In other cases, the right of a record owner to remove his neighbor is impeded not by an allocational rule, but by a remedial one. While the right of the record owner is upheld, the right is protected only by a liability rule, not a property rule.[29] Courts either justify limitations to money damages as a "balancing of the equities,"[30] or they conclude that the record-title holder has an adequate remedy at law, thereby precluding equitable relief.[31] Both sets of doctrinal rules—the allocational rules and the remedial rules—operate to reduce the role of private bargaining in allocating land rights.

### C. *Spite Fences*

The various boundary dispute doctrines depart from geometric-box allocations by excusing activites that would otherwise be trespassory. Nuisance rules, by contrast, depart from geometric-box allocations by making non-trespassory activity actionable. While many nuisance disputes do, of course, involve many parties, some do not. In particular, spite-fence cases generally involve only two parties. Treatment of spite-fence disputes varies from state to state. In a number of cases, spite-fence rules track the geometric-box allocation—landowners may build whatever structures they please on their own land, whatever their underlying motives, subject only to applicable zoning restrictions.[32] Other states have adopted alternative rules that incorporate some of the mechanical features of the geometric-box allocation. A rule permitting a landowner to build with impunity a fence of specified height, but not to exceed that height without approval from his neighbor, is an example.[33]

In many other states, however, courts have explicitly rejected mechanical rules. Instead, neighbors are granted the right to compel removal of fences or walls built with malice so long as the fence confers no reasonable benefit on its builder.[34] Judicial opinions in these states are frequently infused with discussions of motive or of reasonableness

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California, 11 Stan. L. Rev. 720 (1959) (discussing means by which courts have circumvented requirement that taxes be paid).

29. See, e.g., Arnold v. Melani, 75 Wash.2d 143, 449 P.2d 800 (1968); Burns v. Goff, 262 S.E.2d 772 (W. Va. 1980).

30. See, e.g., *Burns*, 262 S.E.2d at 775.

31. See, e.g., Johnson v. Killian, 157 Fla. 754, 759, 27 So. 2d 345, 347 (1946).

32. See, e.g., Cohen v. Perrino, 355 Pa. 455, 50 A.2d 348 (1947).

33. See, e.g., Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889) (Holmes, J.) (sustaining constitutionality of Massachusetts statute regulating spite fences).

34. See Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982) (obstruction of a neighbor's solar collector could produce actionable nuisance). Compare, e.g., Sundowner, Inc. v. King, 95 Idaho 367, 509 P.2d 785 (1973) (structure conferring no reasonable benefit enjoined) and Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937) (same) with Lieb v. Pitsch, 216 Neb. 136, 342 N.W.2d 377 (1984) (no injunction when fences conferred reasonable benefit on builder) and Green v. Schick, 194 Okla. 491, 153 P.2d 821 (1944) (same).

of use.[35]

## II. INTENT-ENFORCING JUSTIFICATIONS

### A. *Exposition*

Judicial opinions and academic commentary commonly justify many of the doctrinal rules just outlined (albeit not all of them—spite-fence rules are an exception) as rules designed to effectuate party intent.[36] Thus, the intent-enforcing justification for easements by implication runs like this: Suppose, prior to severance, one of two now-divided parcels had been used for the benefit of the other, and, at severance, the use was evident to all parties and evidently "necessary" for the enjoyment of the dominant land. The "servient" owner must have recognized that no reasonable "dominant" owner would have entered into a transaction that denied him necessary services—electric lines, access to water or sewers, for instance—that the dominant estate had customarily enjoyed.[37] If the servient owner wished at severance to terminate the existing use, one would have expected him to express his

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35. See, e.g., Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909):

> The moral law imposes upon every man the duty of doing unto others as they would that they should do unto him; and the common law ought to, and, in my opinion, does require him to so use his own privileges and property as not to injure the rights of others maliciously and without necessity.

Id. at 435, 66 S.E. at 440.

36. With respect to easements by implication, see, e.g., Granite Properties Ltd. v. Manns, 487 N.E.2d 1230, 1238 (App. Ct. 1986) ("implied easements arise as an inference of the parties' intent as derived from the circumstances of a sale"); Dressler v. Isaacs, 217 Or. 586, 597, 343 P.2d 714, 719 (1959) ("At the time of the serverance of the land the circumstances must be such as to permit an inference that had the grantor put his mind to the matter he would have intended the servitude to be created."); see also Restatement, supra note 15, at § 476 comment a (rules which ascribe intention to parties have the effect of protecting them from their own lack of foresight); 2 Am. L. Prop., supra note 15, § 8.33 ("Such rules have . . . the effect of protecting parties to a conveyance from their lack of forethought by ascribing to them an intention such as it seems likely they would have had and probably would have expressed had they foreseen the particular problem which the rules are called upon to solve.")

For intent-enforcing justifications of easements by estoppel, see, e.g., Magnuson v. Coburn, 154 Neb. 24, 30, 46 N.W.2d 775, 778 (1951) (easement by estoppel doctrine appears "properly to involve merely the assertion of a rule of construction" (quoting 3 H. Tiffany, Real Property § 834 (1939))); Shepard v. Purvine, 196 Or. 348, 369, 248 P.2d 352, 361–62 (1952).

The "lost grant" theory, long used to justify easements by prescription, is also an intent-enforcing justification. See, e.g., Hester v. Sawyers, 41 N.M. 497, 503, 71 P.2d 646, 650 (1937) ("A prescriptive right is obtained by use alone and does not depend upon any statute. It is founded upon the presumption of a grant, though there may never have been one."). See 3 R. Powell, The Law of Real Property ¶ 413 (P. Rohan ed. 1986) [hereinafter Powell].

37. See Restatement, supra note 15, § 476 comment j (Parties to a conveyance "will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation."); see also Casenote, 13 S. Cal. L. Rev. 525, 526–27 (1940) (discussing the

wishes at that time. The servient owner's silence, then, must be taken either as an attempt to "put one over" on the dominant owner, or as an assent to the existing use. The easement-by-implication rule presumes, perhaps based on experience, perhaps on moral preference, that the servient owner's silence constitutes assent.

The doctrinal requirements for easements by implication bolster this intent-enforcing explanation. The requirement that the pre-existing use be "apparent" insures that the parties to the conveyance at severance did in fact know of the use. The "necessity" requirement insures that the servient owner's silence will be construed as assent only when he had particularly strong reason to realize that the dominant owner expected the existing use to continue; if the existing use was not "necessary," the servient owner reasonably might have believed that the dominant owner planned to do without.[38]

The intent-enforcing justification for easements by necessity is similar. No reasonable landowner would enter into a transaction that left him with a landlocked parcel; when the potentially landlocked parcel is severed from the parcel that had provided access, the owner of the parcel with access must realize that his neighbor expected to retain access.[39] Silence by the servient owner, then, indicates assent to an easement of way.

Like easements by implication and necessity, the easement by estoppel often is justified as an intent-enforcing doctrine.[40] The parties have agreed orally to create an easement, but because the oral agreement provides insufficient evidence of the easement's terms and scope, the oral agreement is not itself enforceable. But the subsequent conduct of the parties—obvious and substantial expenditures by the promisee of the oral agreement without objection from the promisor—provides evidence of the intended scope of the original agreement. If the promisor believed the promisee's conduct was inconsistent with the original agreement, he surely would have objected at the time the promisee proceeded to make improvements.[41] Since no objection was registered, a court can enforce the oral promise with confidence that the original agreement contemplated at least the use currently made by the promisee.

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implication of easements in cases, such as underground sewers and drains, in which the burden was not visibly apparent upon reasonable inspection).

38. See Restatement, supra note 15, § 476 comment g ("a constantly decreasing degree of necessity will require a constantly increasing clearness of implication from the nature of the prior use").

39. See generally 2 Am. L. Prop., supra note 15, § 8.38 ("it must be assumed that the granter intended the grantee to have the benefit of a right of way").

40. See, e.g., Shepard v. Purvine, 196 Or. 348, 369, 248 P.2d 352, 361–62 (1952).

41. See, e.g., Johnston v. McFerren, 232 Iowa 305, 312, 3 N.W.2d 136, 139 (1942) ("[Appellant] saw appellees improve their property at an expense of $5,600 in reliance on the survey, without objection on his part. It would be inequitable to permit appellant to change his position under the circumstances here.").

By now the intent-enforcing justification for the doctrines that allocate border strips to long-time users rather than record owners should be obvious, especially when the long-time user's argument is founded on an express oral agreement. As in the easement by estoppel situation, the argument rests on the premise that the promisor in an unenforceable oral agreement would generally object immediately if his neighbor, the promisee, took action that in the promisor's view was inconsistent with the terms of the agreement. Even when no express oral agreement supports the inference of intent, long-term acquiescence to an existing use signals consent to making the use permanent, if we assume that landowners who do not intend to relinquish the rights conferred on them by record title would promptly register their objections with encroachers.[42]

B. *Critique*

These intent-enforcing justifications for doctrinal rules that depart from the geometric-box allocation are not without difficulty. First, they suggest tbat intent effectuation in a particular case is, or should be, exalted over all other social values. But in countless other contexts, legal doctrine subordinates party intent to other values. Legal doctrine reveals a constant struggle between rules and standards, and standards do not always win.[43] For example, formalities are sometimes enforced, even at the cost of intent effectuation—justice in the particular case.[44] Judges often apply legal doctrines in an effort to further goals other than intent enforcement.

Second, even assuming that one advances intent-enforcement as the preeminent value behind doctrines that depart from the geometric-

42. In fact, courts frequently indulge in the sometimes irrebuttable "presumption" that long-term acquiescence stems from earlier agreement. See, e.g., Mothershead v. Milfeld, 361 Mo. 704, 236 S.W.2d 343 (1951); Malone v. O'Connell, 86 R.I. 167, 171, 133 A.2d 756, 759 (1957) (acquiescence for statutory period provides "conclusive evidence" of agreement (quoting O'Donnell v. Penney, 17 R.I. 164, 167, 20 A. 305, 306 (1890))). See generally Browder, supra note 24, at 506–07 (acquiescence may raise a presumption of an unproved agreement or may be conclusive evidence of such an agreement).

43. See Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687–90, 1701–13 (1976).

44. Of course formalitites are themselves frequently justified as intent-effectuating mechanisms. That is, compliance with the formality provides evidence of intent that would otherwise be lacking, and failure to comply perhaps justifies inferring that the parties did not intend to be legally bound. See Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800–01 (1941); Gulliver & Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 6–9 (1941). But at least to the extent that the formalities are treated as rules rather than standards, they preclude inquiry into actual intent in particular cases, thus acting to frustrate some intent in the name of advancing intent generally. Typically, then, applying formalities strictly brings clamor for modification, as, for instance, by requiring only substantial compliance. See, e.g., Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975).

box allocation, the existing doctrines may not invariably effectuate party intent. All of the doctrines rely, in one form or another, on silence as assent. Take, for instance, the easement by necessity. The intent justification assumes that a seller who at severance retains land providing the buyer's only access to a road and who intends to restrict that access, would make explicit provision entitling him to do so. His silence in the face of the buyer's access problem is taken as assent.

But why assume that silence constitutes assent? The seller's silence could also rest on the hope that the buyer will not notice the absence of access rights (or of the right of access to utilities), and hence provide the seller with a more attractive deal. At least in an era where caveat emptor ideas shaped the consciousness of transacting parties it would seem odd to assume that a seller would, as a matter of course, inform the buyer of his predicament.[45] While the assumption might be more plausible in a different social context, perhaps even in the current context, that is, in part, the point. Whether silence indicates assent is a question that admits of no invariant answer. At best, one can say that the silence-as-assent formulation is more likely to reflect individual intent in some social contexts than in others. In any society, moreover, different individuals may be differently socialized. Even if silence generally may reflect assent within a particular society, Jones' silence may not reflect her assent if she does not know, or does not share, society's conventions.[46]

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45. Indeed, the very coexistence of cross-boundary allocations with caveat emptor ideas presents an apparent paradox. There are a number of possible explanations. First, hard-edged caveat emptor rules might not have been designed to reflect marketplace expectations, but as a judgment that the marketplace ought to be altered: sanctions would induce buyers to exercise the appropriate amount of care, even if the consequence was frustration of party intent in past transactions. Cf. supra notes 43–44 and accompanying text. Second, relations between seller and buyer when they were to become neighbors might have been marked by different social norms from those that prevailed more generally in the commercial marketplace. Cf. infra notes 143–54 and accompanying text. Third, cross-boundary allocations may have been propelled by considerations other than intent-enforcement.

Another potential explanation is that the rise of cross-boundary allocations paralleled a decline in acceptance of caveat emptor ideas. This explanation suggests a fascinating historical study, but one beyond the scope of this Article. Cf. supra note 16.

46. In this respect, silence is like language. The relationship between particular words and the state of mind of the writer (or speaker) is culturally determined. The point was made explicit even in the American Law of Property's discussion of implied easements:

> Language can never be a wholly satisfactory means of indicating intention, since language presupposes a community of thought which never does nor can fully exist. The thought of each man is to some extent unique. In view of this, the language used by a particular individual for the purpose of expressing his intention must be interpreted in the light of the particular situation of that individual relevent to his use of the language.

2 Am. L. Prop., supra note 15, § 8.31, at 256.

But the inherent imprecision of language (or nonverbal forms of communication) is as much due to the characteristics of the interpreter as to the characteristics of the

The intent justification for doctrinal departures from the geometric-box allocation is problematic on another count as well. Even if two parties unambiguously manifest their intent to depart from the geometric-box allocation, this hardly provides cause for binding those who are not parties to the original agreement. Yet cross-boundary allocations bind successors as well. Original intent cannot justify extending the burden to successor landowners unless they too have some basis for learning of that original intent.

The recording statutes provide that basis when express easements are involved, but implied easements by nature are not recordable. While the apparency requirement for easements by implication provides, in theory, an opportunity for subsequent purchasers from servient owners to notice the encroachment and, if concerned, to inquire about it, courts in practice apply the apparency requirement so loosely that notice to subsequent purchasers is largely fiction.[47] Thus, when underground sewer pipes are deemed apparent because a plumber, upon careful examination, might have discovered them,[48] the apparency requirement provides little protection to subsequent servient owners. Moreover, with easements by necessity there is not even a firm theoretical basis for imputing notice to subsequent servient owners. Even the original servient owner, unless he was the grantor of the dominant parcel, might not know whether the dominant owner has alternative access, and subsequent servient owners have still less reason to know, especially if the landlocked owner has not previously needed nor sought access to his parcel.[49] The title search that would be necessary for all potential servient owners to rule out ways of necessity would be quite burdensome, especially when the landlocked owner could so easily provide for his needs by expressly retaining and recording an easement upon severance. Easements by estoppel and boundary dispute resolutions present similar notice problems.

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speaker. To draw conclusions about one's intention from the particular action taken or words spoken requires an interpretive process. The characteristics of any interpreter inevitably bear the mark of her society (which, of course, is influenced by the interpretive tendencies of its members). See Fish, Wrong Again, 62 Tex. L. Rev. 299, 304–05, 313–14 (1983); Fiss, Objectivity and Interpretaion, 34 Stan. L. Rev. 739, 745–46 (1982); see also Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1327 (1984) ("[A]greement [about what a rule means] is not a function of particularly clear and perspicuous rules; it is a function of the fact that interpretive assumptions and procedures are so widely shared in a community that the rule appears to all in the same (interpreted) shape.").

47. See generally 3 R. Powell, supra note 36, ¶ 411(2)(a) (apparency interpreted to mean discoverable after careful inspection rather than obvious or visible).

48. See Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943).

49. Perhaps in recognition of this difficulty, the Iowa Supreme Court has said that "[a]n easement by necessity ordinarily may not be claimed by any except the immediate parties to the transaction." Schwob v. Green, 215 N.W.2d 240, 244 (Iowa 1974). Despite the language of the Iowa court, easements by necessity generally appear to extend to successors-in-interest of the parties who owned the land at severance. See Restatement, supra note 15, § 487; 3 Powell, supra note 36, ¶ 418.

Difficulties with the intent-enforcing justification, especially for easements by necessity, have been acknowledged both in judicial opinions and in academic commentary.[50] But if the parties have not manifested an intention to create an easement by necessity or any other cross-boundary allocation, indeed if the parties have not manifested any intention at all with respect to cross-boundary allocations, what basis is there for creating cross-boundary allocations by operation of law? Why not instead leave the parties to clarify their intentions by additional private bargains?

One answer is that easements by necessity rest on the "public policy that no land should be left inaccessible or incapable of being put to profitable use."[51] Similar efficiency justifications have been offered for other cross-boundary allocations. Thus an "innocent" encroacher may not be required to remove an improvement made on his neighbor's land (although he may be required to pay damages) on the ground that requiring removal would promote waste of resources.[52]

The Coase Theorem, however, teaches that concerns about waste or inefficiency are unwarranted. If development of the land is worth more to its owner than refusing an easement is worth to his neighbor, a bargain will be struck, and the land will be developed, at least in the absence of transaction costs.[53] Academic commentary generally assumes that transaction costs are at their lowest when the transaction need involve only two parties, as is often the case with access easements and boundary disputes.[54] It should follow, then, that if parties have once failed to express their intent to make a bargain that clearly would benefit both of them, very little prevents them from correcting their omission by striking a new bargain. If no new bargain is struck, one might conclude, a transfer of access rights of other cross-boundary rights must offer no significant efficiency gains.

The question remains: why create cross-boundary allocations by operation of law? The next Part examines the bilateral monopoly relationship that exists between many neighboring landowners. If the existence of bilateral monopoly impedes efficient bargains between neighboring landowners, then a rule that imposes these bargains—cross-boundary allocations—by operation of law might itself be efficient. These allocations might be efficient even if the neighboring land-

50. See, e.g., Hollywyle Ass'n v. Hollister, 164 Conn. 389, 400, 324 A.2d 247, 253 (1973); Simonton, Ways by Necessity, 25 Colum. L. Rev. 571, 572–74 (1925).

51. *Hollywyle Ass'n*, 164 Conn. at 400, 324 A.2d at 253; Simonton, supra note 50, at 572–74.

52. See, e.g., Penelko, Inc. v. John Price Assocs., 642 P.2d 1229, 1236 (Utah 1982) (burden of removing improvements "would involve substantial economic waste").

53. See Coase, supra note 7, at 2–8.

54. See, e.g., Calabresi & Melamed, supra note 5, at 1094–1105; Merrill, supra note 3, at 21–22.

owners never actually formulated an intent to transfer rights from one to the other.

## III. Problems in Bilateral-Monopoly Situations

### A. *The Framework*

A timeworn example will illustrate the theoretical difficulties in bilateral-monopoly situations. In *The Problem of Social Cost*,[55] Ronald Coase analyzed the case of straying cattle that destroy crops on neighboring land. As the size of the cattle herd grows, the crop damage increases. To embellish slightly on Coase's example, let us assume the following relationship among the following factors: number of steers, net revenue to the cattle raiser (after all costs other than any share of crop damage he must bear), crop damage, and net revenue to the farmer (after all costs, including the costs inflicted by straying cattle):

TABLE 1

| *No. of Steers* | *Net Annual Revenue from Cattle Raising* | *Crop Damage* | *Net Annual Revenue from Farming* |
|---|---|---|---|
| 0 | 0 | 0 | 10 |
| 1 | 4 | 1 | 9 |
| 2 | 8 | 3 | 7 |
| 3 | 10 | 6 | 4 |
| 4 | 11 | 10 | 0 |
| 5 | 10 | 15 | -5 |

Assume that both the rancher and the farmer seek to maximize their profits. Economists, both before and after Coase, would agree that if the rancher has to pay the farmer for damages caused by his cattle, and if the pricing system works smoothly, the rancher will raise two steers.[56] Coase, however, concluded that even if the rancher is not required to pay the farmer for crop damage, the rancher will raise two steers, again so long as the pricing system works smoothly.[57] This conclusion, however, is true only if one assumes that the existence of bilateral monopoly will not impede bargaining between the parties. While Coase was careful to stipulate that his conclusion would hold true only if "the pricing system is without cost,"[58] his choice of illustrations laden with bilateral-monopoly implications suggest that Coase did not focus on the existence of bilateral monopoly as an imperfection in the pricing system.

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55. Coase, supra note 7, at 2–8.

56. Id. at 2–6 (acknowledging that "most economists would presumably agree" that the efficient solution would be reached "when the damaging business has to pay for all damage caused *and* the pricing system works smoothly").

57. Id. at 6–8.

58. Id. at 2.

Take the situation of the rancher who is liable to the farmer for damages caused by straying cattle. If crop damages were not a factor, the rancher would choose to raise four steers providing an annual revenue of $11. Assuming there are no barriers to entry into the cattle ranching business, the rancher could sell all or part of his right to raise steers on the ranch for up to $11. There is, however, only one buyer in the market—the neighboring farmer—who would be willing to pay more than $11, since if he bought the rancher's right, he could raise two steers producing revenue of $8 and still reap $7 in crop revenue. At the same time the farmer, if he wishes to buy protection from crop damage due to straying cattle, can buy complete protection from a variety of fencing purveyors for, to use Coase's figure, $9. But only the rancher is in a position to sell the farmer protection on terms more favorable than the terms available from fencing purveyors. The rancher can provide the farmer with $7 worth of protection at a cost to the farmer of only $3. The farmer, then, is a monopolist in the market for the rancher's cattle ranching rights; the rancher is a monopolist in the market for providing protection to the farmer. The monopoly is bilateral.[59]

The absence of competititive pressures on the farmer and the rancher removes constraints on the the parties' negotiating positions. Neither party need fear, within a relatively wide bargaining range, that the other will obtain substitutes elsewhere. Each party need only fear that an unfortunate original offer will result in an unfavorable selling price, or perhaps no sale at all. As a result, each party may engage in strategic behavior designed to maximize his own share of gains from trade resulting from a bargain—strategic behavior that the prospect of competitors (absent in the bilateral monopoly situation) would limit sharply.

The assumption that the parties will strike a bargain in bilateral-monopoly situations, albeit at an indeterminate price, is an assumption Coase makes explicitly.[60] Donald Regan has attacked that assumption,

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59. For general discussions of bilateral monopoly, see E. Mansfield, Microeconomics 296–97 (3d ed. 1976); D. Watson & M. Holman, Price Theory and Its Uses 345–46 (4th ed. 1977).

60. What payment would in fact be made would depend on the shrewdness of the farmer and the cattle-raiser as bargainers. But . . . the payment would not be so high as to cause the cattle-raiser to abandon this location and . . . such an agreement would not affect the allocation of resources but would merely alter the distribution of income and wealth as between the cattle-raiser and the farmer.

Coase, supra note 7, at 5. Coase acknowleded the possibility of strategic bargaining: "It might be thought that it would pay the cattle-raiser to increase his herd above the size that he would wish to maintain once a bargain had been made, in order to induce the farmer to make a larger total payment. And this may be true." Id. at 7–8. Ultimately, however, he dismissed the problem: "But such manoeuvres are preliminaries to an agreement and do not affect the long-run equilibrium position, which is the same whether or not the cattle-raiser is held responsible for the crop damage brought about by his cattle." Id. at 8.

recognizing that the thesis that bargains will be reached "is a proposition in the theory of games, and not a proposition about traditional markets or competitive equilibrium,"[61] and suggesting "that the Coase Theorem even as a proposition in the theory of games is open to doubt."[62]

More recently, Robert Cooter has developed an economic model of bargaining that purports to demonstrate why bargaining will not invariably lead to efficient outcomes, and hence, why the Coase Theorem will not always hold true.[63] Cooter's argument may be summarized as follows: Each bargainer will choose between alternative strategies by evaluating the potential response to each. Since the actual response of any particular opponent is uncertain, the best the bargainer can do is choose a strategy that is "optimal against the distribution of an opponent's strategies, but not necessarily optimal against a particular opponent drawn randomly from the distribution."[64] Whether the strategy is optimal against the particular opponent depends, in part, on how far the particular opponent deviates from the norm in his time preference, risk aversion, and spitefulness. If the bargainer's strategy is not optimal against the particular opponent, bargaining fails, and the efficient outcome is not reached.

Of course, once bargaining has failed, each bargainer has learned more about the bargaining strategy of his particular opponent, making agreement more likely in a subsequent negotiation. Only if there is a time limit on bargaining, as Cooter assumes for purposes of his model, need the initial failure be a final one. So long as the bilateral-monopoly situation persists, and so long as the parties treat past bargaining efforts as sunk costs, the likelihood of ultimate agreement should, given Cooter's model, increase with each failed negotiation.[65]

Even in those cases without a time limit, however, Cooter's model suggests the possibility that efficient bargains will not be reached. Sup-

61. Regan, The Problem of Social Cost Revisited, 15 J.L. & Econ. 427, 428 (1972).

62. Id. at 428.

63. Cooter, The Cost of Coase, 11 J. Legal Stud. 1 (1982). In addition, Oliver Williamson has suggested that in commercial transactions, bilateral-monopoly situations pose market exchange difficulties that lead to integration of economic activities within a single firm. See Williamson, The Modern Corporation: Origins, Evolution, Attributes, 19 J. Econ. Literature 1537, 1548–49 (1981). Others, notably Mark Kelman, have questioned as an empirical matter the proposition that private negotiations will reach the same "efficient" result no matter how rights are allocated initially. See Kelman, Consumption Theory, Production Theory, and Ideology In The Coase Theorem, 52 S. Cal. L. Rev. 669, 676–85 (1979).

64. Cooter, supra note 63, at 23.

65. See Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies, 32 Stan. L. Rev. 1075, 1092 n.37 (1980); see also Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615, 629–31 (1985) (in the absence of deadlines, two parties will continue negotiating until the transaction costs of doing so outweighs the potential gains from an agreement).

pose, for instance, that a bargainer faces a distribution of opposing strategies that makes the probability of initial bargaining failure high unless the bargainer is willing to settle for a small share of the potential gains from trade. If the costs of transmitting offers and counter-offers are high, the bargainer may find that his best strategy is to eschew bargaining altogether. By doing so, he not only avoids those transmission costs, but he also makes his threat of non-cooperation more credible in other cases, perhaps improving his relative bargaining position.

Regan and Cooter, then, establish that even in the absence of transaction costs no inexorable economic principles require the conclusion that bilateral-monopoly situations will result in agreements that realize gains from trade.[66] And, of course, as Coase himself recognizes,[67] transaction costs frequently do impede efficient bargains.

Direct testing of the effect of bilateral monopoly on actual land transactions, or on other actual transactions, is hardly possible. A test that examined only aborted and completed transactions in a chosen area would exclude cases in which bilateral-monopoly problems discourage parties from beginning negotiations. Finding those cases would be possible only if one were to investigate the preferences of every landowner in the sample area. Neither economics nor psychology provides a mechanism for obtaining reliable data about those preferences without any transactions to stand as evidence. Moreover, even when dealing with transactions started but aborted, one cannot discover with great certainty the reasons for the transaction's failure. One or both parties might attach sufficient idiosyncratic value to the rights at stake to make the transaction less advantageous to them than it appears to an outside observer. As a consequence, transactions that would appear to make both parties better off might be aborted because the parties do not so regard the transaction. There is, of course, no way for an observer to distinguish between transactions aborted because of strategic bargaining and transactions aborted because of high idiosyncratic value.

As a result, most of the empirical research on bilateral monopoly has focused on controlled experiments rather than real world transactions.[68] The empirical work reinforces the Coase Theorem in two-

66. Indeed, Oliver Williamson's noteworthy work on bilateral monopoly suggests contracting parties seek to avoid facing bilateral-monopoly situations. Williamson has recognized that bilateral monopolies arise between contracting parties when one or both of the parties make transaction-specific investments. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations, 22 J.L. & Econ. 233, 241–42 (1979). He has suggested that "[t]he joining of opportunism with transaction-specific investments . . . is a leading factor in explaining decisions to vertically integrate." Id. at 234 n.4; see also id. at 250–53 (vertical intengration likely where assets are specialized and thus not easily transferred to other uses); Williamson, supra note 63, at 1547–50 (1981) (more specialized assets will lead to bilateral contracting).

67. Coase, supra note 7, at 15.

68. Among the empirical studies, perhaps the most influential have been L.

party situations as a strong tendency but not as an absolute imperative.[69] In practice, however, the instances in which strategic bargaining

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Fouraker & S. Siegel, Bargaining Behavior (1963) and S. Siegel & L. Fouraker, Bargaining and Group Decision Making (1960). More recent work includes Harnett & Cummings, Bilateral Monopoly Bargaining: An International Study, *in* Contributions to Experimental Economics (H. Sauerman ed. 1971); Hoffman & Spitzer, The Coase Theorem: Some Experimental Tests, 25 J.L. & Econ. 73 (1982); Johnson & Cohen, Experiments in Behavioral Economics: Siegel & Fouraker Revisited, 12 Behav. Sci. 353 (1967); Komorita & Brenner, Bargaining and Concession Making Under Bilateral Monopoly, 9 J. Personality & Soc. Psychology 15 (1968).

69. In these experiments, participants generally have been given tables detailing the value of particular transactions to them and sometimes to their trading partners, and then have been instructed to bargain with those partners. Participants are instructed that they will be able to keep at least a share of their earnings, thus simulating real world bargaining conditions. See L. Fouraker & S. Siegel, supra note 68, at 31–32; Harnett & Cummings, supra note 68, at 125–27; Hoffman & Spitzer, supra note 68, at 83. The rules for bargaining, the amount of information provided, and the payoffs involved have varied with the individual experiment. Beginning with the path-breaking work of Siegel and Fouraker, however, the studies agree on at least one conclusion: when two parties bargain, they generally reach a Pareto-optimal result. The studies, then, lend some support to the Coase Theorem and suggest that bilateral-monopoly problems do not frequently impede efficient transactions.

The empirical work, however, reinforces the Coase Theorem in two-party situations as a strong tendency, not as an absolute imperative. Even in the experiments conducted by Hoffman and Spitzer that the authors take as support for the Coase Theorem, about five percent of bargainers failed to reach Pareto-optimal results in two-party situations. Hoffman & Spitzer, supra note 68, at 92 (2 out of 44 tests produced non-Pareto-optimal results). Other studies have produced higher percentages of deviation from Pareto-optimal results. See, e.g., S. Siegel & L. Fouraker, supra note 68, at 31–35 (in circumstances where payoff differences are sufficiently small, only 36% of bargaining parties reached Pareto-optimal results). Siegel and Fouraker found that parties were less likely to conclude Pareto-optimal bargains when, as in real life, they had incomplete information about the bargain's value to their trading partners. Id. They also found, not unexpectedly, that parties became less likely to conclude Pareto-optimal bargains as the difference in payoff between optimal and nonoptimal bargains decreased. Id. at 40–41. That is, parties may be less likely to take the trouble to negotiate to optimal results if the incremental payoff for doing so is small. To summarize briefly, even if the experimental work is taken as an accurate reflection of bargaining in the real world, that work does not establish that bilateral monopolies never impede efficient exchanges.

Moreover, the premise that the experimental work simulates real world bargaining is not immune from attack. The small stakes involved, even if larger than the alternatives open to the participants for time spent in the experiments, might have produced a game-like atmosphere that resulted in a different motivation—perhaps greater, perhaps smaller—to conclude bargains. The participants themselves—generally students, some as young as eighth graders, see Druckman & Bonoma, Determinants of Bargaining Behavior in a Bilateral Monopoly Situation II: Opponent's Concession Rate and Similarility, 21 Behav. Sci. 252, 255 (1976)—might have had reactions different from those of more experienced landowners. As the experiments were set up, there was generally no opportunity cost to bargaining; indeed, to the extent students were paid on an hourly basis, the experiments might have provided incentives to bargain. Finally, consider Mark Kelman's criticism of the Coase Theorem. Kelman suggests that consumers value realized income differently from opportunity cost income. Kelman, supra note 63, at 688–89. But the experiments have provided no mechanism for distinguishing between the two and thus for testing Kelman's suggestion.

does inhibit efficient results are legion. Not all instances of individual landowners who hold out against development can be explained as instances of high idiosyncratic value; many are the result of failed bargaining strategy.[70] The question here is whether doctrinal departures from the geometric-box allocation can be characterized as efficiency-promoting rules that avoid the bargaining failures that might otherwise accompany bilateral monopolies.

### B. *Bilateral-Monopoly Problems as a Justification for Departures from the Geometric-Box Allocation*

1. *Competing Dangers: Strategic Bargaining v. High Administrative Costs.* — Suppose that efficient bargains are less likely to be made in bilateral-monopoly situations than in competitive markets, or suppose, at least, that transaction costs are higher in bilateral-monopoly situations. From an efficiency perspective, it would be relatively more important in bilateral-monopoly situations to assign entitlements (or at least the right to condemn entitlements[71]) to their highest valuing user. By correctly assigning entitlements in this way, the legal system could reduce the possibility that strategic bargaining would result in excessive negotiation or unproductive use of resources.

Attempts to devise rules that assign entitlements to their highest valuing users, however, present difficulties. First it is difficult to determine who is the highest valuing user of an entitlement. The bilateral-monopoly situation by definition involves no competitive or even non-competitive market on which the right can be valued; there is only one buyer and one seller, each of whom has incentives to disguise the entitlement's value to himself. If a particular rule allocates an entitlement to the lower valuing user, negotiations to correct the error will, by hy-

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70. For graphic description of failures to reach efficient bargains in the context of New York real estate transactions, see A. Alpern & S. Durst, Holdouts! (1984). Alpern & Durst discuss many instances in which decisions to hold out almost certainly reflect strategic bargaining rather than high idiosyncratic value. See, e.g., id. at 15–18 (owner of corner at 34th St. and Broadway in New York City agrees to sell to Macy's for $250,000; then sells to others seeking to extract more from Macy's; Macy's builds around the corner parcel).

Examples of failed bargains in bilateral monopoly situations are not limited to land use. As Cooter points out, "[l]itigation drags on for months, strikes occur, nations persist in wars." Cooter, supra note 63, at 24.

71. A number of doctrinal rules that limit aggrieved landowners to damages rather than injunctive relief amount, in effect, to private rights to condemn entitlements. See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (victims of nuisance limited to money damges); Burns v. Goff, 262 S.E.2d 772 (W. Va. 1980) (victim of boundary encroachment limited to money damages).

In some instances, legislation has created explicit private rights of condemnation. Compare Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970) (sustaining constitutionality of statute permitting condemnation of private right of access) with Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964) (holding statute unconstitutional for lack of a public purpose).

pothesis, be difficult. No reliable, cheaply administrable mechanism exists for discovering the relative value the parties place on an entitlement.[72]

Moreover, a rule that is sufficiently uncertain in application would increase the frequency of litigation. Uncertainty makes it more likely that parties to a potential entitlement dispute would assign slightly, or even vastly, different probabilities to their respective prospects in litigation.[73] If the uncertainty induces optimism in both parties about litigation results, the impetus for private settlement may be small. Uncertainty, then, may reduce the incentive for, and the likelihood of, ex ante private bargaining to resolve entitlement allocation problems.[74] Of course the disadvantage of a rule that inhibits negotiated settlement is less important if other institutional structures make successful bargains unlikely in any event. In nuisance cases involving hundreds of parties, for instance, the impact of an uncertain rule on ex ante bargaining is not significant if, following the conventional wisdom, free-rider or holdout problems would prevent consummation of private bargains however use rights were allocated.[75] Thus, in bilateral-monopoly situations, uncertainty would be most troublesome if, as some empirical studies suggest, successful bargains generally would be struck absent the uncertainty.

Consider now the doctrinal departures from the geometric-box allocation. If these doctrinal rules allocate land entitlements to their highest valuing users, the rules may reduce the dangers of strategic bargaining. But the rules might nevertheless be inefficient if they produce heavy administrative cost (including the cost of error in identifying the highest valuing user), or if they impede private resolution of entitlement disputes. The geometric-box allocation, then, with its virtues of relative certainty and rigidity, might be more efficient than alternative rules unless two conditions are met: first, the efficiency advantages of a different allocation are relatively clear without extensive, individualized investigation by courts, and second, the alternative cross-boundary entitlements can themselves be defined with some rigidity (or alternatively, the chance that the parties will bargain is sufficiently slim if a rigid rule will provide an insignificant incentive to private negotiation).

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72. The auction sale, in theory, provides a mechanism for ascertaining the relative value landowners attach to a particular right. But auction sales are fraught with practical difficulties. First, they require prospective bidders with limited assets to go to the expense of obtaining financing commitments even before biddings, perhaps enabling some bidders with greater means to win even when they attach less value to the rights involved. Thus, when co-tenancies are partitioned, courts sometimes order partitions-in-kind, rather than sales when one party lacks ready financial resources. See Note, Partitions in Kind: A Preference Without Favor, 7 Cardozo L. Rev. 855, 872–76 (1986).

73. See Merrill, supra note 3, at 24–25.

74. See Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 265 (1974).

75. See Merrill, supra note 3, at 25–26.

Most existing departures from the geometric-box allocation can be fit into this framework.

2. *Easements by Necessity and Implication.* — Consider first the case of the landlocked owner. The bilateral monopoly in which the landlocked owner and his neighbor are situated may prevent private negotiation of an access easement, or it may make the negotiations costly. Yet when the issue is access, we may plausibly believe that the landlocked owner generally attaches greater use value to access than his neighbor does to depriving him of access.[76] By allocating the right of access to the landlocked owner, the easement-by-necessity doctrine avoids whatever bargaining difficulties the parties would otherwise face.

Recognizing easements by necessity, moreover, avoids the pitfalls that would accompany more general attempts to depart from the traditional geometric-box allocation of use rights. Administrative costs are low—a court need only ascertain that a landowner is landlocked and that he became landlocked on severance[77]—and the easement-by-necessity rule provides a certain background for negotiations and hence produces few impediments to ex ante bargaining.

Easements by implication introduce modestly greater uncertainty and administrative cost. Parties must anticipate, and courts must reach, decisions about "apparency" and "necessity."[78] If, however, strategic

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76. In fact, the intent-enforcing justification for easements by necessity rests on this premise. Unless one assumes that owners of landlocked parcels value access more than access owners value the right to block access, there is no basis for the inference that the parties would not have made a sale that denied access to the landlocked owner. See supra notes 36–39 and accompanying text. If the right to block access were more valuable than the right to access, just the opposite conclusion—the parties never would have made an agreement that prevented the access owner from blocking access—would be more plausible.

77. But see Chandler Flyers, Inc. v. Stellar Dev. Corp., 121 Ariz. 553, 592 P.2d 387 (Ct. App. 1979), where the court declined to find an easement by necessity for aircraft access where highway access was available to the access-seeking landowner. To award such easements "by necessity" would likely increase administrative burdens and introduce uncertainty into the bargaining process.

78. See, e.g., Motel 6, Inc. v. Pfile, 718 F.2d 80, 85–87 & n.17 (3d Cir. 1983) (access to sewer treatment facility "open and visible" and necessary); Koestel v. Buena Vista Pub. Serv. Corp., 138 Ariz. 578, 676 P.2d 6 (Ct. App. 1984) (water pipe apparent; necessity presents issue for trial); Schmidt v. Eger, 94 Mich. App. 728, 289 N.W.2d 851 (Ct. App. 1980) (drainage ditch necessary; not apparent at severance); Flaherty v. DeHaven, 302 Pa. Super. 412, 448 A.2d 1108 (Super. Ct. 1982) (easement by implication to use roadway sustained despite alternative access; slight degree of necessity outweighed by other factors).

The uncertainty that accompanies liberal implication of easements has not, of course, escaped judicial notice:

> To hold that an easement by implication exists here would run counter to the purpose of the recording statutes, would derogate from an explicit warranty deed and might seriously impede the development of future subdivisions. If so little activity were sufficient to impose an easement after severance of a lot from the main tract, no subdivision homeowner could be secure in the record title to his property.

bargaining costs are high, these too might be justified on efficiency grounds.

3. *Easements by Estoppel.* — Next, consider easements by estoppel. The easement-by-estoppel exception to the geometric-box allocation operates only when there are assurances that the landowner allocated the easement values its use most highly. Easements by estoppel are found only when a landowner has made substantial expenditures. Moreover, once those expenditures are made, the value of the easement to the landowner must be at least equal to the cost of the expenditures—otherwise, he would not have made them.[79] Moreover, the landowner's decision to rely upon his neighbor's permission rather than use his own land indicates that even before improvements the right to use the neighbor's land was of positive value to the improving landowner. By contrast, the neighbor who, first, gives oral permission for use of his land and, second, takes no action while the promisee uses his land, indicates that the existing use is not a substantial interference with his own use rights in the land. If the promisee's use were inconveniencing his neighbor, one would have expected prompt action by the neighbor to stop the encroaching use.[80] In most instances, then, easement-by-estoppel doctrine should allocate rights to highest valuing users.

Similarly, recognition of easements by estoppel should not have substantial effect on ex ante bargaining. It is true that a landowner who can acquire an easement right by making improvements that elicit no objection might be less inclined to negotiate for an express right to make the improvements. But a landowner who does make improvements without an express grant takes the risk that his neighbor will object immediately, leaving the easement seeker in a bargaining position weaker than the one from which he started. Moreover, easements by estoppel are often recognized as a result of oral agreements between neighbors on terms intimate enough that a writing would never be sought whatever the legal rule involved.[81]

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Fones v. Fagan, 214 Va. 87, 196 S.E.2d 916, 920 (1973).

79. Of course with time, the value of the easement might decline to a level below the cost of the improvements. One can be certain only that value exceeds cost at the time the cost is incurred. Note, however, that controversy exists about the continued duration of easements by estoppel after the expenditures have been fully amortized. See, e.g., Restatement, supra note 15, § 519(4) (license that becomes irrevocable through estoppel may continue "to the extent reasonably necessary to realize upon . . . expenditures").

80. As with the intent-enforcing justification, this conclusion depends on the assumption that landowners are socialized to register objection when they perceive interference with rights they value. See infra notes 108–113 and accompanying text.

81. See, e.g., Shepard v. Purvine, 196 Or. 348, 369, 248 P.2d 352, 361–62 (1952) ("These people were close friends and neighbors . . . . One's word was considered as good as his bond. Under the circumstances, for plaintiffs to have insisted upon a deed would have been embarassing . . . .").

By contrast, where a writing does define the relationship between the parties, courts

A more serious difficulty is the effect of easement-by-estoppel doctrine on what might be termed settlement negotiations after the improvements have been made but before any litigation has arisen. Easement-by-estoppel doctrine is not so mechanical that the negotiations will necessarily proceed against a clear background. But only rarely may an improver rely, in negotiations, on the possibility that he has acquired an easement by estoppel. Unless there has been some course of dealing between the neighbors that reasonably could be construed as oral permission, the improvement will not give rise to an easement by estoppel.[82] Perhaps, also, the chances of successful negotiations between these parties are sufficiently slim that the impact of the easement-by-estoppel rule on ex ante negotiations is not a serious concern.[83]

4. *Easements by Prescription.* — Easements by prescription, too, can be justified as mechanisms for overcoming bilateral-monopoly problems. First, a landowner's long-term use of his neighbor's land without objection from the neighbor indicates that the landowner's use does not interfere significantly with the use value of his neighbor's land. The requirements that the use be open and notorious, continuous, and hostile assure that the neighbor has been or could have been aware of the offending use,[84] and that the neighbor could not have mistakenly believed that the landowner's use was pursuant to a perhaps misunderstood grant of permission. In those states that require exclusive use for a prescriptive easement to ripen,[85] it is even less likely that a prescriptive easement will have an adverse impact on the use value of the neighbor's land. Particularly when the neighbor need do so little to interrupt the prescriptive period,[86] failure to take any action suggests that the right to prevent continued use of the easement would be of

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are less amenable to estoppel claims. See, e.g., Rose v. Webster, 51 Or. App. 293, 298, 625 P.2d 1329, 1332 (Ct. App. 1981); Storms v. Tuck, 579 S.W.2d 447 (Tex. 1979).

82. See, e.g., State Highway Comm'n v. Thornton, 271 N.C. 227, 239–40, 156 S.E.2d 248, 257–58 (1967); Waibel v. Schleppi, 77 Ohio App. 305, 308, 62 N.E.2d 897, 898 (Ct. App. 1945); cf. Mugaas v. Smith, 33 Wash. 2d 429, 434, 206 P.2d 332, 335 (1949) (rejecting an estoppel argument in a boundary dispute context stating: "It is clear that there was no admission, statement, or act on the part of the respondent which could be construed as inconsistent with her present position. No inquiry was made of her as to the boundary line before the appellants made their purchase.").

83. See Merrill, supra note 3, at 24–25.

84. See, e.g., Kaupp v. City of Hailey, 110 Idaho 337, 340, 715 P.2d 1007, 1010 (Ct. App. 1986).

85. See, e.g., Wood v. Denton, 53 Mich. App. 435, 440, 219 N.W.2d 798, 801 (Ct. App. 1974); Scoville v. Fisher, 181 Neb. 496, 504, 149 N.W.2d 339, 344 (1967).

86. See, e.g., Cal. Civ. Code § 1008 (West 1982) (no easement by prescription when owner posts a sigu). But see Trustees of Forestgreen Estates v. Minton, 510 S.W.2d 800, 803 (Mo. Ct. App. 1974) (construction of chains and barricades does not interrupt prescriptive period if prescriptive user promptly removes the obstacles). See generally Commentary, Interruption of Use: A Prescription for Prescription, 25 U. Fla. L. Rev. 204 (1972) (surveying ways in which a landowner may interrupt use of land and thereby end prescription).

value to the neighbor only to the extent that it would give him leverage in negotiations with the easement seeker. Recognizing easements by prescription, then, is likely to allocate rights to the highest-valuing user.

Moreover, the fixed time requirement and factual predicates for establishing prescriptive rights furnish a rather firm background for ex ante negotiations. Until the prescriptive period has expired, the geometric-box allocation remains intact. It is true that the precise date on which the prescriptive use began, or became adverse, may be subject to dispute,[87] but in any event, use must continue for a long period before the geometric-box allocation is threatened. Even after that point, a landowner who would establish an easement by prescription must prove that his use has been continuous, non-permissive, and perhaps even exclusive. While these doctrinal hurdles are, of course, inherently flexible,[88] they provide at least some background for negotiations.[89] And because the number of instances of dispute in which prescriptive claims are even colorable is small relative to the total number of potential land use conflicts, prescription rules should not generally operate to impede bargaining between neighbors.

5. *Boundary Dispute Doctrines.* — Existing allocational and remedial rules that permit an initial improver to encroach on his neighbor's land can be justified on similar efficiency grounds. Adverse possession doctrine, for instance, awards record title to the first appropriator only when his use has been continuous and exclusive for a substantial period of time.[90] Statutes frequently require cultivation or improvement as a predicate for adverse possession claims.[91] When these doctrinal requirements are satisfied, the initial appropriator can provide a court with reliable evidence that he does attach value to the boundary strip. Similarly, unless we assume that he intended to make a gift, the sub-

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87. See, e.g., Zimmerman v. Newport, 416 P.2d 622 (Okla. 1966); Hamann v. Brimm, 272 Or. 526, 537 P.2d 1149 (1975).

88. Merrill, Property Rules, Liability Rules, and Adverse Possession, 79 Nw. U.L. Rev. 1122, 1144 (1985).

89. The background would be clearer if courts ignored state of mind, and instead focused on readily ascertainable acts of dominion, in evaluating adverse possession claims. Professor R.H. Helmholz has recently questioned whether courts ignore the "good faith" of the adverse possessor to the extent that they (and commentators) say they do. Helmholz studied reported adverse possession decisions from 1966 through 1983 and concluded that "where courts allow adverse possession to ripen into title, bad faith on the part of the possessor seldom exists." Helmholz, Adverse Possession and Subjective Intent, 61 Wash. U.L.Q. 331, 347 (1983).

Helmholz's conclusions should not be startling. In fact, they are quite consistent with the treatment courts have long accorded to bad-faith encroachers who rely on other boundary dispute doctrines to avoid removing their encroachments. For more general discussion, see infra notes 97–102 and accompanying text.

90. See, e.g., Tapley v. Peterson, 489 N.E.2d 1170, 1171–72, 1174–75 (Ct. App. 1986); Mendonca v. Cities Serv. Oil Co., 354 Mass. 323, 237 N.E.2d 16 (1968); Inn Le' Daerda, Inc. v. Davis, 241 Pa. Super. 150, 360 A.2d 209 (Super. Ct. 1976).

91. See, e.g., Idaho Code §§ 5-208, 5-210 (Michie 1979); N.Y. Real Prop. Acts Law §§ 512, 522 (McKinney 1979); Wisc. Stat. Ann., §§ 893.25, 893.26 (West 1983).

stantial expenditure required to establish a claim by estoppel[92] offers assurance that the improver attaches use-value to the boundary strip. Claims to title by acquiescence offer similar protection.[93]

By contrast, acquiescence, estoppel, and adverse possession all involve situations where the first appropriator's neighbor has demonstrated virtually no concern with the possessor's occupation. From that inaction one might infer that the only value the neighbor attaches to the strip is the value the strip would have in a transaction with the first appropriator. The inaction at least demonstrates that the neighbor has not, for a substantial period of time, attached enough value to the right to use the strip to impel him to act to remove the encroacher. These allocational rules, then, depart from the geometric-box allocation only when the first improver has demonstrated that he attaches significant use value to the border strip, and when the neighbor has not demonstrated that he attaches any.

Of course in some instances, encroaching improvements do diminish the value of the record owner's land, albeit to an extent that is small compared with the value of the improvements to the encroacher. In this instance, the judicial response to the innocent encroachment has been fairly consistent: allocate the entitlement to the record owner, but protect it only with a liability rule.[94] The remedial doctrines of "relative hardship" or "balancing the equities" have been used to accomplish that end.[95] By limiting the record owner to damages, a court eliminates whatever strategic bargaining difficulties might otherwise prevent private agreement.

Courts do not invariably permit initial improvers to continue using boundary strips, even if substantial expenditures have been made without the record owner's objection. In cases where courts are unwilling to characterize encroachments as innocent—where the encroacher knew he was encroaching, or in the court's view should have investigated more carefully, or where the encroacher approached a neighbor seeking to resolve a boundary dispute but was rebuffed—courts likely will allocate to record owners the right to force removal of encroaching

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92. Compare, e.g., Kennedy v. Oleson, 251 Iowa 418, 100 N.W.2d 894 (1960) (no estoppel because of insignificance of improvements) with Watson v. Godwin, 259 So. 2d 746 (Fla. Dist. Ct. App. 1972) (substantial expenditure gives rise to estoppel).

93. As with adverse possession, the character of possession necessary to substantiate a claim of acquiescence is likely to provide good evidence that the possessor attaches substantial value to the strip.

94. See, e.g., Terwelp v. Sass, 111 Ill. App. 3d 133, 139, 443 N.E.2d 804, 808 (App. Ct. 1982); Wojahn v. Johnson, 297 N.W.2d 298, 308 (Minn. 1980); Lawrence v. Mullen, 40 A.D.2d 871, 338 N.Y.S.2d 15 (App. Div. 1972).

95. See, e.g., Dolske v. Gormley, 58 Cal. 2d 513, 520–21, 375 P.2d 174, 179, 25 Cal. Rptr. 270, 275 (1962); Graven v. Backus, 163 N.W.2d 320, 325 (N.D. 1968); cf. Brown v. Voss, 715 P.2d 514, 517 (1986) (injunction against extension of easement to nondominant land denied; court says "[o]ne of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction").

improvements.[96]

Treating "innocent" encroachers differently from "non-innocent" ones operates to prevent departure from the geometric-box allocation when departure is not likely to produce gains from trade.[97] Assume for instance that a landowner knowingly crosses his boundary line in constructing an improvement. A landowner has no reason to use his neighbor's land if his own is equally satisfactory. So knowing encroachment itself suggests that use of the neighbor's land has some value to the improver. But then why not negotiate with the neighbor before encroaching? The neighbor, if he attaches no substantial value to the strip, would have little reason to resist a purchase offer from the potential improver, at least so long as the neighbor sees no prospect for bilateral-monopoly profits because the potential improver could find equivalent locations elsewhere. If the prospective improver anticipates obstinacy by his neighbor, he must realize that his neighbor substantially values the boundary strip.

If the boundary strip does have substantial value to the neighbor, deciding whether transfer of the strip from the neighbor to the prospective improver would produce gains from the trade requires more than cursory examination. The improver's failure to seek a negotiated settlement may even provide evidence that the value of the strip is greater to the neighbor than it is to him.[98] And if that is the explana-

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96. See, e.g., Calhoon v. Communications Sys. Constr., 489 N.E.2d 23, 26–27 (App. Ct. 1986); Pugliese v. Town of Northwood Planning Bd., 119 N.H. 743, 750–51, 408 A.2d 113, 117–18 (1979); Royse v. Easter Seal Soc'y, 256 N.W.2d 542, 546 (N.D. 1977); cf. Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 572–73, 676 P.2d 584, 588–89, 199 Cal. Rptr. 773, 777 (1984) (holder of prescriptive easement granted injunction against encroachment of record owner); Brown Derby Hollywood Corp. v. Hatton, 61 Cal. 2d 855, 395 P.2d 896, 40 Cal. Rptr. 848 (1964) (remand to trial court to determine whether encroachment was innocently made).

97. Cf. Merrill, supra note 88, at 1135 (1985) ("intentional dispossessor is distinguishable from the inadvertent or negligent dispossessor because he has more clearly turned his back on consensual (i.e., market) mechanisms for the transfer of property rights").

98. If value to the improver markedly exceeds value to the neighbor, the argument would run, the improver could, and would, easily buy the strip from the neighbor. His failure to seek to do so, then, suggests a recognition on his part that the neighbor would refuse to sell at any price acceptable to the improver—that is, that the neighbor values the strip more than the improver does.

There are, of course, alternative explanations for the knowing encroacher's failure to negotiate. One is that the cost of ex ante negotiations was high compared to the risk that the neighbor would subsequently seek to interfere. The encroacher, for instance, may not have been able to locate the neighbor. Another explanation is that the encroacher believed the improvement itself might ripen into a right, or might at least limit the neighbor's right to damages, thus avoiding transaction costs altogether—albeit at the risk of incurring litigation costs. Still another explanation might rest on the encroacher's antipathy toward any form of dealing with his neighbor, whatever the pecuniary benefit the dealing might produce.

tion of the initial improver's failure to negotiate, little reason exists for a court to depart from the geometric-box allocation.

Of course, the prospective improver might also anticipate that the neighbor will decline a purchase offer because the neighbor knows he has something unique—the boundary strip—that the improver wants. The neighbor might thus foresee the possibility of reaping a share of bilateral-monopoly profits. But unless the improver's parcel is unique and can be put to the desired use only with the addition of the boundary strip, transfer of the boundary strip to the prospective improver will not produce bilateral-monopoly profits. Because such situations, especially with unimproved land, are rare,[99] and because they may not be easy to distinguish from cases in which the boundary strip has use value to the initial improver's neighbor, a court might well ignore them and assume instead that failure of the improver to negotiate provides evidence that the strip has significant value to the neighbor.

The argument for denying knowing encroachers the right to maintain their improvements can easily be extended to encroachers who have been rebuffed in efforts to settle a disputed boundary[100] and to those who make insufficient efforts, however defined, to assure that they are not in fact encroaching.[101] One who proceeds knowing from prior negotiation that his neighbor values a disputed boundary strip can hardly contend that awarding him the strip would not cause injury to his neighbor. And imputing knowledge to one who conducts inadequate investigation eases the judicial burden by eliminating the need for proof of the encroacher's state of mind.

Even if the knowing encroacher's failure to negotiate with the record owner does provide evidence that the neighbor attaches significant value to the strip, that evidence does not exist in a vacuum. If the record owner ignores the encroachment for a siguificant period, that provides contrary evidence that the record owner does not value the strip. And, indeed, some courts have been willing to award title by adverse possession even to knowing encroachers after a long period of inaction by the record owner.[102] But, in general, if the record owner complains

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99. Where they do arise, other doctrinal rules might be helpful. For instance, if the boundary strip provides access, easement-by-necessity doctrine might apply.

100. Cf. Kennedy v. Oleson, 251 Iowa 418, 429, 100 N.W.2d 894, 900 (1960) (fruitless discussions over boundary dispute sufficient to bar relief for encroacher).

101. See, e.g., Christensen v. Tucker, 114 Cal. App. 2d 554, 564, 250 P.2d 660, 666 (Ct. App. 1952); Pacemaker Food Stores v. Seventh Mont Corp., 117 Ill. App. 3d 636, 646, 453 N.E.2d 806, 813–14 (App. Ct. 1983).

102. See, e.g., Warren v. Bowdran, 156 Mass. 280, 31 N.E. 300 (1892); Pettis v. Lozier, 205 Neb. 802, 290 N.W.2d 215 (1980).

Merrill, supra note 88, at 1152–53, suggests that in such cases, the true owner should retain an action for indemnification against the adverse possessor, even if the adverse possessor acquires, and can pass on, good title to the disputed land. In this way, Merrill argues, subsequent purchasers may be protected while a disincentive to intentional dispossession would remain.

about an encroaching improvement promptly, the record owner will be denied equitable relief if the encroachment was "innocent," while injunctive relief will issue if the encroacher knew or "should have known" of the encroachment.

To summarize, whatever the motivation of judges who have developed existing doctrine, the protection that doctrine accords to first improvers is consistent with a fear that strategic bargaining difficulties arising out of the bilateral-monopoly relationship between record owners and first improvers will impede successful negotiations between the two. In addition, the common-law distinction between innocent and non-innocent improvers leads to departure from the geometric-box allocation only when there is substantial assurance that departure would produce gains from trade.

### C. *Problems with the Bilateral-Monopoly Justification*

The bilateral-monopoly justification for departures from the geometric-box allocation is, however, problematic in two senses. First, some departures from the geometric-box allocation, particularly prohibitions of spite fences, cannot plausibly be justified as efficiency-promoting rules that avoid the costs of strategic bargaining. Even if the problems of bilateral-monopoly do justify many departures from the geometric-box allocation, they fail to supply a comprehensive justification, an organizing principle, for all departures. Second, and more important, even in those cases where the bilateral-monopoly justification appears most persuasive, it in fact depends largely on social context. To conclude that a particular cross-boundary allocation is, or is not, more efficient than the geometric-box allocation requires one to draw inferences about the value and behavior patterns of landowners within society. As those values and behavior patterns vary, so does the efficiency of the rule in question. This section explores, in turn, these features of the bilateral-monopoly justification for cross-boundary allocations.

1. *Lack of Comprehensiveness: The Case of Spite Fences.* — A landowner who builds a "spite" fence is the only one who can relieve his neighbor's displeasure by removing it; conversely, the fence builder has only one potential customer—the neighbor—for any offer he might make to remove it. One might then suggest that strategic bargaining difficulties could impede negotiations for removal and thus lead to inefficient retention of the spite fence. One might then justify judicial intervention to force removal of the fence as a mechanism for eliminating inefficient fences.

But what makes the spite fence inefficient? The landowner who has erected it presumably has done so for a purpose. Three possible purposes suggest themselves. First, he could have built the fence for some purpose that increases the market value of his own land independent of the relationship with the builder's neighbor. But then the

fence would not be a "spite" fence: courts invariably permit landowners to erect structures that have a "reasonable" purpose, and every purpose that increases the market value of one's own land is likely to be "reasonable."[103] Second, the fence builder might build to advance his own idiosyncratic preferences, even if the fence produces no pecuniary advantage, or even a pecuniary loss, for the fence builder. His preferences might be unrelated to his neighbor's, or he might be acting out of "spite"—a desire to inflict pain on his neighbor. So long as the fence builder receives great pleasure from inflicting pain on his neighbor, even a fence built out of spite is not inefficient—unless for some reason this type of pleasure "doesn't count"—an ethical decision, not an economic one.[104] Third, the fence builder might be seeking to capitalize on the bilateral-monopoly situation he enjoys with respect to his neighbor. If he can construct a fence at low cost that inflicts great hardship on his neighbor, he might be able to extract money from his neighbor to remove the fence. A rule prohibiting spite fences might prevent inefficient construction of fences built with the hope that the builder will quickly be paid to have them torn down.

This third "blackmail" explanation for why spite fences are built, the only one that is consistent with an efficiency basis for prohibiting spite fences, is itself problematic. First, if a potential fence builder believes strategic bargaining difficulties likely will impede negotiations with his neighbor, he will be reluctant to build a spite fence because he may recover no return on his construction investment. But if, on the other hand, a potential builder believes strategic bargaining will not be a problem, building the fence may be unnecessary. The mere threat of building the fence is likely to induce his neighbor to pay money to be free of the fence, at least so long as the neighbor knows that no legal (or equitable) remedy is available.[105] If not many spite fences are built to extract bilateral-monopoly profits, a prohibition of spite fences is unlikely to produce significant efficiency advantages—especially because the judgmental nature of a spite-fence prohibition imposes entitlement-determination costs and may reduce the prospects for ex ante bargaining.[106]

Of course, the weakness of the bilateral-monopoly justification for

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103. See, e.g., Blair v. 305–313 East 47th Street Assoc., 123 Misc. 2d 612, 614, 474 N.Y.S.2d 353, 355 (Sup. Ct. 1983); Green v. Schick, 194 Okla. 491, 153 P.2d 821 (1944). The statement in the text is, of course, subject to the qualification that no applicable zoning ordinance or other statute forbids the otherwise "reasonable" use.

104. See Radin, Property and Personhood, 34 Stan. L. Rev. 957, 969 (1982) (suggesting that some personal preferences should be disfavored as "fetishism" when "there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution").

105. One might, of course, argue that only if spite fences are occasionally built does the threat of building one become credible. The argument assumes, however, that strategic bargaining is a problem.

106. See Merrill, supra note 3, at 24–25.

spite fence prohibitions does not by itself undermine a similar justification for other departures from the geometric-box allocation. Only if one were to claim that the bilateral-monopoly problem provided causal explanations for all departures from the geometric-box allocation would the spite fence cases be troublesome. If one believes that the quest for efficiency explains all common-law rules, a particular rule that doesn't fit within the efficiency framework is difficult to deal with.[107] If, on the other hand, one takes a more modest view of the impact of efficiency considerations, the absence of a comprehensive efficiency justification for departures from the geometric-box allocation is quite natural.

2. *The Contingency of the Bilateral-Monopoly Justification.* — Lack of comprehensiveness is not, however, the only, nor even the most serious, problem with the bilateral-monopoly justification for cross-boundary allocations. A more serious problem afflicts all efficiency justifications for legal rules. Economic efficiency, divorced from social context, cannot provide a coherent justification for land law doctrine, or for any doctrine.[108] A legal framework can be efficient only within the context of a particular society and the value systems of its members.[109]

The bilateral-monopoly justification for departures from the geometric-box allocation provides an example. The justification assumes that we can divine with some confidence what exchanges landowners would make were it not for the obstacle of strategic bargaining. But what exchanges landowners would make depends on landowner preferences. Landowner preferences are not themselves universal, and our principal theoretical mechanism for identifying preferences—exchange transactions—are, by hypothesis, impeded by strategic bargaining.

For instance, consider the assumption that absent strategic bargaining and other transaction costs a landlocked owner and his neighbor would negotiate to create an easement of access. The assumption underlies the bilateral-monopoly justification for easements by necessity. Perhaps the assumption is usually accurate in contemporary American society, even though we have no way of verifying it. There is, however, no reason to assume that it is universally accurate. For instance, in a society where personal autonomy were accorded great value, no agreement for access might be reached even if the landlocked parcel could be put to productive use at little inconvenience to the ser-

107. There is, of course, no difficulty for one who suggests only that common-law rules should be, but may not currently be, efficiency maximizing. Such an analyst could simply argue that, as a normative matter, spite-fence prohibitions should be abolished or transformed into mechanical rules.

108. See Kennedy & Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711 (1980).

109. See Klevorick, Legal Theory and the Economic Analysis of Torts and Crimes, 85 Colum. L. Rev. 905, 906–11 (1985).

vient owner. The owner of the access parcel might so highly value the right to be free from sharing responsibility with his neighbor that he would avoid negotiating an easement that could prove lucrative. Conversely, a landlocked owner with great antipathy toward shared decisionmaking authority might even discount the value of access. To assume, then, that a landlocked owner and his neighbor would, absent transaction costs, agree to an easement of access is to make a judgment about the relative value society's citizens tend to attach to autonomy.[110]

The contingency of the bilateral-monopoly justification, then, resembles the contingency of the intent-enforcing justification for departures from the geometric-box allocation. When a court attributes to parties an intent to create an easement by necessity, it assumes that the act of conveying a landlocked parcel is a signal that both parties understand as including a conveyance of access rights to the parcel. Since the assumption need not be universally true, it must reflect a particular social norm as understood by the court. Similarly, the bilateral-monopoly justification for an easement by necessity rests on assumptions—the landlocked owner values access more than the access owner values the right to prevent access; negotiation between them might be impeded by strategic bargaining—that reflect social norms rather than universal truths. While the two justifications might rest on somewhat different assumptions about social norms,[111] neither can stand independent of social context.

At best, then, efficiency can provide a standard for evaluating a va-

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110. Patrick Atiyah offers a hypothetical that well illustrates different possible views about the value of autonomy. He asks whether a neighbor who knows that I set my watch by his departure for work has an obligation to inform me when he is sick and intends not to go to work:

> Now whether it is felt that the neighbour ought to be under some obligation in such a case depends largely on one's ideological starting-point. On the one hand, it may be argued that I ought to be encouraged to rely upon myself, and not upon my neighbour; I ought to get a more accurate clock myself; or find other ways of keeping time. What right have I to impose obligations on my neighbour which he has neither invited, nor been paid for? On the other hand, it may be said that human co-operation ought to be encouraged, and that a man is not sole judge of what duties he owes to his fellow men. If others come to rely upon him, whether or not he has sought that reliance, or been paid for it, he must accept some responsibility for the consequences . . . .

P. Atiyah, Promises, Morals, and Law 36–37 (1981).

111. Both the intent-enforcing justification and the bilateral-monopoly justification rest fundamentally on the assumption that the right to use the neighboring parcel is more valuable to the "encroacher" than the right to prevent use is to the owner of the neighboring parcel. From there, however, the assumptions on which the two justifications rest diverge.

The intent-enforcing justification assumes that silence, or failure to object, in response to a variety of actions by neighbors or contracting parties generally indicates a particular state of mind—assent to the transfer of rights. The bilateral-monopoly justification need not rest on this assumption. Instead, it acknowledges the possibility that parties might not expressly make value-maximizing exchanges, but assumes that failure

riety of components of the legal framework as a mechanism for satisfying wants within a particular social system. That is, given established patterns of interaction within the society, one might well ask whether particular rules are efficient—whether they entail greater or lesser transaction costs than available alternatives.

If it would be a mistake to contend that a particular legal rule is efficient regardless of social context, it would also be a mistake to assume that the variability of social context is limitless. At least some attitudes, actions, and responses prevalent within a society may be the product of human characteristics that transcend cultural and social forces.[112] If most human actions and reactions were biologically rather than socially determined, we could evaluate the relative efficiency of different legal rules. Or, to the extent that broad consensus about social norms exists within the society, we can make productive and useful comparisons of the efficiency of competing legal rules. Thus, any efficiency analysis must incorporate the behavior systems prevalent in society, be they socially or biologically determined. Do individuals in society react to each other with trust or suspicion? Do they prefer isolation or interdependence? Do they obtain greatest pleasure from maximizing their own material well-being or from conferring benefit on others? Without knowing the answers to questions like these, it is impossible to characterize any legal framework as efficient or inefficient.[113] Unfortunately, economics alone can provide little

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to make them results from market imperfections that cross-boundary allocations could correct.

All of these assumptions are consistent with the set of norms of neighborly behavior elaborated in the next Part. See infra notes 135–160 and accompanying text.

112. While I do not purport to evaluate the proposition, others, notably Richard Epstein, have suggested that many attitudes about legal problems are remarkably stable even across long periods of time and disparities of culture. Epstein, The Static Conception of the Common Law, 9 J. Legal Stud. 253 (1980).

113. I do not mean to suggest that the Law and Economics literature routinely ignores the contingency of efficiency justifications for legal rules. At times, however, efficiency analysts make strong claims of efficiency without acknowledging that particular conceptions of social norms underlie their conclusions. See, e.g., Wittman, First Come, First Served: An Economic Analysis of "Coming to the Nuisance," 9 J. Legal Stud. 557 (1980). Wittman claims that an efficient coming-to-the-nuisance doctrine would give priority to first users if and only if they "should have been" first. He fails to discuss the possibility that landowners value autonomy, either to pollute or to be free from pollution, more than the economic benefits derived from greater production or a more pleasant environment. See also Tullock, Two Kinds of Legal Efficiency, 8 Hofstra L. Rev. 659, 661–62 (1980) (characterizing Brazilian law in late 19th century as inefficient because of its rejection of limited liability for corporations when "[t]he popular point of view was that corporations are wicked because they permit people to avoid paying their debts").

The objection to such strong claims is not that they are implausible; indeed, within our social structure many (although certainly not all) of the efficiency claims advanced are quite plausible. The objection instead is that from reading work of this genre one might easily be misled into the belief that the claims are universal. See, e.g., Note, Internalizing Externalities: Nuisance Law and Economic Efficiency, 53 N.Y.U. L. Rev. 219,

illumination on these questions.

## IV. Land Law as a Reflection of Social Norms: The Doctrinal Conception of Neighbors

### A. *The Interdependence of Legal Doctrine and Social Norms*

With what values do members of our society approach transactions in land? That question is of interest to economic analysts who cannot evaluate the efficiency of land law rules without either answering it or assuming it away.[114] But the question is also of more general interest to anyone who seeks insight about our society. A variety of social science disciplines examine value structures and, more particularly, the patterns of interaction that individuals follow in implementing their value structures. The study of legal doctrine also provides data about the ways in which people interrelate within the society.

To some extent, legal doctrine shapes the ways in which people interrelate. Judges, legislators, and academics frequently justify particular rules as likely to produce reactions (presumably desirable) among the populace.[115] Thus, a court or legislature may impose a particular

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229–31 (1978) (reasoning that because efficiency is maximized if each activity bears its own costs, polluters ought to bear the costs of pollution, but failing to recognize the existence of the underlying social norm that assigns responsibility for pollution to the polluter and not to the activity inconsistent with the pollution); Note, supra note 12, at 1573–74 ("Where the defendant values the property right . . . economic efficiency is obtained by the plaintiff's sale of his injunction. The monopoly-like problem noted by the commentators merely states that the plaintiff will squeeze out the highest settlement he can in selling the injunction. The plaintiff will sell. He must if he is to maximize his income.").

114. See generally Kennedy & Michelman, supra note 108, at 714 ("any argument for the economic virtue ("efficiency") of any legal rule must depend on specific assumptions about the actual wants and factual circumstances of the persons affected by the choice among possible rules").

115. Incentive justifications appear most extensively in tort and criminal law, presumably because the cost of private transactions between actor and victim are so high that assigning entitlements has greater effect on primary behavior than in the realm of contract or land use. In a world of cost-free bargains, legal rules migbt have little effect on primary behavior, assuming at least that all individuals viewed all entitlements simply as commodities available for trade. So, at least, the Coase Theorem would suggest. But see Kelman, Comment on Hoffman and Spitzer's Experimental Law and Economics, 85 Colum. L. Rev. 1037, 1038–39 (1985) (viewing entitlements as commodities ignores subjective aversion some may have to assigning monetary worth to all values). But a rule imposing a standard of care is much more likely to have an incentive effect in a world where an automaker who is free to manufacture cars negligently would not readily be able to secure payment to act more carefully from his diffuse potential victims.

Even in land law cases involving simply two parties, however, incentive justifications occasionally appear. See, e.g., Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978):

> Our longstanding policy to discourage self-help which tends to cause a breach of the peace compels us to disapprove the means used to dispossess [the tenant]. To approve this lockout . . . would be to encourage all future tenants . . . to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage.

form of tort or criminal liability in order to deter some species of behavior and to encourage others.[116] But legal doctrine also reflects social norms as it reinforces them. A judge who imposes rules designed to deter particular activity must have formulated somehow the belief that the activity ought to be deterred.[117]

In fact, as Robert Gordon has put it, "it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved."[118] Law and social values are interdependent; neither can be explored without reference to the other. As a result, the study of legal doctrine inevitably provides insight into the social value structure, because legal doctrine itself is one of the pillars of that structure.

Legal rules do not perfectly shape or perfectly reflect social norms. If they did, the rules themselves would become superfluous. And to a considerable extent, social practice does proceed without conscious regard for legal rules.[119] In a system with firmly established and widely shared social norms, legal rules may be of little consequence, because the costs of enforcing legal rights are high compared to alternative methods of dispute resolution that bypass legal processes.[120] But even

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Id. at 150.

116. The Supreme Court invokes deterrence even as a justification for constitutional liability. See, e.g., Owen v. City of Independence, 445 U.S. 622 (1980):

> The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Id. at 651–52 (footnote omitted).

117. While one decisionmaker's judgment about the activity need not reflect any social consensus about norms, continued, systematic application of the rule suggests at least a general consensus about norms among society's decisionmakers. Of course if the allocation of decisionmaking authority itself disenfranchises large segments of society, one might question whether the judgment of decisionmakers reflects social norms. At least, however, the judgments reflect the norms of the only segments of society with power to enforce them.

118. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 103 (1984).

119. See Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 Stan. L. Rev. 623, 685–86 (1986) (illustrating the marginality of legal doctrine in resolving actual disputes); see also K. Arrow, Collected Papers of Kenneth J. Arrow, Social Choice and Justice 64 (1983) (discussing how social values alter the terms on which property can be used and transmitted); Ellickson, supra, at 628:

> Our particular culture has tended to minimize noncoercive obligations relative to the predominent role they have played elsewhere, but they are far from absent even today. There is certainly a whole complex of obligations implied in the concept of a "good neighbor." The use of one's real property is limited by more than legal conditions.

Id.

120. The field evidence I gathered suggests that a change in animal trespass law indeed fails to affect resource allocation, *not because transaction costs are low, but because transaction costs are high.* Legal rules are costly to learn and enforce. Trespass incidents are minor irritations beween parties who typically have complex continuing relationships that enable them readily to enforce informal norms.

the most firmly established norms break down on occasion. When breakdowns occur, when nonlegal mechanisms fail, disputing parties sometimes turn to the legal system for dispute resolution.

Land law doctrine may be too narrow a corner of law to warrant sweeping generalizations about social value structures. Nevertheless, the doctrinal choice to adhere to or depart from the geometric-box allocation does illuminate our society's conception of at least one common social and sometimes economic relation: the relation between neighbors. The geometric-box allocation generally permits landowners to avoid interaction with others, including neighbors, unless both the landowner and the other provide for interaction by explicit agreement. Like the doctrinal structure in many other areas, then, the geometric-box allocation is generally well adapted to a society whose members highly value individualism and autonomy. To the extent, however, that the various easement, boundary dispute, and spite fence doctrines depart from the geometric-box allocation, they reverse the societal preference for individualism and autonomy by mandating (and perhaps assuming) a pattern of interaction between neighbors, absent explicit agreement to the contrary. These departures, then, suggest a society whose members do not treat relations with neighbors in the same way they treat relations with strangers.

### B. *Some Relational Parallels*

The suggestion that members of our society treat relations with strangers differently from relations with neighbors should not be surprising. The impetus to maintain relations pervades our forms of social organization in ways that positivist legal theory only grudgingly acknowledges.[121] Certainly a variety of familiar doctrines indicate that our prevailing individualist norm is supplemented by a greater degree of cooperation in some social and economic contexts.

Compare, for instance, the failure of American tort law to impose a duty to rescue[122] with the obligation of virtual selflessness imposed on

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The Shasta County evidence indicates that under these conditions, potential disputants ignore the formal law.

Ellickson, supra at 628 (emphasis in original).

121. I. MacNeil, The New Social Contract 4–13, 66–70, 78–84, 90–92 (1980).

122. See generally Restatement (Second) of Torts § 314 (1965) (knowledge that another needs help is insufficient to impose a duty to help). One state legislature, however, has explicitly repudiated the rule, Vt. Stat. Ann. tit. 12, § 519 (Supp. 1973), see Franklin, Vermont Requires Rescue: A Comment, 25 Stan. L. Rev. 51 (1972), and some courts and more academic commentators have questioned the wisdom of the common-law rule. See Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976); M. Shapo, The Duty to Act: Tort Law, Power & Public Policy 64–68 (1977); Ames, Law and Morals, 22 Harv. L. Rev. 97, 112–13 (1908); Weinrib, The Case for a Duty to Rescue, 90 Yale L.J. 247 (1980). But see Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151, 189–204 (1973) (no general duty to rescue).

fiduciaries.[123] The relationship between rescuer and imperilled person is one between strangers, and failure to recognize a duty is perhaps the classic embodiment of our individualist norms.[124] By contrast, when fiduciary duties are imposed, they arise from a relationship in which extremely close cooperation is the norm.[125]

Between the two poles of (largely) self-interested strangers and selfless fiduciaries lies a variety of relations in which legal doctrine imposes cooperative obligations short of selflessness. The burgeoning literature on relational contract suggests that these obligations to coop-

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123. See, e.g., 1 A. Scott, The Law of Trusts § 2.5 (3d ed. 1967):

> A fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party to the relation as to matters within the scope of the relation .... As to matters within the scope of the relation he is under a duty not to profit at the expense of the beneficiary. If the fiduciary enters into a transaction with the beneficiary and fails to make a full disclosure of all circumstances known to him affecting the transaction, or if the transaction is unfair to the beneficiary, it can be set aside by him.

Id. at 39. Cardozo's description of the constructive trust as a "device through which preference of self is made subordinate to loyalty to others," Meinhard v. Salmon, 249 N.Y. 458, 467, 164 N.E. 545, 548 (1928), provides an apt formulation for fiduciary relations generally.

124. However, courts have eroded the rule by adding to the relationship an obligation to rescue that would not obtain between strangers. See, e.g., Pridgen v. Boston Housing Auth., 364 Mass. 696, 710–13, 308 N.E.2d 467, 476–78 (1974) (landowner-trespasser); Farwell v. Keaton, 396 Mich. 281, 290–91, 240 N.W.2d 217, 221–22 (1976) (companion who initially assumes duty); Lloyd v. S.S. Kresge Co., 85 Wis. 2d 296, 302–05, 270 N.W.2d 423, 426–27 (Ct. App. 1978) (shopkeeper-customer). See generally Restatement (Second) of Torts § 314 A (1965) (special duty to aid extends to a common carrier, an innkeeper, a landowner with respect to invitees, and to one "required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection").

> Landes and Posner argue that the special relationship cases
> are not really exceptions to the no-duty doctrine. That doctrine properly has reference to the rescue of strangers rather than to rescues that occur in the course of a contractual relationship. For example, that the railroad should render assistance to an obviously ill and disabled passenger is a reasonably implied term of the contract of carriage.

Landes & Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Legal Stud. 83, 125 (1978). But, of course, this analysis assumes a social norm of cooperation between people within an existing relationship. Otherwise, the obligation to assist an ill passenger would not be "a reasonably implied term of the contract of carriage."

125. Although one may sometimes assume a fiduciary's obligation of selflessness by express agreement, fiduciary obligations can also arise by implied agreement or by operation of law. Thus, close family members may owe fiduciary duties to each other without express agreement. See, e.g., Sinclair v. Purdy, 235 N.Y. 245, 139 N.E. 255, 258 (1923) (when brother transferred property to sister, even in the absence of a promise to hold it for his benefit, the promise might be implied because "the exaction of such a promise, in view of the relation, might well have seemed to be superfluous"); cf. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (suggesting that contract to hold property for the benefit of another might be implied even in the absence of blood or marriage relationship).

erate do reflect behavioral norms in circumstances where parties expect to maintain continuing relationships.[126] Some of the more striking doctrinal examples of obligations to cooperate come from fields in which distributive or paternalist foundations may underlie regulation of the relationship,[127] but as Ian MacNeil has demonstrated, even in commercial relations contract doctrine frequently provides structures that promote cooperation.[128]

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126. See Goetz & Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089, 1126–30, 1134–49 (1981); MacNeil, Values in Contract: Internal and External, 78 Nw. U.L. Rev. 340, 360–64 (1983); MacNeil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U.L. Rev. 854, 879–83, 895–900 (1978) [hereinafter MacNeil, Adjustment]; Williamson, supra note 66, at 239–42, 254–59; see also, MacNeil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 961, 967–69 (1982) (criticizing non-relational contract theory).

127. For example, the National Labor Relations Act imposes on employers (and unions) a duty to bargain. 29 U.S.C. § 158(a)(5) (1982); 29 U.S.C. § 158(b)(3) (1982). See generally Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525, 548–62 (1969) (discussing labor law as a species of contract law shaped by the relationship between the parties).

Similarly, emerging landlord-tenant law in a number of jurisdictions has given tenants protection against eviction even at the expiration of the lease term. Sometimes this protection is an adjunct to imposition of rent controls, see, e.g., Mass. Ann. Laws ch. 57, § 9 (1979), but in New Jersey, protection against eviction is extended to tenants even in the absence of rent regulation, see N.J. Stat. Ann. § 2A:18-61.1 (West Supp. 1985). No comparable constraints are imposed on landlords in the initial selection of tenants; the existing relation provides the basis for obliging the landlord to act cooperatively.

For discussion of distributional or paternalist bases for these doctrinal rules, see Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1982); see also Radin, supra note 104, at 992–96 (permanent tenure statute "incorporates the normative judgment that tenants should be allowed to become attached to places and that the legal system should encourage them to do so").

128. MacNeil points, for instance, to the rule that denies to victims of contract breach damages that the victim could have avoided "through the exercise of reasonable diligence, and without incurring undue risk, expense, or humiliation." MacNeil, Adjustment, supra note 126, at 879–80 (quoting J. Murray, Murray on Contracts § 227 (2d rev. ed. 1974)). In many instances, MacNeil notes, the victim can avoid damages by continued cooperation even after a technical breach has occurred. See id. By denying the victim avoidable damages, the rule in effect obliges him to cooperate with the breaching party. Id.

Similarly, MacNeil cites U.C.C. § 2-704 (1972), which permits aggrieved sellers who identify unfinished goods to a contract to recover the contract price rather than seeking only damages, which might be smaller in amount and more difficult to prove. MacNeil, Adjustment, supra note 126, at 879–80. MacNeil also discusses various franchise termination rules that operate to induce preservation of existing relations. Id. at 880–83.

The legal rules, moreover, are only the tip of the iceberg. As MacNeil has demonstrated, the impetus to maintain relations pervades our forms of social organization in ways that positivist legal theory only grudgingly acknowledges. See I. MacNeil, supra note 121, at 4–13, 66–70, 78–84, 90–102. Ellickson's study of neigborly relations in Shasta County makes the same point:

> *Rural residents deal with one another on a large number of fronts, and most residents expect those interactions to continue far into the future*.... Thus any trespass dispute with a

Given our existing doctrinal framework and its frequent embodiment of cooperative norms within relationships, then, land law doctrines are far from isolated when they subordinate individualist norms within the relationship between neighbors. The existence of cooperative norms in other areas of legal doctrine, then, provides a context for exploring the tensions between individualist and cooperative norms when the relations between neighbors are involved.

### C. *The Geometric-Box Allocation: Autonomy, Individualism and Market Exchange*

Measured against alternative allocations—communal ownership, for instance, or division of surface rights from air or underground rights—an allocation based on discrete geometric boxes facilitates private exchange and promotes individual autonomy. It facilitates private exchange by defining rights crisply so that the background for negotiations is unmistakable. It promotes individual autonomy by combining rights in a way that empowers individual owners to make many land use decisions unilaterally. Thus, a landowner who wanted to build a ham radio antenna or a two-story basement need not obtain consent from someone who separately has been allocated air rights or underground rights.[129]

The desirability of private exchange and personal autonomy are not, however, beyond dispute. An allocation decision that promotes private exchange and unilateral decisionmaking excludes virtually all of society from participation in any single decision. That exclusion is both its greatest advantage and its heaviest cost. Exclusion is an advantage because the cost of obtaining consent can be enormous, especially as the number of people whose consent is necessary increases.[130] As

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> neighbor is almost certain to be but one thread in the rich fabric of a continuing relationship.

Ellickson, supra note 119, at 675 (emphasis in original).

129. Of course, alternative allocation systems might empower individual "owners" to make decisions that may not be made unilaterally within the geometric-box allocation. Thus, the geometric-box allocation does frequently require consultation and consent for wide-ranging underground (or air space) uses. Developing a mine, for instance, may require the consent of a large number of surface owners, while an alternative rule allocating mining rights to the landowner who owns the opening would permit more unilateral decisionmaking. Cf. Edwards v. Sims, 232 Ky. 791, 24 S.W.2d 619 (1929) (Logan, J., dissenting):

> A cave or cavern should belong absolutely to him who owns its entrance, and this ownership should extend even to its utmost reaches if he has explored and connected these reaches with the entrance. When the surface owner has discovered a cave and prepared it for purposes of exhibition, no one ought to be allowed to disturb him in his dominion over that which he has conquered and subjected to his uses.

Id. at 798, 24 S.W.2d at 622.

130. See, e.g., Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Papers & Proc. 1967).

Kennedy and Michelman have demonstrated, however, whether the cost is large or small depends not on immutable economic principles, but on contingent social norms.[131] At the same time that limiting participation in the decisionmaking process reduces the cost of obtaining consent, exclusion can also produce psychic costs and inefficient substantive decisions that a communal decisionmaking process could avoid.

One need only look to the varying forms of political organization to recognize that the cost-benefit calculus of communal decisionmaking is not a universal one. Take a New England town's decision to eschew representative government in favor of frequent town meetings. For the townspeople, the decision might, despite increased expenditure of time and energy, increase the overall efficiency of decisionmaking in two ways. First, the participatory process may produce psychic pleasures—citizens may enjoy the participatory process, or they may enjoy the feelings of virtue that accompany participation. Second, direct participation may internalize costs that representative government would leave external, thus leading to more efficient substantive policies. A town meeting form of government, then, would be more or less efficient in different communities with different attitudes towards the decisionmaking process. The same factors suggest that no particular system for allocating land use rights need be universally efficient. A system that permits a broad array of unilateral decisions about land use would be silly in a society where exclusion from the decisionmaking process is itself painful and where a larger community can rapidly reach agreement, either unanimously or by unanimously accepted processes, on uses of land. No system of unilateral decisionmaking can internalize the positive externality attached by individuals in such a society to the process of communal decisionmaking. Similarly, in a society where communal decisionmaking is harmonious and quick, the advantages of free exchange evaporate. The opportunity for private exchange is important only if individuals mistrust the communal decisionmaking process.

Moreover, even if communal decisionmaking produces no positive externalities, free exchange may be an inferior allocation system if transacting parties may not cheaply acquire information relevant to their potential exchanges. Information costs may be high for a variety of reasons. For instance, transacting parties may have no mechanism for ascertaining their own future preferences as consumers of goods they purchase,[132] or the difficulties of eliminating free-riders may lead potential suppliers of information to supply less than the optimal level

131. See Kennedy & Michelman, supra note 108, at 728–29.

132. See Kelman, Choice and Utility, 1979 Wis. L. Rev. 769, 771–72, 778–82, 784–87.

of information.[133] Further, to the extent that transacting parties are altruistic rather than self-regarding, their preferences may not be independent, but may instead be intertwined with the preferences of others. If the preferences of relevant others are similarly dependent, obtaining information about preferences becomes more complicated, and free exchange might well promote coordination failure and consequent frustration.[134]

The point is that if American landowners could painlessly make communal decisions about land use, or if they faced serious information difficulties, a geometric-box allocation, or any other allocation that provided great opportunity for unilateral decisionmaking and free exchange, would be a curious mechanism for solving the society's coordination problems. By the same token, an allocation that did promote unilateral decisionmaking and free exchange could hardly avoid inclining the society toward a more individualistically oriented social structure. Regardless of whether either factor—social structure or legal framework—can be given precedence, the prevalence of the geometric-box allocation suggests a society that places a premium on individualism and autonomy.

### D. *Cross-Boundary Allocations: Relations Between Neighbors*

1. *Of Norms and Neighbors.* — Entitlements that cross record boundaries foster neither private exchange nor individual autonomy. Instead, they promote and indeed require limited cooperation between neighboring landowners. To the extent that these cross-boundary allocations reflect social norms, they suggest the inadequacy of a social and legal model that depicts landowners simply as economic actors seeking, through discrete transactions, to maximize personal material advantage and personal autonomy. Instead, these cross-boundary entitlements capture a somewhat different vision of landowner as neighbor. In imposing on landowners a limited duty to cooperate, the doctrinal framework suggests a conception of neighbors that includes continuing mutual dependence rather than a pattern of discrete and unrelated transactions.

Robert Ellickson's recent study of dispute resolution between ranchers and farmers in Shasta County, California, illustrates this con-

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133. See Beales, Craswell & Salop, The Efficient Regulation of Consumer Information, 24 J.L. & Econ. 491, 503–05 (1981).

134. O. Henry's *Gift of the Magi* provides a dramatic illustration: A woman cuts and sells her hair, her most cherished asset, to purchase a chain for the watch of the man she loves. Unbeknownst to her, he has simultaneously sold the watch, his most prized possession, to purchase a comb for her hair. Both parties would have been better off had exchange been forbidden. (Unless, of course, the loss of the unique opportunity to show each other the depth of each other's affection more than compensated for the loss in welfare. A comparison of the gains and losses in the particular (fictional) case is not necessary to illustrate the general point.)

ception of mutually dependent neighbors.[135] Ellickson discovered a strong norm of cooperation among the farmers and ranchers he interviewed.[136] Even cattlemen, Ellickson noted, believe that they should keep their cattle from eating the crops of neighboring farmers.[137] This belief, Ellickson found, was independent of the legal rule governing intrusions, and violation of the norm triggered a set of informal adjustments by farmers and ranchers that involved no assertion of legal claims.[138] The seeming indifference of landowners to their legal rights provides, in Ellickson's view, evidence that legal rules are largely irrelevant constraints upon landowner behavior.[139] Nevertheless, as Ellickson notes, the litigation, albeit infrequent, that has arisen out of Shasta County cattle intrusions has produced decisions consistent with the norm shared by area landowners.[140] My suggestion here is that a large body of land law doctrine incorporates similar norms of neighborliness.

In what ways, then, does legal doctrine treat neighbors and strangers differently? To say that neighbors have an obligation to cooperate is neither to identify the criteria that trigger imposition of additional obligations nor to define the scope of the obligations. Those are the questions addressed in this Section.

Legal doctrine never imposes on a landowner an inescapable duty to cooperate with his neighbors. First, a landowner who chooses not to cooperate may, of course, escape his obligation by selling his land. More fundamentally, in most cases,[141] a landowner who takes appropriate steps to apprise his neighbor of his intent not to cooperate can escape an obligation that might otherwise arise. In one sense, then, the duty to cooperate can be viewed simply as a duty to communicate, a duty to warn. Of course, communication is in its own right one of the most basic forms of cooperation. But in a broader sense, imposing on a neighbor the obligation to be explicit if he chooses not to cooperate assumes a norm of cooperation beyond communication alone, a background duty to cooperate that can be limited or shed only if the landowner makes the appropriate communications. And the scope of the landowner's background duty to cooperate with his neighbor itself varies both with the nature of the relationship between the neighboring landowners and with the magnitude of the neighbor's predicament.

2. *Relations That Give Rise to Neighborly Obligations.* — Neighbors exist everywhere. Yet the geometric-box allocation accords to landown-

135. Ellickson, supra note 119.

136. Ellickson wrote: "Most rural residents are consciously committed to an overarching norm of cooperation among neighbors." Id. at 672 (footnote omitted).

137. Id. at 673.

138. Id. at 673–85.

139. Id. at 685–86.

140. Id. at 683–85.

141. Spite fence cases are an obvious exception.

ers the right to decide, unilaterally, questions relating to use of the landowner's geometric box. Mere ownership of neighboring land, then, does not generally create obligations to cooperate different from the general obligations a landowner might owe to anyone.[142] Instead, a landowner's obligation to share decisionmaking power over his own geometric box appears, for the most part, to arise after a course of dealing between landowner and neighbor, or after a neighbor's own assertions of decisionmaking power have continued without objection over a period of time.

First, consider the effect of a course of dealing. A stranger who seeks access to a roadway across land he does not own generally has no right to access without the landowner's consent. The situation is the same if the "stranger" is a neighbor, or even a landlocked neighbor.[143] But if the landlocked parcel and the neighboring parcel were once held in common ownership, the landlocked owner, at severance, acquired an easement by necessity. The fact of negotiations for sale of the landlocked parcel (or the access parcel)[144] imposes on the owner of the neighboring parcel a choice of obligations.[145] Either he must warn the

142. Even trespassers are the beneficiaries of certain landowner duties. Thus, a landowner must take reasonable care to maintain his premises to avoid injury, see, e.g., Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976), and may not use implements designed to inflict undue intentional harm to trespassers, see Katko v. Briney, 183 N.W.2d 657 (Iowa 1971).

143. See, e.g., Continental Enterprises v. Cain, 156 Ind. App. 296, 296 N.E.2d 170 (Ct. App. 1973); Davis v. Cariker, 536 S.W.2d 246 (Tex. Ct. App. 1976); Othen v. Rosier, 148 Tex. 485, 226 S.W.2d 622 (1950).

In a number of states, however, where no common law way of necessity is available, statutes allow a landlocked owner to condemn a way, albeit at the cost of compensating his neighbor. See, e.g., Hanna v. Means, 319 So. 2d 61 (Fla. Dist. Ct. App. 1975); Franks v. Tyler, 531 P.2d 1067 (Okla. Ct. App. 1974).

144. The obligations may differ somewhat depending on whether the owner before severance retains the landlocked parcel or the access parcel. Thus, the Restatement, supra note 15, § 476 comment c, with considerable case support, suggests that: "Circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor." See, e.g., Thompson v. Schuh, 286 Or. 201, 213, 593 P.2d 1138, 1145 (1979). To the extent that courts impose upon grantors greater obligations to warn than those imposed upon grantees, that greater obligation may reflect the grantor's superior access to information about the situation of the two parcels.

145. It is true, however, that easements by necessity also arise on occasion when there have been no negotiations between neighbors. Thus, where heirs of a decedent held a public sale of adjoining parcels of land held in decedent's estate, the Kansas Supreme Court held that the purchaser of a landlocked parcel acquired an easement by necessity against the purchaser of a neighboring access parcel. Horner v. Heersche, 202 Kan. 250, 447 P.2d 811 (1968).

Perhaps most common among easements that arise by necessity or implication without negotiations between neighbors is the case of division of land to effect a family distribution. The Restatement of Property supports implication of an easement against simultaneous conveyees, reasoning that the grantor (or, presumably, the decedent) would probably desire "that existing conveniences shall continue." See Restatement, supra note 15, § 476 comment f. But the result need not rest simply on the intent of the

landlocked owner of his predicament, or else he must cooperate with the landlocked owners by providing access. When the parties have engaged in negotiations, when they have dealt with one another, their failure expressly to resolve the landlocked owner's access rights results in acquisition by the landlocked owner of a right to access over his neighbor's parcel.

Similarly, if a landowner lays gravel over a roadway on his neighbor's land without the neighbor's permission, the neighbor may generally remove the gravel and forbid the landowner to use the roadway.[146] Suppose, however, the two neighbors have had a conversation, however vague, that one landowner construes as a grant of permission to use the roadway. The oral permission does not itself transfer an irrevocable right to use the roadway.[147] Nevertheless, if the landowner lays the gravel, he acquires a right to continue using the roadway unless his neighbor promptly warns him that his action—laying the gravel—will not make the oral permission irrevocable.[148] Once a landowner has dealt with his neighbor, he is obliged to resolve any ambiguities in their dealings that might put the neighbor in a serious predicament.

This treatment of easements by necessity, implication, and estoppel as reflections of neighborly norms does not undermine traditional justifications of these doctrines as contract-like, intent-enforcing devices. Instead, the norms provide a background against which one can justify these cross-boundary allocations in intent-enforcing terms. When a court says "the law, acting upon the assumption that grantor intended for his grantee to enjoy the thing granted, will imply an ease-

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grantor. Since the conveyees are likely to be family members, rules implying easements might reflect a behavioral norm that family members, even more than other neighbors, cooperate with one another.

146. See, e.g., Am. L. Prop., supra note 15, § 28.17, at 54 ("If the wrongdoer causes an encroachment with full knowledge of the facts or after a proper warning by the occupant of the land, injunctive relief will usually be given without regard to the defendant's injuries."). Moreover, injunctions may be awarded even if buildings, not merely gravel, are the product of deliberate encroachment. See, e.g., Blood v. Cohen, 330 Mass. 385, 113 N.E.2d 448 (1953); Benoit v. Baxter, 196 Va. 360, 83 S.E.2d 442 (1954).

147. Even if the intent of the parties is to create an enforceable right, the statute of frauds would preclude enforcement of the oral agreement as an easement. See Am. L. Prop., supra note 15, §§ 8.19–8.20. At best, the agreement would create a revocable license, creation of which does not require a writing. Id. § 8.118.

148. See Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976); see also Jordan v. Coalson, 235 Ga. 326, 326, 219 S.E.2d 439, 439 (1975), citing Ga. Code § 85-1404 (1976) (amended 1982), which provided:

> A parol license is primarily revocable at any time, if its revocation does no harm to the person to whom it has been granted; but it is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land.

Id. at 327, 219 S.E.2d at 440. But see Mueller v. Keller, 18 Ill. 2d 334, 340, 343, 164 N.E.2d 28, 32, 33 (1960) (expenditures made in reliance do not make license irrevocable; if, however, revocation would work a "fraud," revocation is not permitted); Henry v. Dalton, 89 R.I. 150, 151 A.2d 362 (1959) (rejecting easement by estoppel doctrine).

ment to provide access,"[149] the assumption about the grantor's intent is a reasonable one given the set of cooperative norms I have outlined; it would not necessarily be reasonable against a different set of behavioral norms.

Similarly, the bilateral-monopoly justification is persuasive within, but not without, a framework of norms that leads landowners to warn their neighbors of predicaments caused by confusion over rights. If landowners did not generally respond to such predicaments, a particular landowner's failure to respond would not provide evidence that the right to exclude the neighbor is of little value to the landowner.[150]

Compare, now, the obligations of neighbors who have not engaged in a course of dealing. Consider again the landowner who lays gravel over a roadway on his neighbor's land. While the neighbor generally has a right to exclude both the gravel and the landowner who laid it, his right to exclude is lost if not exercised within some period of time.[151] In doctrinal terms, the landowner will have acquired an easement by prescription, or perhaps title to the strip by acquiescence or adverse posssession. The neighbor need not be as quick to protect his right as if there had been a prior course of dealing, but even anonymous neighbors owe each other some obligation, albeit more limited, when problems arise.

Note, however, that the improving neighbor does not acquire an immediate right to maintain his encroaching improvements. In those cases where the encroaching improvements are more valuable than gravel on a driveway, the improver might hope to limit the record owner to a remedy of money damages rather than an injunction,[152] but absent either a course of dealing or the passage of time, the improver

149. Smith v. Moore, 254 N.C. 186, 190, 118 S.E.2d 436, 438 (1961).

150. That the right involved is of little value to the nonresponding landowner is a crucial element in the bilateral-monopoly justification for cross-boundary allocations. See, e.g., supra notes 80, 86 and accompanying text.

151. The period of time depends in part on state adverse possession statutes. In general, even when statutes do not provide explicitly for prescriptive easements, courts have looked to adverse possession statutes by analogy. See Restatement, supra note 15, § 460 comment a; see, e.g., Chinn v. Strait, 173 Kan. 625, 250 P.2d 806 (1952); Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937). But especially if the driveway lays along a common boundary, the encroacher acquires in some states a right to the strip by acquiescence after a period shorter than the usual statute of limitations. See, e.g., Ga. Code Ann. § 44-4-7 (1982) (providing a seven year statute rather than the otherwise applicable 20 year statute of Ga. Code Ann. § 44-5-163 (1982)). As one commentator has noted in discussing acquiescence and prescription, "[i]t is startling how often courts, although speaking in terms of acquiescence, have not made it clear which doctrine they were applying or even whether they recognize any difference between them." Browder, supra note 24, at 512.

152. See, e.g., Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969):

> [I]f the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon

will remain liable.[153]

Finally, there are some neighborly obligations a landowner assumes merely by purchasing land.[154] First, succession of unrecorded easement rights sometimes results in imposition of undiscoverable cooperative obligations. Second, the obligation not to produce nuisances is an obligation to cooperate with landowners whatever their past or present relationship. Spite fence prohibitions are an example. One who deliberately avoided dealing with a neighbor may still be prohibited from constructing a spite fence that annoys the neighbor. Thus, legal doctrine sometimes imposes an obligation to cooperate even when the particular landowner greatly values his right to ignore his neighbor's wishes.

The obligation to cooperate with neighbors varies, then, with the relationship between the neighbors. While some obligations exist merely by virtue of proximity, others depend on the passage of time. The most developed obligation to cooperate exists between neighbors who have established a course of dealing.

3. *The Scope of Neighborly Obligations.* — No doctrinal rule of land law embodies the biblical command to "love thy neighbor as thyself."[155] A landowner is not obligated to cooperate with his neighbors merely because the landowner would find cooperation helpful or convenient. Even when there has been an extensive course of dealing between

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payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception.

Id. at 389, 255 A.2d at 264.

153. See Radin, supra note 104, at 986–87, 1013–15 (suggesting that "personal" property rights merit (and receive) greater protection than fungible ones). Thus, a landowner who has not, through personal use, bound himself up with his boundary strip might, in Radin's hierarchy of property rights, be limited to a liability rule. Id. at 988. Radin also suggests that attachments to things can become more intertwined with "personhood" over time. Id. at 987–88. Hence, a landowner who stands by as he sees his neighbor become attached, through use, to the landowner's land, may even lose his right to recover damages. See also Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 476–77 (1897).

For a general discussion of the rights of one who improves his neighbor's land, see Merryman, Improving the Lot of the Trespassing Improver, 11 Stan. L. Rev. 456 (1959).

154. Although succession of unrecorded easement rights sometimes results in imposition of undiscoverable cooperative obligations, it does so, as the next subsection of text explores, only when the plight of the neighboring landowner would otherwise be severe, while the likely burden on the obligor would be slight. After all, except in cases of strict necessity, the unrecorded easement was acquired only after an intrusion that the servient owner has endured without complaint. Moreover, if the purchaser expects to put the premises to a different use that is less consistent with the continued existence of the easement, meticulous inspection of the premises would, except in cases of strict necessity, put the purchaser on notice of the encroachment. But see supra notes 47–49 and accompanying text. Although even inspection will not reveal unused easements by necessity, this special treatment of the right to access is consistent with the special provisions in some states permitting landlocked owners to condemn access easements. See supra note 143.

155. Leviticus 19:18; Luke 10:27 (King James).

neighboring landowners, courts adhere to record title and the geometric-box allocation unless the neighbor would otherwise face a serious predicament.

Easements are implied, for instance, only in cases of "necessity," cases where the easement-seeker would not readily be able to find substitutes for the easement. No easement by necessity exists if the landowner has alternative access, even if the alternative is substantially less convenient.[156] And where there has been apparent use of a "quasi-easement" prior to severance, establishing an easement by implication still requires some showing of severe financial hardship, often termed necessity.[157]

Easements by estoppel arise only when the easement seeker has

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156. See, e.g., Thompson v. Schuh, 286 Or. 201, 216, 593 P.2d 1138, 1146 (1979), in which the court rejected an easement by necessity claim when an old logging road was available as access to the otherwise landlocked owner. The court noted that "[t]he main question litigated by the parties was the practicability of making the other access serviceable, with plaintiff estimating a cost of $10,000 for a summer-only road." Id. at 216, 593 P.2d at 1146. In rejecting the easement by necessity claim, the court indicated doubt about plaintiff's figure, and also noted that repairing the alternative access sought by plaintiff might also cost a substantial sum.

Other cases denying easements by necessity on the ground that alternative access was available include Mackie v. United States, 194 F. Supp. 306 (D. Minn. 1961); Kirkland v. Kirkland, 281 Ala. 42, 198 So. 2d 771 (1967); Sullivan v. Kantel, 124 Cal. App. 2d 723, 269 P.2d 175 (Ct. App. 1954); Greer v. Piedmont Realty Investment, Inc., 248 Ga. 821, 286 S.E.2d 712 (1982). But cf. Appeal of Meserve, 120 N.H. 461, 417 A.2d 11 (1980) (landowner may acquire statutorily provided rail crossing even when other access to his land exists).

Some courts have even rejected easement by necessity claims on the ground that alternative water access was available. Compare Elliot v. Ferguson, 104 N.H. 25, 177 A.2d 387 (1962) (no easement by implication where owner had always reached property by crossing lake) with LeMay v. Anderson, 397 A.2d 984 (Me. 1979) (easement by implication; access over roadway in existence at time of severance sustained when only other access was over pond).

In Wilson v. Smith, 18 N.C. App. 414, 197 S.E.2d 23 (Ct. App.), cert. denied, 284 N.C. 125, 199 S.E.2d 664 (1973), the court found an easement by necessity, despite the existence of alternative accesss, albeit permissive alternative access. Even in Wilson, however, the court stressed the landowner's financial predicament:

> While the facts indicate that plaintiffs have a permissive right-of-way to the public highway across the lands of strangers to their title, they are unable to obtain a loan to secure a deed of trust upon their land to finance their home built thereon and, therfore, do not have full beneficial use of their property.

Id. at 418, 197 S.E.2d at 26.

157. See, e.g., LeMay v. Anderson, 397 A.2d 984 (Me. 1979), in which the owner of land on the shore of a pond contended that an easement by implication had arisen for the benefit of the pond-shore land when his predecessor sold off a neighboring parcel with an existing roadway. Rejecting the contention that no easement by implication arose because access over the pond remained available, the trial judge asked: "Even assuming that there is public access to Unity Pond, what would the value of the plaintiffs' land be if the only means of access to it lay over the water, or ice, and then through the public landing?" Id. at 988 n.4. The Supreme Judicial Court of Maine affirmed the trial court's judgment.

made "substantial expenditures"[158] in reliance on his neighbor's permission—outlays that would be valueless to him if his right to use the easement were not secured. Similarly, several of the boundary dispute doctrines generally protect encroachers only when they have made significant investments in the mistaken belief that they have acted on their own land.[159] Even to acquire prescriptive rights, one must establish actual, continuous use of the neighbor's land for a considerable period. Persistent use for a long period, particularly if combined with the improvements likely to make proof of use persuasive, will often be good evidence that the easement-seeker's predicament would be great if he were denied a prescriptive right.

Finally, in spite fence cases, prohibitions tend to be enforced only when the threat to the neighbor's enjoyment of his land is great. Statutes that presume the acceptability of fences under a stated height and vest discretion in courts to permit even higher structures assure that no fences will be prohibited absent at least a credible threat to use and enjoyment.

While a landowner is not obligated to cooperate with his neighbor

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158. Where, for instance, the expenditures would have been made even without permission, no easement by estoppel arises. See, e.g., Rouse v. Roy L. Houck Sons' Corp., 249 Or. 655, 439 P.2d 856 (1968).

On the requirement that expenditures be substantial, see Brown v. Eoff, 271 Or. 7, 12, 530 P.2d 49, 51 (1975) ("The problem here is that the only expenditures with respect to the roadway itself were for grading, gravelling and oiling, none of which are essentially permanent or particularly expensive. The expenditures are thus as referable to a revocable license as to an irrevocable license." (footnote omitted)); see also Harkins v. Zamichieli, 266 Pa. Super. 401, 405 A.2d 495 (Super. Ct. 1979) (expenditures must be substantial, but need not be in form of money or labor; according licensor right to transplant licensee's shrubbery presented question of fact on substantiality); Messinger v. Washington Township, 185 Pa. Super. 554, 137 A.2d 890 (Super. Ct. 1958) ($100 cost of laying pipe and drain substantial compared to the value of the land on which pipe and drain were laid).

159. See, e.g., Tauscher v. Andruss, 240 Or. 304, 309, 401 P.2d 40, 42 (1965) (encroacher enjoined; court says "[i]t is not enough for the defendants to show that their damage will outweigh the plaintiffs' benefit; they must go further and show that their damage would be great and the plaintiffs' benefit would be relatively small"); Baslego v. Kruleskie, 162 Pa. Super. 174, 56 A.2d 377 (laches not applied when encroacher built a wire fence to which record owner did not object for over seven months; encroacher did not sustain sufficient prejudice or disadvantage for application of laches doctrine).

Other boundary dispute doctrines that protect encroachers, particularly the agreed boundaries and acquiescence doctrines, do not focus as heavily on the significance of the encroacher's improvements. Professor Olin Browder has suggested what might be called a res judicata justification for these doctrines: any attempt to translate record boundaries to boundaries on the ground is fraught with difficulty, and there is little reason to assume that a second effort will improve on the first. Writings cannot remove the uncertainty that accompanies efforts to locate boundaries precisely, so if neighbors attempt to locate their boundaries without a writing, the absence has no particular significance. In Browder's view, then, the agreed boundaries and acquiescence doctrines do not allocate rights across boundary lines; they simply aid in defining (practically locating) the boundary lines. See Browder, supra note 24, at 487, 497–98, 504–05.

unless the consequences of noncooperation are serious for the neighbor, the landowner is also not obligated to cooperate if cooperation would, measured by community standards, be onerous to him. In general, the landowner by prompt communication may relieve himself of any obligation to cooperate. Even if he fails to communicate, easements by implication, estoppel, and prescription all ripen from intrusions on the dominant estate that have heretofore existed without complaint. In some cases, of course, the landowner's obligation extends beyond communication. Spite-fence rules obligate landowners to refrain from building structures offensive to neighbors. But even then, if the fence builder can establish a "reasonable use" for his fence, he need not cooperate.[160]

## CONCLUSION

The geometric-box allocation of land that characterizes much of American land law is frequently tempered by doctrines that allocate rights across boundary lines. Courts frequently justify these doctrines as intent-enforcing mechanisms. Indeed in many situations, the doctrines undoubtedly operate to effectuate party intent. But in other cases, as courts have recognized, the connection between cross-boundary allocations and party intent is largely fictional. Cross-boundary allocations persist in these cases nevertheless. This Article has suggested that the most plausible efficiency justification for these departures from the geometric-box allocation focuses on the bilateral-monopoly relationship in which neighboring landowners frequently find themselves. The cross-boundary allocations operate to allocate rights to neighbors who would appear to value them most, thereby avoiding the need for the neighbors to engage in what might be a costly bargaining process.

I have argued, however, that neither party intent alone, nor efficiency alone, nor both in combination suffice to explain doctrinal departures from the geometric-box allocation. Both the intent-enforcing

160. Thus, even in states that permit neighbors to enjoin construction of spite fences, judicial opinions stress that injunctions are available only when the offending structure "serve[s] no useful purpose," see, e.g., Sundowner v. King, 95 Idaho 367, 368, 509 P.2d 785, 787 (1973), or is "useless to the owner," see, e.g., Rapuano v. Ames, 21 Conn. Supp. 110, 115, 145 A.2d 384, 387 (Super. Ct. 1958); see also Piccirilli v. Groccia, 114 R.I. 36, 39, 327 A.2d 834, 837 (1974) (injunction denied, in part for failure to prove that fence was not erected "for the purpose of benefiting or advantaging the person upon whose property the fence was constructed").

The requirement that the offending structure have no reasonable use undoubtedly reflects judicial unwillingness to impute malice to landowners when other plausible explanations for landowner behavior exist. The approach of the Connecticut Supreme Court is illustrative: "Whether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it." DeCecco v. Beach, 174 Conn. 29, 32, 381 A.2d 543, 545 (1977).

To look to objective factors, of course, is to suggest that a standard of neighborly behavior exists against which landowner conduct can be measured.

justification and the efficiency justification rest on a set of assumptions about behavioral norms, assumptions that need not be universally true. In a society where neighbors relate to each other differently, the existing rules might frustrate intent and promote inefficiency.

Indeed, I have suggested that any attempt to justify legal rules exclusively in efficiency terms is fatally flawed. Any intellectually responsible investigation of the efficiency of legal rules must expose the assumptions about social context that underlie the analysis. The difficulty for the economic analyst of law, however, is that most of the data necessary to verify the assumptions are not accessible. Frequently, legal doctrine is the most accessible evidence of social context available to the economic analyst of law. But an argument that uses existing legal doctrine as a contextual foundation for establishing the efficiency of that doctrine is inherently circular. One could, of course, formulate judgments about social behavior to serve as a basis for efficiency analysis without using legal doctrine as a foundation for those judgments. One might instead look to some combination of intuition and experience as a basis for judgments about social context. But if, based on those judgments, doctrine appears not to be efficient, it is at least as likely that the analyst's judgments about social context are in error as it is that judges consistently follow inefficient rules. The argument that existing doctrinal departures from the geometric-box allocation are efficient, then, casts as much light on the social norms of neighborliness as it does on the efficiency of legal rules. Land law doctrine, I have suggested, both reflects and reinforces non-individualist behavioral norms in relations between neighbors.