



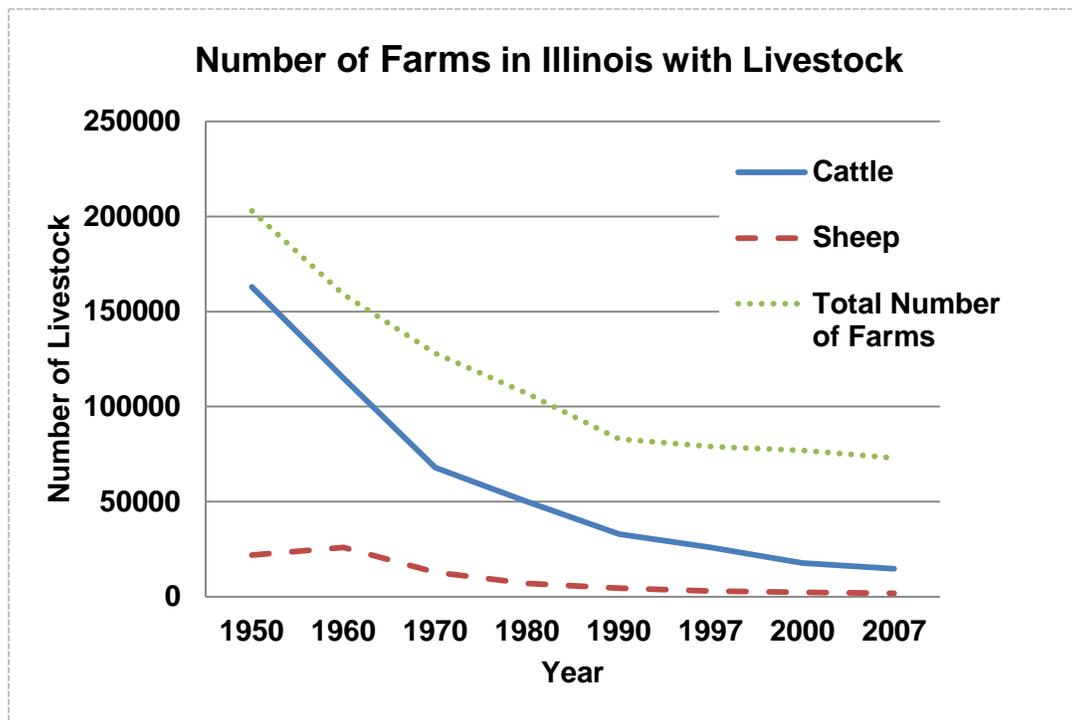
AGRICULTURAL LAW AND TAXATION BRIEFS

DEPARTMENT OF AGRICULTURAL AND CONSUMER ECONOMICS, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

A Move Towards a More Fair Division: Envisioning a New Illinois Fence Act

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Largely unchanged since its initial passage in 1819,¹ the Illinois Fence Act provides that adjoining landowners “. . . shall make and maintain a just proportion of the division fence between them[.]”² When the legislature drafted the statute in the early 1800s, land use patterns in Illinois looked quite different than today. Specifically, more landowners had cattle and sheep roaming their land.³ Starting in 1950, the number of farms in Illinois with livestock grazing has declined, with dramatic reductions in the 1960s and 1970s. As shown in the chart below, this trend continues.



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¹ Jeffrey A. Mollet, *When Bad Fences Make Litigious Neighbors: The Illinois Fence Act*, 89 ILL. B.J. 429, 429 (2001).

² 765 ILL. COMP. STAT. 130/3 (emphasis added) (2012)

³ Illinois Department of Agriculture, *Historic View/Livestock, Dairy & Poultry*, <http://www.agr.state.il.us/about/history/histlive.html> (last visited Nov. 26, 2012).



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Source: Illinois Department of Agriculture statistics available online at:

<http://www.agr.state.il.us/about/history/histlive.html> and

http://www.nass.usda.gov/Statistics_by_State/Illinois/Publications/Annual_Statistical_Bulletin/2010/As10062.pdf

Illinois currently has approximately 76,000 farms, of which only twenty-three percent—17,480—graze beef cows.⁴ This is down from approximately eighty percent in 1950, and appears to be the new normal with respect to agricultural land use.

In addition to dramatically fewer farms with livestock, individual farms are increasing in acreage. As a result, division fences are larger and potentially more expensive. More importantly, as the vast majority of farms no longer graze livestock, most farmers receive little, if any, benefit for bearing the cost of maintaining a division fence under the current statutory regime. The livestock owner, who needs the fence to protect herself from liability exposure arising from escaped livestock, receives a non-reciprocal benefit at the expense of the non-livestock owning neighbor. To eliminate, or at least minimize non-reciprocal benefits, stakeholders should reexamine the current Illinois Fence Act in light of the state's changed agricultural practices.

This Article describes fence law models applied in major agricultural producing states, examines the current Illinois statute and case law, and recommends, based on economic efficiency principles, revising the Illinois Fence Act to reflect modern land use practices based on the equitable cost-sharing model adopted by the Missouri legislature in 2001.

Cost Allocation Models for Division Fences

A “division” fence is simply a fence that divides two adjoining landowners whereby a state statute prescribes a legal obligation to build and maintain the fence.⁵ There are currently four types of fence cost-sharing provisions in the United States: fence-in; fence-out; mandatory cost-sharing; and equitable cost-sharing.⁶ The following section describes each of these models.

The traditional English Common Law rule is the fence-in option.⁷ The operation of this rule is relatively straightforward—to prevent liability from property damage caused by livestock running-at-large, the livestock owner is required to fence-in her property at her own expense.⁸ Of course, nothing prohibited adjoining landowners from sharing the burden of building and maintaining a common fence and in practice this is what happened. But if one landowner elected to keep livestock, and thus build a fence, nothing prohibited the adjacent landowner from later making use of this same fence to restrain his own livestock without compensating for the initial construction costs.

⁴ Illinois Department of Agriculture, Historic View/Livestock, Dairy & Poultry, <http://www.agr.state.il.us/about/history/histlive.html> (last visited Nov. 26, 2012).

⁵ Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change*, 63 MO. L. REV. 537, 538 (1998).

⁶ Terence J Centner, *Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors Only if They are Fair*, 12 J. ENVTL. L. & LITIG. 267, 280 (1997).

⁷ *Id.* at 268.

⁸ *Id.* at 280.



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The converse of the English common law rule, is fence-out, in which the livestock owner is not responsible for building fences to confine her animals, but rather adjoining neighbors who want to keep straying livestock off their land must bear the burden of paying fence costs.⁹ A fence-out policy is more popular in western states where there are large amounts of open grazing land and the cost of fencing-in ones livestock over this vast area would be economically infeasible.¹⁰ Accordingly, the law developed to place the burden on the small-landholder seeking to keep livestock out of their homestead yard. Although declining in use, perhaps due to development pressure, a few fence-out jurisdictions remain.¹¹

Mandatory cost-sharing regimes require adjoining landowners to share the cost of a division fence to control the livestock owner's animals, regardless of the corresponding utility a neighbor may receive from the division fence.¹² In essence, whenever one landowner is willing to pay half the funds to build a fence between the properties, the adjoining landowner is burdened with the other half of the fence costs.¹³ From an economic perspective, this rule may be efficient when the majority of landowners in a jurisdiction graze livestock. This prevents the "free rider" problem of the common law fence-in rule whereby the adjoining landowner can take advantage of the fence erected by the neighbor without compensation. On the other hand, a system that requires payment for an unneeded fence can be burdensome and oppressive.¹⁴

The equitable cost-sharing model is a hybrid of the original fence-in rule along with mandatory cost-sharing. As in the fence-in rule, livestock owners bear the burden of building and maintaining an adequate fence to restrain their livestock.¹⁵ However, if an adjoining neighbor has livestock, or later decides to graze livestock, a cost-sharing provision is triggered to ensure that those landowners benefiting from a fence also share in the cost.¹⁶

The Illinois Rule: Disregarding "Justice" in Proportioning Costs

Although the Illinois statute notes that adjoining landowners are responsible for a "just proportion" of the division fence,¹⁷ in operation, Illinois is a mandatory cost-sharing jurisdiction. The statute provides that when adjacent landowners are unable to reach agreement on the costs of constructing or maintaining a fence, a "Fence Viewer" will determine a just proportion of the cost for each party.¹⁸ Although in theory, the ability for fence viewers to justly proportion costs would provide for an equitable resolution, the fact that one landowner has no livestock and will receive no benefit from the fence historically has not factored into fence viewer calculations.

⁹ *Id.* at 269.

¹⁰ *Id.* at 268-69.

¹¹ See ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

¹² Centner, *supra* note 6, at 281.

¹³ *Id.* at 282.

¹⁴ Centner, *supra* note 6, at 267; See also Sweeny v. Murphy, 334 N.Y.S.2d 239, 242 (N.Y. App. Div. 1972) (finding a mandatory cost sharing fence law to be oppressive when defendant owned 110 dairy cows and plaintiff neighbor kept no livestock).

¹⁵ Centner, *supra* note 6, at 280.

¹⁶ *Id.*

¹⁷ 765 ILL. COMP. STAT. 130/3 (2012).

¹⁸ 765 ILL. COMP. STAT. 130/3 (2012), 765 ILL. COMP. STAT. 130/5 (2012), 765 ILL. COMP. STAT. 130/7 (2012).



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A 4th District Illinois Appellate Court decision in 1995, however, attempted to clarify criteria for fence viewers to determine a just proportion.¹⁹ In this case, two landowners had agreed in 1955 to maintain equal portions of a division fence that separated their land.²⁰ Both landowners had since abandoned livestock production. In 1994, Wallis decided to pasture cattle on his land, but the fence on the boundary of his and the adjoining landowner's property was in disrepair.²¹ By this time, the adjoining landowner was living in a nursing home, on public assistance, and objected to the cost of repairing the fence.²² The two landowners submitted their dispute to two fence viewers, according to the Illinois statute. The fence viewers decided that a new fence would be of no value to the non-livestock owning neighbor, who was unable to pay for the fence, and that Wallis should pay the entire expense of the fence.²³ But if that other landowner eventually decided to enclose her property for livestock in the future, she should reimburse Wallis for one-half of the expense.²⁴

On appeal, Wallis challenged the decision of the fence viewers, arguing that their determination of a just proportion was contrary to the requirements for the Illinois Fence Act.²⁵ As a procedural matter, the Court established that a fence viewer's decision should not be set aside unless the record clearly and unequivocally shows that the decision was arbitrary or inequitable.²⁶ This decision provides fence viewers wide discretion in deciding just proportionality.

Wallis further argued that the statute's use of just proportion meant an equal share from each party. The Court disagreed, noting that "[t]he legislature has had over 120 years to substitute a fixed proportion for a variable proportion in sections 3 and 7 of the Act by substituting "one-half" in place of a "just proportion."²⁷ Rather, the Court noted that fence viewers may consider any factor they believe appropriate in determining a just proportion, including the following four factors used by the fence viewers in this case: (1) the benefit each landowner can expect from the fence, (2) the present condition of the fence and the estimated cost of repair versus a new fence, (3) the financial effect of the cost apportioned on each landowner, and (4) the rights of the landowners to use their land as they desire.²⁸

Why Doesn't the Wallis Case Solve the Problem in Illinois?

Although the *Wallis* Court reached what most commentators view as a correct result in the circumstances of that particular case, it does not resolve the potential economic inefficiency arising from the current statute for two reasons. Although other courts and fence viewers may look to the *Wallis* case for guidance, the precedential impact of this decision is limited to the 4th Appellate District. More importantly, however, the current operation of the underlying Fence

¹⁹ *In re Wallis*, 659 N.E.2d 423 (Ill. App. Ct. 1995).

²⁰ *Id.* at 426.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 428.

²⁸ *Id.* at 429.



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Act leaves excessive discretion in the hands of fence viewers. A careful reading of the case reveals that fence viewers are free to include any factor they deem appropriate, including historical land use patterns, which may have at one time involved livestock. Moreover, anecdotal evidence suggests a strong tendency for fence viewers to simply divide evenly the costs of building and maintain a fence regardless of the expected benefit to each party. And in light of the vast discretion provided to the fence viewers, there is little hope of successfully challenging the fence viewer allocation in court (not even factoring in attorney fees).²⁹

A Modest Reform Option

If the legislature persists in providing substantial discretion in the hands of fence viewers, revising the statute to clearly state factors to consider in adjudicating costs could lead to a more standardized decision making process. This would provide at least some improvement to the current statute. A simple listing of factors, however, may not present the clearest way of updating the Illinois Fence Act. Unless the statute would provide additional guidance on how weigh these factors, a landowner without livestock may still be found by fence viewers to bear the cost of the fence resulting in an economically inefficient non-reciprocal benefit to the livestock owner at the expense of the adjacent landowner. In this respect a larger overhaul of the statute might better address the efficiency and fairness issues.

A Better Option: Missouri's Reformed Fence Act

Missouri ranks second in beef cattle production and in the number of working farms, which cover thirty million acres of land and require substantial fencing.³⁰ In 1808, Missouri adopted its first fence act known as the Open Range Act, which required non-livestock owning neighbors to fence livestock out of his or her land.³¹ In response to the unfairness of non-livestock owners bearing the entire cost, Missouri adopted the Division Fence Act in 1869.³² Under the Division Fence Act, adjoining landowners were required to share the cost of construction and maintenance of the division fence, regardless of livestock ownership.³³ The Division Fence Act remained the law for many years, but in 1963 Missouri enacted the Fence Act, which was known as the "Local Option."³⁴ Under the Local Option, both adjoining neighbors had to pay for their one-half share of the division fence regardless of whether they owned livestock or not.³⁵ The major difference from the previous Division Fence Act was that an adjoining landowner could not be compelled to pay more than one-half the value of a four-strand barbed wire fence, regardless of the type of

²⁹ Since the Wallis decision in 1995, there have been no other reported cases in Illinois that interpret this issue. Additionally, the only case that has cited the *Wallis* decision for its view on just proportion is an Iowa case that uses Wallis to support its decision that the costs of a division fence must be split by all adjoining landowners, regardless of use of land, in a way that equalizes the burden, and that the share may be shifted depending on the difficulty of fencing certain terrain. *Duncalf v. Ritscher Farms, Inc.*, 627 N.W.2d 906, 909 (2001).

³⁰ Heidemann, *supra* note 5, at 537.

³¹ Heidemann, *supra* note 5, at 540-41.

³² *Id.* at 542.

³³ *Id.* at 542-43.

³⁴ *Id.* at 545. The Act was called the Local Option because it required a county to vote and adopt the Act, otherwise the counties would retain the Division Fence Act.

³⁵ *Id.* at 547.



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fence that was actually used.³⁶ While this iteration of the law limited the cost associated with the construction and maintenance of the fence for a non-livestock owning neighbor, the law still favored livestock owners by forcing a shared cost model on non-livestock owners.³⁷

After repeated petitions to the legislature, Missouri amended its fence law in 2001.³⁸ The revised Act provides that only adjoining landowners that have livestock placed against the division fence must pay one-half the cost of constructing or maintaining the actual fence erected. In order to prevent an adjoining landowner from changing his or her land use and free-riding on the fence, if the adjoining landowner begins to keep livestock, he or she must reimburse the other landowner for half the cost of the fence. On the other hand, if both adjoining landowners have livestock, then the cost of the fence is split in half.³⁹ The cost of the fence is determined by the requirements for a lawful fence⁴⁰, if a landowner decides she wants a more expensive fence, she can build the neighbor's portion in excess of the lawful fence requirements at her own expense.⁴¹

Summary and Recommendations

The revised rule in Missouri appears to solve most of the equitable concerns with the current Illinois Fence Act, but it is not just fairness concerns that motivate a change toward an equitable hybrid fence-in/cost sharing among livestock owners. Economic factors, viewed through the lens of an entitlement, argue for a change in the baseline rule such that livestock owners bear the cost of fencing in their livestock rather than receiving a non-reciprocal benefit from their non-livestock owning neighbors.

In its basic form, an entitlement is a policy decision that determines which of two or more conflicting interests will be favored by the law.⁴² The winner of the policy decision has the right to continue what they are doing (an entitlement), while the loser must stop what they are doing or endure what the other party is doing to them.⁴³ When Illinois first passed the fence law in the 1800's, the law sided with livestock owners because of the amount of open land and number of farmers with livestock. In most cases, both landowners would obtain a benefit from the shared costs. But a minority of landowner—those without livestock—would bear the burden of the entitlement.⁴⁴

Passage of the Illinois Domestic Animals Running at Large Act, shifted the legal landscape. The Act required livestock owners to provide proper restraints for their livestock, or face liability for

³⁶ *Id.* at 547.

³⁷ *Id.* at 548.

³⁸ Mo. Rev. Stat. § 272 (2012). Notably, the 2001 revised statute does not apply to the 18 or so counties that had elected the Local Option, but does apply to the remaining counties that were still using the 1869 Division Fence Act.

³⁹ Mo. Rev. Stat. § 272.060.1 (2012) and Mo. Rev. Stat. § 272.132 (2012).

⁴⁰ Mo. Rev. Stat. § 272.020 (2012).

⁴¹ Mo. Rev. Stat. § 272.136 (2012). For example, if a landowner wants to build a “super fence” where a standard 3-strand barbed wire fence is sufficient, this extra cost would be borne by landowner seeking the super fence.

⁴² Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

⁴³ *Id.*

⁴⁴ Centner, *Supra* note 6, at 274.



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damage done by escaped livestock.⁴⁵ This shifted the entitlement to the non-livestock owning residents of the state. But the Act did not change the liability rules for everyone in the state. Those adjoining neighbors who did not own livestock remained responsible for a just proportion of the division fence, *and* if livestock were to break through a portion of the fence that was their responsibility to maintain, the non-livestock owning neighbor could not hold the livestock owner liable.⁴⁶ A distinction is thus drawn between two types of non-livestock owning individuals. One is provided by the state an entitlement to be free from damage from animals running at large and the other, one who happens to own land adjoining property with livestock, is not. This raises a fairness question as to the equitable treatment of non-livestock owning landowners.

From an economic perspective, an argument for mandatory cost-sharing fails because there is no common value between the parties.⁴⁷ This becomes clear when we explore what would happen if no fences were built; one party would receive free grazing area (an entitlement), while the other would experience damage to his cropland and the loss of quiet enjoyment on his land without any legal protection from the state.⁴⁸ On the other hand, a pure fence-in requirement shifts the burden to those receiving a benefit from their use of the land—the livestock owner. But a fence-in requirement would be an inefficient solution for adjoining landowners that both graze livestock as there would either be two division fences or a free rider problem for the later adopter of livestock production. In such cases, an efficient outcome would be a rule that provides for mandatory cost-sharing of the common fence. But when only one owner grazes livestock, there is no common value between the parties. Thus mandatory cost-sharing is an entitlement that shifts wealth from the non-livestock owner to the livestock owner. In this case an equitable/hybrid cost-sharing model corrects the wealth transfer problem.

As noted in the introduction, at the time of the original passage of the Illinois Fence Act in the 1800s, a mandatory cost sharing model provided a fair and efficient resolution to the problem of fencing in livestock. The land use change—specifically the abandonment of livestock production by the vast majority of Illinois farms—has upset this allocation and is in need of reform.

A partial solution is to preserve the “just proportion” language in the existing statute while adding a list of specific factors for fence viewers to consider, some of which were identified by the *Wallis* Court. This option would clarify that the legislature did not intend for adjoining landowners to split the cost 50/50, but rather take a hard look at the expected benefit obtained by the fence, along with the terrain, expected use, financial ability and other useful factors. While this certainly would help clarify the current statute, it fails to resolve the potential fairness issues raised by non-livestock owners as a result of inequitable fence viewer decisions and the discretion provided by a reviewing court. Accordingly, this option is a second-best alternative for a modernized Illinois Fence Act.

⁴⁵ 510 ILL. COMP. STAT. 55/1 (2012).

⁴⁶ *see* McKee v. Triesler, 311 Ill. App. 536 (1924) and Ozburn v. Adams 70 Ill. 291 (1873).

⁴⁷ Centner, *Supra* note 6, at 285.

⁴⁸ *Id.*



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A more economically efficient approach, however, is to follow Missouri's lead and adopt a more equitable way of apportioning the division fence. Specifically, 765 ILCS 130/3, subsection (a) could state that if a livestock owner had adjoining land next to a non-livestock owner, the livestock owner would be responsible for the full cost and maintenance of the division fence. If the adjoining neighbor commences raising livestock that make use of the fence, she would have to reimburse her neighbor for half the cost of the legally required fence and assume maintenance responsibilities for half of the fence. Subsection (b) could apply to situations in which adjoining neighbors both raised livestock. In that case, a mandatory cost sharing provision would require each neighbor to pay half the cost of construction and maintenance of the fence, much like the current Illinois statute.

In sum, the nature of land use in has changed drastically in Illinois over the last century. The original fence law served the state well in an earlier time, but the change in land use argues for a modernization of the fence law. Adopting an equitable cost-sharing fence regime based on the Missouri model would improve the fairness and economic efficiency of Illinois' current land use regulations.