

MORAL OBLIGATIONS OF LANDOWNERS:  
AN EXAMINATION OF DOCTRINE

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Efficiency concerns generally take center stage in modern discussions of property's institutional foundations. But property's moral dimension has a far longer pedigree. Two of the ten commandments implicitly acknowledge the importance of property. "Thou shalt not steal" has no meaning in the absence of property ownership. Similarly, the command that "thou shalt not covet your neighbor's house" assumes that the house has an owner whose rights merit respect.

The widespread property norm recognizes rights in property owners and duties in potential resource users. Although owners may enjoy many rights with respect to property (including the rights to use and to transfer), much modern scholarship focuses on the right to exclude as the right that best captures the uniqueness of property.<sup>1</sup> Conversely, potential users have a duty to "keep off" the property of others.<sup>2</sup> The duty to "keep off" lies at the heart of the moral prohibition of theft. Conveniently, by bundling a set of legal rights in a single owner, the right to exclude makes it easier for potential resource users to acquire resources in a way consistent with their moral obligation—by bidding for those resources rather than appropriating them.<sup>3</sup>

None of the commandments imposes comparable duties on owners or confers rights on potential users. Conceiving property as an institution in which owners have duties to anonymous strangers who

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1. Henry Smith has been most prominent among scholars emphasizing the centrality of the right to exclude. *See, e.g.*, Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1702–04 (2012) [hereinafter Smith, *Law of Things*]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002). Although Smith focuses principally on the information-cost advantages of exclusion rules, the right to exclude serves other functions as well. *See, e.g.*, Eric R. Claeys, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 NW. U. L. REV. COLLOQUY 262, 271–72 (2010) (noting power of exclusion rules to enlarge power to make life plans).

2. Smith, *Law of Things*, *supra* note 1, at 1719.

3. As Tom Merrill and Henry Smith have noted, for property to be successful as a coordination device, lay people must regard property rights, particularly the right to exclude, as moral rights. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

want to use owned resources would conflict with Blackstonian moral intuitions.<sup>4</sup> At the same time, imposing duties on owners for the benefit of prospective users constrains the right to exclude, and undermines the ability of owners to coordinate resource use. It is not surprising, then, that owner duties do not play a central role in most discussions of property.

Nevertheless, in a variety of circumstances, property law has developed doctrines that do treat owners as if they owe duties to users. I argue that these doctrines generally reflect moral intuitions. But because moral intuitions about owner duties are not nearly as well developed or universally shared as intuitions about owner rights, the doctrines are often applied inconsistently. In recent years, legislatures and courts have recognized some owner duties even in disputes between owners and strangers. The most common examples of owner duties, however, arise when owners are locked in continuing relationships, for instance, with neighbors or tenants. This difference in treatment itself reflects common moral intuitions. And imbuing these moral intuitions with legal significance does not interfere significantly with the efficiency of property as an institution.

### I. OWNER DUTIES TO STRANGERS

Consider the obligations owners owe to strangers—to people seeking to acquire property rights. If a prospective buyer approaches me about buying my house, and offers me twice the market value because she believes the schools or the neighborhood are better than the rest of the market believes they are, do I have to insist that she pay less? Do I have to inform her about the market value of the house? Although individual sensibilities will differ, most of us would conclude that the “morals of the marketplace” should govern these questions. I don’t have an obligation to warn the buyer about facts a reasonable buyer could easily discover. In what contract law calls arm’s-length transactions, I don’t have an obligation to correct my buyer’s misimpressions.

Two familiar common law doctrines reflect traditional conceptions of owner dominion undiminished by duties to strangers. First,

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4. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (Property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).

owners have not generally been liable to trespassers for negligent maintenance of the owner's land, because owners owe no duty to trespassers.<sup>5</sup> Second, the doctrine of *caveat emptor* has insulated owners from claims by buyers with respect to the condition of property sold.<sup>6</sup> Over the course of the last half century, the scope of both doctrines has narrowed in many jurisdictions, creating owner obligations where none previously existed. The doctrinal changes undoubtedly reflect, at least in significant part, changing social or moral norms. Yet even with the changes, owner duties to strangers are generally limited to protecting strangers against pitfalls the strangers could not reasonably anticipate.

*A. Duties to Trespassers (and Other Occupants)*

*Mendelowitz v. Neisner*,<sup>7</sup> decided by a unanimous New York Court of Appeals (including Cardozo) illustrates the common law rule that excused owners from liability for negligence to trespassers. A nine-year-old boy, while climbing on a retaining wall in an alley behind an apartment building, lost his leg when a capstone on the wall gave way, causing him to fall into the alley with the capstone on his leg. The trial court awarded damages to the boy, and the Appellate Division affirmed, but the Court of Appeals reversed and dismissed the complaint, invoking the rule that the only duty a landowner owes to trespassers "is to abstain from inflicting intentional, wanton, or willful injuries unless he maintains some hidden engine of destruction, such as spring guns or kindred devices, upon his property."<sup>8</sup> The court applied the rule even though the boy was a tenant in the apartment building, emphasizing that tenant had no right to be in the alley, and landlord had repeatedly warned this boy, and others, to stay out of the alley.

A number of courts had developed a limited "attractive nuisance" exception to permit recovery by child trespassers.<sup>9</sup> The *Mendelowitz*

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5. See, e.g., RESTATEMENT (SECOND) OF TORTS, § 333 (1965).

6. See, e.g., *Bruce Farms, Inc. v. Coupe*, 247 S.E.2d 400 (Va. 1978) (adhering to doctrine of *caveat emptor* in rejecting claim by house buyer against house builder).

7. 258 N.Y. 181, 179 N.E. 378 (1932).

8. 258 N.Y. at 184, 179 N.E. at 379 (1932).

9. See, e.g., *Barrett v. S. Pac. Co.*, 27 P. 666 (1891) (landowner liable to child injured while playing on a railroad turntable; court emphasizes the "immature judgment" of children, and

court acknowledged that a tentative draft of the Restatement of Torts, then in preparation, recognized the exception, but held the exception inapplicable because the wall from which the plaintiff fell did not involve an unreasonable risk of death or serious bodily injury.<sup>10</sup>

The basic rule exempting possessors of land from any duty of care to trespassers survived through the Restatement of Torts,<sup>11</sup> subject to a number of exceptions, including the exception for “artificial conditions highly dangerous to trespassing children.”<sup>12</sup> By contrast, the common law and the Restatement recognized that landowners owe at least some duty of care to “licensees” and “invitees,” persons with whom an owner has established, or is trying to establish a social or business relationship.<sup>13</sup> Even with licensees and invitees, the duty did not extend beyond a duty to warn. Thus, the Restatement provided that a possessor would be liable to invitees for harm resulting from a failure to exercise reasonable care “if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.”<sup>14</sup> With respect to licensees, the Restatement did not trigger a duty to warn unless the licensees “do not know or have reason to know of the possessor’s activities and of the risk involved.”<sup>15</sup>

This differentiation of landowner liability based on the status of the injury victim started to unravel in the 1960s and 1970s, when the

holds that it is “an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon.”)

10. *Mendelowitz*, 258 N.Y. at 185–86, 179 N.E. at 380.

11. RESTATEMENT (SECOND) OF TORTS, §333 (1965) provides:

Except as stated in §§ 334–339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care  
 (a) to put the land in a condition reasonably safe for their reception, or  
 (b) to carry on his activities so as not to endanger them.

12. *Id.* § 339 (1965). A number of other exceptions apply for particularly dangerous activities that cause harm to “constant” or “known” trespassers—persons the owner either knew or should have known were trespassing. *Id.* §§ 334–338.

13. The Restatement defined “invitee” to include either persons invited in connection with the land possessor’s business interest or persons invited to remain “as a member of the public for a purpose for which the land is held open to the public.” *Id.* § 332 (1965). By contrast, a “licensee” is a person “privileged to enter or remain on land only by virtue of the possessor’s consent.” *Id.* § 330. A social guest is deemed to be a licensee, but not an invitee. *Id.* § 330 cmt. h.

14. *Id.* § 341A.

15. *Id.* § 341.

California Supreme Court, and then the New York Court of Appeals, abandoned the categories in favor of an all encompassing rule making landowners liable for injuries that occur as a result of “his want of ordinary care or skill in the management of his property.”<sup>16</sup> The Restatement (Third) of Torts has followed suit, opting for a unitary standard applicable to all landowners.<sup>17</sup>

Few states, however, have followed California, New York, and the Restatement. Although the Restatement itself contends that states are evenly divided between those that retain the traditional categories and those that embrace a unitary standard,<sup>18</sup> it appears that many of the states counted by the Restatement as adopting a unitary standard apply standards to trespassers that are different from those applied to non-trespassers.<sup>19</sup> By one count, 41 states and the District of Columbia retain the traditional trespasser-rule structure.<sup>20</sup> Moreover, even the new Restatement carves out an exception for “flagrant trespassers”—a term intentionally left undefined—and holds that a land possessor owes flagrant trespassers only a duty “not to act in an intentional, willful, or wanton manner.”<sup>21</sup>

Efficiency justifications are readily available for the traditional rule barring recovery by trespassers. First, the trespasser can avoid the injury at lowest cost by not trespassing.<sup>22</sup> Second, the traditional rule almost certainly reduces litigation costs. The primary effect of adopting a unitary standard is to shift responsibility for determining landowner liability from court as law-interpreter to jury or other fact-finder.<sup>23</sup> Under the categorical system, whether an injury victim is a trespasser, a licensee, or an invitee presents a question of law for the court; if the court determines that the victim is a trespasser, no issues remain for the jury; landowner, as in *Mendelowitz*, is entitled

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16. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); see also *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976).

17. RESTATEMENT (THIRD) OF TORTS, § 51 (2012).

18. *Id.* at Reporters' Note, cmt a, tbl.

19. See James A. Henderson, *The Status of Trespassers on Land*, 44 WAKE FOREST L. REV. 1071, 1073 n.11 (2009).

20. *Id.* at 1073, n. 13.

21. RESTATEMENT (THIRD) OF TORTS, § 52 (2012).

22. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 176 (7th ed. 2007).

23. See *Basso v. Miller*, 352 N.E.2d 868, 874 (1976) (Breitel, J., concurring) (criticizing court's abandonment of traditional categories because the new rule “would delegate to the jury the responsibility to determine the applicable social policy, thus abdicating the judicial role . . .”).

to dismissal of the complaint. Under the unitary system, by contrast, claims brought by trespassers more often will go to juries.

On the other hand, a countervailing efficiency justification would support landowner liability to trespassers: if landowners take precautions to safeguard invited guests (to whom landowner owes a legal duty), the marginal cost to landowner of extending that protection to trespassers may be near zero.<sup>24</sup> That is, if landowner already has a duty to protect the (invited) person who delivers newspapers from a broken railing, landowner can protect (trespassing) solicitors at no extra cost.

In light of the indeterminate efficiency case for either rule, it should not be surprising that notions of moral fault would play a significant role in premises liability doctrine. The traditional rule rests on a clear moral compass: a trespasser interferes with a landowner's right to exclude, and should not be entitled to recover for injuries suffered during the course of the wrongdoing. As the Iowa Supreme Court put it in retaining the traditional rule, "we remain unconvinced that the rights of property owners have so little value in today's society that those rights should be diminished in favor of persons trespassing on another's land."<sup>25</sup> And the Supreme Judicial Court of Massachusetts, in rejecting a unitary standard, explicitly recognized "that any legal duty owed by a landowner to an entrant upon his land finds its source in existing social values and customs."<sup>26</sup> Conversely, in those categories of cases in which courts have been most likely to hold landowners liable to trespassers—attractive nuisance cases involving child trespassers, the "fault" associated with trespassing appears less compelling, and the argument is stronger that landlord should have taken care not to maintain "traps" for unsuspecting children.

In considerable measure, the debate between the traditional rule barring trespasser liability and the unitary standard is a debate about whether courts should cede to juries the responsibility for ensuring

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24. RESTATEMENT (THIRD) OF TORTS, § 51 cmt. c(3) (2012).

25. *Alexander v. The Med. Assoc. Clinic*, 646 N.W.2d 74, 79–80 (Iowa 2002). See also *Tantimonico v. Allendale Mut. Ins. Co.* 637 A.2d 1056, 1061 (R.I. 1994) ("Property owners have a basic right to be free from liability to those who engage in self-destructive activity on their premises without permission. The common-law rule developed over the centuries accomplishes this purpose clearly and without equivocation."). *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996) ("We retain a separate classification for trespassers because we conclude that one should not owe a duty to exercise reasonable care to those not lawfully on one's property.").

26. *Schofield v. Merrill*, 435 N.E.2d 339, 341 (Mass. 1982).

that liability determinations reflect social norms. While a number of courts and judges have expressed concern about delegating responsibility to juries,<sup>27</sup> the new Restatement makes it clear that its general adoption of a unitary standard is motivated by a change in “social and cultural attitudes” towards land ownership—a change that would presumably be reflected in jury verdicts.<sup>28</sup> The debate is not, however, about whether norms should play a critical role.

Moreover, even the Restatement’s drafters were unwilling to delegate to juries all responsibility for articulating social norms and values. The Restatement precludes all recovery by “flagrant trespassers,” and the Restatement’s comments highlight the moral content of the flagrant trespasser rule: “the policy justifying the lesser duty owed to flagrant trespassers is protection of the rights of private-property owners, which would be unfairly diminished if possessors are subject to liability to flagrant trespassers based on ordinary negligence.”<sup>29</sup>

### B. Duties to Prospective Purchasers

The common law doctrine of *caveat emptor* imposed on property owners no duties to disclose defects to prospective property purchasers. A purchaser was entitled to recover from an owner for damages resulting from the owner’s affirmative misrepresentations,<sup>30</sup>

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27. *Id.* at 342 (rejecting the unitary standard because “[t]he jury would then be required to determine whether present community values call for the exercise of care for the safety of foreseeable trespassers who are neither children nor known to be helplessly trapped. Such determinations are appropriately made by the court or the Legislature, as has heretofore been the practice, and not by juries”). *See also* Basso v. Miller, 352 N.E.2d 868, 877 (1976) (Breitel, J., concurring) (“The ‘single standard’ provides hospitable ground for the play of jury *ad hoc* promulgation of ‘rules’ of law, social policy, and sometimes humane but ungovernable sympathy.”). *See generally* Henderson, *supra* note 19, at 1072 (2009) (complaining that unitary standard “gave trial courts a roving commission to deal with trespasser-plaintiffs in a discretionary, essentially lawless fashion.”).

28. RESTATEMENT (THIRD) OF TORTS, § 51 cmt. c(4) (2009) (noting that in times when land was the predominant form of wealth and large tracts of land were held by a few, “concomitant social and cultural attitudes privileged the owners of land and promoted the unfettered use of private property. Those conditions have changed in modern times.”).

29. *Id.* § 52 cmt. a (2012).

30. *See, e.g.*, Johnson v. Owens, 140 S.E.2d 311 (N.C. 1965) (*caveat emptor* does not apply in cases of fraud; buyer’s claim for damages for defects in heating system should not have been dismissed when seller had fraudulently reassured buyer that heating system was in working order).

but not the owner's concealment of defects.<sup>31</sup> Although the *caveat emptor* rule minimized litigation about whether the seller actually knew of defects, courts also justified the doctrine on moral grounds: a buyer who did not do enough inspection or seek a warranty from the seller did not *deserve* to recover for the defects.<sup>32</sup>

Over the course of the last half century, however, courts and legislatures in most states have shifted away from a hard-edged *caveat emptor* rule. Although there is considerable variation among the states, most states now require residential sellers to disclose to purchasers the existence of hidden defects.<sup>33</sup> In many states, courts have imposed this obligation as a matter of common law.<sup>34</sup> In others, legislatures have mandated statutory disclosure forms.<sup>35</sup> Both the common law duties and the statutory duties, however, are limited in scope. As a result, *caveat emptor* is far from dead.

### 1. *Limits on Common Law Obligations to Disclose*

Common law doctrine in some states limits seller liability for defects to cases in which seller took affirmative steps to prevent buyer from finding the defects. For instance, in *Jablonski v. Rapalje*,<sup>36</sup> a New York court, while generally adhering to the *caveat emptor* doctrine, held that questions of fact precluded summary judgment in favor of the seller when purchaser presented evidence that seller had actively concealed an infestation of bats in the home.<sup>37</sup>

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31. See, e.g., *Phillips v. Homestake Consol. Placer Mines Co.*, 273 P. 657 (Nevada 1929) (purchaser of mining land has no claim for fraud where seller fails to inform purchaser that all ore and gravel have already been extracted).

32. See *id.* at 659 (“A purchaser of . . . property must exercise common prudence, and, if he fails to avail himself of the ordinary means of information, the law gives him no redress.”); *Bruce Farms v. Coupe*, 247 S.E.2d 400 (Va. 1978) (“Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. [I]f . . . the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.”).

33. See generally Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 CONN. L. REV. 1 (2001).

34. See *id.* at 5–14.

35. See *id.* at 14–18.

36. 788 N.Y.S.2d 158 (N.Y. App. 2005).

37. *Id.* at 160–61; see also *Perez-Faringer v. Heilman*, 844 N.Y.S.2d 170 (N.Y. App. 2012) (affirming grant of summary judgment to seller in the absence of evidence that seller had actively concealed the defect).



Even in states where common law doctrine imposes a broader disclosure obligation on sellers, the obligation typically extends only to defects the purchaser could not have discovered by conducting a reasonable investigation or inspection of the premises. For instance, in *Nelson v. Wiggs*,<sup>38</sup> a Florida court denied relief to a home purchaser who claimed that seller had failed to disclose that the property flooded during the rainy season. The court noted that there is “nothing concealed about the fact that low-lying areas of the county flood during the rainy seasons, and nothing concealed about Dade County’s regulations requiring that home in such areas be built on elevations to avoid interior flooding.”<sup>39</sup> Because reasonable investigation by the buyer would have revealed the possibility of flooding, seller was not required to reveal the fact of flooding.

Doctrine limits disclosure obligations in other ways as well. First, sellers are typically liable only when they have actual knowledge of hidden defects; doctrine does not impose on them an affirmative obligation to identify defects. Second, in many states, disclosure obligations apply only to residential sales; commercial sales remain governed by *caveat emptor*.<sup>40</sup> Third, sellers can sometimes avoid liability to purchasers by requiring buyer, by contract, to accept the property “as is.”<sup>41</sup>

## 2. Limits on Statutory Obligations

A number of states have supplemented common law disclosure requirements by imposing statutory disclosure obligations. Some statutes require the seller to fill out a form making disclosure about

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38. 699 So.2d. 258 (1997).

39. *Id.* at 261.

40. *See, e.g., Savage v. KGE Assoc. Ltd. P’ship*, 580 S.E.2d 591, 595 (Ga. App. 2003) (doctrine holding sellers liable for “passive concealment” has been “limited to controversies between residential homeowners and residential builder/sellers, and it does not apply to commercial transactions.”); *Hayim Real Estate Holdings, LLC v. Action Watercraft Int’l Inc.*, 15 So.2d. 724 , 727 (Fla. App. 2009) (noting that in Florida commercial real estate transactions, nondisclosure of a known defect is a non-actionable offense, while active concealment is actionable). *But see S. Dev. Co. v. Presidio N. Ltd. P’ship*, 31 P.3d 123 (Ariz. App. 2001) (affirming award for commercial buyer based on negligent nondisclosure, despite “as is” clause in sale contract).

41. The issue is a complicated one, and jurisdictions have adopted different rules on the effect of an “as is” clause on a seller’s liability for failure to disclose known defects. *See generally Roberts, supra* note 33, at 21–27 (2001). By contrast, an “as is” clause is never a defense to a claim based on positive fraud or actual misrepresentation. *Id.* at 22.

particular structures and systems,<sup>42</sup> while others simply require disclosure of all material defects known to the seller.<sup>43</sup> These statutes furnish a basis for holding sellers liable for inaccurate or incomplete disclosure to the purchaser.

In many cases, however, the statutes themselves explicitly require the seller only to disclose defects of which the seller has actual knowledge, not to conduct an independent inspection.<sup>44</sup> When the statutes are not explicit, courts have construed the statutes to the same effect.<sup>45</sup>

Moreover, even when the seller fails to disclose a defect about which seller does have actual knowledge, some courts have dismissed purchaser's statutory claim if the defect was one that seller could and should have discovered. For instance, in *Riggins v. Bechtold*,<sup>46</sup> an Ohio court dismissed a purchaser's claim against seller for violating the statutory disclosure statute by failing to disclose deficiencies in the 70-year-old brick home's mortar, deficiencies that contributed to water damage in the house. The court emphasized that the inspectors had labeled the mortar holes "obvious," and emphasized that purchasers had "unimpeded opportunity" to inspect that portion of the house before signing the purchase contract.<sup>47</sup>

The New York statute even includes an express exemption from liability for sellers who agree to pay a \$500 credit to the buyer in lieu of completing the statutory disclosure form.<sup>48</sup> Further, in New

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42. See, e.g., IND. CODE § 32-21-5-7(1) (2013) (requiring disclosure of known conditions of items such as the roof, foundation, and water and sewer systems).

43. DEL. CODE ANN. tit. 6, § 2572(a) (2013).

44. See, e.g., IND. CODE § 32-21-5-11(1) (2013) (providing that owner is not liable for inaccuracies or omissions in disclosure form if "the error, inaccuracy, or omission was not within the actual knowledge of the owner.,").

45. See, e.g., *Beall v. Archer*, 1998 Miss. App. LEXIS 822 (Miss. App. 1998). In *Beall*, the court rejected the argument that seller failed to exercise ordinary care in making representations about mechanical systems in the house because

If that were to be the standard for "ordinary care" in reporting on the condition of the various mechanical systems in a house, then a seller would be required, in every case, to retain a qualified expert to inspect each item listed on the disclosure statement for potential defects not actually known to the seller and not readily apparent to the untrained eye.

*Id.* at 7-8.

46. 2002 Ohio App. LEXIS 3525 (Ohio App. 2002).

47. *Id.*

48. See NY REAL PROP. L. § 465(1) (2013) (providing for credit); *Gabberty v. Pisarz*, 810 N.Y.S.2d 799 (Sup. Ct. 2005); *Bishop v. Graziano*, 804 N.Y.S.2d 236 (Dist. Ct. 2005) (both dismissing claims by buyer).

York, as in many other jurisdictions, the statutory disclosure requirement applies only to small-scale residential sales, not to commercial property or apartment buildings.<sup>49</sup>

### 3. *Efficiency or Moral Norms?*

As with premises liability, efficiency stories are available both for the *caveat emptor* rule, and for a rule requiring disclosure by sellers. Alex Johnson has recently outlined the efficiency case for *caveat emptor*, at least when the doctrine is placed in a historical context: in an agrarian, low-tech society, all defects would have been patent to the purchaser, obviating any need for disclosure by the seller.<sup>50</sup>

Similarly, more than three decades ago, Anthony Kronman offered an economic rationale for a rule requiring disclosure.<sup>51</sup> Sellers, he argued, make no special investment in acquiring information about their homes; they acquire information casually, by living in the homes.<sup>52</sup> As a result, requiring sellers to disclose would not result in the creation of less information, and would reduce transaction costs by relieving buyers of the need to expend resources acquiring information sellers already possess.<sup>53</sup>

The efficiency case for current doctrine is not without its problems. First, as Kronman recognized, the logic of the argument might impose on seller an obligation to disclose all latent defects, whether or not he knows of their existence, because it will typically be cheaper for the seller, rather than the buyer, to discover those defects.<sup>54</sup> Doctrine,

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If, however, the seller completes the disclosure form, but “willfully” fails to perform statutory obligations, buyer is entitled to recover actual damages. NY REAL PROP. L. § 465(2) (2013).

49. See NY REAL PROP. L. § 462(1) (2013) (imposing an obligation on “every seller of residential real property pursuant to a real estate purchase contract”; residential real property is defined to include “real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons”). *Id.* § 461(5); see also, e.g., CAL. CIV. CODE § 1102 (a) (2013) (disclosure article applies to sales of real property “improved with or consisting of not less than one nor more than four dwelling units.”).

50. Alex M. Johnson, *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 98 (2008).

51. Anthony Kronman, *Mistake, Disclosure, Information, and The Law of Contracts*, 7 J. LEGAL STUD. 1, 25 (1978).

52. *Id.*

53. *Id.*

54. Kronman, *supra* note 51, at 25.

however, consistently limits the disclosure obligation to defects about which the seller has actual knowledge. Second, because buyer must establish that seller had actual knowledge of the defect, current doctrine generates litigation costs that would be avoided under either the *caveat emptor* regime or a regime in which seller has an obligation to disclose all defects, known or unknown.<sup>55</sup>

Moreover, the efficiency gains current doctrine generates will not be great when the buyer is discerning or well-advised; even under a *caveat emptor* regime, a discerning buyer has every incentive to demand that the seller make affirmative representations that seller has no knowledge of any material defects. If seller refuses to make such representations, buyer has reason to assume the worst, and to discount the purchase price accordingly. To avoid that result, seller would have little incentive to hide material defects from discerning buyers.

In light of the uncertainty surrounding the efficiency case for current doctrine, it is at least as plausible that the move towards requiring disclosure by sellers represents a moral judgment that sellers should not take too much advantage of knowledge at their fingertips. As one court put it, “[t]here must be some evidence of the silent party’s actual knowledge that the defect exists at the time of the sale from which his ‘moral guilt’ in concealing it can be inferred.”<sup>56</sup> Similarly, a number of courts have quoted an influential 1936 article by Keeton contending that the trend towards requiring disclosure reflects concerns about morality absent from the *caveat emptor* rule.<sup>57</sup>

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55. See Roberts, *supra* note 33, at 19 (2001). As Roberts notes, current doctrine also generates litigation over which omissions are material. *Id.*

56. *Lively v. Garnick*, 287 S.E.2d 553, 557 (Ga. App. 1981) (rejecting claim against sellers because there was no evidence that sellers had actual knowledge).

57. See, e.g., *Russ v. Brown*, 529 P.2d 765, 766–67 (Idaho 1974); *Obde v. Schlemeyer*, 353 P.2d 672, 675 (Wash. 1960).

Keeton had written:

When Lord Cairns stated . . . that there was no duty to disclose facts, however morally censurable their nondisclosure may be, he was stating the law as shaped by an individualistic philosophy based upon freedom of contract. It was not concerned with morals. In the present stage of the law, the decisions show a drawing away from this idea, and there can be seen an attempt by many courts to reach a just result in so far as possible, but yet maintaining the degree of certainty which the law must have. . . .

The attitude of the courts toward non-disclosure is undergoing a change and contrary to Lord Cairns’ famous remark it would seem that the object of the law in these cases should be to impose on the parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it.

W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31 (1936).

## II. OWNER DUTIES WITHIN ONGOING RELATIONSHIPS

The preceding section demonstrates that when property law imposes duties on owners for the benefit of strangers, those duties are largely limited to warning strangers about hidden defects—those the stranger could not reasonably have anticipated. The focus on differential access to information is explicit when courts or legislatures require owners to disclose defects to potential buyers, but it also appears with respect to premises liability. Although many, but not all, jurisdictions have abandoned the rule that landowner is not liable for “open and obvious” dangers, whether the danger is open and obvious remains a significant factor in assessing liability.<sup>58</sup>

Is the situation the same when an owner deals with a long-term tenant who has an option to renew for an additional ten years? Suppose, by the terms of the lease, tenant is obligated to exercise the option in writing. Tenant tells the owner orally that she is exercising the option, and starts spending money remodeling. Does the owner have an obligation to tell her that she needs to exercise the option in writing?

Or suppose my neighbor is building a swimming pool near our border, and I know the pool encroaches on my land. Do I have an obligation to tell my neighbor before she spends thousands of dollars putting in the pool, or can I wait, and then extract money from her in exchange for the right to maintain the pool?

For the person who practices what Carol Rose calls “middle ground morality,”<sup>59</sup> these are harder questions. Many would feel an obligation

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58. Many states have abandoned the open and obvious danger rule, either by statute or by common law. *See, e.g.*, *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004) (statute displaces common law rule); *Richardson v. Corvallis*, 950 P.2d 748, 754 (Mont. 1997) (holding that landowner owes duty even though condition is open and obvious if landowner has reason to believe that injuries will nevertheless result). *Richardson* relied on RESTATEMENT (SECOND) OF TORTS, § 343A (1965), which provided that, even with respect to invitees, a possessor of land was not liable for harm “caused to them by any activity of condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” More recently, a tentative draft of the RESTATEMENT (THIRD) OF TORTS (Phys. & Emot. Harm), § 51 cmt. k (2012), suggests that “the fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed.” Nevertheless, some states have adhered to the rule that a possessor of land is not liable for injuries suffered as a result of exposure to open and obvious dangers. *See Jones Food Co., Inc. v. Shipman*, 981 So.2d 355 (Ala. 2006).

59. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1908, 1913 (2007).

to warn the tenant or the neighbor in a way we would not feel an obligation to warn the purchaser—although in many ways, the buyer, the tenant, and the neighbor are situated similarly: each could avoid financial loss by doing a bit more research before acting. Somehow, however, the morals of the marketplace may not be good enough when we are dealing with neighbors.

When these problems reach the courts, the results are disparate. Sometimes, courts hold that the property owner who acts opportunistically within the confines of an ongoing relationship cannot enforce his “legal” right, while other courts adhere to the letter of the deed, lease, or other document creating legal rights. The difference might reflect a disagreement about whether and how law should incorporate social or moral norms into property doctrine, or, just as likely, a difference in moral intuitions.

This part explores circumstances in which courts impose on owners who operate within an ongoing relationship a broader duty to safeguard the other party in the relationship, even when there is no apparent information imbalance between the parties.

#### *A. Landlord, Tenants, and Renewal Options*

Leases often confer on tenants an option to renew for an additional period. Typically, the renewal option requires tenant to take specified actions to exercise the option and requires that the option be exercised by a specified date. The renewal option is rarely boilerplate; it is often a critical provision in the lease. Moreover, because the lease is signed by both landlord and tenant, and both parties generally retain a copy of the lease, landlord and tenant always have equal access to the lease’s terms. Ordinary contract principles, then, would suggest that tenant (and landlord) should be bound by the language of the lease. In fact, however, courts frequently excuse tenant from failure to comply with the conditions attached to the renewal option. In effect, what courts do in these cases is to impose an obligation on the landlord-owner to remind tenant about the conditions attached to the option, especially when the option is favorable to the tenant.

##### *1. Method of Providing Notice*

Often, a commercial lease will provide that tenant must exercise its option to renew “in writing” or by providing landlord notice by

certified mail. Sometimes, tenant provides landlord with actual notice of its intent to renew, but not in compliance with the provisions of the lease. In these cases, courts commonly cite the absence of prejudice to the landlord, and give effect to tenant's exercise of the renewal option.<sup>60</sup>

These cases rest on the premise that tenant certainly would have renewed in accordance with the lease terms if tenant had been reminded about the content of these terms. Suppose, for instance, landlord, upon receiving oral notice of intent to renew, informs tenant that the lease requires written notice, which tenant then refuses to provide. Would a court hold that tenant's oral notice nevertheless was effective to exercise the renewal option? Such a result would appear unlikely. If landlord were to warn tenant, and tenant ignored the warning, courts would presumably determine that tenant's failure to comply with the provisions in the lease was intentional, and deny tenant the right to exercise the option.<sup>61</sup> In other words, doctrine effectively requires a landlord to warn tenant about the impending loss of the renewal period, and the ways in which tenant can forestall that loss—even though that information was readily available to tenant from reading the lease.

## 2. *Timeliness of Notice*

When tenant attempts to exercise the option by using a method not permitted by the lease, the inference is strong that tenant's action reflects a mistaken understanding. By contrast, when tenant exercises past the deadline specified in the lease, a competing inference is available: tenant waited to see whether market conditions would

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60. See, e.g., *Linn Corp. v. LaSalle Nat'l Bank*, 424 N.E.2d 676, 679 (Ill.1981) (tenant gave oral, but not written, notice on time, and court held exercise effective when "failure to give written notice on time did not cause any substantial hardship."); *MER Properties-Salisbury v. Golden Palace, Inc.*, 382 S.E.2d 869 (N.C. App. 1989); cf. *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269 (Colo. App. 2008) (lease included purchase option requiring exercise by certified mail; court held that tenant was entitled to exercise even though tenant sent notice by ordinary mail). Some courts, however, have held that oral notice, even when combined with landlord's acceptance of rent, is insufficient to exercise a renewal option when the lease requires exercise in writing. See, e.g., *Royer v. Honrine*, 316 S.E.2d 93 (N.C. App. 1984).

61. Cf. *Linn Corp.*, 424 N.E.2d at 679 (distinguishing between intentional failure and failure due to the lessee's carelessness).

make exercise of the option advantageous.<sup>62</sup> Fear that tenants might act out of opportunism, rather than out of mistake, may explain, at least in part, the hostility a number of courts have evinced towards late exercise of renewal options.<sup>63</sup>

Nevertheless, a wide variety of courts have excused untimely exercise of renewal options. The practice is not new; *F.B. Fountain Co. v. Stein*,<sup>64</sup> decided by the Connecticut Supreme Court in 1922, remains a leading case. Tenant's five-year lease made provision for four lease renewals, each for a five-year period, but required tenant to give written notice of the renewal at least 30 days before the beginning of a new renewal period. During the lease period, tenant and various subtenants made improvements to the leased premises and allegedly established good will at the leased location. At the expiration of the second five-year period, tenant failed to exercise its renewal right 30 days before expiration of the period, and, 26 days before expiration of the lease, landlord served notice on tenant to quit possession. When tenant brought an action for specific performance, the court remanded for a trial to determine how much hardship tenant would suffer, articulating an oft-cited rule:

[I]n case of mere neglect in fulfilling a condition precedent of a lease, which does not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.<sup>65</sup>

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62. See *J.N.A. Realty Corp. v. Cross Bay Chelsea*, 366 N.E. 2d 1313, 1321–22 (1977) (Breitel, C.J., dissenting):

[U]nder the guise of sheer inadvertence, a tenant could gamble with a fluctuating market, at the expense of his landlord, by delaying his decision beyond the time fixed in the agreement. The market having resolved in favor of exercising the option, the landlord, even though the day appointed in the agreement has passed, could be held to the return set out in the option, although if the market had resolved otherwise, the tenant could not be held to the renewal period.

63. See, e.g., *SDG Macerich Properties, L.P. v. Stanek Inc.*, 648 N.W.2d 581 (Iowa 2002); *Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited*, 40 P.3d 581 (Utah 2001).

64. 118 A. 47 (Conn. 1922).

65. *Id.* at 50.



Other courts have phrased the problem as one of protecting tenants against “forfeitures.”<sup>66</sup>

These cases hold, in effect, that the owner has an obligation to rescue the tenant from the tenant’s own improvidence when the owner should know—or at least should suspect—that tenant expects that the lease will be renewed. In virtually all of the cases that excuse tenant’s failure to renew on time, tenant has made investments—either in improvements to the site or in site-specific good will—that make economic sense only if tenant intends to renew.<sup>67</sup> In that circumstance, courts hold that landlord has an equitable obligation to excuse tenant’s failure to renew on time.<sup>68</sup>

### *B. Disputes Between Neighbors*

Landowners are locked into ongoing relationships with their neighbors. Sometimes the relationship may be social, but proximity alone ties landowners to their neighbors. When conflicts arise, courts often impose obligations on owners to look out for their neighbors’ interests, even though the neighbors are not disabled in any way from protecting their own interests.

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66. See *J.N.A.*, 366 N.E.2d at 1317 (“A tenant . . . should not be denied equitable relief from the consequences of his own neglect or inadvertence if a forfeiture would result.”); *Fletcher v. Frisbee*, 404 A.2d 1106, 1109 (N.H. 1979) (“Courts of equity avoid enforcing a forfeiture”).

67. See, e.g., *Aickin v. Oceanview Inv. Co., Inc.*, 935 P.2d 992 (Haw. 1997) (lease required tenant to spend at least \$50,000 in building improvements; tenant actually spent more than \$300,000 on improvements under lease that gave tenant the option of extending the lease for eight five-year terms); *Fletcher v. Frisbee*, 404 A.2d 1106 (N.H. 1979) (tenant would lose equipment that was not movable, incur costs for moving other equipment, and lose good will associated with strategic location); *J.N.A.*, 366 N.E.2d at 1317 (tenant spent \$55,000 in improvements, and invested in good will); *R & R of Conn., Inc. v. Stiegler*, 493 A.2d 293 (Conn. App. 1985) (supermarket tenant invested \$40,000 and borrowed \$390,000, and would lose \$50,000 in fixtures and freezers if lease not renewed); *Ward v. Washington Distrib., Inc.*, 425 N.E.2d 420, 424 (Ohio. App. 1980) (lessee made substantial improvements).

68. Courts providing equitable relief to tenant often suggest that tenant is entitled to that relief only if “the delay has not prejudiced the landlord.” See, e.g., *Fletcher v. Frisbee*, 404 A.2d 1106, 1108 (N.H. 1979). Sometimes, courts remand to determine whether landlord was prejudiced by tenant’s untimely exercise. See, e.g., *J.N.A.*, 366 N.E.2d at 1318. Sometimes, the suggestion is made that prejudice would arise if landlord “made other commitments for the premises.” *Id.* But, of course, in some sense landlord is always prejudiced if landlord loses the right to relet the premises on more favorable terms—whether to the existing tenant or to a prospective tenant.

The statute of frauds generally requires that transfers of real property be reduced to writing.<sup>69</sup> That is, a landowner can convey neither a fee interest nor an easement without a writing. Generally, if landowner has not made a conveyance consistent with the statute of frauds, landlord retains a broad right to exclude others.

If, however, a neighbor (rather than a stranger) begins to use an owner's land without express written authorization, doctrine has developed in ways that limit the scope of the statute—and the scope of owner rights. As within the landlord-tenant relationship, the relationship of neighbors imposes on landowners an obligation to warn neighbors whose own behavior places their interests in peril.

### *1. Oral Agreements*

When neighbors face uncertainty about boundaries, one way to settle the controversy is by commissioning a survey. If, however, the neighbors forego the survey, and instead agree, orally, to establish a physical boundary between their parcels, courts typically honor the oral agreement.<sup>70</sup> That is, despite the statute of frauds prohibition on oral transfers, once the parties reach an oral agreement, and one of the parties acts on the agreement by building a fence on the agreed-upon line, the true owner may no longer assert rights to the “true” boundary line.

Similar results arise when an owner orally authorizes a neighbor to use the owner's land for ingress and egress. If the owner watches the neighbor make improvements in reliance on oral permission, many courts hold that an easement by estoppel arises, and the neighbor acquires a permanent right to use the roadway despite the absence of any written deed.<sup>71</sup>

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69. *See, e.g.*, VA. CODE ANN. § 11-1 (2012).

70. *See, e.g.*, *Baker v. Imus*, 250 P.3d 56, 60 (Utah 2011) (relying on boundary-by-agreement doctrine); *Nunley v. Orsburn*, 947 S.W.2d 702, 704–05 (Ark. 1993) (enforcing an “oral boundary line agreement.”).

71. *See, e.g.*, *Cleek v. Povia*, 515 So.2d 1246 (Ala. 1987) (After two neighbors agree to build a road along their common boundary, and to split the cost, owner of one of the parcels sought to enjoin the neighbor from trespassing; the court dismissed the action, concluding that the owner was estopped to deny the existence of the easement.). *See also* *Higgins v. Blankenship*, 605 S.W.2d 493 (Ark. Ct. App. 1980) (holding that when landowner furnishes gravel for construction of roadway over neighbor's land, neighbor held estopped to deny easement); *Kohlleppel v. Owens*, 613 S.W.2d 168 (Mo. Ct. App. 1981) (holding that when landowner builds new road and fence based on oral agreement, part performance doctrine permits enforcement of agreement); *Shrewsbury v. Humphrey*, 395 S.E.2d 535 (W. Va. 1990) (finding easement by estoppel

In holding that an owner is estopped from denying an easement after making an oral agreement with a neighbor, some courts have highlighted the moral basis for departing from the statute of frauds. As an Ohio court put it in *Monroe Bowling Lanes v. Woodsfield Livestock Sales*<sup>72</sup>: “Where an owner of land, without objection, permits another to expend money in reliance upon a supposed easement, when in justice and equity the former ought to have disclaimed his conflicting rights, he is estopped to deny the easement.”<sup>73</sup>

### *2. Improvements in the Face of Owner Silence*

What if a neighbor makes improvements without oral permission from the landowner? In this situation, some but not all courts deny injunctive relief to the owner, invoking the doctrine of “relative hardship” to limit the owner to relatively trivial money damages.<sup>74</sup> Similarly, when a neighbor who has an easement somewhere over an owner’s parcel, but makes improvements at another location, where no easement exists, courts have denied injunctive relief to an owner who fails to act before the improvements are made.<sup>75</sup>

### *3. Improvements in the Face of Owner Objections*

By contrast, when a neighbor makes improvements on an owner’s land despite the owner’s warnings, the neighbor proceeds at his own risk. If the neighbor’s improvements encroach, the owner is entitled to injunctive relief even if the neighbor’s investment in those

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where landowner maintained roadway in winter, improved it with gravel, and used it for eight years; landowner also testified that he purchased the property on representation that he could use the disputed roadway).

72. 244 N.E.2d 762 (Ohio App. 1969).

73. *Id.* at 765–66. For a recent reiteration and application of the principle, see *White v. Emmons*, 2012 Ohio App LEXIS 1769. The court in *White* emphasized that if the servient owners truly believed that neighbors were using a road with their permission, servient owners “had a duty to make that fact known.”

74. *See, e.g., Stuttgart Elec. Co. v. Riceland Seed Co.*, 802 S.W.2d 484, 488–89 (Ark. App. 1991) (denying injunctive relief for a building encroachment when encroacher never conducted a survey); *Hirshfield v. Schwartz*, 110 Cal. Rptr. 2d 861, 875–77 (denying injunctive relief when encroacher mistakenly believed that an existing fence represented the boundary line).

75. *See Vrazel v. Skrabanek*, 725 S.W.2d 709 (Tex. 1987) (holding that neighbor acquired an easement by estoppel over roadway he had leveled and graded, even though the only easement he had acquired by grant was located elsewhere on the servient parcel).

improvements was substantial. For instance, in *Grant v. Warren Bros*,<sup>76</sup> the Supreme Judicial Court of Maine held that an improver could not claim estoppel when the improver encroached after the record owner told him “You say the line’s up there and I say that’s not right.”<sup>77</sup>

#### 4. *Scope of the Owner’s Duty*

When courts invoke doctrines like estoppel, acquiescence, or relative hardship against a true owner who seeks to enforce good paper title, courts effectively impose on the owner a duty to warn neighbors about the consequences of making encroaching improvements. When the owner gives a neighbor an appropriate warning, as the owner did in *Grant*, the owner protects himself against the neighbor’s claim. If the owner does not warn the neighbor, the owner takes a risk that the owner will forfeit property rights, even if the owner has not executed a deed that complies with the statute of frauds.

Sometimes, however, owners obtain injunctive relief against encroaching improvers even when the owner has not warned the improver. In many cases, the owner prevails because courts are understandably concerned about the effect an off-the-record right might have on subsequent purchasers of the owner’s land. When the encroaching improvement is not obvious upon physical inspection, courts are more reluctant to invoke estoppel doctrine, even if the owner gave the improver express permission to make the improvement. For instance, if an owner gives a neighbor permission to use a well on the owner’s land, and the neighbor then installs underground pipes in reliance on that permission, courts may nevertheless hold that the owner (or the owner’s successor) is entitled to enjoin further use of the well.<sup>78</sup> The reasonable judicial concern might be that a subsequent purchaser would buy from the original owner without having any reasonable way to discover neighbor’s use of the well.<sup>79</sup>

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76. 450 A.2d 213 (Me. 1979).

77. *Id.* at 217.

78. *See, e.g.*, *Doyle v. Peabody*, 781 P.2d 957 (Alaska 1989) (license to use a well did not survive conveyance of servient land).

79. Other courts have dealt with the problem by limiting the duration of an easement by estoppels to the time necessary for the dominant owner to recoup his investment, thus limiting the interference with future servient owners. *See, e.g.*, *Eliopoulos v. Kondo Farms, Inc.*,

In other cases, the award of injunctive relief to owners undoubtedly reflects different moral sensibilities. In particular, courts may be reluctant to reward neighbors who could have, but did not, protect themselves by obtaining a written deed to the interest they seek to acquire. These courts suggest ascribe blame to the neighbor for not obtaining an express grant permitting them to use the rights they seek. In the words of the Rhode Island Supreme Court, “[I]t is not hardship for one . . . to secure an easement in perpetuity in the manner provided by the statute, or, such being refused, to weigh the advantages inuring to them as against the uncertainty implicit in the making of expenditures on the basis of a revocable license.”<sup>80</sup> At the same time, they indicate that withholding information from a neighbor is not blameworthy if the neighbor has equal access to the information. As the Vermont Supreme Court put it in *Tallarico v. Brett*,<sup>81</sup> “[t]here is no breach of duty or culpability . . . associated with a failure to disclose information already in the possession of the party asserting the estoppel.”<sup>82</sup>

### C. *The Impact on Efficiency*

When courts refuse to apply equitable doctrines that embody moral norms, they often express the fear that applying those doctrines will adversely affect the ex ante behavior of owners or potential property owners. In particular, courts argue that they want people to reduce certain transactions to writing,<sup>83</sup> or they want people to pay attention to the language in their leases and to be vigilant in complying with those lease requirements.<sup>84</sup>

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643 P.2d 1085 (Idaho App 1982) (six years of draining waste water sufficient to recoup dominant owner's investment).

80. *Henry v. Dalton*, 151 A.2d 362, 366 (1949).

81. 400 A.2d 959 (Vt. 1979).

82. *Id.* at 964. The court quoted language from an earlier case indicating that “[i]t is only where there is an obligation to speak, and the duty is not performed, that the defense of estoppel by silence is properly applied.” *Id.*, quoting from *Boston & Maine R.R. v. Howard Hardware Co.*, 186 A.2d 184, 191 (Vt. 1962).

83. *See, e.g., Patel v. Planning Board*, 539 N.E.2d 544, 547 (Mass. App. 1989) (expressing concern that easement by estoppel doctrine “would detract from the integrity and reliability of land records.”)

84. *See, e.g., Grisham v. Lowery*, 621 S.W.2d 745, 751 (Tenn. App. 1981) (“The record discloses that plaintiffs did nothing to familiarize themselves with the terms of the option. They admit they did not read the lease, even though they had a copy of it.”); *cf. Roberts v. Agricredit*

These objectives—reduce transactions to writing, pay attention to the language in your agreements—are designed to eliminate confusion and mistake. They make it easier on courts and on contract partners. In most substantial arm’s-length transactions, these objectives promote efficiency.

With transactions between parties locked into an ongoing relationship, and particularly with smaller transactions, the efficiency gains associated with rules that hold parties to their bargains (or to their failure to bargain) are less clear. Two related problems undermine the argument that increased formality will promote efficiency.

First, within the context of ongoing relationships, legal rules may have less effect on the behavior of the parties. Consider the Oregon Supreme Court’s language in *Shepard v. Purvine*: “These people were close friends and neighbors. . . . One’s word was considered as good as his bond. . . . For plaintiffs to have insisted on a deed would have been embarrassing. . . .”<sup>85</sup> The import of the court’s opinion is that these parties were not going to rely on law and lawyers, whatever the law might be. A rule requiring them to make their agreement more formal would have had no effect on their behavior, or on behavior of others like them.

Second, even if, somehow, parties within a relationship of trust did respond to legal rules and make their agreements more formal, increased formality would not necessarily promote efficiency. It is not always clear, especially with small scale transactions, that the social benefit of legal advice and accurate surveys exceeds the cost of the advice and the surveys.<sup>86</sup> From the perspective of courts who see litigation in cases where an informal arrangement has gone sour, the advantages of increased formalities may seem self-evident. But those cases represent a small slice of all private transactions, and it is not at all clear that the occasional problem justifies increased formality in the vast bulk of cases. Moreover, increased formality also involves a non-pecuniary cost: formality threatens to degrade

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Acceptance Corp., 764 N.E.2d 776, 779 (Ind. App. 2002) (“[O]ur system of jurisprudence requires the application of a principle that parties engaged in the negotiation of a contract or the sale and purchase of property be obligated to protect their interest by reading the attendant documents before signing.”).

85. *Shepard v. Purvine*, 248 P.2d 352, 361–62 (Or. 1952).

86. See generally Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1299–1301 (2008).

important trust relationships.<sup>87</sup> Again, as the court recognized in *Shepard v. Purvine*, to insist upon a deed “would have been expressing a doubt as to their friend’s integrity.”<sup>88</sup>

The point, then, is that in many cases involving the obligations of property owners within the context of ongoing relationships, courts can enforce what they consider to be moral obligations without generating any clear inefficiencies. In effect, courts can and do develop equitable doctrines that reward parties for doing what courts think was morally right, or that punish parties for moral errors, without having any significant effect on future transactions.

### CONCLUSION

The moral and economic foundations of property doctrine are often difficult to separate. If property doctrine does not comport with shared moral norms, doctrine will not achieve the efficiency objectives associated with property rights. Conversely, moral norms will often coalesce around doctrines that promote economic well-being. What has been called the core of property—the right of an owner to act as a gatekeeper of an owned thing—reflects widespread moral norms while also generating substantial efficiency gains.

My focus has been outside that core, on the obligations of property owners rather than their rights, where the efficiency consequences of legal rules are speculative at best. In those areas, judgments about the morality of owner behavior (and about the behavior of non-owners) become more transparent. My examination, although far from complete, reveals a strong sense that owners owe broader and deeper obligations within the context of ongoing relationships than they do when only strangers are involved.

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87. See generally Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 583–84 (1999) (noting that implicit understandings sometimes stabilize relationships in ways that would be impossible if all understandings were reduced to express agreements).

88. 248 P.2d 352 at 362.