The Invisible Fence: An Exploration of Potential Conflict between the Right to Roam and the Right to Exclude

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Does land ownership require an absolute right to exclude? Or can freedom of movement coexist with the interests of landowners? Whose interests should be paramount? By attempting to answer these questions, the paper shows why a right to roam is of interest to more than a handful of enthusiastic hikers. After outlining Locke and Mill's key theories of property, the paper describes the way traditional British property relations changed in the 18th and 19th centuries. It compares the Countryside & Rights Of Way Act 2000 in England and Wales with the Scottish, American and Scandinavian jurisdictions. The paper ends by looking at the current revival of interest in the commons, and visits the city to demonstrate that opposition to the creeping privatisation of public land has much in common with country-lovers' call for wider access rights. Both concern the balance between individual rights and the common good.

1. Introduction

> Property in land is of a very different character from every other kind of property. Land is not property for our unlimited and unqualified use. Land is necessary so that we may live upon it and from it … and I deny, therefore, that there exists or is recognised by our law or in natural justice, such a thing as an unlimited power of exclusion.[1]

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[1] James Bryce, quoted in Marion Shoard, *A Right to Roam?* (OUP 1999) 172.

This statement made in 1892 to Parliament by James Bryce, an MP and campaigner for the right to roam (i.e. the right of the public to gain access to private land), succinctly encapsulates many of the themes which this paper addresses: the uniqueness and complex nature of land, the debate over whether property law is natural or socially constructed, and the different ways in which the right to property and freedom of movement are currently reconciled in different jurisdictions.

Does property ownership require an absolute right to exclude? Or can a right to roam coexist with the interests of landowners? Whose interests should be paramount? By attempting to answer these questions, the paper shows why freedom of access (often termed a 'right to roam') is of interest to more than a handful of enthusiastic hikers.

The right to own property is one of the most widely accepted rights;[2] it is enshrined in both the Universal Declaration of Human Rights,[3] and the European Convention on Human Rights.[4] The character of land, however, distinguishes it from other property. According to Ellickson and Sawers, land is immobile, has a unique location, is virtually indestructible, lacks natural boundaries, has multiple uses, is easily shared, and is finite.[5] Perhaps one should also add that land is not discrete—what takes place 'here' is likely to affect what happens 'there'. If I destroy, say, a piece of furniture that I own, it has little impact on anybody else or any other piece of furniture. But if I overgraze my land, or use powerful pesticides, neighbouring land is likely to be affected. Last but not least, land elicits strong emotions, perhaps because of its fundamental nature, providing the food we eat,

[2] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 28.

[3] Article 17: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

[4] Article 1, Protection of Property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[5] Brian Sawers, 'The Right to Exclude from Unimproved Land' (2011) 83(3) Temple Law Review 665, 694; Robert C Ellickson, 'Property In Land' (1993) 102 Yale Law Journal 1315, 1319.

the water we drink and the homes in which we live (as Adam Smith pointed out).[6]

Together these attributes generate a complex web of interdependence and conflicting claims. What I do on my land may affect what you can do on yours; my right to move freely (on your land) may have implications for your privacy; your right to privacy affects my right to move freely (a right which campaigners have dubbed the 'right to roam'). The Universal Declaration of Human Rights (UDHR) recognises that conflicts between human rights occur[7] and Freeman suggests that one way of dealing with this is to prioritise them.[8] Essentially, this paper is concerned with the implied prioritisation between an absolute right to exclude, and the right to roam freely.

The paper begins by outlining Locke and Mill's theories of property (Section 2), and goes on to describe traditional British property relations, and the changes that took place in the 18th and 19th centuries (Section 3). Section 4 shows how evolving attitudes to the countryside culminated in the Countryside & Rights of Way Act 2000 (CROW). Section 5 takes a comparative perspective, and presents the more radical reforms recently enacted in Scotland, the complex situation in America (historically and currently), and the virtual absence of rights to exclude in the Scandinavian countries. The final section outlines the current revival of interest in the commons, and briefly visits urban England.

[6] Quoted in Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (Guilford Press 2003) 33.

[7] Article 29: (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[8] Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press 2002) 82.

2. 'Mine' or 'Ours'?—Theories of Property[9]

Thomas Merrill proposes two broad schools of thought regarding property rights: essentialism and nominalism.[10] Although Merrill places himself uncompromisingly among the former, he acknowledges that the nominalists represent the current orthodoxy in the US legal community.

If property is not a simple question of 'things' but of the rights people exert in those things,[11] and given the special nature of property in the form of land, definition of these rights is fundamental to society. A book, or a car, or a diamond may be very desirable, and even scarce—but they hardly touch, in and of themselves, our very existence. In the interests of brevity, from now on I will use the term 'property' narrowly to mean land or real estate.

The Lockean Tradition: 'Essentialism' or 'Formal Exclusion Theory'[12]

John Locke's 'labour theory' of property rights'[13] assumes that in the beginning, God gave the earth to mankind in common to enjoy. Man, at that time, only owned his body, his labour, and the fruits of that labour. By applying labour to land he removes it from 'that common state Nature placed it in'[14] and can, by natural law (i.e. reason and 'right-ness'), claim ownership. The act of mixing labour with land, of 'improving' land, creates 'natural' property rights and a right to exclude.

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[9] This section concentrates on the main theorists relevant to this paper; it is not intended to be a comprehensive survey.

[10] I am using a slightly simplified version of the typology proposed by Merrill as my starting point, though I also add material from other sources. Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730.

[11] Merrill (n 10) 731-732.

[12] The former is Merrill's term; the latter is Lovett's. See Merrill (n 10) 734; John A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2010) 89 Nebraska Law Review 739, 746.

[13] John Locke, *Two Treatises on Government* (CUP 1960 [1689]). Second Treatise, Chapter 5, 285-302.

[14] ibid 288.

Even if Locke didn't intend to act as 'an advocate on behalf of the emerging property-owning middle classes,'[15] his work was widely cited by advocates of enclosure.[16] Conveniently, they forgot that Locke's *Provisos* asserted that ownership of land was only justified 'where there is enough and as good left in common for others' and was limited to 'as much as any one can make use of … before it spoils.'[17] The inconvenient issue of whether the labour had to be one's own (rather than a servant's or slave's) was similarly ignored by pragmatic landowners of the day.

Locke's theory provided powerful and useful ammunition for the activities of colonisers. If, 'In the beginning all the World was America,' [18] then settlers were entitled to improve and claim ownership of the unimproved land they found in the New World. For the colonisers, there was no question of needing to justify expropriation—the natives did not properly own the land since they had hardly improved it.[19]

In the 18th century, William Blackstone,[20] a later natural rights theorist and cornerstone of the British legal establishment, famously described 'that *sole and despotic dominion* which one man claims and exercises … in *total exclusion* of the right of any other individual in the universe.'[21] For Blackstone, the right to exclude is both necessary and sufficient to property ownership. Even in Blackstone's later, more moderate writing, the right to exclude remains at least necessary if not sufficient. [22]

Merrill seems to argue that any watering down of an absolute right to exclude by granting a right to roam fatally undermines the con-

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[15] EJ Lowe, *Locke* (Routledge 2005) 188.

[16] See below, Section 3, '*Keep Out: The Enclosure Movement*'.

[17] Locke (n 13) 288, 290.

[18] ibid 301.

[19] Locke's writing heavily influenced the drafters of the US Constitution. According to Bassani, Jefferson, for example, was a staunch Lockean, and there is no doubt that he 'regarded property as a natural right.' Luigi Marco Bassani, 'Life, Liberty, and …: Jefferson on Property Rights' (2004) 18(1) Journal of Libertarian Studies 31, 32.

[20] Blackstone was the first full-time law professor at an English-speaking university (Oxford) in 1758.

[21] Quoted in Merrill (n 10) 734 (emphasis added).

[22] ibid 736.

cept of property: 'Deny someone the exclusion right and they do not have property.'[23] But on closer reading, Merrill admits that Blackstone's insistence on 'despotic dominion' is a 'caricature of reality' and that the right to exclude is variable.[24] Nevertheless, a presumption in favour of the right to exclude lies at the heart of this approach.[25]

John Stuart Mill: 'Nominalism' or 'Social Obligation Theory'[26]

While utilitarians such as Bentham and Mill may have reached similar conclusions to the Lockeans—namely that private property was justified through productive labour—their reasoning depended on utility, not on natural right: 'No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.'[27] Bentham even claimed that 'Property and law are born and must die together',[28] and for Mill society could choose how to distribute wealth (without recourse to natural law justifications).

Today, social obligation theorists define property as inherently social: 'an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs.'[29] Property rights are viewed as a 'bundle of rights' and as such lack a 'fixed core'.[30]

Since we are all 'fundamentally dependent on human community',[31] all law (including property law) should concern itself with relationships, and be designed to balance 'the relative needs and interests of

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[23] ibid 730.

[24] Not even the most extreme nominalist argues for no right to exclude whatsoever.

[25] Lovett (n 12) 749.

[26] The former is Merrill's term; the latter is Lovett's. See Merrill (n 10) 736; Lovett (n 12) 743.

[27] John Stuart Mill, *Principles of Political Economy* (OUP 1994 [1886]) 40-41.

[28] Quoted in Richard Schlatter, *Private Property: The History of an Idea* (George Allen & Unwin 1951) 246.

[29] Eric T Freyfogle, 'Property and Liberty' (2010) 34 Harvard Environmental Law Review 75, 111.

[30] Merrill (n 10) 737.

[31] Lovett (n 12) 744.

competing property-owners, property-owners and non-owners, or owners and the community'.[32] In other words: 'Rather than serving as platforms for self-regarding behaviour, property ownership and property law become the place for building community'.[33]

In summary, the balance of rights should always favour the community, in particular with regard to access: 'Whoever owns land keeps others out of the enjoyment of it … The exclusive right to the land for purposes of cultivation does not imply an exclusive right to it for purposes of access.'[34] Furthermore: 'The claim of the landowners to the land is altogether subordinate to the general policy of the state.'[35]

These two approaches can be summarised as follows:

Formal exclusion theories	**Social obligation theories**
Historical advocates: Locke, Blackstone	Historical advocates: Mill
Property is a natural right	Property is socially constructed
Right to exclude is paramount	Right to exclude is one of a bundle of rights
Emphasis on landowners' privacy and freedom	Emphasis on shared social interests
Spatial configuration of property rights	Functional configuration of property rights
Presumption in favour of the right to exclude	Presumption in favour of responsible access
Simplicity, predictability	Complexity, contingency
State should protect owners' rights	State should balance competing interests

[32] ibid 745.

[33] ibid 746.

[34] Mill (n 27) 43.

[35] ibid 41.

3. A Case Study from History: The English Commons & the Enclosures

The Commons: Feudal England

The countryside of medieval England was characterised by a profusion of small villages surrounded by open fields, meadows and commonlands. The Lord of the Manor was the largest (but not the only) landowner, and often technically owned the village. Land ownership and usage was complex, and differed fundamentally from the spatial rights we are accustomed to today since usage and ownership rights were not necessarily coterminous.

Large arable fields were divided into narrow strips owned by different people so that landholdings were always scattered among a number of fields.[36] Cultivation of the fields was decided collectively and to some extent democratically—the crop(s) to be grown, and the dates of ploughing, sowing and harvesting were all agreed in the manor court. After harvesting, the fields became communal property with farmers allotted pasturing rights on the stubble in proportion to their land holdings.

Meadowland was also jointly owned. Once the hay was harvested, this land became common pasture. The 'commons' (which included wasteland, woodland, roadside strips etc.) was open to all villagers for grazing and gathering wood, berries and nuts.[37] Similarly, there was an extensive tradition of the communal management of many forests, with regard to grazing, cultivation and the gathering of food and firewood. As elsewhere, the rights tended to be traditional and 'confirmed through practice as much as documentation'.[38]

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[36] A single 200-acre field could have 30 landlords, each of whom owned strips of land in 10 or 20 places. JL Hammond and Barbara Hammond, *The Village Labourer* (Longman 1978 [1911]) 6. For an illuminating map which illustrates the complexity of a typical village, see Ellickson (n 5) 1389.

[37] For detailed descriptions of rural land and usage rights pre-enclosure, see Hammond and Hammond (n 36); Ellickson (n 5); EP Thompson, *Customs In Common* (Penguin 1993).

[38] Ben Cowell, 'Forests, the Magna Carta, and the "New Commons": Some Thoughts for the Forest Panel' (*Magna Carta 800th*, 13 October 2011) <http://magnacarta800th.com/papers/forests-the-magna-carta-and-the-new-commons-some-thoughts-for-the-forest-panel> accessed 27 April 2015

The main social distinction among villagers reflected whether they made their living mainly by farming or mainly by labouring for others.[39] Even the poorest could graze an animal or two on the (literally) marginal commons, and supplement their income by gathering food and fuel.

Despite 'retrospective predictions' of inevitable failure by Garrett Hardin in his famous and influential essay on *The Tragedy of the Commons*,[40] the system cleverly modified land rights seasonally, spreading risk and exploiting available economies of scale such as the need to only fence large fields, and communal harvesting and shepherding. Social controls within a close-knit community regulated farming without degenerating into ungovernable bickering. So although by no means an idyllic world of free and equal men, the pre-enclosure village represented a functioning system based less on property ownership than on reciprocal rights and obligations. EP Thompson nicely sums up the way in which the system supported small farmers by quoting a 1767 pamphlet against enclosure:

> There are some in almost all open parishes, who have houses, and little parcels of land in the field, with a right of commons for a cow or three or four sheep, by the assistance of which, with the profits of a little trade or their daily labour, they procure a very comfortable living. Their land furnished them with wheat and barley for bread, and, in many places, with beans or peas to feed a hog or two for meat; with the straw they thatch their cottage, and winter their cow, which gives a breakfast and supper of milk nine or ten months in the year for their families.[41]

Everybody could move about freely, so long as they did no damage to crops. In the context of the medieval village, the right to exclude was largely irrelevant. It featured most prominently in relation to the

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[39] Hammond and Hammond (n 36) 3.

[40] I have used the term 'retrospective prediction', for lack of a better phrase, to describe the opposite of a prophecy. Hardin theoretically predicted the 'inevitable' outcome of a situation which existed in the past—disregarding the fact that the anticipated tragedy manifestly did not take place. Even if Hardin was an ecologist writing about population control rather than a historian or economist, it nevertheless seems an odd way of constructing a theory—but it has clearly had impact. Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

[41] Thompson (n 37) 127-128, 176-177.

vast and jealously-guarded royal hunting parks from which commoners were totally and rigorously excluded.

Keep Out: The Enclosure Movement

The enclosure movement radically transformed rural England. In their classic study of the subject, JL and Barbara Hammond described England in 1685 as 'a country of commons and of common fields'; by 1830 it had been transformed into 'a country of individualistic agriculture.'[42]

A new breed of landowner without rural roots was created when King Henry VIII distributed land expropriated from the monasteries after their dissolution following his break with the Roman Catholic Church in the first half of the 16th century. Coupled with advances in agricultural techniques which demanded larger plots, traditional arrangements centred on rights and responsibilities were simply an obstacle to these new rural capitalists who were keen to maximise profit. In response to political instability in Europe at the time, there was also a desire to subdue the rural poor. Over the centuries, but particularly in the 18th and 19th centuries, over 5,200 Inclosure Acts passed through Parliament.[43]

The strip-farmed open fields were parcelled up into separate units, and common land became enclosed pasture or private woodland where both grazing and foraging by peasant farmers were forbidden.[44] Footpaths, until then defined by informal custom and usage, were formalised. Although this guaranteed access, it was paradoxically also restrictive. If you are officially allowed to walk along this path, it follows that you are not allowed to walk elsewhere, regardless of whether or not you are harming crops in any way.

[42] Hammond and Hammond (n 36) 1.

[43] Inclosure is the archaic form of the modern term enclosure. Marion Shoard, 'Let History Redeem Itself' Walk Magazine (London, Autumn 2014) 37.

[44] Hedges were planted to enclose much land. It is interesting to note that hedges, which are today viewed as representing an unchanging vision of rural tranquillity and continuity, in the 18th century 'symbolised a new exclusion from the land'. In riots against enclosure, hedges were often uprooted. Shoard (n 1) 143.

Usage became less important than ownership, and land was reified; rights became attached to places rather than persons.[45] Enclosure converted a '"functional system" of property rights, in which many different individuals might have rights to use a particular parcel of land, to a purely "spatial" system of absolute ownership of specific land.'[46]

The landed aristocracy acquired a taste for landscaped estates encircled by high walls, and hunting wild animals was ruthlessly controlled. In some extreme examples of this total retraction of rights by land-owners, whole villages were, quite literally, moved to sites where they would not disrupt the view or impede the sport of hunting.

The outcome of enclosure was by no means impartial. The compensation awarded by the Commissioners in charge of each Inclosure Act benefited owners not users, and smallholders were left with plots which were too small to sustain a family without recourse to commonly-owned pasture plus foraging rights.[47] 'Virtually overnight, peasants who had until then been able to earn a living independently were forced to find a wage-earning job, move to an industrial town, or emigrate.'[48] Although in theory local people had a say in the decisions reached with regard to each application to enclose, in reality illiteracy, inarticulateness, poverty and sheer distance from, and lack of influence in, London rendered them powerless. By removing the need for communal decision-making, community cohesion was also undermined.

In their classic study, the Hammonds paint a bleak picture:

> The peasant with rights and a status, with a share in the fortunes and government of his village, standing in rags, but standing on his feet, makes way for the labourer with no corporate rights to defend … no property to cherish, no

[45] Thompson (n 37) 136.

[46] These are Stuart Banner's terms, quoted in Lovett (n 12) 767.

[47] Thompson (n 37) 136.

[48] Jerry L Anderson, 'Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks' (2007) 19(3) Georgetown International Environmental Law Review 375, 387.

> ambition to pursue … and the weight of a future without hope.[49]

Other historians are less gloomy. What is certain, though, is that enclosure effected an irreversible sea-change in rural ways of life, and inflicted substantial suffering on the poorest. On the positive side, enclosure initiated the move from feudalism to a market economy, brought more land into cultivation and increased yields.

4: 'A Kind of National Property'[50]

Changing Attitudes in England & Wales

Despite the Lockean view of the countryside as something to be improved rather than appreciated, sensibilities gradually changed over the 18th and 19th centuries. The Romantic movement in the arts epitomised the growing value placed on nature and by the 19th century this was combined with the pragmatic needs of the industrial urban masses for healthy recreation. The outdoors was no longer solely a supplier of profit, but also a source of spiritual (and physical) renewal.

Groups campaigning for land reform proliferated, ranging from the influential and dedicated Commons Preservation Society (established in 1865)[51] to more general organisations such as various land reform societies, and the Fabian Society. All attempted to change the law on land ownership and access. In 1884, MP James Bryce introduced the first right to roam bill, proposing no less than the abolition of the law of trespass on uncultivated land in Scotland. His bill was, of course, defeated and even though he reintroduced it an astonishing twelve times, a general right to roam remained elusive.[52]

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[49] Hammond and Hammond (n 36) 63.

[50] William Wordsworth described the Lake District as 'A sort of national property in which every man has a right and interest who has an eye to perceive and a heart to enjoy'.

[51] The Commons Preservation Society fought legal battles to preserve Epping Forest, Hampstead Heath, Wimbledon Common and other remaining commons around London.

[52] James Bryce is quoted at the beginning of this paper. Lovett (n 12) 759.

During the depression of the 1930s, matters reached crisis point, as evidenced by the 1932 mass trespass of Kinder Scout, a wilderness easily accessible from the overcrowded cities of the industrial Midlands and North. On Sundays, an estimated 15,000 ramblers set out from Sheffield alone, and paths were being damaged by over use. Yet walkers were prevented from roaming by landowners safeguarding their lucrative grouse-shooting and by water boards claiming to protect water reserves (although they were willing to lease the land for sheep grazing). An iconic event among walkers today, the mass trespass failed to change the law but did, perhaps, raise public awareness.

It was not until 1949 that the UK's network of public rights of way was definitively mapped, as a result of the provisions of the National Parks and Access to the Countryside Act 1949. But it was only in 1979, when Labour returned to power after many years of Conservative rule, that right to roam legislation was introduced.

England does have a magnificent network of rights of way, and a total of 190,000km of footpaths criss-cross the country.[53] Astonishingly, a public footpath runs within 1,000m of Chequers, the Prime Minister's official country residence, and another lies 100 metres from Madonna's mansion in rural Wiltshire.[54]

Originally simply a way of getting from A to B, footpaths are, by definition, linear and narrow, and use is restricted to walking, picnicking and sometimes riding. Landowners may not block footpaths or discourage access by, for example, ploughing up a path, dismantling a stile or gate, or putting a bull in a field; walkers must stick to the route. The path through the Chequers estate is littered with CCTV cameras—any digression would be dealt with speedily. Walkers who stray can in theory be charged with trespass and landowners may use 'reasonable force' to eject them. In practice, so long as no damage

[53] This includes all public rights of way (footpaths, bridleways, restricted byways, and byways open to all traffic). For more information, see: <http://webarchive.nationalarchives.gov.uk/20140605090108/http://www.naturalengland.org.uk/ourwork/access/rightsofway/prow/default.aspx> accessed 27 April 2015; Anderson (n 48) 381.

[54] Jerry L Anderson, 'Countryside Access and Environmental Protection: An American View of Britain's Right to Roam' (2007) 9 Environmental Law Review 241.

has been done, the offence is civil and damages are nominal. Only rarely does trespass become a criminal offence.[55]

The Countryside & Rights of Way Act 2000 (CROW)

CROW provides a statutory right of access to registered common land and four categories of privately-owned 'open access' land in England and Wales: mountain, moor, heath and downland.[56] The Act excludes cultivated land, as well as buildings and their curtilage. In total, 940,000 hectares,[57] or 7% of England has been classified by Natural England[58] as open access land on which people are free to roam.

The right is for recreational purposes, so people may walk and picnic, but not hunt, light fires, swim, remove plants or trees, ride a bicycle/horse, or do any damage. The right to roam is absolute (the only grounds for objection being the classification of the land). Landowners received no compensation but their privacy is protected by prohibiting access within 20 metres of a building, and their duty of care is limited.[59]

There is no doubt that CROW marks a return to a functional definition of land ownership, where several parties share rights in the same land. It also restores commoners' freedom of movement, lost during enclosure—though it does not, of course, restore many of the other usage rights lost at that time. So is CROW a 'dramatic curtailment of the right to exclude'[60] or simply a relatively minor

[55] These include trespassing a second time in defiance of an injunction, large-scale trespassing, and aggravated trespass by, for example, hunt saboteurs or New Age travellers. See Shoard (n 1) 11-13.

[56] Anderson (n 54). See Section 5 below for Scotland.

[57] Natural England, 'Countryside Access and the New Right (CA65)' (Leaflet, 1 October 2005) <http://publications.naturalengland.org.uk/publication/9026?category=211280> accessed 15 March 2015.

[58] Formerly the Countryside Agency.

[59] Landowners' duty of care is limited to that owed to trespassers rather than that owed to invitees.

[60] Anderson (n 48) 375.

rebalancing of the rights of landowners? A brief look at similar legislation elsewhere may help to provide an answer.

5. A Wider Perspective

Bringing Fairness to the Countryside (Scotland)

By the 1990s, it was generally agreed that the Scottish situation was unsatisfactory. Land ownership was inequitable; figures suggest that $^{2}/_{3}$ of private land was owned by just 1,252 people, with 60% of the Highlands owned by a mere 100 people. This pattern has been described as 'the worst in Europe.'[61] This situation reflected a history of injustice and bitterness dating back to the infamous Highland Clearances of the 19th century.[62]

Yet, notably in the Highlands, landowners had also tolerated hill-walkers for generations. In fact, a widely-held but inaccurate myth held that a right to roam actually existed, despite the absence of any basis in law.[63] In one sense, though, the law concerning the right to exclude was less stringent than in England: the act of trespass was only actionable if damage had been caused.[64]

Still controversial today,[65] the Land Reform (Scotland) Act 2003 provides a statutory right of access to all land for recreation, so long as that right is exercised responsibly. Specific exclusions concern land on which crops are growing, and houses and their curtilage.[66]

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[61] W David H Sellar, 'The Great Land Debate and the Land Reform (Scotland) Act 2003' (2006) 60(1) Norsk Geografisk Tidsskrift—Norwegian Journal of Geography 100, 101.

[62] During the Clearances, tenant farmers (known as crofters) were evicted en masse by absentee landlords in the name of modern, efficient and profitable sheep farming.

[63] Sellar (n 61) 103.

[64] DL Carey-Miller, 'Public Access to Private Land in Scotland' (2012) 15(2) Potchefstroom Electronic Law Journal 119,120 < http://dspace.nwu.ac.za/handle/10394/7220?show=full> accessed 27 April 2015.

[65] Controversy over the Act stems partly from its right to roam provisions, and partly from other provisions concerning the abolition of feudal tenure and a community 'right to buy'. For comments on the Act, see Sellar (n 61) 107.

[66] Other specific types of land such as schools, airfields, railway land, etc, were also excluded. Carey-Miller (n 64) 129.

Walking, cycling, horse-riding, canoeing, and camping are permitted—hunting, shooting and fishing (three major sources of income for the great Highland estates) are not.

On one count, this Act is more radical than CROW in that it covers all land (not just certain restricted categories); on the other hand, in the Highlands at least, it merely converted a de facto situation into a de jure right.[67]

'The Man with the Fence Wins'[68]*—Or Does He? (The Case of America)*

America boasts many long-distance trails, but most Americans cannot take a walk in the country without driving to a publicly-owned park. How did this situation come about?

Many American settlements were originally laid out on a grid pattern (rather than growing organically), so obviating the need for a network of footpaths in the days before motorised transport. Although people are encouraged to use state and national parks, American paths often cross remote wildernesses and are less accessible than their English equivalents.

Restrictions on public access to private land are underpinned by the 'takings clause' of the 5th Amendment,[69] which the Supreme Court interprets as creating an absolute right to exclude, described as 'one of the most essential sticks in the bundle of rights that are commonly characterised as property.'[70] There is explicitly no requirement to

[67] To quote the former Scottish Deputy Minister for Justice: 'It is about codifying what happens currently.' Quoted in Heidi Gorovitz Robertson, 'Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude' (2011) 23 Georgetown International Environmental Law Review 212, 248.

[68] Anderson (n 54) 257.

[69] 'Nor shall private property be taken for public use, without just compensation.' The Constitution of the United States, Amendment 5.

[70] Quoted in Anderson (n 48) 426.

balance private and public interests and any limitation, however small, must be compensated.[71]

At least one American scholar has proposed a distinction between access rights to improved and unimproved land. It is true that the early settlers were given parcels of land which they had to cultivate in order to secure full title.[72] But, Sawers suggests, the situation today 'would appear unrecognisably limited to the Founding Fathers. At independence, the public had broad rights to use unimproved land, including the right to graze, fish, hunt and forage.' Until the 1860s 'open access was the norm.'[73]

While English landowners needed to keep livestock *in*, their American counterparts fenced to keep livestock *out*. Notably in the Mid-West, the open range served as a vast, unenclosed grazing commons. Conflicts between ranchers and farmers[74] were eventually resolved as, state by state, the range was closed, much land was improved and access restricted.[75]

In effect, two systems operated in 19th century America—one on improved, enclosed farmland, and the other on unimproved land. In many states, the presumption is still that owners must act to prevent access; 29 states limit trespass to land 'posted' as private, effectively qualifying the right to exclude and imposing non-trivial costs on

[71] Even the laying of cable boxes and wires requires compensation. See Anderson (n 54) 251.

[72] It is perhaps a sad reflection on American sensibilities that at least two law professors (Anderson and Sawers) discuss the history of property rights in the USA without even mentioning the varied property regimes of the indigenous Native American tribes. See for example Anderson (n 48) 417-421; Sawers (n 5) 674-684.

[73] Sawers (n 5) 673, 674.

[74] As evidenced in the famous Rodgers and Hammerstein song 'The Farmer and the Cowman', from their musical *Oklahoma!* For the full lyrics, see <http://lyrics.astraweb.com/display/374/oklahoma..musical_ost..farmer_and_the_cowman.html> accessed 27 April 2015.

[75] To me, at least, this is reminiscent of enclosure in England, but I came across no such comparison in the literature. It is also interesting to note that while enclosure in England was driven by technological innovation, the closing of the range was made possible (i.e. financially viable) by technology, namely the invention of barbed wire in 1867. Ellickson (n 5) 1330.

landowners.[76] This only applies to unimproved land—cultivation is of and in itself regarded as sufficient notice that access is prohibited.

Sawers argues that despite Supreme Court judgements, the Constitution does not require a general right to exclude,[77] and historical precedent limits the right to exclude on unfenced or unimproved private land.[78] Sawers also makes a social justice argument: whites own 98% of all farmland in the USA, and 1% of Americans own 66% of privately-owned land (equivalent to a massive 46% of the country). Retaining the right to exclude effectively allows a tiny minority to decide who may enjoy the countryside.[79]

'Don't Disturb, Don't Destroy'[80] *(The Scandinavian Model)*

Sweden, Norway, Finland and Iceland[81] enjoy possibly the most relaxed approach to the right to roam in the developed world, for a variety of reasons. The region's low population density has mitigated conflict over land ownership,[82] the forests have always been regarded

[76] Hence the many 'Posted—No Trespassing' signs that one sees travelling through rural America. Sawers (n 5) 672.

[77] Specifically, the famous case of *Kaiser Aetna v United States*, 444 U.S. 164 (1979), on which the Supreme Court's 'canonisation' of the right to exclude was based, rests on slim precedents, and there exist many other cases relating specifically to unimproved land, such as beaches, where greater public access has been approved. See Sawers (n 5) 667.

[78] For an explanation of how the two terms—unfenced and unimproved—can be used almost interchangeably, see Sawers (n 5) 689.

[79] ibid 694.

[80] This slogan is used by the Swedish Environmental Protection Agency to encapsulate their approach to public access. See <http://www.naturvardsverket.se/en/Environmental-objectives-and-cooperation/Swedish-environmental-work/Work-areas/This-is-the-Right-of-Public-Access/> accessed 27 April 2015.

[81] I am excluding Denmark, where the right to exclude was enacted in 1873 and then partially reversed in 1969. Overall, the public access regime in Denmark is the most restrictive in the region, and is limited to certain types of land (along similar lines to England after CROW). For more on Denmark, see Sawers (n 5) 687.

[82] For example, even at the height of their power, the Swedish aristocracy owned only 40% of the country and the crown 20%. Gorovitz Robertson (n 67) 223.

as 'existing for the common good',[83] and fully-fledged feudal systems never developed in these countries.

In Sweden for example, although the term *allemansrätt* (which translates as 'everyman's right') is relatively recent, the notion that anybody may walk anywhere they please dates back to at least 1350.[84] In fact, not just walking but camping, picking berries and foraging for mushrooms are all permissible. Both berries and mushrooms are richly abundant so that there never has been (and still is not) any possibility of exhausting or even denting the resource. In the past at least, foraging contributed significantly to the diet of the poor. The right to pitch a tent was necessary—villages were often more than a day's journey apart. Swimming and canoeing are allowed; freshwater fishing is not.[85]

This right is constrained by common sense: roamers must not invade landowners' privacy and they must do no damage. This means that cultivated land is out of bounds during the growing season when crops might be damaged but, for instance, skiing across snow-covered fields is permitted. As befits a right established by 'customary law',[86] there is no definition of exactly how near a 'homestead' one can roam. The suggested rule of thumb is that 'if you can see and hear people, you are too close'.[87]

Although everyman's right varies slightly from country to country, for all Scandinavians the need to balance property-owners' right to exclude against the public's right to access is axiomatic. *Allemansrätt* is symbolic of citizens' rights and duties, 'grounded in rules of reason … basic respect and personal responsibility.'[88]

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[83] ibid 222.

[84] ibid 220.

[85] Except in the country's five large lakes.

[86] In Sweden and Finland *allemansrätt* (*jokamiehenoikeus* in Finnish) is included in the constitution but is not formally codified; the rule is that 'if it's not forbidden, it's allowed'. In Norway and Iceland the right was codified in law in 1957 and 1999 respectively. Gorovitz Robertson (n 67).

[87] ibid 225.

[88] ibid 226.

6. Current Paradigms

The Commons Revisited

The examples of England & Wales, Scotland, America and Scandinavia outlined above all concern differing degrees of public access to privately-owned, rural land. Yet new paradigms concerning the ownership of common resources are emerging.

Nobel Prize-winning economist Elinor Ostrom proved a strong advocate of joint ownership and responsibility for common-pool resources.[89] Taking the traditional commons as her model, she overturned the conventional (and influential) wisdom of Hardin's *Tragedy of the Commons*. In contrast to Hardin's 'disempowering and pessimistic vision,'[90] Ostrom demonstrated that neither government intervention nor privatisation are necessary to the successful, long-term management of common-pool resources such as forests, fisheries, grazing land, irrigation systems, and even oil fields. Socialism or free enterprise are not the only options. In fact, she suggested that catastrophic failures in the management of common-pool resources could often be attributed to the fact that resources were placed under the sole control of government agencies.

Instead, Ostrom demonstrated—by means of rigorous empirical analysis of case studies from around the world—that people tend to work sensibly together for the general good in the maintenance of common-pool resources so long as certain conditions are met. In particular, she pointed to a need for the decision-making process to be organised locally, and to be based on trust and shared values.

Rather than arguing from a theoretical, idealistic or historical viewpoint, Ostrom's research provided empirical data evidencing collaboration for the common good. Thus although, as she herself said, sound science is necessary but not sufficient,[91] her cautious optimism is neither naive nor unreliable. Looking to the future, Ostrom argues, the greater challenges of managing the 'global com-

[89] Elinor Ostrom and others, 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 Science 278; Thomas Dietz, Elinor Ostrom and Paul C Stern, 'The Struggle to Govern the Commons' (2003) 302 Science 1907.

[90] Ostrom and others (n 89) 278.

[91] Dietz, Ostrom and Stern (n 89) 1910.

mons' in relation to issues such as climate change, biodiversity and similar issues will 'require forms of communication, information, and trust that are broad and deep beyond precedent, but not beyond possibility.'[92]

In short, there is no practical reason why common land—estimated at just 4% of land registered in England and Wales[93]—should not expand once again; and in fact the concept of the commons has found other new champions in recent years. Experts from organisations such as Natural England and the National Trust propose the creation of new commons in and around urban centres, to be administered by 'land companies' (first proposed in the 1860s).[94] These would provide green and open spaces for recreation, trees to combat climate change, and habitats for biodiversity. The creation of such new commons clearly meshes with the currently topical themes of localism, devolution, even the 'Big Society'.[95]

The Urban Scene

Although this paper focuses on access to rural land, a detour into current controversies relating to the urban situation is illuminating.[96]

Looking back in history, the burgeoning industrial cities of the 19th century were surprisingly private spaces. Huge swathes of land were privately owned, and London, for instance, included many closed

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[92] Ostrom and others (n 89) 282.

[93] Anna Minton, 'The Privatization of Public Space' (Royal Institution of Chartered Surveyors 2006) 9.

[94] Back in the 1860s, Robert Hunter, solicitor to the Commons Preservation Society, proposed a new form of land ownership through the creation of Land Companies for the express purpose of managing common land, not for profit but to protect public interests in public spaces. See Duncan Mackay, 'New Commons for Old: Inspiring New Cultural Traditions' in Ian D Rotherham, Mauro Agnoletti and Christine Handley (eds), *End of Tradition? Part 2* (Wildtrack Publishing 2010) 109.

[95] Mackay (n 94) 116; Cowell (n 38); Shoard (n 43) 37. Shoard, a long-time campaigner for the right to roam, points out that the process is partly in place—a 'right of common' can be expressly granted by landowners, which is then registered in the UK under the Commons Act 2006. Subsequently, such land is deemed open access land (under CROW) and is therefore available to the general public.

[96] Minton (n 93).

squares and private streets, with gates and barriers preventing unauthorised access. Growing debate concerning public access led, in the mid-Victorian period, to the transfer of many roads, streets and parks to the public domain (i.e. to government or local authority ownership).

Just over a century later, the picture is changing dramatically, in so far as a number of UK (and US) cities are favouring large-scale developments undertaken by a single institution, often on previously derelict, neglected or redundant industrial locations. The early pioneer developments—starting with Broadgate on the fringe of the City of London in the 1980s—actually added to public space by allowing access to previously private sites (such as railway lines and docklands).

Overall though, the 'growing privatization of the public sector' arguably constitutes a 'quiet revolution',[97] worrying some urban theorists for two main reasons. First, there is the deceptive (some would say disingenuous) use of language. Although new developments are creating new spaces referred to blithely as 'public', in fact they are privately-owned and managed—and the owners are at liberty to restrict access as they wish. The 2011 Occupy movement is a case in point—the protesters were prevented from using Paternoster Square (in the City of London); although most people thought of, and used, the square as a public space, it is in fact privately owned. The owners quickly and rigorously asserted their rights, erecting notices which stated that there was absolutely no free right of access. Forced to turn to the square in front of St Paul's Cathedral—certainly a public space—the protesters were eventually even evicted from there too.[98]

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[97] ibid 2.

[98] See, for example, Anna Minton, 'Private Spaces are Stifling Protest' (*The Guardian*, 26 October 2011) <http://www.guardian.co.uk/commentisfree/2011/oct/26/private-spaces-protest-occupy-london?INTCMP=SRCH> accessed 27 April 2015; Sarah Sackman, 'The Occupy London Result Raises the Thorny Issue of Property v Protest' (*The Guardian*, 18 January 2012) <http://www.guardian.co.uk/commentisfree/libertycentral/2012/jan/18/occupy-london-eviction-freedom-expression-private?INTCMP=SRCH> accessed 27 April 2015.

The second cause for concern is political, and relates to private-public spaces carved out of public spaces, such as Liverpool One, in which over 30 streets in the city centre are run by a private landlord, effectively removing public rights of way.[99] On a smaller scale, shopping centres often incorporate the public highway, yet are able to impose their own restrictive by-laws.[100] In these cases, previously public land has been turned over to a single private landlord to exploit and manage; in essence this is the expropriation of common resources by the private sector. Here, there are major issues of democracy and accountability, with the public sector handing over management of previously public spaces to unaccountable institutions. As such, it is argued, such private mega-developments undermine trust and social cohesion.

7. 'A Spacious Horizon is an Image of Liberty':[101] Conclusions

There is no doubt that land, particularly rural land, is very different from other possessions, and ownership cannot be absolute. Allocation of the sticks in the property-owner's 'bundle of rights' can, and does, change over time and geography. Revisiting the table presented earlier, we can add the examples described above:

[99] See Minton (n 93).

[100] Layard, for example, discusses the commodification of public space in shopping centres, and suggests that the different legal regimes on either side of an (often invisible) dividing line turn multiplicity into uniformity. She gives the telling example of a Quaker who was prevented from distributing non-contentious leaflets in Quakers Friars, a shopping centre built on the site of a former Meeting House. Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37(3) Journal of Law and Society 412.

[101] Joseph Addison, English essayist (1672-1719), writing in *The Spectator* magazine. Quoted in Ian Waites, 'A Spacious Horizon is an Image of Liberty: Artistic and Literary Representations of Space and Freedom in the English Common Field Landscape in the Face of Parliamentary Enclosure, 1810-1830' (2004) 28(84) Capital & Class 83, 84.

Formal exclusion theories	Social obligation theories
Historical advocates: Locke, Blackstone	Historical advocates: Mill
Property is a natural right	Property is socially constructed
Right to exclude is paramount	Right to exclude is one of a bundle of rights
Emphasis on landowners' privacy and freedom	Emphasis on shared social interests
Spatial configuration of property rights	Functional configuration of property rights
Presumption in favour of the right to exclude	Presumption in favour of responsible access
Simplicity, predictability	Complexity, contingency
State should protect owners' rights	State should balance competing interests
Enclosures in England	Countryside and Rights of Way Act 2000
Highland Clearances in Scotland	Land Reform (Scotland) Act 2003
US Supreme Court today	USA in 18th/19th centuries
	Scandinavia

Medieval England comprised a complex set of functional property rights, in which most ordinary people living in the countryside had a stake and which accommodated the agricultural cycle. The commons were, basically, accessible to all at all times; other land was accessible to some people, some of the time. Through enclosure, this was transformed into a more rigidly spatial system characterised by many invisible (and, of course, visible) fences. Individual rights, and exclusion, became the norm. CROW partly turned the clock back as some unimproved land became, once more, accessible to everybody.

Scottish reforms have been more dramatic, in that everybody is now allowed access to everywhere, and the current model is much closer to the everyman's right of the Scandinavian model. America presents a conundrum. Historically, there was both openness and exclusion; today exclusion is the norm, although an argument can be made in favour of a right to roam on unimproved land.

Freyfogle reminds us that by definition private property represents a massive restriction on everybody's freedom, and that in fact 'liberty lives on both sides' of the debate.[102] To resolve the issue, we need to realise that the customary 'bright line'[103] between mutually exclusive categories of public versus private property is not necessarily the only option available to us.

This is especially clear in the urban context. In the UK, the creeping privatisation of previously public urban spaces has been seen as symptomatic of the current trajectory of neoliberalism, according to which the commons continue to be expropriated. Critics of such projects, such as political philosopher Michael Hardt, view the privatisation of public land through the same lens as the privatisation of, for example, the energy and water industries.[104]

Ultimately, therefore, questions of public access do not only concern walkers, but are important to all of us. A quote from Merrill provides appropriate last words by referring to: 'a complex tapestry of property rights … with different types and degrees of exclusion rights being exercised by different sorts of entities in different contexts.'[105] Despite being an arch-essentialist, his seminal article supports the right to roam in all its manifestations, from the openness of Scandinavia and Scotland, to the current restrictive US regime, via the English 'middle way'.

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[102] Freyfogle (n 29) 83 and 114.

[103] To use Anderson's term. Anderson (n 54) 258.

[104] Hardt would add to this the privatisation of modern commons, i.e. the products of human intelligence (ideas, knowledge, software, etc). Thus, for example, 'biopiracy' transforms indigenous medicinal knowledge into private property. See for example, Michael Hardt, 'The Common in Communism' (2010) 22(3) Rethinking Marxism 346.

[105] Merrill (n 10) 753.