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Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks

JERRY L. ANDERSON*

ABSTRACT

Britain recently enacted a "right to roam" in the Countryside and Rights of Way Act (CRoW) 2000. At first glance, CRoW appears to be a dramatic curtailment of the landowner's traditional right to exclude; it opens up all private land classified as "mountain, moor, heath, or down" to the public for hiking and picnicking. Yet, when viewed in the light of history, CRoW may be seen as partially restoring to the commoner rights lost during the enclosure period, when the commons system ended. CRoW also represents a return to a functional rather than spatial form of land ownership, allowing more than one party to have rights in a particular piece of land. The new law highlights some important public values regarding freedom of access that have been all but forgotten in the United States. The law calls into question U.S. Supreme Court precedent that has enshrined the right to exclude as an "essential" stick in the bundle of property rights and serves as a powerful alternative to the Court's formalistic notion of property rights. Given the differences in its history, culture, and legal system, the United States is unlikely to follow Britain's lead in enacting a right to roam; nevertheless, the study of CRoW contains valuable lessons for Americans.

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* *Richard M. and Anita Calkins Professor of Law*, Drake University Law School. © 2007, Jerry L. Anderson. The author wishes to thank the anonymous donor of the Drake International Research Stipend who generously enabled this research. This article benefited from the comments of Professors Bob Ellickson and Stuart Banner on an earlier draft. The author was also aided by suggestions from his faculty colleagues who participated in a Drake faculty colloquium, especially by Professor Neil Hamilton. In addition, the author acknowledges the research assistance of Terica Keaton and Aaron Brees. He would also like to thank Drake law library personnel, especially Susan Lerdal and Sherry VonBehren for their energetic, timely, and cheerful assistance in procuring hard-to-find sources. For clarifications of European law, the author thanks Dutch lawyers and friends Wouter Hertzberger and Jan Franken. For acquainting him with European land use issues, the author wishes to thank the Östling brothers, Fred, Kent, and Paul-Erik, and the author's Swedish "sister" Marianne Levander. Finally, he offers warm thanks to Susan Anderson for her usual editing acumen. This article is dedicated to Del Knauer, who "inspired hath in every holt and heeth."

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No man made the land: it is the original inheritance of the whole species . . . . The land of every country belongs to the people of that country.

—John Stuart Mill[1]

I. INTRODUCTION

At least since Blackstone, property rights discourse has been plagued by absolutism, the notion that the right of property should be defined as the "sole and despotic dominion" over the *res*, to the "total exclusion of the right of any other individual in the universe."[2] Property professors and courts generally refer to the collection of rights that private property owners enjoy vis-à-vis other landowners and the public as a "bundle of sticks," in an attempt to render rather abstract concepts more concrete.[3] The prevailing metaphor, however, lends itself to a formalistic, absolutist conception of these interests, implying that the sticks, such as the right to devise or the right to convey, are things, much like your car or your house; therefore, the composition of the bundle must be an immutable and essential state of affairs.[4]

In contrast, many scholars insist that property rights are neither static nor absolute. The recognition of private property interests involves trade-offs with community values and egalitarian goals; therefore, the exact composition of the bundle of sticks must be recognized as a mediation between these interests.[5]

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1. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, Book II, Ch. II, § 6 (1866).

2. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2.

3. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES xli (Aspen Publishers, Inc. 4th ed. 2006); United States v. Craft, 535 U.S. 274, 274 (2002).

4. *See generally* Craig A. Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002) (suggesting that bundle of sticks metaphor hinders environmental protection goals).

5. Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1345 (1993) (noting that property systems are

Moreover, the balance struck is always tentative, subject to constant re-evaluation in light of current needs and norms.[6] Certainly, the relative stability of property rights over time is not only fair to those who strive to obtain them, but is also necessary for society to function.[7] Nevertheless, some evolution in our conception of the proper scope of property rights is both inevitable and desirable.

The United States Supreme Court has furthered a formalistic, absolutist conception of property rights by adopting the bundle of sticks metaphor and placing the landowner's "right to exclude" at the top of the woodpile. In a series of cases, the Supreme Court has canonized the right to exclude others as "essential" to the concept of private property.[8] Completely absent from the Court's analysis is recognition that the landowner's right to exclude involves a balance with the public's interest in access. The public may desire access to these lands for the purpose of reaching some communal property, such as a beach or park, or it may value access for its own sake, to enjoy the aesthetic values the private land and its surroundings offers. While the public interest has figured into a few state court decisions on access,[9] the Supreme Court has not so much as mentioned it in upholding a seemingly absolute right to exclude.

Blackstone's descendants, in contrast, take a much different view of the balance of interests. Britain's[10] recent enactment of a "right to roam" in the Countryside and Rights of Way Act 2000 (CRoW)[11] provides a fascinating study of how the right to exclude may be modified to accommodate public needs without unduly impacting the interests of the private landowner. CRoW classifies private land that contains mountains, moors, heath, or downland[12] as "open

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"a major battleground" on which the conflict "between individual liberty and privacy on the one hand and community and equality on the other" is resolved).

6. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 93 (2003) ("All individual and public claims [to property] are subject to dispute, discard, evolution, and change, as societally constructed understandings."); Eric T. Freyfogle, *Eight Principles for Property Rights in an Anti-sprawl Age*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 777, 785-86 (1999) (noting that property rights and ownership norms evolve over time); Maria Ågren, *Asserting One's Rights: Swedish Property Law in the Transition from Community Law to State Law*, 19 LAW & HIST. REV. 241, 243 (2001) (noting that property rights systems change over time, citing historical analyses of property rights).

7. Freyfogle, *supra* note 6, at 785 (noting that property rights must be relatively stable to serve economic functions, yet flexible enough to meet current societal needs).

8. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

9. *See, e.g.*, State *ex rel*. Thornton v. Hay, 462 P.2d 671 (Or. 1969).

10. Throughout this article, I have used the term "Britain" as the subject of study. Great Britain, which comprises England, Wales and Scotland, is technically only a part of the political entity, the United Kingdom, which also includes Northern Ireland. However, many of the laws and regulations to which this comparative study refers apply only to England and Wales. Therefore, the reader should be aware that procedures, laws, and the names of the agencies involved may differ in Scotland and Northern Ireland. In most instances, I have not noted those distinctions, because they are not relevant to my purpose and would unnecessarily complicate the article.

11. Countryside and Rights of Way Act 2000, ch. 37 (Eng.).

12. Downland is defined as "land comprising semi-natural grassland in areas of chalk or limestone geology

country," and requires landowners to allow the public to roam freely across these lands. Thus, CRoW opens up millions of acres of private land to public access, without compensating the landowners for this limitation on their right to exclude. As a result, the law represents a dramatic shift in the allocation of the bundle of sticks.

The impetus for CRoW can be understood fully only by delving into British history and culture. Britons have long valued public access to the countryside, which allows the public to fully enjoy its amenities.[13] The romantic vision of a rural walk is enshrined in English literature, from the poetry of William Cowper,[14] John Clare,[15] Thomas Hardy,[16] and William Wordsworth[17] to the novels of Jane Austen.[18] Numerous public footpaths crisscross private lands, and both the government and private groups such as the Ramblers Association zealously guard these rights-of-way against encroachment.[19] Under a theory of implied dedication, British courts have consistently recognized the public's continued enjoyment of common rights to certain private lands historically used by the citizenry.

But these rights, as extensive as they may seem to outsiders, have never satisfied the British public, due primarily to class outrage with an historical basis. The enclosure of the commons seems to have been the genesis of a long-running

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generally within an open landscape. The typical vegetation type is unimproved grassland often with scattered scrub." Countryside Agency, FAQ, http://www.countryside.gov.uk/LAR/Access/open_access/FAQ/definition/open_country.asp (last visited April 7 2007).

13. *See* MARION SHOARD, A RIGHT TO ROAM: SHOULD WE OPEN UP BRITAIN'S COUNTRYSIDE? 1-2 (1999) (noting that the British have a "fierce attachment to their countryside," which is part of the country's "collective identity").

14. *See, e.g.*, Tim Fulford, *Cowper, Wordsworth, and Clare: The Politics of Trees*, 14 JOHN CLARE SOC'Y J. 47 (1995), *available at* http://www.johnclare.info ("Cowper found in the landscapes of Buckinghamshire the virtues he had sought and failed to find in polite society. They were for him places from which order, morality, even love could be derived when it could not from the actions of gentlemen.").

15. Populist poet John Clare (1793-1864) often wrote of the joys of the countryside and its importance to the common man. *See, e.g.*, text accompanying *infra*, note 23.

16. Although Hardy may be more well-known for his novels, he was also a celebrated poet. Many of his poems reflect a love for nature and the joys of walking in the countryside:

> I went by footpath and by stile
> Beyond where bustle ends,
> Strayed here a mile and there a mile
> And called upon some friends.

Thomas Hardy, *Paying Calls*, ll. 1-4, *in* MOMENTS OF VISION AND MISCELLANEOUS VERSES 160 (1919).

17. *See, e.g.*, William Wordsworth & William Knight, *Lines Composed a Few Miles Above Tintern Abbey*, *in* WILLIAM WORDSWORTH, THE POETICAL WORKS OF WILLIAM WORDSWORTH 160-65 (1882) (discussed further *infra*, notes 286-88).

18. *See, e.g.*, JANE AUSTEN, PRIDE AND PREJUDICE Ch. VII (1813); discussion *infra*, note 306; JANE AUSTEN, MANSFIELD PARK 87 (T. Tanner ed., 1985) (lamenting landowner's destruction of trees).

19. UK Charity—The Ramblers' Association—Outdoor Industry Supporters, www.ramblers.org.uk/fundraising/corporates.html (last visited Jan. 15, 2007) (claiming 140,000 members).

conflict over public's access.[20] As more fully explored below, enclosure converted communal land into private land, profoundly affecting commoners' rights and English society in general. Although many public footpaths were preserved by enclosure orders, the public's access to many areas over which they previously enjoyed a general right to roam was summarily extinguished.

The loss of these "roaming" rights seems to have been chafing at Britons ever since.[21] Public discontent with lack of access resulted in celebrated protests, to which Parliament responded with a gradual shift back to greater access. Rather than a radical nationalization of private property rights, then, CRoW can be viewed as an attempt to regain a balance between public and private rights to land that was upset during the enclosure period.

For Americans, the study of Britain's right to roam reminds us that there is an important cost to the recognition of an absolute right to exclude. Rather than simply accept the right to exclude as a given, courts should carefully consider the interests it serves and determine whether, in some circumstances, it may be possible to accommodate greater public access without damaging the private owner's interests. The analysis below suggests that the difference in the treatment of the right to exclude can be traced to important distinctions in the two countries' histories and cultures. Nevertheless, the new right to roam deserves to be recognized as a landmark, which validates important public interests that have been all but forgotten in the United States. Americans may be able to accommodate those interests in ways that take into account differences in our cultural and legal landscape.

This Article will discuss the evolution of the right to roam in Britain, tracing its origins to the public rights of common held before enclosure. Section II describes how the loss of roaming rights led the British public first to the courts, where they gained limited access through common law doctrines such as custom and prescription. Still shut out of desired areas, roamers then turned to Parliament, which responded with laws that protected the scenic beauty of the countryside and, by degrees, increased the public's access to it. In Section III, the Article discusses in detail the most recent, and certainly the most dramatic, legislative recognition of the public's right to roam the countryside, CRoW. In addition to a discussion of the mechanics of the legislation and developments in its early application, the Section will also outline the public values behind the right to roam. Finally, Section IV will compare CRoW to the fierce protection of the right to exclude in the United States and explore how it provides access to the countryside. The article concludes that, despite significant differences in culture

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20. As discussed *infra*, Section II.B, enclosure of common lands occurred gradually over several centuries, but the most intensive period occurred between 1700 and 1840.

21. *See* Shoard, *supra* note 13, at 154-182 (describing history of resistance to exclusion); Dept. of Env., Transp. and the Regions, "Access to the Open Countryside in England & Wales: A Consultation Paper, at v (Feb. 1998) (right to walk over countryside has been sought for over 100 years).

and history, the United States should look for ways to better accommodate the important public interests behind the right to roam.

II. EVOLUTION OF PUBLIC ACCESS RIGHTS IN BRITAIN

The new "right to roam" established by CRoW can be fully understood only in the context of Britain's complex history of public access rights. Before the enclosure period, British commoners enjoyed a variety of rights to use common land, which were extinguished when the land was converted to private land. Although many footpath easements were preserved by enclosure orders,[22] the general right to roam freely over the mountains and moors was not. The public, however, continued to fight to restore those roaming rights, first through the courts, with limited success, and then through Parliament. This Section traces the loss of roaming rights and their gradual reinstatement. The Section begins, however, with an examination of the footpath system, another means of public access with a basis in history.

A. THE BRITISH FOOTPATH SYSTEM

Green lanes that shut out burning skies
And old crooked stiles to rest upon
Above them hangs the maple tree
Below grass swells a velvet hill
And little footpa[th]s sweet to see
Go seeking sweeter places still.

—John Clare[23]

This Article will discuss two types of public access rights in Britain: footpaths[24] and roaming rights. Footpaths are public easements over private lands that are confined to a particular defined right of way.[25] A right to roam, in contrast, is not limited to a specific path. Instead, the right to roam gives much broader access, allowing the public to wander freely over private meadows or other uncultivated private lands. Under a right to roam, a family could pick a spot on top of an escarpment or mountaintop and spread out a blanket for a picnic lunch; in contrast, a footpath easement is for travel only. Footpath easements are

22. Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEG. HIST. 45, 59 (1989).

23. JOHN CLARE, *The Flitting*, *in* SELECTED POEMS AND PROSE OF JOHN CLARE 176, 177 (1967).

24. "Footpath" is the common term used to describe a "public way," which actually encompasses bridleways and carriageways in addition to walking paths. A footpath, the narrowest of the three types of public ways, is limited to foot-traffic only. SIR ROBERT HUNTER, THE PRESERVATION OF OPEN SPACES AND OF FOOTPATHS AND OTHER RIGHTS OF WAY 314 (2d ed. 1902). Even bicycles are typically not allowed on a footpath. *See id.* at 381-87. A bridleway may be used for traveling either by foot or by horse, and a carriageway or byway may be used also by motorized vehicles, although it may not be maintained as a road. *Id.* at 313-14. This Article will use the term "footpath" to refer generically to these public easements.

25. National Parks and Access to the Countryside Act 1949 (ch. 97), § 27(6) (Eng.).

typically of ancient origin, while roaming rights were only recently granted in CRoW. As discussed below, however, both these public rights have historical origins.

Over 130,000 miles of footpaths crisscross England and Wales,[26] and on average each square mile of land contains 2.2 miles of public paths.[27] These trails, worn by countless travelers through the centuries, were historically the primary routes of communication between villages.[28] Before automobiles were invented everyone except the gentry had to journey by foot or horseback on these trails, which certainly pre-date the roads built to accommodate vehicular traffic. Footpaths led to the mills, to the churches, to the springs, to the lakes or coast, anywhere that people wanted or needed to go.[29] On market days, villagers from all of the surrounding hamlets, laden with goods to sell, used footpaths to reach the market town.[30]

Remarkably, many of these paths formed by centuries of use remain in existence today. Some footpaths span long distances, taking the walker through the pages of history. For example, the Cotswold Way, a one-hundred-mile trek from the ancient Roman city of Bath to the historic market town of Chipping Campden, travels along the edge of an escarpment, offering dramatic views of sheep grazing in fields lined by stone walls in the valley below.[31] The path links picturesque villages, filled with buildings of yellow Cotswold stone. A day's walk may take you through the ruins of an ancient abbey,[32] past a castle frequented by Queen Katharine Parr and King Henry VIII,[33] and then to a burial chamber or "long barrow" dating from the Stone Age.[34]

Similarly, other paths offer a rich variety of historical and scenic values. Hadrian's Wall Path runs along the entire eighty-mile site of the ancient stone wall built on the order of Emperor Hadrian in AD 122 to repel Barbarian invasion. The Thames Path stretches 184 miles along the well-known river, from the middle of London to the quiet Cotswold countryside. Several coastal paths run hundreds of miles along cliffs and through fishing villages. In Wales, Glyndwr's Way runs 132 miles through a spectacular variety of terrain, from wild

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26. Mark Rowe, *Ramblers Protest the 'National Disgrace' of Britain's Footpaths*, THE INDEPENDENT (LONDON), Apr. 9, 2000, at 13.

27. SHOARD, *supra* note 13, at 17.

28. KIM TAPLIN, THE ENGLISH PATH 1 (1979) (noting importance of paths for communication, but also for providing "mental landscapes").

29. *Id.* at 3.

30. WILLIAM HOWITT, THE RURAL LIFE OF ENGLAND 125 (Phila., Parry & M'Millan 1854) (1838).

31. *See* Countryside Agency, National Trails website, http://www.nationaltrail.co.uk (last visited Jan. 13, 2007).

32. The ruins of Hailes Abbey, founded in 1246, are located on the Cotswold Way near Winchcombe. *Id.*

33. Sudeley Castle is on the Cotswold Way near Winchcombe. *See* Sudeley Castle website, http://www.sudeleycastle.co.uk (last visited Jan. 15, 2007).

34. Belas Knap, which dates from 3000 B.C.E., is also near Winchcombe. *See* Earth Mysteries, http://britannia.com/wonder/belas.html (last visited Jan. 15, 2007).

hill country to river valleys, moors and woodlands.[35]

Of course, there are many miles of footpaths that are not as renowned or spectacular, but equally as useful in allowing the rural residents to walk to town, to the grocery store or the pub, or conversely to allow the town dweller to walk the dog (or themselves) in the fresh air and sunshine without worrying about traffic. During my recent stay at a country cottage in Britain, three footpaths passed within 100 yards of the front door, allowing me to walk to several neighboring villages.

The signal characteristic of these footpaths, and what sets them apart from most trails in the United States, is that they are almost entirely on private lands. A walker may climb a stile[36] over a fence, or walk through a kissing gate,[37] and follow a path right through a farmer's rye field or through a meadow full of grazing sheep. Under British law, the landowner is prohibited from interfering with this public right of way or discouraging public use of it.[38] Even posting a sign such as "Beware of the Bull" can be deemed an impermissible means of discouraging foot traffic.[39] If a land owner wishes to divert the path, to build a new structure or for farming reasons, for example, the landowner must first obtain a diversion order. The diversion will be approved only if another pathway is provided that is not "substantially less convenient" for the public.[40]

A recent case illustrates how seriously the British take their footpaths. A golf course developer started to build a clubhouse directly over a footpath, without having obtained a diversion order.[41] The local council confirmed the public's right to use the path and the developer was forced to provide hardhats to the citizens as they continued to tramp right through the construction site.[42] The conflict was resolved after the developer applied for a diversion and had the path moved to another location.[43] In another case, Andrew Lloyd Webber attempted to

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35. For general information on the walking paths of Britain, see the Rambler's Association website, http://www.ramblers.org.uk (last visited Jan. 15, 2007).

36. A stile is a set of steps used for getting over a fence or wall.

37. A "kissing gate" is a gate that swings in an enclosure, so that only one person can go through at a time and animals cannot escape. It is apparently so named because the first person through the gate can demand a kiss to swing the gate back to let the next person through. Who knew hiking could be so much fun?

38. National Parks and Access to the Countryside Act [NPACA], 1949, ch. 97, § 57 (Eng.).

39. A landowner may not keep a bull on any field crossed by a public way, although there are exceptions. *See* Wildlife and Countryside Act, 1981, ch. 69, pt. III, § 59. If a bull is in the footpath area legally, a warning sign may be used, but it must be covered or removed when the bull is not present. Health & Safety Exec., Cattle and Public Access in England and Wales, Agric. Inf. Sheet No. 17EW, at 3 (updated Nov. 2006), *available at* http://www.hse.gov.uk/pubns/ais17ew.pdf.

40. Highways Act, 1980, ch. 66, § 119(6) (Eng.) (requiring that decisions on path diversion orders take into account the effect of the path on public enjoyment).

41. Shirley Skeel, *Rambling and Roaming Rights in England: Walkers Rush to Meet Mapping Deadlines*, CAL. COAST & OCEAN, vol. 19.1, 2003, *available at* http://www.coastalconservancy.ca.gov/coast&ocean/spring2003/pages/three.htm.

42. *Id.*

43. *Id.*

protect his privacy by diverting a footpath that ran between his house and office, but the inspector rejected the application because the diversion would disadvantage the public by lengthening the path and lessening its visual amenities.[44]

The roots of these access rights can be traced to the medieval feudal system. While the lord of the manor retained ownership of village lands, the villagers enjoyed complex and varied rights to use common land.[45] Rights to the commons included the right to graze a certain number of animals, to take wood from the forests for heat or for house repairs, and to take rock or gravel.[46] Commoners could also walk or ride freely over the common or wastelands of the lord; routes that were frequently used developed into footpaths and bridleways.[47]

When the land was later enclosed and common rights largely extinguished, many footpath rights of way survived, either by the enclosure order itself or under the doctrines of dedication or prescription. The lord, having allowed the public passage over the land since time immemorial, was presumed to have dedicated the path to the public or to have lost the right to object due to the passage of time.[48] These doctrines, of course, require proof that a specific, defined right of way was so used; neither the courts nor the enclosure orders granted a more generic right to roam. The next Section more fully describes the dramatic impact this enclosure period had on the public's access rights.

B. IMPACT OF ENCLOSURE ON ACCESS RIGHTS

The fault is great in man or woman
Who steals a goose from off a common;
But what can plead that man's excuse
Who steals a common from a goose?

—The Tickler Magazine[49]

The enclosure of the commons, which extinguished common rights as it converted common land into private property, completely transformed British society. Enclosure took place over four centuries, with the most activity occurring between 1700 and the mid-1800s.[50] Parliament enacted the first enclosure act in

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44. SHOARD, *supra* note 13, at 197. Decision of Secretary of State, Diversion of Echhinswell and Sydmonton Footpath No. 21 (May 30, 1996), *available at* http://www.hants.gov.uk/scrmxn/c19599.html. Among other considerations, the inspector noted that the diverted footpath would no longer allow close views of historic buildings.

45. G.M. TREVELYAN, ENGLISH SOCIAL HISTORY 35-37 (Penguin 2000).

46. *Id.*

47. Some footpaths date back to Roman times, at least. *See* ANTHONY BURTON, HADRIAN'S WALL PATH 84 (2003) (noting Roman milestone on the footpath to Vindolanda).

48. *See* HUNTER, *supra* note 24, at 316 (citing Poole v. Huskinson, 11 M. & W. 827, 828 (1843) (Exch. Div.) (Eng.) and Eyre v. New Forest Highway Bd., 56 J.P. 517 (1892)).

49. TICKLER MAGAZINE, Feb. 1, 1821, *quoted in* THE OXFORD UNIVERSITY PRESS DICTIONARY OF QUOTATIONS 10 (2d ed. 1953).

50. J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700-1820, at

either 1545 or 1606, but most enclosure was by agreement of the parties until the 1700s.[51] In the early eighteenth century, the pace of parliamentary enclosure increased: Parliament passed 280 acts enclosing particular areas between 1700 and 1760, and in contrast passed nearly 4,000 such acts between 1760 and 1840.[52] This latter stage of parliamentary enclosure has provoked the most inquiry into the fairness of its impact on commoners.[53]

Typically, Parliament justified enclosure by an appeal to the national interest. The commons system, according to those favoring enclosure, had resulted in an untenable situation, including such problems as "the insubordination of commoners, the unimprovability of their pastures, and the brake on production represented by shared property."[54] Historians generally agree that enclosure brought more land into production and improved the economy overall by increasing economies of scale and reducing the inefficiency caused by multiple tenants.[55] However, enclosure came at a heavy price to the commoners.

Common rights created a complex system of land utilization. Villagers who owned common rights in the arable fields might be entitled to graze a certain number of animals on the common pasture.[56] Certain cottages might also have the right to pasture attached to their occupancy. But even landless commoners could enjoy the use of the manor's wasteland.[57] They could take wood, turf, gorse, bracken, and peat to use as fuel.[58] Commoners also gathered fruit and nuts,

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5 (1993).

51. Sharman, *supra* note 22, at 47. Parliament's partition of Hounslow Heath in 1545 could be called the first parliamentary enclosure.

52. *Id.* at 48. In addition to parliamentary enclosure, land was also enclosed by private agreement, which makes study of the subject even more complicated. *See* Gregory Clark & Anthony Clark, *Common Right in Land in England, 1475-1839*, 61 J. ECON. HIST. 1009, 1028 (2001) (attempting to estimate amount of common land based on statistical study, and discussing the complexity of enclosure).

53. Ågren, *supra* note 6, at 243 n.8 (citing both favorable and unfavorable treatments of this enclosure period).

54. NEESON, *supra* note 50, at 7.

55. Ellickson, *supra* note 5, at 1392. *See also* GEORGE WINGROVE COOKE, THE ACTS FOR FACILITATING THE ENCLOSURE OF COMMONS IN ENGLAND AND WALES WITH A TREATISE ON THE LAW OF RIGHTS OF COMMONS at 2 n.* (4th ed. 1864) (discussing how the right of common is one of the "conditions of tenure which condemn the land to perpetual sterility" because of its inefficiency.) (quoting ARCHDEACON PALEY, PALEY'S MORAL PHILOSOPHY, bk. vi, ch. xi, § 6 (n.d.)).

56. NEESON, *supra* note 50, at 59.

57. The term "waste" referred to lands that were at best marginally useful for agricultural production or grazing. Clark & Clark, *supra* note 52, at 1015. The extent of wasteland depended, therefore, on the economic value of the crop and agricultural methods. As crops became more valuable and techniques for bringing land into production improved, lands that were previously thought to be waste became more valuable. Bogs or fens previously held to be waste, for example, were later drained to bring them into production.

58. NEESON, *supra* note 50, at 158-59. Wood could also be taken for building or repairing houses or barns. COOKE, *supra* note 55, at 7 (describing common of estovers or house-bote). *See also* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L. J. 247, 265-70 (1996) (describing value of commoners' multitude of uses of English fens and wetlands, which were destroyed by enclosure).

as well as herbs and roots on wasteland.[59] Landless commoners could also enjoy the right to turn out their pigs or geese into the fields after harvest in order to glean the remaining grain.[60] Hunting rights, for deer or rabbit, were also valuable to commoners.

The origins of these common rights are ancient and somewhat obscure.[61] Although the lord owned the land according to royal grant or proclamation, necessity required him to allow the villagers to make use of some of it, especially those lands which the lord found to be of little economic value—the "waste" lands. As long as land was more abundant than people, the system worked nicely:

> So long as the population was scanty, land was too abundant to be cultivated for pasture. After as much as the population could till had been parceled out, with a reservation of services, there was still a large remaining waste, upon which the cattle used in tillage might pasture. The waste was the lord's but its extent was beyond his power of occupation, and the tenants of his arable lands used it until he chose to reclaim it.[62]

But the custom arose as much from the public need as it did from the lord's economic surplus. The Statute of Merton in 1235 allowed the Lord of the Manor to enclose his waste, to some extent, but required him to leave enough of the waste "for the needs of his tenants."[63] The right was further burdened by recognition of the commoners' rights of pasture.[64] While fee title might belong to the lord, the land was burdened by public servitudes said to have their origins in concessions made to the commoners "in remote antiquity."[65] Thus, common rights represented a compromise between the needs or demands of the gentry and those of the lower classes, which enclosure threatened to upset.

There are countless explanations of why enclosure occurred. The economic explanation is simply that land became scarcer and agricultural prices higher. Until then, the gentry had tolerated common rights because it was not worth the cost to enclose the lands. As innovations in agricultural practices made farming larger tracts feasible, the benefits of enclosure began to outweigh the costs.[66]

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59. NEESON, *supra* note 50, at 169-70.

60. Peter King, *Customary Rights and Women's Earnings: The Importance of Gleaning to the Rural Labouring Poor 1750-1850*, 44 ECON. HIST. REV. 461, 461 (1991).

61. *See* COOKE, *supra* note 55, at 1 (describing attempts to discern origin of common rights in ancient Roman law and elsewhere).

62. *Id.* at 4.

63. J.L. HAMMOND & BARBARA B. HAMMOND, THE VILLAGE LABOURER 5 (Harper Torchbook ed. 1970).

64. *Id.*

65. *Id.*

66. COOKE, *supra* note 55, at 4 (claiming that the expense of enclosure was not formerly worth the cost). Cooke argued that the basis for common rights was not legal in nature, but practical: "It has always been co-existent with the disproportion of land to population; it grows restricted as that disproportion decreases; and it must every where disappear when that disproportion ceases." *Id.* at 1-2. Similarly, the open range was enclosed in the American west only when barbed wire decreased the cost of fencing. HENRY D. & FRANCES T. MCCALLUM, THE WIRE THAT FENCED THE WEST 10-11 (1965).

Moreover, consolidating the land ownership into one owner rather than dozens or hundreds of common right-holders allowed for more efficient decision-making.[67]

Under the parliamentary enclosure system, as it developed, any landowner could petition Parliament to initiate enclosure.[68] Although the commoners could attempt to defeat the enclosure measure, that would require the poor to somehow acquire the wherewithal to oppose powerful landed interests. Few commoners were able to afford representation or travel to London to present their complaints against enclosure.[69] Even if they did, commoners had little chance of succeeding against the more politically powerful gentry.[70] Although protests did occur, including the burning of fenceposts and rioting,[71] a commoner could not hope to "move a dim and distant Parliament of great landlords to come to his rescue."[72]

Upon the enactment of an enclosure act, Parliament appointed commissioners to allocate the lands to be enclosed. The commissioners allotted lands to the Lord of the Manor, to tithe-holders, and to those who owned land in the common fields. In at least some instances, the allocation set aside land for the use of the poor.[73] In the enclosure orders, the commissioners also typically set out roads and footpaths to be recognized over the enclosed lands.[74]

Landless commoners and those with small allotments were profoundly affected by enclosure and the loss of common rights. Enclosure extinguished the village economy, in which many peasants eked out an existence on common lands and thereby could remain independent. Those who lost common rights, sometimes half of the villagers, sometimes more,[75] were not compensated adequately, or even at all.[76] A peasant's right to gather fuel or to turn out geese or pigs into the field for gleaning, for example, could and was often suddenly

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67. COOKE, *supra* note 55, at 2 n.* (noting that no owner can "stir a clod" without obtaining concurrence of other owners) (quoting PALEY'S MORAL PHILOSOPHY, c. xi.s. 6). Cooke also refers to the dispute between Abraham and Lot, concerning overgrazing caused by both of their cattle herds trying to graze the same fields, as the first commons conflict. *Id.* at 3 (citing *Genesis* 13:6).

68. Sharman, *supra* note 22, at 49.

69. HAMMOND & HAMMOND, *supra* note 63, at 19-46. The Hammonds convincingly describe the obstacles a poor commoner would face in attempting to oppose enclosure. After the enclosure act passed, the commoner's prospects of obtaining fair treatment from the commissioners appointed to divide the interests were equally dismal. *Id.* at 37 (describing "helplessness" of commoners in legal proceedings regarding enclosures).

70. While one would expect the House of Lords to be dominated by aristocrats, the vast majority of members of the House of Commons were also landowners. *See* TREVELYAN, *supra* note 45, at 286-87 (noting that in Restoration England, ninety percent of House of Commons members were landowners).

71. NEESON, *supra* note 50, at 259-93. *See also id.* at 291 (documenting protests illustrating "deep hostility" toward enclosure, which was "corrosive of social relations"); Bosselman, *supra* note 58, at 301 (describing violence directed against fen-drainage projects).

72. HAMMOND AND HAMMOND, *supra* note 63, at 21.

73. Sharman, *supra* note 22, at 59, 65; NEESON, *supra* note 50, at 174.

74. Sharman, *supra* note 22, at 59.

75. NEESON, *supra* note 50, at 61, 72-73.

76. *Id.* at 16, 47-52 (citing E.C.K. GONNER, COMMON LAND AND INCLOSURE 362-66 (2d ed. 1966) (1912)); Bosselman, *supra* note 58, at 301 (noting that statutes authorizing drainage and enclosure of fens "made only minimal attempts to protect the interests of the commoners").

extinguished with no recompense. Although some peasants turned to the courts to vindicate their common rights, those attempts were unsuccessful.[77] The poor, in essence, became poorer, "surrounded by hether (sic) they dare not collect, and by a profusion of turnips they dare not pluck."[78] Even those allotted small landholdings in the enclosure found it difficult to subsist because of the cost of enclosure and because of the loss of common rights that supported their small operations.[79]

Virtually overnight, peasants who had been able to earn a living independently became desperate for a wage-earning job. This new supply of laborers became the raw material that fueled the Industrial Revolution. Even the simple loss of gleaning rights, which allowed a peasant's pigs and ducks to fatten in the fallen grain after harvest, could force a commoner from the land and into the labor force.[80]

The loss of independence caused by the shift to a labor economy was decried by many who were now "utterly dependent on miserable wages."[81] In the words of poet John Clare, enclosure "came and trampled on the grave, of labour's rights and left the poor a slave."[82] Just as Thomas Jefferson believed that liberty depended on a nation of independent landowners, British commentators have noted that the independence of the commoner, "the most precious gift of a free nation," was one of most important casualties of enclosure.[83]

The loss of common rights triggered an even larger social impact. Many elderly villagers had been supported by the young, who worked and shared the wealth from the common fields and pastures. With enclosure, the elderly were now left to fend for themselves.[84] Moreover, the poor, who had been able to survive on the common rights, were now forced to try to find scarce work, and relations between the classes became strained and tainted with resentment.[85] Owning a common right gave all of the villagers a connection to the land and also to each other that was lost with enclosure. The system of communal property may

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77. For example, in Steel v. Houghton et Uxor, (1788) 126 Eng. Rep. 32 (C.P.), the court refused to grant a common law right to glean, finding that gleaning rights would be "inconsistent with the nature of property which imports absolute enjoyment." *Id.* at 33. The author of the main opinion, Lord Loughborough, was himself a member of the landed gentry. *See* NEESON, *supra* note 50, at 56-57. *See generally* Peter King, *Legal Change, Customary Right, and Social Conflict in Late Eighteenth-Century England: The Origins of the Great Gleaning Case of 1788*, 10 L. & HIST. REV. 1 (1992) (detailing the history of the case).

78. THE TORRINGTON DIARIES: CONTAINING THE TOURS THROUGH ENGLAND AND WALES OF THE HON. JOHN BYNG (LATER FIFTH VISCOUNT TORRINGTON) BETWEEN THE YEARS 1781 AND 1794, at 505-06 (C. Bruyn Andrews, ed. 1938), *quoted in* NEESON, *supra* note 50, at 47 n.92.

79. Sharman, *supra* note 22, at 66-67; NEESON, *supra* note 50, at 22 (describing enclosure that "impoverished twenty small farmers to enrich one").

80. King, *supra* note 77, at 24, 29-31 (arguing that loss of gleaning rights contributed to the "proletarianization" of rural poor).

81. NEESON, *supra* note 50, at 14.

82. JOHN CLARE, *The Mores*, *in* SELECTED POEMS AND PROSE OF JOHN CLARE 169, 170 (1967).

83. NEESON, *supra* note 50, at 45.

84. *Id.* at 198-99.

85. *Id.* at 256-57.

have been inefficient, and its demise may have been inevitable, but one should not overlook the social side of the equation. Communal property often created a community fabric made up of social relationships that contributed to well-being in ways that cannot be measured in property value.[86]

Moreover, even if enclosure was more efficient, scholars roundly condemn its fairness. Enclosure has been criticized as a legislatively sanctioned reallocation of property rights from commoners to the landed gentry.[87] More succinctly, E.P. Thompson called it "class robbery."[88] Prior to enclosure, the poor had come to depend on common rights, taking them "to be as much their property, as a rich man's land is his own."[89]

In contrast, other scholars praise enclosure as a prime example of the economic efficiency of private property as opposed to the common pool, glossing over the redistributive impacts of the allocation. In his seminal article, "Property in Land," for example, Professor Ellickson notes: "It is now widely agreed, however, that, at least after 1700, enclosures in England were usually scrupulously fair to smallholders, who received new lands in rough proportion to the value of their prior rights."[90] For this supposed wide agreement, Ellickson cites only Sharman, who actually concludes after a brief review that "it is not at present possible to pass judgment" on the fairness of parliamentary enclosure.[91] In his one-page analysis of the "general effects" of enclosure, Sharman notes the dramatic impact on the poor, who got "little or nothing" out of enclosure and on small landowners, whose allotments were so small as to be commercially impracticable to farm.[92] Ellickson does concede that laborers lost out in enclosure, because they received no allotments and lost their common rights, but concludes that "most villages appear to have regarded the last waves of enclosures as welcome reprieves from archaic land tenure arrangements."[93] This analysis of enclosure thus appears to

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86. Stuart Banner, *The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850*, 41 AM. J. LEGAL HIST. 61, 90-93 (1997) (noting that people may value owning things in common "as an end in itself," and noting the value of collective self-government).

87. Fred Bosselman refers to the redistribution from commoners to gentry during enclosure as "rent-seeking." Bosselman, *supra* note 58, at 247.

88. E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 218 (1963).

89. DANIEL DEFOE, A TOUR THROUGH THE WHOLE ISLAND OF GREAT BRITAIN, 1724-26, II, at 15-16 (ed. 1962) (1724), *quoted in* NEESON, *supra* note 50, at 107. Interestingly, at about this same time, the movement away from common rights toward more absolute private property arrangements, and the resulting redistribution of wealth, was also occurring in India (*See* V.A. SMITH, THE OXFORD HISTORY OF INDIA 534-36 (4th ed. 1982)) and in France (WILLIAM H. SEWELL, JR., WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848, at 114, 134 (1980) (describing common rights destroyed by Revolution in favor of absolute property ownership)).

90. Ellickson, *supra* note 5, at 1392.

91. Sharman, *supra* note 22, at 50. The page Ellickson cites, page 47, actually makes no mention of the fairness of enclosures. *Id.*

92. *Id.* at 67.

93. Ellickson, *supra* note 5, at 1392. Interestingly, while elsewhere Ellickson has noted the advantages of property rights systems based on custom (*See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS

minimize enclosure's costs, perhaps to emphasize the advantages of private ownership of property.[94]

Although one can argue that consolidation of land ownership was more economically efficient,[95] the unfairness of this property redistribution cannot be ignored. In fact, although historians may debate the impact enclosure caused,[96] the consensus is closer to the view of Oxford historian Christopher Hill, who concluded that "enclosure brought untold suffering to countless numbers of English men, women and children."[97] Law professor Stuart Banner, who has studied transitions between property regimes, notes that enclosure favored the politically powerful, while the poorest commoners often got nothing.[98] Dr. J.M. Neeson, who was awarded the Whitfield Prize by the Royal Historical Society for her study of common rights, observes that enclosure destroyed a whole class—the English peasantry—and along with it the "social cement" that bound the village together.[99]

The reallocation of property rights that occurred during enclosure is one of the great case studies of what property rights truly are and how they arise. For centuries, the public had enjoyed rights of common on the lands of the lord. Then, suddenly, those rights were extinguished. In some cases, some compensation was given to those who lost common rights, but the paltry sums offered could not begin to make up for the rights upon which many commoners desperately depended.

Banner calls enclosure an example of a transition from a "functional" system, in which multiple individuals have rights to do things on a particular piece of ground, to a "spatial" system of absolute ownership of certain territory.[100] The

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SETTLE DISPUTES *passim* (1991)) he fails to note that enclosure ran counter to a very well-entrenched system of customary property rights. See Ågren, *supra* note 6, at 244 (stating that pre-enclosure property rights were based on "commonly accepted norms pertaining to the use of land").

94. Ellickson does, however, recognize certain inherent advantages of communal ownership in particular circumstances. Ellickson, *supra* note 5, at 1332-35, 1341-44,1354.

95. Some economists argue that enclosure resulted in significant efficiency gains. *See, e.g.*, Donald N. McCloskey, *The Prudent Peasant: New Findings on Open Fields*, 51 J. ECON. HIST. 343, 348 (1991); Michael Turner, *English Open Fields and Enclosures: Retardation or Productivity Improvements*, 46 J. ECON. HIST. 669, 688 (1986); Donald N. McCloskey, *The Enclosure of Open Fields: Preface to a Study of Its Impact on the Efficiency of English Agriculture in the Eighteenth Century*, 32 J. ECON. HIST. 15, 34 (1972). Others, however, argue that enclosure produced more distributional consequences than overall efficiency gains. *See* Robert C. Allen, *The Efficiency and Distributional Consequences of Eighteenth Century Enclosures*, 92 ECON. J. 937 (1982); ROBERT C. ALLEN, ENCLOSURE AND THE YEOMAN (1992).

96. *See, e.g.*, Clark & Clark, *supra* note 48, at 1034 (arguing that the vast majority of common lands were not truly communal in the sense of free access to all).

97. CHRISTOPHER HILL, REFORMATION TO INDUSTRIAL REVOLUTION 225 (1969).

98. Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. 359, 368 (2002).

99. NEESON, *supra* note 50, at 46. For information on Neeson's receipt of the Whitfield Prize, see Royal Historical Society, Report of Council, Session1993-1994, http://www.rhs.ac.uk/a934.html (last visited Jan. 19, 2007).

100. Banner, *supra* note 98, at 369. *See also* SHOARD, *supra* note 13, at 115-16 (discussing Aristotle's vision of private property ownership with communal use).

recognition of a public right to roam then represents a return to a more functional approach, in which the landowner's rights exist alongside the public's use of the land for wandering. While Britain will never return to common fields and gleaning rights, granting the public greater rights of access to private property must be viewed against the backdrop of this history. Thus, CRoW may be seen as simply a step toward restoring to the public what it lost during enclosure.

C. LIMITED COMMON LAW RIGHTS OF ACCESS

Beginning with the earliest enclosures, early attempts to regain common rights of access in Britain came through the common law. After enclosure, commoners increasingly asked courts to recognize as legitimate their use of enclosed lands. With regard to public access, the common law favored the continued right to use footpaths under certain circumstances. However, it failed to recognize a more general right to roam.

Enclosure threatened to extinguish not only common rights, but also the paths used by commoners to reach the village or other towns. Sometimes the special commissioners appointed under an enclosure act would explicitly include a public right of way in their award.[101] In many cases, however, public use of the footpath simply continued until challenged by the landowner, and the case was then decided in court.[102]

In that case, courts would apply the common law doctrine of prescription for private easements, or implied dedication for public uses, to determine whether to grant the right of way. These doctrines required proof that the path had been used from "time immemorial"; if so, under the fiction of the "lost grant," the right of way could not be extinguished.[103] Originally, the period of adverse use had to date from the reign of a particular monarch. Under the Statute of Merton (1235), for example, the date was 1154, the accession of Henry II. The Statute of Westminster (1275) advanced the date to 1189, the accession of Richard I. Finally, in 1623 the Limitation Act fixed a twenty-year period of limitation for actions for ejectment and thereafter judges began using that period by analogy.[104] Under the 1832 Prescription Act, Parliament statutorily confirmed the 20-year period for private easements by prescription.[105] The Rights of Way Act 1932

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101. HUNTER, *supra* note 24, at 317.

102. *Id.* at 317-18.

103. Fitzpatrick v. Robinson, 9 G.IV. 585, 594 (1828); Bryant v. Foot, L.R. 2 Q.B. 161, 181 (1867). The "lost grant" doctrine presumed that at some point the landowner must have granted the right of way, given the long period of use. This presumption avoided the admission that the court itself was creating the easement.

104. For an excellent summary of the history of easements by prescription, see R. v. Oxfordshire CC, [2000] 1 A.C. 335, 354 (H.L. 1999) (appeal taken from Eng.) (holding that the public's state of mind is irrelevant in determining whether implied dedication exists), *available at* www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990624/sun.htm.

105. CHARLES JAMES GALE, A TREATISE ON THE LAW OF EASEMENTS 98-99 (2d ed. 1849).

prescribed the identical period for public easements by implied dedication.[106]

In addition to footpaths, commoners sought to maintain many other public uses of the commons including the use of the village greens for recreation.[107] Again, courts would uphold the villagers' claims if well-established by custom, which was basically a variant of the theories behind dedication or prescription.[108] Customary public uses upheld ranged from dancing,[109] to horseracing,[110] to playing cricket.[111] Eventually, this doctrine of custom was incorporated into a statute seeking to settle these claims by registering public spaces as village greens.[112]

The public uses upheld by custom, prescription, or dedication, however, did not extend to a public right to roam, or *servitus spatiandi*, however.[113] Instead, courts placed several important limits on these common law doctrines that prevented their use for broader roaming rights. First, customary rights could not be established in favor of the general public, but rather were limited to only a particular group of beneficiaries.[114] For example, in *Fitch v. Rawling*,[115] the defendants were charged with trespass for playing cricket on the plaintiff's lands. Although the court was quite willing to support the customary right of the local inhabitants to play sports on the property, it drew the line at allowing outsiders to join in. Justice Buller declared: "Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom."[116] The court did not, however, give any reason for this limitation.

Second, courts refused to allow roaming rights based on implied dedication,

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106. Rights of Way Act, 1932, § 1(1) (Eng.).

107. *See generally*, CHARLES I. ELTON, A TREATISE ON COMMONS AND WASTE LANDS, WITH SPECIAL REFERENCE TO THE LAW OF APPROVEMENT 285-88 (1868).

108. *Id.* at 285 ("Rights of recreation and exercise may be claimed either under a custom or a grant: but not by prescription.").

109. Abbott v. Weekly, 1 Lev. 176, 176-77 (1665) (allowing dancing on village green).

110. Mounsey v. Ismay, 1 Huelst. & Coltm. 729 (1863) (allowing horseracing).

111. Fitch v. Rawling, Fitch & Chatheiss, 126 Eng. Rep. 614, 614-15 (C.P. 1795) (allowing cricket matches).

112. *See* Commons Registration Act, 1965, ch. 64, § 22(1) (Eng.) (defining a village green, which would allow public use, to include any land "on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes" or land on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years). *See also* R. v. Oxfordshire CC, [2000] 1 A.C. 335 (H.L.1999) (appeal taken from Eng.) (detailing history of village greens).

113. ELTON, *supra* note 107, at 289 ("[T]he general public has no such rights by the common law, and cannot claim them by particular custom"; the use of waste lands for exercise and recreation "raises no presumption of an abandonment of any private rights by the owners."). *See also* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 750-52 (1986) (analyzing rationales for denying public access).

114. *See* ELTON, *supra* note 100, at 290-91. "A custom which may be extended generally to all the subjects in England, and is not warranted by the common law, but contrary thereto, is void." *Id.* at 291 n.(a) (quoting Sherborn v. Bostock, (1729) 94 Eng. Rep. 648 (K.B.)).

115. *Id.* at 614.

116. *Id.* at 616-17.

because they feared that property owners "would virtually be divested of all open and uninclosed lands over which people have been allowed to wander and ramble as they pleased."[117] Because the owner, before enclosure, had very little opportunity or economic incentive to prevent the use of wastelands for roaming, the courts found no abandonment or implied dedication.[118] Instead, even though the public's use could be established, courts presumed that the use was permissive and thus no intent to dedicate could be implied.[119]

In one seminal case, *Blundell v. Catterall*,[120] the court declined to allow a general common law right of public access to seashores over private lands. The defendant, an employee of a hotel in Great Crosby, a village on the River Mersey (an arm of the Irish Sea), earned money by taking hotel guests down to the water in bathing machines.[121] The Lord of the Manor, over whose lands the defendant had to pass, objected to this practice and sued for trespass. The hotel employee did not rely on prescription or custom, because although citizens had crossed the land for many years on foot, crossing with bathing machines was a relatively recent practice. The court held that it could not grant a general common law right of public access, apart from custom and prescription, and it refused to engage in a balancing approach to access rights:

> [P]ublic convenience must in all cases be viewed with due regard to private property, the preservation of which is one of the distinguishing characteristics of the law of England. It is true that property of this description is in general of little value to its owner. But if such a general right as is claimed should be established, it is hard to know how that little is to be protected, much less increased. . . . Many of those persons who reside in the vicinity of wastes and commons walk or ride on horseback in all directions over them for their health and recreations. . . . yet no one ever thought that any right existed in favour of the enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.[122]

Thus, the court found that establishing a right to public access, very similar to that granted by CRoW some 180 years later, would be "inconsistent with the nature of permanent private property."[123]

In dissent, Justice Best would have found a common law right, noting that

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117. *Id.* at 291-92 (citing Schwinge v. Dowell, (1862) 175 Eng. Rep. 1314).

118. *Id.* at 292-93 (citing Att.-Gen. v. Chambers, 5 Jurist. Chy. 745 (1859)).

119. *See, e.g.*, Folkestone Corp. v. Brockman [1914] A.C. 338.

120. Blundell v. Catterall, (1821) Eng. Rep. 38 (K.B.), 5 B. & Ald. 268, 299, 304.

121. Bathing machines were little huts on wheels, which could be rolled into the water. Victorian bathers could enter the machine in regular clothes on shore, change into a bathing suit and then be wheeled into the water, which they could enter without anyone ever seeing them in an improper state of dress. The machines were quite popular in the 19th century and remained in use until around World War I. Wikipedia, Bathing Machine, http://en.wikipedia.org/wiki/Bathing_machine (last visited Jan. 16, 2007).

122. 5 B. & Ald. at 313-315 (Abbott, C.J.).

123. 5 B. & Ald. at 299 (Holyroyd, J.).

"free access to the sea is a privilege too important to Englishmen to be left dependant on the interest or caprice of any description of persons."[124] Justice Best noted the public benefits associated with bathing (health, primarily, but also learning to swim), which use of a bathing machine furthered.[125] More generally, he emphasized the public interest in navigation, promoted by free passage to the seashore. Best believed that the common law had to adapt to further the public's current needs: "As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters."[126]

Thus, for Justice Best, the proper distribution of property rights between the private and public owners was not a formalistic exercise, but rather a balance struck by weighing social policy concerns.[127] Even though some members of the court's majority also discussed the balance of interests, they struck the balance differently. Those justices placed far greater weight on the interests of the private owner, believing that granting a general common law right of access would render private property meaningless. Conversely, the majority found the public side of the balance to carry less weight because the public had sufficient access to beaches through either customary or prescriptive rights, or through the permissive use of private owners. Where there was clearly no harm to the private owner, Chief Justice Abbott pointed out, the landowner is unlikely to object to public access or to bother bringing the claim to court.[128]

In *Cox v. Glue*[129] the court again attempted to strike a balance between public and private rights. In an action for trespass, the court had no problem upholding the customary right of the local citizenry to hold horseraces on the ground on the manor of Derby.[130] The fee-owner, by custom, did not have the right to possess the soil from July 6 to February 14, when the citizens enjoyed a common right of pasturage, and therefore the landowner could not complain about horseback riding.[131] However, the fee owner also complained that defendants had erected tents, stalls, and booths, and had thereby made holes in the soil by sinking stakes and posts.[132] Stressing the limitations on customary rights, the court found that the custom did not extend to disturbance of the soil and therefore the trespass action would lie.[133]

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124. *Id.* at 275 (Best, J., dissenting).

125. *Id.* at 278-79.

126. *Id.* at 282.

127. Justice Best also cites public trust doctrine, which makes this case interesting for those trying to use that mechanism to further public access to seashores. *Id.* at 287.

128. 5 B. & Ald. 315.

129. Cox v. Glue, 5 C.B. 533 (1848).

130. The Epsom Derby, England's oldest horse race, was established in 1780 by the twelfth Earl of Derby. In due time, a horse race of stature came to be called a "derby." *See* dictionary.com, Word FAQs, Derby, http://dictionary.reference.com/help/faq/language/e49.html (last visited April 7, 2007).

131. 5 C.B. at 548-53.

132. *Id.* at 533.

133. *Id.*

Again, the *Cox* court made a technical distinction—preventing the citizens from "trespassing" on the soil by sinking a stake in the ground—in order to place some limits on public rights over private property. The court could have distinguished between the types of uses of the soil that had been established by custom—i.e., grazing horses is permitted, but racing them is not. Presumably, however, the court did not want to become enmeshed in numerous cases alleging that a horse was ridden rather than grazed and so drew the line at a place much easier to police. In addition, an activity that disturbs the soil may be more likely to hurt the fee-owner than surface activities, so economic efficiency may have driven the court's decision.

Thus, while the public was able to protect or regain some of their historic uses through common law doctrines of prescription, implied dedication, and custom, courts placed limits on those remedies to prevent their widespread use. In many cases, courts used a sort of economic balancing test to determine the extent to which they would honor the historic uses of common land. In the end, the right to roam the countryside was not recognized as important enough to justify a common law right. As a result lands that for centuries had been open to the public for wandering were shut off by the landowner, often with no recourse. Instead of gradually dissipating, however, public dismay at the loss of countryside access fermented. Increasingly, citizens turned to Parliament to provide the remedy.

D. FACILITATING ACCESS THROUGH STATUTORY REFORM

The public's interest in the countryside is focused on two equally important policy areas: preservation and access. Unless the beauty of rural Britain is preserved, access will become meaningless. Likewise, unless the public can enjoy the countryside, expensive measures to preserve its scenery have little value, rather like hiding a Monet in the attic.[134] This Section describes the measures Britain has employed to preserve its countryside and then details the attempts to grant access leading up to CRoW at the turn of the century.

1. Land Use Controls to Preserve Scenic Values

The British have always had a deep commitment to the countryside. While many Americans find bucolic scenes pleasant, Britain's reverence for its rural scenery rises to a much higher level. When Britons use the term "countryside," they refer to a category of land worthy of special protection. For example, the Department of the Environment calls the countryside "a national asset," which is a "priceless part of our national heritage."[135] The British Parliament created a

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134. Or as Thomas Gray put it, like a flower blushing unseen, wasting its "sweetness on the desert air." Thomas Gray, *Elegy Written in a Country Churchyard*, http://www.thomasgray.org/cgi-bin/display.cgi?text=elcc (last visited Jan. 15, 2007).

135. DEPT. OF THE ENV'T, RURAL ENGLAND: A NATION COMMITTED TO A LIVING COUNTRYSIDE, CM 3016, at 9,

special government body, Natural England, for the precise purpose of promoting and conserving the quality of rural life and the countryside itself, for the enjoyment of all.[136] While Americans may lament the loss of the family farm and attack urban sprawl, there is no similar national commitment to the countryside.

Because most of the land in Britain's scenic countryside is privately owned, the burden of maintaining its beauty falls mainly on individual landowners. About eighty percent of British property is owned privately;[137] in the United States, however, only around sixty percent of land is in private hands.[138] Thus, while Americans create public spaces, such as national parks, on government land, Britain is more likely to use a variety of regulatory tools that leave the land in private hands, but that significantly restrict development activity.

Britain, in fact, did not create its first national park—the Peak District—until 1951,[139] long after the United States had established its first national park, Yellowstone, in 1872.[140] But the British concept of a national park differs significantly from the American model, in that the British park is not wholly "natural" in the sense of being insulated from human development activity. Although some areas are strictly protected as nature preserves, in most parks mining, timber cutting, farming, and grazing can be found, alongside tourist and residential development.[141] None of the public lands in Britain probably could be classified as "wilderness" under the American conception.[142]

Thus, the British definition of "natural beauty" does not refer, typically, to areas untouched by human hands. Instead, the countryside revered in Britain is the product of human interaction with nature for centuries. Whatever may have been its condition before man arrived, "nature" in Britain now often connotes meadows of grazing sheep or fields of flax, hedgerows, stone walls, and old

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14 (Oct. 1995).

136. Prior to 2006, this statutory mandate was fulfilled by the Countryside Agency. Under the Natural Communities and Rural Environment Act of 2006, these responsibilities were shifted to Natural England, a new agency that also took on the functions of English Nature, the agency which previously had responsibility for wildlife and biodiversity. *See* Natural England, http://www.naturalengland.org.uk (last visited Jan. 15, 2007).

137. *Who Does Own Britain Today?*, 68 LABOUR RESEARCH NO. 4, April 1979, at 1. In the 19th century, private land ownership in Britain was also concentrated in a relatively small aristocratic class, but it is now much more fragmented. *Id.* Around thirty-two percent of the country, however, is still owned by the titled families, including some with holdings over 100,000 acres. *Id.* Conversely, only ten percent of the land in England and Wales is devoted to national parks, of which none can be classified as wilderness. UK Association of National Park Authorities, National Parks Facts and Figures, www.nationalparks.gov.uk/index/learningabout/factsandfigures.htm (last visited Jan. 15, 2007). Thus, the British concept of "natural beauty" does not refer, typically, to areas untouched by human hands.

138. RUBEN N. LUBOWSKI, ET AL., DEPT. AGRIC. & ECON. RESEARCH SERV., MAJOR USES OF LAND IN THE UNITED STATES: 2002, at 35 (2006), *available at* http://www.ers.usda.gov/publications/EIB14/eib14j.pdf.

139. Peak District National Park Authority, http://www.peakdistrict.org (last visited Jan. 5, 2007).

140. Yellowstone National Park, http://www.nps.gov/yell (last visited Jan. 15, 2007).

141. R.N. HUTCHINS, NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT 1949, at 3-4 (1950).

142. The Wilderness Act of 1964 defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." Wilderness Act § 2(c), 16 U.S.C. § 1131 (2006).

barns. Indeed, government authorities recognize that much of the countryside's attraction is the result of these rural development features, so their efforts are aimed as much at preserving stone walls and hedgerows as they are at nature itself.[143]

British law contains a variety of tools that protect the beauty of the countryside. These regulations strictly control development in the countryside for no other reason than to promote aesthetic or cultural values. Because British law regarding land development is much more restrictive than American law, it provides an interesting comparison of how societies balance private and public interests in property.

In many respects, the process governing land development in England has much in common with the United States system.[144] Control mechanisms in both countries are concerned primarily with the separation of incompatible uses,[145] and secondarily with creating efficient and aesthetically pleasing urban plans.[146] Both proceed from a central land use plan. In the United States, most cities and many counties have a comprehensive land use plan, which is then implemented through zoning, subdivision, and other regulations.[147] In England, the planning process results in a district local plan that combines many of these aspects.[148]

The differences in the two systems, however, have important consequences. First, while the American system allows local governments to exercise primary planning authority, the British system's control mechanism gives more authority over development to regional and national bodies. For example, the Secretary of State of the Environment retains centralized control over all policy relating to planning.[149] The degree of central control is quite remarkable from the American perspective, where there is usually little federal or even state level interference with local land use decisions, except where particular environmental laws such as the Endangered Species Act or wetlands restrictions are implicated.[150] In En-

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143. DEPT. OF THE ENV'T, *supra* note 135, at 101.

144. I will not attempt in this section to make the reader an expert in British planning law, but rather to provide enough information to illustrate significant similarities and differences in the two systems. For comprehensive treatment, *see* ENCYCLOPEDIA OF PLANNING LAW AND PRACTICE (Malcolm Grant & Sir Desmond Heap, eds. 1996) [hereinafter ENCYCLOPEDIA].

145. Sir Desmond Heap explains that English town planning law evolved to deal with "the problem of the dwelling-house built in the shadow of the factory and of the factory erected in the midst of the garden suburb." *See id.* sec. 1-001.

146. Royal Town Planning Institute, *What is Planning?*, http://www.rtpi.org.uk/planning-advice (last visited Jan. 15, 2007).

147. The model act on which all states based their zoning enabling statutes, requires zoning decisions to be made "in accordance with a comprehensive plan." *See* U.S. Dept. of Commerce, A Standard State Zoning Enabling Act, § 3 (rev. ed. 1924), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf; JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 3.6 (1998).

148. Planning and Compensation Act, 1991, ch. 34, § 27 (including unitary development plans) (Eng.).

149. ENCYCLOPEDIA, *supra* note 144, sec. 1-051.

150. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) (categorizing land use regulation as a

gland, however, the Department of the Environment (DOE) issues detailed policies concerning land use planning, which mandate certain planning decisions in specified circumstances. For example, national policy requires planners at the district level to strictly control development in the countryside.[151] Moreover, the central government can become directly involved in individual land use decisions: The DOE may "call in" any application for planning permission for decision in the first instance at the national level[152] and landowners may appeal to the DOE the local authority's refusal to grant planning permission.[153] British courts have upheld this strong central government role.[154]

As a result, there is less chance that a "race to the bottom" will develop, in which competitive forces overwhelm local attempts to control development. While local officials may feel pressure to waive a restriction to promote the economic development of an area, regional and national officials should be more focused on broader interests, including preserving aesthetics. In addition, using regional rather than local control over the planning process allows the government authority to take into account the relationship among various towns and the rural areas in between them.[155] The planners focus on retaining the integrity of individual communities and specifically prevent one community from becoming a suburb of another. For example, the plan for the old market town of Chipping Campden in the Cotswolds specifically prohibits further development along the road which leads to the small hamlet of Broad Campden, only 200 meters away, "[t]o prevent the character of [Broad Campden] being swamped by its much larger neighbour."[156]

Although some American municipalities have architectural review boards, most towns exercise very little control over the specific nature and design of development, as long as it is within the broad parameters of the applicable zoning classification and meets the subdivision requirements.[157] In contrast, the English

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"function traditionally performed by local governments"). Some states, such as Oregon, have moved toward greater control at the state level. *See* Jerry L. Anderson & Daniel Luebbering, *Zoning Bias II: A Study of Oregon's Zoning Commission Composition Restrictions*, 38 URB. LAW. 63, 68 (2005); JOHN R. NOLON, WELL-GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 25 (2001) (listing ten states that have growth management laws that in some way restrict or guide local land use authority).

151. *See* Cotswold, Eng., Cotswold District Local Plan Amended Deposit Draft § 3.55 (1995) [hereinafter Cotswold 1995 Draft].

152. Town and Country Planning Act [TCPA] 1990, § 77; *see* JOHN ALDER, DEVELOPMENT CONTROL 3 (2d ed. 1989) (U.K..).

153. Town and Country Planning Act [TCPA] 1990, § 78 (U.K..).

154. *See, e.g.*, R. v. Sec'y of State ex p. Southwark L.B.C. [1987] 54 P. & C.R. 226, 231 (Gr. Brit.).

155. *See* Ashley S. Miller, *Developing Regionalism: A Review of "The Regional City: Planning for the End of Sprawl" by Peter Calthorpe and William Fulton*, 11 N.Y.U. ENVTL. L.J. 842, 846 (2003); Patricia E. Salkin, *Symposium 2005: Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL L. 9, 54-55 (2004-5).

156. Cotswold, Eng., Cotswold District Local Plan Deposit Draft § 6.7 (1993) [hereinafter Cotswold 1993 Draft].

157. *See, e.g.*, *Smith v. City of Mobile*, 374 So. 2d 305, 307 (Ala. 1979) (development could not be denied

planning process becomes heavily involved in the specifics of the proposed use. For example, in Chipping Campden, the Cotswold District Council refused planning permission for a housing development because the nature and number of planned dwellings would be "detrimental to the character and appearance" of the area and would have an adverse effect on "views into and from the surrounding countryside and town."[158] The Council determined that the proposal's impact on the landscape would be contrary to policies contained in the county Structure Plan and the Cotswold District Local Plan.[159] The plan was also rejected because of its "suburban-style layout and house designs, with large houses in comparatively small gardens."[160] The Council noted that the uniform design of the houses would be out of character for the area, which contained "individually-designed properties set in large gardens."[161] While this development faced greater controls because it was in an Area of Outstanding Natural Beauty,[162] in many instances British planning delves far deeper than American authorities do into the design of the development.

Finally, when planning permission is refused, compensation is rarely awarded in England. Although the contrast can be overdrawn, it can be said that the British landowner has no legitimate expectation of development absent planning permission, while in the United States there is a legitimate expectation of development absent a pre-existing regulation to the contrary. As described below, significant controls on development have long been a part of British landowners' expectations.

Although town planning first became part of British law in 1909, Parliament attacked the issue comprehensively in 1947, pushed by the need to rebuild the areas destroyed in World War II in an orderly fashion.[163] The 1947 Act established complete government control over the development of land, by absolutely prohibiting any kind of development without planning permission.[164]

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because it was "out of character" with area, as long as it met subdivision requirements). *See generally* DANIEL R. MANDELKER, LAND USE LAW, § 9.09 (2003) (discussing limited authority of subdivision control). While some communities have architectural design review ordinances, they may be challenged as violating due process or free speech rights. *See id.*, at § 11.01. There is some movement now toward "form-based" development controls that may include an architectural design component. Robert J. Sitowski & Brian W. Ohm, *Form-based Land Development Regulations*, 38 URB. LAW. 163, 165 (2006).

158. Cotswold District Council, Town and Country Planning Act 1990, Decision Notice, CD. 1466/D at 2 (Eng.). Chipping Campden lies in the Cotswolds, which the planners describe in poetic terms: "Nowhere in England is there such a lack of stridency. The colours, the grey of the stone walls and of the cottages and manor houses, the green and gold of the pasture and arable fields, seem softly blended. The landscape is a watercolour." Cotswold District Local Plan, Section 2.5, p.5 (1999) (Eng.).

159. *Id.*

160. *Id.*

161. *Id.*

162. British law mandates greater protection from development in Areas of Outstanding Natural Beauty. Countryside and Rights of Way Act [CRoW], ch. 37, § 82 (Eng.).

163. ENCYCLOPEDIA, *supra* note 144, sec. 1-001.

164. *Id.* sec. 1-002. Under the American system, a developer must obtain approval of a plat if subdivision of

The most remarkable aspect of the 1947 Act, however, was its nationalization of development rights. Sir Desmond Heap, Britain's foremost expert on town planning, called the Act "the most drastic and far-reaching provision[] ever enacted affecting the ownership of land . . . and the liberty of an owner to develop and use his own land as he thinks fit."[165] Landowners would henceforth have no right to change the existing use of land and, in return for this expropriation of development value, could make a claim on a £300 million fund.[166] Thereafter, because the government would now own the development rights, landowners would be required to pay development charges for the benefits conferred when the government granted development permission (called "planning gain").[167]

The plan to nationalize land development rights, however, did not succeed. The 1954 Town and Country Planning Act eliminated the development levy and allowed development fund claims only when the landowner had been subjected to planning restrictions that limited or prevented the development of land.[168] Even though development value had not been expropriated, however, the general rule that no compensation would be granted for refusing planning permission for new development remained.[169] Compensation would be granted only where permission was withdrawn after it had already been granted or where retroactive controls on existing development destroyed its value—a vested rights approach.[170] In addition, the concept of planning gain was eventually abandoned as unworkable, but vestiges of this notion—that landowners owe something to the community—may be found in the idea of greater access rights.

In 1990, Parliament enacted a new Town and Country Planning Act, along with several other planning acts relating to listed buildings, conservation areas and hazardous substances.[171] These British laws, which are now the main planning controls, place significant restrictions on development that would damage the scenic landscape, illustrating the value the public places on aesthetics.[172] In general, local authorities have broad authority to deny "planning permission," roughly equivalent to a plat approval in the American scheme,[173] if the proposed

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land is proposed; otherwise, only a building permit must be obtained, which is a ministerial act if the proposed development falls within the zoning classification.

165. *Id.*

166. Town and Country Planning Act [TPCA] 1947 (U.K.), Part VI; ENCYCLOPEDIA, *supra* note 144, sec. 1-003.

167. Town and Country Planning Act [TPCA] 1947 (U.K.), Part VII; *see also* MICHAEL PURDUE, CASES AND MATERIALS ON PLANNING LAW 416 (1977) (describing the "betterment levy" imposed by the TPCA).

168. Town and Country Planning Act 1954 (U.K.); ENCYCLOPEDIA, *supra* note 144, secs. 1-005, 1-006.

169. PURDUE, *supra* note 162, at 418.

170. Moreover, the Planning and Compensation Act 1991 repealed all existing statutory provisions providing for the payment of compensation for adverse planning decisions. VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW 6 (3d ed. 1992).

171. ENCYCLOPEDIA, *supra* note 144, sec. 1-029.

172. *See generally* Andrew Waite & Tim Smith, *Constraints on Development in the United Kingdom*, 13 NAT. RES. & ENV. 353 (1998).

173. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT

development would harm local interests, including preserving the area's scenery.[174] Furthermore, at the national level, strigent restrictions protect historic buildings, wildlife, and the countryside.[175]

British planning law also requires municipalities to adopt a "development boundary," a feature that significantly protects countryside values.[176] Within the development boundary, development "is acceptable in principle."[177] This hardly means that development is a foregone conclusion. The development must be "of an appropriate scale, in sympathy with the form and character of the settlement and the surroundings of the site," and it must not have a "significant adverse impact on the environment."[178] This of course means that the development must be carefully tailored to the site, and the district council will look closely at the design and size of the development to ensure that it does not unduly impact its neighbors or the town in general.[179]

Outside the development boundary, only strictly limited forms of development are allowed.[180] For example, a farmer would not be allowed to build a new house on his or her land unless there is a proven need for the dwelling.[181] Many developers have tried to get around the development restrictions by converting existing agricultural structures, such as barns, into houses or apartments. The policy also strictly controls this practice, allowing such conversions if they positively contribute to the local rural economy or relieve other development pressures, for example.[182]

Zoning maps may also contain "Policy Areas" that are subject to very specific controls, many of which are calculated to preserve aesthetic values. In the scenic Cotswolds, for example, the map for the ancient market town of Chipping Campden contains Policy Area D, called "The Craves," which prohibits any development that would "adversely affect the open character, general appearance, or setting afforded to the surrounding areas or buildings."[183] In Policy Area L, an area in the center of town, new development is "very unlikely to be permitted."[184] Thus, these plans may incorporate significant restrictions on

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REGULATION LAW § 7.6 (2003) (describing plat approval process as requiring compliance with subdivision requirements). The actual construction of a dwelling or other structure requires a "building permit," but this is typically is more ministerial, requiring compliance with construction codes. *Id.* § 8.8.

174. Waite & Smith, *supra* note 172, at 353.

175. *Id.* at 355-56.

176. *See, e.g.*, Cotswold 1993 Draft, *supra* note 156, § 4.1.

177. Cotswold 1995 Draft, *supra* note 151, § 3.54.

178. *Id.* at 20 (Policy 1).

179. *Id.* (Note for Guidance).

180. *See id.* § 3.135 ("[T]here is often the feeling that the unscrupulous might attempt to circumvent strict controls on development in the countryside, by putting forward a weak or a well-argued but spurious case for a dwelling. . . . [I]t is necessary to strictly apply rigorous criteria.").

181. *See id.* at 20 (Policy 2), 21 (Policy 11).

182. *See id.* at 32 (Policy 7), § 3.107.

183. Cotswold 1993 Draft, *supra* note 156, Policy 1.5.2.

184. *Id.* at 20 (Policy 1.5.5).

development likely to impair the community's interest in maintaining local character.

Many other types of development controls may be used to preserve the British countryside for the enjoyment of the public. For example, the Countryside Agency may designate an "Area of Outstanding Beauty" or a "conservation area," in which development can occur only in ways that "preserve or enhance the natural beauty of the landscape."[185] Similarly, English Nature has the power to designate an area as a Site of Special Scientific Interest (SSSI), by reason of any of its flora, fauna, geological, or physiographical features.[186] Landowners in a SSSI must obtain government consent for activities that may damage these values and, at least until CRoW, English Nature typically entered into management agreements that provided compensation in exchange for preservation.[187] CRoW now allows the agency to prohibit damaging activities without compensation, as discussed below.[188] The control of development goes literally down to the bushes: the Department of the Environment now requires the notification of local planning authority before hedgerows over twenty meters long are removed. If the hedgerow is considered important under certain criteria, the local authority can refuse permission.[189]

In combination, these development restrictions effectively preserve the scene of "natural beauty" coveted by British ramblers. Similar controls in the United States would quickly run into constitutional takings claims if the restriction significantly impacted property values.[190] While British laws provide compensation in limited circumstances, for the most part Britain reverses the presumption in favor of development present in American property law.

2. Increasing Recognition of Access Rights

Sooner than part from the mountains, I think I would rather be dead. . . .
I may be a wage slave on Monday, but I am a free man on Sunday.
—Ewan MacColl[191]

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185. Countryside and Rights of Way Act [CRoW], ch. 37 (Eng.), § 82. Thirty-six of these "AONB"s, covering about 15% of England, were designated by the Countryside agency, which is now referred to as Natural England. Natural England, *supra* note 136.

186. Wildlife and Countryside Act, 1981, Part II (amended in 1985 and by Countryside and Rights of Way Act [CRoW], 2000).

187. Wildlife and Countryside Act, 1981. Andrea Ross & Jeremy Rowan-Robinson, *Behind Closed Doors: the Use of Agreements in the UK to protect the Environment*, 1 ENVTL. L. REV. 82, 86 (1999). For example, in the Pennine Dales, a management agreement requires farmers to maintain land in grass, to limit use of fertilizer and cultivation, and to repair barns and walls using only traditional materials, in exchange for payments. JOSÉ MANUEL L. SANTOS, THE ECONOMIC VALUE OF LANDSCAPE CHANGE 123 (1998).

188. *See infra*, Section III.A.

189. Pauline M. Callow, *Country Report, United Kingdom*, 5 EUROP. ENV. L. REV. 6, 338 (Dec. 1996) (citing Depart. of the Env. News Release 430 (Oct. 21, 1996)).

190. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019-21 (1992).

191. Excerpt from classic 1930s ballad, "The Manchester Rambler," by Ewan MacColl. *See* Dominic

While land use laws increasingly focused on preserving the natural beauty of the countryside, Parliament also slowly moved toward granting the public greater access. Even as enclosure was foreclosing the public's use of the commons, many recognized that the growth of cities in the Industrial Revolution actually increased the need for access to the countryside "as a recreation-ground for all classes."[192] In essence, the battle over the loss of a common right to ramble never ended. Even as far back as 1868, commentators noted a movement to change legislatively the results of court decisions that limited public access rights, by declaring a public right of exercise and recreation on waste lands "without paying the value of the private rights of ownership."[193] The establishment of a Commons Preservation society in the 1870s also indicates how long the British public has been seeking greater protection for public uses of land.[194] In 1884, MP James Bryce introduced the first bill to establish a public right to roam.[195] Although the bill failed, the movement toward greater access had begun. During the next century, Parliament tipped the balance toward greater public use slowly; finally, with the enactment of CRoW in 2000, the right to roam was restored. The impetus for this change thus has deep roots in British history.

In 1932, a large group of ramblers from Manchester trespassed on private land on Kinder Scout, a windswept plateau containing the highest point in the celebrated Peak District. The trespassers engaged in this civil disobedience to protest their exclusion from "some of the best countryside England has to offer."[196] Confronted by a group of the landowner's gamekeepers, violence ensued and some of the trespassers were arrested. Public sentiment, however, favored the hikers, and after World War II, the government under Prime Minister Attlee began a movement toward public rights to the countryside. One of the first steps was the establishment of national parks, including the Kinder Scout area.[197] Remarkably, just as Americans now revere the protests of Martin Luther King and Rosa Parks, which helped to bring down the barriers of discrimination, Britons now praise the Kinder Scout trespassers as having secured "far-reaching changes in unjust and oppressive law."[198]

In 1939, Parliament attempted to open the mountains to public use through the

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Casciani, *Why MI5 monitored singer Ewan MacColl*, BBC NEWS, Mar. 5, 2006, http://news.bbc.co.uk/2/hi/uk/4772328.stm (last visited Jan. 24, 2007).

192. HUNTER, *supra* note 24, at vii.

193. ELTON, *supra* note 107, at 301.

194. *See* HUNTER, *supra* note 24, at vii.

195. UK Association of National Park Authorities, History of the National Parks, http://www.nationalparks.gov.uk/index/learningabout/history.htm (last visited Jan. 15, 2007).

196. Giles Wilson, *The Walk That Changed Britain*, BBC NEWS ONLINE, April 26, 2002, http://news.bbc.co.uk/1/hi/uk/1953035.stm (last visited Jan. 22, 2007).

197. *Id.*

198. Michael Meacher, MP, then Minister of the Environment, Speech at the 70th Anniversary of the Kinder Scout Protest (Apr. 24, 2002). Excerpts available at http://www.huntfacts.com/kinderScout.htm (last visited April 7, 2007).

Access to Mountains Act. Instead of declaring mountains to be open for roaming, however, the Act merely set up an "elaborate machinery" for issuance of an access order for a particular area.[199] The process required an application to be filed with the Minister of Agriculture, but the applicant had to pay large deposits to cover the costs of the process and many applications were rejected. Moreover, any access granted was subject to numerous restrictions.[200]

In 1949, Parliament created "immense changes" in the right of public access by enacting the National Parks and Access to the Countryside Act (NPACA).[201] Under this legislation, the system of public rights of way, including footpaths, bridleways, and carriageways, was comprehensively mapped. Each county council conducted a survey showing where public rights of way were thought to exist.[202] A landowner or the public could appeal this determination, but would have to produce evidence contradicting the council's proposed designation.[203] This process resulted in a definitive map, which was deemed conclusive regarding these easements.[204] The map is reviewed periodically to conform to changes or new information.[205] A new right of way may be created, but only by compensating the owner.[206] The Act also provided the national government with authority to establish long-distance routes.[207]

The NPACA was important because it systematically confirmed public rights of way and established a procedure for administratively determining rights over controversial paths. If a landowner challenged the existence of a path, both sides could produce evidence of use or nonuse, and the matter could be settled rather quickly and inexpensively. Thus, the Act created much greater certainty regarding the existence and location of footpaths, which furthered the public's confidence in using them.

The NPACA also allowed the government to issue compulsory orders to open up private land to public roaming.[208] However, this attempt to provide roaming rights failed. In order to issue a compulsory order, the permission of three cabinet ministers was required, a cumbersome process had to be followed, and compensation paid.[209] Moreover, the request for an access order had to come from a

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199. SHOARD, *supra* note 13, at 182.

200. *Id.* at 182-83.

201. HUTCHINS, *supra* note 141, at iii.

202. *Id.* at 13-14.

203. *Id.*

204. *Id.* at 15.

205. *Id.*

206. *Id.* at 17 (citing National Parks and Access to the Countryside Act [NPACA], 1949, ch. 97, §§ 46, 107 (Eng.).

207. *Id.* at 20 (citing National Parks and Access to the Countryside Act [NPACA], 1949, ch. 97, §§ 51-55 (Eng.).

208. National Parks and Access to the Countryside Act [NPACA], 1949, ch. 97, §§ 59, 70 (Eng.).

209. SHOARD, *supra* note 13, at 30-31. The Access to Mountains Act of 1939 also failed in its attempt to provide access for similar reasons. *Id.* at 182. Interestingly, one commentator indicated that Parliament declined

county council, many of which were dominated by landowners or locals reluctant to open the land to outsiders.[210] Only two access orders were ever issued under NPACA.[211] Thus, the public's desire for greater countryside access remained unsatisfied—that is, until the enactment of the Countryside and Rights of Way Act in 2000.

III. COUNTRYSIDE AND RIGHTS OF WAY ACT (CROW) 2000

Although the extensive network of footpaths, coupled with the establishment of public lands under NPACA, gave Britons significant opportunities for walking in the countryside, the public wanted still more. Footpaths were confined to limited routes and some desirable lands had no public access at all. Marion Shoard, a major proponent of greater access rights, asked a simple question: "Why shouldn't people be able to go where they wanted to go?"[212]

Britons also looked jealously at the far greater access rights provided by their European neighbors.[213] For example, in Sweden, Finland, and Norway, the public enjoys "*allemansrätten*," which allows a general right of access to all land in the countryside, although the right stems from custom rather than explicit law. Pursuant to *allemansrätten*, the public may walk over any private land, unless it would conflict with privacy (near houses or other dwellings) or would interfere with growing crops.[214] Far more than just walking, *allemansrätten* gives the public the right to picnic or camp, and even gather mushrooms or berries.[215] Other countries, such as Germany, Denmark, Switzerland, Austria, and Spain, also give the public broad access rights to certain types of private lands,[216] and Britons wondered why they could not enjoy them as well.

Public sentiment for roaming rights began to grow in the 1990s. Ramblers' rights groups conducted mass occupations of countryside areas.[217] In 1994, the Labour Party, then out of power, made the public right of access part of its platform at its annual conference.[218] So, when Labour ended eighteen years of

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to include a general right to roam in NPACA not because they were convinced that landowners would be unduly burdened, but because they believed owners typically allowed access anyway. HUTCHINS, *supra* note 137, at 22. *See also* HUNTER, *supra* note 23, at vii ("[T]he public owe much to the generosity and good sense of land-owners; but the use of the country for purposes of recreation should not be left to depend entirely upon the goodwill of a limited class. . . .").

210. SHOARD, *supra* note 13, at 189-90.

211. *Id.*

212. *Id.* at 5.

213. *Id.* at 261.

214. For a general description of the *allemansrätten* in Sweden, for example, see Naturvårdsverket, Allemansrätten, http://www.naturvardsverket.se/allemansratten (last visited Jan. 18, 2007).

215. *Id.*

216. SHOARD, *supra* note 13, at 6.

217. *Id.* at 4 (describing "The Land is Ours" movement).

218. *Id.* at 6.

Conservative Party rule in 1997, the people expected action to be taken.[219] The Blair government began in February 1998 by issuing a consultation paper to solicit comments on how best to provide access to the countryside, especially mountain, moor, heath, down, and registered common land, which it estimated was some 1.2 to 1.8 million hectares or around ten percent of the land area of England and Wales.[220]

Landowners, of course, were understandably wary of the new proposals. They feared not only a loss of property value due to the imposition of an easement, but also increased costs of liability insurance, greater need for supervision of livestock, increased costs to repair fences and other damage, and even costs for the provision of access in the first place by installing stiles or kissing gates. At a minimum, landowner rights groups believed the government should compensate them for access or allow them to charge users in order to recoup these costs, which they estimated would be anywhere from £29 (US$56) and £37 (US$72) per hectare annually.[221] Local authorities and recreational users overwhelmingly opposed compensation, however, except perhaps for improvements necessary to facilitate the initial provision of access.[222] Although a few suggested that roamers should be required to buy an annual pass for access nationally, the vast majority opposed any fee for access.[223]

In the end, Parliament was convinced that the public benefit from opening up access to these lands far outweighed the additional burden on the landowners.[224] The government estimated that costs to landowners would be minimal, especially on land that was not used for hunting.[225] Damage caused by access users, such as vandalism, erosion, littering, and stock worrying, was anticipated to be rare.[226] For sites that would be infrequently visited and were not used by landowners for hunting, annual costs to landowners were thought to be extremely low, estimated

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219. *Id.* at 6-7. *See, e.g.*, Labour Party, 1997 Manifesto (1997), http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml (last visited Jan. 20, 2007) (promising public "greater freedom to explore our open countryside").

220. Consultation Paper, DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Access to the Open Countryside in England and Wales* (Feb. 1998). *See also* DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Appraisal of Options on Access to the Open Countryside of England and Wales* (Mar. 1999), http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm (last visited Jan. 17, 2007). A hectare is roughly equivalent to 2.5 acres.

221. DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Analysis of Response to the Open Countryside Consultation Paper* (Mar. 1999), http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm (last visited Jan. 17, 2007) (The total annual costs to landowners were estimated to be between £21 million and £88 million, or between US$40 and US$170 million).

222. *Id.*

223. *Id.*

224. SHOARD, *supra* note 13, at 259 (arguing that the ability to exploit property for economic gain can co-exist with right of access).

225. DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Appraisal of Options*, *supra* note 220, ch. 7.

226. *Id.* tbl. 7.1.

to range from £.06 to £.51 per hectare.[227] At the upper end, however, for popular sites also used for hunting, landowners might lose as much as £8.70 per hectare when loss of hunting income was considered.[228] The government estimate of benefits to the public, based on a "willingness to pay" analysis, ranged from £.39 per hectare for infrequently used upland sites to £87.50 for frequently used lowland areas.

In introducing its Right to Roam proposal, the Blair administration set out its case for this readjustment in rights:

> In a crowded island, we are fortunate to have some of the most beautiful landscapes to be found anywhere in the world. But through England and Wales, from mountain and moorland to heath, down and ancient common lands, some of our finest countryside has been closed to public access for centuries.[229]

Although the government considered alternatives, including a largely voluntary access plan with compensation incentives and condemnation of access with landowner payments, both options entailed much higher implementation and administration costs.[230] Moreover, experience with the voluntary approach under previous acts increased skepticism of that mechanism.[231] Therefore, the administration settled on a new statutory right of access to the open countryside, coupled with restrictions to protect landowner interests.[232] While the national government would not compensate landowners, local authorities could assist with the costs of providing access, and landowner liability for any injuries would be limited.[233] Thus, the government believed it had struck the proper balance between interests of the public and the landowners.[234]

A. MECHANICS OF LEGISLATION

In 2000, the British Parliament enacted CRoW, which opened up certain categories of private property to public access. Under this Act, the public has the right to wander over registered "common land" and lands classified as "open country," consisting of mountain, moorland, heath and downland.[235] Lands

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227. *Id.* These estimates translate to between US$.12 and US$1 per hectare.

228. *Id.* tbl. 7.2.

229. DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Access to the Open Countryside of England and Wales: the Government's Framework for Action* (Mar. 1999), http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/ (last visited Jan. 17, 2007).

230. DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Appraisal of Options*, *supra* note 220, Executive Summary.

231. *See* DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Access to the Open Countryside of England and Wales: the Government's Framework for Action*, *supra* note 229.

232. *Id.*

233. *Id.*

234. *Id.*

235. Countryside and Rights of Way Act [CRoW], 2000, c. 37, § 1, (Eng.).

qualifying for access comprise about twelve percent of England and Wales,[236] covering millions of acres in England alone.[237] Some of the country's most scenic real estate was opened up, including areas fought over by nature lovers and landowners for over a century.[238] Vast landholdings that were previously shut off from the public, including the downs of *Wuthering Heights* fame in West Yorkshire and the moors of Dartmoor, which is currently occupied by the Prince of Wales, are now accessible.[239]

The public may freely enter lands classified as common land or open country "for the purposes of open-air recreation," provided that they do not damage fences or gates.[240] Unlike the footpath easement, wanderers are not restricted to any particular right-of-way on these lands. The access is primarily for walking and picnicking; one may not hunt, light a fire, swim in nontidal waters, remove plants or trees, ride a bicycle or horse, or disrupt lawful activities on the land.[241] Breaches of these restrictions will result in loss of the right of access for a period of seventy-two hours.[242]

CRoW requires the Countryside Agency to prepare a definitive map of all registered common land and open country.[243] The agency issued maps in draft form, received comments, and then issued the maps in provisional form in 2004.[244] The landowner could then appeal the designation to the Secretary of State, who could appoint an inspector to investigate and decide the appeal.[245] The inspector could hold a hearing or "local inquiry" with regard to the case.[246] The only ground for appeal with respect to open country designation was that the land did not in fact consist "wholly or predominately of mountain, moor, heath or down."[247] Notably absent was any power to balance the rights of the public against the interests of the landowner. Once all of the appeals were determined,

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236. Wilson, *supra* note 196. CRoW applies only to England and Wales. In Scotland, private land is presumed to be free to walk on unless the owner has specifically excluded it. *Id.*; Margot Higgins, *Conservationists Celebrate UK Countryside Bill*, March 13, 2000, http://www.enn.com/arch.html?id=10848 (last visited Feb. 2, 2007).

237. Natural England estimates that four million acres in England is classified as open country, although some of that will fall within exemptions to the Act. *See* English Nature, Walking Into History: New Right Introduced in Eastern England (Oct. 2005), *available at* http://www.countryside.gov.uk/LAR/Regions/eastOfEngland/whoweare/pressReleases/PR_WalkingIntoHistory.asp

238. Mark Rowe, *The Right to Roam—but not for years*, INDEP. ON SUNDAY, Jan. 14, 2001, at 3.

239. *Id.*

240. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 2 (Eng.).

241. *Id.* sched. 2.

242. *Id.* § 2(4).

243. *Id.* § 4. The Countryside Agency prepares the map for England, while the Countryside Council for Wales prepares the map for Welsh open country. Land that was registered common land and land over 600 meters above sea level immediately qualified as open country without going through the mapping process. *Id.* § 1.

244. *Id.* § 5.

245. *Id.* §§ 6, 8. In Wales, the appeal goes to the National Assembly. *Id.*

246. *Id.* § 7.

247. *Id.* § 6.

the agency issued the maps in conclusive form.[248]

Similar to laws regarding footpaths, CRoW prohibits a landowner from posting a sign "likely to deter the public from exercising" its access rights.[249] Thus, any "Keep Out" or "Trespassers Will Be Prosecuted" signs could result in substantial fines.[250] On the other side, the access authority (typically the local highway agency) may adopt by-laws regulating access rights, and the Countryside Agency maintains a Code of Conduct to guide the public and landowners.[251]

Not all land is eligible for access designation. The CRoW exempts land that is plowed or used as a park or garden.[252] Quarries, golf courses, and racecourses are also exempt. No land within twenty meters (about twenty-two yards) of livestock buildings may be included. CRoW also exempts any land covered by buildings, including the "curtilage" of that land, which would normally include the yard or fenced area around a dwelling house.[253]

Notably, the declaration of public access rights does not carry with it any right to compensation. One justification, put forward when the government initially proposed the scheme, was that, because access would be limited to land not currently used for development or agriculture, the additional rights would not significantly harm private landowners.[254] The government has agreed to provide compensation for vehicular access over common lands.[255]

Landowners were justifiably concerned about their potential liability to injured roamers. What if a child decides to jump in a farm pond and drowns? What if a hiker is injured by livestock or slips and falls down a rocky slope? CRoW attempts to address these concerns by limiting the standard of care owed to those exercising access rights to the same level owed to trespassers, rather than the higher level owed to invitees or licensees.[256] Moreover, the act specifically provides that land occupiers will incur no liability for risks arising from natural features of the landscape, water (river, stream, ditch, or pond), or passage across

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248. For the detailed maps, see the Countryside Agency's website, Countryside Access—Home, http://www.countrysideaccess.gov.uk (last visited Feb. 2, 2007).

249. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 14 (Eng.).

250. For first offenses, the fine could be up to £200 under the current scale. Refusal to comply with an order to remove the offending notice could bring much larger penalties (currently up to £1000).

251. *See* Countryside and Rights of Way Act [CRoW], 2000, ch. 37, §§ 17, 20 (Eng.); Countryside Access—Home, http://www.countrysideaccess.gov.uk (last visited Feb. 2, 2007).

252. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, sched. 1 (Excepted Land) (Eng.).

253. *Id.*; *see also* Explanatory Notes to the Countryside and Rights of Way Act 2000, ¶ 13, *available at* http://www.opsi.gov.uk/Acts/en2000/2000en37.htm (explaining exemptions).

254. DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, Access to the Open Countryside, *supra* note 229, at 23.

255. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 68 (Eng.).

256. *Id.* § 13; *see also* British Railways Board v. Herrington, (1972) 2 W.L.R. 537 (Noting that toward trespassers, landowners have a limited duty not to act with "reckless disregard of their safety"). The property owner has a duty to warn of known latent deadly hazards, but has no duty to ascertain and warn of all hazards on the property. *Id.* Licensees, in contrast, should be warned of all known hazards, not merely the deadly ones, while invitees may sue due to injuries caused even by hazards unknown to the landowner. *Id.*

walls, fences, or gates (except for proper use of a gate or stile).[257] The landowner or occupier remains liable, however, for recklessly or intentionally creating risks.[258]

CRoW is a remarkable transformation of the right to exclude others into a public right to roam. For those landowners affected, the re-allocation of this stick in their bundle of property rights means that they will have diminished privacy and possible damage to their land from a potential invasion of hikers or picnickers. Before Parliament passed the act, landowners complained that the burdens imposed on them would be substantial. Examining early developments under this new regime, it is possible to assess the effects of the shift in access rights.

B. RECENT DEVELOPMENTS

Several recent cases illuminate the adjustments required by landowners under CRoW. In 2001, pop singer Madonna and her husband, film director Guy Ritchie, purchased Ashcombe House in south Wiltshire for £9 million (about US$16.5 million). The 1,132-acre property includes a public footpath, which comes within about one hundred yards from the mansion where the family resides. Although this caused the singer some concern, she at least knew about the footpath when she purchased the land, and she has reportedly been pleased that so far walkers have not unduly invaded her privacy.[259] However, the couple did protest when the Countryside Agency announced its plans to classify about 350 acres of their estate as "downland," which qualifies as "open country" under the CRoW.[260] That designation would give the public the right to walk across that portion of the property at will. The famous couple objected at a public inquiry into the matter, arguing that the land was not suitable as open country and that free access would violate their privacy rights under the European Convention on Human Rights. An independent inspector appointed to resolve the matter decided that only 130 acres, all of which were out of sight of Madonna's home, should be classified as downland and opened to access.[261] Because privacy was not therefore at issue,

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257. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 13 (Eng.); *see also* Explanatory Notes to the Countryside and Rights of Way Act 2000, *supra* note 253, ¶ 29.

258. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 13 (Eng.).

259. Press Release, Rambler's Association, Rambler's Association Statement Regarding the Public Inquiry Concerning Access Land on Ashcombe House Estate (June 18, 2004), *available at* http://www.ramblers.org.uk/news/archive/2004/madonnaverdictstatement.html.

260. *See* Richard Savill, *Madonna Wins Partial Ban on Public Walking Across Estate*, TELEGRAPH.CO.UK, June 19, 2004, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/06/19/nmadge19.xml (last visited Feb. 2, 2007).

261. *See id.*; Planning Inspectorate, Appeal Decision, CROW/3/M/03/1076 (June 17, 2004), at 4-5, para. 20-22, available at http://www.planning-inspectorate.gov.uk/access/appeals/central_southern/documents/1076.pdf [hereinafter "Madonna appeal"].

the inspector declined to consider the privacy aspects of the case.[262]

Madonna's case therefore fails to clarify how privacy concerns may impact the right to roam. Under CRoW itself, such concerns are irrelevant; the only considerations are whether the characteristics of the land qualify as open country and whether it falls within a designated exemption.[263] Because the Act has provided, albeit in a limited fashion, for the accommodation of landowner concerns, such as damage to crops or privacy, there appears to be no room, even in the extraordinary cases of celebrities, for additional balancing of those landowner interests. However, it remains to be seen whether extreme applications of CRoW could run afoul of higher law, such as the European Convention on Human Rights.[264]

The European Human Rights Convention does mandate the protection of individual property rights. Article 1 of the First Protocol (1P1) of the Convention states:

> 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. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[265]

The European Court of Human Rights has construed this provision as allowing restrictions on use, without compensation, as long as there is a "fair balance" between the public interest and the burden on the individual.[266]

The Human Rights tribunal had an opportunity to apply the Convention's property protections to CRoW in a recent case involving the Act's amendments to

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262. Madonna appeal, at 4, para. 20.

263. There are numerous examples of appeals in which landowners have successfully challenged the characterization of their property as meeting the open country definition. *See, e.g.*, Appeal Decision, CROW/1/M/03/203 (May 7, 2003) (holding that land was improperly classified as downland because it contained dense scrub and young trees); Appeal Decision, CROW/1/M/02/82 (Oct. 13, 2003) (holding that qualifying vegetation does not predominate site, as required by methodology). *See generally* DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, GUIDANCE ON APPEALS UNDER SECTION 6 OF THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000, *available at* http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/cl/appeals-guidance.pdf (describing mapping process).

264. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms does contain an explicit right of privacy, though the protection may be modified in the pursuit of the rights of others. Although Article 8 has been applied primarily in the search and seizure context, it is possible that the European Court of Human Rights could apply it to CRoW. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, Europ. T.S. No. 5.

265. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 255, Protocol 1, art. 1.

266. James v. United Kingdom, App. No. 8795/79, 8 Eur. H.R. Rep. 123, 156 (1986) (holding that the burden on a private owner must not be "disproportionate"); Papamichalopoulos v. Greece, 16 Eur. H.R. Rep. 440, 451 (1993) (requiring "fair balance" between community interests and fundamental rights of individual).

the government's nature preservation powers.[267] Pursuant to its authority under the 1968 Countryside Act, English Nature had entered into a voluntary management agreement with the owner of a canal, under which the owner agreed to extensive restrictions on use in exchange for £19,000 (US$37,000) per year.[268] Under the 2000 CRoW Act, however, no compensation was required for similar restrictions, even though they clearly impeded the commercial activities of the canal owner.[269] The court found that the impact of these restrictions could have a significant economic impact on the landowner.[270] Nevertheless, the court found that compensation would not have to be provided if the benefit to the community outweighed the impact on the landowner.[271] In this case, preventing the landowner from harming native flora and fauna was plainly in the public interest and did not require compensation.[272] The court therefore adopted the sort of harm/benefit distinction explicitly rejected by the U.S. Supreme Court in *Lucas*.[273]

Most decisions regarding the application of CRoW involve more mundane considerations, such as whether the land qualifies as mountain, moor, heath, or downland. In cases challenging a designation, a government inspector conducts a visual inspection and receives evidence from experts and others. The land must consist "wholly or predominately" of the qualifying habitat, which calls for many discretionary judgments.[274]

For example, landowners succeeded in removing a popular rock feature, Vixen Tor in Dartmoor, from open country designation.[275] The outcropping was considered a landmark, which had been open to hiking for thirty years until the current owners closed it in 2003. Later, the landowner was found guilty of attempting to change the character of the land to improved grassland (which would take it out of CRoW classification) by clearing scrub and applying fertilizer.[276] The Countryside Agency classified the land as open access, due to its character as moor, but the landowners appealed. While the inspector's expert determined that the site "probably" had a predominance of qualifying vegetation,

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267. R (on the Application of Trailer & Marina (Leven) Ltd.) v. Sec'y of State for the Env't, Food & Rural Affairs and English Nature, v[2004] EWCA (Civ) 1580 (Eng.) [hereinafter Leven].

268. *Id.* These agreements were entered into pursuant to Section 15 of the Countryside Act 1968.

269. English Nature declared the area a Site of Special Scientific Interest (SSSI) under the 2000 CRoW Act, Part III, which "effectively replac[ed] voluntary agreement with mandatory control." Leven, *supra* note 267, ¶ 14.

270. *Id.* ¶ 16 (holding that impacts could be "severely detrimental").

271. *Id.* ¶ 58.

272. *Id.* ¶¶ 71-72.

273. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-25 (1992) (criticizing the harm/benefit distinction in takings analysis). For an analysis of *Leven*, see Tom Allen, *Human Rights and Regulatory Takings*, 17 J. ENVTL. L. 245 (2005).

274. Countryside and Rights of Way Act [CRoW], 2000, ch. 37, § 1 (Eng.).

275. Appeal Decision, CROW/6/M/04/2889 to 2895 (March 2, 2005).

276. Legendary Dartmoor, The Forbidden Tor, http://www.legendarydartmoor.co.uk/For_bidden.htm (last visited Jan. 15, 2007).

certain assessment was difficult.[277] The inspector concluded that, because there was "some doubt" about the predominance of qualifying cover, the site should not be mapped as open country.[278] In protest of this decision, roamers staged demonstrations at the site, including several mass trespasses.[279] Eventually, the landowners offered to open access under a ten-year agreement, for payments totaling £400,000, which they said represented their costs.[280] In response, the Dartmoor National Park authority offered £1500 per annum. As of June 2006, the two sides had been unable to agree on an access agreement and the site remains closed, despite continued sporadic protests.[281]

The *Vixen Tor* case illustrates that, without CRoW, landowners may be unwilling to grant access without substantial compensation. The failure to provide compensation for CRoW access thus represents the loss of a valuable property right. Nevertheless, the shift in property rights effected by CRoW seems to be surviving claims that it impermissibly undermines fundamental human rights. As discussed in Section IV below, American constitutional law would presumably strike a different balance.

C. THE IMPORTANCE OF COUNTRYSIDE ACCESS

> *[T]his English country! Why any of you ever live in towns I can't think. Old, old grey stone houses with yellow haystacks and lovely squelchy muddy lanes and great fat trees and blue hills in the distance. The peace of it! If ever I sell my soul, I shall insist on the devil giving me at least forty years in some English country place in exchange.*
>
> —P.G. Wodehouse[282]

To Americans, CRoW represents a rather remarkable idea—that the public's interest in roaming across scenic lands outweighs the private property owner's right to exclude. While Americans have traditionally emphasized the privacy concerns of the landowner, they have rarely considered the strength of the public side of this equation. This Section will discuss in more detail the interests that led to CRoW's validation of the right to roam.

The British commitment to retaining access to the countryside seems to be grounded in some important public values, including providing for transportation

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277. Appeal Decision, CROW/6/M/04/2889 to 2895, at 4-5, ¶ 21 (March 2, 2005).

278. *Id.* at 5, ¶ 22.

279. Legendary Dartmoor, *supra* note 276.

280. Dartmoor National Park Authority, Meeting Minutes (March 3, 2006), app. 1, para. 5, http://www.dartmoor-npa.gov.uk/index/aboutus/au-authoritymeetings/au-report/committee_reports_from_2006.htm (last visited Jan. 15, 2007). The landowners desired reimbursement for potential damage and litter from access users, as well as loss of farm income and income from charging admission to the site.

281. Dartmoor National Park Authority, Meeting Minutes (June 30, 2006) http://www.dartmoor-npa.gov.uk/index/aboutus/au-authoritymeetings/au-report/committee_reports_from_2006.htm (last visited Jan. 15, 2007).

282. P.G. WODEHOUSE, MOSTLY SALLY 196 (1923).

by foot, enhancing the enjoyment of nature, promoting mental and physical health, facilitating a historical and cultural connection, and building a sense of community.

1. Means of Transportation. The British tradition of walking in the countryside was originally a matter of necessity. Footpaths or cross-country rambles were the primary means of getting from place to place, especially for commoners with rare access to a horse. Obviously, travel by foot is usually no longer required, when most people have a car or bike, or can take a bus. But footpaths do provide a useful and pleasant alternative to the paved road. Without the footpath, a nice one-mile walk to town, cutting through neighboring meadows, could turn into a three–mile, dangerous trip on narrow, circuitous paved roads without shoulders. Ensuring that it is easy to walk from place to place may significantly reduce reliance on other forms of transportation.

2. Enjoyment of Nature. Roaming rights and footpaths enable the walker to reach places that are not yet spoiled by urban development, from which a road would detract.[283] A hike may lead to a beautiful vista, or a mountain stream, surrounded by natural beauty unblemished by concrete and steel. Walking through the scenery, such as hiking on a footpath through a meadow of grazing sheep, puts you in the middle of the beauty, and makes you a part of it, rather than simply observing it through a car window. The effect is therefore more like a three-dimensional image than a picture postcard. Moreover, the slow pace allows for a more intimate observation of the wildlife and plants that abound in the countryside.

3. Mental health. Walking to town by a footpath allows the walker to "rediscover something of a slower, quieter, more rooted existence,"[284] an advantage that becomes more important as the pace of life increases. Americans tend to view any physical activity as a competitive event, and the walker striding purposefully down a crowded street with hand weights and headphones is perhaps peculiarly American. In contrast, the right to roam celebrates a type of walking that promotes peaceful reflection and a sense of serenity. Marion Shoard, a strong proponent of the right to roam, describes the countryside as a "repository of tranquility."[285]

In Wordsworth's "Tintern Abbey," the poet basks in the pleasure of once again viewing the rural landscape along the River Wye, exclaiming that the memory of "these beauteous forms" sustained him through many nights in noisy cities, giving him a feeling of "tranquil restoration."[286] Wordsworth found nature to be

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283. TAPLIN, *supra* note 28, at 4 (Footpaths "lead the way to unexpected, hidden landscapes and furnish peaceful places from which to absorb them.").

284. *Id.* at 2.

285. SHOARD, *supra* note 13, at 1.

286.

These beauteous forms,

the "anchor of my purest thoughts, the nurse, the guide, the guardian of my heart, and soul of all my moral being."[287] A walk in the country, therefore, was seen by Wordsworth and his followers to be a powerful antidote to the "dreary intercourse of daily life."[288]

4. Physical health. Access to the countryside encourages a culture of walking that promotes physical health. Being able to walk out your front door and within minutes be striding through peaceful green meadows is more inviting than the typical urban concrete nightmare. Even Americans who live in the country may find it difficult to take a walk, being forced by neighbors' fences to use country roads with traffic and no shoulders for walkers. Even if the road has a shoulder, the noise, exhaust and danger detracts from its desirability for healthy and pleasant exercise. Footpaths or roaming rights make it possible to walk to town for lunch or for shopping instead of hopping in the car.

Health officials in the United States have strongly advocated that Americans get more exercise, including walking, to help combat a growing obesity problem.[289] Recent studies indicate that about two-thirds of American adults are now overweight.[290] The Centers for Disease Control and Prevention now attributes over 100,000 deaths per year to being overweight.[291]Obesity rates among American adults and children have doubled over the last two decades.[292] In

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Through a long absence, have not been to me
As is a landscape to a blind man's eye:
But oft, in lonely rooms, and 'mid the din
Of towns and cities, I have owed to them
In hours of weariness, sensations sweet,
Felt in the blood, and felt along the heart;
And passing even into my purer mind,
With tranquil restoration:

WORDSWORTH, *supra* note 17, at 161.

287. *Id.* at 164.

288. *Id.*; *see also id.* (Nature informs mind, impresses us with "quietness and beauty," and feeds our "lofty thoughts."). In a similar vein, Thomas Hardy described the mental release accorded by a walk on "Wessex Heights":

In the lowlands I have no comrade, not even the lone man's friend –
Her who suffereth long and is kind; accepts what he is too weak to mend:
Down there they are dubious and askance: there nobody thinks as I,
But mind-chains do not clank where one's next neighbor is the sky.

THOMAS HARDY, "Wessex Heights," *in* SELECTED POEMS OF THOMAS HARDY 43 (John Crowe Ransom ed., 1966).

289. *See, e.g.*, U.S. Dep't of Health and Human Serv., Press Release, HHS Secretary Announces Development of Physical Activity Guidelines at National Prevention Summit (Oct. 26, 2006), *available at* http://www.hhs.gov/news/press/2006pres/20061026.html.

290. U.S. Dep't of Health and Human Serv. Ctrs. for Disease Control and Prevention, National Health and Nutrition Examination Survey (2003), *available at* http://www.cdc.gov/nchs/data/nhanes/databriefs/adultweight.pdf.

291. Centers for Disease Control and Prevention, Frequently Asked Questions About Calculating Obesity-Related Risk, (May 27, 2005), *available at* http://www.cdc.gov/PDF/Frequently_Asked_Questions_About_Calculating_Obesity-Related_Risk.pdf

292. *Id.* Obesity rates for the adolescent group tripled over the same time-frame.

addition to unhealthy eating habits,[293] lack of exercise is the main culprit. Europeans tend to walk a lot more than the average American.[294] In part, this is due to the design of their cities and towns, which encourage and enable walking, and roaming rights are an extension of that.

A prime example of the difference in culture is that, in the United States, many golf courses will not allow you to walk; a golf cart is required to ensure speed of play.[295] Even where the course does not require a cart, at many courses it is rare to find a walker among the carts. In contrast, on the Old Course at St. Andrews, the most venerated golf course in the world, only those who can provide documentation of a permanent disability can use a "buggy" and no carts are allowed at all on some of St. Andrews' courses.[296] In fact, most courses in Europe require you to walk unless you are elderly or disabled.[297] Footpaths and roaming rights are just another example of this cultural emphasis on walking.

5. Connection to History and Culture. There is a distinct pleasure in walking a path you know villagers have walked for centuries before you. The use of land in the same way as those previous inhabitants results in a connection to the past, to one's ancestors, through the land itself. Washington Irving, an American visiting Britain, captured the concept beautifully when he wrote approvingly of "the stile and footpath leading from the churchyard, across pleasant fields and along shady hedge-rows, according to an immemorial right of way." He believed the paths "evince a calm and settled security, and hereditary transmission of homebred virtues and local attachments, that speak deeply and touchingly for the moral character of the nation."[298] This connection to the past, tied to a sense of morality, can inspire and motivate preservation of rustic scenes, of which footpaths and roaming have always been a part.

Perhaps Thomas Hardy was thinking of this feature of a walk in the countryside when he wrote *Wessex Heights* in 1896:

> There are some heights in Wessex, shaped as if by a kindly hand,
> For thinking, dreaming, dying on, and at crises when I stand,

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293. *See* SUPER SIZE ME (The Con 2004) (illustrating the effects of fast-food diet).

294. Recent studies indicate that obesity rates in Europe are rising rapidly, although they are still far below American rates. Int'l Obesity Task Force, EU Platform Briefing Paper fig. 1 (2005), *available at* http://ec.europa.eu/health/ph_determinants/life_style/nutrition/documents/iotf_en.pdf. Europeans walk, on average, much more than Americans do. A study found that Germans took trips on foot four times more often than Americans, while the Dutch walked three times more often. John Pucher & Lewis Dijkstra, *Making Walking and Cycling Safer: Lessons from Europe*, 54 TRANSP. QUART. No. 3, at 25 (2000).

295. *See* Therese Droste, *Walking the Links is Good Exercise, If It's Allowed*, WASH. POST, May 15, 2001, at HE06, *available at* www.popeofslope.com/paceofplay/walking.html (noting that half of the public facilities in the study required carts).

296. *See* St. Andrews Links, http://www.standrews.org.uk/golf/book_golf/trolleys_buggies.html (last visited Jan. 20, 2007).

297. *See* Alistair Tate, *A Good Walk Spoiled*, GOLFWEEK, *available at* http://www.golfweek.com/ourtake/287547302780100.php.

298. WASHINGTON IRVING, THE SKETCH BOOK 67-68, *quoted in* TAPLIN, *supra* note 28, at 17.

> Say, on Ingpen Beacon eastward, or on Wylls-Neck westwardly,
> I seem where I was before my birth, and after death may be.[299]

Even in the United States, legal recognition of a historic connection to land is quite common. In Iowa, for example, century farms, which have been in the same family for at least one hundred years, are entitled to special land use protection, to honor a family's multi-generational relationship with the land.[300] In adverse possession law, the law recognizes the psychological attachment to land that comes with continued use over time.[301] Historic preservation laws preserve old associations and a sense of history and continuity in our culture. Likewise, arguments for wilderness protection in the United States have emphasized their connection to America's pre-Columbian heritage.[302] Thus, in some ways, walking an ancient traveled way serves in part as an outdoor, interactive museum and in part like a visit to the cemetery.

6. Sense of community. The public's use of footpaths and roaming rights also evokes a sense of community, arising from the shared ownership of the land.[303] Instead of "my land" and "your land," it is "our land." Community is also enhanced by the chance meetings of neighbors that occur along the path. In cars, even if you recognize someone whizzing by, you can barely manage a wave before they are gone. On a footpath, greetings are always exchanged, and typically there is time to stop and converse. Even with strangers, the unwritten code of the footpath requires a greeting and often a chat about the weather, the path ahead, and more.[304]

The right to roam also represents a tribute of sorts to the common man. Nature poet Kim Taplin notes that "[f]ootpaths were made by common men who were obliged to go afoot; they are open to all."[305] She highlights the incident in *Pride and Prejudice* when Elizabeth Bennett crossed "field after field at a quick pace, jumping over stiles and springing over puddles."[306] By using the commoner's route, "she incurred the class scorn of the Misses Bingley for her muddy petticoat and red cheeks, but she claims the approval of Jane Austen and her readers for her

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299. HARDY, *supra* note 288, at 43.

300. IOWA CODE §§ 368.26, 403.17(10) (2006).

301. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

302. *See, e.g.*, Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 289-90 (1966).

303. SHOARD, *supra* note 13, at 50-51 (noting that public has more of a "stake" in the land it uses).

304. As William Barnes put it:

> We souls on foot, with foot-folk meet:
> For we that cannot hope to ride
> For ease or pride, have fellowship.

William Barnes, *Fellowship*, *reprinted in* TAPLIN, *supra* note 28, at 50.

305. *Id.* at 17

306. *Id.* (quoting AUSTEN, *supra* note 18, Ch. VII)

independence and indifference to form."[307] For Britain, which has always had a hyper-sense of class differences,[308] the right to roam is not just a "public" right, but more specifically a right of those who do not belong to the landed gentry, and therefore, a right to be protected as fiercely as the right to a decent wage or universal health insurance.[309] In a similar vein, Elihu Burritt referred to footpaths as "the inheritance of our landless millions."[310]

At the same time, public access to private lands helps to break down class differences by establishing a connection between the commoner and the landed gentry. On the footpath, everyone is equal, regardless of who owns the land. Instead of the imposing exclusivity of the modern American gated community, the English footpath allows the poorest plebeian to walk right across Madonna's estate.

In conclusion, the public interest supporting a right to roam over private land stems from a variety of significant social values. Its strongest appeal may be the sense of "tranquil restoration," as Wordsworth called it, that a walk in the country brings. In that way, countryside access is cheaper than psychological counseling, and given its physical benefits, may reduce national health costs as well. Yet, the private property owner's right to exclude, against which these public benefits are balanced, is also supported by strong policy reasons, which will be discussed more fully below.

IV. ACCESS RIGHTS IN UNITED STATES IN COMPARISON

> *An American farmer would plough across any such path . . . but here, it is protected by law, and still more by the sacredness that inevitably springs up, in this soil, along the well-defined footprints of the centuries. Old associations are sure to be fragrant herbs in English nostrils, we pull them up as weeds.*
>
> —Nathaniel Hawthorne[311]

In the United States, the balance between public and private rights to land is tipped decidedly toward the landowner. Public access rights are much more limited, although there are some rare instances of easements established by customary use. Moreover, as a matter of constitutional law, a legislative curtailment of the right to exclude, by recognizing a right to roam as in CRoW or even

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307. *Id.*

308. DAVID CANNADINE, CLASS IN BRITAIN (Penguin 2000). The author is a London University historian who believes class distinctions remain extremely important in Britain. *Id.*

309. Robin Hood, it may be recalled, was not only stealing from the rich to give to the poor, but was also a prominent poacher on the land of the ruling class. *See Robyn Hod and the Shryff off Notyngham*, *introduction* to ROBIN HOOD AND OTHER OUTLAW TALES 269, 269 (Stephen Knight & Thomas H. Ohlgren eds., 1997) (noting that the Robin Hood story, which emphasized defiance of authority, was "*the* most popular form of secular dramatic entertainment in provincial England for most of the sixteenth century").

310. ELIHU BURRITT, A WALK FROM LONDON TO JOHN O'GROATS 10 (2d ed. 1864).

311. NATHANIEL HAWTHORNE, OUR OLD HOME 69 (1891), *quoted in* TAPLIN, *supra* note 28, at 18.

more limited public access rights, probably would be impossible to sustain without compensation. The contrast in approach stems not only from the differences in the two countries' legal systems, but also from cultural differences that have their roots in the history of United States land development.

A. HISTORY OF U.S. LAND DEVELOPMENT

In Britain, as we have seen, the public's claim to greater access rights is grounded firmly in their historic use of the property before enclosure. Although the history of land tenure in Britain is complex, its origin in a feudal system resulted in land that was held subject to the interests of many holders. After the Norman conquest, monarchs were deemed the eminent owners of all property and parceled out large tracts to lords by royal edict.[312] In return for services, a tenant might hold certain property of the lord, but neither could be said to be absolute owner.[313] Of necessity, the commoners living on or near the land had to be taken care of, and common rights arose as a natural consequence. Commoners made great use of the lord's wastelands, which lords countenanced or tolerated. From an economic standpoint, it would have been impossible for the lords to police their wastelands, and since they did not derive necessary income from them, the expense of policing did not merit the cost. Historically, then, "ownership" of British property has always been subject to the rights of others, either the kings above or the tenants or commoners below.

In constrast, American land was initially distributed to individual landowners in fee simple without encumbrances.[314] Some commons arrangements did exist in the colonies, but in most instances the colonists quickly reverted to a private ownership scheme. Professor Ellickson has described how private property rights in the colonies led to economic prosperity, after communal ownership led to economic disaster.[315] Commons arrangements also existed in other parts of the new nation, but by the early nineteenth century, such arrangements were virtually extinct.[316]

In *Dividing the Land*, Edward T. Price details how American land was originally parceled out. Price notes that immigrants were attracted to the United States precisely because of the opportunity for freehold tenure.[317] From the beginning of colonial history, a premium was placed on development to help the

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312. After the Norman conquest, all land in England was deemed to be held subject to the monarch's ultimate authority. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 257 (3d ed. 1990).

313. *Id.* at 262-63 (noting that neither lord nor tenant could be said to "own" the land in absolute sense).

314. EDWARD T. PRICE, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC (1995). Of course, in some cases mineral rights were withheld from land grants.

315. Ellickson, *supra* note 6, at 1336-42. *See also* PRICE, *supra* note 14, at 35-48 (documenting how the change from communal property to private property rights in the Plymouth colony increased corn production).

316. Banner, *supra* note 86, at 61, 66.

317. PRICE, *supra* note 314, at 11.

colonies gain a better foothold in the new world. An immigrant was given a parcel of land in fee (typically around fifty acres), but the freehold was perfected only by actually settling and cultivating the land.[318] Thus, while English lords could allow their land to lie fallow without fear it would be lost, the American settler knew that the land would be his only if it were transformed into productive property.

As the country expanded west under the ideal of "manifest destiny," settlers willing to brave the wilds were given expansive property rights as a reward. Under the various Homestead Acts, a premium was placed on establishing ownership by excluding others, with fences or walls, and by putting the land into useful production. Common rights were not considered, both because they were not necessary, but also because they were antithetical to the whole ideal of development and enclosure.[319] Timing also had something to do with the difference in property distribution; by the time most of the United States was being settled, commons systems were on their way out in all modern societies.[320]

Despite these fundamental differences, there are some parallels to the British experience of common rights preceding enclosure. The best examples come from the American West, where ranchers used the open range as a vast grazing commons and cowboys drove cattle hundreds of miles over open lands in the late 1800s.[321] On the Chisholm Trail, for example, a typical cattle drive would move a herd of a few thousand cattle across the Red River from Texas through Oklahoma up to the railroad stop at Abilene, Kansas, a distance of several hundred miles. There were many other routes established by the cattle drives. Similarly, traders established the Santa Fe Trail from Missouri to New Mexico, which the government recognized as a public road in 1848.[322] Settlers moving West used the Oregon Trail, over 2000 miles long, to reach the West Coast from Missouri.[323]

Yet, these paths are relatively minor compared to the fabric of trails criss-crossing England. Moreover, although some of them became highway rights of way, most of these trails fell into disuse and were abandoned as public easements. Settlements were laid out in uniform patterns, with the idea that streets and roads would accommodate travel by carriage and by foot. Therefore, footpaths or other public access rights were not typically reserved in government grants of land.

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318. *Id.* at 14, 343 ("[A]ttracting settlers and getting the land in production were the immediate aims of colonial land distribution.").

319. There were, however, some significant exceptions to this pattern. See Banner, *supra* note 86, for a fascinating description of common field system used in St. Louis and surrounding area from 1750-1850.

320. *See id.* at 66 ("By the time the west was ready for distribution, there was no serious argument to place any productive land in commons.").

321. My thanks to Dr. Bradley J. Birzer, Amos Kirk Chair in History at Hillsdale College, for assistance with this section.

322. U.S. Department of the Interior, National Park Service, Santa Fe National Historic Trail, http://www.nps.gov/safe/ (last visited Jan. 15, 2007).

323. U.S. Department of the Interior, National Park Service, Oregon National Historic Trail, http://www.nps.gov/oreg/ (last visited Jan. 12, 2007).

Although the United States based its legal doctrine on the received common law of Britain,[324] American courts were quick to adapt those rules to the peculiar circumstances of the new nation. The stronger version of property rights that resulted may have grown out of a variety of conditions that differed from the old world. The greater opportunity for and broader distribution of land ownership in the United States, for example, may have reduced the need for public rights and lessened the class-based tension between landholders and non-landholders. Many large landowners in Britain could trace their holdings to grants from royalty and land was largely concentrated in a small group of aristocratic owners. Commoners resented the idea that "the privileged few could dictate the terms on which the countryside was used."[325] In contrast, the American landowner class was much larger and less exclusive, and, having for the most part earned their property through labor (homesteading) or service in a war, the public presumably felt they had earned the right to exclude.

Finally, differing cultural mores developed, which are reflected in the literature and fables of the two countries. Britain produced *The Selfish Giant* by Oscar Wilde where a giant turns the local children out of his garden and puts up a sign indicating that "Trespassers Will Be Prosecuted."[326] The result of this exercise of the right to exclude is catastrophic: Spring refused to return to the giant's land until he finally relents and lets the children back in.[327] Keeping natural beauty away from the public is portrayed as evil and insisting on the right to exclude is selfish.

Similarly, in *The Secret Garden*, a classic English children's book published in 1912 by Frances Hodgson Burnett, two neglected children use nature and exercise to heal their own physical and mental health.[328] The children's discovery of the beauty of the gardens, as well as the surrounding moors, instills a belief in the regenerative power of contact with the natural world, very similar to the policy behind the right to roam. And significantly, the garden is supposed to be off-limits to the children, but only by breaking through that barrier do they find happiness and well-being.[329]

While many modern American children's books also celebrate sharing, generations have been weaned on books that emphasize the dominion of man over nature. For example, Paul Bunyan was celebrated in print for his nature-clearing prowess, such as cutting down twenty three trees with one swing of his ax.[330] The

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324. Bosselman, *supra* note 58, at 256-57 (describing reliance of American courts on English common law).

325. SHOARD, *supra* note 13, at 99.

326. OSCAR WILDE, THE SELFISH GIANT (1891). Although Wilde was born in Ireland, he was educated at Oxford and lived in England much of his life. RICHARD ELLMAN, OSCAR WILDE (Vintage 1988).

327. *See* WILDE, *supra* note 326..

328. FRANCIS HODGSEN BURNETT, THE SECRET GARDEN (1912).

329. Another example is Beatrix Potter's Peter Rabbit, who is celebrated for his attempts to invade the private garden of evil Mr. McGregor. BEATRIX POTTER, PETER RABBIT (Frederick Warne & Co. 1902).

330. *See* JAMES STEVENS, PAUL BUNYAN (2001) (describing origins of the legendary figure).

classic Laura Ingalls Wilder and Willa Cather books celebrate pioneers, primarily homesteaders, and the hard work they did to make the land their own.[331] Western novels and movies depict the struggle for dominion over the open range as an effort to bring human control to wild territory.[332] Although certainly too much can be made of the cultural distinction, most would agree that is it extremely unlikely that an American author would have written a children's book like *The Selfish Giant*, which overtly denigrates the zealous defense of private property rights.

B. PUBLIC ACCESS TO THE COUNTRYSIDE IN THE UNITED STATES

In the United States, public access to scenic areas will typically be found in some form of government-owned property, such as a park. Public easements in rural areas are mostly limited to old railroad easements opened for public recreation under the Rails to Trails Act. While a few states have recognized, in limited instances, the public's common law right to access beaches or other public places, for the most part courts have not been willing to grant public easements absent a strong case for implied dedication. As a result, there is nothing in the United States that compares to the footpaths of Britain, now augmented by the right to roam.

Americans do enjoy a wealth of trails on public lands, allowing long hikes through the breathtaking beauty of national parks, forests and wilderness areas.[333] Several long-distance trails—such as the Appalachian Trail (2160 miles),[334] the Pacific Crest Trail (2650 miles),[335] and the Continental Divide Trail (3100 miles)[336]—simply dwarf their British cousins. Many states have long-distance trails, too. The Centennial Trail in South Dakota, for example, spans 111 miles through the Black Hills and Custer State Park.[337] The 225-mile KATY Trail in Missouri crosses nearly the entire state.[338]

Although these trails provide exceptional recreational opportunities, they do not serve exactly the same functions as the footpath and roaming rights in Britain

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331. *See, e.g.*, LAURA INGALLS WILDER, LITTLE HOUSE ON THE PRAIRIE (1935); WILLA CATHER, O PIONEERS! (1913), *reprinted in* WILLA CATHER: EARLY NOVELS AND STORIES 133 (The Library of America 1987).

332. *See, e.g.*, JACK SCHAEFER, SHANE, ch.6 (1949) (idealizing the morality of a classic Western hero on the side of homesteaders in battle against the open range rancher).

333. *See* James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. L. 93, 95 (1999) (describing the system of national trails).

334. National Park Service, Appalachian National Scenic Trail, FAQ, http://www.nps.gov/appa/faqs.htm (last visited April 7, 2007).

335. Pacific Crest National Scenic Trail, http://www.fs.fed.us/pct/ (Last visited April 7, 2007).

336. Continental Divide Trail Alliance, The Trail Unites Us, http://www.cdtrail.org/page.php (last visited April 7, 2007).

337. South Dakota Div. of Parks & Rec., Centennial Trail Map, *available at* http://www.sdgfp.info/Parks/Regions/Custer/csptrails.htm

338. *See* bikekatytrail.com (last visited April 7, 2007).

discussed above. Except for the trails located on old railroad easements, these long-distance trails are found almost entirely on vast expanses of public lands (national or state parks or forests), which almost by definition are remote from civilization and inaccessible to all but serious hikers. These are not trails for the person who just wants to take a walk before dinner. In many cases, even those who live nearby have to drive to get to a trailhead.[339]

This is not to denigrate these trails—they are a magnificent achievement and glorious for those who have the time and ability to get to them. But they are also in keeping with the American tradition of separating nature from human habitation. Although some modern developments are incorporating more greenbelts and trails, for the vast majority of Americans there is still no possibility of walking out the front door to reach a trail.

State statutes in the United States governing public access to private land focus mainly on hunting rights.[340] About half of the states have enacted "posting" rules, which generally allow access to private land for hunting, without the landowner's specific permission, unless the land has been posted with "no trespassing" signs.[341] The other states require hunters to obtain permission from landowners before hunting and do not require posting.[342] In at least some of these states, the statutory requirement of posting to prohibit access could apply to recreational access as well as to hunting, which would allow a hiker to presume permission to walk across unposted lands.[343] In most of the states that require posting, however, hunting is given a preferred status over public access for other purposes.

In all states, then, the landowner has the option, but not the obligation, to allow access to lands for public recreation. In states with posting statutes, the roamer may be able to presume implied permission to hike across private lands unless the owner has posted "no trespassing" signs. In Alaska, for example, where vast expanses of land may be unenclosed, the statute presumes permission to walk across "unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders," unless notice against trespass is either posted or "personally communicated."[344] While this does not equate to a right to roam, a posting statute could facilitate public access by eliminating the need to seek permission to hike across unenclosed lands.

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339. For example, I recently stayed in Keystone, near Mount Rushmore. The town is nestled in some of the most beautiful Black Hills scenery, and is typically jam-packed with tourists during the season, yet there are no walking trails that one can get to without getting into a car and driving at least five miles.

340. *See generally* Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004) (summarizing different types of access laws). Some statutes apply the posting requirement only to unenclosed or uncultivated lands. *Id.* at 559.

341. *Id.* at 558-59 (noting that twenty-nine states require posting to exclude hunters); *see, e.g.*, ARIZ. REV. STAT. § 17-304(D) (forbidding action for trespassing against hunters unless posted).

342. Sigmon, *supra* note 340, at 560.

343. *Id.* at 559 n.62 (noting that posting statutes in Washington, Wisconsin, and Pennsylvania apply to all trespassers).

344. ALASKA STAT. § 11.46.350(b) (2005).

C. COMMON LAW PUBLIC ACCESS RIGHTS

The posting statutes noted above codify a common law notion of implied permission based on custom that has historically prevailed in most American states. The Supreme Court recognized this custom in *McKee v. Gratz*:

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.[345]

However, in contrast to the English cases establishing irrevocable public access rights based on custom, the American customary license recognized in *McKee* could be revoked whenever the landowner wished.

In order to establish an irrevocable right of access, a hiker would have to rely on doctrines of prescription, implied dedication, or custom. An easement by prescription would be limited to a specific path and would allow access only for adjacent landowners rather than the public in general. An implied dedication would allow for broader access by the general public, but would require proof of some intent to dedicate for each particular parcel. The most advantageous type of common law right would rest on custom, because it would allow a court to open an entire category of lands (e.g., beachfront property) to public access. However, while courts generally allow rights of way to be established by prescription or implied dedication, in general courts do not recognize easements based on custom.[346]

The New Mexico Supreme Court's recent treatment of a prescriptive easement claim illustrates the difficulty of attempting to establish a right of way based on historic use. In *Algermissen v. Sutin*, the court rejected a claim by neighbors to continue their long-time use of a dirt path over defendants' property to reach a state park for recreational purposes (such as jogging, horseback riding, hiking, etc.).[347] The court found sufficient evidence to conclude that the neighbors had the implied permission of the landowners. Evidence of permission from the 1940s was sufficient to support a presumption that the use remained permissive into the 1990s.

The court also discussed another possible impediment to a prescriptive claim, the "neighbor accommodation" exception, under which a court does not presume adverse use when the "claimed right-of-way traverses large bodies of open,

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345. McKee v. Gratz, 260 U.S. 127, 126 (1922).

346. *See generally* Rose, *supra* note 113, at 739-40 (noting that custom is rarely used in the United States to support public easement claims).

347. Algermissen v. Sutin, 61 P.3d 176 (N.M. 2002).

unenclosed, and sparsely populated privately-owned land."[348] Although the court limited the application of this doctrine to expansive tracts of land, where owners could not reasonably be expected to have knowledge of the intrusion, it would effectively preclude many claims attempting to establish roaming rights in remote scenic areas. The neighbor accommodation doctrine does, however, encourage landowners to allow neighbors to freely traverse their property, knowing that they are not thereby in danger of relinquishing their right to exclude.

Obtaining access to private land based on implied dedication is equally difficult. The landowner must have somehow indicated an intention to dedicate the right of way, through his statements or conduct.[349] Generations of public wandering over land may not be enough, because, as the South Carolina Supreme Court put it, "[d]edication is not implied from the permissive, sporadic and recreational use of the property."[350]

Easements based on public customary use, such as the village green cases in England,[351] are not generally favored in the United States. In *Graham v. Walker*, the Connecticut Supreme Court rejected a claim for a right of way based on custom.[352] Residents of Blissville argued that their inhabitants, from time immemorial, had used the defendant's land to get to nearby Taftville and therefore claimed to have established a customary right of way.[353] The Connecticut Supreme Court noted that such an easement in gross could be established in England, but refused to apply English law, noting that the state's "political and legal institutions have from the first differed in essential particulars from those of England."[354] A right of way held by villagers in gross, the court determined, could not be recognized under American law.[355] However, the court was willing to allow a claim of a prescriptive easement, established by continuous use for the statutory period, in favor of appurtenant landowners.

Limiting prescriptive rights only to other landowners explicitly favors one class (those wealthy enough to own land) over another (renters or homeless). Courts may have adopted this dividing line as a means of preventing easements from becoming overly burdensome. By limiting the right of way to other landowners, whose land may be reciprocally burdened in the same way, the rights would necessarily be limited in scope. However, the result is that the public in general, and more specifically those who cannot afford to own property themselves, are excluded. Thus, the prescriptive easement, even if it can be estab-

348. *Id.* at 182.
349. C.J.S. DEDICATION § 16 (2007).
350. State v. Beach Co., 248 S.E.2d 115, 119 (S.C. 1978).
351. *See supra* Section II.C.
352. Graham v. Walker, 61 A. 98, 99-100 (Conn. 1905).
353. *Id.*
354. *Id.* at 99.
355. *Id.* at 99-100 ("To a fluctuating body of that kind no estate in lands can be granted.").

lished, would not be the equivalent of the British footpath, which is open to all.

The most prominent decision recognizing access based on custom came from the Oregon Supreme Court in *State ex rel. Thornton v. Hay*, which recognized a public right of access to oceanfront beaches.[356] Relying on the English doctrine, the court found that the public had used the dry sand area along Oregon's Pacific coast "as long as the land has been inhabited."[357] Requiring a beach-by-beach determination based on prescription, the court found, would be unduly burdensome and unnecessary. "Ocean-front lands from the northern to the southern border," the court determined, "ought to be treated uniformly."[358]

In a later case, the Oregon Supreme Court determined that this declaration of public access rights based on custom did not constitute a taking of beachfront owners' property rights. In *Stevens v. City of Cannon Beach*, the court held that, under *Lucas*, the public's right of access should be considered one of the "background principles" of state law that inhere in every property owner's title.[359] Therefore, the property owner never had a right to exclude the public from the beach and the recognition of that in *Thornton* did not destroy a previously existing right.

Although the United States Supreme Court declined to review the *Cannon Beach* case, Justice Scalia, joined by Justice O'Connor, dissented from the certiorari denial.[360] Justice Scalia laced his dissent with expressions of doubt about whether the Oregon Supreme Court was "creating" rather than "describing" the custom of public access.[361] Nevertheless, the majority of the Court

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356. State *ex rel*. Thornton v. Hay, 462 P.2d 671, 676-78 (Or. 1969). Along with access to the beaches, the public's right to use the beaches themselves is a complex subject based on each state's application of custom, prescription, and implied dedication doctrines. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869, 1893 n.105 (2000). New Jersey, for example, used the public trust doctrine to grant the public access to the dry sand portion of the beach to ensure their enjoyment of the foreshore. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 49 (N.J. 1972); Matthews v. Bay Head Improv. Ass'n, 95 N.J. 306, 323-25, *cert. denied*, 269 U.S. 821 (1984). This may also include perpendicular, or vertical, access over private property in certain cases. *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 119 (N.J. 2005).

357. *Hay*, 462 P.2d at 676-77.

358. *Id.* at 676.

359. Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Or. 1993).

360. Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S.Ct. 1332 (1994), *cert. denied* (Scalia, J. dissenting from denial of petition for certiorari). Justice Scalia's dissenting opinion is truly a case study of his zeal with regard to property rights. Scalia argued that the Supreme Court of Oregon, in McDonald v. Halvorson, 780 P.2d 714 (Or. 1989), had limited *Thornton*'s reach to only those areas that could be proven to have been customarily used by the public. 114 S.Ct. at 1333. *McDonald*, however, announced that rule only for areas other than the dry sand area adjacent to the Pacific Ocean. 780 P.2d at 724. *McDonald* dealt with a *freshwater* pool not bordering the ocean, which Scalia does not even mention. *See id.* at 716. Moreover, it is unusual that the Supreme Court would tell the Oregon court how to read its own precedent. See, e.g., *Cannon Beach*, 114 S.Ct. at 1334 n.3, in which Scalia finds the Oregon Supreme Court's seemingly logical reading of *Thornton* "unsupportable." One is left with the impression that Scalia believes that states are not free to depart from his own vision of Blackstonian absolutism in property rights.

361. *See, e.g.*, *Cannon Beach*, 114 S.Ct. at 1335 n.4.

declined to interfere with this allocation of the right of access to the public.

While an exhaustive survey of coastal access law is beyond the scope of this article, Oregon's beach access doctrine based on custom comes closest to the British cases recognizing recreational easements. The doctrine, however, prevails in only one state and has been expressly rejected by several others.[362] Moreover, even in Oregon the public right of customary access is limited to beachfront property; public access for recreational purposes in contexts other than beaches finds even less support in the courts.[363] Other states have granted public access to beaches using prescriptive easement or implied dedication doctrines.[364] There is a significant difference, however, between these cases granting access across private land to reach a public resource, such as a beach, and the establishment of a general "right to roam" across public land for recreational purposes.

D. CONSTITUTIONAL LIMITATIONS ON PUBLIC ACCESS: THE RIGHT TO EXCLUDE

The most salient difference between United States and British property law is the limitation on government intrusion contained in the takings clause of the Fifth Amendment to the United States constitution. CRoW's reallocation of property rights, without compensating the landowners, would almost certainly have been struck down by American courts as an unconstitutional taking. In Britain, however, there is no constitutional property protection, although Parliament has provided compensation for most significant impacts on landowners.[365] In this case, however, compensation was not provided because Parliament felt that the impact on landowners would be minimal and not worth the cost of setting up a compensation mechanism. After all, allowing the public to walk over lands such as mountains or moors, which were not really being used for anything anyway, would not preclude any existing uses. That sort of balancing approach to the question of compensation, however, has been banished in American courts by Supreme Court precedent requiring a categorical approach to the right to exclude.

The "right to exclude" has been enshrined in the United States as "one of the most essential sticks in the bundle of rights that are commonly characterized as

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362. *See* Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 OR. L. REV. 913, 914 (1998) (stating that most jurisdictions rely on "parcel-specific doctrines of easements by prescription and implied dedication"). The Oregon doctrine of customary access has met with harsh criticism as well. *See, e.g.*, David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1417 (1996) (critiquing Oregon beach decisions as "judicial activism").

363. *Cf.* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (2000) (Most jurisdictions "have been reluctant to recognize prescriptive rights to recreational uses other than on beaches.").

364. *See, e.g.*, Concerned Citizens of Brunswick v. North Carolina, 404 S.E.2d 677, 682 (N.C. 1991) (discussing prescriptive easement); Gion v. City of Santa Cruz, 465 P.2d 50, 59 (Cal. 1970) (relying on implied-dedication theory).

365. Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQ. 261, 280 (2004).

property."[366] The Supreme Court first made this pronouncement in *Kaiser Aetna v. United States*, which involved the public's right to access a private pond that had been dredged and converted into a marina by connecting it to the nearby bay. The government argued that this action subjected the pond to the federal navigational servitude that covers all waters of the United States. The Court, however, rejected that argument, holding that the imposition of such a servitude would amount to a taking of property without compensation in violation of the Fifth Amendment.[367]

In so holding, the Court explicitly determined that the "right to exclude, so universally held to be a fundamental element of the property right, falls within th[e] category of interests that the Government cannot take without compensation."[368] Interestingly, for this view of the right to exclude as "fundamental," the Court cited only three sources: a Claims Court case,[369] a Fifth Circuit case,[370] and Justice Brandeis' dissent in an intellectual property case.[371] None of these sources really support the notion that the right to exclude must be absolute. The Claims Court case, for example, deals with the exclusive occupancy necessary to establish "Indian title."[372] The Fifth Circuit's mention of the right to exclude was pure dicta, occurring in a discussion of when the risk of loss passes to a buyer of goods.[373] Justice Brandeis' lone dissent quickly qualified his comment about the right to exclude by noting that it could indeed be modified if "the property is affected with a public interest."[374]

Despite the slender reed upon which the Court declared the "right to exclude" to be "fundamental" and "essential," later cases used *Kaiser Aetna* to further solidify the absolute nature of this stick in the bundle. In *Loretto v. Teleprompter Manhattan CATV*, the Supreme Court held that even the *de minimus* intrusion of a cable TV box could not be countenanced without compensation.[375] If a small, mute and stationary object violates the Court's categorical right to exclude, then a "right to roam" or other public easement surely would be insupportable.

Indeed, in *Nollan v. California Coastal Commission*,[376] the Supreme Court explicitly held that the imposition of a public right of way in exchange for a building permit constituted a taking of property, which required compensation to

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366. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). *See generally* Rose, *supra* note 113, at 711-12 (discussing wide agreement regarding importance of right to exclude).

367. *Kaiser Aetna*, 444 U.S. at 179-80.

368. *Id.*

369. United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975).

370. United States v. Lutz, 295 F.2d 736, 740 (5th Cir. 1961).

371. International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

372. *Pueblo of San Ildefonso*, 513 F.2d at 1385.

373. *Lutz*, 295 F.2d at 740.

374. *International News Service*, 248 U.S. at 250.

375. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

376. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

sustain it.[377] The public's need or desire for the easement did not avoid the constitutional proscription against taking a property right without paying for it. Moreover, the Court held, the right to build on the property could not be conditioned on the grant of an easement, a scheme the Court likened to "extortion."[378]

In dissent, Justice Brennan noted that the development condition was in fact consistent with "settled public expectations," shaped by the California constitutional provision prohibiting private landowners from obstructing the public's access to navigable waters.[379] Thus, Brennan concluded, "California has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights."[380] Brennan also noted that the burden on the landowners would be slight, because their privacy would not be appreciably infringed by the few feet of right of way, as the public could already pass by the house from the wet sand portion of the beach.[381]

Justice Brennan's balancing of interests and willingness to find a public easement inherent in the landowner's bundle of sticks is much more akin to the rationale justifying the "right to roam," but of course his views did not prevail in *Nollan*.[382] Thus, unless previous use had ripened into a right by prescription or implied dedication,[383] the type of public right of way conferred by CRoW can be obtained in the United States only by compensating the landowner.[384] The legislature could decide to reallocate the sticks in the bundle, but only by compensating the losing party.

Congress apparently did just that in the "rails-to-trails" amendment to the National Trail System Act (NTSA).[385] Under the NTSA, the Interstate Com-

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377. *Id.* at 833-34.

378. *Id.* at 837; *see also* Dolan v. City of Tigard, 512 U.S. 374, 391, 395-96 (1994) (holding that a bike trail may be demanded as a condition of development permission only if access demanded is "rough[ly] proportional" to the additional transportation burden caused by development).

379. *Nollan*, 483 U.S. at 847-48 (Brennan, J., dissenting); *see generally* Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529 (1989) (arguing that landowner expectations must be tempered by public welfare constraint).

380. *Nollan*, 483 U.S. at 858 (Brennan, J., dissenting).

381. *Id.* at 853-54 (Brennan, J., dissenting) (calling intrusion "minimal").

382. The *Nollan* decision was 5 to 4, indicating some hope that the majority position will be modified in future cases, but for now, the pre-eminent place of the "right to exclude" is assured. *See also* Dolan v. City of Tigard, 512 U.S. 374 (another 5-4 decision reaffirming importance of right to exclude). Justice Stevens in dissent lamented the Court's "narrow focus on one strand (the right to exclude) in the property owner's bundle of rights." *Id.* at 401 (Stevens, J., dissenting).

383. In fact, in *Nollan*, the public may have already acquired the right of access by prescription or dedication, but that issue was not before the Court. 483 U.S. at 862 (Brennan, J., dissenting).

384. It could also be possible to condition development permission on the grant of access rights, but only if the government could establish the proper nexus. It might be possible, for example, to claim that a particular development would cause an increased burden on existing transportation systems and therefore require a footpath as an exaction. *See Dolan*, 512 U.S. at 391 (describing requirements of "rough proportionality" test).

385. Nat'l Trail System Act, 16 U.S.C. §§ 1241-1251 (2000). *See generally* Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings*

merce Commission may preserve railroad rights of way for the future by allowing them to be used, on an indefinite "interim" basis, as recreational trails.[386] Under the terms of most railroad easements, the right of way is lost when railroad use is abandoned. At that point, full use and ownership of the property would revert to the fee owner, usually the adjacent landowner. Congress effectively re-wrote the terms of these easements by declaring, legislatively, that recreational trail use would not constitute "abandonment" and therefore, the landowner's reversionary interest was not triggered.

This type of readjustment in the bundle of sticks is not countenanced by American courts without compensation. When adjacent landowners claimed that the NTSA amounted to a taking of their property, the Supreme Court, in *Presault v. Interstate Commerce Commission*,[387] avoided answering the question by directing them to seek a remedy, if a taking had occurred, under the Tucker Act.[388] Subsequently, the Court of Appeals for the Federal Circuit held that the conversion of the easements to recreational trail use had worked a taking, requiring compensation.[389] The government had argued that adjacent landowners never really had any reasonable expectation of recovering the land free of the easement. Thus, its conversion to trail use did not really take anything.[390] The court, however, adopted a formalistic analysis, finding that the trail was a physical occupation of plaintiffs' land, and therefore constituted a taking.[391]

The government also argued that the original scope of the easement, for railroad purposes, could be construed to include other public uses, such as recreational hiking and biking.[392] Although Vermont state law, which applied to the easement interpretation, allowed the scope of the easement to be adjusted to fulfill its purpose in changing circumstances, the court found that the nature of recreational trail use was too different from railroad use to fall within its scope.[393] While trains were noisy, they were also limited in their frequency, whereas recreational users may be present at any time and they may be more difficult to contain within the easement's boundaries.[394]

The Rails-to-Trails case indicates how strictly American courts view the right to exclude.[395] Although, to many, a hiker or a biker would seem much less of a

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Jurisprudence?, 26 COLUM. J. ENVTL. L. 399 (2001).

386. 16 U.S.C. § 1247(d).

387. Presault v. Interstate Commerce Comm'n, 494 U.S. 1, 4 (1990).

388. *Id.* at 17.

389. *See* Preseault v. United States, 100 F.3d 1525, 1531 (Fed. Cir. 1996).

390. *Id.* at 1539-40.

391. *Id.* at 1540.

392. *Id.* at 1541.

393. *Id.* at 1541-44.

394. *Id.* at 1543.

395. A notable exception among state court decisions is State v. Shack, 277 A.2d 369 (N.J. 1971), in which activists who came onto property to aid migrant workers were absolved of trespass charges. In thus modifying the right to exclude, the court noted that "[p]roperty rights serve human values. They are recognized to that end,

burden on the adjacent landowner than a passing train, courts refuse to engage in any balancing of burdens in protecting the right to exclude. Any intrusion is actionable, and even where the public owns a right of way, its scope will be strictly construed. The case strongly indicates that any attempt to impose an easement along the lines of CRoW would not be sustainable absent compensation.

E. ARGUMENTS FOR ADDITIONAL PUBLIC ACCESS RIGHTS

> *[A]t daybreak I am the sole owner of all the acres I can walk over. It is not only boundaries that disappear, but also the thought of being bounded. Expanses unknown to deed or map are known to every dawn, and solitude, supposed no longer to exist in my county, extends on every hand as far as the dew can reach.*
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> —Aldo Leopold[396]

Given the legal, cultural and historical differences between the two countries is there anything America can learn from the British adoption of the right to roam? It is extremely unlikely that a state or the federal legislature will suddenly decide to adopt the equivalent of CRoW in the United States, even if it were constitutional. Yet, the story behind CRoW contains some interesting lessons Americans could profit from studying.

First, as I have pointed out in at greater length elsewhere,[397] Britain's right to roam represents a rather dramatic re-allocation of one of the sticks in the property rights bundle from the landowner to the public. The example teaches us that the composition of the bundle is not necessarily immutable, and that changes may be desirable to better reflect contemporary society's needs and values. Of course, the relative stability of property rights is extremely valuable, because it honors settled expectations and therefore promotes economic transactions and furthers our desire for fairness. But property rights must evolve and the right to roam reminds us that, in the end, the recognition of the private owners' rights involves a trade-off with public interests that should not be ignored.

Second, the right to roam represents a welcome return to a more interrelated, functional approach to property, a position once thought to be banished to the wastebins of history. UCLA law professor Stuart Banner has pointed out that Americans have become so accustomed to the distinction between public and private property, that they have lost the ability to imagine possible gradations between the two.[398] We have public property, for hiking and wandering, and private property, to stay off of. Property theorists spend a lot of time on the

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and are limited by it." *Id.* at 372.

396. ALDO LEOPOLD, A SAND COUNTY ALMANAC 44 (Ballantine Books 1970).

397. *See* Jerry L. Anderson, *Comparative Perspectives on Property Rights: the Right to Exclude*, 56 J. LEGAL EDUC. 539 (2006).

398. Banner, *supra* note 86, at 63-64.

question of whether property is best held by private owners or in common, but very little on anything in between.[399] The right to roam reminds Americans that it is possible to allow the public certain limited uses, while leaving the fee in private hands. There are numerous ways, in other words, to allocate the bundle of sticks without abandoning the idea of private property in general.

Finally, the right to roam suggests that Americans should consider whether they have undervalued the public access side of this equation, and whether there are ways, consistent with their own culture and legal framework, to further the important public interests represented by CRoW.[400] It is, in fact, possible to construct a strong argument in favor of modifying the formalistic notion of an absolute right to exclude. Interestingly, none of the other "sticks" in the landowner's bundle have acquired the categorical status of the right to exclude. Yet, there is little reason to support the absolute form of this right.

In terms of morality, there are strong arguments to be made in favor of more public rights to private property. Many philosophers assert that land is, at bottom, the "common inheritance" of all.[401] It has been parceled out for reasons of economic efficiency and fairness, but there is no moral imperative against allowing access. Indeed, the moral argument suggests that true freedom should include the right to walk wherever one pleases, unless the landowner can make a case that it is unduly burdensome.[402] Surely Americans would balk at allowing private owners to cut off the ability to boat down the Mississippi, because it would interfere with the freedom to travel. Why, then, do they allow the right to travel over land to be cut off at every fencepost?

In economic terms, the argument for an absolute right to exclude fares no better. In enacting the right to roam, Parliament weighed the potential for damage to individual landowners from public intrusion and found very little to be concerned about, with regard to these types of land—mountains, moors, heath, and downland—where crops would not be growing and little damage could be done. The value to the public, however, as described in Section III above, was much higher than the expected costs. Naturally, given the estimated costs and benefits, individual landowners could reach agreements with the public regarding

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399. *See, e.g.*, Rose, *supra* note 113, at 720-21 (discussing "standard paradigm" which recognizes only public and private property).

400. *See* Kevin Gray & Susan Francis Gray, *The Idea of Property in Land*, *in* LAND LAW: THEMES AND PERSPECTIVES 38-39 (Susan Bright & John Dewar eds., 1998), *quoted in* UNDERKUFFLER, *supra* note 6, at 93 n.27 ("In a crowded urban environment, where recreational, associational, and expressional space is increasingly at a premium, an unanalyzed, monolithic privilege of . . . exclusion is no longer tenable.").

401. MILL, *supra* note 1, Book II, Ch. II, § 6 ("[L]and of every country belongs to the people of that country."); Thomas Paine, AGRARIAN JUSTICE (1796), in MARK PHILIP, THOMAS PAINE: RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS 417-19 (1975); Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* THE PORTABLE JEFFERSON 395, at 396-97 (M. Peterson ed. 1975) ("[E]arth is given as a common stock for man to labour and live on" and property rights should be modified if necessary to serve greater needs of society.).

402. *See* SHOARD, *supra* note 13, at 147, 287-87.

access rights, in exchange for compensation. But the transaction costs of reaching individualized agreements for access would prevent them in most cases.[403]

Professor Ellickson suggests, however, that in general the right to exclude may be more economically efficient than the right to roam:

> If decentralized negotiations between Blackstonian neighbors cannot be counted on to generate an efficient transportation network, why shouldn't a group simply confer on its members reciprocal and routine privileges to transport themselves across all private land? The reason is manifest: entrants may damage crops, commit thefts, and do other mischief. Reciprocal rights of passage would undermine the basic virtue of parcelization, namely, the relative ease with which a person can monitor boundary crossings, as opposed to the quality of an entrant's behavior. If privileges of passage were routine, guard dogs and motion detectors would lose most of their usefulness.[404]

Ellickson goes on to posit that exceptions to the general right to exclude occur only when they are efficient; for example, where "the would-be entrant would objectively value entry far more than the landowner would objectively suffer from the entry" or where the burden of monitoring the trespass would be slight.[405] In addition, the likelihood of damage to the landowner from the trespass should be considered: "The less vulnerable a tract is to damage, the more likely nonowners are deemed privileged to enter it."[406] Finally, Ellickson suggests that modifications to the right to exclude should be sensitive to transactions costs associated with gaining the owner's permission to enter.[407]

These considerations seem to support the right to roam as set forth in CRoW. Parliament has chosen specific categories of land that contain the most elements of scenic beauty, thereby representing high value to the public, while at the same time presenting little potential for damage. Moreover, because landowners probably rarely spend much time or resources monitoring their moors or mountains, in most cases, monitoring costs probably would not greatly increase. These are not lands where it is likely that public entrants will "damage crops, commit theft or do other mischief," because there is little to steal, and no crops are grown on the mountains and moors. Of course, it may be that the British "code of conduct," the unwritten law governing public behavior when exercising the right to roam, makes the intrusion less worrisome as well.

Thus, as long as the right to roam is limited to those types of land where the balance tips most strongly in favor of public use, it likely comports with

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403. *See* Banner, *supra* note 98, at 360-61; Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1209-10 (1999) (arguing that *Nollan*'s formalistic approach to labeling private property rights may block the "optimal social level of use of beaches").

404. Ellickson, *supra* note 5, at 1382.

405. *Id.* at 1382-83.

406. *Id.* at 1383.

407. *Id.*

economic principles.[408] H.G. Wells put it succinctly, in expressing his support for an individual's right to roam "where his presence will not be destructive of its special use, nor dangerous to himself, nor seriously inconvenient to his fellow citizens."[409] Mill similarly argued that public access should not be denied "except to the extent necessary to protect the produce against damage, and the owner's privacy against invasion."[410] According to Mill, "[t]he species at large still retains, of its original claim to the soil of the planet which it inhabits, as much as is compatible with the purposes for which it has parted with the remainder."[411]

Short of a revolution in American thinking about the right to exclude, however, it is difficult to imagine serious modifications to the right to exclude anytime soon. It is much more useful, therefore, to imagine other ways to facilitate movement toward greater public access. It is possible, for example, that many landowners would voluntarily allow the public to use their lands for roaming. For those lands, there are a number of minor impediments that could be easily removed. First, there is a lack of information. While it is easy to find the "no trespassing" sign, landowners rarely hang out a "trespassers welcome" sign. The state government agency in charge of natural resources could facilitate the collection and dissemination of information about which areas are "open for walking," perhaps in the form of a map. Legislation could provide a voluntary mechanism for registering land as open for access, while providing rules for those taking advantage of the scheme to lessen damage or privacy concerns. Landowners would be encouraged to allow hikers if they could be assured that they would be immune from liability for any injuries and that the use could not ripen into some sort of prescriptive easement.

In Kansas, for example, the state wildlife agency instituted a novel program to use hunting license fees to enter into long-term contracts with private landowners to allow access for "walk-in hunting." In exchange for a modest payment, the landowner agrees to allow hunting in designated areas. The agency takes care of sign posting, and the landowner receives liability protection.[412]

Recognizing the clear public benefits from additional access to the countryside might also lead legislatures to investigate greater use of their condemnation authority for this purpose. The government readily condemns land for highways to ensure automobiles can go from Point A to Point B, but often seems reluctant

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408. Henry Smith has noted that a simple right to exclude avoids the significant "delineation" costs of more complex arrangements, but that in certain cases the added benefits of more elaborate schemes could outweigh these costs. *See* Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 78 (2005).

409. H.G. Wells, *On War Aims: The Rights of Man*, THE TIMES, Oct. 25, 1939, at 6.

410. MILL, *supra* note 1, Book II, Ch. 2, § 6. Mill complained about the "pretension" of two dukes who shut off mountain scenery from public roaming merely so as not to disturb wild animals they wanted to hunt. Mill called it an "abuse" of the right of property. *Id.*

411. *Id.*

412. KANSAS DEP'T OF WILDLIFE & PARKS, WALK-IN HUNTING ACCESS PROGRAM, http://www.kdwp.state.ks.us/other_services/private_landowner_assistance/wildlife/walk_in_hunting (last visited Feb. 2, 2007).

to use that authority to allow people to walk there. Public access could also be made a condition of government payments for agricultural conservation set-asides.

The British experience reminds us of the importance of ensuring public access to natural areas, even those within private lands. Americans, however, are more likely to use a different set of tools to achieve that goal. As the nation matures and the cultural baggage of the homestead era begins to fade, Americans may begin to place more emphasis on the public's freedom to roam and less on protecting an absolute right to exclude.

V. CONCLUSION

> *[A] race that neglects or despises this primitive gift, that fears the touch of the soil, that has no footpaths, no community of ownership in the land which they imply, that warns off the walker as a trespasser, that knows no way but the highway, the carriage-way, that forgets the stile, the footbridge . . . is in a fair way to far more serious degeneracy.*
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> —John Burroughs[413]

Unfortunately, Burroughs may have had the United States in mind when describing his view of a degenerate society. It is clear that the American public places far less value on a countryside walk than the British do. Partially, this difference is due to a harsher climate, so that it sometimes seems that the weather moves from intolerably hot and humid to intolerably cold without many days of glory in between. Nevertheless, many Americans lament their separation from the environment: as they move from their air-conditioned houses to their air-conditioned cars to their air-conditioned offices, they can go weeks at a time without coming in contact with nature. Americans can get exercise, surely, at the health club, but it is most often while watching CNN or listening to their iPod. Along the way to this hermetically sealed existence, Americans may have lost something that a walk in the countryside might help them regain.

Britain's right to roam can easily be derided by critics as the product of a society verging on socialism.[414] The review of the historic progression of access rights in Britain shows that CRoW can also be seen as the restoration, in part, of a freedom that commoners lost during the enclosure period. It can also be viewed as a step back toward a functional approach to property rights, moving away from a strictly spatial system, and achieving a greater good. Moreover, it can be seen as a refutation of Blackstonian absolutism, proving that furthering the goals of our property rights system requires balancing private and public interests, rather than

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413. John Burroughs, *Exhilarations of the Road*, *reprinted in* TAPLIN, *supra* note 28, at 17-18.

414. During the debates on CRoW, some members of Parliament called it just that. *See, e.g.*, 328 Parl. Deb. H.C. (6th ser.) (1999) 672-75 (statement of Mr. Peter Atkinson), *available at* http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990326/debindx/90326-x.htm.

supporting a categorical right to exclude. And perhaps the right to exclude is not as "essential" a stick in the bundle as the U.S. Supreme Court has heretofore regarded it.

In Scandinavia, "*allemansrätten*" gives everyone the right to cross the private property of another. *Allemansrätten* translates, very simply, into "the rights of everyone." Look out across the countryside where you live and ask, why shouldn't I have the right to go there? Look at a nearby mountain and ask, isn't the right to walk up to that peak and see the view no less mine than that the right to swim in the ocean or put my canoe in the river? Would my life be different if I could walk out my front door and head across the hills to discover who knows what? Shouldn't true freedom include the fundamental right to go where one will, as long as no one else is hurt by it?

Britain's resurrection of the right to roam causes us to ask these questions. Americans undoubtedly will arrive at somewhat different answers than the British have. But studying CRoW highlights the significant public values at stake, which we may be able to accommodate in ways that are consistent with our own system and culture.