

**Drake University**

---

**From the Selected Works of Jerry L. Anderson**

---

August, 2007

# Comparative Perspectives on Property Rights: The Right to Exclude

Jerry L. Anderson



SELECTEDWORKS™

Available at: [http://works.bepress.com/jerry\\_anderson/8/](http://works.bepress.com/jerry_anderson/8/)

# Comparative Perspectives on Property Rights: The Right to Exclude

Jerry L. Anderson

Property professors typically face some major hurdles in teaching ownership concepts. First, we have to accustom the students to abstract conceptions of property, which seem no less difficult than imagining the structure of unseen atoms. We traditionally attempt to establish that private property does not consist of the thing itself, but rather is best thought of as a bundle of rights: the right to convey, the right to devise, the right to use, and, at the top of the pile, the right to exclude. Once the “bundle of sticks” metaphor is firmly in place, we harangue them with Hohfeld, explaining that these property rights are really relational and may vary according to who is on the other side. You may have the right to exclude your neighbor, for example, but not the police with a valid warrant, or your landlord under a valid clause of the lease.

These principles, however, are sometimes difficult for students to comprehend. They have been immersed in a world that still views property in terms of Blackstonian absolutism, regarding ownership as the “sole and despotic dominion” over the *res*, to the “total exclusion of the right of any other individual in the universe.”<sup>1</sup> Even if they buy the bundle of sticks concept, they tend to believe that the rights in the bundle are static and absolute. Given the students’ natural inclination to prefer blackletter concepts, it is difficult to persuade them that, in fact, the exact composition of these property rights represents a societal balance of interests, which should be subject to constant re-evaluation and revision in light of current needs and norms.<sup>2</sup>

**Jerry L. Anderson** is the Richard M. and Anita Calkins Distinguished Professor of Law at Drake University Law School.

1. William Blackstone, *Commentaries on the Laws of England*, Book the Second, at 2 (Albany, N.Y., 1899).
2. See Eric T. Freyfogle, *Eight Principles for Property Rights in an Anti-Sprawl Age*, 23 *Wm. & Mary Envtl. L. & Pol’y Rev.* 777, 785-86 (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) (property rights systems change over time, citing historical analyses of property rights).

Much of the material in the Property course lends weight to the students' inability to grasp this evolutionary nature of property rights. For example, we emphasize the benefits of maintaining the relative stability of property rights over time: it is not only fair to those who strive to obtain them, but also desirable to encourage investment and enable society to function.<sup>3</sup> We tend to laud the virtues of privatization of the commons as furthering economic efficiency, certainty, order, and political freedom. It is usually quite easy to get students to support and recognize the value of robust protection of individual property rights.

It may be harder to illustrate how private property recognition results in a diminution of community values and egalitarian goals. As Professor Ellickson notes, property systems are "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.<sup>4</sup> Yet, the raging battle tends to be concealed behind the curtain, while students see only the end result, the bundle of sticks, a given and static definition of what "property" is, presented on stage without traces of the societal compromise at its heart.

To combat the students' impression that property rights are essentially absolute and immutable, both history and comparative law are invaluable tools. History helps us illustrate that property rights have evolved as societal needs change. Most students are surprised to learn that married women could not control their own property until the common law of coverture was reformed by the Married Women's Property Act, for example.<sup>5</sup> Historically, then, the bundle of sticks was rather large for men and correspondingly small for married women. Likewise, remembering that the definition of private property once included the ownership of human beings can help students question whether current property rules should be reevaluated to determine whether they are fair in light of modern norms.<sup>6</sup>

3. Freyfogle, *Eight Principles*, supra note 2, at 785 (property rights must be relatively stable to serve economic functions, yet flexible enough to meet current societal needs).
4. Robert C. Ellickson, *Property in Land*, 102 *Yale L. J.* 1315, 1345 (1993).
5. Prior to these nineteenth-century legislative reforms, the common law coverture concept gave essential control over a married woman's property to her husband. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *Geo. L. J.* 1359, 1397-98 (1983). For an Edwardian novel depicting the treatment of women as property and some upper-class difficulty adjusting to the elimination of the *femme covert*, see John Galsworthy, *The Man of Property* (New York, 1964) (1906).
6. Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 *J. Legal Educ.* 319, 327-28 (2005) (discussing *Hinds v. Brazealle*, 3 *Miss. (2 How.)* 837 (1838)). In *Hinds*, the Mississippi Supreme Court refused to allow a testator's emancipation of his slaves and instead made them the property of his intestate heirs. See also *In re Ralph, Morris* 1, *Bradf.* 3, 1839 WL 2764 (Iowa Terr. 1839) (the Iowa Territory Supreme Court, in refusing to hand over a slave to his Missouri owner, stated: "The law does not take away his property in express terms, but declares it no longer to be property at all.").

Similarly, a comparison of other countries' property regimes makes concrete the notion that the bundle of sticks can be allocated in a variety of ways, with the balance between community and individual struck differently depending on societal needs and preferences. Even in jurisdictions which claim to respect private property as much as we do, the concept of what rights are implicated by calling something "property" can differ widely. Comparative law, in other words, can be a remarkable tool for freeing the mind from the ingrained habits of thought to which it has become accustomed.

The right to exclude provides a perfect illustration. In the United States, no one is allowed to walk across the private land of another without the landowner's consent, typically in the form of an easement or license.<sup>7</sup> The "No Trespassing" sign is a common feature of every Sunday drive in the countryside. The Supreme Court, in canonical cases such as *Kaiser Aetna*,<sup>8</sup> *Loretto*,<sup>9</sup> and *Nollan*,<sup>10</sup> has consistently and forcefully affirmed that the right to exclude stands at the very pinnacle of private property rights. Indeed, the Court has eschewed discussion of the origin of this notion, lending credence to a formalistic Blackstonian concept of the bundle of sticks. Teaching these cases therefore leaves the class with the impression that the right to exclude is a "given," an essential stick that must accompany the idea of private property as surely as water is wet. A comparative law discussion may be the most effective method of prying open this conception, leading to a rewarding analysis of the policy behind this rule.

### The American Right to Exclude

The Supreme Court has established the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>11</sup> This characterization as essential, with its connotations of absolutism, developed through a series of Supreme Court cases in which property owners sought compensation under the takings clause for the government's infringement of the right to exclude. Despite declarations of its importance, however, the provenance of the right to exclude remains somewhat murky.

The Supreme Court first declared the right to exclude to be a fundamental element of private property in 1979 in *Kaiser Aetna v. United States*.<sup>12</sup> A private owner had converted a pond into a marina and connected it to a navigable bay and the Pacific Ocean. The United States declared that this action subjected

7. Although in some states the owner's permission may be assumed for certain types of land unless a "no trespassing" sign is posted. See Mark R. Sigmon, Student Author, "Hunting and Posting on Private Land in America," 54 Duke L.J. 549 (2004).
8. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).
9. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).
10. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
11. *Loretto*, 458 U.S. at 433.
12. 444 U.S. at 176.

the former pond to the government's navigational servitude, which thereby opened it for public access. The Court, however, determined that the waterbody was still private and could not be converted for public use without just compensation.

In so holding, Justice Rehnquist's majority opinion concluded without discussion that the right to exclude was "universally held to be a fundamental element of the property right."<sup>13</sup> Yet, the Court could muster precious little support for this claim of universality. The Court cited only three sources: an obscure Claims Court case, which discussed the exclusion of others as an element necessary to establish possession of property; dicta in a Fifth Circuit decision involving insurance proceeds; and Justice Brandeis's dissent in an intellectual property case, *International News Service v. Associated Press*.<sup>14</sup> The Court did not discuss the policy behind stringent protection of the right to exclude, nor its possible limitations, giving the decision an air of formalism.

*Loretto v. Teleprompter Manhattan CATV Corp.* confirmed the placement of the right to exclude at the pinnacle of property rights. The Court held that a New York law requiring landlords to allow cable companies to install cable and cable boxes on their buildings constituted a physical invasion, which required compensation under the takings clause.<sup>15</sup> Although this was a relatively minor intrusion, the Court held that all permanent physical occupations by the government or its agents were takings, without regard to the public purpose served thereby. In adopting the categorical rule, the Court emphasized the importance of the right to exclude to the property owner, calling it "one of the most treasured strands in the owner's bundle of property rights."<sup>16</sup>

The ruling was extended to non-permanent physical invasions in *Nollan v. California Coastal Commission*, where the Court held that conditioning a building permit on the dedication of a public right of way constituted a taking of property.<sup>17</sup> The public's need or desire for the easement did not avoid the constitutional impediment to 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."<sup>18</sup> In

13. *Id.* at 179-180.

14. For the Claims Court case see *United States v. Pueblo de San Idelfonso*, 512 F.2d 1383, 1394, 206 Ct. Cl. 388 (1975). For the dicta regarding insurance proceeds, see *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961). *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918). Interestingly, Justice Brandeis also noted that the right to exclude could be "qualified" in property that is "affected with a public interest." *Id.* He went on to conclude that newsgathering agencies should not have a common-law right to exclude others from using their news once it was published. *Id.* at 251.

15. *Loretto*, 458 U.S. at 438.

16. *Id.* at 435.

17. *Nolan*, 483 U.S. at 833-34.

18. 483 U.S. at 837; see also *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (bike trail may be demanded as condition of development permission only if access demanded is "roughly

his 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. Brennan advocated a balancing test, which would have taken into account the relatively slight burden on the landowner’s privacy.<sup>19</sup> The majority, however, refused to countenance any limitations on the owner’s right to exclude, once again harkening back to a formalistic or even natural law approach to property rights that lends credence to Blackstonian conceptions of the bundle of sticks.

Thus, the Supreme Court’s jurisprudence has firmly established the right to exclude as an essential stick in the bundle of property rights. In teaching this line of cases, students can easily grasp the categorical physical invasion rule, which is a rare instance of a fairly bright-line standard in an otherwise “trackless ocean” of takings doctrine.<sup>20</sup> It is much more difficult, however, to engage the students in critical thinking about the rule, to reveal the balance of interests behind it. What public rights are compromised by adopting a standard that always favors the landowner’s right to exclude? How does absolute exclusion comport with the basic policy reasons for which we protect property in the first place? We place limits on most landowner’s rights: for example, the right to build is subject to zoning laws and endangered species protections and the right to devise is subject to perpetuities restrictions. Are there, or should there be, any limitations on the landowner’s right to exclude? The Court’s formalistic approach does not enrich this discussion.

Comparative law examples can crack the nut, leading to a much more fruitful consideration of the right to exclude. While at first it may be difficult to imagine what Chai Vang, a Laotian immigrant who murdered six people in Wisconsin, might have in common with Madonna, the pop icon, both provide striking recent examples of differing conceptual property norms regarding the right to exclude. As with any comparative discussion, the object is not to determine, necessarily, whether a different rule would be better, but rather to stimulate critical thinking by opening up the mind to other possible outcomes.

### **Chai Vang and Laotian Hunting Rights on Communal Lands**

In November 2004, Chai Vang, an immigrant from Laos, was hunting deer in Wisconsin.<sup>21</sup> He apparently got lost, wandered onto a 400-acre piece

---

proportional” to the additional transportation burden caused by development).

19. 483 U.S. at 847-48, 853-54 (Brennan, J., dissenting); see also Jerry L. Anderson, *Takings and Expectations: Toward a “Broader Vision” of Property Rights*, 37 U. Kan. L. Rev. 529 (1989).

20. Benjamin N. Cardozo, *The Nature of the Judicial Process* 166 (New Haven, Conn., 1921).

21. Associated Press, *Vang Guilty of Murdering Wis. Hunters*, available at <<http://www.kstp.com/article/stories/s10476.html>> (last visited May 26, 2006).

of private property, found an empty tree stand and climbed up.<sup>22</sup> Not long thereafter, the landowner, accompanied by a group of hunters, discovered Vang, confronted him, and asked him to leave. According to Vang, the confrontation was hostile and aggressive. One hunter angrily shouted profanities at him and used racial slurs. Vang also claimed that another hunter fired a shot at him. We don't know if Vang's version of the events is true, unfortunately, because most of the witnesses are dead—Vang opened fire on them with a semi-automatic rifle, killing six of the hunters and wounding the other two.

What can this tragedy teach us about Property law? Of course it would be simplistic and misguided to suggest that differing property norms were the cause of this crime. But even so, somewhere at the bottom of this conflict—in both the hostility that Vang claimed he encountered and his extreme reaction to it—is a lesson about how different cultures view private property rights and why it matters.

In Laos, especially among the Hmong people to which Vang belonged, the community owns the forests and much other land. Thus, every member of the public has abundant land, typically nearby, on which to hunt freely. Many Hmong are avid hunters and depend on game as a vital source of their sustenance. To the Hmong, the “right to hunt” might be seen as a basic human right, perhaps roughly like the American view of communal rights to navigable waters. If hunting is seen as a necessity rather than a sport, depriving a Hmong of access to hunting land might be somewhat equivalent to depriving Americans of access to breathable air.

Given this background of free access to hunting lands, Hmong immigrants may find it difficult to comprehend a system comprised of mostly private lands, on which an almost absolute right to exclude is fiercely protected. In many areas of the United States, communal hunting lands are extremely hard to find. In the upper Midwest, where Vang lived, most huntable land is in private hands. In Iowa, for example, 97 percent of the land is privately owned. In Wisconsin, where the shootings occurred, over 80 percent of land is private and most of the government land is not open for hunting. Of course, many private landowners will give permission to hunt on their land, and it is possible to rent land for hunting, but Laotian hunters would confront significant financial, language, and cultural barriers in striking such a bargain.<sup>23</sup> Moreover, the mostly urban Laotian community probably just doesn't know many people in rural areas with suitable acreages.

In Laos, the balance of public and private rights to land is struck much differently. Whereas we value the property owner's right to privacy and want

22. A tree stand is an elevated wooden platform from which the hunter can see advancing deer without being observed.

23. For example, hunting leases in Iowa average \$12 to \$15 per acre, which would have required Vang to pay around \$5000 per year to hunt the 400-acre parcel in question. See Jerry Perkins, *Hunters Gaining Ground*, *Des Moines Register* (Iowa), at 1D (May 20, 2006).

to protect against unwanted intrusions, in Laos the right of the community to access the fruits of the land is paramount. Again, while differing property norms can scarcely excuse murder,<sup>24</sup> at least some of the fuel for this hunter's fury may have arisen from the frustration of adjusting to a culture that declares wild animals—the deer, the birds, even the bear—as *res nullius* and therefore available for capture by anyone but then makes it very difficult for the public to get at them.

So, comparing Hmong hunting rights with ours can begin the process of thinking critically about the right to exclude. Protecting the private owner's right does have trade-offs, including the exclusion of the public from access to enjoyment and use of public resources. Many of us may have felt a similar frustration trying to reach some allegedly "public" resource—perhaps a beach or a beautiful mountain—and being confronted with a solid barrier of private property that limited access. Given these negative consequences to public interests, why do we protect the private interests so vigorously? What exactly are the private values that would be impacted by modifying the right to exclude? Exploring these issues adds great depth to the classroom discussion, but unless the students understand that other cultures have chosen a different way to allocate the sticks in the bundle, they may have difficulty seeing the point.

Interestingly, even in the Wild West, the right to exclude has not always been so absolute. In South Dakota, from 1899 to 1973, hunters could enter and hunt on the private land of others without permission.<sup>25</sup> Land was off limits only if it was fenced with woven wire, had standing crops, or was near livestock, dwellings, schools, or churches. This "right to hunt" reflected, perhaps, the importance of hunting to the frontier culture and relatively larger tract sizes, which would lessen privacy concerns.<sup>26</sup> Even today, landowners in this region are significantly less likely to post their property to keep out hunters, indicating that the public's right of access may be valued differently in various areas of the country.<sup>27</sup>

Private property protection will naturally be weaker in a country like Laos, one of the few remaining Communist regimes. Therefore, students may find a comparison of our private property culture with Hmong communal rights of little value. But even in capitalist democracies, the right to exclude has been significantly tempered by giving the public access rights over private lands. As

24. Especially since Vang was not a recent immigrant.

25. Tom Simmons, *Highways, Hunters and Section Lines: Tensions Between Public Access and Private Rights*, 2 *Great Plains Nat. Res. J.* 240, 252 (1997).

26. See Paul Gentle et al., *Private Landowner Attitudes Concerning Public Access for Outdoor Recreation: Cultural and Political Factors in the United States*, 6 *J. Hosp. & Leisure Mktg.* 1 (1999), table 3 (average tract size greater in Great Plains/Rocky Mountain region), available at <<http://www.srs.fs.usda.gov/pubs/1507>> (last visited Dec. 8, 2006).

27. *Id.* at tables 19 and 20 (only 18.5 percent of landowners in Great Plains/Rocky Mountains post to keep hunters out, while about 39 percent of landowners on Pacific Coast give that reason).



the next section illustrates, even Madonna found that property norms change and that the right to exclude may not be absolute.

### **Madonna and the Right to Roam<sup>28</sup>**

“[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.”<sup>29</sup>

The United States derived its conception of private property from England, and we have historically looked to old English cases to provide the fundamental composition of the bundle of sticks. As noted previously, Blackstone’s declaration of ownership as a despotic dominion comported well with the American desire to protect property, both for moral reasons and more utilitarian ones—to fuel economic progress and westward expansion.<sup>30</sup> Thus, it is safe to say that the British property system is the nearest to our own in the world. Although the United Kingdom has no constitutional property protection similar to our own Fifth Amendment, Parliament regularly provides compensation for government condemnations.<sup>31</sup> The British position on the right to exclude therefore makes for a particularly apt comparison to our own.

Although British courts for centuries protected the landowner’s right to exclude, Parliament recently enacted a statutory “right to roam” giving the public access to millions of acres of privately-owned land. The Countryside and Rights of Way Act of 2000 (CRoW) declares private land that contains mountains, moorland, heath or downland<sup>32</sup> to be “open country,” on which the public is now free to walk.<sup>33</sup> The private landowner may not bar the

28. I expand on this topic in *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 9 *Geo. Int’l Env’tl. L. Rev.* \_\_\_ (forthcoming 2007).

29. John Burroughs, *Exhilarations of the Road* in 2 *The Writings of John Burroughs*, Winter Sunshine (1895) (*quoted in* Kim Taplin, *The English Path* 17-18 (Chicago, 1987)).

30. Early colonists, however, tended toward a more natural rights theory of property ownership, which emphasized individual rights, rather than the positivism of England, which allowed for greater assertion of public interests. See Eric T. Freyfogle, *Book Review: Land Use and the Study of Early American History*, 94 *Yale L.J.* 717, 728 (1985).

31. Daniel H. Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* 159-60 (New York, 2002). The European Convention on Human Rights contains a provision protecting against the deprivation of property except “in the public interest” and in conformance with law. *European Convention on Human Rights*, Protocol 1, art. 1 (1950). This provision, however, allows government regulation of property without compensation if it is proportional to the public interest involved. See Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 *N.Y.U. Env’tl L. J.* 136 (2002).

32. “Downland” is characterized by unimproved grassland, often with scattered scrub.

33. *Countryside and Rights of Way Act of 2000 (CRoW)* § 1.

public from wandering over these lands. The CRoW therefore represents a rather dramatic reallocation of the sticks in the bundle, negating the right to exclude on what was once private land, presenting a fascinating study in how the balance of private and public interests in land may be modified.

The British have always held “wandering” in high regard. There are over 130,000 miles of footpaths crisscrossing England and Wales, in many cases directly across farmers’ fields or through meadows full of grazing sheep.<sup>34</sup> Footpaths follow historic trails connecting villages and, because their use by the public predates enclosure,<sup>35</sup> the right to exclude the public from them was not part of the original grant of private property. Thus, the legal basis of the extensive British footpath system comports with American concepts of easements by prescription or implied dedication.

The CRoW Act, however, goes far beyond existing footpath rights of way. Under CRoW, if private land contains mountains, moors, heath, or downland, a government agency may classify it as open country. The landowner then must give the public access to the open country land, for walking or even picnicking; any barriers to access must be removed. Land that is cultivated or used as a garden is exempt, as is land near a house or barn. Notably, the law does not provide any compensation to the affected landowners.

Lands qualifying for access comprise about 12 percent of England and Wales, an estimated four million acres in England alone. Some of the country’s most scenic real estate has been or will be opened up, including areas fought over by nature lovers and landowners for more than a century. 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, currently occupied by the Price of Wales, will now be accessible.

Even Madonna has been affected by CRoW. In 2001, Madonna and her husband Guy Ritchie bought Ashcombe House in south Wiltshire—over 1000 acres—for £9 million (about \$16.5 million). Thereafter, the Countryside Agency announced it planned to classify about 350 acres of their estate as downland, which would have opened the property to public access.<sup>36</sup> 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. Ultimately, an independent inspector appointed to

34. Ramblers Protest the “National Disgrace” of Britain’s Footpaths, *The Independent* (Apr. 9, 2000), available at <<http://www.millennium-debate.org/indsungap4.htm>> (last visited Dec. 8, 2006).

35. “Enclosure” refers to the privatization of common land over several centuries, through Parliamentary Acts and private agreement, which profoundly transformed English village society. Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEG. HIST. 45, 47 (1989). Most enclosures occurred between 1700 and the mid-1800s.

36. Richard Savill, Madonna Wins Partial Ban on Public Walking Across Estate, (June 19, 2004), available at <<http://news.telegraph.co.uk>> (last visited Dec. 8, 2006).

resolve the matter decided that only 130 acres, all of which was out of sight of Madonna's home, should be opened to access. Because privacy was not therefore at issue, the inspector declined to consider the privacy aspects of the case.<sup>37</sup>

Although Madonna's case eventually resulted in a compromise that seemed to please all sides, newspaper and blog commentators mercilessly criticized the singer for an "American" view of property rights that disregarded the needs of the public.<sup>38</sup> Indeed, the Ritchies must have been surprised to find that their heretofore private property could be suddenly opened to public access—in effect the grant of a public easement—without their consent and without compensation. Yet, in Parliament's view, the Act merely made amends for taking away public access during the enclosure period and brought a more equitable balance between public and private rights.

CROW illustrates that even among capitalist countries that place a high value on property right protection, there may be different views of the "essential" nature of the right to exclude. Britain is not alone in this regard. Norway and Sweden have long recognized an even broader "Allemansrätten"—every person's right to cross the lands of another and even camp there temporarily.<sup>39</sup> Imagine jumping in a canoe and heading down the river, knowing you had the right to pull over and eat lunch or even spend the night wherever you liked. All land is included, except cultivated land and homestead areas. It is even permissible to pick mushrooms, wild berries, and wildflowers on someone else's land. Interestingly, Allemansrätten are not found in the law books, but rather have developed by custom, which the Scandinavians find unnecessary to codify. The right emerged as an ethical obligation on the part of both the landowner—to allow access—and the visitor—to not disturb the landowner's privacy or damage his land.

While Britain and the Scandinavian countries understand the private property owner's legitimate desire for privacy, they also strive to accommodate the public's interest in access, in ways they believe do not unduly burden private interests. Thus, assuming the benefits of public access outweigh the burden on the landowner, an overall enhancement of societal land use value is obtained. These differing notions of the right to exclude open the

37. Appeal Decision, CROW/3/M/03/1076 (June 17, 2004), available at <[http://www.planning-inspectorate.gov.uk/access/appeals/central\\_southern/Salisbury.htm](http://www.planning-inspectorate.gov.uk/access/appeals/central_southern/Salisbury.htm)> (last visited Jan. 9, 2007).

38. For example, see the comments posted on the BBC website, available at <[http://www.bbc.co.uk/wiltshire/entertainment/days\\_out/madonna\\_ashcombe/madonna\\_ashcombe.shtml](http://www.bbc.co.uk/wiltshire/entertainment/days_out/madonna_ashcombe/madonna_ashcombe.shtml)> (last visited Dec. 8, 2006), including this one from Toby Scott: "This is Europe not America. What a shame that America supposedly populated by those 'thrown off' land should have such draconian privacy of property laws denying access to vast tracts of almost wild land on the basis of ones (sic) ability to buy it." To be fair, many comments also supported Madonna's right to exclude.

39. For a full description of Sweden's right of public access, see <<http://www.allemansratten.se>> (last visited May 27, 2006).

students' minds to the possibility that it need not be absolute, that different allocations of the bundle of sticks may be possible, without causing undue harm to the underlying concept of private ownership. At a minimum, considering comparative property norms helps students grasp that defining property is ultimately an exercise in finding a balance that will best promote the goals of property ownership and meet the needs of society.

Once we accept that a property right is not a given, but rather a product of this balancing, we can ask what the proper scope of the right to exclude in the United States should be. For example, in Rhode Island, private landowners own more than ninety percent of Narragansett Bay's 350-mile shoreline, severely reducing the possibilities of public access to this scenic resource.<sup>40</sup> Would it be possible to recognize the owners' desire for privacy while still providing the public greater means to enjoy what is, after all, their beach? What interests would be diminished by recognizing greater access? What interests would be promoted?

Increased access to private lands would not only promote the public's interest in recreation, it could also result in psychic and health benefits. Health officials have warned that Americans face an obesity epidemic and about two-thirds of American adults are now classified as overweight.<sup>41</sup> Although the problem is partially due to our diet, of course, Americans also walk, on average, much less than Europeans. Researchers have already identified our land use planning system as a major barrier to creating a culture of walking. Perhaps the right to exclude also plays a role, by increasing the difficulty of walking from one place to another and by placing some of the most inviting territory for a hike off limits. Would it make a difference if you could start a hike by simply hiking across the fields near your house, rather than having to drive to a park or nature preserve many miles away? Advocates of rambling also point to a feeling of community, of common interest in the land that comes from shared access.

Obviously, the right to exclude has important benefits to the landowner. Privacy is an important attribute of property and one of the fundamental desires of those who own land. Public access may limit the uses of property and a landowner may have to increase vigilance and security to protect against damage or theft from the invading public. The landowner may have to invest in fences to separate public and private portions of land. But, as the British determined, the landowner's concerns may be diminished with regard to certain types of property—it is harder to damage heath, for example, than a cultivated field, and privacy concerns lessen when the land is far from a homestead. In

40. Michelle A. Ruberto and Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 *Suffolk U. L. Rev.* 353, 354 (1990).

41. National Center for Health Statistics, 1999-2000 National Health and Nutrition Examination Survey (NHANES), available at <<http://www.cdc.gov>> (last visited Dec. 31, 2006).

those instances, moreover, the public's interest in the use of the property is heightened.

By examining these competing policies behind the right to exclude, it is possible to paint with a finer brush. Perhaps the bundle of sticks can be modified without causing undue damage to the interests at its core.

### **Conclusion**

Regardless of how students conclude public and private property interests should be balanced, the story of access rights in other countries makes a fascinating comparison to our own tendency to place the right to exclude on such a lofty pedestal. While the bundle of sticks may be an entrenched metaphor, it can promote an unfortunate tendency toward viewing property rights in absolute terms. Contemplating the freedom of a ramble across meadows in England or a hunt for wild blueberries in Sweden can provide a useful antidote to that tendency. In the end, the comparative approach should provide students a path to a greater understanding of the evolutionary and mutable nature of property rights.