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## Progressive Property in Action: The Land Reform (Scotland) Act 2003

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# Progressive Property in Action: The Land Reform (Scotland) Act 2003

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## I. INTRODUCTION

There is a *material* deficit at the core of an important strain of American property law scholarship—the debate over the nature and extent of a landowner's right to exclude non-owners from land. By referring to a “material deficit” I do not mean to suggest that there is a lack of theoretical sophistication regarding this subject. For more than a decade two rival camps of property theorists have made powerful, often intricate, and seemingly irreconcilable claims about the function and normative value of exclusion rules in property law. What I mean is that when these two groups of property theorists engage each other they tend to illustrate their arguments with discussion of the same, relatively small set of classic American cases that form the canon of most property law case books.

American law students know these cases well by the end of their first year of law school. They have evaluated trespass claims in the agricultural plains of New Jersey<sup>1</sup> and in a snowy field in Wisconsin.<sup>2</sup> They have considered demands for public access to the beaches of New Jersey<sup>3</sup> and an abandoned railroad track in Vermont.<sup>4</sup> And, of course, they have pondered the confusing regulatory takings jurisprudence of the United States Supreme Court.

The tendency of property theorists to dwell on these same cases has two principal drawbacks. First of all, it obviously produces a certain amount of redundancy, maybe even a sense of exhaustion among

1. *State v. Shack*, 277 A.2d 369 (N.J. 1971).

2. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

3. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

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

property law scholars and students. Second, and more important, the failure of property law scholars to discover new property rule making and decision making in action can freeze the imaginative capability of theoretical scholarship. This Article is designed to respond to both of these deficiencies.

It responds to the first by leading readers abroad, to post-devolution Scotland, where a small band of recreational access advocates, enlightened landowners, law reformers, legislators, and jurists have done something remarkable. In Part I of the Land Reform (Scotland) Act 2003 (the LRSA),<sup>5</sup> just the latest in a series of sweeping property law reform initiatives in Scotland,<sup>6</sup> the Scots have created a new kind of property interest and a detailed property regime to contextualize this interest. At the heart of this regime is the right of *responsible* access. It is a right to go almost anywhere in Scotland, on most land and inland water, whether privately owned or public, without a motorized vehicle, for purposes of recreation, education, and passage, as long as one acts responsibly.<sup>7</sup>

By introducing the LRSA and its right of responsible access to an American property law audience this Article should help alleviate the palpable shortage of new subjects in property law analysis. In other words, this Article provides an invaluable case study of a bold property lawmaking scheme in action, which property law scholars can explore for years to come.

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5. Part II of the LRSA creates a “community right to buy,” i.e., a preemptive right of first refusal in favor of community groups who register an interest in purchasing land for purposes of sustainable community development. Part III of the LRSA establishes a stronger, absolutecrofting community right to buy. See generally Malcolm M. Combe, *Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?* 2006 JURID. REV. 195. Parts II and III of the LRSA are beyond the scope of this Article.
  6. See, e.g., Tenements (Scotland) Act, 2004, (A.S.P. 11) (modernizing condominium law); Title Conditions (Scotland) Act, 2003, (A.S.P. 9) (modernizing law of title conditions that run with land, including equivalents of real covenants, conservation easements, and common interest community covenants); Abolition of Feudal Tenure etc. (Scotland) Act, 2000, (A.S.P. 5) (abolishing vestiges of feudal tenure). For analyses of some of these reforms and other aspects of Scottish property law, see John A. Lovett, *Title Conditions in Restraint of Trade*, in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 30 (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2010); John A. Lovett, *Meditations on Strathclyde: Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYRACUSE J. INT’L L. & COM. 1 (2008); John A. Lovett, *Creating and Controlling Private Land Use Restrictions in Scotland and Louisiana: A Comparative Mixed Jurisdiction Analysis*, 19 STELLENBOSCH L. REV. 231 (2008); John A. Lovett, *A New Way: Servitude Relocation in Scotland and Louisiana*, 9 EDIN. L.R. 352 (2005).
  7. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 2(1) (“A person has access rights only if they are exercised responsibly.”); *id.* §§ 1(2)–(4), 32.

But this Article also has a normative component that responds to the imaginative paralysis that can result from the deficit of new subject matter in property scholarship. I argue that the LRSA shows us something important about what is possible in property law design. I contend that Part I of the LRSA demonstrates—at least in this area of property—that a property regime can embrace a social obligation norm and a series of virtue-oriented standards of behavior without sacrificing all of the information processing efficiencies and coordination benefits that information theorists contend flow from a property law architecture founded on a core commitment to a robust, *ex ante* presumption in favor of the right to exclude.

This is not to say that this model of property law design has no costs. I acknowledge that adoption of Part I of the LRSA has required Scottish courts to develop several highly contextualized decision making methodologies to interpret key portions of the Act designed to allow land owners to exempt some land from access taking and to preserve certain barriers to access. Recent judicial decisions interpreting the Act thus admittedly expose some of the information processing and uncertainty costs that are by-products of this kind of complex “governance” based property law innovation. Yet the tests and methodologies developed by the Scottish courts so far are, though not perfect, generally reasonable and have largely succeeded in avoiding demoralizing results.

Most importantly, though, I contend that because the LRSA actually replaces the traditionally robust, modular, *ex ante* presumption *in favor* of the right to exclude with a surprisingly simple, but also robust, *ex ante* presumption *in favor* of responsible access, information processing costs and coordination costs are not necessarily as high or as destructive as some critics might have expected. In the end I claim that the LRSA’s reordering of private property rights in Scotland reveals how a long cherished vision of shared social interests in land can emerge as working legislation that promotes important aspects of human flourishing while at the same time preserving land owners’ privacy interests and their prerogative to make crucial decisions about how their land can be used productively, how that land fits into their own life projects, and even how their land’s long term value can be preserved for future access takers.

To help readers appreciate the significance of Scotland’s achievement in property law institutional design, this Article initially reviews the theoretical debate over the fundamental structure and values of property law in general and over the centrality of the right to exclude in particular. Section II.A explains the assumptions and goals of the “progressive theorists,” those scholars who call for American property law to embrace a social obligation norm aiming to maximize human flourishing at all times and who welcome a more contextualized prop-

erty law decision making process focused on producing relationships of dignity, fairness, and respect. Section II.B discusses the assumptions and aims of the leading “information” or “formal exclusion” theorists, the scholars who insist upon the normative superiority, doctrinal centrality, and above all, the informational efficiency of robust rules of exclusion at the core of property law. Section II.C briefly introduces several other property theorists whose views on the right to exclude in particular do not fit neatly in either of these camps but whose insights are helpful in understanding the new property regime in Scotland.

To provide further context for understanding the emergence of the right of responsible access, Part III briefly examines how Scottish common law dealt unsuccessfully with the problem of demands for access to private land prior to the LRSA. Part IV discusses and contrasts the consensus building efforts and historical experiences that led to the LRSA in Scotland with the different set of experiences that led to passage of the Countryside and Rights of Way Act 2000 (CRoW Act), the legislation that established the better known but less radical “right to roam” in England and Wales. Part V then provides a comparative analysis of the major features of the CRoW Act and the LRSA and reveals how Scotland’s version of access legislation has not only a wider geographic reach but has created a far more ambitious and potentially transformative kind of access regime than is found in England and Wales. Part VI analyzes recent judicial decisions in which Scottish courts have begun to interpret key provisions of the LRSA designed to balance the privacy and personal enjoyment interests of home dwellers and the land management interests of other property owners with the interests of Scotland’s statutorily protected access takers. Part VII concludes.

## II. THE DEBATE OVER THE STRUCTURE AND PURPOSE OF PROPERTY LAW AND THE RIGHT TO EXCLUDE

The decade of “the noughties” (roughly 2000–09) was an exciting time for American property scholarship. Perhaps one of the most distinctive aspects of the scholarly discussion about property law during this period was the on-going, high level debate between two rival camps of property theorists about the fundamental structure and values of property law in general and over the nature and importance of the right to exclude in particular. This portion of the Article discusses the views of the key protagonists in this debate as well as the views of several theorists who do not fit neatly into either category.

### A. Progressive or Social Obligation Theorists

A prominent group of theorists who claim for themselves the moniker “progressive” have contended that property law can and should

embrace a social obligation norm designed to promote human flourishing, or at least the basic human capabilities that allow individuals to make reasoned and meaningful decisions about the projects they will undertake in their lives.<sup>8</sup> In a series of influential articles and books, Gregory Alexander,<sup>9</sup> Eduardo Peñalver,<sup>10</sup> Joseph Singer,<sup>11</sup> Eric Freyfogle,<sup>12</sup> and Jedediah Purdy<sup>13</sup> have repeatedly argued that property law is fundamentally about relationships: between neighboring property owners or co-owners, between landlord and tenant, between present possessor and future interest holder, between property owners and non-owners, and between the property owner and the state. Property law in their view must constantly recalibrate the needs and demands of all these parties. Property entitlements matter not so much because of the negative liberty they provide to owners (and especially the shield that property provides from state interference) but because of what they enable people (both owners and non-owners) to become and to do with their lives in practices of social cooperation.

These “progressive” or “social obligation” theorists picture individuals, and by extension property owners, as fundamentally dependent on human community.<sup>14</sup> In moments of conflict, this interdependence requires property law decision makers to determine whether a property owner’s interest in autonomy and control over her asset must be sacrificed, sometimes without compensation or strict reciprocity, to

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8. Gregory S. Alexander et al., *A Statement of Progressive Property Law*, 94 CORNELL L. REV. 743, 743–44 (2009) [hereinafter Alexander, *Statement*]; Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1258–60 (2005) [hereinafter Purdy, *Freedom-Promoting Approach*].
  9. Gregory S. Alexander, *The Social-Obligation Norm*, 94 CORNELL L. REV. 745 (2009) [hereinafter Alexander, *Social-Obligation*].
  10. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) [hereinafter Peñalver, *Land Virtues*]; Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005) [hereinafter Peñalver, *Property as Entrance*].
  11. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009) [hereinafter Singer, *Democratic Estates*]; Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) [hereinafter Singer, *Ownership Society*]; Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243 (2006) [hereinafter Singer, *After the Flood*].
  12. ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007).
  13. JEDEDIAH PURDY, *THE MEANING OF PROPERTY* (2010); Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047 (2007) [hereinafter Purdy, *People as Resources*]; Purdy, *Freedom-Promoting Approach*, *supra* note 8.
  14. Alexander, *Social-Obligation*, *supra* note 9, at 761–70; Peñalver, *Land Virtues*, *supra* note 10, at 869–70; Peñalver, *Property as Entrance*, *supra* note 10, at 1911–17; Purdy, *People as Resources*, *supra* note 13, at 1092–94; Singer, *After the Flood*, *supra* note 11, at 264–66.

satisfy a non-owner's need for access to that asset or the community's interest in control over use or disposition of that asset.<sup>15</sup> In determining the extent of this need for sacrifice, the progressive theorists tell us that property law has nothing to fear from open-textured standards that allow courts to make *ex post*, fine-tuned, contextualized decisions about the relative needs and interests of competing property owners, owners and non-owners, or owners and the community, even in cases where property rights have traditionally been protected with relatively crystalline, *ex ante* rules of exclusion.<sup>16</sup>

Further, in making decisions about land use, for instance, courts will have to consider not just how to maximize a parcel of land's market value and the owner's market return, but they will have to (and already do so more than we realize) consider concepts similar to what Peñalver calls "land's complexity" and "land's memory."<sup>17</sup> In addition, some of these theorists, particularly Alexander and Peñalver, insist that property law has much to learn from the Aristotelian tradition of virtue ethics and should not be afraid to test property owner behavior by considering the application of several "land virtues," specifically the virtues of industry, justice, and humility.<sup>18</sup>

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15. Alexander, *Social-Obligation*, *supra* note 9, at 770–73.

16. *Id.* at 801–10 (illustrating with a discussion of *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), and *State v. Shack*, 277 A.2d 369 (N.J. 1971)); Peñalver, *Land Virtues*, *supra* note 10, at 864–86; Singer, *Ownership Society*, *supra* note 11, at 328–37 (endorsing Supreme Court's use of a "citizenship model" for takings questions in *Penn Central Transport Co. v. New York City*, 438 U.S. 104, 123 (1978)).

17. By referring to "land's complexity," Peñalver seeks not only to capture the commonplace idea that every parcel of land is unique in a some physical sense but also to remind us that parcels of land can vary dramatically in their ecological and environmental characteristics and, perhaps even more importantly, in their "social dimension." Peñalver, *Land Virtues*, *supra* note 10, at 828–29. Pointing out that "human ingenuity" and human labor can transform land in extraordinarily positive and negative ways, he observes that every parcel will gain complexity because of the myriad ways it shapes "human interactions" and the idiosyncratic ways it affects access to other parcels of land and other land uses. *Id.* at 829. When Peñalver refers to "land's memory," he invokes not only the long-lasting physical manifestations of human engagement with land but also the powerful psychological attachments that develop when humans possess property for any length of time. *Id.* at 829–30.

18. Alexander, *Social-Obligation*, *supra* note 9, at 760–61; Peñalver, *Land Virtues*, *supra* note 10, at 864–86. For Peñalver, the virtue of "industry" refers to "encouraging the productive and efficient use of land." *Id.* at 877. The virtue of "justice" requires consideration of how the "fruits of the land's productivity" and, crucially in relation to the subject of this Article, how access to "the land itself" can be distributed in a way that serves human flourishing. *Id.* Finally, the virtue of "humility" recognizes that one generation's use of land may irreversibly harm the ability of future generations to flourish. *Id.*



At the end of the day, these theorists' key point of agreement is that property law can serve "plural and incommensurable values."<sup>19</sup> Although economic efficiency, generating wealth, and welfare maximization are among these values, they are not, and should not be, the only metrics of analysis.<sup>20</sup> Other equally important values that can serve as polestars of property law decision making include, in addition to human flourishing itself, the promotion of human freedom (and especially the freedom to recruit or be recruited for social projects on grounds of reciprocity, persuasion, and negotiated cooperation),<sup>21</sup> the creation of a free and democratic society in which human beings are treated with equal dignity and respect,<sup>22</sup> and the preservation of our natural and human environment to serve the needs of future generations and even the interests of the non-human world.<sup>23</sup> Throughout the progressive theorists' writing, there is a consistent willingness to discuss virtues and virtuous behavior and to consider how human beings should treat each other. Rather than serving as platforms for self-regarding behavior, property ownership and property law become the place for building community, not merely satisfying personal preferences.

## B. Information or Formal Exclusion Theorists

Competing against these progressive theorists is a group that is sometimes referred to as the "information" theorists,<sup>24</sup> who we might also call "formal exclusion" theorists. These theorists contend that at the very core of any properly functioning private property regime is a robust commitment to protecting a property owner's right to exclude everyone else in the world from the object of his ownership. Their justifications for this core commitment to exclusion, to a vision of property as "thing-ownership," are both moral and utilitarian. Currently Thomas Merrill and Henry Smith's versions of this exclusion oriented view of property are the most vital and influential.<sup>25</sup>

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19. Alexander, *Statement*, *supra* note 8, at 743; Alexander, *Social-Obligation*, *supra* note 9, at 805; Peñalver, *Land Virtues*, *supra* note 10, at 867–69; Singer, *Democratic Estates*, *supra* note 11, at 1054.

20. Alexander, *supra* note 8, at 805; Peñalver, *Land Virtues*, *supra* note 10, at 863; Singer, *Democratic Estates*, *supra* note 11, at 1034–37.

21. Purdy, *People as Resources*, *supra* note 13, at 1110–14; Purdy, *Freedom-Promoting Approach*, *supra* note 8, at 1242–44.

22. Singer, *Democratic Estates*, *supra* note 11, at 1037, 1051–52.

23. FREYFOGLE; *supra* note 12, at 138–41; Peñalver, *Land Virtues*, *supra* note 10, at 884–86 (describing the land virtue of "humility").

24. Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 918, 924–27 (2010).

25. Merrill and Smith's insights into property law have been articulated in numerous articles. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) [hereinafter Merrill & Smith, *Morality of Property*]; Thomas W. Merrill & Henry E. Smith, *What Happened to Property*

In *Property and the Right to Exclude*, a foundational essay that helped launch the exclusion theory debate, Merrill claimed that the right of a property owner to exclude others is not just “one of the most essential” sticks in the bundle that is often seen as comprising property,<sup>26</sup> but is in fact the “sine qua non” of property.<sup>27</sup> As he put it: “Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.”<sup>28</sup>

For Merrill, the right to exclude is a “necessary and sufficient condition of identifying the existence of property.”<sup>29</sup> He claims that this prioritization of the right to exclude can be justified on numerous grounds: (1) its logical utility (i.e., the notion that most of the other attributes of property can be deduced by simply clarifying or modifying the right to exclude);<sup>30</sup> (2) its deep historical and anthropological roots;<sup>31</sup> and (3) its sheer “ubiquity” in mature legal systems.<sup>32</sup> For Merrill, a robust defense of the right to exclude is essential to guard against the disintegrating effects of legal realism and its bundle-of-sticks approach to property, concepts that threaten to strip property of its institutional coherence and social value.<sup>33</sup>

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*in Law and Economics?*, 111 YALE L.J. 357 (2001) [hereinafter Merrill & Smith, *What Happened to Property*]; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*]; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) [hereinafter Smith, *Exclusion Versus Governance*]. For a recent, prominent case book by these authors, see THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007).

26. This claim was famously made by the United States Supreme Court in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), and was repeated in subsequent decisions. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

27. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) [hereinafter Merrill, *Right to Exclude*].

28. *Id.*

29. *Id.* at 731.

30. *Id.* at 740–44.

31. *Id.* at 745–47 (citing WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS AND THE ECOLOGY OF NEW ENGLAND* 62 (1983); Robert E. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1364–65 (1993)). Merrill asserts that “[i]t is commonly believed that the most elementary form of property right in land is the usufruct, an exclusive right to engage in particular uses of the land that is non-transferable and that terminates when the owner dies or ceases the use.” *Id.* at 745–46. If primitive societies first developed an exclusive usufruct-like right, Merrill reasons, this use exclusion must be “foundational” or “more basic to the institution of property” than other incidents of property. *Id.* at 745–47.

32. *Id.* at 747–51.

33. *Id.* at 736–39.

Henry Smith's writings over the past decade have largely corroborated Merrill's insights but have added his distinctive information-processing-cost rationale to the defense of exclusion.<sup>34</sup> In his recent response to Alexander's important article calling for incorporation of a social obligation norm in American property law,<sup>35</sup> Smith takes us to the nub of the debate. Although he acknowledges the intuitive attractiveness of human flourishing as a societal goal,<sup>36</sup> Smith asserts that property law and scholarship cannot afford to become overly concerned with promoting desirable social *ends*. Rather, it must focus on *means*, on how property law goes about its business of serving human interests—and especially on what property law does well, at least in comparison to other branches of the law. Smith thus draws us to his (and Merrill's) key insight: that property law's comparative advantage, its *exceptionalism*, lies in solving problems “wholesale,” in coordinating action for a wide range of often anonymous actors.<sup>37</sup> Thus, the essence of property resides in its unique “in rem” quality, its ability to speak in modular and informationally dense ways to those who must deal with property in a complex and heterogeneous world in which most individuals have little prior information about each other.<sup>38</sup>

Property law accomplishes this by providing default packages of rights that decide important questions *ex ante* for everyone.<sup>39</sup> The *numerus clausus* principle, the strict limitation on the number and type of property ownership forms in both the civil and common law, illustrates this demand for standardization at the macro level.<sup>40</sup> Merrill and Smith's favorite example of such a default package at the level of individual rules is the right-to-exclude principle that underscores the mechanistic and crystalline law of trespass.<sup>41</sup> Yet another, slightly more complex, but still favorite example is the baseline rule in nuisance—namely that a residential property owner is entitled to be free of pollution.<sup>42</sup> The great benefit of these simple, *ex ante* property

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34. Smith began to elaborate his information processing approach and his exclusion versus governance strategy paradigm in 2002 in Smith, *Exclusion Versus Governance*, *supra* note 25, but he and Merrill introduced the concept together at roughly the same time in Merrill & Smith, *What Happened to Property*, *supra* note 25, at 393–96.

35. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009) [hereinafter Smith, *Mind the Gap*].

36. *Id.* at 960.

37. Merrill & Smith, *Morality of Property*, *supra* note 25, at 1852; Smith, *Mind the Gap*, *supra* note 35, at 963.

38. Merrill & Smith, *Property/Contract Interface*, *supra* note 25, at 793–95.

39. Merrill & Smith, *Optimal Standardization*, *supra* note 25, at 24–40.

40. *Id.*

41. Thomas Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 16–19 (1985); Merrill & Smith, *Morality of Property*, *supra* note 25, at 1871–74.

42. Smith, *Mind the Gap*, *supra* note 35, at 963–64.

rules, according to Smith, is that they reduce information processing costs for those subject to the rules (i.e., duty holders and non-owners), those who might like to acquire property (i.e., other market participants), and the officials who must administer these rules (i.e., judges).<sup>43</sup>

Like Merrill before him,<sup>44</sup> Smith is quick to acknowledge that a property owner's general right to exclude non-owners and to decide the uses to which his property can be put is "not an end in itself, and is far from absolute even as a means."<sup>45</sup> When it confronts a subject of enough importance, or when parties cannot reach bargains easily on their own, or when we simply do not trust bargaining's results, property law will subordinate an owner's simple *ex ante* exclusion rights to larger social interests.<sup>46</sup> The general pattern that emerges according to Merrill and Smith is "exclusion" at the core—an *ex ante* rebuttable presumption in favor of the owner's right to exclude non-owners and to determine the use of the property—and "governance" at the periphery.<sup>47</sup> By "governance" Smith does not necessarily imply government regulation; he merely means more carefully tailored, contextualized solutions that openly refer to some collective ends society hopes to achieve—something akin to what the progressive theorists are calling for more generally.<sup>48</sup>

It is not easy to reconcile the approach of these information or formal exclusion theorists with the basic assumptions of the progressive theorists. As Jane Baron has recently observed, both groups of scholars' understanding of property is founded on divergent and "contested commitments."<sup>49</sup> While the information theorists like Merrill and

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43. *Id.* at 964. In their seminal article on the *numerus clausus* principle, Merrill and Smith made a similar point about the information cost advantage of limiting the number of property forms that are available in any property regime. Merrill & Smith, *Optimal Standardization*, *supra* note 25, at 27–33.

44. Merrill admitted even at the time of his seminal article that an individual's right to exclude might be diminished or reduced in various contexts depending on the identities and needs of non-owners and the kinds of interference presented. Merrill, *Right to Exclude*, *supra* note 27, at 753.

45. Smith, *Mind the Gap*, *supra* note 35, at 964.

46. *Id.*

47. *Id.* at 964, 967. Merrill and Smith point to aviation rights, the doctrine of necessity in trespass, anti-discrimination laws, restraints on future alienation such as the rule against perpetuities, and the law of trusts as just some of the most easily recognizable examples of "governance" rules—where "situational morality" and "fine-tuned regulation" are called for in property law. Merrill and Smith, *Morality of Property*, *supra* note 25, at 1890–94; Smith, *Mind the Gap*, *supra* note 35, at 964.

48. Smith, *Mind the Gap*, *supra* note 35, at 964–65.

49. Baron, *supra* note 24, at 920–21. All that they share, Baron shrewdly notes, is the salience of a core and periphery metaphor. They disagree profoundly about what should be the content of property law's core and the moral justifications for their core ideals. *Id.* at 962–63.

Smith tend to view property metaphorically as an information generating “machine” that produces, on average, good enough outcomes, the progressive theorists see property law as an on-going “conversation” that should be geared toward identifying human values, dislodging unconscious presumptions, improving the quality and character of social relationships, and creating a more just distribution of resources to facilitate more human flourishing.<sup>50</sup> While the information theorists favor simplicity, stability, and predictability, the progressives embrace complexity, contingency, and contextualism.<sup>51</sup> While the information theorists are ambivalent about change within property law, even when change is needed they are nervous about radical revision and prefer for any innovation to emanate from legislatures.<sup>52</sup> The progressives, on the other hand, are more impatient and ready to accept dynamism whatever its institutional source.<sup>53</sup> In short, as Baron has suggested insightfully, the information theorists see themselves as mechanical engineers concerned with promoting functional efficiency within the legal system and the marketplace, whereas progressive theorists see themselves as social engineers aiming to produce a “virtuous, free, or democratic society.”<sup>54</sup>

### C. Other Voices: Reciprocity Theorists and Exclusive Use Theorists

Lying somewhere in between (or beyond) the progressive theorists and the information theorists are other important voices engaged in the exclusion debate. Hanoch Dagan and Michael Heller, for instance, have emphasized the importance of the “right to exit” from property relationships as the hallmark of liberal property law.<sup>55</sup> Guaranteeing that persons who participate in property relationships have a viable right to exit from these relationships not only preserves their individual liberty and security but also serves to curb harmful, invasive, and

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50. *Id.* at 920–21, 937–39. Baron also notes that each camp views the relationship between rights and duties differently. For information theorists, property law is fundamentally a system in which right holders send a one-way message to duty holders: “keep out.” This informational simplicity allows it to coordinate behavior efficiently. *Id.* at 954–55. For progressive theorists, property law constantly illustrates how property owners are at once both right holders and duty holders or, to be more precise, subject to obligations to other owners and non-owners. *Id.* at 955–57.

51. *Id.* at 940–52.

52. *Id.* at 944, 960–61.

53. *Id.* at 923, 945, 961. Whereas the progressive theorists are clearly committed to making “distributional fairness” a concern of property, the information theorists believe other institutional mechanisms, like taxation and government transfer systems, are a more efficient means of promoting this end. *Id.* at 957–59.

54. *Id.* at 964.

55. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 567–70 (2001).

opportunistic behavior on the part of their co-venturers.<sup>56</sup> Thus, a healthy right to exit can discipline commoners and even encourage trust and cooperation among participants in a property regime<sup>57</sup>—just the kind of virtuous, other-regarding behavior that the progressive property theorist seeks to promote.

More broadly still, Dagan has argued that if government or property laws do impose limits on a property owner's right to exclude or exclusive authority over the use of a resource, they can do so only if those limitations create some long-term pay-off for the property owner.<sup>58</sup> In other words, a social obligation limitation on private property will only be legitimate if it is based on some long-term reciprocity, some explicit or implicit contractarian bargain. In sum, Dagan and Heller are committed to the liberal notion that property owners have powerful autonomy-based reasons to protect exclusion and exit rights, but they seek to soften property liberalism of the kind promoted by Merrill and Smith by finding avenues for private actors to come together in voluntary relationships, networks, and communities of cooperation and trust-building.

Although they may not regard themselves as forming a cohesive theoretical school, another group of scholars consisting of Adam Mossoff, Eric Claeys, and Larissa Katz have made similar (and for our purposes very helpful) points about property law in recent years.<sup>59</sup> First, all three theorists reject the conceptually disintegrating effect of the legal realists' bundle-of-rights view of ownership.<sup>60</sup> As a corollary,

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56. *Id.* at 568.

57. *Id.* Dagan and Heller's favorite examples of how robust exit rights enhance cooperation and trust include the rights of partners to terminate a partnership, the rights of beneficiaries to terminate a trust, the right of a spouse to seek a divorce and terminate a marital property regime, and the right of shareholders to sell their shares or liquidate a corporation. *Id.* at 597.

58. Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1263 (2007); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 769–70, 771–73 (1999). Dagan's views on the importance of reciprocity overlap to some extent with Purdy's claims that the functional purpose of property law is to provide the framework for individuals to recruit one another into cooperative projects based on norms of reciprocity and respect, not subordination and domination. Purdy, *Freedom-Promoting Approach*, *supra* note 8, at 1242–44.

59. See Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) [hereinafter Claeys, *Property 101*]; Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009) [hereinafter Claeys, *Virtue and Rights*]; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

60. Claeys, *Property 101*, *supra* note 59, at 618–19, 631; Katz, *supra* note 59, at 276, 279; Mossoff, *supra* note 59, at 372 (claiming sympathy with Merrill's resistance to the "acid wash of nominalism"). Claeys, in particular, argues that the legal realists co-opted the formal right to exclude identified by the Hohfeld–Honore vocabulary to justify an instrumentalist agenda and "interventionist property regulation." Claeys, *Property 101*, *supra* note 59, at 635–36.

all three embrace the idea that some kind of unifying and robust exclusion right exists at the core of property ownership.<sup>61</sup> Where they diverge from Merrill and Smith, however, is in their shared contention that the central value that property law protects is not so much a formalistic, boundary-drawing right to exclude, but the exclusive authority of property owners to make decisions or set agendas about the *use* to which property can be put. Hence, I call these scholars the “exclusive use” theorists.

Drawing inspiration from “rights based” property theorists (i.e., James Harris, Jeremy Waldron, and J.E. Penner), Larissa Katz in particular argues that property’s key task is to protect “our enduring interest in determining *the use of things*,” a key aspect of our personal autonomy.<sup>62</sup> Utilitarian or “costs-based” exclusion theorists like Merrill and Smith, she complains, focus too much on boundaries in defining ownership and too much on the duties of non-owners to obey exclusion orders and meanwhile neglect the special “powers” of owners that the law wants to advance.<sup>63</sup> Adopting a political analogy, Katz argues that owners, just like sovereigns, occupy an “exclusive position that does not depend for its exclusivity on the right to exclude others from the object of the right,” but on the fact that “owners are in a special position to set the agenda for a resource.”<sup>64</sup> Thus, the essential right in property is not a formal right to exclude keyed to protecting the boundaries of a thing, but the *exclusive right* of the property owner to *set the agenda* for a resource.<sup>65</sup> Importantly for our purposes, Katz illustrates her “agenda setting” approach to property in part by briefly describing the Scandinavian custom of *Allemansratt*, one of the important legal sources for the LRSA.<sup>66</sup>

In an important and more normatively focused response to Alexander and Peñalver, Eric Claeys also warns that social obligation theorists’ search for virtuous behavior and distributive justice at the core, rather than at the periphery, of property law could have troubling con-

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61. Claeys, *Property 101*, *supra* note 59, at 631; Katz, *supra* note 59, at 280; Mossoff, *supra* note 59, at 375.

62. Katz, *supra* note 59, at 280 (discussing JAMES HARRIS, *PROPERTY AND JUSTICE* (1996); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988)).

63. *Id.* at 276–77, 280 & n.13.

64. *Id.* at 277–78.

65. *Id.* at 283–84. Katz asserts that her “agenda setting” account of property is superior to other accounts because it explains why ownership does not always require non-owners to keep out of property but does insist that non-owners “fall in line with the agenda the owner has set.” *Id.* at 278.

66. *See id.* at 298–99. According to Katz, *Allemansratt* is a principle that “ensures that anyone can use rural land for recreational purposes, so long as these uses are not inconsistent with the uses to which the owner has decided to put the land.” *Id.*

sequences.<sup>67</sup> By subordinating individual property rights and a robust right to exclude to judicial discretion over questions of when and to what extent an owner must sacrifice his property to satisfy the human flourishing needs of a non-owner, property law might sacrifice some of the key social gains made by the Enlightenment.<sup>68</sup> In particular, it might encourage certain factions—religious, economic, class based, or political—to seize the heights of property law decision making and acquire “hegemonic power,”<sup>69</sup> thus transforming property law into a setting for troubling “culture war fights”<sup>70</sup> or even more unsettling forms of strife.

This review of the basic positions of the progressive and information theorists, as well as those interested in reciprocity and exclusive use, reveals how divided contemporary scholars are over the role that exclusion does and should play in property law. It also suggests how intensely interested we remain in this subject. My goal here is not to resolve the conflicts between these theorists at a conceptual level. Instead the aim has been to create a framework of analysis and an enriched vocabulary that will prove useful as we begin to explore the forces that lead to the emergence of the LRSA and as we examine its most important design features.

### III. LIMITATIONS ON PUBLIC ACCESS AT SCOTS COMMON LAW

#### A. Public Rights of Way and Community Rights

Scottish common law has long recognized that the public can acquire a real right of access over privately owned land through what is called a “public right of way.”<sup>71</sup> Just as with an Anglo-American servitude or easement, the *solum* or ownership of the ground itself remains with the underlying landowner, be it a private person or a

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67. Claeys, *Virtue and Rights*, *supra* note 59, at 922–23.

68. As Claeys observes, communitarian theorists like Alexander and Peñalver “take for granted the tough-minded choices early Enlightenment theorists made to confine virtue and elevate rights as the dominant category of public discourse.” *Id.* at 924. Elsewhere, Claeys explains that Locke’s accomplishment was in some sense to “compartmentalize virtue as far away from politics as possible,” *id.* at 928, or to assign the “perfection of human character and the pursuit of happiness . . . to the private realm.” *Id.* at 929.

69. *Id.* at 917.

70. *Id.* at 922 (internal quotation marks omitted). Claeys’ critique of Alexander and Peñalver’s virtue based approach to property law obviously brings him much closer normatively to Merrill and Smith than Katz, whose normative commitments appear more closely aligned with the progressive theorists. See Katz, *supra* note 59, at 314–15.

71. KENNETH G.C. REID, *THE LAW OF PROPERTY IN SCOTLAND* ¶ 495 (1996) (“A public right of way is distinguishable from a public street or highway maintainable at the public expense which requires at all times to be kept free of obstruction of any form.”).



public entity.<sup>72</sup> Yet, unlike most servitudes or easements, there is no specific benefitted property (or dominant estate). Rather, the benefited persons are simply members of the public at large.<sup>73</sup> In the United States, we would classify these as servitudes or easements in gross in favor of the public.<sup>74</sup>

These common law “public rights of way” often originated in old cross-country routes traversed by foot or on horseback, connecting one town or village with another.<sup>75</sup> Some were ancient “drove-roads” that were used to lead cattle and sheep to markets.<sup>76</sup> Others were “kirk” roads meandering their way to a local church.<sup>77</sup> Finally, others still were “coffin” roads terminating at a graveyard.<sup>78</sup> Important as these public rights of way were,<sup>79</sup> their utility and occurrence has always been circumscribed by several doctrinal limitations.

At the outset, a public right of way must connect two “public places,” that is, places to which the public has “resort for a lawful purpose,”<sup>80</sup> or, in other words, a “legal” and “unrestricted right of access at all times.”<sup>81</sup> Places that qualify include public roads, public harbors, beaches used for public recreation, towns, and even church-

72. *Id.* Technically, the burdened property may be either open ground or a structure through which some kind of passage has been created, such as a covered walkway over a road. See, e.g., *Cumbernauld and Kilsyth Dist. Council v. Dollar Land (Cumbernauld) Ltd.*, (1993) S.C.(H.L.) 44 (Scot.).

73. REID, *supra* note 71, ¶ 495.

74. For discussion of servitudes benefiting the public; their creation through dedication, prescription, and on the basis of custom and the public trust doctrine; their limitations; and their regulation, see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. a–g (2000); JON W. BRUCE AND JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* §§ 5:25–5:29, 6:2–6:3 (2010).

75. George Menzies, *Preface* of RODERICK PAISLEY, *ACCESS RIGHTS AND RIGHTS OF WAY* 5 (2006).

76. *Id.*

77. *Id.*

78. *Id.*

79. According to the National Catalogue of Rights of Way maintained by the Scottish Rights of Way and Access Society, there are more than 7000 recorded rights of way currently in Scotland. *Is There Any Record of Rights of Way in Scotland?*, SCOTTISH RIGHTS OF WAY & ACCESS SOCIETY (Aug. 2, 2008, 6:09 PM), [http://www.scotways.com/inex.php?option=com\\_content&view=article&id=216:is-there-any-record-of-rights-of-way-in-scotland&catid=38:rights-of-way&Itemid=72](http://www.scotways.com/inex.php?option=com_content&view=article&id=216:is-there-any-record-of-rights-of-way-in-scotland&catid=38:rights-of-way&Itemid=72). Many other rights of way are unrecorded. *Id.* Information from the Catalogue about particular rights of way can be obtained from the ScotWays Office. *Is Information About Particular Rights of Way Available On The Internet?*, SCOTTISH RIGHTS OF WAY & ACCESS SOCIETY (Aug. 2, 2008, 6:36 PM), [http://www.scotways.com/inex.php?option=com\\_content&view=article&id=238:is-information-about-particular-rights-of-way-available-on-the-internet&catid=38:rights-of-way&Itemid=72](http://www.scotways.com/inex.php?option=com_content&view=article&id=238:is-information-about-particular-rights-of-way-available-on-the-internet&catid=38:rights-of-way&Itemid=72).

80. GEORGE L. GRETTON & ANDREW J.M. STEVEN, *PROPERTY, TRUSTS AND SUCCESSION* 247 (2009); REID, *supra* note 71, ¶ 496.

81. *PIK Facilities Ltd. v. Watson’s Ayr Park Ltd.*, (2005) S.L.T. 1041, 1049 (Scot.).

yards.<sup>82</sup> But a cattle market open only a few days a week might not satisfy the public place terminus requirement,<sup>83</sup> and other destinations clearly fail to meet the test, including a small, sub-post office in a private house,<sup>84</sup> a geologically noteworthy and curiously large rock next to the seashore,<sup>85</sup> and even a large but limited-access commercial airport.<sup>86</sup> Reading the opinions on what constitutes a “public place” for purposes of establishing a public right of way, one senses not only the narrow construction habits of Scottish judges but a certain reluctance to admit any incursion of private property rights. As one perhaps more sympathetic judge observed in 1917, even logic was not a necessary ingredient to this doctrinal puzzle because the requirement that a right of way connect *two* public places meant that a well used footpath making a pleasant circuit from one point on a public road would still fail the test.<sup>87</sup>

The second doctrinal limitation is that a public right of way permits only locomotion across the burdened property, not any other related recreational activity.<sup>88</sup> The only non-access activities that might be permitted under a public right of way are purely ancillary ones, like the placing of signs to show its existence.<sup>89</sup> Hence, as with any other common law servitude, activities like bike riding or horse riding would

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82. REID, *supra* note 71, ¶ 496. Compare *Lauder v. MacColl*, (1993) S.C.L.R. 753 (Scot.) (holding that the foreshore is a public place); *Richardson v. Cromarty Petroleum Co. Ltd.*, (1982) S.L.T. 237, 238 (Scot.) (holding that a way terminating at a public road and a foreshore regularly used by the public for recreation met the test); *Marquis of Bute v. M'Kirby & M'Millan Ltd.*, (1937) S.C. 93 (Scot.) (holding that Scalpsie Bay on the Isle of Bute is a public place); *Smith v. Saxton*, (1927) S.C.(Notes) 98, 99 (Scot.) (holding that a church and churchyard qualify even if the church is in ruin); *Scott v. Drummond*, (1865) 5 M. 771, 772 (Scot.) (holding that a small natural harbor used by fishermen and other members of the public met the test); *with Darrie v. Drummond*, (1865) 3 M. 496, 501 (Lord Deas) (Scot.) (holding that a mere spot on the seashore is not a public place but a beach with a history of public recreation like Portobello Beach in Edinburgh could be).
83. *Ayr Burgh Council v. British Transport Comm.*, (1955) S.L.T. 219, 222 (Lord Carmont) (Scot.).
84. *Love-Lee v. Cameron of Lochiel*, (1991) S.C.L.R. 61, 67–68 (Scot.).
85. *Duncan v. Lees*, (1870) 9 M. 274, 276 (Scot.).
86. *PIK Facilities Ltd. v. Watson's Ayr Park Ltd.*, (2005) S.L.T. 1041, 1049–50 (Scot.). In this case, the party seeking to establish the public right of way was the operator of a remote parking lot seeking to gain unrestricted access to the airport to pick up and drop customers in a van, and so perhaps he was not as sympathetic a claimant as the typical recreational user in other cases. *Id.* at 1042–43.
87. *Rhins Dist. Comm. v. Cuninghame*, (1917) 2 S.L.T. 169, 170 (Lord Sands) (Scot.).
88. *GRETTON & STEVEN*, *supra* note 80, at 248.
89. *Id.* Under the Land Reform (Scotland) Act, local authorities now have statutory authority to install and maintain facilities that improve the “comfort and convenience” of those exercising a public right of way. Land Reform (Scotland) Act, 2003, (A.S.P. 2), §§ 15(4), 31.

not be permitted, unless such use itself was instrumental in establishing the right of way.<sup>90</sup>

Third, and perhaps most important, because a public right of way's purpose is to provide access from one public place to another, it must have a "definable course" and cannot provide access for general and indiscriminant wandering over another's private land.<sup>91</sup> Thus a public right of way in Scotland cannot provide an unlimited "right to roam."<sup>92</sup> As Lord Justice-Clerk Hope put it in a decisive 1849 opinion: "There is no case whatever in which a right to wander over, to rest or to lounge upon the ground of a private proprietor, under the new name of recreation, has ever been sustained."<sup>93</sup>

Finally, the constitutive requirements for establishing a public right of way by positive prescription have limited the frequency of their occurrence in Scotland.<sup>94</sup> Thus, to transform an "asserted" or "claimed" right of way into a "vindicated" one,<sup>95</sup> some representative of the public must prove (in addition to the two public termini and a definite route) that the public's possession and use (1) runs along the entire length of the right of way, (2) has been continuous and uninterrupted for a period of twenty years, (3) is substantial given the character of the locality, and (4) is adverse to and not merely tolerated by the landowner.<sup>96</sup> The hostility requirement is probably the most difficult

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90. See, e.g., *Marquis of Bute v. M'Kirdy & M'Millan*, (1937) S.C. 93, 95 (Scot.) (finding no right-of-way over track for passengers by horse or motor vehicle but finding one for foot passengers).
91. REID, *supra* note 71, ¶ 497; see, e.g., *Mackintosh v. Moir*, (1871) 9 M. 574, 575–76 (Lord President Inglis) (Scot.); *id.* at 578–79 (Lord Ardmillan) (finding that a public right of way could not "emerge in law from a mere practice of sauntering"). Although a path need not be "visible" in all cases, for instance when it crosses some part of the foreshore, it must be "definite" all the same. *Rhins Dist. Comm.*, 2 S.L.T. at 171 (Lord Sands).
92. Jeremy Rowan-Robinson & Andrea Ross, *The Freedom to Roam and Implied Permission*, 2 EDIN. L.R. 225, 227 (1998).
93. Dyce v. Hay, (1849) 11 D. 1266, 1275 (Scot.), *aff'd*, (1852) 1 Macq. (H.L.) 305 (Scot.).
94. Although it is theoretically possible to create a right of way by deed, most public rights of way are created by positive prescription and without registration in the public land records. GRETTON & STEVEN, *supra* note 80, at 248. Prior to the enactment of the Prescription and Limitation (Scotland) Act in 1973, the requisite period of use necessary to establish a public right of way was forty years, though courts were often lenient with regard to evidence of use in the early part of the period. Today, the statutory period is only twenty years. Prescription and Limitation (Scotland) Act, 1973, c. 52, § 3(3).
95. This terminology is taken from the National Catalogue of Rights of Way. *National Catalogue of Rights of Way (CROW)*, SCOTTISH RIGHTS OF WAY & ACCESS SOC'Y (Jul. 27, 2008, 9:21AM), [http://scotways.com/index.php?option=com\\_content&view=article&id=47:national-catalogue-of-rights-of-way-crow&catid=34:about-rights-of-way&Itemid=66](http://scotways.com/index.php?option=com_content&view=article&id=47:national-catalogue-of-rights-of-way-crow&catid=34:about-rights-of-way&Itemid=66).
96. GRETTON & STEVEN, *supra* note 80, at 248; REID, *supra* note 71, ¶¶ 500–01. To appreciate the difficulty advocates historically faced in establishing public rights

to establish, as the line between hostile occupation (leading to prescription) and implicit toleration (which does not) is often difficult to draw in actual cases.<sup>97</sup>

At the end of the twentieth century, public rights of way were seen as an insufficient response to the public's need for recreational and education access to enclosed land for two principal reasons. First, as we have seen, the doctrinal limitations and stringent grounds for constituting a public right of way were simply too confining and created too much uncertainty for those who sought greater recreational access. One scholar who studied access rights carefully and was deeply involved in the consensus building efforts that eventually led to the enactment of the LRSA estimated in 2003 that although there were 15,000 kilometers of "claimed public rights of way in Scotland . . . the legal status of 80 percent of those routes was uncertain."<sup>98</sup> Just as important, even if the legal doubts surrounding many claimed rights of way could have been cleared up, there was a strong sense that these routes still would not provide sufficient access over enclosed ground close to where most people in Scotland actually lived and thus where the greatest demand for recreational and educational access could be found.<sup>99</sup>

One other common law form—the elusive and obscure category of "community rights"—also failed to satisfy the growing demand for recreational access in Scotland.<sup>100</sup> This category of public rights theoretically belong to members of a particular community like a town or village and provides access over land within (and perhaps adjacent to)

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of way, see *Richardson v. Cromarty Petroleum Co. Ltd.*, (1982) S.L.T. 237, 238 (Scot.) (denying prescription because there were multiple ways of reaching one of the claimed termini, an area of foreshore, because there was insufficient evidence of the quantity of public use of a recreational footpath); *Strathclyde (Hyndland) Hous. Soc'y Ltd. v. Cowie*, (1983) S.L.T. 61, 62–63, 66 (Scot. Sheriff Ct.) (denying prescription because of insufficient end-to-end use of a mews lane even though various properties could be reached along the way).

97. Under the relevant statute of limitations in Scotland, the hostility element is expressed by the requirement that the possession be open, peaceable, and without judicial interference. Prescription and Limitation (Scotland) Act, 1973, c. 52, § 3(3). For discussion of the distinction between prescriptive user as of right and use by "mere tolerance," see *Marquis of Bute v. M'Kirdy & M'Millan*, (1937) S.C. 93, 120–21 (Lord President Normand) (Scot.) (observing that "if a proprietor lies by while regular and unrestricted public use is made of a private road between two public termini for the prescriptive period, the law will assume a public right rather than an easy-going proprietor").
98. Jeremy Rowan-Robinson, *Reform of the Law Relating to Access to the Countryside: Realising Expectations?*, 2003 J. PLAN. & ENVTL. L. 1394, 1396 (2003).
99. SCOTTISH NATURAL HERITAGE, ACCESS TO THE COUNTRYSIDE FOR OPEN AIR RECREATION: SCOTTISH NATURAL HERITAGE'S ADVICE TO GOVERNMENT 7 (1998) [hereinafter ACCESS TO THE COUNTRYSIDE].
100. Andrea Loux Jarman, *Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century*, 28 J. LEGAL HIST. 207 (2007).

that community for recreation or for more pedestrian activities like bleaching or pasturage.<sup>101</sup> These rights became highly politicized in nineteenth century Scotland as demands for open spaces available for recreation increased in response to urbanization and industrialization.<sup>102</sup> Politicization led both landowners and advocates for the public to bring several high profile test cases.<sup>103</sup>

In the first of these test cases, which involved alleged rights to draw water from a well and to wash, bleach, and dry clothes on land adjacent to the well (all within the limits of the burgh), the Court of Session recognized that inhabitants of a mere burgh of barony were entitled to the same level of common law protection as inhabitants of a royal burgh.<sup>104</sup> In addition, the court recognized that the burgh superior owed a kind of fiduciary duty to manage property subject to these community rights for the interest of all burgh inhabitants who historically used the land, even though they had neglected to exercise their rights to elect a magistrate for the burgh.<sup>105</sup> Ultimately, though, judicial development under this doctrine was halted by the Court of Session's holding in *Dyce v. Hay* that a community right of recreation could not be claimed by a burgh community on land *outside* the burgh that was not in any way connected to the burgh or its inhabitants and was owned by a third party.<sup>106</sup>

Even though some Scottish courts recognized that a right to play golf could constitute a servitude,<sup>107</sup> sanctioning a generalized right of

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101. *Id.* at 214–15.

102. *Id.* at 219–20.

103. *Id.* at 208–20, 228–32.

104. *Home v. Young*, (1846) 9 D. 286, 300–04 (Scot.). In this complex case, the legal factor of the estate of the superior of Eyemouth (a burgh of barony) sued five impoverished women who lived in Eyemouth to establish an exclusive claim of property to the superior's land unencumbered from any servitude of bleaching of linen, washing of clothes, or drawing of water. The women all leased, rather than owned, their houses and therefore could not point to a dominant tenement for purposes of establishing a servitude under Scottish law. Because the community was only a burgh of barony, and not a royal burgh, it was not "infert" of any land, and thus the burgh itself could not provide a dominant tenement upon which to base a servitude. *Id.* at 286–89.

105. *Id.* at 297–303. For a detailed discussion of *Home v. Young*, see Jarman, *supra* note 100, at 209–10, 222–23.

106. *Dyce v. Hay*, (1849) 11 D. 1266, 1272 (Scot.). *Dyce* concerned the assertion of a right to recreation on the land of Lady James Hay that lay between a footpath and the River Don outside of the burgh of barony of Old Aberdeen and which was claimed on behalf of the inhabitants of Aberdeen and other burghs and villages in the vicinity. *Id.* at 1266–67.

107. *See Magistrates of Earlsferry v. Malcolm*, (1829) 7 S. 755, 756–57 (Scot.), *aff'd*, (1832) 11 S. 74 (Scot.) (holding that a royal burgh could claim a servitude of golfing on land owned by neighboring proprietor); *see also Dempster v. Cleghorn*, (1813) 3 Eng. Rep. 780, 785–86 (appeal taken from Scot. Sess.) (recognizing a servitude of golf claimed to prevent the buyer of burgh land from keeping a rabbit warren on the famous links at St. Andrews). This St. Andrews decision of the

recreational access was simply a step too far, even under the potentially flexible doctrine of community rights.<sup>108</sup> The decision in *Dyce v. Hay* was a key turning point. It marked a “conservative backlash” against a liberalizing view toward community uses and an emerging, but politically well-connected, access movement that had proved willing to engage in dramatic and galvanizing acts of property law breaking.<sup>109</sup> After these test cases, except in the special arena of golf, Scottish courts continued to retreat from protecting asserted community rights of recreation.<sup>110</sup> In sum, Scottish courts’ failure to develop the common law of public rights of way and community rights in ways that would respond to the intensifying demand for public recreational access was a significant impetus for seeking legislative reform in the form of the LRSA.

## B. The Law of Trespass

If public rights of way and community rights failed to serve the access aspirations of the Scottish public, there was hardly any more satisfaction with the law of trespass in Scotland prior to the passage of the LRSA. Not only did many Scots consistently question the existence of a law of trespass in Scotland, but just as important, the trespass law that did exist was difficult and often impractical to enforce.

In the late nineteenth century, the remarkable late Victorian jurist, historian, political commentator, social reformer, and Liberal politician James Bryce introduced no less than twelve bills in the British

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Court of Session was later reversed and remitted by the House of Lords. *Id.* at 787–89. For more on the St. Andrews case, see Andrea C. Loux, *The Great Rabbit Massacre—A “Comedy of the Commons”? Custom, Community and Rights of Public Access to the Links of St. Andrews*, 22 LIVERPOOL L. REV. 123 (2000).

108. As one contemporary commentator puts it, “[a]side from the game of golf, the judiciary [as reflected by the opinions of the majority in *Dyce*] viewed recreational uses generally as too insignificant to be the object of legal rights.” Jarman, *supra* note 100, at 228.
109. *Id.* at 222–29 (describing how some of the key legal actors in *Dyce* had been involved in earlier cases such as *Torrie v. Duke of Athol*, (1849) 2 D. 328 (Scot.), a staged confrontation over a disputed road, and the 1822 case of Thomas Harvie in which a crowd blew up an obstruction placed by a landowner on a footpath that ran along the River Clyde in Glasgow). For a detailed discussion of the creative and often inspiring impact of property law breaking on the development of property law in the United States, see Eduardo Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PENN. L. REV. 1095, 1104–40 (2007).
110. *Compare* *Harvey v. Lindsey*, (1853) 15 D. 768, 774–76 (Scot.) (granting interdict to proprietrix to prevent villagers from skating, curling, and sliding on frozen loch within her private, enclosed grounds because villagers’ use was too “occasional and accidental” to be declared a servitude), *with* *Sanderson v. Lees*, (1859) 22 D. 24, 27–28 (Scot.) (recognizing right of inhabitants of Musselburgh to use “whole ground” on which a golf course was situated and to prevent magistrates of burgh from selling the land).

Parliament seeking to secure rights to access to land in Scotland.<sup>111</sup> Bryce's legislative initiatives came in response to private landowners' and tenants' attempts to restrict access to estates or shut down what were perceived to be existing public rights of way.<sup>112</sup> In the parliamentary debates, Bryce asserted that there had always been a common law right of access to land in Scotland, at least for purposes of "recreation and scientific or artistic study."<sup>113</sup>

Bryce was not alone in fostering this egalitarian view toward land access. An important contemporary of Bryce's, Graham Murray, the Solicitor General for Scotland and later Lord President of the Court of Session, once suggested that "in Scotland there is not in any true sense a law of trespass at all."<sup>114</sup> Several other members of Parliament and commentators expressed similar views.<sup>115</sup> A century later, in the debates preceding the passage of the LRSA, a new generation of Scots continued to assert that Scotland recognized a right of access to privately owned land at least for recreational purposes.<sup>116</sup>

Despite the frequency of these denials of the existence of trespass, the weight of authority is clearly against the access advocates. Historical sources, judicial opinions, and almost all contemporary Scottish legal academics agree that landowners in Scotland always enjoyed an exclusive right to control access to their lands, absent some other legally recognized right, and thus could theoretically prohibit and sanction violations through the law of trespass. In his influential treatise, *An Institute of the Law of Scotland in Four Books*, published posthumously in 1773, the late institutional writer John Erskine observed:

This right [of property] necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall [e]ncroach upon the right of the proprietor; and consequently every [e]ncroachment, though it should not be guarded against by statute, founds

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111. Christopher Harvie, *Bryce, James, Viscount Bryce (1838–1922)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/32141?docPos=3> (last visited Nov. 4, 2010). Bryce's accomplishments are extraordinary. He wrote two immensely popular and influential books, *The Holy Roman Empire* and *The American Commonwealth*, traveled the world, climbed mountains on many continents, served as Regius Professor of Civil Law at Oxford, and finally, served as the British Ambassador to the United States between 1907 and 1913. Mount Bryce in the Rocky Mountains is named after him. *Id.*
112. Tom Guthrie, *Access Rights*, in *THE PROMISED LAND: PROPERTY LAW REFORM 125*, 125 (Robert Rennie ed., 2008).
113. *Id.* at 127 (quoting from preamble to Bryce's bills up through 1897).
114. *Id.* at 127 & n.14.
115. *Id.* at 127 n.15.
116. See Alan Blackshaw, *Implied Permission and the Traditions of Customary Access*, 3 EDIN. L.R. 368 (1999) (asserting the existence of a "long-standing general freedom in Scotland to take harmless responsible access to land not in cultivation without any need to seek consent, and without trespass").

the proprietor in an action of damages. But positive statute hath secured property against several [e]ncroachments that most frequently happen, by inflicting special penalties on the trespasser . . . .<sup>117</sup>

Eighteen years later, Lord President Campbell stated in an often quoted opinion that “[n]o man can claim a road or passage through another man’s property, even for the purpose of going to church, without a servitude, far less for amusement of any kind, however necessary for health.”<sup>118</sup> In his widely read and cited *Principles of the Law of Scotland*, George Joseph Bell wrote that the “right of property” encompassed the right to prevent others from “setting foot upon” his land or encroaching “however inoffensively” and that “[i]ndividual benefit or convenience will not justify the invasion of the exclusive right of property.”<sup>119</sup> One hundred years later, Lord Trayner observed that the “often expressed” notion that there was no law of trespass in Scotland was “a loose and inaccurate one.”<sup>120</sup> Finally, John Rankine, one of the leading commentators on Scottish property law at the end of the nineteenth century, flatly rejected the existence under Scottish law of any kind of “*jus spatiandi*—a privilege of using the surface of a landowner’s ground without express grant, for strolling about, games, access for curling, [etc.]”<sup>121</sup>

Most contemporary observers agree that prior to the LRSA landowners in Scotland could invoke the law of trespass to exclude any persons seeking access to their land without some private law or special statutory right. Indeed, several of the Scottish academic lawyers most heavily involved in developing the LRSA concluded, based on extensive review of these and other authorities, that Scottish common law had never recognized any so called “right to roam.”<sup>122</sup> Other con-

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117. 1 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 151 (Edinburgh, John Bell 1773).
118. *Livingstone v. Earl of Breadalbane*, (1791) 3 Pat. App. 221 (H.L.) 223 (appeal taken from Scot.). In this famous case, a Scottish laird of a Perthshire estate brought an action for injunction and damages against an English gentleman who came to Scotland for a hunting holiday, acquired a hunting license, and proceeded to shoot game on the proprietor’s unenclosed estate for several days without permission. The House of Lords affirmed Lord President Campbell’s view, holding that under the law of Scotland, even though wild game was *res nullius*, no person was entitled to enter a proprietor’s unenclosed land for purposes of shooting game, and a proprietor was entitled to bar anyone from entering his land. *Id.* at 221.
119. GEORGE JOSEPH BELL, PRINCIPLES OF THE LAW OF SCOTLAND §§ 943–44, at 424 (Edinburgh, T. & T. Clark 6th ed. 1872) (1829). Bell went on to stress that any right to invade or use the property of another must be purchased. *Id.* § 944, at 424. Moreover, Bell’s understanding that a landowner could avail himself of certain trespass remedies is confirmed by his discussion of permissible and impermissible means of self-help “to detain a trespasser.” *Id.* § 961, at 428–29.
120. *Wood v. N. British Ry. Co.*, (1899) 2 F. 1, 2 (Scot.).
121. JOHN RANKINE, THE LAW OF LAND-OWNERSHIP IN SCOTLAND 322–33 (4th ed. 1909).
122. Rowan-Robinson & Ross, *supra* note 92, at 226.



temporary Scottish property law scholars not involved in the debate surrounding the LRSA concur.<sup>123</sup>

Still, what makes the law of trespass in Scotland problematic—and perhaps what accounts for so many Scots’ dismissive attitude toward it—is the difficulty that landowners and others face in enforcing the right to exclude. The practical limitations on enforcement stem from several doctrinal conditions. First, and most tellingly, trespass in Scotland is primarily viewed as constituting a tort, assuming there is damage, and is generally *not* considered to be a crime.<sup>124</sup> Prior to the LRSA, a trespasser would be subject to criminal sanction only in exceptional situations: for instance, when the trespasser was also caught poaching game,<sup>125</sup> overnight camping,<sup>126</sup> New Age traveling or participating in a “rave,”<sup>127</sup> or engaging in hunting sabotage.<sup>128</sup>

More significantly, although trespass can in principle be interdicted (enjoined), this remedy can be difficult to obtain and of limited value for a number of reasons. At the outset, a proprietor cannot practically obtain an interdict against the public at large, because an interdict is only available if the identity of the trespasser is known.<sup>129</sup> In addition, there must be a reasonable likelihood of trespass occurring in the future before an interdict will issue.<sup>130</sup> Thus, a proprietor usually must establish evidence not only of past trespass,<sup>131</sup> but also, at least according to some decisions, that a trespasser has failed to heed proper warnings.<sup>132</sup> Finally, for an interdict to be available, the

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123. See 1 WILLIAM M. GORDON & SCOTT WORTLEY, *SCOTTISH LAND LAW* ¶ 13-09, at 399–400 (3d ed. 2009) (rejecting the notion that there is no law of trespass in Scotland); GRETTON & STEVEN, *supra* note 80, at 253 (same); REID, *supra* note 71, ¶ 180 (defining trespass as “temporary or transient intrusion into land owned or otherwise lawfully possessed by someone else” and noting that both slight intrusion and harmless intrusion can constitute trespass, although these latter intrusions may not be easily remedied).
124. GRETTON & STEVEN, *supra* note 80, at 254; see also GORDON & WORTLEY, *supra* note 123, ¶ 13-09, at 400 (explaining that what is most often meant by saying that there is no law of trespass in Scotland is that “trespass is not a crime at common law”).
125. Game (Scotland) Act, 1832, 2 & 3 Will. 4, c. 68, §§ 1–3, 5 (criminalizing poaching activities during daytime and establishing fines and forfeiture of game as penalties); Night Poaching Act, 1828, 9 Geo. 4, c. 69, § 1 (same for night-time poaching and allowing incarceration for up to three or six months as penalty, depending on number of offenses).
126. Trespass (Scotland) Act, 1865, 28 & 29 Vict., c. 56, § 3.
127. Criminal Justice and Public Order Act, 1994, c. 33, §§ 61–62.
128. See *id.* §§ 68–69.
129. REID, *supra* note 71, ¶ 183.
130. *Magistrates of Inverurie v. Sorrie*, (1956) S.C. 175, 179–80 (Scot.); *Hay’s Trs. v. Young*, (1877) 4 R. 398, 400–02 (Scot.).
131. *Warrand v. Watson*, (1905) 8 F. 253, 262 (Scot.).
132. *Cf. Paterson v. M’Pherson*, (1917) 33 Sh. Ct. Rep. 237, 239–41 (Scot.) (denying interdict because defender fenced in his sheep after being notified of single incident of his sheep straying onto and grazing on neighbor’s farm).

trespass must be non-trivial. In the leading case, *Winans v. Macrae*,<sup>133</sup> concerning an alleged trespass by a crofter's pet lamb onto a neighboring 200,000 acre estate, the court made it clear that interdicts will generally not be awarded for de minimis trespasses that do not threaten any demonstrable or "appreciable wrong."<sup>134</sup> All of these practical limitations led one late nineteenth century landowner to complain:

This power [to apply for interdict] is never exercised and is perfectly useless, as the tourist or botanist does not intend going up the mountain a second time, and if he did, the expense and trouble attending the application would be out of all proportion to the advantage gained, seeing that a fresh batch of visitors might be expected the very next day.<sup>135</sup>

When a landowner sues for damages in lieu of or in addition to an injunction, another doctrinal limitation comes into play. In a leading late nineteenth century decision, Lord Ormidale clearly implied that an innocent or good faith intruder would not be liable for trespass, suggesting that liability for this tort is not strict.<sup>136</sup> Contemporary authorities concur, pointing out that monetary liability for trespass depends on a finding of fault.<sup>137</sup> In conclusion, unless a landowner apprehends a trespasser in the act of trespassing and can use some reasonable means of self-help to escort him off the premises,<sup>138</sup> a Scot-

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133. (1885) 12 R. 1051 (Scot.).

134. *Id.* at 1063 (Lord Young). Thus, it might be said that Scotland lacks a robust expressive remedy for trespass similar to the punitive damage award affirmed by the Wisconsin Supreme Court for intentional, but economically harmless, trespass in *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997). However, Professor Kenneth Reid reports that "interdict has frequently been granted without averments of injury." REID, *supra* note 71, ¶ 183 (citing *Brown v. Lee Constr. Ltd.*, (1977) S.L.T. (Notes) 61, 61 (Scot.)). In *Brown*, however, there was at least the potential for injury, as the trespass consisted of a tower crane's "jib" passing over the petitioner's garden for a lengthy period of construction on the neighboring property. (1977) S.L.T. (Notes) at 61.

135. Cameron of Lochiel, Letter to the Editor, *TIMES* (London), Mar. 10, 1892, *quoted in Guthrie, supra* note 112, at 129.

136. *Hay's Trs. v. Young*, (1877) 4 R. 398, 401 (Scot.) (finding not liable for interdict a plumber who dug holes without proprietor's permission in order to trace an old drain to obtain evidence for another legal proceeding because he acted in good faith).

137. *See* REID, *supra* note 71, ¶ 185; *see also* *Harvie v. Turner*, (1916) 32 Sh. Ct. Rep. 267, 268–69 (Scot.) (finding defender's liability for trespass damage founded on contemptuous failure to take precautions in face of repeated warnings about his bull trespassing onto neighbor's property and serving cows). Despite the holding in *Harvie*, Scottish courts are generally more likely to place the onus of preventing animal trespass on landowners on the theory that it is easier for them to enclose their land than for animal owners to keep their stock under constant control and supervision. GRETTON & STEVEN, *supra* note 80, at 255–56. On straying animals generally, *see* REID, *supra* note 71, ¶¶ 186–89.

138. In *Bell v. Shand*, (1870) 7 S.L.R. 267, 267–68 (Scot.), a landowner was held not liable for assault for dragging rather roughly by the coat collar a fifteen-year-old boy who the landowner had caught poaching. Of course, preventive measures

tish landowner's remedies are limited, particularly when confronted by isolated acts of trespass unaccompanied by damage.<sup>139</sup>

Notwithstanding the doctrinal limitations of the law of trespass, the repeated assertions by laymen and some lawyers that Scotland lacked a law of trespass at all and that there existed some generalized right of recreational access across privately owned land certainly remain significant despite their descriptive inaccuracy. These frequent assertions, reiterated in the press, in conversation, and occasionally even in learned journals,<sup>140</sup> helped establish a kind of customary expectation of access, or perhaps an implicit social obligation norm imposed on landowners, that helped smooth the way for legislative action.

### C. Access by Express or Implied Permission

Two other means of providing public access to private land deserve brief mention before we explore the emergence of the LRSA. First, it is always possible for landowners to provide express permission to persons seeking to gain access to their land for some kind of recreational or educational activity. If this occurs, the access taker is, by definition, not trespassing.<sup>141</sup> Prior to the enactment of the LRSA, some landowners in Scotland no doubt had entered into express license agreements with persons seeking access for these or similar purposes. Although it is impossible to know exactly how many agreements like this may have existed, there is no evidence to suggest they were widespread.<sup>142</sup>

Another consensual means of providing access rights occurs under the common law doctrine of implied permission or consent. This may be what some of the access advocates in the years preceding the LRSA were describing when they claimed that Scotland did not have a com-

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like building walls and fences are normally the preferred means of self-help. See *Winans v. Macrae*, (1885) 12 R. 1051, 1064 (Scot.); REID, *supra* note 71, ¶ 184.

139. REID, *supra* note 71, ¶ 182.

140. See Blackshaw, *supra* note 116.

141. REID, *supra* note 71, ¶ 181.

142. Pursuant to one such agreement that did occur, however, the owner of the large Assynt estate in the Highlands guaranteed free access to the public, along with sympathetic conservation management, in exchange for favorable inheritance tax treatment. AUSLAN CRAMB, WHO OWNS SCOTLAND NOW? 39 (1996). Yet, another notable agreement, the Concordat on Access (1996), signed by the Scottish Landowners' Federation, was clearly not a grant of express permission for the public to enjoy freedom of access, but rather just a statement of the signatories' intent to promote certain principles among its members. Rowan-Robinson & Ross, *supra* note 92, at 228. A third agreement, the Letterewe Accord, that preceded the Concordat is somewhere in between. Co-written by the wife of the owner of a large estate in Western Ross and the leader of the Rambler's Association, it provided a general right to roam but imposed some restrictions on access in deer stalking season. CRAMB, *supra* at 54-55.

mon law of trespass. Although it is certainly true that many Scottish landowners, particularly in more remote areas, often looked the other way and impliedly granted permission to walkers and hikers who passed across their land, the nature and scope of the resulting public rights always remained vague.<sup>143</sup>

The basic limitation in this area of the law, Professors Jeremy Rowan-Robinson and Andrea Ross explain, is that even if an access taker can prove to a court the principal elements of an implied consent claim,<sup>144</sup> the resulting implied permission is still quite “precarious” because a landowner can always withdraw consent at any time.<sup>145</sup> Thus, although implied consent can be a defense to a trespass action, once a landowner changes his mind and erects barriers to entry, engages in other forms of self-help, or perhaps even initiates legal proceedings, implied consent will not avail those seeking to regain access. It is easy to imagine how this unhappy situation would arise as landownership changes hands more frequently, absentee ownership becomes more common, or more intensive land exploitation activities are undertaken, phenomena that were all clearly underway in Scotland in the decades preceding the LRSA.<sup>146</sup>

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143. In fact, two scholars who attempted to penetrate and systematize this branch of the law concluded that it “gives rise to very considerable difficulty.” Rowan-Robinson & Ross, *supra* note 92, at 228.

144. Rowan-Robinson and Ross discerned three requirements for establishing implied permission for access to land: (1) the landowner’s knowledge that access is being habitually taken; (2) no serious attempts by the landowner to prevent access; and (3) an objective belief by the person taking access that permission is being given. *Id.* at 230–32. These authors found that there were basically two branches of judicial decisions that suggested some form of implied consent for permission to be on the land of another in Scotland. One branch involved cases of permanent encroachment by buildings or constructions, an area of little relevance to the LRSA. *Id.* at 228. The second, more significant, but still unreliable branch of decisions date from the first half of the 1900s and concern the liability of landowners for personal injury to persons (particularly children) who wandered onto their land. *Id.* at 228–29. As Rowan-Robinson and Ross explain, courts’ reluctance to declare victims “trespassers” in these cases probably stemmed more from a desire to avoid altering the principles of occupiers liability law and landowners’ duty of care than from any real desire to provide formal recognition of implied recreational access rights. *Id.*

145. *Id.* at 232.

146. See W. David H. Sellar, *The Great Land Debate and the Land Reform (Scotland) Act 2003*, 60 *NORSK GEOGRAFISK TIDSSKRIFT* [NOR. J. GEOG.] 100, 101 (2006) (reporting on the increasing commodification of Scottish land in the international marketplace, and the increasing likelihood that large landowners in Scotland were absentee and foreign); see also CRAMB, *supra* note 142, at 26–28 (listing top twenty landowners in Scotland by size of estate and major foreign landowners in Scotland); ANDY WIGHTMAN, *WHO OWNS SCOTLAND* 164 tbl.9, 165 tbl.10 (1996) (listing the twenty-five largest overseas landowners and the top ten investment landowners in Scotland respectively).

The conclusion of Scottish Natural Heritage, a respected quasi-autonomous non-governmental organization (QUANGO) that examined the entire landscape of public access law in Scotland in 1998 and that played a crucial consensus-building role prior to the passage of the LRSA, was accurate when it observed that no one was particularly happy with the status quo in Scotland. Landowners faced “difficulty in protecting their interests in the face of irresponsible or provocative behaviour by the public.”<sup>147</sup> In addition, the existing law of public access was neither clear to members of the public seeking access nor particularly protective of their interests in access.<sup>148</sup> To understand how this situation was transformed, though, we must now consider how a new consensus on access arrangements was forged in England and Wales, and then in Scotland.

#### IV. TWO PATHS TO EXPANDED PUBLIC ACCESS

To appreciate the novelty of the LRSA as a matter of institutional design, it helps to consider the Countryside and Rights of Way Act 2000 (CRoW Act), the access legislation that the British Parliament enacted a decade ago for England and Wales. Although the CRoW Act has been discussed in property law literature in the United States and abroad,<sup>149</sup> and is significant in its own right because it enshrines “a generaliz[ed] right of self-determining pedestrian access to open land” that the English common law could never recognize,<sup>150</sup> the CRoW Act is, as Part V will show, decidedly less ambitious than the LRSA.<sup>151</sup> To understand how these different institutional approaches emerged, this Part contrasts the origins of the CRoW Act in England and Wales with the preliminary studies and consensus building that occurred in Scotland prior to passage of the LRSA. This Part thus shows how these different historical experiences yielded different kinds of access legislation.

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147. ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 7.

148. *Id.* at 7–8.

149. See, e.g., JESSE DUKEMINIER, ET AL., PROPERTY 811–12 (7th ed. 2010); KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 1372–76 (5th ed. 2009); AJ VAN DER WALT, PROPERTY IN THE MARGINS 193–95 (2009); Jerry L. Anderson, *Countryside Access and Environmental Protection: An American View of Britain's Right to Roam*, 9 ENVTL. L. REV. 241 (2007) [hereinafter Anderson, *Countryside Access*]; Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375 (2007) [hereinafter Anderson, *Right to Roam*].

150. GRAY & GRAY, *supra* note 149, at 1372; see also Kevin Gray, *Pedestrian Democracy and the Geography of Hope*, 1 J. HUM. RTS. & ENV'T 45, 49–52 (2010) (detailing why a universal right to roam was inconceivable under English common law).

151. GRAY & GRAY, *supra* note 149, at 1372; VAN DER WALT, *supra* note 149, at 194; Rowan-Robinson, *supra* note 98, at 1394.

## A. Origins of the CRoW Act in England and Wales

The demand for some kind of legally recognized right to roam over open country in England and Wales has its origins in the loss of common access and use rights that took place during the centuries-long enclosure movement.<sup>152</sup> Under the common rights system that was extinguished by the enclosure movement, commoners enjoyed a wide assortment of use rights in land technically owned by a feudal lord.<sup>153</sup> Thus, an otherwise landless villager or commoner who had common rights might have been entitled to graze some animals on a common pasture, gather wood or turf on a manor's "wastelands," or let his pigs and geese glean the remains of a harvested field.<sup>154</sup> Starting in the late sixteenth century, but with increasing frequency between 1700 and the mid-1800s, private enclosure agreements and literally thousands of acts of Parliament extinguished these "commons" rights.<sup>155</sup>

While this is not the place to review the historiographic and theoretical debates over the causes, consequences, and fairness of the enclosure movement, one thing seems clear: at the end of the period of enclosure, English property law had moved from what Stuart Banner has described as at least a partially "functional" system of property rights, in which many different individuals might have rights to use a particular parcel of land, to a purely "spatial" system of absolute ownership of specific land.<sup>156</sup> In the latter there is little or no room for a generalized right of public access, even for purposes of recreation and passage. By the beginning of the twentieth century, it was clear that members of the public did not enjoy a general right of access over private land unless such a right had been granted by the owner or by statute.<sup>157</sup>

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152. See Gray, *supra* note 150, at 49 (noting that although a "golden age" of access may have existed in medieval England, in which something like a right to roam over uncultivated land was recognized, "any entitlement of this kind was gradually extinguished, from the 16th century onwards, by the enclosure movement"). See generally Anderson, *Right to Roam*, *supra* note 149, at 383–89.

153. Anderson, *Right to Roam*, *supra* note 149, at 383.

154. *Id.*

155. *Id.* at 383–84; see also MARION SHOARD, A RIGHT TO ROAM 97–110 (1999) (elaborating on transition from medieval land ownership patterns to feudalism and enclosure movement). For a comprehensive study of the system of common rights that the enclosure movement tore down and the social, political and economic effects of enclosure, see J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700–1820 (1993).

156. Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S365–68 (2002); see Anderson, *Right to Roam*, *supra* note 149, at 389–90. As Banner points out, though, the allocation of property rights in pre-enclosure England was not purely functional; plenty of land was divided spatially as well. Banner, *supra*, at 366.

157. ANGELA SYDENHAM, PUBLIC RIGHTS OF WAY AND ACCESS TO LAND 196–97 (2001).

Yet, as Jerry Anderson explains, there was some suppleness in the property rights system that emerged out of the enclosure movement. In addition to their use rights, members of the public had also enjoyed the right to walk or ride over the commons or wastelands that belonged to landlords for purposes of traveling from one village to another or to other important places of congregation like mills, churches, or the coast.<sup>158</sup> The routes the commoners used most frequently developed over time into footpaths and bridleways.<sup>159</sup> Much like public rights of way in Scotland, these footpaths and bridleways eventually were recognized in English law as public easements over private land, but just as in Scotland, these public easements only provided for access along a particular and defined route and did not provide a generalized right of access or right to roam.<sup>160</sup> Because these footpaths and other public ways were often the primary means of transportation between villages and other places people needed to go, they became relatively widespread in England and Wales, covering, according to some estimates, over 130,000 linear miles.<sup>161</sup>

The first major legislative break from the spatial system that emerged at the end of the enclosure movement came with the Law of Property Act in 1925.<sup>162</sup> Appearing during the interwar period when the British outdoor movement began to gain momentum and popularized the notion that healthy open air pursuits were a valuable public good, this landmark legislation established public rights of access for the purposes of “air and exercise” to what was considered “common land” in certain urban and metropolitan districts in England and Wales and in some rural areas like the popular Lake District of north-west England and parts of South Wales.<sup>163</sup> Today, this legislation

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158. Anderson, *Right to Roam*, *supra* note 149, at 381; *see also* NEESON, *supra* note 155, at 171–72, 194 (describing how commoners enjoyed various forms of recreational access, for “walking, looking, and being” and playing football, over open fields and commons in the common right system).

159. Anderson, *Right to Roam*, *supra* note 149, at 383.

160. *Id.* at 380. Anderson details the various means by which these public easements were recognized under English law. “Sometimes the special commissioners appointed under an enclosure act would explicitly include a public right of way in their award.” *Id.* at 390. More often, the doctrines of prescription and implied dedication were used, both of which required a twenty-year period of use. *Id.* at 390–91; *see also* SHOARD, *supra* note 155, at 15–19 (describing the current system and regulation of footpaths and bridleways in England and Wales).

161. Anderson, *Right to Roam*, *supra* note 149, at 381; *see also* SHOARD, *supra* note 155, at 17 (reporting that as of 1999, England and Wales had “101,416 miles of public footpath, 21,450 miles of public bridleway, 4,590 miles of road used as public path, and 2,267 miles of byway open to all traffic”).

162. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20 (Eng. & Wales).

163. *Id.* § 193; SYDENHAM, *supra* note 157, at 195. This “common land” consists merely of any land (typically privately owned) over which “commoners” traditionally enjoyed specific use rights, such as the right to graze animals or collect wood, the remnants of the pre-enclosure rights to the commons. SYDENHAM, *supra* note

still protects the public's right to be present on many small commons and large open spaces in or near major cities.<sup>164</sup>

After World War II, another landmark act of Parliament, the National Parks and Access to the Countryside Act 1949 (NPACA), made several significant contributions to public access in England and Wales.<sup>165</sup> First, it facilitated agreements between landowners and local authorities and the promulgation of orders that led to approximately 50,000 hectares becoming open to the public.<sup>166</sup> Second, and more important, the Act committed each county council to conduct a survey of existing public rights of way (the footpaths, bridleways, and carriage ways discussed above) and to have them comprehensively mapped.<sup>167</sup> After initial surveys were completed and landowners were given an opportunity to appeal, definitive maps were published which showed the location of now legally recognized public rights of way.<sup>168</sup> As a result of this mapping process, the NPACA produced, to a much greater extent than in Scotland, a system of "systematically confirmed public rights of way" and a procedure for resolving disputes over controversial paths.<sup>169</sup> In short, the NPACA created, as Jerry Anderson puts it, some "certainty regarding the existence and location of footpaths, which furthered the public's confidence in using them."<sup>170</sup>

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157, at 197; see also Anderson, *Right to Roam*, *supra* note 149, at 383–85 (commenting on how enclosure affected commons rights and dismantled an efficient and "complex system of land utilization"). For a valuable discussion of the emergence of the British outdoor movement in the interwar period, its ideology, and how the movement intersected with other forces, such as mass trespass and habitual trespassing organized by the Ramblers' Association and others, see Ben Mayfield, *Access to Land: Social Class, Activism and the Genealogy of the Countryside and Rights of Way Act*, 31 STATUTE L. REV. 63, 66–71 (2010). See also HARVEY TAYLOR, A CLAIM ON THE COUNTRYSIDE: A HISTORY OF THE BRITISH OUTDOOR MOVEMENT 1–16 (1997) (providing an overview of manifold forces that shaped this movement).

164. SHOARD, *supra* note 155, at 25–26.

165. National Parks and Access to the Countryside Act, 1949, 12, 13 & 14 Geo. 6, c. 97 (Eng. & Wales).

166. SHOARD, *supra* note 155, at 35–38; SYDENHAM, *supra* note 157, at 195.

167. Anderson, *Right to Roam*, *supra* note 149, at 403.

168. *Id.*

169. *Id.*; see National Parks and Access to the Countryside Act, 1949, 12, 13, 14 Geo. 6, c. 97, §§ 46, 51–55, 107. Periodic reviews of the conclusive maps were required, and new rights of way could be established based on new information, but only after compensating the landowner. Anderson, *Right to Roam*, *supra* note 149, at 403; see also SHOARD, *supra* note 155, at 21 (contrasting the difference in both extent and certainty of public footpaths and bridleways in England and Wales versus public rights of way in Scotland and noting that in England and Wales the average density of public paths is 2.2 miles of path per square mile of countryside compared to 0.2 in Scotland).

170. Anderson, *Right to Roam*, *supra* note 149, at 403. Looking back at the 1949 Act, Mayfield calls it "a clear antecedent to the Countryside and Rights of Way Act." Mayfield, *supra* note 163, at 73. He also observes that it signaled Britain's first



In the 1950s and then again in the 1980s, various royal commissions and reports recommended expansion of and greater legal protection for access rights on common land.<sup>171</sup> Yet, landowner opposition and the Conservative governments' lack of interest yielded inaction.<sup>172</sup> It was only in 1997, with the election of the Labour Party led by Tony Blair and other "New Labour" politicians who had committed the party to broad conservation values and to increasing public access to the open countryside, that momentum was regained.<sup>173</sup>

After first considering a voluntary approach to enhancing access favored by the Conservative Party and landowner groups, the government ultimately chose to promote compulsory access rights that gave the public the right to "explore" the countryside and travel beyond established paths or where landowners had granted permission.<sup>174</sup> After debate in both houses of Parliament, including significant amendments in the House of Lords, the CRoW Act was passed and received Royal Assent on November 30, 2000.<sup>175</sup> As we shall see, a considerable amount of implementation work—the mapping of statutorily defined CRoW "access land"—still had to be accomplished even after this momentous change.<sup>176</sup>

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comprehensive commitment to protection of the countryside and the public's rights to enjoy its beauty and that, much as with the Law of Property Act in 1925, this legislation followed soon after the conclusion of a world war when the British public felt its wartime sacrifices should be rewarded with greater public access to the land which had helped inspire much of that wartime sacrifice. *Id.* at 71–73.

171. See Anderson, *Right to Roam*, *supra* note 149, at 398–400, 402–03.

172. SYDENHAM, *supra* note 157, at 195.

173. SHOARD, *supra* note 155, at 5–7; SYDENHAM, *supra* note 157, at 195. As Mayfield notes, the 1997 Labour Party manifesto which promised wider access to land in Britain reflected a mixture of "New Labour" values including conservation, environmental awareness, and concerns about public heath, rather than just the traditional class consciousness associated with "old Labour." Mayfield, *supra* note 163, at 75–76.

174. SHOARD, *supra* note 155, at 7; SYDENHAM, *supra* note 157, at 195–96; Mayfield, *supra* note 163, at 79–80. The British government performed an extensive cost–benefit analysis of the basic options for achieving greater public access to the countryside before deciding upon the compulsory legislation option. For a summary of this analysis, see DEPT. OF ENV'T, TRANSP., & REGIONS, APPRAISAL OF OPTIONS ON ACCESS TO THE OPEN COUNTRYSIDE OF ENGLAND AND WALES 13–27 (1999).

175. SYDENHAM, *supra* note 157, at 200.

176. See *Open Access Land*, RAMBLERS, <http://www.ramblers.org.uk/freedom/rightor-oam/latestdevelopments.htm> (last visited Nov. 4, 2010) (noting that the mapping process established under the CRoW Act was finally completed on October 31, 2005).

## B. Historical Memory, Preliminary Studies, and Consensus Building in Scotland

Scotland's recent experience leading up to its breakthrough in access legislation was noticeably different than England and Wales' experience preceding the CRoW Act. To a much greater extent than in England and Wales, the motivation for land reform in Scotland was marked not just by unhappiness with the amount of legally protected public access to the outdoors but also by Scots' broader dissatisfaction with both the distribution and nature of landownership itself in Scotland.<sup>177</sup> This dissatisfaction transcended the technical deficiencies in the law regarding public rights of way, trespass, and implied consent described in Part II. Moreover Scots responded to this general dissatisfaction and to these technical problems with its existing access regime with an unusually well organized and collaborative effort to build consensus around the principles of a new access regime. Finally, the enthusiasm and national pride in Scotland that was produced by constitutional devolution in the United Kingdom clearly played a decisive role in enabling these common principles to flower in the form of the LRSA.

Scots' dissatisfaction with the state of landownership in their country had at least three different aspects. First, and perhaps most fundamentally, in the decades preceding the LRSA many Scots complained that ownership of the land in Scotland was concentrated in a surprisingly small number of people and institutions.<sup>178</sup> While the vast majority of Scots live in the urban belt extending from Edinburgh to Glasgow and in several other scattered urban areas—namely Aberdeen, Dundee, and Inverness—where landownership is relatively diffused, it is undeniable that much of the rural and undeveloped land in Scotland is held in large estates by a relatively small number of private and public owners.<sup>179</sup> Although the precise numbers may vary depending on who is doing the counting, one critic of land ownership patterns in Scotland reported that in 1970 just 1720 owners owned more than twelve million (64.3%) of Scotland's roughly nineteen million acres and that by 1995 just 1411 owners owned slightly more than eleven million acres (57.8%) of Scotland.<sup>180</sup>

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177. Sellar, *supra* note 146, at 100–01.

178. *Id.*

179. *Id.*

180. WIGHTMAN, *supra* note 146, 142–43, 157 tbl.1, 158 tbl.3; *see also* CRAMB, *supra* note 142, at 12–28 (commenting on the elite status of large Scottish landowners and how their view of Scottish property “as a sort of personal, sporting paradise” results in a system that “benefit[s] the owner, fail[s] the environment, [and] do[es] little for the community”); JOHN MCEWEN, WHO OWNS SCOTLAND? A STUDY IN LAND OWNERSHIP 18–20 (Polygon 2d ed. 1981) (listing the names of major landowners in Scotland, the acreage of their estates, and where the estates are located). McEwen's study was the first breakthrough in this field, and Wightman

The second source of dissatisfaction with land ownership stems from the fact that anyone can acquire and own land in Scotland, without committing to live there, being a citizen of Scotland, or adhering to any kind of community-based land management regime.<sup>181</sup> The increasingly frequent phenomena of absentee ownership, whether by the archetypical English grandee who visits his sporting estate in Scotland a few weeks each year or the more contemporary example of the Arab sheik, Dutch or Danish business tycoon, or English rock star who buys a Scottish estate for the prestige, contributed to the sense that Scottish land was becoming just another object of desire, in effect a commodity available on the international marketplace.<sup>182</sup>

Finally, there was a profound historical sense that many Scots had been unjustly evicted from their ancestral land as a result of what is known as the “Highland Clearances,” the process through which small customary agricultural tenants, often called “crofters,” were cleared from their landholdings to make way for agricultural improvement, especially large sheep farms, in the late eighteenth and much of the nineteenth centuries.<sup>183</sup> Much like the English enclosure movement, the causes and consequences of the Clearances have been debated at length in Scottish historiography.<sup>184</sup> What is more important for our purposes, though, is the extent to which the plight of the crofters and their frequent law-breaking resistance to the Clearances was popularized and romanticized through poetry, fiction, and popular history and

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relies on it extensively, though he made corrections and improvements to McEwen’s numbers. See WIGHTMAN, *supra* note 146, at 147, 158 tbls. 2 & 3. Because of the absence of an official land registry at the time, McEwen and his collaborators engaged in a painstaking process of collecting data using index cards and estate boundaries marked on ordinance survey maps. McEwen, *supra*, at 6–7. Cramb reports that as of 2000 the powerful Scottish Landowners’ Federation consisted of approximately 4000 members, and their membership accounted for about 80% of the land in Scotland. CRAMB, *supra* note 142, at 19.

181. CRAMB, *supra* note 142, at 18–20; Sellar, *supra* note 146, at 101.

182. Cramb’s presentation of the contemporary state of land ownership in Scotland today dramatically illustrates this concern over commoditization as he shows that large landowners today run the gamut from the traditional “self-perpetuating élite, educated at Eton/Harrow and Oxford/Cambridge, pursuing careers in London” to self-made rock stars like “Paul McCartney, Genesis, and Ian Anderson of Jethro Tull,” not to mention pension funds, insurance companies, and environmental groups. CRAMB, *supra* note 142, at 12, 17, 21; see also WIGHTMAN, *supra* note 146, at 147–50, 164 tbl.9, 165 tbl.10 (offering a dispassionate account of “overseas interests,” including the curious case of large numbers of Danish individuals and corporations and “investment owners”).

183. Sellar, *supra* note 146, at 101.

184. For comprehensive and balanced studies of the entire social and economic history of the Clearances, including peasant resistance, see ERIC RICHARDS, *THE HIGHLAND CLEARANCES: PEOPLE, LANDLORDS AND RURAL TURMOIL* (2005) and T.M. DEVINE, *THE SCOTTISH NATION: 1700–2007*, 124–50, 413–47 (2006).

thus entered into Scottish national consciousness.<sup>185</sup> Regardless of the complex economic and social factors that produced these events, the Clearances have become synonymous in Scottish historical memory with a story of loss, dispossession, and resistance that helped fuel the political drive for radical land reform at the end of the twentieth century, the precise moment when Scotland finally regained its own Parliament and a much greater degree of political and law making independence.<sup>186</sup> This bitter yet proud historical memory combined with Scots' growing dissatisfaction with the state of land ownership in Scotland to produce a powerful desire for legal change.

For actual change to occur, however, more than a convergence of historical conditions was necessary. The passage of actual legislation required the contribution of many individuals and organizations working to develop a consensus for an achievable platform of land reform that would feature enlarged public access as a key element. One organization that played a crucial role was the QUANGO known as Scottish Natural Heritage (SNH).<sup>187</sup> Another was the Access Forum, a group designed to work in a collaborative manner to represent not only land management interests but also recreational interests and the public agencies that would eventually be involved in overseeing any new access legislation.<sup>188</sup> Building on an influential agreement known as the Letterewe Accord, which had been negotiated in the early 1990s between the Dutch owner of an 87,000 acre estate in the Highlands and the head of the Ramblers' Association and which had provided for a generalized right of recreational access in exchange for restrictions on access during deer-stalking season,<sup>189</sup> the Access Forum took the lead in negotiating a critical document known as the Concordat on Access to Scotland's Hills and Mountains.<sup>190</sup>

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185. Sellar, *supra* note 146, at 101–02; *see also* Peñalver & Katyal, *supra* note 109, at 1114–22 (discussing the expressive power of property law breaking through the example of civil rights sit-ins in the American South during the 1960s).

186. Sellar, *supra* note 146, at 100–01.

187. Donna W. McKenzie Skene & Jeremy Rowan-Robinson, *Access to the Scottish Countryside: Proposals for Reform*, 2001 JURID. REV. 95, 96–97.

188. *Id.* at 96. Actually, the Access Forum is comprised of two separate fora: the Access Forum proper, dealing with access to land, and the Access Forum (Inland Water), which dealt with waterborne access. *Id.* In practice, the two groups often meet together and are thus referred to collectively as the Access Forum. *Id.* According to reports, the Access Forum did actually work in a cooperative, non-confrontational mode. *Id.* Jeremy Rowan-Robinson served as Chairman of the Access Forum. *Id.* at 95.

189. The Letterewe Accord was considered by many access groups and landowners to be a blueprint for a non-legislative solution to the access problem. CRAMB, *supra* note 142, at 54–55. This accord was adopted by some neighboring (mainly Dutch-owned) estates in Western Ross, but apparently not in large numbers elsewhere. *Id.* at 54.

190. McKenzie Skene & Rowan-Robinson, *supra* note 187, at 96.

Signed in 1996 by the Access Forum and the leadership of the Scottish Landowner's Federation, the Concordat signaled recognition by at least some influential landowners of the principle of "freedom of access exercised with responsibility and subject to reasonable constraints for management and conservation purposes."<sup>191</sup> Access takers, for their part, recognized "the needs of land management."<sup>192</sup> Although it was perceived as a groundbreaking agreement, its scope was limited. As its title suggests, it only addressed access to hills and mountains and left the issue of recreational access to lowlands and in-land water for another day. Additionally, it did not bind any members of that organization, or any other landowners for that matter, even though it was signed by the convener of the Scottish Landowner's Federation. Despite its limitations, access enthusiasts in Scotland still viewed it as a breakthrough because it signaled landowner acceptance of the notion that there should be some kind of presumption in favor of recreational access.<sup>193</sup>

Another crucial linchpin in the process leading to passage of the LRSA was the election on May 1, 1997, of Britain's Labour government. During its exile, the British Labour Party had committed itself not only to constitutional devolution and greater access rights in England and Wales but also to initiate a study of the system of land ownership and management in Scotland.<sup>194</sup> Consequently, as Donald Dewar, then Secretary of State for Scotland, put it in 1998, "with the advent of the Scottish Parliament, there will be for the first time a real sustained opportunity to debate at Parliamentary level the policies which are right for Scotland."<sup>195</sup> Dewar's remark captures a widespread sentiment in Scotland that prior to devolution, the British Parliament—especially large landowning interests that were well rep-

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191. Elizabeth Buie, *Protagonists Urged to Give 'Ground-Breaking' Concordat Chance as Preferred Option to Legislation*, HERALD SCOTLAND (Glasgow), Jan. 18, 1996, <http://www.heraldscotland.com/sport/spl/aberdeen/protagonists-urged-to-give-ground-breaking-concordat-chance-as-preferred-option-to-legislation-peace-deal-over-access-to-the-hills-1.470643>.

192. *Id.*

193. *Id.*

194. See SHOARD, *supra* note 155, at 6–7; Donna McKenzie Skene et al., *Stewardship: From Rhetoric to Reality*, 3 EDIN. L. REV. 151, 152 (1999).

195. Rt. Hon. Donald Dewar, MP, Sec. of State for Scot., Fifth John McEwen Memorial Lecture: Land Reform for the 21st Century (Sept. 4, 1998), available at <http://www.caledonia.org.uk/land/dewar.htm>. Dewar's speech, given as the fifth John McEwen Memorial Lecture in September 1998, is regarded as one of the definitive statements of the case for land reform in Scotland and was given by the man who was then Secretary of State for Scotland and would soon become Scotland's first First Minister after devolution was secured, and who was labeled by some after his untimely death in 2000 as "the Father of the Nation." To understand Dewar's role in the long struggle for devolution, including the referenda that secured its final implementation, see DEVINE, *supra* note 184, at 616–17, 631–32, 634–37.

resented in the House of Lords—had blocked any serious consideration of land reform in Scotland.<sup>196</sup> Dewar also captured another remarkable aspect of Scottish attitudes towards land reform at this moment of constitutional restructuring. Although Scots had become increasingly concerned about the concentration of landownership in a relatively small number of hands and about how under-investment in land and neglectful land management had harmed rural communities, devolution produced a surge of optimism in Scotland and a willingness to move beyond vindictiveness. As Dewar explained, “[w]e must not use land reform to settle old scores. We must let the past go, and look to the future.”<sup>197</sup> So, when Queen Elizabeth II opened the Scottish Parliament on July 1, 1999—for the first time since 1707—the stage was set for profound change.

SNH, the other key consensus building entity, entered the scene prominently after the newly elected Labor Party government asked it to review the existing access arrangements for Scotland.<sup>198</sup> By 2000, relying in large part on previous work by the Access Forum, SNH completed and submitted to the Scottish Executive a draft “Access Code” that introduced and explained the concept of “responsible access,”<sup>199</sup> a crucial element of the consensus compromise that would facilitate passage of the LRSA. Meanwhile, back in 1998, drawing again on recommendations of the Access Forum, SNH had published a major report, *Access to the Countryside for Open-Air Recreation*,<sup>200</sup> perhaps the single most important pre-legislative document on access rights. This report set forth all of the key principles that had gained support among interested parties during their years of meetings and that fundamentally shaped the final bill that was adopted as the LRSA.<sup>201</sup> Although each of these principles helped the Scottish Executive to secure popular and legislative support for the draft bill it introduced in 2001,<sup>202</sup> four were particularly crucial.

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196. The remarks of various members of the Scottish Parliament on the final day of debate on the Land Reform (Scotland) Bill, in January of 2003, attest to this widespread belief. 23 Jan. 2003, SCOT. PARL. OFFICIAL REP., (2003) 14461–62, 14466, 14470, 14472 (Scot.), available at <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-03/sor0123-01.htm>.

197. Dewar, *supra* note 195, at 8; see also Combe, *supra* note 5, at 196 (noting same focus on the future, not the past).

198. McKenzie Skene & Rowan-Robinson, *supra* note 187, at 96.

199. *Id.* at 97.

200. ACCESS TO THE COUNTRYSIDE, *supra* note 99.

201. See *id.* at 7, 16–17 (highlighting “four pillars” of the Access Forum’s recommendations and enumerating fifteen specific proposals that should structure a legislative package introducing a right of responsible access); McKenzie Skene & Rowan-Robinson, *supra* note 187, at 96–97 (identifying five key elements of the Access Forum’s proposals).

202. *Land Reform: The Draft Bill* was published as a consultation paper by the Scottish Executive in February 2001. McKenzie Skene & Rowan-Robinson, *supra* note 187, at 95.

This first principle—that there should be a broad right of non-motorized, informal, recreational access to all land and inland water—reflected a conscious decision to adopt a Scandinavian, as opposed to an English, solution to the problem of public access rights.<sup>203</sup> This decision was motivated in part by the appreciation that Scotland was relatively poorly provided with existing paths and public rights of way, at least as compared with England and Wales,<sup>204</sup> and partly by a sense that previous legislation designed to improve access arrangements had not been successful. The insistence on providing access to inland waters, canals, and the foreshore was motivated by the recognition that access to land and access to water are closely related and recreational activities often take place “at the interface between land and water.”<sup>205</sup>

The second principle—the notion that access should be contingent on responsible exercise of access rights—was even more fundamental because it helped to frame the upcoming public debate not so much on the question of where people might go but on the question of how people would or should behave when taking advantage of access rights. Significantly and perhaps shrewdly, the eventual draft bill introduced to the Scottish Parliament in 2001 did not define “responsible access,” but instead listed various kinds of irresponsible behavior and merely

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203. Indeed, the SNH–Access Forum reports contained a detailed discussion of access arrangements in Norway, Sweden, Denmark, and Germany and referred to those as a model for Scotland. See ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 29–30, 55–56. While a detailed review of Scandinavian access rights is beyond the scope of this Article, it is worth noting that several of the core principles that emerged in the LRSA were found to exist in these Northern European systems. Those include: (1) the idea that “property rights are often safeguarded through a ‘privacy zone’ around dwellings;” (2) “legislation often stipulates that users must exercise due care and consideration and avoid damage or nuisance;” and (3) “[c]omplex definitions are usually avoided.” *Id.* at 29. For a detailed analysis of Scandinavian access customs and legislation confirming the Scottish drafters’ synopsis, see generally Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 GEO. INT’L ENVTL. L. REV. (forthcoming 2011).
204. The Access Forum reported that while 15,000 kilometers of public access rights had been claimed in Scotland and 84% of those had not been fully asserted or vindicated, some 160,000 kilometers of rights of way existed in England, most of which were “recorded on publically available maps.” ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 25–26. In Wales, there were 38,000 kilometers of rights of way. *Id.* at 26. Further, in England and Wales, a much higher proportion of these rights of way were available for cycling and horseback riding than in Scotland. *Id.* In addition, in England and Wales, the geographic spread of these rights of way was more uniform across all areas, whereas in Scotland most of the claimed rights of way were found in areas that only contained a small amount (23%) of the country’s population. *Id.*
205. McKenzie Skene & Rowan-Robinson, *supra* note 187, at 99. The report of the Access Form is replete with details about the inadequacy of access rights to water in Scotland. ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 24, 26.

provided for the preparation and dissemination of an access code.<sup>206</sup> This approach helped ease the passage of the Bill and indicated the government's confidence in the ability of average Scots to use the soft-law tool of an access code to accommodate one another and respect the interests of landowners.

The third principle—the proviso that any new statutory access rights would contain safeguards to protect the privacy of countryside residents and to protect legitimate land management interests—was also instrumental in assuring that not all values associated with private property ownership and exclusion rights would be lost under the new statutory scheme.<sup>207</sup> In other words, the document was careful to signal that homeowners' privacy interests and landowners' interests in making decisions about the uses to which their land is devoted would be preserved as much as possible.

Finally, the fourth pillar of SNH's report—the recommendation that the government should provide additional resources to the public bodies who would be tasked with implementing the new access system and that the government should develop a significant education program to inform the people of Scotland of their new access rights—struck a tone of realism that may have helped persuade those who were skeptical that a new property regime was practically achievable.<sup>208</sup> These pragmatic suggestions about implementation acknowledged that as significant a change in property arrangements as that envisioned by the Access Forum and SNH would have unavoidable costs that the government should bear.<sup>209</sup>

## V. TWO VERSIONS OF ACCESS LEGISLATION CONTRASTED

Having traced the historical background of breakthrough access legislation in England and Wales and in Scotland, we can now turn to the details of the current statutory schemes. As this Part demonstrates, the LRSA creates an access right that is far wider in scope in several important respects than that provided by the CRoW Act. First, while the LRSA applies to almost all land and in-land water in

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206. There was some unease over this decision as it was seen to open the door to potential commercial access and to access for large group events. McKenzie Skene & Rowan-Robinson, *supra* note 187, at 100–01.

207. ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 7, 31–32.

208. *Id.* at 9, 31–32; McKenzie Skene & Rowan-Robinson, *supra* note 187, at 97. In fact, SNH estimated that as much as £10 million annually would be necessary to establish and maintain the path networks needed for its vision of increased access to the countryside to be realized. ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 9.

209. A final principle, reiterated in SNH's report, was simply that all of the elements described above should be incorporated into a “comprehensive” or “balanced” package and not adopted piecemeal. ACCESS TO THE COUNTRYSIDE, *supra* note 99, at 6–7.



Scotland, the CRoW Act only applies to a relatively small percentage of land in England and Wales. Moreover, the specific use-based exceptions to coverage are somewhat narrower in Scotland than in England and Wales. Second, the LRSA allows for a more extensive range of access activities than the CRoW Act and thus provides the people of Scotland with a fuller range of opportunities to engage their landscape for recreation and education. In short, it provides more potential for human flourishing. Third, the CRoW Act gives landowners greater power to exempt their land from access rights and for longer periods of time than does the LRSA. Finally, while the CRoW Act remains loyal to a boundary based understanding of ownership and exclusion, particularly when dealing with important subjects like how to protect the privacy interests of homeowners and residential occupants and land owner discretion to make changes that will affect access, the LRSA embraces a more open-textured, standard-based regime that seeks to inspire landowners and access takers to act virtuously or responsibly toward one another. In this sense, the LRSA represents a much more ambitious attempt to create not just a narrow, boundary-based exception to the right to exclude but instead a potentially transformative, new property regime based on a relationship between landowner and access taker grounded in principles of reciprocity and mutual respect.

### A. Land Subject to Access Rights

**General Scope of Land Subject to Access:** Let us first consider what land is actually subject to public access rights. Under the LRSA, literally all land and inland water in Scotland is potentially subject to the statutory access rights established in the legislation.<sup>210</sup> Except for several narrow subcategories of land over which access is “not exercisable,”<sup>211</sup> persons can potentially exercise their right of responsible access anywhere in Scotland—in highland glens, on large and small islands, on lochs and rivers, on wooded estates, and even in suburban villages. As recent judicial decisions have made clear, the LRSA’s geographic reach is remarkably unlimited.<sup>212</sup>

In contrast to Scotland’s “universalist” approach to access, which was modeled in part on Scandinavian conceptions of access rights, England and Wales chose to follow a “partialist” approach.<sup>213</sup> This approach starts from a completely different presumption. Rather than declaring all land potentially subject to access rights, the CRoW Act

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210. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 1(2)(a) (providing that “everyone” has statutory rights to be “on land”); *id.* § 32 (defining land to include, among other things, “inland waters,” canals, and “foreshore”).

211. *See id.* § 6; discussion *infra* notes 235–46 and accompanying text.

212. *See Forbes v. Fife Council*, (2009) S.L.T. 71 (Scot. Sheriff Ct.); discussion *infra* notes 344–60 and accompanying text.

213. SHOARD, *supra* note 155, at 265–66.

limits the reach of access rights to five specific categories of land that are affirmatively designated as “access land.”<sup>214</sup> Thus, in England and Wales, the public’s “right to roam” only applies to these specific, and sometimes overlapping, categories. The first three categories are all essentially defined by their physical characteristics. These consist of (1) mapped open country, (2) mountain land, and (3) coastal land.

“Mapped open country” refers to land that is shown on a conclusive map issued by the appropriate “countryside body” as “open country.”<sup>215</sup> “Open country” means land which “appears to the appropriate countryside body to consist wholly or predominantly of *mountain, moor, heath or down*, and is not registered common land.”<sup>216</sup> While most layman probably understand the terms “mountain, moor, heath or down” to refer to the vast open highlands found in many parts of the United Kingdom or the rough grazing land near the English and Welsh coasts covered by grass or heather,<sup>217</sup> the term has long been a staple of British countryside legislation.<sup>218</sup> Under the CRoW Act, however, “mountain, moor, heath or down” is only defined in negative terms to *exclude* land “which appears to the appropriate countryside body to consist of improved or semi-improved grassland.”<sup>219</sup> The general idea seems to be that only land not subject to any kind of agriculture or intensive grazing activity would be considered as access land. Further, large categories of land in England and Wales, including agricultural fields, forests, and parkland, would presumably be ex-

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214. Countryside and Rights of Way Act, 2000, c. 37, § 1(1) (Eng. & Wales); SYDENHAM, *supra* note 157, at 201.

215. Countryside and Rights of Way Act, 2000, c. 37, § 1(1)(a) (Eng. & Wales). The appropriate countryside bodies for England and Wales respectively are the Countryside Agency and the Countrywide Council for Wales. *Id.* § 1(2).

216. *Id.* (emphasis added).

217. See SHOARD, *supra* note 155, at 63–76 (describing the physical condition of mountain, moor, and rough grassland—i.e. heath and down—and public access to such land prior to the CRoW act throughout the U.K.).

218. See SHOARD, *supra* note 155, at 30 (discussing use of these terms in the National Parks and Access to the Countryside Act 1949, as amended by the Countryside Act 1968 and the Countryside (Scotland) Act 1967). In an important consultation paper, the British Department of Environment, Transport, and Regions (DETR) defined “heath” as “characterized by the presence of dwarf shrubs such as heather, gorse, cross-leaved heath, bilberry and crowberry.” DEPT OF THE ENV’T, TRANSP., & THE REGIONS, ACCESS TO THE OPEN COUNTRYSIDE IN ENGLAND AND WALES § 3.5 (1998). It defined “moor” to include “upland heath and grass,” and noted its soils “usually have a peaty top” and that it is generally characterized by semi-natural vegetation used as rough grazing.” *Id.* § 3.6. Finally, it characterized “down” as “semi-natural grassland on shallow, lime-rich soils associated with limestone escarpments” and that “often contains an exceptional diversity of plants.” *Id.* § 3.7. This agency estimated that in total “mountain, moor, heath and down” would account for approximately 1,240,000 hectares or “about 8% of the land area of England and Wales.” *Id.* § 3.8, tbl.1 at 38.

219. Countryside and Rights of Way Act, 2000, c. 37, § 1(2) (Eng. & Wales).

cluded.<sup>220</sup> The substantive work of delineating this primary category of access land took place during a lengthy and costly process of provisionally designating and mapping certain land as “open country,” followed by a public comment and challenge process, before the maps issued by the appropriate countryside agencies finally became conclusive.<sup>221</sup> This entire process of mapping “open country” and otherwise implementing the “right to roam” was completed in 2005 and cost the British government £69 million.<sup>222</sup>

The second category of access land, “mountain land,” is easier to pin down. It is simply land situated more than 600 meters above sea level in an area for which a conclusive map has not been issued.<sup>223</sup> This mountain land, though a subset of “open country,” thus qualified immediately for access rights at the moment the CRoW Act became law. Mountains that are less than 600 meters above sea level are not subject to public access unless and until they are shown on conclusive maps as open country.<sup>224</sup> Together, these two subcategories of land—“open country” and “mountain land”—are the two most significant additions made by the CRoW Act to the total area of land subject to public access rights in England and Wales.

The CRoW Act also empowered the Secretary of State for England and the National Assembly for Wales, subject to parliamentary approval, to extend the definition of open country to include “coastal land,” meaning the foreshore or land adjacent to it, including any cliff, bank, barrier, dune, beach, or flat.<sup>225</sup> In 2009, the Marine and Coastal Access Bill 2009 fulfilled that promise and now extends the category of access land to include a “coastal margin,” that is, enough land to provide a recreational route along the entire English coast.<sup>226</sup>

The final two categories of access land under the CRoW Act are more technical in nature and not as extensive. The first consists of

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220. See SHOARD, *supra* note 155, at 49–63, 76–84 (describing physical condition and restricted public access to such land prior to the CRoW Act).

221. Anderson, *Right to Roam*, *supra* note 149, at 407–08. For detailed maps, see *CRoW Access and Fire Severity Maps—Search*, NATURAL ENGLAND, <http://www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps/MapSearch> (last visited Nov. 4, 2010).

222. Interviews with Rob Garner, Policy and Advice Officer, Scottish Natural Heritage, in Edinburgh, Scot. (Sept. 22, 2009 & Dec. 18, 2009); see SELECT COMMITTEE ON PUBLIC ACCOUNTS, THIRTY-SECOND REPORT, 2006-7, H.C., ¶ 11 (U.K.), *available at* <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/91/9107.htm>.

223. Countryside and Rights of Way Act, 2000, c. 37, § 1(1)(d) (Eng. & Wales).

224. SYDENHAM, *supra* note 157, at 208.

225. Countryside and Rights of Way Act, 2000, c. 37, §§ 3, 44 (Eng. & Wales).

226. Marine and Coastal Access Act, 2009, c. 23, §§ 296, 303 (Eng.); see GRAY & GRAY, *supra* note 149, at 1376; Gray, *supra* note 150, at 65. Once again, the process of determining where exactly this coastal margin will be located will take years of painstaking work. The Act allows Wales to determine its own future for coastal access. Marine and Coastal Access Act, 2009, c. 23, §§ 303, 310 (Eng.).

“registered common land,” which includes land that had been specifically designated as common land under registers and maps under the Commons Registration Act 1965 and whose registration had become final under that act at the time of enactment of the CRoW Act 2000.<sup>227</sup> The other is “dedicated land,” which includes land specifically “dedicated” by private land owners (fee simple owners and leasehold owners with at least ninety years left to run on their leases) as access land.<sup>228</sup> Notably absent from the categories of land subject to the “right to roam” in England and Wales is inland water. Thus, many hundreds of miles of rivers, canals, and lakes are not subject to public access in England and Wales.<sup>229</sup>

When all of the mapping required by the CRoW Act was complete, the five categories of “access land” viewed together represented somewhere between 8% and 12% of all land in England and Wales.<sup>230</sup> While this is certainly a significant expansion of the amount of land available for public access compared to fifty years earlier,<sup>231</sup> it still pales in comparison to the amount of land potentially subject to responsible access in Scotland.

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227. Countryside and Rights of Way Act, 2000, c. 37, §§ 1(1)(b), 1(3)(a) (Eng. & Wales). In other words, if some land was already shown on an official map as registered common land, it would automatically be deemed access land. SYDENHAM, *supra* note 157, at 208. Land which was “registered common land” when the CRoW Act became law or becomes so registered thereafter will continue to be access land even if it becomes deregistered. *Id.*; Countryside and Rights of Way Act, 2000, c. 37, § 1(3)(b) (Eng. & Wales). In addition, access land will also include registered common land in any area outside inner London for which a conclusive map relating to common land has not been issued. *Id.* § 1(1)(c).
228. *Id.* §§ 1(1)(e), 16. Dedicating one’s land as “access land” is an irrevocable legal act that binds successive owners and occupiers of the land but also provides certain advantages, especially if there is de facto access to the land. These advantages include limiting the landowner’s or occupier’s tort liability to those who enter the land, receipt of benefits created under local by-laws, and receipt of certain wardening services. *See id.* §§ 13, 16; SYDENHAM, *supra* note 157, at 208–09. The tort liability protection is derived from the fact that a person entering “access lands” is not treated as a “visitor,” but rather like a trespasser under the Occupier’s Liability Act, and is deemed to assume risks relating to the natural features of the landscape. *Id.* at 230–31; *see* Countryside and Rights of Way Act, 2000, c. 37, § 13 (Eng. & Wales).
229. SHOARD, *supra* note 155, at 86–95 (discussing access to inland water bodies in the U.K. generally prior to CRoW Act); Rowan-Robinson, *supra* note 100, at 1396.
230. GRAY & GRAY, *supra* note 149, at 1373. This is also the figure originally estimated by the DETR in ACCESS TO THE OPEN COUNTRYSIDE IN ENGLAND AND WALES, *supra* note 218, § 3.10.
231. In England alone, this massive mapping resulted in approximately 865,000 hectares of land becoming subject to public access as defined in the Act, according to Natural England, an independent organization that advises the government on protecting the natural environment and encouraging outdoor recreation. *See Open Access Land*, NATURAL ENGLAND, <http://www.naturalengland.org.uk/our-work/enjoying/places/openaccess/default.aspx> (last visited Nov. 4, 2010).

Perhaps more important than the question of total acreage, though, is the different methodology used to determine lands subject to access under each regime. As we have seen, the CRoW Act relies essentially on mapping—on what Larissa Katz might call a boundary drawing approach—to providing new access rights over land.<sup>232</sup> Although certain categories of land are exempted from the right to exclude, the responsibility of determining new exclusion boundaries falls on government experts to tell the public exactly where the economic use of land is insignificant enough to justify limited forms of recreational access. Put differently, England and Wales have chosen essentially a “top down” approach,<sup>233</sup> in which governmental ministers exercise their expertise in designating certain land as suitable for access under one of the designated categories and then translate those designations into conclusive maps. Under Scotland’s universalist, “bottom-up” approach,<sup>234</sup> all land is potentially subject to access, and landowners, access takers, and local officials were encouraged to enter into a long term, evolving dialogue about how to accommodate each other’s needs—landowners’ legitimate land management interests, homeowners’ privacy and personal enjoyment needs, and the public’s interest in responsible access taking.

***Land Excluded from Access:*** Not surprisingly, both of the new access regimes in Britain specifically exclude from land otherwise subject to public access certain sub-categories of land being put to particular uses. Yet even here there are discernable differences in approach. Under both regimes, for instance, fields where crops are growing or have been sown are generally exempt from access.<sup>235</sup> In Scotland, however, the public still can exercise access rights in certain agricultural settings: in the margins of fields where crops are growing; in woodlands, orchards, and tree farms, unless the land is being used to cultivate “tree seedlings”; and in grassland where grass is being grown for hay or silage, except where it is at a late stage of growth and likely to be damaged.<sup>236</sup> Scotland, it seems, has gone out of its way to preserve as much access as possible in and around agricultural fields, woodlands subject to active forestry management, and productive grasslands, while recognizing that sometimes and in some places land management interests require exclusion.

Next, both regimes exempt from access land on which a building is located, along with the curtilage of non-residential buildings and other

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232. Katz, *supra* note 59, at 276–80.

233. Rowan-Robinson, *supra* note 100, at 1394.

234. *Id.*

235. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 6(1)(i); Countryside and Rights of Way Act, 2000, c. 37, sch. 1(1) (Eng. & Wales).

236. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 7(10)(a)–(c).

works, plants, and fixed machinery.<sup>237</sup> In this case, Scotland actually provides somewhat more scope for exclusion by also denying access to land where there is a “caravan, tent or place affording a person privacy or shelter.”<sup>238</sup> Still, even this respect for temporary shelters typically associated with outdoor recreation could be viewed as yet another sign of greater solicitude for access in Scotland.

It is also not surprising, given the importance of sport in Britain, that both regimes limit access to certain kinds of sporting areas. In England and Wales, golf courses, race courses, and aerodromes are entirely off-limits.<sup>239</sup> In Scotland, though, natural grass sports and playing fields are accessible as long as they are not in active use (i.e., as long as a match is not underway) and access to other kinds of recreational settings (for example, where “horse racing gallops” occur) is prohibited only where access would “interfere with the recreational use to which the land is being put.”<sup>240</sup> Most remarkable of all, the public in Scotland can, in principle, even pass over a golf course as long as access is not taken across a green and does not interfere with any actual golf game.<sup>241</sup>

In general, although there is a shared concern in both regimes with protecting owners’ interest in lands dedicated to some obviously productive economic use, with protecting some important (but not always access friendly) public uses, and with assuring public safety,<sup>242</sup> it seems as if Scotland generally defines its exempt categories narrowly

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237. *Id.* § 6(1)(a)(i), (b)(i) (exempting “a building or other structure or works, plant or fixed machinery” and “the curtilage of a building which is not a house”); Countryside and Rights of Way Act, 2000, c. 37, sch. 1(2) (Eng. & Wales) (exempting simply land “covered by buildings or curtilage of such land”).

238. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 6(1)(a)(ii).

239. Countryside and Rights of Way Act, 2000, c. 37, sch. 1(7) (Eng. & Wales).

240. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 7(7)(a)–(b) (modifying § 6(1)(e)). Access is also prohibited on sports or playing fields with artificial surfaces. *Id.* § 7(7)(c); see also SCOTTISH NATURAL HERITAGE, SCOTTISH OUTDOOR ACCESS CODE § 2.11 [hereinafter SCOTTISH OUTDOOR ACCESS CODE] (setting forth places where access rights do not apply).

241. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 7(7)(b) (modifying § 6(1)(e)); see SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.2. Similarly, access is prohibited on bowling greens, cricket squares, lawn tennis courts, or other similar areas where grass is grown and prepared for a particular recreational use. *Id.*

242. Other areas where access rights do not apply in Scotland include school grounds, Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 6(1)(b)(iii), surface mines and quarries, *id.* § 6(1)(h), construction, engineering and demolition sites, *id.* § 6(1)(g)(i), visitor attractions or other places (e.g., castles, historic sites, amusement parks) that generally charge an entry fee for admission, *id.* § 6(1)(f), and places like military bases, airfields, and railway sites where access is restricted by other statutes, *id.* § 6(1)(d). See also SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.11 (setting forth places where access rights do not apply). Similarly, in England and Wales, the other specifically excluded areas include surface mines and quarries, land used for railways and tramways, land used for temporary detention of livestock or for training racehorses, and military bases. Coun-

to provide as wide a margin as possible for the exercise of access rights. Moreover Scotland repeatedly demonstrates a remarkable amount of trust in the common sense and good judgment of members of the public to decide when access taking would cause unreasonable interference in many borderline cases.<sup>243</sup>

The final significant difference concerning exempted lands lies in how the two schemes deal with the problem of providing a buffer of private space around homes and residences. In England and Wales, the CRoW Act once again employs a boundary line drawing approach and specifically exempts “land within 20 meters of a dwelling” and, somewhat more indefinitely, land used as a “park or garden.”<sup>244</sup> In Scotland, however, section 6(1)(b)(iv) of the LRSA provides that members of the public do *not* have a right of access to land that “comprises” in relation to a house, or any other place providing a person shelter or privacy, “sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house or place and to ensure that their enjoyment of that house or place is not unreasonably disturbed.”<sup>245</sup> In Scotland, then, homeowners and other occupants of homes can exclude the public from enough land next to their dwellings so that they can enjoy a “reasonable” degree of privacy and freedom from disturbance. The question of how far this zone of reasonable privacy and enjoyment should extend in any particular case is left to local authorities, landowners, and access takers to sort out on their own, and ultimately, when these parties cannot reach agreement among themselves, to the courts. The only interpretative assistance provided by the Act is a brief statement indicating that “the location and other characteristics of the house or other place” are “among the factors” which can be considered in making a sufficient adjacent land determination.<sup>246</sup>

The two regimes’ approaches to dwelling privacy are telling. The CRoW Act’s twenty meter rule is certainly crystalline and easy to apply. The possibility that it might be under-inclusive in some cases (possibly for large country estates) is partially offset by the likelihood that in many cases a homeowner’s zone of privacy and personal enjoyment will be considerably extended by the park or garden exemption. The LRSA’s resort to a classically open-textured standard of reasonableness, on the other hand, leaves a great deal to be decided later. Indeed, it is a crucial marker of Scotland’s embrace of contextualism

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tryside and Rights of Way Act, 2000, c. 37, sch. 1(5)–(6), 1(11)–(13) (Eng. & Wales).

243. The *Scottish Outdoor Access Code* drives home this principle repeatedly, devoting an entire part of the Code to this subject. See SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, §§ 1.3, 3.1–3.64.

244. Countryside and Rights of Way Act, 2000, c. 37, sch. 1(3)–(4) (Eng. & Wales).

245. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 6(1)(b)(4).

246. *Id.* § 7(5).

and interest balancing. It evidences Scotland's willingness to leave the actual boundaries between public recreation and private enjoyment to be delineated through negotiation and, if necessary, litigation between interested parties.

## B. The Nature of the Access Rights

The second major difference between the CRoW Act and the LRSA is that the Scottish legislation allows a far broader range of access activities. Consider the CRoW Act. In England and Wales, a person exercising access rights can enter and remain on access land for the purpose of "open-air recreation," as long as she does not break or damage a wall, fence, hedge, stile, or gate and she observes a set of general restrictions applicable to all access land and special restrictions pertaining to the particular area she is visiting.<sup>247</sup> At first glance this seems broad, but restrictions soon follow.

Crucially, with the exception of those who use wheelchairs, anyone going on "access land" must be on foot.<sup>248</sup> This means that cycling, horseback riding, mountain biking (and maybe even skiing or sledging) are not forms of legitimate access taking in England and Wales.<sup>249</sup> In addition, a number of activities that might commonly be considered part of "open-air recreation"—(1) using a canoe or sailboard on non-tidal water, (2) bathing in non-tidal water, (3) engaging in organized games, or (4) camping—are specifically prohibited.<sup>250</sup> In short, the idea seems to be that members of the public can walk onto access land, have a picnic, and then go home.<sup>251</sup> Little else is allowed.

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247. Countryside and Rights of Way Act, 2000, c. 37, § 2(1) (Eng. & Wales).

248. SYDENHAM, *supra* note 157, at 219.

249. See, e.g., Katrina M. Brown et al., Claiming Rights to Rural Space through Off-Road Cycling 2–5 (unpublished manuscript presented at the Annual Meeting of American Geographers Apr. 17, 2008) (on file with author) (elaborating on significance of lack of provision for mountain biking under the CRoW Act, despite its widespread and growing popularity in the U.K.).

250. SYDENHAM, *supra* note 157, at 220–21; Countryside and Rights of Way Act, 2000, c. 37, sch. 2 (Eng. & Wales). Other prohibited activities include fishing, hunting, and using a metal detector. *Id.*

251. See Anderson, *Right to Roam*, *supra* note 149, at 407. Apparently, one of the reasons that the right to roam was so narrowly drawn was that opponents argued that damage to wildlife and historic sites would result if a right was codified. Angela Sydenham, *The Countryside and Rights of Way Act 2000: Balancing Public Access and Environmental Protection?*, 4 ENVTL. L. REV. 87, 87–95 (2002). Concerns about the damages that dogs would cause to game and livestock also led to provisions allowing landowners to exclude dogs in various circumstances and requiring dogs to be leashed. Countryside and Rights of Way Act, 2000, c. 37, §§2, 23(1)–(2), sch. 2(4)–(6) (Eng. & Wales); Sydenham, *supra*, at 91.



In contrast, the LRSA establishes two broad categories of “access rights” that are literally granted to “everyone.”<sup>252</sup> First, there is the right to be “on land”—the right to go on, pass over, and remain on the land for some limited period of time—for three specified purposes.<sup>253</sup> The first and most important of these is “recreational purposes,”<sup>254</sup> an undefined category that turns out to be much more expansive than the concept of open-air recreation under the CRoW Act.

The second articulated purpose for being on land is “carrying on a relevant educational activity,” which means furthering the “understanding of natural or cultural heritage.”<sup>255</sup> Thus, a teacher and a group of students visiting the outdoors to study wildlife, landscape, or geology would fall within this heading, as would a group carrying out a natural or cultural history survey.<sup>256</sup>

The third authorized purpose is carrying on one of the two previously permitted purposes in a commercial or for-profit manner.<sup>257</sup> Consequently, a mountain guide taking a paying client hill-walking, a canoeing instructor giving a group canoeing lesson, or a commercial nature writer or commercial photographer could all take advantage of the statutory right to be on land under the LRSA.<sup>258</sup> Under the CRoW Act, it is not clear whether this kind of commercial activity can take place even if it might otherwise further open-air recreation.<sup>259</sup>

The second category of access rights under the LRSA is narrower but still quite significant. It is simply “the right to cross land,” defined to mean going on to land, passing over it, and then leaving it “for the purpose of getting from one place outside the land to another such place.”<sup>260</sup> In other words, it is a right of passage. In principle, this access right could encompass activities like taking a short cut across someone’s land to get to work, school, or a bus stop.<sup>261</sup> Although this kind of passage was what many legally recognized footpaths were designed to provide in England and Wales before the CRoW Act, it does

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252. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 1(1)–(2).

253. *Id.* § 1(2)(a), (4)(a).

254. *Id.* § 1(3)(a).

255. *Id.* § 1(3)(b), (5)(a)–(b).

256. SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.8.

257. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 1(3)(c); Guthrie, *supra* note 112, at 133 n.53.

258. SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.9.

259. Schedule 2 of the Countryside and Rights of Way Act 2000 does not strictly prohibit commercial activity on access land by access takers, but the legislation elsewhere does not affirmatively authorize it either. Countryside and Rights of Way Act, 2000, c. 37, § 2(1), sch. 2 (Eng. & Wales).

260. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 1(2)(b), (4)(b).

261. Guthrie, *supra* note 112, at 133 n.54.

not, strictly speaking, appear to be a protected activity under the CRoW Act itself.<sup>262</sup>

Of course there are some restrictions on the nature of access taking in Scotland as well, but once again the way that Scotland frames these restrictions is very different. First, and most important, the LRSA conditions its broad grant of access rights on the premise that access takers must use them in a virtuous, responsible way: “A person has access rights only if they are exercised responsibly.”<sup>263</sup> In determining whether this standard of responsible access taking has been met “a person is to be *presumed* to be exercising access rights responsibly if they are exercised so as not to cause *unreasonable* interference with any of the rights (whether access rights, rights associated with the ownership of land or any others) of any other person.”<sup>264</sup> Under the LRSA, responsible access taking thus means, first and foremost, acting in an other-regarding manner. It means being considerate of the entire community, taking care of the natural environment, and taking into account the interests and needs of landowners and of other persons seeking to enjoy their own access rights.<sup>265</sup>

Despite this broad, open-ended directive to exercise access rights responsibly, there are several activities that the LRSA specifically defines as not falling within the sphere of responsible access taking and are thus clearly prohibited. One cannot be on or cross land in breach of an injunction or to commit “an offence”; one cannot hunt, shoot or fish; one cannot take access with a dog or other animal unless it is “under proper control”; one cannot poach game; and one cannot use a motorized vehicle or vessel other than a motorized wheel chair.<sup>266</sup>

Beyond this relatively narrow set of prohibited activities, though, access takers in Scotland can do many things under the broad heading of exercising their access rights. They can take a walk, run a marathon, orienteer, ride a horse, canoe, sail or windsurf, ride a mountain bike, enjoy “wild camping,” explore a historic site, paint a picture, take photographs, go sledding, fly a kite, rock climb, cross-country ski, explore a cave, take a swim, or join a professionally led nature tour or

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262. Yet, as an access taker in England and Wales can always claim to be enjoying the benefit of “open air recreation” at the same time she is traveling from one place to another on access land, one cannot really say that passage or transportation is a prohibited activity under the CRoW Act either. See Anderson, *Right to Roam*, *supra* note 149, at 413 (discussing “means of transportation” as one of the public values that the CRoW Act promotes).

263. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 2(1).

264. *Id.* § 2(2) (emphasis added).

265. For numerous examples of what responsible exercise of access rights might entail in various situations, see SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, pt. 3. However, the code itself “is not an authoritative statement of the law.” *Id.* § 1.5.

266. Land Reform (Scotland) Act, 2003, (A.S.P. 2), §§ 2(2)(a)(i), 9.

hill walk.<sup>267</sup> They can do all of these things during the day or at night.<sup>268</sup> Further, when a person engages in any of these activities on land subject to access taking, she is not, under the express provision of the LRSA, committing an act of trespass.<sup>269</sup> In effect, there are just two fundamental limits to the exercise of access rights under the LRSA: the duty to act responsibly with regard to others and the human imagination. In a profound way, the right of responsible access instantiates a vision of human flourishing bounded by little else other than common sense and a concern for the well-being of others.

### C. Landowners' Rights to Exclude Unilaterally and to Seek Exemption Orders for Land Management Activities

The final area of significant divergence between the CRoW Act and the LRSA lies in the scope given to landowners to act unilaterally to limit or prevent access for land management reasons. In England and Wales, the basic position of the CRoW Act is that land managers—land owners and all those acting for them—are granted a unilateral right to exclude access to land for up to twenty-eight days in any calendar year (with some limitations pertaining to summer weekends and bank holidays when the public is most likely to want to exercise its right to roam), as long as notice is given to the relevant local authority.<sup>270</sup> No justification for these closures is required, and these unilateral exclusions can be used on separate days and on separate parcels within one property.<sup>271</sup> It is only when land managers want to exclude the public or otherwise restrict access for more than twenty-eight days or for some specified period every year that they must seek permission from local authorities.<sup>272</sup>

In contrast to this primarily “legislative solution,” Scotland’s access legislation takes what one commentator calls an “advisory approach” to this subject.<sup>273</sup> The LRSA initially imposes a duty on land owners “to use and manage their land and otherwise conduct their

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267. See SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, §§ 2.6–2.9. For an enlightening study of the ways mountain bikers are enjoying their access rights and challenging conventional notions of what access taking means in Scotland, see Brown, *supra* note 249, at 5–12.

268. See SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.4. However, nighttime access taking could be limited in some circumstances. See *Forbes v. Fife Council*, (2009) S.L.T. 71 (Scot. Sheriff Ct.); discussion *infra* notes 429–35.

269. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 5(1).

270. Countryside and Rights of Way Act, 2000, c. 37, § 22 (Eng. & Wales); Sydenham, *supra* note 251, at 89.

271. Rowan-Robinson, *supra* note 98, at 1397.

272. Land managers must then show that the exclusion or restriction is necessary for purposes of land management and the twenty-eight day automatic exclusion has otherwise proven insufficient. Countryside and Rights of Way Act, 2000, c. 37, § 24(1) (Eng. & Wales); Rowan-Robinson, *supra* note 98, at 1397.

273. Rowan-Robinson, *supra* note 98, at 1398.

ownership” in a way that is “responsible.”<sup>274</sup> In determining whether this standard of responsible management is being met, land owners, just like access takers, are initially *presumed* to be acting responsibly if they do “not cause *unreasonable interference* with the access rights of any person exercising or seeking to exercise them.”<sup>275</sup> The access takers’ presumption of responsible access taking is matched here with a presumption of responsible land management. Land owners, like access takers, are presumed to be virtuous and are held to a standard of other-regarding behavior.

This presumption of responsible land management is fleshed out in section 11 of the LRSA. A local authority can issue an order—presumably upon the application of an owner, but also on its own initiative—temporarily exempting land from access taking for some particular purpose for up to five days without having to seek either public consultation or Ministerial approval.<sup>276</sup> If the order is to last for six or more days, however, the local authority must consult the owner of the land (though presumably the owner has provoked the application) as well as the local access forum, provide public notice of the purpose and effect of the proposed order, and obtain confirmation by government ministers.<sup>277</sup>

Thus, if a land owner wants to restrict or redirect access for less than six days for some typical but short term land management purpose—say, to spray crops with pesticides, to move farm animals from one field to another, or to facilitate timber felling—the owner can do so simply by posting signs and flags requesting access takers to avoid these activities or by providing alternative routes to circumvent them.<sup>278</sup> If the owner wants to completely restrict access to his land for some purpose for less than six days—perhaps to host an agricultural show, a motor car or motor cycle rally, or a Highland games festi-

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274. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 3(1).

275. *Id.* § 3(2) (emphasis added).

276. *Id.* § 11(1)–(2); SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 4.14 n.54.

277. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 11(2)–(3).

278. See SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 4.9, 4.11–4.15. *But see id.* §§ 4.7–4.9 (“The Land Reform (Scotland) Act 2003 states that for the purpose or main purpose of preventing or deterring any person entitled to exercise access rights from responsibly doing so, you must not . . . put up any sign or notice. This essentially means not obstructing or hindering people from exercising access rights, either by physically obstructing access or by otherwise discouraging or intimidating them. . . . Obviously, land management involves putting up signs or notices, building fences or walls . . . and many other tasks. Given this, there is a need to define the point at which an action is deemed to be either deliberate or unreasonable in obstructing or hindering someone from exercising access rights.”) (citing Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 14).

val—he must seek the consent of the local authorities.<sup>279</sup> Any interruption of access occurring for six days or more will require the initiation of a public notice, comment, and review process and consent by higher level government ministers. This basic approach reflects the Access Forum’s recommendation that any arrangements for limitation on access “should [be] of an advisory nature with guidance on their use being given in the Access Code.”<sup>280</sup>

One final restriction on landowners merits special attention. Section 14 of LRSA states that landowners cannot put up signs or notices, fences or walls, allow vegetation or hedges to grow, leave animals at large, or take or fail to take any other action, “for the purpose or for the main purpose of preventing or deterring any person entitled to exercise [access] rights from doing so.”<sup>281</sup> A violation of this prohibition against preventing or deterring access rights can be met with a written notice from the local authorities demanding that the landowner remedy the obstruction or deterrence, and if the landowner fails to act, the local authority can remove it or take some other remedial action.<sup>282</sup> An owner who objects to such a section 14 notice can proceed to the local sheriff court to contest it.<sup>283</sup> Disputes over these section 14 notices have given rise to a number of the judicial decisions that have begun to interpret the LRSA.

## VI. SCOTTISH CASES INTERPRETING THE LRSA 2003

Given the remarkable geographic reach of the LRSA and its reliance on several broad, open-textured standards to delimit private landowners’ ability to exclude and restrict public access, it is not surprising that Scottish courts would soon be called upon to interpret the Act and to begin to draw some of the boundaries that the Scottish Parliament declined to draw. In fact, unlike in England and Wales, where the CRoW Act sparked relatively little litigation concerning the “right to roam” other than administrative appeals concerning whether certain land is “open country”<sup>284</sup> within the terms of the Act,<sup>285</sup> dis-

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279. *Id.* § 4.14. See generally SCOTTISH EXECUTIVE, PART 1 LAND REFORM (SCOTLAND) ACT 2003: GUIDANCE FOR LOCAL AUTHORITIES AND NATIONAL PARK AUTHORITIES (2005), available at <http://www.scotland.gov.uk/Resource/Doc/36496/0014290.pdf>.

280. Rowan-Robinson, *supra* note 98, at 1398. The idea was that land managers could simply advise the public at key access points of the need to avoid entering certain areas, and these restraints would be as short in duration and narrow in scope as possible. *Id.*

281. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 14(1).

282. *Id.* § 14(2)–(3).

283. *Id.* § 14(4).

284. Countryside and Rights of Way Act, 2000, c. 37, §§ 1(1)(a), 2(1) (Eng. & Wales) (defining “access land” as “any land which is shown as ‘open country’ and providing that “any person is entitled . . . to enter and remain on any access land for the purposes of open-air recreation”).

putes over implementation of the LRSA have so far produced at least eight jurisprudentially significant court decisions. These decisions illustrate how the LRSA is beginning to create a property regime that aims to promote certain important aspects of human flourishing while at the same time preserving a zone of personal privacy around homes and allowing landowners to make important decisions about how land may be used to fulfill their own life projects and even how to enhance access opportunities for future access takers.

Within this growing body of LRSA case law, three important issues have emerged so far. The courts have been most frequently concerned with the question of how much land adjacent to homes property owners can exempt from access on grounds of privacy and the need for personal enjoyment free from disturbance. Several decisions have addressed whether barriers to or restrictions on access taking on land otherwise subject to access taking are permissible. In other words, they are concerned with the extent to which land owners can impose restrictions on how access can be taken and particularly whether landowners can effectively zone various kinds of access activities on their property. Finally, one decision addressed the retroactive application of the LRSA and, in particular, whether the Act applied to barriers to access created prior to its effective date.

#### **A. The Sufficient Adjacent Land Cases: The Emergence of the Property-Specific Objective Test**

The first major interpretive issue confronting the Scottish courts, and probably the one that has attracted by far the most public attention, concerns application of the “sufficient adjacent land” exception in section 6(1)(b)(iv) of the LRSA. In five different cases, sheriff courts have resolved disputes between landowners and local councils over just how much land in relation to a house or dwelling is sufficient “to enable persons living there to have reasonable measures of privacy” and “to ensure that their enjoyment” of their homes is “not unreasonably disturbed.”<sup>286</sup> Faced with this open-textured standard of reasona-

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285. These administrative decisions have not necessarily escaped public attention. One involved Madonna and her husband Guy Ritchie’s successful appeal to reduce the number of acres classified as “downland,” which “qualifies as open country under the [CRoW Act]” on their 1132 acre estate from 350 acres to 150 acres. Anderson, *Right to Roam*, *supra* note 149, at 409 n.261. Another concerned landowners’ successful but controversial appeal that resulted in removing a popular local rock feature, Vixen Tor in Dartmoor, from open country designation. *Id.* at 411–12 & n.275. The technical analyses in these decisions, however, concern whether the land at issue qualifies as mountain, moor, heath or down, not the balancing of landowner and public interests. *Id.* at 410–11. For more details of these two emblematic CroW Act disputes, see Anderson, *Countryside Access*, *supra* note 149, at 241–42, 246–47.

286. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 6(1)(b)(iv).

bleness, the sheriff courts have responded by building a purportedly objective test that at once seeks to cabin the scope for personal judicial bias, avoid the need for re-adjudication whenever ownership or occupancy of a home changes, but allow for the consideration of the unique geographic and social circumstances of each case. In short, the courts have crafted a test—I call it the property-specific objective test (PSOT)—that aims to take account of land’s memory and complexity while simultaneously limiting uncertainty as much as possible.

1. *The Starting Point: Kinfauns Castle and the Stagecoach Tycoon*

In the first, and best known sufficient adjacent land decision, *Gloag v. Perth & Kinross Council*,<sup>287</sup> the Perth Sheriff Court directly confronted the issue of just how much berth to give a landowner seeking to bar the public from gaining access to gardens and woodlands surrounding a home. What garnered so much attention to the case, aside from its temporal primacy, was the fact the owner was Ann Gloag, a successful business woman known throughout Scotland as the “Stagecoach Tycoon,” who lived in Kinfauns Castle, a fine country home surrounded by lawns, flowerbeds, water features, and woodlands.<sup>288</sup> Gloag initiated this lawsuit because she wanted to enclose with a six foot high barbed wire fence more than eleven of her twenty-three acres—in particular not just the immediate gardens around her architecturally significant castle but also parts of the surrounding grasslands and woodlands, especially woods where undergrowth had been tidied up, pathways had been cleared or restored, children’s play equipment had been located, and a barbecuing site prepared.<sup>289</sup>

The first defendant, Perth and Kinross Council, the local authority charged with administering the LRSA in this instance, asserted that Gloag was simply seeking to enclose too much land—more, that is, than was actually “sufficient” to ensure her privacy and enjoyment.<sup>290</sup> The Ramblers Association, the second defendant, took the same posi-

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287. (2007) S.C.L.R. 530 (Scot. Sheriff Ct.).

288. *Id.* at 533. Gloag’s nickname is derived from the highly successful European inter-city bus company—Stagecoach—that she founded. KENNETH REID & GEORGE GRETTON, *CONVEYANCING 2007*, at 127 (2008).

289. *Gloag*, (2007) S.C.L.R. at 533. There were suspicions that the play equipment and barbecue site had been located close to the perimeter of the enclosed area (and a public highway) to manufacture the impression that this land was intensively used by the household. *Id.* at 533. However, after a site inspection, the sheriff gave Gloag the benefit of the doubt, concluding that, except for the children’s play area, “the pursuer intended the woods to be used by herself and her family as suitable places for recreation and play.” *Id.* at 534.

290. *Id.* at 532.

tion.<sup>291</sup> Both defendants suggested that the line where Gloag could erect a fence should be demarcated with reference to distinctions drawn in the *Scottish Outdoor Access Code* between more and less “intensively managed” parts of the “policies” typically found surrounding larger country houses.<sup>292</sup> Although the distance between the two proffered lines was not always large (in some places a mere fifteen to twenty feet),<sup>293</sup> the battle was nevertheless joined.

No doubt aware of the great public interest in the case and the likelihood that his decision would become an important precedent, Sheriff Michael Fletcher took considerable care in hearing the evidence, visiting the site, and articulating reasons for his judgment. In the end he ruled in favor of Gloag, concluding that the area enclosed by her barbed wire fence was *not* more than sufficient to ensure her reasonable measures of privacy and reasonable undisturbed enjoyment, and thus she was entitled to keep her barbed wire fence in place.<sup>294</sup>

Before reaching his final conclusion, however, Sheriff Fletcher articulated several important legal principles that have reverberated in subsequent LRSA decisions. The first concerned whether access takers should be presumed to be “genuine” outdoor enthusiasts or instead motivated by some “ulterior criminal or voyeuristic motive” or “an unhealthy curiosity” about a dwelling’s occupants.<sup>295</sup> Sheriff Fletcher’s view was that it would be “rather naïve” to “assume that the high ideals of the Act would be followed by the vast majority of persons who took access to land.”<sup>296</sup>

This determination was problematic in two ways. First, the LRSA does not call for this kind of inquiry into access takers’ state of mind in deciding how much land should be exempt from access under section 6(1)(b)(iv). If anything, the sheriff’s view plainly contradicts the

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291. *Id.* The Director of the Ramblers Association, David Morris, played a major role in sparking this litigation. During an unannounced visit to Gloag’s property to investigate whether access rights were being obstructed by her fence, Morris slipped through the front gate and then encountered the driver of a Land Rover who challenged his entry and later called four police officers to the scene. *Id.* at 537–38. Morris’ conversations were reportedly civil but unappreciated by Gloag and the sheriff, who thought Morris was acting irresponsibly by going onto land that he knew to be excluded from access taking under the Act. *Id.* at 537–39.

292. *Id.* at 540–42; SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 3.16. Application of these distinctions would involve observation of subtle landscaping details, such as the height at which grass is mown and the quality of such grass. *Gloag*, (2007) S.C.L.R. at 542.

293. *Gloag*, (2007) S.C.L.R. at 548–49.

294. *Id.*

295. *Id.* at 537.

296. *Id.* at 539.



LRSA.<sup>297</sup> Second, Sheriff Fletcher lacked any factual basis to generalize about access takers' lack of good faith.<sup>298</sup> Although subsequent decisions have not expressly endorsed this specific line of inquiry as a relevant factor in section 6(1)(b)(iv) sufficient-adjacent-land determinations, it has become, as we shall see, a kind of jurisprudential leit-motif. The emergence of this judicial concern about "genuine" access taking—and also with genuine landowner activity—should not come as a total surprise, though, given the Act's overriding emphasis on the reasonableness of both access taker and landowner behavior. Indeed, it may be a predictable, and perhaps difficult to control, consequence of what is, at least in part, a virtue-based access regime.<sup>299</sup>

Sheriff Fletcher's second important determination concerned how much interpretive weight, if any, should be given to the *Scottish Outdoor Access Code* in deciding where to draw lines under section 6(1)(b)(iv). Here Sheriff Fletcher was on more solid ground in declaring that even though the *Access Code* is not "entirely irrelevant," it is designed to offer nothing more than "help and guidance" to access takers and landowners and thus cannot provide any aid to a court in interpreting section 6 of the LRSA.<sup>300</sup> Although this ruling has been endorsed by several academic commentators,<sup>301</sup> it nevertheless seems to give insufficient weight to the collaborative work that went into drafting the *Access Code* and the importance that the Access Forum, SNH, the Parliament, and others attached to it when the LRSA was passed.

Sheriff Fletcher's next crucial ruling concerned the degree to which individual characteristics of a landowner should be considered. Gloag argued that her personal notoriety, her practice of entertaining VIPs,

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297. See Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 2(2) (instructing that in determining whether access rights are exercised responsibly, "a person is to be presumed to be exercising access rights responsibly if they are exercised so as not to cause unreasonable interference with any of the rights . . . of any other person"); see also Malcolm M. Combe, *No Place Like Home: Access Rights over Gardens*, 12 EDIN. L. REV. 463, 467 (2008) (also noting the absence of a "genuine" access taker in the legislation); Guthrie, *supra* note 112, at 135 (criticizing Gloag on the decision's interpretation of "whose view of the 'responsibility' of access is to be taken" and noting that Gloag looks at the issue from the view of the person taking access but that this view "is almost certainly incorrect").

298. Sheriff Fletcher's conclusion about access takers' motives seems to have been based on his personal disapproval of the behavior of one individual, the Director of the Rambler's Association, David Morris. See Gloag, (2007) S.C.L.R. at 537–39; *supra* note 289.

299. See Claeys, *Virtue and Rights*, *supra* note 59, at 934, 942–45 (observing risk of making judges into "philosopher-kings" who must make subtle judgments about whether certain parties, especially those who may be relative strangers to one another, are acting virtuously).

300. Gloag, (2007) S.C.L.R. at 541.

301. REID & GRETTON, *supra* note 288, at 129–31; Combe, *supra* note 297, at 465–66; Guthrie, *supra* note 112, at 142.

and the value of her possessions should all be considered.<sup>302</sup> The defendants countered that such an obviously subjective approach would require constant re-assessment every time the ownership or occupancy of a house or dwelling changed.<sup>303</sup> Ultimately, Sheriff Fletcher agreed with the defendants, observing that the language of the LRSA—and especially its use of the terms “reasonable measures of privacy” and “not unreasonably disturbed”—counseled against taking into account “the individual proprietor for the time being” and favored looking at the “the needs of a fictitious ‘reasonable occupant.’”<sup>304</sup> In short, the court clearly opted for what appears to be—at least at first glance—an objective standard in interpreting section 6(1)(b)(iv).

Still, having declared the need for an objective test, in his very next move Sheriff Fletcher opened the door to a more open-textured, highly contextualized form of adjudication by stating that courts making “sufficient adjacent land” decisions under section 6(1)(b)(iv) should also consider “what a reasonable person living in a property of the type under consideration would require.”<sup>305</sup> To appreciate just how contextualized (and perhaps subjective) this type of analysis could be in light of the phrase “property of the type under consideration,” consider how Sheriff Fletcher put this principle to work:

I agree with counsel for the pursuer that the evidence in this case shows that persons living in a house of this kind located as it is in the country would consider that their enjoyment of that house would be considerably reduced if the house was not located in reasonably large grounds which were private. I think one can take from the evidence and applying judicial knowledge and common-sense that *persons capable of and interested in purchasing a house of the kind which is the subject of these proceedings as their own private house would not consider doing so if the house itself and its grounds, and by that I mean a substantial area round the house were not able to be used by them privately.*<sup>306</sup>

The import of this passage is clear. Although Sheriff Fletcher recognizes the need to cast his analysis objectively in terms of the “average reasonable person purchasing a house,”<sup>307</sup> he nevertheless introduces a wealth adjustment factor to his analysis of how much adjacent land is “sufficient” by focusing on the expectation of a buyer that a “home of *this kind*” would be surrounded by a “large area of ground,” including “such things as the lawns and gardens of the house” and perhaps ex-

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302. *Gloag*, (2007) S.C.L.R. at 544. Gloag asserted that this kind of individualized, subjective assessment was mandated by the European Convention on Human Rights. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 545 (emphasis added).

307. *Id.* The sheriff admits that the analysis he calls for presents “danger that one might stray from the bounds of judicial knowledge into the bounds of private knowledge.” *Id.*

tensive woodlands, especially when they are developed with paths and other amenities.<sup>308</sup>

In short, if a home is a large and impressive one sitting amidst a large country estate, the occupant is presumably entitled to exempt substantial amounts of land for her privacy and personal enjoyment. If the home is more modest, the occupant needs and should expect far less land for privacy and enjoyment. The process of locating the precise boundaries of these zones of personal privacy and exclusive undisturbed enjoyment thus seems to depend on the size, prestige, and social setting of the property at issue. Judges applying the LRSA, Sheriff Fletcher seems to imply, must make assumptions about what the typical hypothetical owners of differently sized and situated Scottish estates can reasonably expect in terms of privacy and personal enjoyment.

This analysis embodies Sheriff Fletcher's invention of the property-specific objective test for determining how much adjacent land is sufficient to provide a reasonable measure of privacy and undisturbed enjoyment to homeowners and other dwelling occupants under the LRSA. Cast in the unobjectionable, seemingly neutral language of an objective "reasonable man" standard, the test in fact creates room for a highly contextualized determination of the physical and social circumstances surrounding each particular parcel at issue. Such a test has clear advantages and disadvantages. On one hand, it has the advantage of flexibility. It allows a court to take into account all of the detailed circumstances that make up a given parcel of what Peñalver describes as land's "complexity" and "memory" for the purpose of making the important boundary-drawing call required by section 6(1)(b)(iv).<sup>309</sup> On the other hand, it has the disadvantage of leading to potentially inconsistent, ad hoc decisions,<sup>310</sup> and particularly ones that will privilege the largest and wealthiest of landowners. As Sheriff Fletcher's intuitive analysis reveals, the average, reasonable person buying a large estate like Kinfauns Castle probably would want and expect a "large area of ground" to be available for her personal use.<sup>311</sup> The problem is that the LRSA does not grant large landowners an entitlement to greater amounts of privacy and personal auton-

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308. *Id.* (emphasis added).

309. *Compare Gloag*, (2007) S.C.L.R. at 544–45 (applying what has been described as the "property-specific objective test"), with Peñalver, *Land Virtues*, *supra* note 10, at 828–30 (discussing the features of land's "complexity" and "memory").

310. This is one of the principal criticisms that Henry Smith launches at the progressive property theorists. See Smith, *Mind the Gap*, *supra* note 35, at 982 (labeling some of the progressive's favorite decisions as partaking of "pernicious case-by-case ad hocery").

311. *Gloag*, (2007) S.C.L.R. at 545.

omy than owners of more modest estates.<sup>312</sup> The property-specific objective test that emerges from *Gloag* could thus potentially endow large estate owners with far more space for privacy and personal enjoyment in proportion to their actual dwelling spaces than other homeowners. Notwithstanding this potential for bias in favor of large estate owners, it is not clear there was any better alternative given the open-ended nature of the statutory guidelines. Moreover, as we shall see, owners of smaller estates are by no means powerless in asserting a section 6(1)(b)(iv) exemption on the grounds of privacy and the need for undisturbed enjoyment.

In the final chapter of his analysis in *Gloag*, Sheriff Fletcher enumerated a number of specific factors that could fall within the broad framework of his objective but property-specific approach to section 6(1)(b)(iv). First, he considered the specific location of the property and other physical characteristics of the house or place—the two factors specifically enumerated in section 7(5).<sup>313</sup> Here he particularly found that the “exceptional” quality of the house, its general prominence, and its “substantial size” all weighed in favor of more, rather than less, ground being required for the purposes of section 6(1)(b)(iv).<sup>314</sup> Second, Sheriff Fletcher found that the security concerns of the owner merited a larger, rather than a smaller, perimeter of exclusion.<sup>315</sup> Third, the sheriff deemed the prior location of fencing and other boundaries pre-dating the LRSA to be a legitimate factor for consideration, especially if these were not erected on the actual boundary lines of the property.<sup>316</sup> Finally, the sheriff found that the use to which the adjacent ground is put by the homeowner will be a relevant factor. Here the existence of restored pathways and other amenities were an indication that the owners of Kinfauns Castle would have rea-

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312. This criticism has been leveled by several Scottish academic commentators. See REID & GRETTON, *supra* note 288, at 131–32 (complaining that Sheriff Fletcher’s analysis here lacks clarity and seems to presume, without any statutory basis, that “large houses should have large gardens which are free from access rights”); Guthrie, *supra* note 112, at 141 (criticizing Sheriff Fletcher’s analysis for failing to realize that the “point of the legislation is not to guarantee owners an area of land large enough to maximize enjoyment, but to ensure that their enjoyment of land is not unreasonably disturbed”).

313. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 7(5); *Gloag*, (2007) S.C.L.R. at 546.

314. *Gloag*, (2007) S.C.L.R. at 546.

315. Here, Sheriff Fletcher deemed it legitimate to infer that the owner of a residence like Kinfauns Castle would possess valuable objects entitling her to more “highly developed” security concerns than other householders. *Id.* at 546–47. The court’s invocation of this factor has been questioned by some Scottish commentators. See, e.g., Guthrie, *supra* note 112, at 142 (criticizing resort to this factor as directing undue “attention to the characteristics of individual proprietors” and thus being inconsistent with Sheriff Fletcher’s earlier emphasis on an objective approach).

316. *Gloag*, (2007) S.C.L.R. at 547–48.

sonable expectations of privacy and undisturbed enjoyment extending over the substantial area of ground on which they were found.<sup>317</sup> These factors—all of which are tethered to Sheriff Fletcher’s property-specific objective test—are the first signs of an emerging multi-factor analysis for inquiries under section 6(1)(b)(iv).

## 2. *Variations on Sufficient Adjacent Land: Snowie to Creland*

After *Gloag*, four more sheriff court decisions confronted the problem of how much adjacent land is “sufficient” to give land owners reasonable measures of privacy and undisturbed enjoyment around their homes. These decisions further highlight the advantages and disadvantages of the property-specific objective test developed by Sheriff Fletcher in *Gloag*. In addition to revealing its inherent flexibility, these decisions show how this approach can give judges the capacity to detect landowners who are making unwarranted assumptions about access takers’ motives, to make fine-grained assessments about the privacy afforded by fences and gardens, and to recognize the legitimate conservation aspirations of some landowners. Yet, they also show how the PSOT can lead to inconsistent outcomes and reveal the information processing costs inherent in this kind of particularized, ex post adjudication.

In *Snowie v Stirling Council*,<sup>318</sup> proprietors Euan and Claire Snowie contested the geographic extent of the public’s access rights around Boquhan House and Estate, a property consisting of approximately seventy acres near Stirling.<sup>319</sup> The Snowies sought to exclude a large portion from public access under the “sufficient adjacent land” exception and to close permanently a pedestrian gate at the end of a long driveway. Stirling Council, the local authority, insisted that much less land should be exempt from public access and that the pedestrian gate remain open. Once again the Ramblers Association was joined as an additional defendant.<sup>320</sup>

Although the factual setting in *Snowie* was thus broadly similar to *Gloag*, Sheriff A. M. Cubie ultimately required the Snowies to open the pedestrian gate at the end of their driveway<sup>321</sup> and dramatically scaled back the portion of the Snowies’ estate that could be exempt from public access under section 6(1)(b)(iv).<sup>322</sup> He did, however, ex-

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317. *Id.* at 548. Again, Guthrie is critical because consideration of the use of adjacent ground could encourage landowners to try to protect extensive areas by laying them out for amenities (i.e., to game the Act). Guthrie, *supra* note 112, at 141.

318. (2008) S.L.T. 61 (Scot. Sheriff Ct.).

319. The Snowie estate, purchased in 2001, consisted of seven different properties, including stables, a tennis court, extensive managed driveways, and a garden. *Id.* at 61–63.

320. *Id.*

321. *Id.* at 68.

322. *Id.*

empt 12.6 acres from access under this exception, an amount that was not so much less than the 14.5 acres of land Ann Gloag was finally able to fence off around her castle in Perth.<sup>323</sup>

Several facts account for the different outcome. First, Sheriff Cubie noticed that even if the Snowies were allowed to keep the pedestrian gate closed, access takers would have found other ways to gain access to their property.<sup>324</sup> Second, despite occasional examples of irresponsible access taking (primarily teenage drinking, courting, and driving), there was, in the sheriff's words, a long term "core of regular, indeed frequent, access taken by genuine recreational walkers, including dog walkers."<sup>325</sup> In other words, Sheriff Cubie seemed to accept the invitation issued in *Gloag* to investigate whether there were genuine access takers interested in the land. Nevertheless, on balance he found that there was real evidence of responsible recreational use of the property in this instance.

Next, the sheriff found that even though the Snowies had legitimate concerns about security, a factor recognized in *Gloag*, these concerns still did not justify excluding more than half of their large estate from public access. Two particular facts undermined the Snowies' position on security. First, the sheriff found the expert testimony of their security consultant unimpressive and unreliable.<sup>326</sup> More important, Euan Snowie apparently "regarded anybody moving around the estate as 'suspicious'" and repeatedly asserted that he had never seen "any genuine walkers" on his property, despite the courts' finding that there were plenty of virtuous access taking neighbors.<sup>327</sup> Sheriff Cubie may have been suggesting that Snowie had not sufficiently internalized one of the LRSA's primary meanings—that responsible land owners must sincerely respect the rights of access takers. Snowie's failing here was, we might say, one of insufficient land owner

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323. KENNETH G.C. REID & GEORGE L. GRETTON, *CONVEYANCING* 2008, at 114 (2009). The precise area the Snowies were allowed to exempt comprised grounds in front and immediately adjacent to their house, a car park, a tennis court and changing area, and some of the other managed grounds, including a rear garden. It did not include driveways leading from the gates of the property to the house. *Snowie*, (2008) S.L.T. at 68.

324. Access takers apparently could gain access to the Snowie estate through hedges, through an active neighboring dairy farm which apparently enjoyed the right to use driveways on the estate, from two public roads, and from a public right of way which bordered the property. *Snowie*, (2008) S.L.T. at 61–62, 68.

325. *Id.* at 62–63.

326. *Id.* at 63–65.

327. *Id.* at 63–64. This tendency to exaggerate safety threats and discredit genuine walkers was typified, in the sheriff's view, by an incident in which Snowie claimed to have met a "suspicious and threatening" couple walking with "torch and baton," when in fact the baton was nothing more than a stick—most likely a walking stick. *Id.* at 63.

virtue or perhaps, to be even more precise, a lack of appreciation of the virtues and needs of others.

In the end, despite these different micro-level factual conclusions, Sheriff Cubie's legal analysis in *Snowie* essentially mirrored Sheriff Fletcher's approach in *Gloag*. Not only did Sheriff Cubie reject the Snowies' invitation to adopt an openly subjective approach to the section 6(1)(b)(iv) inquiry, but he plainly adopted Sheriff Fletcher's property-specific objective test.<sup>328</sup> Thus he easily—indeed too easily—echoed the suggestion that anyone purchasing a large property like Boquhan Estate “would require a reasonably substantial area of ground” surrounding their house for purely private use.<sup>329</sup> By making assumptions about the privacy and personal enjoyment desires of large estate owners, the sheriff again transformed the “sufficient adjacent land” inquiry into a consideration, not of what is sufficient to afford a person or family reasonable privacy and personal enjoyment around their dwelling, but of what someone purchasing differently sized estates would want and expect, an inquiry that is nowhere indicated in the LRSA.<sup>330</sup>

The next section 6(1)(b)(iv) decision, *Ross v. Stirling Council*,<sup>331</sup> was actually a companion to Sheriff Cubie's decision in *Snowie*, issued on the same day, but it illustrates other complications with application of the LRSA. Here the plaintiffs, Lindsay and Barbara Ross, were long-time residents and owners of a more modest, but no doubt pleasant, dwelling known as the West Lodge, located next to the contested west gates in *Snowie* and at the end of a long driveway leading to Boquhan House.<sup>332</sup> Prior to 2006 the Snowies controlled the gates. In August of that year responsibility for the gates (both pedestrian and vehicular) was transferred to the Rosses pursuant to a lease.<sup>333</sup> However, just like Boquhan Estate, the Ross property could not be made more secure by blocking pedestrian access through the gates, as visitors could still gain access to the Ross property at many different locations, including points near the West Lodge itself.<sup>334</sup> Nevertheless,

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328. *Id.* at 67–68. Here, Sheriff Cubie's rationale echoed *Gloag*: adoption of an openly subjective approach could lead to “repeated applications being made depending on the particular views, concerns, family circumstances and even prejudices of any particular proprietor, which cannot be the purpose of the Act.” *Id.* at 68.

329. *Id.*

330. See REID & GRETTON, *supra* note 323, at 113–14.

331. *Ross v. Stirling Council* (Scot. Sheriff Ct., Apr. 23, 2008) (Sheriffdom of Tayside Central and Fife at Sterling), <http://www.scotcourts.gov.uk/opinions/ross.html>.

332. *Id.* ¶¶ 1, 4, 7. The Rosses apparently own the land on which their house is situated, even though it is within the broader boundaries of Boquhan Estate. *Id.* at nn.4 & 25.

333. *Id.* ¶ 10. Sheriff Cubie suspected this lease arrangement was motivated by the Snowies' desire to avoid the effects of the threatened litigation with Stirling Council over access rights to Boquhan Estate. *Id.* at n.12.

334. *Id.* ¶ 18 & nn.4–5.

after the Rosses objected to the notice issued by the defendant Stirling Council, insisting that the pedestrian gate be opened, litigation ensued.<sup>335</sup>

Although he acknowledged their legitimate desire for extra security and privacy,<sup>336</sup> Sheriff Cubie concluded that the private gardens on both sides of the driveway leading into the Rosses' West Lodge property afforded sufficient adjacent land for reasonable measures of privacy and undisturbed enjoyment and therefore the pedestrian gate must remain open.<sup>337</sup> Other than to note cryptically that the "West Lodge, while in a very scenic location, is not in the same category of property [as the Snowies' seventy acre estate], and accordingly will give rise to different considerations about what constitutes sufficient ground" for purposes of section 6(1)(b)(iv),<sup>338</sup> he provided little guidance as to what those other considerations might be.

The legal analysis in *Ross* generally mirrored that in *Snowie*,<sup>339</sup> but two details are curious. First, Sheriff Cubie observed that the Rosses' garden and related grounds were "well-defined" and thus "reasonable access takers, to whom the Act is directed, would have no difficulty in recognising [and thus staying away from] the Rosses' [private] ground."<sup>340</sup> The implication is that if a landowner goes to the trouble of erecting and maintaining hedges, fences, and other landscaping features circumscribing a garden, then those features will tend to become the outer limits of the "sufficient adjacent land" surrounding the dwelling, at least for a modestly sized estate like the West Lodge.

Second, Sheriff Cubie noted that had he allowed the Rosses to prevent pedestrian access through the West Gate, he would have effectively prevented access to Boquhan Estate over which the public otherwise enjoyed broad access rights via the long driveway terminating at the gate.<sup>341</sup> In other words, a decision about access rights across one parcel may be shaped by the public's access interests in another, neighboring parcel. Thus, it is conceivable at least that even if one property might otherwise be deemed exempt from access rights on the grounds of protecting reasonable privacy (a result that might have been obtained had the Rosses' dwelling been located at the dead end of an isolated lane, for instance), the possibility that such an ex-

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335. *Id.* ¶ 14.

336. The Rosses had been victimized by a break-in decades earlier, a motor vehicle theft, and the theft of some items from their garden, but Sheriff Cubie characterized these as "very limited incidents." *Id.* at n.25.

337. *Id.* ¶ 19 & n.25.

338. *Id.* at n.56.

339. *Id.* at nn.48–55 & 57.

340. *Id.* at n.58.

341. *Id.*



emption would inhibit legitimate access to neighboring land may warrant denial of an application to exclude under section 6(1)(b)(iv).

Is this a legitimate or logical interpretation of the LRSA? If one believes the development of a highly contextual, property-specific objective test is an appropriate response to the reasonableness inquiry section 6(1)(b)(iv) seems to call for, the answer may be yes. Progressive property theorists like Alexander, Peñalver, and Singer would all certainly agree.<sup>342</sup> For those in search of a more certain, efficient, “modular” approach to the problem of defining the zone of privacy and personal enjoyment surrounding a home or residence and coordinating relationships between relative strangers, there could well be doubts about this entire approach.<sup>343</sup>

The fourth decision interpreting the “sufficient adjacent ground” exception, *Forbes v. Fife Council*,<sup>344</sup> underscores even more dramatically how the public’s new statutory right of access applies, not just in relatively remote rural areas of Scotland, but also in more densely settled areas, such as a “quiet suburban part of Glenrothes.”<sup>345</sup> The dispute in this case centered on an unlit and unpaved path located behind the Forbeses’ house and adjacent to their backyard garden, but separated from the garden by a six foot high fence.<sup>346</sup> The path was owned in common by the plaintiffs and six other sets of homeowners in the same housing development.<sup>347</sup> The path was not a public right of way under Scottish common law even though it led from a nearby public street to an open area of grassy land adjacent to another street.<sup>348</sup>

The problem concerned how the path was being used. Daytime users (such as walkers and occasional cyclists) were generally responsible. However, night time users, particularly teenagers, had begun to engage in forms of “anti-social behavior” (for instance, littering, lighting fires, drinking, and engaging in verbal abuse) that disturbed the Forbeses, their children, their dog, and their neighbors.<sup>349</sup> Unhappy with this situation, the Forbeses, with the apparent support of several neighbors, sought to deny access to the path by erecting locked gates.<sup>350</sup> The gates led to litigation when the Forbeses appealed a no-

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342. See *supra* section II.A.

343. See Smith, *Mind the Gap*, *supra* note 35, at 963–65, 968–69.

344. (2009) S.L.T. 71 (Scot. Sheriff Ct.).

345. *Id.* at 73.

346. *Id.* at 72.

347. *Id.* at 71.

348. *Id.* at 73–75.

349. *Id.* at 76–77. One cause of the antisocial behavior may have been a decision by the local council to close an “underpass” at one end of the path where teenage antisocial behavior had previously occurred. *Id.* at 76. This underpass closing may have displaced the antisocial behavior to the path.

350. *Id.* at 72, 75–76.

tice issued by Fife Council requiring removal of the locked gates.<sup>351</sup> The Forbeses made two claims: (1) the path was not land subject to access rights under section 6(1)(b)(iv), and, (2) in any event, the erection of locked gates at both ends of the path was not designed *primarily* to prevent responsible access but rather for the benign purpose of preventing anti-social behavior, and it thus did not justify sanction under section 14 of the LRSA.<sup>352</sup>

Putting aside for the moment the disposition of the Forbeses' section 14 claim, there are several noteworthy elements of the court's rejection of the Forbeses' threshold contention that the path should be exempt from access taking under section 6(1)(b)(iv). First, Sheriff W.H. Holligan emphasized that the "access rights conferred by the 2003 Act apply to all land throughout Scotland *wherever that land may be*," and thus "[t]here is no restriction limiting it to rural land."<sup>353</sup> If there were any doubts about the radical geographic reach of the LRSA, this aspect of the *Forbes* decision put them to rest.

Second, while declining to adopt any kind of "general formula" for balancing the interests of access takers and land owners,<sup>354</sup> Sheriff Holligan, like those before him, embraced the property-specific objective test for determining exemption from access rights under section 6(1)(b)(iv), commenting that application of the test "to a large country house in an estate will clearly be a different evidential process from that involving a suburban house and garden."<sup>355</sup> His particular application of the PSOT to these facts reveals, however, even more starkly its potential to lead to inconsistent results. He openly admits that his analysis of how much adjacent land around a house would be "sufficient" would depend on whether it was occupied by one person or had been "divided into flats and occupied by families."<sup>356</sup> Yet, he did not explain how this would change his analysis. Had the Forbeses actually sub-divided their house into two units, would this have diminished or enhanced the occupants' expectations of privacy and personal enjoyment on the adjacent grounds? One can imagine arguments in favor of the need for either more or less sufficient adjacent land here.<sup>357</sup>

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351. *Id.* at 71. In due course, the local council issued a notice under section 14 of LRSA requiring removal of the gates' locks, which prompted the Forbeses' appeal of the notice in the sheriff court under section 28 of the LRSA. *Id.* at 72.

352. *Id.* at 78–79.

353. *Id.* at 78 (emphasis added).

354. *Id.* at 79.

355. *Id.*

356. *Id.*

357. If two families occupied the same house in different units, they might argue they need and deserve even more elbow room for personal enjoyment. On the other hand, access officials could plausibly claim that by consenting to occupy a divided house, these same families had already accepted and indicated their toleration of less privacy and scope for undisturbed enjoyment.

In any event, Sheriff Holligan next appears to add a new factor to his PSOT inquiry—“how the access rights at issue are actually being used and the occupants’ experience of their exercise.”<sup>358</sup> In fact, this may be just another manifestation of judicial concern with identifying genuine access taking and being sensitive to the effects of access taking on residents. Sheriff Holligan’s discussion of this subject implies that a record of responsible or irresponsible access taking in the context of the particular land at issue might dictate a wider or narrower range of “sufficient adjacent land” for reasonable privacy and enjoyment.<sup>359</sup>

In the end, two simple physical characteristics were most decisive in supporting Sheriff Holligan’s conclusion that the path was not exempt from public access under section 6(1)(b)(iv): (1) the existence of the six foot high fence separating the pursuer’s garden from the path and (2) the distance—never specified—between the fence and the house (i.e., the size of the backyard garden).<sup>360</sup> Just like the fence and private gardens in *Ross*,<sup>361</sup> the presence of these simple physical demarcations seems to circumscribe the extent of excluded sufficient adjacent land, at least in the context of modestly scaled properties in suburban settings. The curious impression given by this decision and Sheriff Cubie’s decision in *Ross* on this front then is that landowners with pre-existing fences and hedges that are set close by their homes may find themselves with more modest claims to privacy and undisturbed enjoyment than if there had never been any such barriers to access on their estates at all.

The final “sufficient adjacent land” decision, *Creelman v. Argyll and Bute Council*,<sup>362</sup> further illustrates how the property-specific objective test can be employed to discern contextual detail. In this case, Robin and Myra Creelman, a married couple who jointly own six acres of land in Argyll, sought to have their land declared exempt from access taking under section 6(1)(b)(iv). Employing the PSOT,<sup>363</sup> Sheriff

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358. *Forbes*, (2009) S.L.T. at 79.

359. *Id.* (“Take a simple example of a house in the middle of an area of land. If there is evidence that persons regularly exercising rights of access over the field do so by passing very close to the house, that evidence may be relevant in helping to set the bounds of what is sufficient adjacent land.”).

360. *Id.* at 80. Sheriff Holligan also mentioned the fact that the path had existed “for some time” and that some of the Forbeses’ neighbors did not have any “difficulty” with its use, but these observations appear not to have been decisive. *Id.*

361. *See Ross v. Stirling Council*, n.58 (Scot. Sheriff Ct., Apr. 23, 2008) (Sheriffdom of Tayside Central and Fife at Sterling), <http://www.scotcourts.gov.uk/opinions/ross.html> (observing that the Rosses’ garden and related grounds were “well-defined” and thus “reasonable access takers, to whom the Act is directed, would have no difficulty in recognising [and thus staying away from] the Rosses’ [private] ground”).

362. (2009) S.L.T. 165 (Scot. Sheriff Ct.).

363. *Id.* at 175.

D. Livingston granted their wish, relying on myriad special facts and circumstances in a striking example of how land's complexity and memory can be incorporated into an LRSA adjudication.<sup>364</sup>

What was so special about these facts? First, consider the land and the three structures found there. The Creelmans' six acre tract is long and thin, consisting mainly of woodland gardens originally associated with Dunans Castle, an important historic structure situated on the parcel next door.<sup>365</sup> The Creelmans' five bedroom residence, known as Stronardron, was built in the early seventeenth century.<sup>366</sup> The second structure on the property is the former lodge house of the castle, known as Dunans Lodge, and is rented out by the Creelmans to holiday vacationers.<sup>367</sup> The third structure on the property is a mausoleum believed to belong to the Fletcher Family and which may continue to be used as the final resting place of future members of the clan.<sup>368</sup>

The Creelmans' personal engagement with their property was also significant. When they initially purchased Stronardron in 2000 and Dunans Lodge in 2004, the flora was "overgrown and impenetrable," and the main driveway leading to Stronardron was "impassible and had not been in use for approximately forty years."<sup>369</sup> Through their effort and expenditure, the Creelmans cleared and repaired the driveway.<sup>370</sup> They also made impressive efforts to restore the woodland gardens between Stronardron and Dunan's Lodge to their former glory, taking special care to plant and cultivate original species of trees and shrubbery.<sup>371</sup> Robin Creelman described these horticultural and arboreal efforts as a "life project."<sup>372</sup> Myra Creelman called them the couple's "main leisure interest."<sup>373</sup>

Although the Creelmans occasionally allowed visitors to stroll through the restored gardens and visit the Fletcher mausoleum,<sup>374</sup>

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364. *Id.* at 168.

365. *Id.* at 166.

366. *Id.* at 165.

367. *Id.* at 166.

368. *Id.* Apparently, the Fletcher family holds some private right of access over the Creelmans' property to reach the mausoleum. *Id.* Another curious feature of the land in dispute is the Stronardron Douglas Fir, which at 83.79 meters is supposedly the tallest tree in all of the United Kingdom. See *Dunans Castle*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Dunans\\_Castle](http://en.wikipedia.org/wiki/Dunans_Castle) (last visited Nov. 28, 2010).

369. *Creelman*, (2009) S.L.T. at 166.

370. The driveway bisects the Creelmans' parcel, passes very close to Dunans Lodge, is clearly visible from Stronardron, and is not bordered by walls or fences. *Id.* at 166. The only safe and practical way to access the gardens is by using this driveway. *Id.* at 167.

371. *Id.* at 167. The Creelmans spent about £10,000 in these efforts. *Id.* at 171.

372. *Id.*

373. *Id.* at 172.

374. *Id.* at 167.

their property had generally not been the subject of much public curiosity. This changed when the adjacent Dunans Castle property was purchased by a gentleman, Dickson Spain, who approached the Creelmans and asked them for permission to take visitors through the Creelmans' gardens as part of a commercial tour of his castle.<sup>375</sup> When the Creelmans declined, Mr. Spain reportedly quipped, "There's always land reform."<sup>376</sup> Apparently it was Spain's complaint to the local council regarding the denial of access to the gardens that ultimately led to the Creelmans' lawsuit against the local council.<sup>377</sup>

Given these curious facts, Sheriff Livingston acknowledged this was a difficult case to decide.<sup>378</sup> Yet, he concluded that the Creelmans could exempt their entire property from public access under the sufficient adjacent land exception for several reasons. First, a host of physical characteristics of the property—the proximity of the driveway (the route most access takers would use) to the house and lodge; the absence of any kind of privacy enhancing hedge or fence alongside the driveway; the relatively small size of the parcel given the presence of not just one, but two substantial dwellings; the tract's thin, narrow shape; and the fact that two acres consisted of steep, unusable slopes—all supported a broad claim to "sufficient adjacent land."<sup>379</sup> In addition, permeating the entire decision is Sheriff Livingston's general view that persons buying a property like this in a remote, rural location do so because they value gardens and privacy more than those choosing to live in urban areas.<sup>380</sup> In the end, none of these factors are particularly novel, and they all fall within the PSOT's emerging cone of analysis.

The most distinctive factor in Sheriff Livingston's analysis was his artful observation that the demand for access to the Creelmans' land did not come from disaffected but genteel local ramblers, as it seems to have in other section 6(1)(b)(iv) cases, but from a "neighbor who

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375. *Id.* at 171.

376. *Id.* To his credit, there is some evidence Mr. Spain proposed a "shared venture" in the tours. *Id.* at 172.

377. *Id.* After the Creelmans erected signage and some barbed wire designed to deter access to the driveway bisecting their property and Mr. Spain's subsequent complaint, the local council served the Creelmans with formal notices under section 14 of the LRSA. *Id.* at 167. The council's investigation of the matter conducted by its local access officer and review by the local access forum was cursory and unsympathetic, although it conceded that land to the west of the Creelmans' driveway could be exempt from access taking. *Id.* at 167, 171, 173.

378. *Id.* at 174.

379. *Id.* at 174–75. Although the court did not elaborate on this implication, it seems that if some kind of privacy-ensuring hedge or fence had already existed, as was the case in *Ross* or *Forbes*, the Creelmans' need for a broader exemption might have been diminished.

380. *Id.* at 166–67, 175.

wanted to use the pursuers' land for business purposes."<sup>381</sup> In other words, the interest in access taking here was not really "genuine," as other courts have put it, even though the LRSA does specifically allow for commercial advantage to be had in access taking as long as it is connected to some recreational or educational purpose.<sup>382</sup> In this case, the attempt by one landowner to use the LRSA to exploit his neighbor's property for his own commercial gain was a step too far. To Sheriff Livingston, at least, this access claim was not really virtuous enough to justify interference with the Creelmans' privacy and personal enjoyment of their narrow but unusually interesting parcel of land.

Looking back at all of these sufficient adjacent land cases, it is possible to assemble a growing laundry list of potentially relevant factors in the emerging multi-factored property-specific objective test. Those factors include: (1) the size and prominence of the dwelling and the estate;<sup>383</sup> (2) the relationship between the size of the parcel and the dwelling;<sup>384</sup> (3) the public's ease of access to the property;<sup>385</sup> (4) the history of genuine, or as the case may be, irresponsible, access taking on the property;<sup>386</sup> (5) the degree of landowner respect for legitimate access taking;<sup>387</sup> (6) security concerns of the resident;<sup>388</sup> (7) the location of old fences and boundary markers;<sup>389</sup> (8) the use of the adjacent ground by the resident;<sup>390</sup> (9) the presence of fences, walls and other privacy enhancing features around gardens;<sup>391</sup> (10) the need for access to the property by those seeking access to other properties in the vicinity;<sup>392</sup> and (11) the potential for commercial exploitation by ac-

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381. *Id.* at 175. Indeed, Sheriff Livingston observed that access takers generally had ample roaming opportunities in rural Argyllshire. *Id.*

382. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 1(3)(c); SCOTTISH OUTDOOR ACCESS CODE, *supra* note 240, § 2.9. Might the outcome have been different if someone other than Dickson Spain (perhaps Scottish Natural Heritage or some other respected non-profit) sought access to the Creelmans' land for purposes of leading educational tours through the gardens formerly associated with Dunans Castle? Should this matter?

383. *See* *Gloag v. Perth & Kinross Council*, (2007) S.C.L.R. 530, 545 (Scot. Sheriff Ct.).

384. *See id.*

385. *See* *Snowie v. Stirling Council*, (2008) S.L.T. 61, 68 (Scot. Sheriff Ct.).

386. *See* *Creelman v. Argyll & Bute Council*, (2009) S.L.T. 165, 175 (Scot. Sheriff Ct.); *Gloag*, (2007) S.C.L.R. at 539.

387. *See* *Snowie*, (2008) S.L.T. at 63–64.

388. *See id.* at 63–65; *Gloag*, (2007) S.C.L.R. at 546–47.

389. *See* *Gloag*, (2007) S.C.L.R. at 547–48.

390. *See* *Forbes v. Fife Council*, (2009) S.L.T. 71, 79 (Scot. Sheriff Ct.).

391. *See id.* at 80; *Ross v. Stirling Council*, n.58 (Scot. Sheriff Ct., Apr. 23, 2008) (Sheriffdom of Tayside Central and Fife at Sterling), <http://www.scotcourts.gov.uk/opinions/ross.html>

392. *See* *Ross*, at n.58, <http://www.scotcourts.gov.uk/opinions/ross.html>.

cess takers.<sup>393</sup> Undoubtedly, future decisions will unearth other relevant factors.

## B. Barriers, Section 14, and Zoning to Regulate Irresponsible Access Taking

The second cluster of decisions in the newly emerging LRSA jurisprudence examines the problem of barriers to, or restrictions on, access in relation to land otherwise subject to access taking. As some Scottish observers have put it, these decisions are concerned with regulating *how* access can be taken, not *where* it can be taken.<sup>394</sup> In precise statutory terms, the recurring issue is whether a barrier—a fence, a wall, a hedge, a locked gate, a sign or notice—created by a landowner that has the effect of limiting or discouraging access taking was constructed or erected for the “purpose or main purpose of preventing or deterring” persons from exercising access rights (a violation of section 14 of the LRSA) or for a benign, good faith, and thus unsanctionable land management purpose.<sup>395</sup> In essence, the issue is whether the prevention or restriction of access is the primary goal or merely the secondary effect of a barrier created by a landowner.<sup>396</sup>

Some of these decisions may be also be read as raising the question of whether, and under what circumstances, a landowner may “zone” land for different kinds of recreational pursuits or impose some “time and manner” limitation on access taking on land otherwise subject to access taking.<sup>397</sup> In this sense these decisions provide a test of the extent of land owner autonomy over certain land use choices in the face of the LRSA. The judicial responses are noteworthy for their demonstrated willingness to open the door even more widely to subjective, and sometimes even speculative, inquiries into the personal circumstances and motivations of landowners, the behavior of access takers, and concerns about the consequences of irresponsible access taking.

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393. See *Creelman v. Argyll & Bute Council*, (2009) S.L.T. 165, 175 (Scot. Sheriff Ct.).

394. REID & GRETTON, *supra* note 288, at 135; Combe, *supra* note 297, at 464. This dichotomy is generally apt but may be misleading in some situations because some limitations on how property may be used for access taking that are upheld under this emerging line of authority could have the practical effect of barring all or most forms of access taking on land otherwise subject to access rights.

395. Land Reform (Scotland) Act, 2003, (A.S.P. 2), § 14(1).

396. The issue might remind some American readers of the United States Supreme Court’s analysis of First Amendment challenges to land use regulation of adult entertainment venues where the Court has asked whether a restrictive ordinance is “aimed not at the *content* of the films shown at ‘adult motion picture theaters,’ but rather at the *secondary effects* of such theaters on the surrounding community.” *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976).

397. Malcolm M. Combe, *Access to Land and to Landownership*, 14 EDIN. L.R. 106, 107 (2010).

### 1. *Tuley and the Problem of Internal Zoning*

In the leading decision, *Tuley v. Highland Council*,<sup>398</sup> the Inner House of the Court of Session effectively held that a landowner can differentiate among different types of access taking and restrict one form of access taking—here, horseback riding—to preserve the land’s suitability for another form of access taking—namely, pedestrian access. Once again, the facts are arresting. Graham Tuley, an accomplished retired forester,<sup>399</sup> and his wife, Margot Tuley, the proprietors of an estate called Feddonhill Wood in Inverness, had invested considerable effort in developing their land as a recreational area welcoming access takers of all stripes.<sup>400</sup> After acquiring the property in 1992, the Tuleys created or improved a number of paths, labored to keep them clear and well drained, and increased their appeal by cultivating flora and even providing seats for walkers.<sup>401</sup> Although they specifically welcomed horseback riding on the southern half of their property and actually created a bridle path for this purpose, the Tuleys sought to exclude horses from the northern sector of their property.<sup>402</sup> In particular, they wanted to exclude equestrian traffic from a path called the “red track,” because they feared that equestrian use would severely and permanently damage this path and other smaller paths branching off from it.<sup>403</sup> Thus, the Tuleys erected padlocked barriers that prevented horses from gaining access to the “red track,” while allowing walkers to enter.<sup>404</sup>

After complaints were registered by several of the Tuleys’ horseback riding neighbors—including the owner of an adjacent commercial stable that enjoyed a conventional servitude of egress along the principal access track bisecting the Tuleys’ property and who wished to lead four ponies ridden by small children along the red track a few times a week—the local authorities eventually issued a section 14 notice requiring the Tuleys to allow equestrian, as well as pedestrian, access to this path.<sup>405</sup> The Tuleys appealed the issuance of the notice to the local sheriff court.<sup>406</sup>

Somewhat surprisingly, the sheriff refused to recall or vary the notice, reasoning that the LRSA required him to assume that horseback

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398. *Tuley v. Highland Council*, (2007) S.L.T. 97 (Scot. Sheriff Ct.), *rev’d*, [2009] CSIH 31A; (2009) S.L.T. 616 (Scot.).

399. Mr. Tuley is the originator of a forestry innovation known as the “Tree Tube” or “Tuley Tube.” See Combe, *supra* note 397, at 107 n.6.

400. *Tuley*, (2007) S.L.T. at 97.

401. *Id.*

402. *Id.* at 99.

403. *Id.*

404. *Tuley v. Highland Council*, [2009] CSIH 31A [3]–[9]; (2009) S.L.T. 616, 618–19 (Scot.).

405. *Id.* at [1]–[2]; (2009) S.L.T. at 617–18.

406. *Id.* at [2]; (2009) S.L.T. at 617–18.



riders would exercise their rights responsibly.<sup>407</sup> Although the Tuleys could post signs warning of the risks posed by irresponsible horseback riding, more restrictive remedies barring all equestrian access to the red track, he concluded, could not be implemented unless and until real and permanent damage materialized.<sup>408</sup> Not surprisingly, the Tuleys were distressed. If the sheriff court decision was allowed to stand, Graham Tuley warned, he would cease to maintain any of the paths in Feddonhill Wood and allow erosion and fallen timber to render them eventually inaccessible to all access takers.<sup>409</sup> After criticism of the sheriff court decision by a number of academic property lawyers,<sup>410</sup> the Extra Division of the Inner House of the Court of Session, Scotland's highest court, reversed.<sup>411</sup>

The first branch of Lord Eassie's opinion for the Court of Session rested essentially on one factual finding and two important legal determinations. First, Lord Eassie found that the sheriff simply failed to give proper weight to his own findings about the strong likelihood of damage that would result to the red track and connecting paths from regular horseback riding, particularly during wet weather.<sup>412</sup> More importantly, Lord Eassie stressed that just as access takers are presumed to be exercising their access rights responsibly under the LRSA, so too must land owners be presumed to be managing their land and conducting their ownership in a reasonable way.<sup>413</sup> In other words, he sought to underscore how the LRSA exhibits faith in the ability of *everyone* intersecting with land to deal with one another in a framework of good will and mutual regard, of shared responsibility, not of competition and exclusion. Lord Eassie also determined that the sheriff had erred in limiting the range of remedies available to the Tuleys in light of the real risk of damage.<sup>414</sup> It made no sense that

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407. *Tuley v. Highland Council*, (2007) S.L.T. 97, 108 (Scot. Sheriff Ct.), *rev'd*, [2009] CSIH 31A; (2009) S.L.T. 616 (Scot.).

408. *Id.* at 110.

409. REID & GRETTON, *supra* note 288, at 138 (quoting *Trees Can Lie Where They Fall, Says Access Wrangle Man*, INVERNESS COURIER, July 13, 2007, available at [http://www.inverness-courier.co.uk/news/fullstory.php/aid/3343;Trees\\_can\\_lie\\_where\\_they\\_fall\\_says\\_access\\_wrangle\\_man.html](http://www.inverness-courier.co.uk/news/fullstory.php/aid/3343;Trees_can_lie_where_they_fall_says_access_wrangle_man.html)).

410. *Id.* at 136–37 (commenting that the sheriff's decision caused a “sense of unreality” to settle over the reader); Guthrie, *supra* note 112, at 137 (offering the milder complaint that “it seems unfortunate that the only remedy arises after the damage has already been done”).

411. *Tuley v. Highland Council*, [2009] CSIH 31A, (2009) S.L.T. 616 (Scot.).

412. *Id.* at [26]–[35]; (2009) S.L.T. at 622–24. Lord Eassie was especially critical of the sheriff's attempt to qualify the Tuleys' expert's testimony by suggesting that a small number of horses trampling down the red track in good weather might not lead to any significant damage. *Id.* at [30]; (2009) S.L.T. at 623. As any visitor to Inverness knows, inclement weather is not at all unusual in this part of Scotland.

413. *Id.* at [13]–[17]; (2009) S.L.T. at 619–20 (Lord Eassie derives this point from sections 2(2) and 3(2) of the LRSA).

414. *Id.* at [32]–[33]; (2009) S.L.T. at 624.

landowners like the Tuleys would be required to allow a mode of access likely to damage their land and would be prohibited from taking reasonable precautionary measures that could preserve the land's recreational value for a broader spectrum of access takers.<sup>415</sup> In short, Lord Eassie concluded that the Tuleys were acting responsibly in preventing equestrian access to the red track to protect its accessibility to pedestrian visitors.<sup>416</sup>

Although he could have stopped here, the second chapter of Lord Eassie's opinion addressed an alternative ground for appeal raised by the Tuleys—whether section 14(1) of the LRSA should be read in a strictly objective manner.<sup>417</sup> If it were, the Tuleys warned, landowners like themselves might be held in breach simply for posting warning notices or erecting any barrier preventing entry to land. For example, a landowner who put up a sign warning access takers not to enter a wood where tree felling is being carried out could violate section 14(1) when in fact her “underlying” purpose was simply to prevent the access taker from getting hurt.<sup>418</sup>

Once again Lord Eassie agreed with the Tuleys. Turning to legislative history, he observed that the Scottish Parliament actually rejected an amendment that seemed to import such an objective strict liability approach to section 14(1).<sup>419</sup> By retaining the “protean” language that now constitutes section 14(1),<sup>420</sup> the final version of the LRSA preserved, in Lord Eassie's view, a court's ability to make a subjective assessment of landowner intention in cases like *Tuley*.<sup>421</sup> Thus, courts can ask whether a landowner's actions in putting up a sign or notice, erecting a fence or wall, or planting a hedge or crop are motivated simply by the desire to limit access, by a “genuine concern” for access takers' safety, or by some other benign or bona fide interest.<sup>422</sup> Indeed, Lord Eassie moved well beyond the facts of this dispute to suggest the possibly wide scope of permissible landowner decision making that might yet have the secondary effect of preventing or deterring responsible access to the land. For example, he noted:

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415. *Id.* at [33]; (2009) S.L.T. at 624.

416. *Id.* at [35]; (2009) S.L.T. at 624.

417. *Id.* at [36]; (2009) S.L.T. at 624.

418. *Id.* at [37]; (2009) S.L.T. at 624–25.

419. *Id.* at [38]; (2009) S.L.T. at 625 (The proposed amendment, Lord Eassie noted, would have substituted the words “if it is likely to have the effect, (whether or not intentional)” for the current language of section 14).

420. *Id.* (noting that the language finally approved for section 14 only classifies barrier erection and similar acts as violations if their “purpose or main purpose” is to deter or prevent access).

421. *Id.* at [41]; (2009) S.L.T. at 625. Lord Eassie also referred to the “very protean concepts [sic] of acting responsibly” that underscore the entire LRSA as endorsing a “subjective approach” to the application of section 14(1). *Id.*

422. *Id.*

[T]he establishment of a hedge may have the foreseeable and direct result of preventing access across what was otherwise open land but yet be done for the genuine purpose of enabling the enclosure of livestock, the provision to the livestock of shelter, and the provision of habitat for birds and other wildlife.<sup>423</sup>

Cumulatively, the various aspects of Lord Eassie's ruling in *Tuley* are important in a number of ways. The last branch of his opinion concerning the primary purposes and secondary effects of certain barriers to access could open the LRSA to subjective judicial inquiries into landowners' intention whenever local authorities assert that these barriers have the direct or immediate effect of restricting responsible access under section 14. Although it will complicate interpretation of the Act and may sometimes lead to inconsistent results, Lord Eassie's approach probably represents the only responsible way of preserving property owners' core interest in making significant decisions about the productive and recreational use to which their land may be put in the context of section 14 challenges.

More generally, the decision in *Tuley* recognizes that land owners should be able to make some decisions that render access activities "compatible *inter se* by dedicating or allocating areas or paths to the particular recreational activities in question,"<sup>424</sup> or as one contemporary Scottish lawyer put it simply, "to zone areas for certain uses."<sup>425</sup> This power allows land owners—in the words of Larissa Katz—to "set the agenda" for how certain kinds of access taking can occur on their property,<sup>426</sup> as long as their regulatory actions are not motivated by a desire to exclude all access taking, but rather by some form of the precautionary principle, and particularly by a desire to preserve the land's availability for a wider community of access takers.

The court in *Tuley* is not saying, however, that a landowner can pick and choose among various forms of access taking indiscriminately and prefer one form over another based on personal prejudice. Instead, what earns the court's respect here is what Eduardo Peñalver might describe as the virtue of landowner "humility,"<sup>427</sup> a willingness to temper some current, intensive land use to insure the land's value for a wider community of access takers and other users in the future.

Finally, by ruling against the local authority and recognizing the legitimacy of the Tuleys' practical, conservationist land ethic, the *Tuley* decision has, in an intangible but very real sense, helped to assure the legitimacy of the LRSA. Had the Court of Session allowed the sheriff's decision to stand, there might well have been a ground swell of popular and political support for amending the LRSA or even re-

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423. *Id.* at [42]; (2009) S.L.T. at 626.

424. *Id.* at [35]; (2009) S.L.T. at 624.

425. Combe, *supra* note 397, at 108.

426. Katz, *supra* note 59, at 277–78.

427. Peñalver, *Land Virtues*, *supra* note 10, at 884–86.

pealing it. By cabining what seemed to be the local access officials' overzealous advocacy on behalf of a very narrow group of access takers—the Tuleys' somewhat self-interested horse farm neighbors—the Court of Session underscored the double-edged nature of the new culture of access in Scotland. Both landowners and access takers must act responsibly with regard to the needs of others. Here it was the Tuleys—the landowners—who seemed to have personified this new other-regarding virtue of responsibility more than the small circle of equestrian access takers that encouraged the local authorities to challenge the Tuleys' management of Feddonhill Wood. In sum, the decision short-circuited what might have been a very demoralizing outcome for responsible landowners.<sup>428</sup>

## 2. *Back to Glenrothes*

One can appreciate the morale enhancing value of *Tuley* by observing how Sheriff Holligan used the decision to resolve the second issue in *Forbes v. Fife Council*,<sup>429</sup> the case discussed earlier concerning the narrow path behind a modest housing estate in the suburbs of Glenrothes that was held not to be exempt from access taking under Section 6(1)(b)(iv). Recall that in *Forbes* the plaintiff landowners claimed that their erection of locked gates blocking access to the path behind their house was motivated by a legitimate desire to prevent irresponsible access taking by local youth engaging in antisocial behavior.<sup>430</sup> After a lengthy, somewhat uncertain commentary on the relationship between sections 13 and 14(1) of the LRSA and Article 6 of the European Convention on Human Rights,<sup>431</sup> Sheriff Holligan used *Tuley* to reach his own contextualized and pragmatic solution to the section 14 issue in *Forbes*.

In the crucial portion of this part of his opinion, Sheriff Holligan declared that section 14 “does not prevent a land owner from stopping somebody exercising access rights where they are doing so irresponsi-

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428. In other words, the decision in *Tuley* may help the LRSA avoid producing what Frank Michaelman famously described in the context of U.S. takings doctrine as “demoralization costs”—the costs that arise when property owners and their sympathizers realize that the legal system will not afford them adequate compensation when their property rights are constrained by an alleged regulatory taking. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967).

429. (2009) S.L.T. 71 (Scot. Sheriff Ct.).

430. *Id.* at 72, 74–75.

431. Here, Sheriff Holligan’s opinion defended a fairly broad and probing scope for judicial review of a landowner’s appeal from a section 14(2) notice. *Id.* at 80–81. The defendant, Fife Council, had argued that a court’s ability to review a section 14(2) notice should be narrowly limited to establishing the accuracy of material facts relied on by the local authority and the jurisdictional basis of its actions—i.e., an administrative law model of judicial review. *Id.* at 80.

bly.”<sup>432</sup> Guided in the end by Lord Eassie’s admonition in *Tuley* to look for the landowner’s “actual purpose” in taking steps that may restrict access rights, remembering “that it is only in exceptional circumstances that access rights may be terminated,”<sup>433</sup> and noting that the irresponsible use in this case seemed to occur mainly at night, Sheriff Holligan concluded that a blended remedy was appropriate. In effect, he permitted the local authorities to insist that the gates to the path be opened during the day to allow responsible access taking, but he also permitted the Forbeses to lock them at night when antisocial behavior was most likely to occur.<sup>434</sup> Open during the day and closed at night. This is a modification of the LRSA’s general rule that access taking can occur nocturnally, but it is probably a sensible one in this “quiet suburban part of Glenrothes.”<sup>435</sup>

### C. Fences, Hedges, and Retroactivity

One more recent Scottish decision interpreting the LRSA deserves brief mention. In *Aviemore Highland Resort Ltd. v. Cairngorms National Park Authority*,<sup>436</sup> a sheriff principal held that a fence erected in 2004, after Royal Assent was given for the LRSA, but before Part I went into force, would not be considered to violate section 14(1) even though the fence clearly impeded public access over a path that had long been used for passage by members of the public.<sup>437</sup> By overturning the sheriff’s initial decision refusing to consider whether the Act could have retroactive effect because of the long history of public use

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432. *Id.* at 81. The sheriff also recognized how difficult it may be to select an appropriate remedy when the evidence in a case like this reveals a “mixed” history of responsible and irresponsible access taking. *Id.* at 81–82.

433. *Id.* at 82.

434. *Id.* at 82. According to subsequent reports of the case, Sheriff Holligan determined that the section 14 notice should be amended to require the gates be unlocked during the day (from 8:00 a.m. until 8:00 p.m.), and he awarded the plaintiffs 50% of their costs on the basis that they had been partially successful. See *Scotways Court Cases Update June 2009*, SCOTTISH RIGHTS OF WAY & ACCESS SOC’Y (June 19, 2009, 3:10 PM), [http://www.scotways.com/index.php?option=com\\_content&view=article&id=280:scotways-court-cases-update-june-2009&catid=37:court-cases&Itemid=70](http://www.scotways.com/index.php?option=com_content&view=article&id=280:scotways-court-cases-update-june-2009&catid=37:court-cases&Itemid=70).

435. *Forbes*, (2009) S.L.T. at 73.

436. (2009) S.L.T. 97 (Scot. Sheriff Ct.).

437. *Id.* at 100–01. Here, the plaintiffs owned land in Aviemore, including part of a road named Laurel Bank Lane, on which hotels, retail, and recreational facilities had been constructed. *Id.* at 97. Members of the public had apparently long enjoyed unrestricted access along the lane from the main shopping area in the town of Aviemore into the plaintiff’s resort, and likewise employees and guests at the resort used the lane to gain access to the town. *Id.* However, in 2004 the plaintiff erected a fence (and apparently planted a hedge right behind the fence) at one end of the lane. *Id.* The local authority did not contest the allegations about the fence but claimed it did not know when the hedge was planted. *Id.*

over the route in question,<sup>438</sup> and by rejecting the local authority's argument that the propriety of a section 14(2) removal notice must be evaluated based on the state of affairs at the moment of the notice's issuance,<sup>439</sup> the sheriff principal clearly circumscribed the potential reach of the LRSA.

Not only are long-standing fences, walls, hedges, signs, and other physical obstacles to access safe under this decision, but so too are barriers erected in the shadow of the Act's passage—in the roughly two years between its passage in Parliament and the date it went into force. Perhaps the Scottish Parliament should have anticipated this problem and assured more access by providing in section 14(1) that a landowner or land manager who “maintains,” as well as puts up, a fence, wall, or some other deterrent to access taking is in violation of the Act. However, as the sheriff principal pointed out, it did not do so.<sup>440</sup> At the end of the day, the land manager eventually took down the fence and hedge, but only after it used its litigation victory before the sheriff principal as a negotiating chip to resolve a separate dispute over planning approval for an expansion of the resort facilities.<sup>441</sup>

## VII. CONCLUSION

Having reached the end of this analysis of how the LRSA came about and how it is beginning to operate in Scotland, we should reflect on what this Article has been forced to leave aside and what it has established. First, this Article has not sought to argue that the LRSA could quickly and easily be transplanted to American soil to revolutionize our own property law. There is no doubt that such a sweeping re-conceptualization of the right to exclude would initially meet strong resistance in American courts on Fifth Amendment takings grounds.<sup>442</sup> Some commentators, however, might argue that an

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438. *Id.* at 99.

439. *Id.* at 100.

440. *Id.* at 100–01.

441. Interviews with Rob Garner, *supra* note 222.

442. Federal courts would be likely to declare a statutory scheme like that of the LRSA an unconstitutional taking under the Fifth Amendment. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (observing that if a state required private landowners to make an easement across their land “available to the public on a permanent basis in order to increase public access . . . there would have been a taking”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (proclaiming that “the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). State courts might react similarly given their history of declaring unconstitutional statutes that created easements for the public to walk on private beaches. See *Opinion of the Justices*, 313 N.E.2d 561, 568–71 (Mass. 1974); *Opinion of the Justices*, 649 A.2d 604, 611–12 (N.H. 1994); see also Anderson, *Countryside Access*, *supra* note 149, at 250–52 (analyzing some of the cases noted above and concluding that an

LR(US)A could survive such a constitutional attack because it would create an “average reciprocity of advantage” for all property owners by creating a right of responsible access everywhere rather than singling out individual property owners or a small subset of them to bear the burdens of government regulation alone.<sup>443</sup> Alas, this is not the place to work out these constitutional subtleties.

The Article has also not delved into the descriptive debate over the extent and uniformity of the right to exclude the public from private land in the United States. It may well be true that the American historical experience with legal impediments to access is not as monochromatic as some courts have recently assumed.<sup>444</sup> Future studies will be necessary to answer those debates.

Finally, this Article cannot work out on a case by case basis just how an LR(US)A, even assuming it could survive a constitutional challenge, would change the outcome of particular disputes between those seeking access to private land and landowners. It is true that cases concerning trespasses to land that involve motorized access or are motivated purely by commercial gain would certainly be unaffected.<sup>445</sup> Similarly, the outcome of disputes over access to land or buildings for purposes unrelated to recreation, education, or passage would also most likely be unchanged.<sup>446</sup> Other disputes, however, particularly those focused on demands for recreational access to open land like beaches and former rail road rights of way, might well require considerable rethinking if a LR(US)A were enacted.<sup>447</sup>

All this speculation aside, the primary purpose of this Article has been to show that it is practically possible for a modern, democratic nation committed to the rule of law, the protection of private property, and open markets to create, if it wants, a property regime that to a

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American “Right to Roam” law would be declared unlawful unless the statute provided for compensation to affected landowners); Anderson, *Right to Roam*, *supra* note 149, at 426–30 (same).

443. See Brian Sawers, *Is the Right to Exclude Fundamental to Property?* 83 *TEMP. L. REV.* (forthcoming March 2011) (manuscript at 4, 6–7) (on file with author) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

444. *Id.* (manuscript at 15–30) (demonstrating that initially many American colonies and states allowed a considerable amount of public access to unfenced, uncultivated private land for purposes of grazing livestock, hunting and fishing, and even recreation and that enclosure of private land occurred only gradually and fitfully across much of the United States); see FREYFOGLE, *supra* note 12, at 29–60 (same; also discussing a lost “right to roam” in the United States).

445. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

446. See *State v. Shack*, 277 A.2d 369 (N.J. 1971). If a dispute like *Shack* were to arise under a hypothetical LR(US)A, the state might argue that access was justified for purposes of education. Then again, the landowner might be able to exclude access to the buildings where migrant farm workers are housed.

447. See *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984).

considerable extent replaces the ex ante presumption in favor of the right to exclude that has come to be taken for granted in the United States with an equally robust, but rebuttable, ex ante presumption in favor of access. Moreover, as this Article has shown, the creation of a property regime like this does not happen overnight. It requires years of consensus building and collaboration by individuals and groups from diverse backgrounds. Further, it still may only arise when there has been a history of dispossession that echoes powerfully in a society's collective historical consciousness and when the legal system has otherwise failed to provide effective and reliable doctrinal means for access to the countryside for a largely urban society with increasing interest in recreation. It also may be easier to establish such a system in a society in which there has been a long history of implied licenses and customary toleration of access.<sup>448</sup>

Crucially, this Article has demonstrated that it is possible to create a property access regime that does not depend on further boundary drawing and a narrow conception of the access rights that the public might enjoy on private land. Instead, a legal system can, we have seen, establish a regime that is fundamentally open-ended in texture and that aims to inspire a new relationship between landowner and non-owner access takers, a relationship based on mutual respect for the rights of the other. Such a regime can, despite some unavoidable uncertainty costs, incorporate and seek to inspire virtues of responsibility, humility, and mutual regard.

Through its analysis of recent Scottish judicial decisions interpreting the LRSA, this Article has also shown that a property regime that pivots on an ex ante presumption of access can incorporate exceptions to this presumption that employ open-textured standards of reasonableness. These standard-based exceptions in turn require landowners and access takers to work out compromises on their own or courts to assess the needs of access takers and landowners in individual cases depending on the unique physical and social geography of the land at issue. Only time will tell if the Scottish courts' initial efforts in establishing the property-specific objective test for purposes of determining how much "sufficient adjacent land" various home owners are entitled to claim will provide enough predictability to limit disputes and uncertainty in this important gray area of the LRSA. Similarly, it is too early to judge whether the courts' initial efforts to distinguish between access barriers that are primarily and illegitimately designed to deter or prevent access and those that are created for bona fide land man-

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448. See generally Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009) (describing how legal systems can draw on and incorporate customs into law most readily when the customs are already well known throughout society and do not require significant extra publicity to become understood).



agement purposes will provide a long term workable solution to the conflicts raised by section 14 of the LRSA. Despite some rough edges in their opinions, it appears that the Scottish courts have made a solid beginning in their approach to both of these key interpretive issues.

Finally, as this Article has emphasized all along, we should acknowledge that there is certainly an information processing and efficiency cost to an endeavor like the LRSA and that those who crafted this legislation were not insensitive to this. In fact, the Scottish Parliament set aside a considerable amount of resources to educate the public about the new access regime it was creating<sup>449</sup> and imposed obligations on local councils to establish “local access forums” and to develop systems of “core paths” that might meet some of the newly unleashed demand for recreational access in all areas of Scotland.<sup>450</sup> Further research will be required to evaluate the success of these educational and advertising efforts and to assess the impact of the core paths initiatives.

At this point, we can at least be certain of one thing. The LRSA has begun to create a new culture of access in Scotland by fundamentally changing the legal relationship between landowners and those who seek access to land for recreation, education, and passage. American property scholars should watch carefully how this culture of access continues to develop in the years ahead as they formulate and revise their theories about the role that the right to exclude plays in our own property law.

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449. According to Rob Garner of Scottish Natural Heritage, the Scottish Executive (now called the Scottish Government) allocated some £8.1 million per annum to local authorities during 2005–09 in recognition of the costs of the new duties under the LRSA (e.g., core paths planning, running local access forums, etc.). The local authorities have more than matched that amount in their continuing capital and maintenance spending on paths, and other running costs, as detailed in annual monitoring questionnaire returns, available at <http://www.scotland.gov.uk/Topics/Environment/Countryside/16328/AccessAuthorities>. Additional funding, principally from Scottish Natural Heritage, has supported the advertising and educational campaigns about the LRSA and the Scottish Outdoor Access Code. See *Your Access Rights*, SCOTTISH NATURAL HERITAGE (Dec. 10, 2009, 5:15 PM), <http://www.snh.gov.uk/enjoying-the-outdoors/your-access-rights/>; see also ROB GARNER, SCOTTISH ACCESS LEGISLATION—THE FIRST 40 MONTHS (2009) (unpublished report) (on file with author) (reporting on funding and activities of Scottish Natural Heritage).

450. See Land Reform (Scotland) Act, 2003, (A.S.P. 2), §§ 17–20 (imposing duty on local authorities to draw up systems of “core paths,” publicize core path plans, and then maintain, review, and amend them); *id.* § 25 (requiring every local authority in Scotland to establish for its area a “local access forum” whose duty it will be to advise the local authority on the exercise of access rights and the drawing up and adoption of core path plans and to give assistance to the parties to any dispute about access rights).