

## PROPERTY

# ROAM IF YOU WANT TO?

*Some argue that property rights should not include the right to exclude interlopers.*

✦ BY JONATHAN KLICK AND GIDEON PARCHOMOVSKY

“Get off my lawn,” snarls Clint Eastwood as he looks down the barrel of his M1 rifle in *Gran Torino*. It would be hard to pack more America into a single movie scene. However, whether it makes sense to have the right to exclude interlopers from your property is increasingly being called into question. In an April 23, 2016 op-ed in the *New York Times* titled, “This Is Our Country. Let’s Walk It,” backpacking enthusiast and author Ken Ilgunas suggests that, prior to the late 19th century, Americans enjoyed a de facto right to roam on private land. Invoking recent legal changes in the United Kingdom as well as longstanding rights in Scandinavia, he concludes: “Something as innocent and wholesome as a walk in the woods shouldn’t be considered illegal or intrusive. Walking across the so-called freest country on earth should be every person’s right.”

## LAW & ECONOMICS OF PROPERTY

The right to exclude others has long been seen as the central attribute of private property. The economist Harold Demsetz long ago pointed out that the right to exclude others is what gives the owner of a property the ability to internalize the costs and benefits arising from its use. In so doing, the owner has the incentive to maximize the property’s value in a way that would be very difficult without exclusion. The right to exclude, in Demsetz’s conception, does not necessarily eliminate or minimize the use of the property by non-owners, but rather it gives the owner the ability to manage the use of the resource optimally.

For example, a landowner who cannot stop hunters from pursuing game on his property may soon find the levels of valuable animals driven to zero. Any single outside hunter has very little incentive to worry about the sustainability of the animal stock. If

he forgoes shooting a fertile female to aid in the replenishment of the stock, surely another hunter coming after him will not similarly pass up the chance. However, an owner with the ability to exclude individuals from using his land will have incentive to limit the amount of hunting that occurs, husbanding the resources in the most sensible way. By selling permits and placing limitations on which animals can be hunted, the owner will maximize the value of his asset.

Similarly, if the owner’s property is attractive to those wishing to hike through it, an inability to restrict entry might lead to crowds that reduce everyone’s enjoyment, not to mention degradation of the property itself. With the right to exclude, the owner has the ability to limit congestion through entrance fees, raising prices to the point where the value of the asset is maximized. Further, in such a case the owner might be induced to use some of his revenue to improve the property in order to further increase value. If the owner happens to place a particularly high value on privacy and solitude, he will set prices accordingly, such that he only allows visitors if their implicit valuations exceed the cost represented by his loss of quietude. Without an ability to exclude, losses to peace-loving owners will go largely ignored.

Outside of economics, many legal thinkers have likewise indicated that exclusion is the central element of property. In one of the most famous sentences in the history of property law, William Blackstone described property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” Importantly, in this statement Blackstone did not advance an original conception of property. Nor was it a normative statement. Rather, his comment was descriptive. It accurately reflected the property conception that prevailed among legal thinkers in the 18th century.

Today, renowned legal scholars likewise recognize the centrality of exclusion. Harvard law professor Henry Smith, in individual work and joint work with his colleague Thomas Merrill from

JONATHAN KLICK and GIDEON PARCHOMOVSKY are professors in the University of Pennsylvania Law School. This article is based on their forthcoming article, “The Value of the Right to Exclude: An Empirical Assessment,” *University of Pennsylvania Law Review* 165 (2017).



Columbia Law School, emphasizes the information cost advantages of a property law focused on exclusion rights. In keeping with this insight, Smith notes that property is “the law of things.” It makes sense for property law to take advantage of the clear and well-defined boundaries of things, or assets, as a mechanism for communicating information to third parties as to their duties and liberties in their interactions with property owners. If an owner says that a third party may not use his property, courts or other regulators do not need to engage in complicated analyses to determine the contextual rights of the non-owner. The determination of the owner’s wishes is all that matters, leaving a system with a high degree of certainty for all involved.

Harvard law professor Steven Shavell offers a different efficiency-based justification for the right to exclude. He observes that in the absence of a right to exclude, possessors of assets would devote considerable resources to protect their property from intruders or to otherwise discourage the intrusions to begin with. Such expenditures are purely wasteful from society’s perspective,

but they will be undertaken nonetheless. The state, by enacting a right to exclude, can perhaps protect owners more cost effectively.

#### QUESTIONING THE RIGHT TO EXCLUDE

A group of scholars carrying the mantle of “progressive property” have raised objections to this purportedly reductionist view of the importance of exclusion with respect to maximizing the social value of property and the administration of property law. In their view, the use of property “implicates plural and incommensurable values,” according to Cornell law professor Gregory Alexander and co-authors’ 2009 *Cornell Law Review* article, “A Statement of Progressive Property.” An owner’s value of privacy and seclusion cannot be easily compared to another individual’s use value, which may be crucial for that non-owner’s flourishing as a human.

Writers in this movement note that access to nature is often essential to both physical and mental health. However, this access typically is difficult if not impossible for those who do not own

## PROPERTY

property. Unequal distribution of ownership will lead to unequal opportunities to flourish. Additionally, many in the progressive property movement believe exclusion rights interfere with the interactions among individuals that are necessary for the social life that is important in a democracy.

Even among some more economically minded property theorists, exclusion rights have been questioned. Columbia law professor Michael Heller coined the phrase “Tragedy of the Anticommons” to describe situations wherein an excess of strong exclusion rights can destroy social value. For example, even if individuals placed very high value on accessing land through which they wished to hike (indeed, even if the value were many times greater than the subjective cost borne by the land’s owner as a result of their intrusion), if the desired hiking path required accessing multiple properties held by different owners, each owner may have the incentive to attempt to extract all of the hikers’ value for himself through his access fee, leading the hikers to abandon their trek rather than pay out the full value they would have gotten to each of multiple landholders. The intuition of the anticommons idea is that the greater the number of individual owners with exclusion rights over inputs necessary to create a particular output, the more intractable holdout problems become. Thus, exclusion rights, rather than being what allow owners to maximize the social value of their property, may end up becoming the main impediment to the creation of social value.

#### COUNTRYSIDE AND RIGHTS OF WAY ACT OF 2000

Often such high-level theoretical disputes carry on for years with very little to calibrate their implicit empirical claims and assumptions. However, in a recent journal article, we exploit the Countryside and Rights of Way Act passed in England and Wales in 2000 to provide some empirical grounding on whether exclusion rights create or impede value.

The Countryside and Rights of Way Act grants the general public a right of access to most “open” areas. Passage of the act was followed by an extensive effort to define and map the areas to which the right applied. The mapping process was completed on October 31, 2005, at a cost of £69 million (about \$85 million) to the British public. The legislative scheme in England and Wales recognizes a right to roam that applies to three main categories of land: (1) mapped open country; (2) mountain land; and (3) coastal land.

The first category of mapped open country covers designated areas as they appear on a conclusive map issued by the “appropriate countryside body.” “Open country,” in turn, is defined as land that “(a) appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and (b) is not registered common land.” The statutory definition excludes areas that were determined by the appropriate countryside body as “improved or semi-improved grassland.” The second category, mountain land, refers to mountains of 600 meters (1,968 feet) or higher. The third category, “coastal land,”

was added in 2009 with the enactment of the Marine and Coastal Access Bill of 2009 and extended the right to roam to a “coastal margin” in order to form a trail of over 2,700 miles along the English coast. Overall, the public right of access covers 3.4 million acres (between 8% and 12% of the total amount of land) in some of the best hiking areas in England and Wales.

The right to roam is subject to several limitations. First, the right does not apply to freshwater bodies such as rivers, streams, and lakes. Second, the act excludes cultivated agricultural areas. Third, the act specifically exempts sports fields such as golf courses, race courses, and aerodromes. Fourth, the act provides that the right does not extend to “land within 20 meters [60 feet] of a dwelling,” as well as parks and gardens, thereby creating a “privacy zone” for landowners in the ground adjacent to their homes. Fifth, the right to roam in England and Wales permits only access on foot for recreational purposes. Other recreational activities such as cycling, horseback riding, skiing, camping, hunting, boating, bathing, and the lighting of campfires are forbidden. In addition, hikers are required to not cause property damage and to respect walls, gates, fences, stiles, and hedges. They are also expected to protect plants and animals and not to litter.

Landowners, for their part, are obliged to give the public free access to their properties if they are subject to the right to roam. In keeping with this obligation, owners must ensure that all rights of way on their properties are clear and must not post or maintain misleading notices on, near, or on the way to, access land.

Private landowners can restrict or bar access altogether for up to 28 days a year for any reason without permission from the authorities. Any restriction in excess of that period must be justified and requires special approval from the authorities, which may be granted for reasons of land management, conservation, or fire prevention.

Landowners are exempt from tort liability for harm to hikers caused by natural features of the property or resulting from an improper use of gates, fences, or walls. However, landowners are liable for harms resulting from the materialization of risks they have intentionally or recklessly created. For example, if an owner releases her cattle to graze on the property and one of the animals attacks a visitor, the owner would be held liable for the injury sustained by the visitor.

It may surprise American readers, but the scope of the right to roam in England and Wales is modest relative to its scope in other countries. In Scotland, the right to roam, as established by the Land Reform (Scotland) Act of 2003, covers almost the entire territory of the country. Furthermore, Scottish law contains fewer exclusions and exemptions. For example, in Scotland the right to roam also applies to grassy sports fields when they are not in active use. More significantly, the range of activities permitted under Scottish law is much broader than that which exists in England and Wales. The definition of the right to roam in Scotland encompasses such activities as organized educational tours, orienteering, bicycle riding, rock-climbing, swimming, and

camping. Finally, Scottish law does not demarcate a clear “privacy zone” for landowners (as does the English law). Instead, it employs a reasonableness standard, requiring hikers to use their access rights reasonably and provide owners with a reasonable measure of privacy and refrain from unreasonably disturbing them. This means that in Scotland, private landowners can exclude visitors only to the extent necessary to give them a reasonable degree of privacy in their homes. Also, the conscious decision by the Scottish legislature to avoid bright-line rules in designing the right to roam and build the statutory scheme on the standard of “reasonable access” created uncertainty as to the precise scope of the right and necessitated judicial intervention in some cases.

Some Scandinavian countries went even further than Scotland in recognizing public roaming rights. In Scandinavia, the right to

reduce the holdout problems that occur in the anticommons setting, the attendant increase in social value should conversely push property values up. The net equilibrium change in property prices observed after such a legal change would provide an indication of whether exclusion or access generates more social value.

Unfortunately, such theoretical conclusions depend crucially on largely untestable assumptions regarding how quickly and completely value is capitalized in prices. Most concerning, perhaps, is the possibility that property owners, buyers, and sellers are more readily able to affect market prices than are non-owners, who are likely to be the primary beneficiaries of increased access. (However, even non-owners’ property values are likely to be capitalized at least to some degree as ancillary services, such as lodging, provisions, guide services, etc., would rise in demand.

This would increase the economic activity in the areas where individuals wanted to hike, which in turn would affect property values in those areas).

That being said, it is still useful to estimate changes in property values resulting from the passage of access laws because they may give us at least some indication of how burdensome access is to landowners. Such a calculation is especially important in the U.S. setting where a law comparable to the Countryside and Rights

of Way Act would trigger a requirement for just compensation, as such an increase in access would constitute a takings under U.S. constitutional law.

*We compared the changes in prices in areas where relatively large amounts of land were designated for access as compared to areas where access rights did not change much at all.*

roam has ancient historical roots and is widely known as “everyman’s right.” In Norway, for example, the right to roam encompasses recreational activities such as swimming, sailing, canoeing, and kayaking. Hikers are allowed, in principle, to pick berries, flowers, and mushrooms, and even nuts for in situ consumption. Moreover, the right to roam grants the public the right to pitch tents and camp for up to two days without seeking permission from the owner, as long as tents are positioned at least 165 yards away from the nearest house and the privacy of landowners is respected. Campers are allowed to light campfires between mid-September and mid-April. As far as their duties, in residential areas hikers must keep a distance of 500 feet from houses and other structures. Visitors must also ensure that they do not litter or cause property damage. They must also refrain from disturbing farm animals or wildlife. Finally, the right to roam does not cover freshwater fishing.

#### **DOES EXCLUSION CREATE OR DESTROY VALUE ON NET?**

Theoretically, if decreases in/limitations on the right to exclude (or, viewed a different way, increases in/expansions of access rights) inhibit owners from optimizing the value of their land, real estate prices should decline upon the passage of laws like the Countryside and Rights of Way Act, and they should decline further when the reductions are even larger, such as in the Scottish or Scandinavian cases. However, if these limitations on exclusion

#### **MEASURING THE CHANGE IN VALUE**

To isolate the effects of the Countryside and Rights of Way Act, we used sales data for properties in England and Wales around the period of the act’s passage in 2000. Rather than simply examine changes in price before and after 2000 (which would be problematic given that real estate prices were in the midst of a fairly steady upward trend at the time), we compared the changes in prices in areas where relatively large amounts of land were designated for access as compared to areas where access rights did not change much at all. For England, aggregate data on access designation is broken down across nine regions. On average, 6.5% of all land was so designated, but this ranged from lows of 0.5% for London and 0.7% in the East of England, all the way to 13.8% in York, 17.7% in the Northwest of the country, and 18.4% in the Northeast of the country. For Wales, the range was even greater. In Wales, access land data are available at the county or local authority level, with the average county having 11% of its land designated for access. Cardiff, Monmouthshire, and Pembrokeshire all experienced access designations of 1% or less of their land, while Powys, Merthyr Tydfil, and Torfaen each had at least 20% of its land so designated and Blaenau Gwent saw 40% of its land marked for increased access.

## PROPERTY

Examining sales data from 1995 to 2014, we find that property values in areas with relatively large access land designations did not grow as quickly after 2000 (the year the act was adopted) compared to the areas with relatively little land designated for access. This result was observed for both England and Wales and accounts for potentially different pre-2000 trends by location. In England, regions with the largest fractions of land designated for access lost more than 8% of the growth in prices that were enjoyed by the areas with only trivial designations. This reduction sets in almost immediately in 2000, increasing confidence that it was due to the act's passage. What's more, the relative decline is not reversed throughout the sample period, so it appears the effect we identify is not merely a short-term overreaction by fearful landowners. Instead, it appears to be a systematic and lasting loss

*Property values in areas with relatively large access land designations did not grow as quickly after 2000 (the year the act was adopted) compared to the areas with relatively little land designated for access.*

of value. The results are largely unaffected if London, a somewhat idiosyncratic real estate market that might be more affected by global wealth dynamics than by national policy, is omitted from the sample.

The story is comparable in Wales. For the period, the overall growth in average sales prices in Wales is about 112%. However, for the areas where the largest fraction of land is designated to be accessible, growth averaged only 94% over the period. As with England, the bulk of the change is experienced around the act's adoption in 2000 and does not reverse through the end of the period. Also, the estimated effects do not differ if pre-existing differential trends by location are accounted for.

In any type of empirical analysis like this, there is always a concern that the estimated effect is merely picking up some other background changes. The fact that in both countries the results are comparable and concentrated around the 2000 adoption mitigates those concerns, as does the fact that the "before" and "after" changes do not appear to be extensions of pre-existing differences in trends across the countries. One may wonder, however, whether our results are not driven by something else that changed in 2000, making rural areas less valuable than more urban places, and our results merely conflate the act's passage with this changing rural/urban divide. But if we include controls that allow trends to differ by how rural an area is, we find no change in our estimates. While we can never be certain that something else is not driving our results, it is not at all clear what that something else could be.

Another concern for the interpretation of our results is the possibility that our relative decline of areas with large access land designations are actually driven by increases in the value of living in places without much access land. The idea would be that in the pre-act world, living in London or some other place with limited opportunities to enjoy nature is less enjoyable and so a premium is placed on properties with more natural amenities. Once the Countryside and Rights of Way Act is passed, this downside to living in London disappears because one can now simply make day trips to areas with access land. Our primary design does not allow us to rule out this possibility because areas with little access land are used as the presumptive counterfactual comparison for the areas where more land is designated for access. However, in subsequent analyses, we compared real estate price changes in England and Wales in 2000 with contemporaneous changes in Scotland and Northern Ireland (neither of which experienced any such legal change in 2000) and we found that the average English and Welsh property value declined significantly relative to the prices in the other countries at this time. This implies that our observed relative decline in regions with more access land was not driven by a more-than-proportionate increase in urban areas benefiting

from the opening of the countryside. Additionally, to further our confidence in the general finding, we found that Scottish property values declined in 2003 when that country adopted its own access land act.

## CONCLUSION

Taken as a whole, our results suggest that property owners place significant value on their ability to exclude others from their land. These findings are in some ways quite surprising given how limited the intrusions are under the Countryside and Rights of Way Act. Individuals exercising their rights under the act cannot camp, hunt, or fish on another person's property. Some modicum of privacy is preserved by the requirement that travelers stay more than 20 meters away from any dwelling. Compared to the access rights enjoyed in Scandinavia, the English and Welsh regulations are quite modest, and yet buyers and sellers appear to have significantly revised their valuation of properties affected by the Countryside and Rights of Way Act.

While our research does not completely resolve any debate about what is best for social welfare generally, it does imply that restrictions on the right to exclude entail significant costs that should be considered in any cost-benefit analysis of right to roam proposals. Further, for such proposals in the United States, where the Constitution's 5th Amendment may require just compensation for property owners under any such access land law, these costs could be substantial. R