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Exclusion Erosion – Scots property law and the right to exclude

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This is my first contribution to a festschrift. Although new to this branch of literature, I have gleaned there are loose rules applicable to essays written in honour of someone.¹ Essays should somehow relate to the person celebrated. In turn, the focus, and indeed the topic, of an essay should generally veer away from an autobiographical discourse of the person doing the celebrating. In writing this note, I have found my first rule is relatively easy to follow. My second rule is trickier to adhere to. The simple fact of this contribution to his festschrift shows I might have insights or anecdotes that explain a bit more about the exceptional scholarship, and more importantly the fine man, represented by the honouree.

Fortunately, I have been able to look to the work of Professor Carey Miller to confirm I should not worry about eschewing autobiography entirely, as he demonstrated in a contribution to a recent festschrift.² As such, before explaining the topic of this essay and its relevance to the honouree, I will take a moment to set out some of the occasions where David and I worked together.

Despite our shared connections to Aberdeen, I first met David at the University of Strathclyde, when it played host to the 2005 Society of Legal Scholars conference, just after I finished my law degree there. On the basis that I was about to move to the University of Aberdeen to study the Diploma in Legal Practice (as the professional training phase of legal education in Scotland was then known), I was able to speak to David and strike up the beginnings of a relationship that resulted in me being both a research student and a tutor for the School of Law whilst working towards my qualification. Some of my research work was

¹ Advice is available. See David Schleicher, 'From Here All-the-Way-down, or How to Write a Festschrift Piece', *Tulsa Law Review*, 48 (2012–2013), 401–25.

² David L. Carey Miller, 'Lawyer for all Time' in Andrew Burrows, David Johnston and Reinhard Zimmermann, *Judge and Jurist: Essays in honour of the late Lord Rodger of Earlsferry* (Oxford, 2013), 383–97.

independent,³ but the most significant works were produced in partnership with David. This collaboration came to fruition in the form of two pieces of work: one on the boundaries of property law;⁴ and another on one of David's specialist subjects, corporeal moveable property.⁵

After completing my diploma, I retained some links to the School of Law, delivering a seminar to LLB students and participating in the Baltimore/Maryland Summer School, both at the David's invitation.⁶ I then re-joined the School of Law as a lecturer in 2011, working with David on a range of matters: teaching for the undergraduate property law course; submitting a response to the Scottish Law Commission on the reform of security for corporeal moveables;⁷ and presenting to a delegation of Norwegian judges about aspects of Scottish land law. With the latter, David presented on the access provisions contained in the Land Reform (Scotland) Act 2003 (asp 2). He returned to this topic at a conference in his native South Africa, resulting in a paper for the Potchefstroom Electronic Law Journal.⁸

I am aware my work with David only represents the tip of the iceberg as regards his scholarship, but that tip reveals something that is worthy of further study. Much has been written about Scotland's new access regime, including David's valuable contribution, but a dedicated, modern Scottish analysis of the extent of an owner's entitlement to exclude others from property remains lacking. This essay will explore that, and specifically consider the shift away from a strong mandate to regulate access to private property, set against the body of literature about the so-called right to exclude. As we shall see, it is difficult for any legal system to completely align with the paradigm of a full exclusionary entitlement. However, it is not redundant to analyse how Scots law measures against that paradigm. This exercise

³ One output from this period was a note about the community right to buy introduced by Part 2 of the Land Reform (Scotland) Act 2003: Malcolm M. Combe, 'No place like *Holme*: Community Expectations and the Right to Buy', *Edinburgh Law Review*, 11(1) (2007) 109–16. It was based on a paper I presented to a conference in 2006, in a session chaired by Professor Carey Miller. I was able to register my thanks to him for his (and Professor Roderick R. M. Paisley's) support in a printed acknowledgement.

⁴ David L. Carey Miller and Malcolm M. Combe, 'The Boundaries of Property Rights in Scots Law', *European Journal of Comparative Law*, 10(3) (2006), <http://www.ejcl.org/103/art103-4.pdf>, accessed 4 December 2016.

⁵ David L. Carey Miller, Malcolm M. Combe, Andrew J. M. Steven and Scott Wortley, 'National Report on the Transfer of Movables in Scotland' in Wolfgang Faber and Brigitta Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Munich, 2009), 297–470.

⁶ David's contribution to the success of this Summer School cannot be understated, not least for his ability to attract one slightly more prestigious speaker than me on an annual basis, namely the late Lord Rodger: Carey Miller, 'Lawyer for all Time', 384.

⁷ Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011). See Andrew J. M. Steven, 'Reform of Security over Moveables: Still a Longstanding Reform Agenda in Scots Law', in this volume.

⁸ David L. Carey Miller, 'Public Access to Private Land in Scotland', *Potchefstroom Electronic Law Journal*, 15(2) (2012), 119–47 <http://dx.doi.org/10.4314/pelj.v15i2.6>, accessed 4 December 2016.

gives a prime example of how much erosion there can be to a system associated with a strong exclusionary right whilst a recognisable system of property law remains.

The right to exclude – in theory and in literature

What is meant by the right to exclude? It is one of the rights in the ‘bundle of rights’ found in property law.

Instantly, there is a conceptual problem for a Scots lawyer. I do not recall paying much attention to bundles of rights in the undergraduate property law course I studied. No criticism of my *alma mater* is intended: I do not espouse the bundle of rights theory to undergraduates now that I lecture in Scots private law. Perhaps it does not hold a special value to Scots law scholars.⁹ (The ‘befogging metaphor’¹⁰ does not always hold a special value to non-Scots either.) That is not to say I am unaware of the theory, and its use to separate out institutions of property law with physical property itself: ‘the right to convey, the right to devise, the right to use, and, top of the pile, the right to exclude.’¹¹

That quote comes from an article by Professor Anderson on the educational benefits of using the right to exclude in teaching – perhaps I have missed a trick in my teaching practice to date – before noting an immersion in ‘Blackstonian absolutism’¹² can lead students to struggle to appreciate how rights might be relational and may vary depending on who is on the other side of a particular dialectic. Anderson subsequently explains how the strong right to exclude that pervades the jurisprudence of the United States of America¹³ can be best set in context – and challenged – by comparative law analysis, before considering the

⁹ In a leading student textbook on Scots property law, Gretton and Steven do not introduce the bundle of rights theory, although they do mention the expression ‘dismemberments of ownership’ in the context of encumbering ownership: George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession* (3rd edn, Haywards Heath, 2017), para. 2.5. Instead, the preference for analysis in terms of the civil law constituent rights of use (*usus*), fruits (*fructus*) and consumption or disposal (*abusus*) prevails. See also Hector L. MacQueen and Rt. Hon. Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (14th edn, Edinburgh, 2017) para. 30.01.

¹⁰ Thomas W. Merrill, ‘Property and the Right to Exclude’, *Nebraska Law Review*, 77(4) (1998), 730–55, 755.

¹¹ Jerry L. Anderson, ‘Comparative Perspectives on Property Rights: The Right to Exclude’, *Journal of Legal Education*, 56(4) (2006), 539–50.

¹² *Ibid.*, 539, before quoting Blackstone’s characterisation of ownership as the ‘sole and despotic dominion’ over a thing, to the ‘total exclusion of the right of any other individual in the universe.’ William Blackstone, *Commentaries on the Laws of England, Book the Second* (Albany, N.Y., 1899), 2.

¹³ Except, Anderson muses, in South Dakota: *ibid.*, 545. Cf the discussion in Eric T. Freyfogle, ‘Property law in a time of transformation: the record of the United States’, 131(4) (2014), *South African Law Journal*, 883–921 and Eric T. Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Boston, 2007), chapter 2, entitled ‘The Lost Right to Roam’.

situations in Laos, Norway, Sweden and ‘Britain’ (although, slightly disappointingly, the analysis of Britain Anderson describes is restricted to England and Wales).¹⁴

Before proceeding any further, it seems prudent to do some fundamental groundwork. Where does that ‘bundle of rights’ – perhaps a ‘tartan weave of rights’ would be a more appropriate Scottish analogy – originate?¹⁵ The starting point is ownership, or *dominium*: the main real right;¹⁶ the ‘greatest possible interest in a thing which a mature system of law recognizes’.¹⁷

It can take quite a logical step to get to the idea of ownership as a legal concept in the first place, but for the moment the starting point of *dominium* will be taken as a given.¹⁸ What does ownership entail? Scotland does not have a neat civil code that says what ownership is,¹⁹ but that is unlikely to cause its property lawyers to panic. The triplet of *usus*, *fructus* and *abusus* is well known. Autonomy abounds for the owner, who has the right to use the property subject to ‘law or paction’, as Erskine would put it, before noting that ownership ‘necessarily excludes every other person but the proprietor’.²⁰

Is it worthwhile to try to demarcate what that autonomy entails? In his influential essay, Honoré begins with a detailed disclaimer which concludes that it is not ‘worthless to try to delineate the incidents [of ownership] in the ordinary, uncomplicated case’.²¹ He then lists eleven incidents.²² How that mix coalesces to form ownership might vary from situation to situation. It is clear from Honoré’s analysis that not all the listed incidents are individually

¹⁴ Anderson repeats this approach in a slightly later article: Anderson, ‘Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks’, *Georgetown International Environmental Law Review*, 19(3) (2006–2007), 375–435. That article gives a slightly unconvincing explanation. He states studies of Scotland (and Northern Ireland) are ‘not relevant to my purpose and would unnecessarily complicate the article’, when in fact a study of Scotland’s liberal access laws could have fortified the thrust of his article.

¹⁵ On the origin more generally, see Jane Ball, ‘The Boundaries of Property Rights in English Law’, *European Journal of Comparative Law*, 10.3 (2006) <http://www.ejcl.org/103/art103-1.pdf>, accessed 4 December 2016, 4–5.

¹⁶ See Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996) paras 4 and 5, drawing on Stair, *Institutions*, II.1.28.

¹⁷ A. M. Honoré, ‘Ownership’ in A. G. Guest, *Oxford Essays in Jurisprudence* (Oxford, 1961), 106–47.

¹⁸ Consider Jonathan B. Wiener, ‘What Begat Property’, *History of Political Economy*, 43:2 (2011) 353–60.

¹⁹ Although there have been occasional moves towards codification of aspects of it: David L. Carey Miller, ‘Scottish Property: a system of Civilian principle. But could it be codified?’, in Hector L. MacQueen, Antoni Vaquer and Santiago Espiau Espiau (eds), *Regional Private Laws and Codification in Europe* (Cambridge, 2003), 118–135.

²⁰ Erskine, *An Institute of the Law of Scotland*, first edition (Edinburgh, 1773; reprinted as Old Studies in Scots Law, vol. 5, Edinburgh, 2014), II.1.1. See also Reid, *The Law of Property in Scotland*, para. 5.

²¹ Compare the comments of Gordon, which are analysed further in the discussion about corporeal moveables below: William M. Gordon, in Reid, *The Law of Property in Scotland*, para. 533.

²² Honoré, ‘Ownership’ 113–128. These are: the right to possess; the right to use; the right to manage; the right to income; the right to capital; the right to security; the incident of transmissibility; the incident of absence of term; the prohibition of harmful use; liability to execution; and the incident of residuary.

necessary for someone to be designated owner.²³ Most importantly for this analysis, he rejects the idea of one criterion being the difference between ownership and lesser interests.²⁴

That said, Honoré observes that the right to possess – that is to say, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits – is ‘the foundation on which the whole superstructure of ownership rests.’²⁵ ‘From an English law perspective’, Cooke asks, ‘is there a core to the ownership bundle, one essential ingredient?’²⁶ She observes ‘[o]ne suggestion is inalienability’, before continuing ‘[a] more truly core concept is the power to exclude others.’²⁷ Returning to Honoré’s analysis, in the context of land he notes ‘a general licence...to enter on the “property” of others would put an end to the institution of landowning as we now know it.’²⁸

Anderson’s comments above make clear there are other rights that co-exist, but it is also clear that he places much import on the right to exclude (as a teaching aid and more generally). Further theoretical contributions have been made by American scholars, perhaps most famously by Merrill,²⁹ with other analysis from Alexander and Peñalver,³⁰ Sawers³¹ and (with a convenient, for present purposes, Scottish slant) Lovett,³² amongst others.³³ Merrill’s [in]famous article has been something of a poster boy of a movement that the right to exclude is the *sine qua non* of ownership,³⁴ to the extent that he was moved to refine some of his

²³ Ibid., 112–3

²⁴ Ibid., 125–6.

²⁵ Ibid., 113.

²⁶ Elizabeth Cooke, *Land Law* (Oxford, 2012), 3.

²⁷ Ibid., 3–4. Cooke further continues, ‘My piano is mine, and therefore I am entitled to stop you playing it; my land is mine, and so I can keep you out.’ Understandably, she then follows those examples with a counter-example, of a police officer exercising power legitimately.

²⁸ Ibid., 114. The full quote is instructive: ‘It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of ownership of land, yet a largish number of officials have the right of entering on private land without the owner’s consent, for some limited period and purpose. On the other hand, a general licence so to enter on the “property” of others would put an end to the institution of landowning as we now know it.’ As shall be discussed later, there are now a number of contexts where a largish number of *non*-officials are allowed on private land in Scotland without the owner’s consent.

²⁹ Merrill, ‘Property and the Right to Exclude’.

³⁰ Gregory S. Alexander and Eduardo M. Peñalver, *An Introduction to Property Theory*, (Cambridge, 2012), 149–55. Consider also Gregory S. Alexander, ‘The Social-Obligation Norm in American Property Law’, *Cornell Law Review*, 94(4) (2009), 745–819, 801–10.

³¹ Brian Sawers, ‘The Right to Exclude from Unimproved Land’, *Temple Law Review*, 83(3) (2010–2011) 665–96.

³² John A. Lovett, ‘Progressive property in action: the Land Reform (Scotland) Act 2003’, *Nebraska Law Review*, 89(4) (2011), 739–818, particularly 743–50.

³³ David L. Callies and J. David Breemer, ‘The Right to Exclude Others From Private Property: A Fundamental Constitutional Right’, *Washington University Journal of Law and Policy*, 3 (2000), 39–59. (That particular issue of the journal was entitled ‘Evolving Voices in Land Use Law: A Festschrift in Honour of Daniel R. Mandelker’).

³⁴ Cf Henry E. Smith, ‘The Thing About Exclusion’, *Property Rights Conference Journal* 3 (2014) 95–123. This article opens with the subtle variation that, ‘The right to exclude is a *sine qua non* of debates over property’,

observations in a subsequent paper,³⁵ but even there it is clear that the right to exclude has a certain primacy.

There is a wider debate as to whether exclusion is the single variable essential that makes ownership what it is or whether it is part of a multiple variable mix,³⁶ and there are alternative viewpoints to the primacy of the right to exclude.³⁷ Honoré's exhortation that you should not prioritise one over any other has already been noted. There has been scholarship about the priority of the incident of use³⁸ or the importance of the owner's role as agenda setter.³⁹ Some argue any property rights should be linked to notions of 'human flourishing'⁴⁰ and the 'social obligation norm'.⁴¹

All of this could be explored in more detail, but even with those alternative perspectives on ownership it is clear exclusion theory has a special place in property theory, in terms of legal scholarship⁴² and beyond.⁴³ Whilst aspects of exclusion theory can also be

before concluding, 'The right to exclude is an important feature of property, albeit not a sine qua non' 122. Instead of the right to exclude, Smith homes in on the thing that there might be a right to exclude from as the heart of property law.

³⁵ Thomas W. Merrill, 'Property and the Right to Exclude II', *Property Rights Conference Journal*, 3 (2014), 1–25.

³⁶ Merrill, 'Property and the Right to Exclude', 734

³⁷ The important contribution of A. J. van der Walt in 'The Modest Systemic Status of Property Rights', *Journal of Law, Property, and Society*, 1 (2014), 15–106 is acknowledged, but not analysed at this stage. His work will be returned to below.

³⁸ See the discussions in Merrill, 'Property and the Right to Exclude II', 4–5, Susan Pascoe, 'Social obligation norm and the erosion of land ownership?' *The Conveyancer and Property Lawyer* 76(6) (2012) 484–97, 485–7 and Lovett, 'Progressive property in action', 743–53. Consider also Rahmatian, who notes in his analysis of the treatment of property by Lord Kames that 'there is an external and an internal aspect which can be regarded as two sides of the same coin: the rights to exclude or the external aspect, and the rights to use or the internal aspect of property rights.' Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh, 2015), 227. Here he refers to J. E. Penner, *The Idea of Property in Law* (Oxford, 1997). In turn, at the beginning of his chapter 4 (entitled 'The Right to Property, the Exclusion Thesis'), Penner notes exclusion and use are 'intertwined'. See also Jonnette Watson Hamilton and Nigel Bankes, 'Different views of the cathedral: the literature on property law theory Property and the Law in Energy and Natural Resources' in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, *Property and the Law in Energy and Natural Resources* (Oxford 2010), 19–59, 27.

³⁹ Larissa Katz, 'Exclusion and Exclusivity in Property Law', *University of Toronto Law Journal*, 58(3) (2008), 275–315.

⁴⁰ Consider Eric T. Freyfogle, 'Private Ownership and Human Flourishing: An Exploratory Overview', *Stellenbosch Law Review*, 24(3) (2013), 430–54, drawing: on Hanri Mostert and Thomas W Bennett (eds), *Pluralism and Development* (Cape Town, 2012); and A. J. van der Walt, *Property in the Margins* (2009, Oxford). In relation to the exclusionary focus of this chapter, see Alexander and Peñalver, *An Introduction to Property Theory*, 149–55.

⁴¹ Alexander, 'The Social-Obligation Norm in American Property Law'. See also Pascoe, 'Social obligation norm and the erosion of land ownership?'.

⁴² A. J. van der Walt, 'The Modest Systemic Status of Property Rights', especially 17–23, and see now Jonathan Klick and Gideon Parchomovsky, 'The Value of the Right to Exclude: An Empirical Assessment', *University of Pennsylvania Law Review*, 165(4) (2016–2017), 917–66, 923–35. Cf Freyfogle, *On Private Property*, xvi.

⁴³ For example, Garret Hardin's critique of a common approach to resources is well known: 'The Tragedy of the Commons', *Science* 162 (1968) 1243–8, but cf Avital Margalit, 'Commons and Legality' in Gregory S. Alexander and Eduardo M. Peñalver, *Property and Community* (Oxford, 2010) 141–63. Meanwhile, Harold Demsetz highlights the economic case for exclusion in 'Toward a Theory of Property Rights', *The American*

found in diverse areas such as criminal law,⁴⁴ invasion of privacy,⁴⁵ international law and state sovereignty,⁴⁶ and intellectual property (if that is to be classed as separate to property law as a whole),⁴⁷ the right to exclude has acquired a particular property law resonance in many legal systems. It threads into emerging comparative⁴⁸ and international treatments of property law,⁴⁹ not to mention human rights insofar as they relate to property.⁵⁰

Economic Review, 57(2) (1967), 347–59, for example at 356 by noting (in the context of a comparison between communal and individual ownership) ‘an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.’ See also Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago and London, 2006) 5 and particularly footnote 20 there, and Laura S. Underkuffler-Freund, ‘Property, a Special Right’ *Notre Dame Law Review*, 71(5) (1996), 1033–58, 1038.

⁴⁴ And relatedly, the integrity of the human body regarding consent to medical treatment. Consider *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, about the importance of a patient’s autonomy when it comes to making informed consent about a medical option.

⁴⁵ Hector L. MacQueen, ‘A Hitchhikers Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy’ in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee, 2009), 549–88. See also Jace C. Gatewood, ‘The Evolution of the Right to Exclude – More than a Property Right, a Privacy Right’, *Mississippi College Law Review*, 32(3) (2014), 447–65.

⁴⁶ This strong, non-interventionist view of sovereignty can be seen in Article 2(7) of the UN Charter. It is strongly associated with Hersch Lauterpacht, and indeed an analogy he makes between property law and international law is discussed in John G. Sprankling, ‘The Global Right to Property’, *Columbia Journal of Transnational Law*, 52(2) (2013-2014), 464–505, 467. Consider also Aaron Schwabach, ‘Diverting the Danube: The Gabčíkovo-Nagymaros Dispute and International Freshwater Law’, *Berkeley Journal of International Law*, 14(2) (1996), 290–343, 325–36. One recent example of a typical property law encroachment actually involving an international element (as the encroachment crossed the Czech-Austrian border) can be found on the Radio Praha website, 22 June 2006 ‘Exasperated hotel owner saws off own roof to resolve border dispute’ <http://www.radio.cz/en/section/curraffrs/exasperated-hotel-owner-saws-off-own-roof-to-resolve-border-dispute>, accessed 4 December 2016.

⁴⁷ Perhaps the prime example of an exclusionary right is the patent, governed in the UK by the Patents Act 1977, but exclusionary ideas are also evident in other IP areas like copyright and trade marks. The social obligation theory aspects of intellectual property are touched on in relation to copyright and patent in Alexander, ‘The Social-Obligation Norm in American Property Law’, 810–5. See more generally Charlotte Waelde, Abbe Brown, Smita Kheria and Jane Cornwell, *Contemporary Intellectual Property: Law and Policy*, fourth edition (Oxford, 2016), 1.33–1.35. See also Gillian Black, ‘Exclusive Privilege: Adam Smith, John Millar, and the Creation of a New Right?’ in Ross G. Anderson, James Chalmers and John MacLeod (eds), *Glasgow Tercentenary Essays: 300 Years of the School of Law* (Edinburgh, 2014), 20–52.

⁴⁸ See the Draft Common Frame of Reference, which defines ownership as the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property: Christian von Bar, Eric Clive, Hans Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich, 2009) VIII-1:202.

⁴⁹ John G. Sprankling, ‘The Emergence of International Property Law’, *North Carolina Law Review*, 90(2) (2012), 461–509; Sprankling, *The International Law of Property*, chapter 13 (entitled ‘The Right to Exclude’), touching on diverse matters like the “generally unfettered” right to eject (citing *Appleby v United Kingdom* 37 EHRR 38 para 22) and also looking at Chinese, Vietnamese, American, Japanese and Shari’a rules about interfering or encroaching on another’s property (at 311); and Sprankling, ‘The Global Right to Property’.

⁵⁰ Theo R. G. van Banning, *The Human Right to Property* (Antwerpen, 2002), 1.2.2 and 2.2.2 (particularly pages 90–2). This coverage touches on Article 1 of the First Protocol to the European Convention on Human Rights and the entitlement to peaceful enjoyment of possessions, but the clearest characterisation of the right to exclude analysed there relates to the home, in terms of Article 8 (considered in *Niemietz v. Germany*, judgment of 16 December 1992, Series A no.251-B). See also the discussion at 2.2.4. Perhaps not too much should be made of this for the present analysis, because rights to a home and property rights should not be conflated: as Carey Miller reminds us, ‘Property and housing are associated matters but, of course, involve entirely distinct rights.’ David L. Carey Miller, ‘The Great Trek to Human Rights: The Role of Comparative Law in the

Of course, we do not live in a world where the owner of a thing can completely exclude all others from that thing in all circumstances.⁵¹ It is difficult to imagine a legal system where a hermit could cocoon himself and all of his patrimony from all other people. To give an example, state authorities can enter premises for law enforcement purposes with appropriate authorisation.⁵² Meanwhile, someone benevolently intervening to avert a dangerous situation or of necessity escaping a peril in a manner that involves a temporary incursion onto another's property would not normally be expected to obtain prior consent.⁵³ With that backdrop, not to mention Honoré's observation that no aspect of ownership trumps the others, can any legal system, never mind Scotland, be expected to ever fully meet the paradigm most associated with Merrill: "Deny someone the exclusion right and they do not have property?"⁵⁴ If not, what is the point of comparing any system to that paradigm?

It is submitted that it is not a hollow exercise to do so. In fact, Scotland showcases how much erosion there can be to a system associated with a strong exclusionary right whilst retaining a recognisable system of property law.

Whilst this study will bring its own insight, I appreciate I am following in the footsteps of a giant. This is because Scots law is not the only legal system embarking on a journey of reform or reconceptualisation. Professor Carey Miller considered the South African system's remarkable journey alongside Scotland's in the article referred to in my introduction. As he explains:⁵⁵

Development of Human Rights in Post-Reform South Africa' in E. Özücü (ed.), *Judicial Comparativism in Human Rights Cases* (Birmingham, 2003), 201–27, 214. Of more relevance to this exclusion analysis is Article 17 of the Universal Declaration of Human Rights, which recognises the right to own property and that there should not be arbitrary deprivations. Cf Laura Dehaibi, 'The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization', *Western Journal of Legal Studies* 6(1) (2015) 5, at <http://ir.lib.uwo.ca/uwojls/vol6/iss1/5>, accessed 4 December 2016.

⁵¹ Alexander and Peñalver, *An Introduction to Property Theory*, chapter 7 (entitled 'The Right to Exclude and Its Limits').

⁵² See Sprankling, *The International Law of Property*, where he considers that the home is safeguarded from arbitrary interference (with reference to the International Covenant of Civil and Political Rights, Article 17, the European Convention on Human Rights, Article 8, and American Convention on Human Rights, Article 11 (313)). Scottish situations of necessity and state authorisation are discussed at MacQueen and Eassie, *Gloag and Henderson*, (eds) 34.15, with the examples of extinguishing a fire, pursuit of a criminal, a constable ascertaining whether a crime is being committed, and statutory conferrals of a right to enter such as under the Health and Safety at Work etc. Act 1974, section 20. To this can be added rights of entry to land under the High Hedges (Scotland) Act 2013 (asp 6) to deal with offending foliage and Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), s 47 (powers of entry and seizure of equipment used to make noise unlawfully).

⁵³ George Joseph Bell, *Principles of the Law of Scotland*, fourth edition (Edinburgh, 1839; reprinted as *Old Studies in Scots Law*, vol. 1, Edinburgh, 2010), § 956–958. Consider also Kames, *Principles of Equity* § 134. Consider also Sprankling, *The International Law of Property*, 320–2.

⁵⁴ Merrill, 'Property and the Right to Exclude', 730.

⁵⁵ Carey Miller, 'Public Access to Private Land in Scotland', 143.

The South African Constitution sets out a controlling agenda for land reform with major implications for the protection of property in terms of the position of the common law. As part of that development the landowner's power to evict has been redefined but without recognition of any general notion of public access to private property. However, as Professor André van der Walt has shown, post-apartheid case law does reflect certain moves to restrict a landowner's general right to exclude.⁵⁶ But a limit on the power to exclude persons, on the basis of their behaviour, from private premises open to the public⁵⁷ is different in kind from a general right of public access for recreational and educational purposes.

This extract provides at least two topics for analysis, namely public access to private land and eviction. Those will be considered here, alongside certain other exclusionary aspects of Scots law. To keep the scope of that analysis in check, again Professor Carey Miller provides some guidance. He restricted one of his studies to matters of corporeal property as 'the most important part of any system of property law'.⁵⁸ Similarly, this paper will focus on Scotland's treatment of such tangible things against the exclusion paradigm.⁵⁹ Land will be an important part of the coverage, but it would be remiss not to cover corporeal moveables, especially when one considers Carey Miller's huge contribution in that area of scholarship.⁶⁰ Another restriction which will keep this analysis in check is a focus on situations where there is no particular relationship between a landowner and the person they are seeking to exclude. There will be no consideration of, for example, matrimonial homes legislation⁶¹ and

⁵⁶ Here, Carey Miller cites van der Walt, *Property in the Margins*, 195.

⁵⁷ Here, Carey Miller cites *Victoria & Albert Waterfront (Pty) Ltd v Police Commissioner, Western Cape* 2004 4 SA 444 (C).

⁵⁸ Carey Miller, 'Scottish Property: a system of Civilian principle. But could it be codified?', 118. Admittedly, his statement was about derivative acquisition in the context of voluntary transfer of corporeal goods, so the 'most important part' statement Carey Miller made also included transfer rules within its purview, whereas here I am looking only at physical property and not wondering why, how or when someone became the owner of that property. That is not to say the rules of original and derivative acquisition are not important, it is simply to recognise the limitations of this piece.

⁵⁹ Intellectual property is therefore excluded from this particular exclusion analysis, but as already noted that is not to say it cannot be subject to exclusion analysis as well. In fact, Merrill considers IP is a prime candidate for exclusion analysis: 'The law with respect to intangible rights in intellectual property is, if anything, even more striking in the degree to which the property right and the right to exclude go hand-in-hand. Copyrights, patents, trademarks, and trade secrets are all recognized as intangible forms of property. In each case, the core of the property right is the right to exclude others from interfering with or using the right in specified ways'. Merrill, *Property and the Right to Exclude*, 749.

⁶⁰ D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005).

⁶¹ Section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, confers a right of occupancy, which can have effect even after an owner deals with the property in terms of s.6. Equivalent rules for (same sex) civil-partners are found in the Civil Partnership Act 2004. Occupancy rights can also apply in relation to co-habiting couples, allowing a non-owner on application to court to gain occupancy for up to six months: s.18.

servitudes.⁶² Analysis of circumstances where an otherwise landlocked proprietor can be afforded access to an area of land even where there is no agreement⁶³ and the constitution of rights by positive prescription⁶⁴ will also be eschewed. This approach will highlight relevant examples of erosion of the proprietor's right to exclude, before concluding that those erosions of the exclusion paradigm have not damaged the solidity of Scots property law.

Conceptions of the right to exclude – land law

1. General

You do not need to look far to find a trend towards exclusivity in Scottish land law.⁶⁵

Rankine's text on Landownership has a chapter headed 'Exclusive Use, Trespass and Game'.⁶⁶ Erskine's formulation about exclusivity has already been noted, while Bell notes that, 'The proprietor of land has the exclusive right to the use and occupation, not merely of the surface, but of what is below, and what is above the surface, *'a coelo usque ad centrum.'*⁶⁷ These positions, and more, are analysed in detail by Lovett.⁶⁸

⁶² In this regard, it can be noted that despite expounding a strong exclusionary approach at the beginning of Book II of *An Institute of the Law of Scotland*, Erskine noted 'it is most consistent with this rule that the right of property may be in one person, while that of servitude, impignoration, or other inferior right in the subject, is vested in another.' Erskine, *Institute*, II.1.1. The 'rule' that is referred to is 'that two different persons cannot have, each of them, full property of the same thing at the same time'. Tangentially, it can be noted that certain servitude rights – such as the right to lead a pipe over or under land (Title Conditions (Scotland) Act 2003, s.77. Cf the now obsolete Bell, *Principles of the Law of Scotland*, § 942) or position a septic tank or park a car on land (*Moncrieff v Jamieson* [2007] UKHL 42) are less transient than others.

⁶³ As was the case in *Bowers v Kennedy* 2000 S.C. 555. As there is no role for agreement here this exclusion from my exclusion analysis is more challenging to justify, but two reasons can be offered. First, Sprankling, *The International Law of Property*, chapter 13 characterises this doctrine as an attenuated example of necessity, a doctrine that will be mentioned below. Second, in these situations the access is provided for as a result of particular proximate ownership arrangements, so there is a particularity to this exception to the right to exclude that would not stop the encumbered landowner from excluding other uninvited parties.

⁶⁴ Under the Prescription and Limitation (Scotland) Act 1973. See further George L. Gretton, 'Reforming the Law of Prescriptive Title to Land', in this volume. In relation to prescription for corporeal moveables, this is a matter David Carey Miller and Andrew Simpson analysed in a recent consultation exercise by the Scottish Government: see https://consult.scotland.gov.uk/family-and-property-law/prescription_and_title_to_moveable_property/consultation/view_respondent?uuId=412089906 accessed 4 December 2016. Further, positive prescription represents a situation where an owner has had a chance to exclude another but has not done so, and thereafter loses the right to do so.

⁶⁵ On the topic in general, see William M. Gordon and Scott Wortley, *Scottish Land Law* (3rd edn, vol. 1, Edinburgh, 2009), and particularly at 3.02 where it is noted that the owner can 'resist any unlawful interference with the land by temporary or permanent encroachment on the surface of the land, on the air-space above it and on the ground beneath the surface.'

⁶⁶ John Rankine, *The Law of Land-Ownership in Scotland*, fourth edition (Edinburgh, 1909). Also page 134: 'it is the nature of property to be exclusive'.

⁶⁷ Bell, *Principles of the Law of Scotland*, § 940.

⁶⁸ Lovett, 'Progressive Property in Action', 760–2.

A landowner can take steps to prevent a crane jib swinging over his property⁶⁹ and by analogy take similar legal steps in relation to a drone flying over his property (but not in relation to civil aviation flights).⁷⁰ As for less temporary exclusions, on an *a fortiori* analysis encroachments by way of building can be prevented or (should it be too late to prevent such intrusion) removed.⁷¹ The right to remove is however subject to ‘an equitable power of the court, in exceptional circumstances, to refuse enforcement of the proprietor’s right’, as set out in the case of *Anderson v Brattisani’s*⁷², which related to a flue leading from a ground floor property up the wall. As explained by Professors Reid and Gretton, in a useful analysis of that leading authority and recent case law on similar issues, the flue had been installed with the consent of the upper neighbours, but the successor in title to one of those neighbours later sought removal of the apparatus from the property he had acquired. The court refused to do so, but on such narrow grounds to make clear this compassion would not be conferred lightly.⁷³

That deals with encroachments from the *solum* up. What about subterranean intrusion? Bell wrote that the exclusive right extends downwards and there is ample case law in line with that analysis.⁷⁴ Modern technology and the related regulatory and indeed judicial response is challenging that, most notably in relation to extraction of the unconventional resource of shale gas.⁷⁵ Whilst environmental concerns and politics have intervened to the

⁶⁹ *Brown v Lee Constructions Ltd* 1977 SLT (Notes) 61. Anyone wishing to lawfully periodically encroach in this manner would require an oversail agreement with the proprietor. Reid, *The Law of Property in Scotland*, para. 198.

⁷⁰ A landowner’s right to exclude domestic flights from her airspace is restricted by the Civil Aviation Act 1982.

⁷¹ This principle applies equally to a cornice protruding from a building sited on neighbouring land as it does to a structure that touches the ground owned by someone else: *Milne v Mudie* (1828) 6 S. 967; *Hazle v Turner* (1840) 2 D. 886. Cf *William Tracey Ltd v SP Transmission PLC* [2016] CSOH 14, 2016 SLT 678, discussed in Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2016* (Edinburgh, 2017), 10–2.

⁷² 1978 SLT (Notes) 43.

⁷³ This case, and two modern related cases (with reference to South African scholarship) are discussed in Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2015* (Edinburgh, 2016), 158–61. They number three aspects from the court’s reasoning in *Anderson v Brattisani’s* (at page 43), namely ‘the court will have to be satisfied [1] that the encroachment must in the belief that it was unobjectionable, [2] that it is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and [3] that its removal would cause the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor.’ The two modern cases are *McLellan v J & D Pierce* [2015] CSIH 80, 2015 GWD 37-594, where removal was ordered after an encroachment where building works continued and were completed despite a request to stop by the encroached upon landowner’s solicitor, and *Munro v Finlayson* 2015 SLT (Sh Ct) 123, a case about a driveway where the encroached upon landowner did not seek removal of the drive, but rather sought (successfully) an order removing the neighbours, and as such excluding the encroaching neighbour from the use of his property.

⁷⁴ Erskine, *Institute*, II, 6, 1; Bell, *Principles of the Law of Scotland*, § 737–740, 940; *Whyte v Lee* (1879) 6 R. 699. This general rule does not prevent separate ownership rights in separate horizontal strata: Gordon and Wortley, *Scottish Land Law*, chapter 5 (entitled ‘Horizontal Subdivision of Land, Minerals and Support’).

⁷⁵ This encompasses ‘fracking’ in particular, as hydraulic fracturing is commonly known. See generally Tina Hunter (ed.), *Handbook of Shale Gas Law and Policy: Economics, Access, Law and Regulation in Key Jurisdictions* (Cambridge, 2016).

effect that fracking is not proceeding in Scotland for the moment, developments in England and Wales are instructive. First, the Infrastructure Act 2015 removes the equivalent chance to object to operations below the surface.⁷⁶ It is open to Scottish legislators to follow. Second, the following observations of Lord Hope (a Scottish judge, sitting in an English appeal to the UK Supreme Court) suggest the centre of the Earth might not be an appropriate terminus of ownership after all.⁷⁷ He noted:

There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion.

Notwithstanding that conceptual challenge from a Scottish judge to a similar English rule and the comparator of English legislation that superseded that rule, Scots law still offers a strong right to exclude for temporary and not so temporary intrusions below, on and above land. The only category (if it is a category) that remains is that of a wandering animate object. Owners are entitled to remove straying animals from their land (and damage caused by them renders the keeper of those animals liable under the Animals (Scotland) Act 1987). Straying humans are dealt with below.

From this brief analysis, it is clear ownership is a powerful starting position. But that is also not the full story. As noted in a leading Scots law textbook, ‘the comprehensiveness of the right of ownership means that it is open to extensive fragmentation’.⁷⁸ That is to say, the wide range of application is acknowledged as something that lends itself to erosion. Even beyond the recognised subordinate real rights (most of which will have been derived from the owner or a predecessor in title, and as such are not looked at here), there can also be other controls because ‘the law, for policy reasons, from time to time, creates new forms of fragmentation by the recognition of rights which have the character of real rights in terms of

⁷⁶ Section 43 provides ‘A person has the right to use deep-level land in any way for the purposes of exploiting petroleum or deep geothermal energy.’ ‘Deep level land’ (per subsection (4)) is any land at a depth of at least 300 metres below surface level.

⁷⁷ *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, para. 27. See also Jill Morgan, ‘Subsurface ownership and hydraulic fracturing in the UK: (probably) under my backyard’, *Journal of Business Law*, 8 (2015), 634–48.

⁷⁸ MacQueen and Eassie (eds), *Gloag and Henderson*, 30.01.

their implications for the relevant core right of ownership.’ Examples are then given relating to matrimonial homes and access to land under Part 1 of the Land Reform (Scotland) Act 2003 and (perhaps not so usefully for the present discussion) the rights of community acquisition in Parts 2 and 3 of the 2003 Act. Those rights of community acquisition will be skimmed over here, as they are about reallocating rather than reconfiguring ownership and thus are not directly in point for this discussion.⁷⁹ As already noted, matrimonial homes will not be discussed here. The focus of this paper will now move to the issue of public access to private land.

2. Access to private land by those without prior consent

Perhaps the simplest scenario of the owner’s right to exclude being put to the test is an uninvited individual accessing that person’s property. There are essentially three situations where Scots property law explicitly allows this: a public right of way; a public right in relation to the foreshore or a tidal river;⁸⁰ or a right of responsible access under the 2003 Act.

Access to land in Scotland is much discussed and often misunderstood. A commonly expressed sentiment is that there is no law of trespass in Scotland.⁸¹ That is not quite right, but from the other end of the spectrum a landowner putting up a sign saying ‘TRESPASSERS WILL BE PROSECUTED’ is likely to be disappointed if it comes to an attempt to do so.⁸² As is often the case, the truth is somewhere between the two, although recent reforms have slightly repositioned the truth into friendlier terrain for access advocates.

Before considering those recent reforms, it is necessary to set out the old ways that afforded access. Like many countries, Scotland is covered by an invisible network of traditional routes, many of which remain public rights of way. Contemporary rights of way may have begun as old routes to take livestock to markets, or they may have been formed in living memory after twenty years of unbroken use by members of the public travelling from

⁷⁹ That said, the wider land reform agenda in Scotland is moving towards recognising community rights of acquisition in situations where a landowner might previously have been entitled to do nothing with an asset whilst simply excluding others for any reason or none. This will be returned to below.

⁸⁰ These are part of the ‘Regalia’, as discussed in Gloag and Henderson, *The Law of Scotland*, 34.06–34.07, citing *Hope v Bennewith* (1904) 6 F. 1004, *Mather v Alexander* 1926 S.C. 139 and *Burnet v Barclay* 1955 J.C. 34.

⁸¹ The line of argument has most recently been associated with the late Alan Blackshaw: see ‘Implied permission and the traditions of customary access’, *Edinburgh Law Review*, 3(3) (1999), 368 and ‘An historical approach to the new outdoor access legislation’, *Scottish Affairs*, 62 (2008), 1. Cf Jeremy Rowan-Robinson and Andrea Ross, ‘The freedom to roam and implied permission’, *Edinburgh Law Review*, 2(2) (1998), 225.

⁸² At one level, a landowner would be disappointed because it is the norm for prosecutions in Scotland to be instigated at the behest of a public prosecutor, a step that is not triggered by signage erected by private individuals. A landowner may also be disappointed to learn this sign could fall foul of the 2003 Act, s 14 if it is positioned in a place where access rights can be enjoyed, as it could be characterised as a baseless attempt to dissuade access taking.

one public place to another.⁸³ Ways are not necessarily sign-posted, nor is it necessary for them to appear on maps (in contrast to, for example, England and Wales). Where they exist they can and regularly do traverse parcels of land in separate ownership. Affected landowners cannot block the route or otherwise interfere with someone taking access along the route.⁸⁴ The right to exclude is restricted accordingly.

Rights of way work well for anyone travelling from point to point. What is the situation if someone wants to take a diversion away from a public right of way, or perhaps pitch a tent for the night when on a recreational outing? Absent any agreement or quiet tolerance by the owner of the land where a diversion or dalliance is planned or taking place, the traditional Scots law position is that a landowner can take steps to retain or regain exclusive possession. Considering practicalities, a landowner is sometimes restricted in terms of remedies against a one-time, bare trespasser. This can be demonstrated by the fact that someone taking unauthorised access to land is only liable to a landowner (or indeed criminally liable⁸⁵) for actual damage caused.⁸⁶ Furthermore, for a prohibition of access relative to a specific individual to carry force of law, a court action must be raised against that individual.

Issues of enforcement and a custom of tolerance have undoubtedly contributed to the perception that there is no law of trespass in Scotland. However, the balance of scholarly and (more importantly) judicial authority tends towards the position that Scotland traditionally allows a landowner to exert a significant amount of control over access to his land,⁸⁷ albeit

⁸³ Prescription and Limitation (Scotland) Act 1973 s.3(3).

⁸⁴ See further Douglas J. Cusine and Roderick R. M. Paisley, *Servitudes and Rights of Way* (Edinburgh, 1998) and Roderick R. M. Paisley, *Access Rights and Rights of Way* (Edinburgh, 2006).

⁸⁵ There are some specific statutory offences that might be characterised as having connotations of trespass, such as s.56 of the Civic Government (Scotland) Act 1982 (which relates to the setting of fires in a public place) or the Trespass (Scotland) Act 1865 (as amended by the 2003 Act, which makes it an offence to occupy or encamp on any private land without prior permission or to encamp or light a fire on or near any road or enclosed or cultivated land without consent, unless such activities are properly recreational and within the Land Reform (Scotland) Act 2003, which will be discussed below). Reference can also be made to general criminal law and targeted legislation relating to public order, such as the Criminal Justice and Public Order Act 1994, s. 61. That allows police holding the reasonable belief that two or more persons are trespassing on land with the common purpose of residing there for any period to ask them to leave and take appropriate action if they do not.

⁸⁶ Another contrast with England and Wales is apparent. In this situation, Scots law can take solidarity from the similar approach in South Africa, as explained by Carey Miller in a passage written in 1986 (drawing on the case *Hefer v Van Greuning* 1979 (4) SA 952 (A)): 'Roman-Dutch law does not know any specialized action for the recovery of damages in respect of the wrongful possession, use or occupation of property. There is nothing akin to the tort of trespass of English law and the question is simply whether liability arises on the application of the ordinary principles of delict.' David L. Carey Miller, *Acquisition and Protection of Ownership*, (Cape Town, 1986), para. 13.1/page 333.

⁸⁷ Consider Lovett, 'Progressive property in action', 760 and Lord Trayner's oft-quoted maxim that it is 'loose and inaccurate' that there is no law of trespass in Scotland (*Wood v North British Railway* (1899) 2 F. 1 at 2). That case is cited by Paisley, *Access Rights and Rights of Way*, where he also highlights the compelling

there are time, money and other practical implications relating to enforcement. Both the principle and surrounding practicalities have recently been confirmed by the Court of Session.⁸⁸ That case will be analysed further below:⁸⁹ for now it will suffice to say that political campaigners who had occupied land near the Scottish Parliament were not able to fall within the terms of the Land Reform (Scotland) Act 2003. How that legislation works will now be considered.

(a) Access to land for passage, recreation, education, and (some) commerce

Part 1 of the 2003 Act blankets the whole of Scotland, subject to limited exceptions,⁹⁰ with access rights that allow people, perhaps accompanied by an animal or using a non-motorised vehicle, to be on or to cross land in a responsible manner. They are rights for everyone. No prior bargain or even acquiescence by a landowner or manager is required for *ad hoc* use, nor is prior conduct needed to evidence the rights. This marks something of a challenge to those favouring a strong model of exclusion. How do they work without challenging property law as a whole?

The new regime is set out in Part 1 of the 2003 Act,⁹¹ as supplemented by the Scottish Outdoor Access Code. The Access Code is a freely available document produced by Scottish Natural Heritage – and approved by the Scottish Parliament – which gives guidance on how access rights and corresponding responsibilities work in practice.⁹²

In terms of the mechanics of the legislation, only a brief overview is possible here.⁹³ Section 1 begins by stating ‘Everyone has the statutory rights established by this Part of this

inference that, ‘Public rights of way would hardly have been required if there had been no law of trespass’ (at 40).

⁸⁸ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, affirmed [2016] CSIH 81. Lord Trayner’s quote in *Wood* was referred to uncritically by the Outer House (see particularly paras 31–33) then approved by the Inner House of the Court of Session.

⁸⁹ See also Malcolm M. Combe, ‘The Indycamp: Demonstrating Access to Land and Access to Justice’, *Edinburgh Law Review*, (2017) 21(2), 228–33.

⁹⁰ Contained in s.6. The legal framework is set out below.

⁹¹ The remaining Parts of the legislation relate to the community right to buy (Part 2) and the crofting community right to buy (Part 3): see Malcolm M. Combe, ‘Parts 2 and 3 of the Land Reform (Scotland) Act 2003: a definitive answer to the Scottish Land Question?’ *Juridical Review*, 2006 195–227. The Community Empowerment (Scotland) Act 2015 has added a new Part 3A and a further community right to buy certain land. On that and other recent reforms, see Malcolm M. Combe, ‘The Land Reform (Scotland) Act 2016: another answer to the Scottish Land Question’ *Juridical Review*, 2016 297–31.

⁹² The Access Code is provided for by s.10. See <http://www.outdooraccess-scotland.com/>, accessed 18 November 2016. The full Access Code is accessible there.

⁹³ Access rights have triggered a great deal of analysis. A flavour can be found in: Paisley, *Access Rights and Rights of Way*; Lovett, ‘Progressive property in action’; Carey Miller, ‘Public Access to Private Land in Scotland’; Combe, ‘Get off that land: non-owner regulation of access to land’; and Tom Guthrie, ‘Access Rights’ in Robert Rennie (ed.), *Property Law Reform: The Promised Land* (Edinburgh, 2008), 125–46.

Act’.⁹⁴ It then elaborates what that entails, namely the right to be ‘above and below (as well as on)’⁹⁵ land⁹⁶ for recreational purposes, relevant educational activities (such activities being defined as those which further someone’s understanding of natural and cultural heritage)⁹⁷ and commercial purposes, provided that the money-making activity can also be undertaken ‘otherwise than commercially or for profit’.⁹⁸ Recreation is not defined, but the Access Code suggests that this includes activities such as walking, cycling, orienteering, climbing and wild camping.⁹⁹ There is also a stand-alone right to cross land.¹⁰⁰

Section 2(1) acts as a check to section 1, providing that access rights must be exercised responsibly. The centrality of responsible access to the operation of the legislative scheme is immediately apparent, hence a means of determining what is ‘responsible’ is provided. Section 2(2) first sets out: a presumption of responsible access where a person exercises access rights without causing ‘unreasonable interference with any of the rights of any other person’;¹⁰¹ but notwithstanding that presumption, a person cannot be taken as exercising access rights responsibly when acting: i) in contravention of section 9; ii) in contravention of any byelaws made under section 12(1)(a)(i);¹⁰² or iii) in a manner that undermines any work undertaken by the statutory body Scottish Natural Heritage (in connection with its role to protect natural heritage).

Of the three exclusions, section 9 has the greatest practical effect. It contains a *numerus clausus* of seven conduct-based exceptions, such as crossing land in a motorised vehicle where that vehicle is not being used to provide mobility for a person with a

⁹⁴ s.1(1).

⁹⁵ s.1(6). Thus, (non-motorised) airborne and speleological pursuits can be as acceptable (if not quite as common) as walking.

⁹⁶ s.32 defines ‘land’ as including bridges, inland waters, canals and the foreshore. As regards the foreshore, as noted above there are overlapping public rights of use and access as part of the Regalia, which are important in relation to the foreshore and tidal rivers. The co-existence of these rights with access rights is acknowledged in s.5(4).

⁹⁷ s.2(5).

⁹⁸ s.1(2)(a); s.1(3). The classic example of an outdoor activity that can be undertaken ‘otherwise than commercially or for profit’ is hillwalking. Thus, a paid mountain guide can enjoy access rights as much as a keen amateur hillwalker.

⁹⁹ For a contemporary twist on what might be acceptable recreational access, see Malcolm M. Combe, ‘Gotta Catch ‘Em All: Access to Land and #PokemonGo’, University of Aberdeen School of Law Blog, 22 July 2016, <https://aberdeenuilaw.wordpress.com/2016/07/22/gotta-catch-em-all-but-what-about-the-law-access-to-land-and-pokemongo/> accessed 4 December 2016.

¹⁰⁰ s.1(2)(b). By the operation of s. 9(g), this is the only right that applies in relation to golf courses.

¹⁰¹ Rights could be associated with the ownership of land, access rights under the 2003 Act, or any other rights. In terms of when access takers should defer to other parties (including other access takers under the 2003 Act), see Combe, ‘Get Off That Land: Non-Owner Regulation of Access to Land’, 296.

¹⁰² This has been a particular issue in relation to camping near Loch Lomond, where byelaws have been introduced. See <http://www.lochlomond-trossachs.org/images/stories/Visiting/PDF/LochLomondCampByHighRes.pdf> accessed 4 December 2016.

disability,¹⁰³ any activity that is an offence or breaches a court order,¹⁰⁴ or ‘hunting, shooting or fishing.’¹⁰⁵ In relation to the last of those exceptions, Scotland contrasts with the continental legal systems where a landowner cannot exclude someone from land for hunting: as explained by Watkin, provided the access taker does no damage or there is no particularly sensitive activity going on, this means ‘across continental Europe the somewhat odd principle holds that one may only enter upon a neighbour’s land uninvited if one is armed with a gun.’¹⁰⁶

If an access taker’s conduct is not caught by section 9, the question of whether that conduct is responsible will turn on an analysis of the circumstances of the case at hand. That analysis is to have regard to whether an access taker has been following the guidance on responsible conduct in the Access Code¹⁰⁷ and with reference to four aspects relevant to responsibility found in section 2(3) (lawfulness, reasonableness, proper account of the interests of others, and the features of the land in question).

The biggest test for responsible access to date occurred when the owners of a forested area in the Highlands traversed by a number of paths, who were on record as being generally in favour of public access to their land, decided to close one path to equine access. They did this for the (legitimate) reason of preventing damage to the path by the action of multiple horses’ hooves. Eventually, the Court of Session agreed that the landowners were able to internally zone their land (and steer riders to another path): allowing for a (slight) reassertion of the right to exclude.¹⁰⁸

¹⁰³ s.9(f). The prohibition seems clear enough, but it actually leaves some room for dubiety, with one potential issue being power-assisted bicycles. Automobiles are clearly excluded, but car parking is mentioned in the Access Code notwithstanding (at page 76), under explanation that motorised activities are not covered by access rights and, as such, special consideration should be taken when leaving your car anywhere (and see also para. 3.58). On a landowner’s ability to charge someone for parking on land more generally, this has proven to be a problematic area (in Scots contract law terms) until fairly recently. The matter has now been clarified by the UK Supreme Court in *ParkingEye v Beavis* [2015] UKSC 67, and see now *Vehicle Control Services v Mackie* SC Dun [2017] SC DUN 24, analysed in Malcolm Combe, ‘Fine to Park Here?’, *Journal of the Law Society of Scotland*, 62(6) (2017), 26–7. It can also be noted that in a recent case that touched on camping and access to land, Lord Turnbull was particularly critical of cars being taken onto a site: *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, paras 58–59.

¹⁰⁴ s.9(a) and s.9(b).

¹⁰⁵ s.9(c).

¹⁰⁶ He refers to the position in France and Spain, whilst making the observation that non-hunting activities like walking, picnicking and rambling would not be permitted. The Scottish position would be the opposite. Thomas Glyn Watkin, ‘Stewardship of Land’ in Paul Beaumont (ed.), *Christian Perspectives on the Limits of the Law* (Carlisle, 2002) 118–49, 132.

¹⁰⁷ s.2(2)(b)(i). See also s.2(2)(b)(ii), which provides a further tie-in with the natural and cultural heritage role of Scottish Natural Heritage under s.29.

¹⁰⁸ *Tuley v The Highland Council* 2007 S.L.T. (Sh Ct) 97, rev 2009 S.L.T. 616. Consider also *Forbes v Fife Council* 2009 S.L.T. (Sh Ct) 71. Both these cases are analysed in Malcolm M. Combe, ‘Access to Land and to Landownership’, *Edinburgh Law Review*, 14(1) (2010), 106–13. See also Lovett, ‘Progressive Property in Action’, 809–14.

It can be seen that the manner of purported access is crucial to ensure an access taker remains under the auspices of the 2003 Act. Those who engage with a proscribed activity or do not meet the required standards of non-interference with the rights of others fall back to the traditional Scots law position and can be excluded from the land by an owner.¹⁰⁹ The place of purported access is also important: access rights are potentially exercisable on all of Scotland's terrain, except for land that is excluded under section 6¹¹⁰ or subject to a temporary exclusion that has been sought and obtained by the relevant local authority under section 11.

Section 6 is the more important provision in terms of dictating the geography of access, given its automatic and open-ended effect. The language of that section is interesting, not least because of its use of the English word 'exclude' that chimes with much of the English language scholarship. Where it operates, the owner has a right to exclude a purported access taker even if she behaves impeccably.

Within section 6 there are different types of exclusion evident. The exclusion may operate automatically, owing to the characteristics of the land, or it may operate from time to time, when land is being used for a purpose it has been landscaped for.¹¹¹ It might also be noted an owner's right to exclude someone from a particular area on a cadastral map might reassert itself. For example, access rights may operate one year, but not the next, because access rights are no longer compatible with certain features on or of the newly excluded land (perhaps through the erection of a building).¹¹² Those permutations aside, if there is clarity that land is excluded, access rights cannot be exercised there.

A recurring point of contention in court has been the extent to which ground around a private residence is excluded, under s.6(1)(b)(iv). That provision provides a dwelling should have 'sufficient adjacent land to enable persons living there to have reasonable measures of privacy' and 'to ensure that their enjoyment of that house or place is not unreasonably

¹⁰⁹ As to what non-owners can do in this situation, see Combe, 'Get off that land: non-owner regulation of access to land'.

¹¹⁰ s.1(7).

¹¹¹ Consider s.7(7)(a), which relates to sports pitches or playing fields when they are in use (but compare s.7(7)(b) and (c) which are absolute exclusions (relating to sensitive sporting areas like golf greens and synthetic surfaces)). Consider also certain (perhaps temporary) uses by the owner which can promote open land to excluded land (an active quarry is restricted, a non-active quarry is not: s.6(1)(h)).

¹¹² On this point, consider Sawers, 'The Right to Exclude from Unimproved Land'. Tangentially, it seems the recent occupation of land near the Scottish Parliament has led to a consideration of suitable sculpting of the landscape: The Herald, 11 November 2016 'Holyrood bosses to take action to avoid indycamp repeat', at http://www.heraldsotland.com/news/14881040.Holyrood_bosses_to_take_action_to_avoid_indycamp_repeat/ (accessed 4 December 2016). On the possibility of a garden being creatively landscaped to engender a need for privacy considerations to relate to a wider area of land, see Malcolm M. Combe, 'No Place Like Home: Access Rights over Gardens', *Edinburgh Law Review*, 12(3) (2008), 463–8, 467.

disturbed.’¹¹³ It was tested in the ‘tycoon cases’ of *Gloag*¹¹⁴ and *Snowie*,¹¹⁵ both of which led to a sheriff ruling that certain areas around the expansive residences near Perth and Stirling respectively were ‘not land in respect of which access rights are exercisable.’¹¹⁶

It can be seen that there has been some litigation involving landowners and access takers, particularly in relation to land around a dwelling and how much of an area should be afforded for privacy and the interaction of access takers with legitimate land management activities.¹¹⁷ There have also been occasional issues of competition between access takers.¹¹⁸ That said, the general indications are that the new access rights are operating in a coherent way.¹¹⁹ To those, the simplistic indication that the new legislation has not been profoundly revisited since it came into force can be added.¹²⁰ The issue of access to land did return to the Scottish Parliament though, in a somewhat unexpected way.

(b) Access rights come back to the Scottish Parliament

The most recent court case to feature access rights brings aspects of the foregoing discussion together in an illustrative manner.¹²¹ It has already been noted that wild camping is treated as a recreational activity in the Access Code. It has also been noted above that campaigners recently occupied land near the Scottish Parliament. The political activists hoped to remain

¹¹³ The provision is supplemented by s.7(5): ‘There are included among the factors which go to determine what extent of land is sufficient for the purposes mentioned in s.6(1)(b)(iv) above, the location and other characteristics of the house or other place.’ Cf the position in England and Wales, where a fixed distance of 20 metres from a dwelling is excluded, in terms of the equivalent but less radical Countryside and Rights of Way Act 2000. This aspect is discussed by Lovett, ‘Progressive property in action’, 784–5.

¹¹⁴ *Gloag v Perth and Kinross Council* 2007 SCLR 530.

¹¹⁵ *Snowie v Stirling Council* 2008 S.L.T. (Sh Ct) 61.

¹¹⁶ s.28. For further discussion, see Combe, ‘No place like home: access rights over “gardens”’.

¹¹⁷ *Tuley v The Highland Council* 2007 S.L.T. (Sh Ct) 97, rev 2009 S.L.T. 616. It can be noted that land managers must also act responsibly in relation to land where access can be taken, in accordance with section 3 of the 2003 Act. See further *Loch Lomond and Trossachs National Park Authority v Anstalt* [2017] SAC (Civ) 11; 2017 S.L.T. (Sh Ct) 138, discussed in Malcolm M. Combe, ‘Access to land: responsible landowner conduct under the Land Reform (Scotland) Act 2003’, 2017 S.L.T. (News) 201.

¹¹⁸ Malcolm M. Combe, ‘Get off that land: non-owner regulation of access to land’, *Juridical Review*, 2014 287–317.

¹¹⁹ See the observations in the Final Report of the Land Reform Review Group, *The Land of Scotland and the Common Good* (Edinburgh, 2014), Section 29 ‘Public Access’, available at <http://www.scotland.gov.uk/Publications/2014/05/2852> (accessed 4 December 2016), and Calum Macleod, Tim Braunholtz-Speight, Issie Macphail, Derek Flynn, Sarah Allen and Davie Macleod, ‘Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003’, at <http://archive.scottish.parliament.uk/s3/committees/rae/documents/Inquiryplanningsheet.pdf> (accessed 4 December 2016).

¹²⁰ Part 1 itself came into force on 9 February 2005 (SSI 2005/17). It has been amended slightly (by the Land Reform (Scotland) Act 2003 (Modification) Order 2005/65, the Land Reform (Scotland) Act 2003 (Modification) Order 2013/356), and Part 9 of the Land Reform (Scotland) Act 2016 (asp 18). The fundamentals of the scheme are unaffected by these measures.

¹²¹ More detailed analysis is available in Combe, ‘The Indycamp: Demonstrating Access to Land and Access to Justice’.

there until Scotland obtained independence from the rest of the UK. This ‘Indycamp’,¹²² as it came to be known, attracted much press attention in what proved to be an eleven-month stay in Edinburgh. Much of that coverage related to the equally colourful court proceedings.¹²³ One report in The Herald newspaper headlined that ‘Holyrood campers may be permanent thanks to law passed by Scottish Parliament’,¹²⁴ and quoted me in the report. I explained the campers could not camp indefinitely right next to a building,¹²⁵ but if they maintained a safe distance and behaved responsibly in line with the Access Code, they might be able to remain there, whilst noting there might be civil rights issues to consider as well.

This argument can colloquially be described as flying a kite. It was by no means guaranteed to succeed. In any event the Indycampers did not help themselves by bringing motor vehicles and a caravan onto the land, neither of which are allowed in terms of the 2003 Act. As it transpired, when the matter became litigious the non-professionally represented campers did not initially run the argument in court, allowing Lord Turnbull to quickly note the following:¹²⁶

Given that no direct reliance was placed on the 2003 Act, it will be sufficient to note that the right of access given by section 1 is a right to be on land for limited purposes, as defined within that section, none of which are present in the circumstances of the occupation by the Camp.

On appeal, that analysis notwithstanding, the Indycampers decided to develop the point after all. It was argued that their activities included recreational elements and also that the activities of the camp served an educational purpose. As regards the vehicles and caravan, it was submitted that the majority of campers should not be punished because of a minority bringing these items to the site, and actually that the legislation prohibited invasion of the space around a caravan, and so protected the campers’ occupation. The second strand of that

¹²² The term ‘Indycamp’ was used by the press: see BBC News, 4 November 2016, ‘IndyCamp group evicted from Scottish Parliament site’ <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37871442>, accessed 4 December 2016. ‘Indy’ has developed into an accepted contraction of ‘independence’ since around the time of the Scottish independence referendum on 18 September 2014.

¹²³ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761; *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, 2016 S.L.T. 862; affirmed [2016] CSIH 81.

¹²⁴ The Herald, 5 December 2015

www.heraldsotland.com/news/14125964.Holyrood_campers_may_be_permanent_thanks_to_law_passed_by_Scottish_Parliament, accessed 4 December 2016. The headline was not mine.

¹²⁵ Buildings, and the curtilages thereof, are excluded from the scope of access rights: s 6(1)(a)(i) and 6(1)(b)(i).

¹²⁶ Para. 58, [2016] CSOH 65.

argument was optimistic.¹²⁷ For the landowners, a detailed counter-argument explained that the primary purpose of the campers was political, and political activities are not inherently recreational or educational. Also addressed was the limited duration of the right to be on land: ‘The Act only allows someone to remain on the premises while the specified purpose is carried out. They must then leave.’¹²⁸

The Lord Justice Clerk, Lady Dorrian, rejected the argument of the Indycampers, simply stating ‘we are satisfied that there is nothing in the Act which justifies the reclaimers’ occupation of the property.’¹²⁹

With that in mind, it is clear such political campers cannot rely on the 2003 Act in future; not only that, the criminal law provisions of the Trespass (Scotland) Act 1865 (which regulate occupations, encampments or fires that are not classed as responsible access under the 2003 Act) could be deployed against them. There may be other considerations to allow such camps (which will be analysed below), but the scope of 2003 Act rights are clearly limited in this context.¹³⁰ The question of what these new access rights mean for the right to exclude in light of all of this will now be considered.

(c) Rights of responsible access and the right to exclude

Lovett has highlighted that the interaction of the underlying Scots law and the 2003 Act shows that a legal system which started with a theoretically strong right to exclude can adapt to a more porous system, whilst still protecting certain important aspects of the right.¹³¹ A less considered reform could have flirted with human rights concerns, such as the right to private and family life under Article 8 of the ECHR (which is catered for by the exclusion around a dwelling),¹³² and the right to peaceful enjoyment of possessions under Article 1 of

¹²⁷ Whilst the legislation does indeed exclude “a caravan, tent or other place affording a person privacy or shelter” and land in the immediate vicinity of such places from the scope of access rights, (under s.6(1)(a)(ii) and s.6(1)(b)(iv)), it seems a stretch to imagine that such a restriction can stop a landowner taking enforcement action against someone in a place affording privacy or shelter on any other basis.

¹²⁸ Para. 26.

¹²⁹ Para. 32.

¹³⁰ Another limitation, not mentioned so far in this analysis, is that the operation of access rights can be temporarily suspended by a local authority acting under s.11, to allow for events such as a music festival or an outdoor tournament. Such a suspension would remove any chance to even run an argument about responsible access and any purported access takers would not be entitled to take access in that time period.

¹³¹ On this, Lovett’s contribution is particularly valuable: ‘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 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.’ Lovett, ‘Progressive property in action’, 816–7.

¹³² This is considered in the *Gloag* case and analysed in Carey Miller, ‘Public Access to Private Land in Scotland’, 139.

the First Protocol to the ECHR. Regarding the latter, there is case law that suggests measures that require owners to allow private actors to enter their lands on a frequent basis – thereby unduly infringing the right to exclude – can be an interference with the right to property.¹³³ How do the Scottish reforms measure up?

Access to land is an area of scholarship that has lent itself to much comparative study,¹³⁴ and it is that comparative scholarship that provides two useful insights. First, when considering the lesser rights of access contained in the Countryside and Rights of Way Act 2000 (which opened a comparatively smaller proportion of England and Wales to access and did so on narrower terms than Scotland),¹³⁵ the American commentator Anderson noted these (non-compensated) reforms would almost certainly have been struck down by American courts as an unconstitutional taking.¹³⁶ *A fortiori*, the stronger Scots reforms would have been similarly struck down.¹³⁷ That is of academic interest: how does contemporary Scots law fare against the human rights regime that actually applies to it? A scholarly dialogue between two South Africans provides an answer (again in the context of a comparison of English and Scots law), where Carey Miller noted the following:¹³⁸

case law has come to recognise that the detail of a controlling requirement of balancing is appropriately dealt with in the statute. The Scottish access legislation does this and, to

¹³³ In one case, a requirement to allow the public to use roads privately owned by individuals ‘significantly reduced in practice effective exercise of their ownership’: *Bugajny v Poland* App no 22531/05 ECtHR 6 November 2007, para. 59. Consider also *Chassagnou and others v France* (2000) 29 EHRR 615 and *Herrmann v Germany* (2013) 56 EHRR 7, the former being an imposition of forced collectivisation of hunting rights that did fall foul of the human rights law, the latter being a similar situation where the correct balance was struck.

¹³⁴ The writing of Anderson, Lovett, Carey Miller and Combe has already been referred to. For two legal systems not yet mentioned, see Richard Campion and Janet Stephenson, ‘The “right to roam”: Lessons for New Zealand from Sweden’s allemansrätt’, *Journal of Policy Research in Tourism, Leisure and Events*, 6(1) (2014), 52–65.

¹³⁵ In England and Wales, the Countryside and Rights of Way Act 2000 applies to mapped open access land, which includes mountains, moor, heath and down, and registered commons (making a much smaller proportion of the country available for access when contrasted with Scotland, in the region of 865,000 acres). That legislation confers the right to enter and remain on land for the purposes of open-air recreation, but that right is restricted by twenty exceptions listed in a schedule to the statute, the overall effect of which would allow someone to walk on land, accompanied by a dog (but no other animal) and stop for a picnic, but not use a metal detector, camp or bathe in non-tidal water (making for a more limited range of activities than Scotland). There is also access to coastal areas by virtue of the Marine and Coastal Access Act 2009.

¹³⁶ Anderson, ‘Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks’, 426. In terms of how much monetary effect the English reforms had, see Klick and Parchomovsky, ‘The Value of the Right to Exclude: An Empirical Assessment’. No equivalent Scottish analysis exists.

¹³⁷ Cf Lovett, ‘Progressive Property in Action’, 815–6 who briefly notes (with prospective reference to Sawers’ article that was later published in the *Temple Law Review*), there might be a way it ‘could survive a constitutional attack because it would “create an average reciprocity of advantage”’, before noting ‘this is not the place to work out these constitutional subtleties.’ This is not the place either, but see now Sawers, ‘The Right to Exclude from Unimproved Land’, 670.

¹³⁸ Carey Miller, ‘Public Access to Private Land in Scotland’, 138.

this extent, is probably proof against constitutional challenge. It is submitted that the comments of Professor André van der Walt relating to the English access provision apply equally to the Scottish legislation.

Finally, another aspect in the general acceptance of the rights of responsible access flows from the particular history and culture in Scotland, which has been analysed at length by Alexander.¹³⁹ This has been coupled with, or indeed manifested by, a general tradition of tolerance of access to mountains (over and above any difficulties of enforcement for a landowner against a one-time bare trespasser).

From this, it is clear that Part 1 of the Land Reform (Scotland) Act 2003 provides a working model for rights of public access to private land, in a way that reconceptualises the right to exclude rather than makes it redundant. That being the case, any observers who think it might be a successful export to another jurisdiction should have careful regard to any historic, cultural or human rights considerations to ensure such a scheme would be properly received.

(d) Access to land without a property foundation

The above discussion explains the strong position a landowner is in when there is no underlying right of access or permission. Does this mean that a landowner can remove anyone taking access in other circumstances? To phrase it as it was put in the ECHR case of *Appleby*, is the ability to eject ‘generally unfettered’, with no test for reasonableness?¹⁴⁰

¹³⁹ Gregory S. Alexander, ‘The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam’, *University of Illinois Law Review*, (2016) 321–70. On the importance of history and ‘a society’s collective historical consciousness’ to the acceptance of such reforms, see also Lovett, ‘Progressive property in action’, 817. A keen sense of history, particularly in the Highlands and Islands of Scotland, means the Highland Clearances cast a long shadow: consider James Hunter, *A Millennial History of the Highlands and Islands of Scotland* (Edinburgh, 2000) and his more recent and geographically targeted *Set Adrift Upon the World: The Sutherland Clearances* (Edinburgh, 2015), and see also Michael Fry, *Wild Scots: Four Hundred Years of Highland History* (London, 2005). (The significance of Fry’s text will be returned to below.) On the popularity of mountaineering even in the absence of any formal right to do so, see Carey Miller, ‘Public Access to Private Land in Scotland’, 121–2, the preface by George Menzies (the then Chairman of the Scottish Rights of Way and Access Society) in Paisley, *Access Rights and Rights of Way*, 5–6, and the comments in Carey Miller and Combe, ‘The Boundaries of Property Rights in Scots Law’, 22.

¹⁴⁰ *Appleby v United Kingdom* (2003) 37 EHRR 38 para 22. Consider also *Pruneyard Shopping Center v. Robins* 447 U.S. 74 (1980), discussed in David L. Callies and J. David Breemer, ‘The Right to Exclude Others From Private Property: A Fundamental Constitutional Right’. In the one partly dissenting opinion in *Appleby*, Judge Maruste noted, ‘The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society.’ This chimes with the contributions of van der Walt, discussed below. See also Kevin Gray and Susan Francis Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’, *European Human Rights Law Review*, 4(1) (1999), 46–102.

The recent decision about the Indycamp confirms that vacant possession can be recovered although there are other considerations that come into play when there is a public-sector landowner.¹⁴¹ The analysis of van der Walt is helpful here, who positioned such other considerations under a heading that pitted property against ‘privileged statutory non-property rights’.¹⁴² For the Indycamp case, those rights are found in Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association) of the ECHR. In the first of his two opinions, Lord Turnbull noted that he had to consider ‘whether the interference with the [Indycampers’] rights entailed in granting an order [for possession] would be lawful, necessary and proportionate.’¹⁴³ He asked to hear evidence of whether and how the Indycampers constituted an interference with the rights of others to access the grounds of the Scottish Parliament, which he then weighed in a proportionality assessment in which he decided that the landowner’s steps were proportionate.¹⁴⁴ He observed that, ‘In essence the [indycampers’] position seems to be that their rights under articles 10 and 11 should trump both the petitioner’s right to possession and the rights of others to enjoy undisturbed use of the grounds’, then noted that this approach was ‘selfish or even arrogant’, illustrating that with their approach to hosting barbecues and parking motor vehicles on the (grass) land despite nearby parking provision,¹⁴⁵ and noting that the recovery of possession sought did not impair the ability to protest at the grounds of the Scottish Parliament and any interference with the Indycampers’ article 10 and 11 rights would be targeted, limited and not deprive them of the essence of their rights.¹⁴⁶

The Inner House of the Court of Session adhered to this analysis. That result notwithstanding, the saga shows that other factors can and do weigh against the right to exclude. In South Africa, this has occurred in relation to burial rights¹⁴⁷ and labour rights.¹⁴⁸ Van der Walt also highlights a pertinent German case, at Frankfurt Airport,¹⁴⁹ before going

¹⁴¹ This is an abridged version of the analysis in Combe, ‘The Indycamp: Demonstrating Access to Land and Access to Justice’.

¹⁴² van der Walt, ‘The Modest Systemic Status of Property Rights’, 3.4.

¹⁴³ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761, para. 64.

¹⁴⁴ *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, 2016 S.L.T. 862, paras 49–57.

¹⁴⁵ *Ibid.*, para. 58.

¹⁴⁶ *Ibid.*, paras 63–64.

¹⁴⁷ On burial rights and indeed other rights, consider Carey Miller, ‘The Great Trek to Human Rights:’ particularly 212–3.

¹⁴⁸ van der Walt, ‘The Modest Systemic Status of Property Rights’, 71–8.

¹⁴⁹ 1 BvR 699/06 – 78–84. In discussing that case, van der Walt observes: ‘When property rights clash with civic, political or social rights that are protected by dedicated legislation, it seems, protecting property rights will tend, at least in some instances, to be a modest systemic objective to the extent that the protection of property rights is restricted to the space that remains once the non-property right identified and regulated in the dedicated legislation had been secured. In instances where the presumptive power does not shift so clearly or inevitably to

on to consider matters which might even fall short of a privileged right. He does this with reference to a South African case where – in sharp contrast to *Appleby* – an attempt to completely deny access to premises was unsuccessful, owing to matters like the area's importance to the community and the need for free movement.¹⁵⁰

Access rights can be classed as one such limitation, as can the considerations discussed here that might not feature in a traditional property law analysis. This is as it should be, in a dynamic system of law that seeks to adapt to modern circumstances. The final matter covered in this section might be seen as another move away from traditional land law. In actual fact it reflects a wider shift towards land reform in the treatment of private property.

3. Modern considerations for exclusion from land

In his study of the English right to roam, Anderson notes the following:

The example teaches us that the composition of the bundle is not necessarily immutable, and that changes may be desirable to better reflect contemporary society's needs and values. Of course, the relative stability of property rights is extremely valuable, because it honors settled expectations and therefore promotes economic transactions and furthers our desire for fairness. But property rights must evolve and the right to roam reminds us that, in the end, the recognition of the private owners' rights involves a trade-off with public interests that should not be ignored.¹⁵¹

the non-property right, protecting property rights might still be a modest systemic objective to the extent that non-property rights are allowed to impose reasonably easily justifiable limitations on property owners' right to exclude non-owners.'

¹⁵⁰ This is dealt with under the heading 'Other Free Speech and Demonstration Cases', the case in question being the one referred to be Carey Miller in: *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape*. In a similar vein, Dhliwayo introduces her PhD thesis (which was supervised by van der Walt) by noting 'that limitations on the right to exclude are normal in a legal and constitutional system within which property functions and of which limitations are part. Case law and examples dealing with the conflict between exclusion and access rights indicate that exclusion of non-owners is not always the preferred outcome and that it is not prioritised abstractly. This suggests that the right to exclude is relative and contextual in nature.' Privilege Dhliwayo, 'A constitutional analysis of access rights that limit landowners' right to exclude' (Ph.D. thesis, Stellenbosch University, 2015) available at <http://hdl.handle.net/10019.1/97933>, accessed 4 December 2016.

¹⁵¹ Anderson, 'Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks', 430.

That property rights must evolve is a valid point. The enforcement powers that allow entry to be taken to remove high hedges or noise-making equipment have already been referred to. All of these evolutions challenge the right to exclude.¹⁵²

Another relevant situation, where an entirely different type of relationship fails to function as both parties envisaged, is that of a lease when the tenant holds over at the end of the term and stays in possession (with or without the continued offer of rent). Alternatively, a tenant may simply stop paying rent. Landlords can be expected to wish to recover possession in such circumstances, but (particularly with regard to residential tenancies) there are rules to prevent that happening summarily¹⁵³ and, in South Africa, in a way that overly prejudices the tenant.¹⁵⁴ Again, the right to exclude is regulated.

That South African measure can be placed within a much wider movement for land reform in that country.¹⁵⁵ Scotland might not have an exact equivalent to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.¹⁵⁶ Nevertheless, Scotland has taken a number of steps of its own in relation to land reform.¹⁵⁷ It was noted in 2004 that a comparison of the policy-oriented land law reform measures in the two jurisdictions demonstrated ‘difference and not similarity’.¹⁵⁸ Whilst that remains largely true,¹⁵⁹ the

¹⁵² High Hedges (Scotland) Act 2013 (asp 6); Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), s 47. Consider also The Matrimonial Homes (Family Protection) (Scotland) Act 1981, although as noted previously that hyper-specific aspect of family law will not be analysed here.

¹⁵³ In the Rent (Scotland) Act 1984.

¹⁵⁴ See Anne Pope, ‘A Tricky Balancing Act: reflections on recent South African eviction jurisprudence’ (in this volume).

¹⁵⁵ See H. Mostert, ‘Land as a “national asset” under the Constitution: the system change envisaged by the 2011 Green Paper on land policy and what this means for property law under the Constitution’, *Potchefstroom Electronic Law Journal*, 17(2) (2014), 760–96 at <http://dx.doi.org/10.4314/pelj.v17i2.06> (accessed 4 December 2016); J. M. Pienaar, *Land Reform* (Cape Town, 2014); D. L. Carey Miller with Anne Pope, *Land Title in South Africa* (Cape Town, 2000), particularly chapters 6 and 10; D. L. Carey Miller, ‘A New Property’, *South African Law Journal*, 116(4) (1999), 749–59; Carey Miller, ‘The Great Trek to Human Rights’, particularly 209–16; and Alexander, *The Global Debate over Constitutional Property*, chapter four, entitled ‘From Social Obligation to Social Transformation? South Africa’s Experience with Constitutional Property’.

¹⁵⁶ At least, not in terms of private residential leasing. There is specific legislation to deal with the problem of homelessness, which places an obligation on local authorities. A slight analogy might also be made about the rules which prevent instant enforcement of securities over residential premises in the Conveyancing and Feudal Reform (Scotland) Act 1970 (following its amendment by the Home Owner and Debtor Protection (Scotland) Act 2010 (asp 6)), which requires a sheriff to consider matters like alternative housing provision before allowing enforcement by a secured creditor. For the purposes of this discussion the analogy is inexact, as a secured creditor is not technically the owner, so any regulation of enforcement is not actually a restriction on the proprietor’s right to exclude.

¹⁵⁷ See Malcolm M. Combe, ‘The Environmental Implications of Redistributive Land Reform’, *Environmental Law Review*, 18(2) (2016), 104–25 and Combe, ‘The Land Reform (Scotland) Act 2016: Another Answer to the Scottish Land Question’.

¹⁵⁸ Kenneth Reid and C. G. van der Merwe, ‘Property Law: Some Themes and Variations’ in Reinhard Zimmerman, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford 2004), 637–71, 670.

¹⁵⁹ Consider, for example, Richard Cramer and Hanri Mostert, ‘“Home” and Unlawful Occupation: The Horns of Local Government’s Dilemma: Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)’

passage of the Community Empowerment (Scotland) Act 2015 (asp 6) and the Land Reform (Scotland) Act 2016 (asp 18) demonstrates that Scotland is continuing on something of a land reform journey.¹⁶⁰ At first glance, neither of these measures seem a direct challenge to a landowner's right to exclude. On further consideration the new community right to buy land that has been wholly or mainly neglected or abandoned land is in point. This right, when the new Part 3A of the 2003 Act is brought into force, will allow properly constituted community bodies to force the sale of land to them. The relevance to the right to exclude may seem contrived, but it comes into focus when it becomes clear that a landowner will no longer be able to simply exclude others from her land *and do nothing else* with impunity.¹⁶¹ That is to say, for the landowner to avoid a potential taking event (albeit with compensation), some kind of activity that shows the land is being used will be required.¹⁶² In a contorted way, the right to exclude is no longer the *sine qua non*, because the right to continue as owner without challenge only exists if the landowner is also doing something productive and not resting on her exclusionary laurels.¹⁶³ Whilst this is not a direct erosion of proprietor's right to exclude, it means that any proprietor who simply excludes others from land and does nothing else can be faced with a land reform reallocation. Meanwhile, another strand of the Scottish land reform programme encourages landowners to engage with communities whenever they make decisions about land that will affect them: this means a landowner who is moved to act to avoid a potential buyout should then consider the interests of a local community when it comes to any given action.¹⁶⁴

All of this might be seen as a more general trend towards social usage of land. Scotland and South Africa are taking steps towards using land for the common good or as a national asset under an overt land reform banner, but moves towards more social usage of

Stellenbosch Law Review, 26(3) (2015), 583–611, on the difficult situation authorities in South Africa find themselves in when trying to combat the issues of homelessness and illegal land occupation, which is not exactly mirrored in contemporary Scotland. (Although Scotland has had some experience of similar unlawful occupation as recently as the previous century: see, for example, Ben Buxton, *The Vatersay Raiders* (Edinburgh, 2008).)

¹⁶⁰ And it is still not over, both in terms of implementing those statutes and also in terms of the measures which were proposed in the Final Report of the Land Reform Review Group, *The Land of Scotland and the Common Good*, which have not yet found their way into legislation but might yet do so.

¹⁶¹ Consider Hanri Mostert, 'No right to neglect? Exploratory observations on how policy choices challenge basic principles of property' in Susan Scott and Jeannie van Wyk, *Property Law Under Scrutiny* (Claremont, 2015), 11–30.

¹⁶² This could lead to some interesting questions in the future, perhaps where a landowner has made a conscious decision to do nothing with land for conservation or re-wilding purposes.

¹⁶³ It should be acknowledged that there is a certain crossover between the point made about prescription above, which represents a situation where an owner has had a chance to exclude another but has not done so, and the situation under discussion. Both might be thought of as not automatically susceptible to analysis in terms of the right to exclude.

¹⁶⁴ Land Reform (Scotland) Act 2016, Part 4.

land do not need to be branded as such. For example, Pascoe notes that England and Wales is moving to a situation of property relativism which ‘signifies that the landowner is not entitled to exploit¹⁶⁵ land resources irrespective of community need and represents a more outward-looking orientation,’ citing the fiscal treatment of empty property, rules about hunting, and access to land in her analysis.¹⁶⁶ To a greater or lesser extent, those three examples also relate to the right to exclude (the first example by using taxation to incentivise use, which again penalises an owner who excludes and does nothing else, and the latter examples more directly).

There is much for proponents of a strong right to exclude to think about when considering land, and Scotland, especially in light of contemporary conceptualisations of land as having some kind of role for the common good.¹⁶⁷ Scotland has witnessed both a direct and an indirect erosion of a landowner’s entitlement to decide who to exclude from land. As a result, more people have a say in matters relating to land in a way that remains sensitive to the landowner.

The final part of this chapter will now step away from land. It will consider a field of property law where a move towards more social usage has not been so readily apparent, namely corporeal moveable property.

Conceptions of the right to exclude – corporeal moveables in Scots law¹⁶⁸

The standard Scottish definition of ownership – that of the institutional writer Erskine – has already been alluded to.¹⁶⁹ According to Erskine, ownership may be either limited by law or agreement. This applies to both moveable and immovable property. Meanwhile, Bell offers

¹⁶⁵ Or not exploit, as the case may be.

¹⁶⁶ Pascoe, ‘Social obligation norm and the erosion of land ownership?’, 496. On empty property, consider the ‘Fill ‘Em Up’ campaign of The Big Issue magazine (a publication which aims to tackle homelessness in the UK): ‘How to Rescue an Empty House’, *The Big Issue* 23–29 November 2015, 1068, 18–9. That report included details of the UK Government’s Empty Homes Programme, which has since closed. There are also options available at a municipal level, with local authorities having the ability to remove any empty property discount or set a council tax increase in relation to long term unoccupied homes (but not second homes): see <http://www.gov.scot/Topics/Government/local-government/17999/counciltax/Secondhomes> (accessed 4 December 2016).

¹⁶⁷ The next step in this direction for Scotland will be the new land rights and responsibilities statement, provided for by the Land Reform (Scotland) Act 2016, s.1.

¹⁶⁸ This analysis draws on the content of D. L. Carey Miller, M. M. Combe, A. J. M. Steven and S. Wortley, ‘National Report on the Transfer of Movables in Scotland’ in W. Faber and B. Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Munich, 2009), 297, particularly 1.2.

¹⁶⁹ Erskine, *Institute*, II.1.1: ‘the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction’.

a definition of ownership specifically in relation to moveables, emphasising exclusivity but also stressing the restrictions that can apply, as follows:¹⁷⁰

Ownership in moveables is a right of exclusive and absolute use and enjoyment, with uncontrollable powers of disposal, provided no use be made of the subject and no alienation attempted, which for purposes of public policy, convenience, or justice, are, by the general disposition of the common law or by special enactments of the Legislature, forbidden; or from which, by obligation or contract, the owner has bound himself to abstain.

What does this mean in terms of the rights of the owner of a corporeal moveable? Writing in that context, Professor Gordon commented that ‘It is not profitable to attempt to enumerate the rights of an owner – it is simpler to say that he has any right to deal with property of which he is not deprived by law or by his own contract’.¹⁷¹ This is a valid point (although it jars somewhat against Honoré’s claim that it is not worthless to seek to delineate aspects of ownership),¹⁷² but it is clear that the right to recover a moveable from a third party is a key manifestation of ownership¹⁷³ and in turn the right to exclude.¹⁷⁴

To put it another way, and to borrow the words of Carey Miller (writing in 1986), ‘the right to vindicate [is] synonymous with ownership.’¹⁷⁵ That work – which specifically focusses on ownership rather than the incidents of it, draws on Grotius, with Carey Miller characterising his treatment thus: ‘the right to recover lost possession is the quintessence of ownership’.¹⁷⁶ Putting this in a Scots context, Carey Miller (writing in 2005) explains,¹⁷⁷ ‘An

¹⁷⁰ Bell, *Principles* § 1284

¹⁷¹ Gordon, in Reid, *The Law of Property in Scotland*, para. 533.

¹⁷² Honoré, ‘Ownership’, 111.

¹⁷³ This is, in turn, linked to the fact that ownership gives a right to exclusive possession. In the (less common) situations of a dispute between non-owner parties where the right of ownership is not at play, those with another right (such as possession or detention) can similarly recover and exclude: see Malcolm M. Combe, ‘Communist ideas and Scots property law: Canning v Glasgow Caledonian University’, *Scots Law Times (News)*, 2016, 34–6 (with the case commented on reported at 2016 S.L.T. (Sh Ct) 56) and Craig Anderson, ‘Recovery of goods by a non-owner’, *Scots Law Times (News)*, 2016, 22, 117–21. See generally Craig Anderson, *Possession of Corporeal Moveables* (Edinburgh, 2015), Carey Miller, *Corporeal Moveables*, 10.24–10.31 (on the wrong and remedy of spuilzie) and John Townsend, ‘Raising Lazarus: Why Spuilzie Should Be Resurrected’ *Aberdeen Student Law Review*, 2 (2011), 22–51.

¹⁷⁴ It is acknowledged that the right to use the property, which for many moveables will instantly imply an exclusivity, although it is also acknowledged that there is an element of conflation between exclusion and use here. This seems unavoidable: consider the references to Rahmatian, *Lord Kames: Legal and Social Theorist* and Penner, *The Idea of Property*. See also Merrill, ‘The Right to Exclude: II’, 4–5.

¹⁷⁵ Carey Miller, *Acquisition and Protection of Ownership*, 11.1.1

¹⁷⁶ Carey Miller, *Acquisition and Protection of Ownership*, 11.1.1.

¹⁷⁷ Carey Miller, *Corporeal Moveables*, 1.19.

owner who can show that he lost possession involuntarily can,¹⁷⁸ in principle, recover the thing from even an innocent onerous possessor.’¹⁷⁹ Statute might regulate recovery of possession in idiosyncratic situations: for example, the Consumer Credit Act 1974, section 90, regulates the recovery of possession of certain goods where a debtor is in breach of a hire-purchase or regulated conditional sale agreement relating to those goods but has paid more than a third of the price. That section is not mentioned by Carey Miller, but it is perhaps situations like that which led his more recent (2005) treatment to move away from the recovery of possession aspect as key to ownership when he expressed:

Although in theory ownership is an absolute right, in practice it is often constrained and controlled to the point that hardly more than a collection of residual rights remain: one accordingly tends to think of the apposite criterion of ownership as an intact right of disposal.¹⁸⁰

That observation seems to fillet any attempt to characterise the right to exclude as the key consideration for corporeal moveable property. Is Carey Miller (writing in 2005) correct that the apposite criterion is an intact right of disposal? It is submitted that Carey Miller (writing in 1986) also made an important point that remains valid. Furthermore, an intact right of disposal for a thing that is so constrained and controlled as to prevent recovery could legitimately be described as (economically) worthless. Whilst the right to exclude is perhaps not as crucial in relation to moveable property scholarship as it seems to be for land, it does still have a role. That being said, an entitlement to exclude others from using a corporeal moveable can be regulated when society deems it necessary (much like it could be with land), as can be seen in relation to goods bought on credit by consumers and other examples relating to potentially harmful items.

Conclusion

Carey Miller’s observation that an intact right of disposal is the apposite criterion of ownership for a corporeal moveable contributes to a wider discussion which shows that the

¹⁷⁸ Here, Carey Miller refers to Stair, *Institutions*, III.2.7. In Scots law there is a presumption of ownership that flows from being in possession, but this can be rebutted where the owner can show possession was lost in a manner that was inconsistent with a transfer of ownership.

¹⁷⁹ Carey Miller, *Corporeal Moveables*, para 1.12.

¹⁸⁰ Carey Miller, *Corporeal Moveables*, para 1.12, with reference to Stair, *Institutions*, II.I.pr. Similar wording to this extract appears in MacQueen and Eassie (eds), *Gloag and Henderson*, at 30.01, although it is explained in a footnote (9) that Bell ‘links exclusivity with the power of disposal’.

role of exclusion theory should not be overstated in a modern system of property law. A more fundamental point about the right to exclude has been added by van der Walt, who notes that an analysis founded on ‘the modest systemic status of property rights in a particular context’ is appropriate.¹⁸¹ Both points are valid but, standing those critiques, it is clear that exclusion is a huge part of property law analysis in Scotland and beyond.

In a Scottish context, this is all too evident in the remarks of Lord Turnbull in the recent case about the Indycamp at the Scottish Parliament. In an eminently quotable passage, he stated ‘the general law of land ownership in Scotland entitles the petitioner to have exclusive use of its property, to resist encroachment upon it and to otherwise regulate the use of its property.’¹⁸² But the remainder of his careful judicial consideration, not to mention the points covered in the unsuccessful appeal against that, shows the situation is more nuanced than that attractively simple proposition (the Inner House’s approval of Lord Turnbull’s reasoning notwithstanding).

Some would point out that the right to exclude has never been absolute anyway.¹⁸³ Others might take up Carey Miller’s point that disposal is the apposite criterion of ownership, or offer alternative critiques to the primacy of the right to exclude.¹⁸⁴ Others still would argue now is the time to be moving away from traditional ideas of ownership that focus on aspects like exclusion.¹⁸⁵ Be that as it may, this analysis provides an original counterpoint to the continuing narrative about the exclusionary influence that has threaded through Scots property law analyses, particularly with regard to the ongoing reform of land law in Scotland. This will prove useful to those trying to explain what exactly ownership is or does.

¹⁸¹ He notes the following: ‘instead of just emphasising limitations or exceptions that restrict the owner’s right to exclude, I also argue that progressive property theory should focus on the systemically modest role that property rights play, and should play, in the broader systemic context of at least certain legal disputes. Analysing property disputes from the perspective of the modest systemic status of property rights in a particular context supports the progressive property approach even when the discussion starts out from limitations on or exceptions to the right of exclusion, since the limitations and exceptions are not presented as counterpoint rules but as examples of a broader principle regarding the systemic status of property rights.’ van der Walt, ‘The Modest Systemic Status of Property Rights’, 30–1.

¹⁸² *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761, para. 35.

¹⁸³ Alexander, ‘The Social-Obligation Norm in American Property Law’, 801; Gretton and Steven, *Property, Trusts and Succession*, 3.3.

¹⁸⁴ Freyfogle, *On Private Property*, 57-60, where he highlights the related but nonetheless distinct right to halt interferences in place of a bald right to exclude. It is noteworthy that this non-interference conceptualisation resonates with the test for responsible access in the 2003 Act.

¹⁸⁵ See P.J. Badenhorst, Juanita M. Pienaar and Hanri Mostert, *Silberberg and Schoeman's The Law of Property* 5th edition (Durban, 2006), 93. There, after listing the usual entitlements associated with property, they note ‘it is obvious that changing social, economic and political conditions cannot justify a concept of ownership unchanged in content and function since Roman and Roman-Dutch times.’ See also the detailed discussion in Gray and Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’.

Concurrently, it demonstrates that a recognisable system of property law can subsist despite an active programme of land reform and a certain amount of exclusion erosion.

That concludes the targeted analysis in this paper. I pray your indulgence for some closing observations about David Carey Miller. First, a passing comment on his legal analysis, and how it troubled me. Not in a negative way, I should stress. Rather, I confess that his above quoted observation about disposal being the nub of ownership (in the context of corporeal moveables) presented me with a challenge when trying to conclude this chapter which I had formed around exclusion. This was not his first challenge to me. I can recall various discussions where I confidently offered my analysis, to which he often nonchalantly (but never arrogantly) offered his somewhat more developed thoughts, which forced me to reconsider matters. It seemed fitting to give him something of a final word here.

Finally, some personal insights, which I hope offer more insight into him as a man.¹⁸⁶ On 20 August 2013 the summer diet of exams at the University of Aberdeen was underway. Some students were tackling the Law of Property paper that David, other colleagues, and I had set. With apologies to those students, any exam travails faced are not important to this anecdote. The more noteworthy travails were mine. To put it mildly, I was not at my best that day. I was finding the simple task of exam invigilation to be a struggle: for context, I was no longer able to walk the relatively short distance from my home to the university, my breathlessness and groin strain being attributed to a recently diagnosed hernia. David had kindly volunteered to help with invigilation that day, but the main thing he witnessed – with some concern – was me hirpling around the exam hall. He accompanied me back to the School of Law after the exam, carrying more than his fair share of exam scripts on my behalf. Clearly something was wrong with me, and the next day I was admitted to Aberdeen Royal Infirmary after blood tests showed a concern that was decidedly not a hernia. The next again day I was diagnosed with stage 4 testicular cancer: this went some way to explaining my breathlessness and other travails.

It goes without saying this was not a great time for me, but I was lucky enough to have colleagues who launched into action to help. Special mention must go to the Law of Property team of Roddy Paisley, Andrew Simpson, Douglas Bain and Abbe Brown, but extra special mention goes to David. Not only did he step up to replace me as class coordinator of that course for the impending term, he also furnished me with copious supplies of books,

¹⁸⁶ This insight, and others, have been incorporated into a blog post: Malcolm M. Combe, 'David Carey Miller: A Tribute', University of Aberdeen School of Law Blog, 29 February 2016, <https://aberdeenunilaw.wordpress.com/2016/02/29/david-carey-miller-a-tribute/> accessed 4 December 2016.

butteries and best wishes when he visited me in the hospital at the first possible opportunity. (Fry's book on the Highlands, which I refer to above, was one such book.) He was then considerate enough to keep me involved where appropriate. When I was well enough to participate in academic tasks, he let me do so. When I was not, I was able to rely on him to coordinate a course in my absence.

Fast forward to February 2016 and I offer one further anecdote. My last communication with David was an email attaching a case commentary note.¹⁸⁷ The draft note related to a dispute about corporeal moveable property. He sent me some helpful points for consideration. I replied to thank him, offered him some counter-analysis, and also noted that I was actually on annual leave that day (albeit I was replying to emails). David then sent me some further thoughts and source material, whilst simultaneously imploring that I did not reply to his correspondence on my day off. I followed his order. I am strangely gutted that I did. I did not get to finish that last conversation with him, as his sudden death intervened. That being said, even that abrupt ending to that correspondence, at his behest, tells something of the man: not only was he keen to help in that specific instance, he was also looking out for my best interests as a whole.

I have already dedicated that case note to David. I am happy to be able to add this chapter to this collection in his memory.

¹⁸⁷ Combe, 'Communist ideas and Scots property law: *Canning v Glasgow Caledonian University*'.