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Creating ‘new’ commons for the twenty-first century: innovative legal models for ‘green space’

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We all need space; unless we have it, we cannot reach that sense of quiet in which whispers of better things come to us gently. (Hill 1883)

This article considers legal models for creating new commons as a community resource (‘green space’) in English law. It presents a strategy for creating ‘new’ commons to ‘re-purpose’ land for public recreation and to (re)-connect people and nature. This will require the creation of common rights – a species of private property right – over private land, to facilitate its registration as common land with open public recreational access. The article considers the types of private property right appropriate and necessary to achieve this overriding purpose, and considers the narratives of locality and identity which this model for ‘new commons’ could engender. Victorian philanthropists such as Sir Robert Hunter and Octavia Hill led a defensive response to the ‘old’ enclosure movement. Establishing ‘new commons’ would, by contrast, start to address some of the concerns raised by the ‘new’ enclosure movement, by offering a vision for a model of urban common that can provide spaces for human interaction, interdependence and cooperation from which no one is excluded. This would also contribute to addressing key modern public policy objectives for reconnecting people and nature, and contribute to the development of cultural ecosystem services of the kind envisaged by the UK National Ecosystem Assessment and the *Biodiversity 2020* strategy for England.

Keywords: commons; greens; cultural ecosystem services; Commons Act 2006

1. Introduction

Common land is an important source of ‘green space’ over which the public enjoy rights of recreational access in England and Wales. The amount of surviving common land has been estimated at 574,880 hectares, all of which is available for public access (Foundation for Common Land 2017). This article will place the commons within the wider legal and policy context for recreational access rights over land. It argues for the creation of ‘new commons’, especially in or near urban centres, using an innovative legal model. This requires the creation of common rights – a species of private property right – over land, thereby facilitating its registration as common land with open public recreational access. It will consider the types of private property right appropriate and necessary to achieve this overriding purpose, considers the narratives of locality and identity which this model for ‘new commons’ could engender, and its potential for reconnecting people and nature.

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2. Recreational access to land – the commons in context

2.1. Recreational access – the legal context

English law has a very restrictive approach to recreational access to land. There is no universal right of access to land, neither does the law recognise a customary public right, even one based on long practice, to enter another person's land for recreational purposes. "No right can be granted (otherwise than by a statute) to the public at large to wander at will over an undefined open space" (*Re Ellenborough Park* [1956]). Most recreational access has, until comparatively recently, been enjoyed as a permissive licence granted by the landowner – one that gives members of the public no legally enforceable *right* to enter land for the purposes of open air recreation or sport.

This position has been gradually ameliorated by the piecemeal introduction of legislation to give the public recreational access rights over several categories of land, of which common land is one of the most important. This process began in the nineteenth century, with the passage of several local or private Acts of Parliament protecting the more important surviving urban and metropolitan commons, e.g. the Epping Forest Act 1878. These gave the public rights of recreational access over the specific commons to which they applied, and were largely the result of the Victorian commons movement led by pioneers such as Octavia Hill and Robert Hunter. Another right for which Octavia Hill had campaigned was enacted in section 193 of the Law of Property Act 1925. This gives all members of the public 'rights of access for air and exercise' to all urban and metropolitan commons – a right that can be exercised on foot or horseback, but which does not give a right to enter land with vehicles or to camp or light fires on the land.

The modern legal context for recreational public access was completed by the provision for the registration of common land and common rights by the Commons Registration Act 1965, and by the introduction of the 'right to roam' over large areas of open land by Part 1 of the Countryside and Rights of Way Act 2000. The 1965 Act was intended to preserve open spaces and protect them from commercial development (Royal Commission on Common Land 1958). It provided for the registration of two categories of land: common land, and town and village greens. Common land is not 'community land' in the sense of being communally owned. Most common land in England and Wales is privately owned, but it is characterised as 'common' by the existence of private property rights over it that give individual members of the community access to its resources. Alternatively, it may be the waste land of a manor, over which no common rights subsist (1965 Act, s. 22). Much of the modern law of commons is premised upon the rights of commoners (appropriators) to take or use the resources of the land. It follows that English law on commons governance offers a means for large numbers of people to share in the benefits of land that they do not own, but it is poorly adapted for the implementation of modern public policy (Rodgers 1999, 255).

The most recent changes in commons registration were made by Part 1 of the Commons Act 2006, which currently applies in only nine administrative districts.¹ It will eventually replace the Commons Registration Act 1965, but until then there is a bifurcated registration system under which some commons are governed by the 1965 Act, and some by the 2006 Act. The commons registers are maintained by the commons registration authority, typically the county council or unitary authority for the area concerned. Registration indirectly creates public access rights over all common land. The Countryside and Rights of Way Act 2000 introduced a statutory right of public access over all 'access land', i.e. mapped open country, registered common land and coastal margin land (2000 Act, ss. 1(1), 15(1)). The registration of land as 'common land' also,

Access Right	Legislative Basis	Extends to?	Nature and extent of permitted public access
Access land	<ul style="list-style-type: none"> • Countryside & Rights of Way Act 2000 s. 1 and Sch. 1 + 2 	<ul style="list-style-type: none"> • Mapped open country • Registered common land • Unmapped open country > 600m above sea level 	<ul style="list-style-type: none"> • Entry on foot for 'open air recreation' • No access to land ploughed in last 12 months; no vehicular access; no bathing; no shooting, hunting, fishing or otherwise taking wildlife. Other restrictions apply
Coastal access rights	<ul style="list-style-type: none"> • Marine & Coastal Access Act 2009 Pt. 9 	<ul style="list-style-type: none"> • English coastal route & coastal 'margin' of land (Natural England Coastal Access Scheme 2013 (NE 496)) 	<ul style="list-style-type: none"> • As above for access land • Access on foot for open air recreation
Dedicated access land	<ul style="list-style-type: none"> • Countryside & Rights of Way Act 2000, s. 16 	<ul style="list-style-type: none"> • All land voluntarily dedicated by landowner 	<ul style="list-style-type: none"> • As above but may be subject to variation in terms of dedication
Town and village greens	<ul style="list-style-type: none"> • Commons Act 2006 • Commons Registration Act 1965 s. 22 (as amended) 	<ul style="list-style-type: none"> • All land registered as town and village green 	<ul style="list-style-type: none"> • Access limited to "inhabitants of a locality" for purposes of exercising "lawful sports and pastimes".
Urban and metropolitan commons	<ul style="list-style-type: none"> • Law of Property Act 1925, s. 193 	<ul style="list-style-type: none"> • Metropolitan commons • Manorial waste • Any common wholly or partly within a borough or urban district 	<ul style="list-style-type: none"> • "Rights of access for air and exercise" • No right of vehicular access
Access orders or agreements	<ul style="list-style-type: none"> • National Parks and Access to the Countryside Act 1949, ss 50, 60, Sch. 2 	<ul style="list-style-type: none"> • "Open country", i.e. "any area appearing...to consist wholly or predominantly of mountain, moor, heath etc. or foreshore." 	<ul style="list-style-type: none"> • "Open air recreation" • No vehicular access; no bathing, hunting, fishing, etc. • Dedication by agreement is voluntary and other restrictions may be applied by the access agreement
Public rights of way	<ul style="list-style-type: none"> • Highways Act 1980 • Countryside Act 1968 • Natural Environment & Rural Communities Act 2006 	<ol style="list-style-type: none"> 1. Footpaths 2. Bridleways 3. Byways open to all traffic 4. Restricted byways 	<ol style="list-style-type: none"> 1. Walking, running, right to pass & repass 2. Walking, running, entry on horseback, bicycles, right to pass & repass 3. Pass & Repass, incl. all traffic (includes cars and vehicles) 4. Pass & repass on foot, horseback, cycles but not mechanised propelled vehicles.
Ancient monuments	<ul style="list-style-type: none"> • Ancient Monuments & Archaeological Areas Act 1979, s. 19 	<ul style="list-style-type: none"> • Any ancient monument under ownership or guardianship of Historic England, the Secretary of State or a local authority 	<ul style="list-style-type: none"> • Access on foot. Can be limited or controlled if necessary for preservation or maintenance of monument

Figure 1. Public recreational access to land – categories.

therefore, confers the statutory rights of public access granted by the 2000 Act. Registration as a common protects the land from future development. The erection of buildings, fencing or any other structures that may impede public access requires the consent of the secretary of state, and when considering applications for consent she/he must consider the need to preserve public access, and wider public interests including (for example) the promotion of nature conservation (2006 Act, ss. 38, 39). Once registered, a common cannot be deregistered unless the landowner offers 'exchange' land that the secretary of state considers can offer similar benefits for open access and nature conservation (2006 Act, ss. 16.17). Once registered, therefore, common land will become a protected open access resource in perpetuity.

Village greens are another important category of 'common' over which public access rights are recognised. Land can be registered as a town or village green (hereafter 'TVG') if it has been dedicated by an Act of Parliament for the recreation of the inhabitants of a locality; if the inhabitants of a locality have a customary right to indulge in local sports and pastimes; or if it is land on which, for not less than 20 years, a "significant number of the inhabitants of any locality, or any neighbourhood within a locality" have indulged in lawful sports and pastimes (2006 Act, s. 15). Registration as a TVG preserves the land from commercial development. It does not engage the 'right to roam' under the 2000 Act; however, recreational access is limited to members of the local neighbourhood or locality, not the wider public. The complex web of statutory provision for public recreational access is set out in [Figure 1](#).

This restrictive approach can be compared to the more expansive policy adopted in Scots law and in many European countries. The Land Reform (Scotland) Act 2003 gives every citizen an entitlement to recreational access to all land in Scotland (not just 'access land' as in England). The range of permitted activities that can be carried out is also more generous, and includes the right to cross the land and to use it for recreational, educational and some commercial purposes. Access can be on foot, horse or cycle, and camping, canoeing and air sports are permitted (in England only access on foot is permitted). Relevant educational activities include "furthering the understanding of the natural or cultural heritage" (2003 Act, s. 1 (5) (a)) – a key consideration if permitting access is to be instrumental in reconnecting people and nature.

2.2. Creating 'new' commons – the historical and policy context

In an English context, then, the creation and registration of new commons presents one of the best available avenues to secure new 'green space' for recreational public access to privately owned land. The inspiration for creating 'new commons for the twenty-first century' owes much to the work of two nineteenth century philanthropists, Sir Robert Hunter and Octavia Hill (see Mackay 2010; Shoard 1997, 342). Their work led to the creation of the National Trust – one of whose principal objectives was the acquisition and preservation of common land, to be available to the public for open air recreation and managed for the public benefit. Their strategy was essentially defensive, to halt the enclosure of common land and to protect urban green space from development. Nevertheless, the Commons Registration Act 1965 and the Commons Act 2006 both retained the legal mechanisms needed to register *new* commons – but these have been rarely used. With the notion of 'new' commons, we are moving from the 'preservation' agenda that drove the Victorian pioneers to one of *creation* – looking for innovative ways to use the existing commons legislation to create new and protected green space, 'commons' for future recreational use and nature conservation.

In an 1884 speech to the Congress of the National Association for the Promotion of Social Science, Hunter stressed the negative impact that the enclosure of urban commons would have on social issues: the rapidly expanding population of London; the lack of space for recreation; the adverse effects on public health (Hunter 1884). He collected evidence about the use of existing London commons and acted upon it through a Parliamentary Committee set up in 1865, culminating in the Epping Forest Act 1878 and the success of the struggle to save Epping Forest from enclosure. Hunter also invoked Octavia Hill's attempt to save some open, wildflower-filled fields at Swiss Cottage in Finchley, then at the edge of London (Hill 1877). Despite public subscriptions being raised to buy the fields for public recreation, the land was sold for building. Nevertheless, these events helped stimulate a train of events that were of historic importance in the worldwide conservation movement.

Hunter's main thesis was that there needed to be a body created to hold land in and around the edges of towns for the health and recreational benefit of the urban poor (Hunter 1884). He thought that urban commons and other freehold land should be acquired for this purpose. Octavia Hill's work focused especially on helping those affected by the poverty and disease of the East End of London, and she published a paper 'Space for London' in 1883 (Hill 1883). In 1887, she used Stamford's map of London to divide it into 4 quadrants using two radii of 4 and 6 miles from Charing Cross. This showed an eightfold difference in the acreage of green space between the western and eastern halves of London, with 1,701 acres in the west and just 223 in the east – 1 acre of green space in the west was available to 682 people while 1 acre in the east had to be shared amongst 7,481 people (Hill 1888; Wohl 1971).

Evidence of a continuing contemporary 'disconnect' between people and nature is very clear. Research for Natural England shows that half of the English population do not visit the natural environment at all (Natural England 2015). Of those that do, the majority (68%) barely go further than 2 miles from their homes and only c.13% venture further than 5 miles from home to do so. Most of the reasons for visiting the outdoors are associated with physical or mental health benefits; the most popular reason for countryside visits in the three months to February 2016 was walking dogs (48%), while only 2% of visits were for wildlife watching (Natural England 2016). The urban fringe presents opportunities to create new commons that might not be available within towns and cities where space is hard to find. Re-purposing land to attain this is, however, a challenge. England is one of the most highly urbanised countries in the world. The 2011 Census found that 81.5% of the population lived in urban towns and cities and another 9.1% lived in rural towns (ONS 2011).

The Victorian vision therefore still resonates today. The question for the twenty-first century is, however, different. Hunter and Hill led a defensive response to the 'old' enclosure movement. Establishing 'new commons' would, by contrast, start to address some of the concerns raised by the 'new' enclosure movement, by offering a vision for a model of urban common that can unite communities (Chatterton 2010; Hodgkinson 2012). It could provide spaces for human interaction, interdependence and cooperation from which no one is excluded. And formal registration of a 'new common' as common land would supersede the right of the property owner to displace members of the community using the land for recreational purposes.

Creating new commons could start to address the urgent need to increase recreational green space in the urban fringe of large towns and cities and improve neighborhood access to recreational 'green space' (DEFRA 2011a). It could contribute to achieving many nature-based benefits – including increases in well-being, greater

energy efficiency and the fostering of an increased connection with nature by underrepresented groups (European Commission 2015, 4). The creation of ‘new’ commons in the urban fringe offers an opportunity to overcome a significant barrier to achieving this, and of adapting nature-based solutions to local conditions. It could also be a powerful means to reconnect people and nature, and of generating ‘cultural’ ecosystem services by providing “environmental settings which provide the sites for human interactions with nature and with others” (UK National Ecosystem Assessment: Technical Report 2010, 679). This could, for example, provide a powerful setting for upscaling nature conservation education to an active-outdoor mode of learning, e.g. to connect children to nature as soon as possible in an otherwise largely urban context (see on this van den Born 2017, this issue, pp. 841–856; and also for a wider exploration of the importance of eudemonic values to actors in implementing nature conservation policy). The creation of ‘new’ commons in the urban fringe has the potential, therefore, to strongly contribute to the *Biodiversity 2020* strategy for England’s wildlife and ecosystem services, by “putting people at the heart of biodiversity policy” in a meaningful way (DEFRA 2011b, 21).

The difficulties of measuring the cultural benefits generated by engaging with nature are well known. Human interactions with wild animals and plants can generate a range of cultural goods that are the subject of ongoing research (UK National Ecosystem Conceptual Framework 2010, Chapter 7; O’Brien and Morris 2013; Raymond *et al.* 2017, this issue, 778–799). There is a synergistic benefit in providing green space for physical recreation, and this is enhanced by being directly exposed to nature (Pretty *et al.* 2007). ‘Green exercise’ studies have shown that while people already benefit from spending time in green space, contact with nature significantly improves psychological health (see Barton, Hine, and Pretty 2009; McMahon and Estes 2015). It is also clear that exposure to natural *landscapes* while undertaking green exercise enhances its psychological and physical health benefits (Pretty *et al.* 2005; Ulrich 1979). The creation of new commons as ‘urban green spaces’ could, therefore, provide enormous recreation values, and offer significant improvements in physical and mental health – generating a potential reduction in health expenditure that has been estimated at £2.1 billion p.a. (Natural Capital Committee 2015, 3). Research on the health benefits of green exercise show that finding a legal model for creating new commons that ensure their availability not only as a recreational resource, but also for nature conservation, is important if we are to maximise the cultural ecosystem services and human–environment interactions that they can generate. Creating and registering ‘new’ commons in the urban fringe could provide additional *sites* for the co-production, and maximisation, of ecosystem services (as to which see Raymond *et al.* 2017, this issue, pp. 778–799).

State policy discourse is usually dominated by rational, often economically determined, frames of reference such as the ecosystem approach, whereas at the individual level, people’s ‘connectedness’ to nature can include spiritual or emotional dimensions (Muhar *et al.* 2017, this issue, pp. 756–777). The work of the Natural Capital Committee is an example of the former. The creation of new commons, using the model discussed in the following, offers instead an innovative strategy to structure commons governance to maximise the socio-cultural aspects of green space. Socio-cultural concepts such as ‘connectedness’ to nature, ‘locality’ and ‘place identity’ are, of course, simply descriptive shorthand for different manifestations of community engagement in conservation and environmental behaviour. These are explored elsewhere in this issue (for example: Pagès 2017; Raymond *et al.* 2017; Yoshida *et al.* 2017). We are concerned here instead with identifying *the legal means by which we can secure, and*

then protect from development, the ‘green space’ on which these engagements (however structured in practice) can be developed and undertaken.

Viewed as a socio-ecological system the ‘connectedness with nature’ that a new common will engender in user groups will depend upon a variety of factors, but of these the governance arrangements applied to it can strongly condition the human/nature relationship (Muhar *et al.* 2017, this issue Table 1 and Figure 3). Crucially, these will be determined by the different ownership structures, property rights and resource distribution applied by the different legal models for a ‘new’ common. These differ for land registered as common land under the 2006 Act, and for land registered as a TVG. We will therefore consider the different legal models available to create a ‘new’ common, before considering their characteristics and effectiveness for (re-) connecting people with nature.

3. New commons: the legal landscape

The key to the creation of a new common using the model described in the following is the creation of new *private property rights* over the land – that is, of one or more right(s) that are recognised in English law as ‘common’ rights (2006 Act, s. 6). The creation of a single common right is sufficient for land to become registrable as ‘common land’; and its registration as common land will then secure recreational public access under the Countryside etc. Act 2000.

Common rights are a type of servitude (a ‘profit a prendre’) that give the holder the right to take some of the produce of, or the wild animals on, the land of another (*Alfred F Beckett Ltd. v Lyons* [1967]). Most profits are ‘appurtenant’ rights that exist for the benefit of other land, and are attached to that land (known as the ‘dominant tenement’). Some common rights are instead personal rights held ‘in gross’, in the sense that they are not attached (‘appurtenant’) to other land (*Bettinson v Langton* [2002]). Common rights ‘in gross’ cannot, however, be created once the 2006 Act comes into force. This has implications for the future governance of common land, for it restricts the transfer of common rights to another person or community management body without also transferring the land to which the right attaches.

Common rights are therefore an unusual type of communal property right; they are usually private property rights held by members of the local community, entitling them to take produce from the land of another. In the past, these rights were often acquired by long usage and custom. The legal force of customary use was recognised in the acquisition of rights under the doctrine of prescription – if used for 60 years without interruption a profit became absolute unless enjoyed with the written permission of the landowner (Prescription Act 1832, ss. 1 and 2). Modern legislative policy is, however, to encourage certainty by ensuring that common rights are clearly defined and accurately registered in the commons registers. The 2006 Act therefore provides that a right of common can in future only be created by an express grant by the landowner. New commons rights can no longer be claimed by long usage – that is, by prescription (2006 Act, s. 6(3)). Long usage can still, however, be used as the basis for the creation of a TVG, as we will see below.

4. A model for creating ‘new’ commons

The model suggested here for the creation of a ‘new’ common requires the grant of one or more common rights over the land by the landowner, to the owner of land near the intended ‘new common’ that can benefit from the exercise of the rights. If, however, the

new common is in an area where Part 1 of the 2006 Act is not yet in force, it may still be possible to create a new common by granting common rights in gross over it. What rights will be recognised as ‘common rights’ for this purpose, and of these which are the most appropriate for the creation of a new common in a contemporary context?

4.1. Creating common rights

Most common rights recognised in English law are of customary origin and have an ancient pedigree. Many of them originated in a subsistence level agricultural economy and the medieval manorial system, and were directed to maximising the use of scarce natural resources (see Winchester 2000, Chapters 1 and 2; Winchester and Straughton 2010). Can we adapt these ancient rights to create modern servitudes that are suitable for the twenty-first century, and then use these as a basis for triggering the registration of the land over which they are exercised as ‘new’ commons?

The types of private land use right that will be recognised as ‘common’ profits fall into well-established categories. The categories are not closed, however, and ‘new’ types of common right analogous to those previously established are from time to time recognised by the courts (*Dyce v Lady James Hay* [1852]; *Re Ellenborough Park* [1956]). The choice of the common rights appropriate to support the creation of a new common will depend upon local circumstances and what is sought in each case.

Several established categories of common right are suitable for the creation of new commons in a modern setting. The right of *pasturage* is one of the most widespread common rights. It confers the right to take grass by the mouths of sheep, horses, cattle or other animals (*Earl de la Warr v Miles* [1881]; *Besley v John* [2003]). Large numbers of common pasturage rights were registered under the Commons Registration Act 1965, and in many cases, they are registered as exercisable for limited periods of the year, representing customary agricultural practice, e.g. between Lady Day (25 March) and Michaelmas (29 September). Livestock would in such cases be grazed on the common only during the summer months, and the customary rule was intended to preserve the grazing resource. The overriding purpose for establishing a ‘new’ common will, however, be to secure public recreational access. The creation of large numbers of new livestock grazing rights will be inappropriate in this context. It would be possible, however, to create a new common by granting a right of pasturage and limiting its exercise in temporal terms, e.g. a right to graze three goats for a period of two months annually from 1 July to 31 August.

The right of *pannage* gives a more limited right to graze pigs on fallen acorns and beech mast in woodland or forests, usually in the autumn (*Chilton v Corporation of London* [1878]). Granting pannage rights is unlikely to be an appropriate means to create many new commons. But it may support the creation of a ‘new’ common where woodland is to be dedicated to public use, e.g. by granting a limited right of pannage for grazing one or two pigs between fixed dates each autumn, specifically to secure the registration of the wood as common land.

The most suitable common right for the establishment of a ‘new common’ in a modern context is the ancient right of *estovers*. The common of *estovers* gives the right to take the natural produce of the land, usually annexed to a building or house, and is limited to taking what is necessary for its repair, or to support its residential use (*Sir Henry Nevil’s Case* [1570]; *The Earl of Pembroke’s Case* [1636]). Several categories of *estover* were recognised at common law (Cousins 2012, 2–38 to 2–40): the right to take timber or trees to repair a house or other building, or to take wood shrubs or dead trees

for firewood ('house-bote'); the right to take timber to repair agricultural implements ('plough-bote'); the right to take timber, rushes, shrubs and bushes to repair gates, stiles, fences or hedges ('hay-bote'). The categories of estover are not, however, closed, and the right can also extend to the taking of other natural produce from the land, including gorse, ferns, bracken and heather. The produce to be gathered from the common will usually be unquantified, and most registrations of estover rights made under the 1965 Act were both generic ('right of estovers' without specifying the produce to be taken) and unquantified. Where this is the case it will be necessary to look 'behind' the register at customary practice to establish the precise nature and parameters of the right captured by the commons register (see *Dance v Savery* [2011]).

A grant of estovers by the landowner to neighbouring householder(s) will trigger the registration of the land over which it is to be exercised as common land. What estovers will be appropriate in a modern setting? The right can encompass the taking of fallen timber or fruit (so-called 'foraging' rights), and could include a right to take fruit or berries from trees or shrubs found on the common. The volume of produce to be taken can be unspecified; it may be quantified; or it may be limited in temporal terms (for example, to pick berries between certain dates in autumn). The owner of the soil will retain the right to use the land for purposes that do not interfere with the exercise of the commoners' rights to take produce from the land.

The choice of a grant of estovers to create a new common has one important limitation. A profit can only exist in *fructus naturales* – it must give a right to take something that is the product of natural growth, and not the result of the application of human labour to the land (that is, *fructus industriales*: see *Saunders (Inspector of Taxes) v Pilcher* [1949]). A common of estovers cannot include picking produce that is planted and grown by the commoners themselves, or collecting fruit where the trees are planted and actively managed by the commoners. The right must be one to take what naturally occurs on, or is naturally growing on, the land, e.g. plants, wood from trees planted by the owner of the soil, naturally occurring berries, etc. It follows that the creation of common rights does not furnish a legal model for holding community gardens or orchards. The exact parameters of what will be considered *fructus naturales* are, however, ill-defined. Some maintenance of trees or shrubs may be permitted without impugning the nature of their fruit as *fructus naturales* – for example where trees require some maintenance by commoners, but not on a regular annual basis (*Clos Farming Estates Pty Ltd v Easton* [2002]). It is clear however, that growing crops will be regarded as *fructus industriales*, and a right to harvest crops cannot therefore constitute a common right of estovers (*Grantham v Hawley* [1616]).

If a grant of estovers is to be used to create and then register a new common, the right must be carefully considered and appropriate to the circumstances of each case. A right to pick fruit or berries from trees already *in situ*, or from trees or bushes planted for this purpose by the owner of the soil, can constitute a grant of estovers. A right for the commoners to themselves plant, maintain and then harvest fruit bushes would not, and neither would a right to plant and harvest vegetables. Provided the right is limited to taking the natural produce of trees and bushes, however, there would in principle be no restriction on the ability of the landowner to plant new trees or bushes from time to time – and for the common of estovers to permit the harvesting of fruit from trees thus provided by the owner of the soil. This would be permissible, provided the planting did not constitute 'restricted works' that impede public access to the common (2006 Act, section 38 and Schedule 3).

What other categories of common right may be used to create a new common? The Countryside etc. Act 2000 only gives a right of public access for recreational walking over common land. Can a grant of recreational sporting rights, such as fishing in ponds or streams, or shooting game, support the creation of a new common? There is a tension in the duality of purpose for which such rights may be granted: as a right to take natural produce (e.g. fish) for consumption, or as a right to do so for primarily sporting reasons? The common of piscary gives the right to take fish from a pond, lake, stream or river, where the bed belongs to someone else. While unusual, this type of right can clearly exist as a *profit a prendre* – for example there are many registered ‘samphire rights’ in Norfolk that give commoners the right to take “herbage, estovers, samphire, soil, fish, shellfish, bait and wildfowl” (Rodgers *et al.* 2010, 175–176). Similarly, the right to take wild animals can also subsist as a common right (*Ewart v Graham* [1859]; *Mason v Clarke* [1955]). A right whose sole purpose is, however, to provide recreational pleasure (e.g. to shoot wildfowl) is not in principle capable of subsisting as a right in common (Cousins 2012, 2–48). If such a right were to be granted over land that is intended to become a ‘new’ common, it will therefore be important to define the right and make it clear that a sporting right is not being granted.

4.2. Registration of a new common

The grant by the landowner of a common right(s) over land will make it registrable as ‘common land’. Viewed in the wider context of the objectives of establishing ‘new’ commons, however, registration is simply a means to an end: the registration of the land as ‘common land’ will give it the status of open access land and guarantee public access for future recreational use.

There are currently two pathways to registration: under the Commons Registration Act 1965; or under the Commons Act 2006 if the common land is in an area where Part 1 of the 2006 Act is in force. Because a profit is a right to take the produce of the land, it cannot be held by a *fluctuating* body of persons, and must be registered in the name of an individual person(s) (*Alfred F Beckett v Lyons* [1967]). But a body corporate or other statutory body with legal personality could be invested with and hold common rights – for example, a limited company or a statutory body such as a local council, Natural Resources Wales or Natural England.

The 1965 Act will govern the registration of new common land outside the nine ‘pilot’ areas in England, and in the whole of Wales (1965 Act, s. 1). Separate applications are required to register the land itself as common land, and to register the common rights exercisable over it.² Registration under the 2006 Act is more straightforward. A right of common can in this case only be created by an express grant, and the application to register both the common and rights is made in a composite form that incorporates the deed of grant of the new common right(s).³ A key objective of the 2006 Act is to improve the accuracy of the registers, and it specifies model entries for the registration of common rights.⁴

5. Governance

The management of a ‘new’ common as a community resource would arguably be best achieved by a local, community-based, body such as a parish council, management committee or community trust. Unfortunately, the 2006 Act will potentially complicate the governance of new commons. The 2006 Act prohibits both the creation of common

rights ‘in gross’, and the severance of appurtenant common rights from the dominant tenement to which they attach. These technical legal rules have implications for how the future management of a ‘new’ common might be structured. Management can be undertaken by a community land trust or local council, but it may not be possible to vest ownership of the common rights in a community management body once Part 1 of the 2006 Act is in force.

The prohibition on creating new common rights in gross currently only applies in the nine areas where the 2006 Act has been implemented. It is still permissible elsewhere, allowing their registration and subsequent transfer to be held by a community body, e.g. a community land trust or parish council. The legislative policy in the 2006 Act ignores the fact that the intention when creating a ‘new’ common would not be to vest private land use rights in the owners of nearby land, but rather to create a public recreational resource. A very limited option to transfer common rights exists, by ‘swapping’ common rights to a ‘new’ common by exchange, following deregistration of an existing common (2006 Act, s. 16). This might have limited utility, for example, where a landowner wishes to de-register common land for future development, and is willing to grant alternative land in exchange as a community resource. But it will be of little use in achieving appropriate community-based governance for most new commons.

The *severance* of common rights from the dominant tenement is also now prohibited (2006 Act, s. 9(2)). It is therefore no longer possible to detach appurtenant common rights from the land they benefit and ‘convert’ them into rights in gross – thereby rendering them transferable without land. There are limited exceptions allowing common rights to be transferred to the statutory conservation bodies or to a commons council (2006 Act, Schedule 1, para 1). The transfer of common rights to Natural England or Natural Resources Wales to hold in abeyance would, for example, enable them to relieve grazing pressure on common land that has high nature conservation value. The ability to create a commons council was another 2006 reform, but aimed primarily at the management of rural commons (2006 Act, Part 2). The powers of a commons council are chiefly focused on the management of vegetation and farming activities, and are of limited utility for ‘new’ commons of the type under discussion here (2006 Act, ss. 26 –32; Rodgers 2010). The 2006 Act also permits the secretary of state or Welsh Ministers to authorise the permanent severance of common rights by order, if the order specifies the servient land over which the rights are exercised (2006 Act, s. 9 and Schedule 1, para 3).

The prohibition on severance only applies to a right that “would apart from this section be capable of being severed from [the] land” (2006 Act, s. 9 (2)). An unquantified common right cannot at common law be severed from the dominant tenement – for example rights of estover (to take berries, wood, rushes, etc.) where the registered rights fail to specify the amount of produce to be taken from the common. Rights of pasturage, on the other hand, are registered for a fixed number of grazing animals, and being quantified could, in principle, be severed from the land (*Bettinson v Langton* [2002]). The facility to sever and then transfer common rights to the public conservation bodies therefore only applies to grazing rights, and to other common rights where the produce to be taken from the common is quantified.

If unquantified estovers are created over a ‘new’ common once the 2006 Act is in force, it follows that the dominant (benefitting) land must be transferred if the rights are to be owned and managed by a community body. The common rights would then vest in the transferee of the dominant land, e.g. the intended community management body, trust or council. And in the case of those common rights (such as pasturage) that *can* be

severed, it will only be possible to separate ownership of the rights from the dominant tenement if they are transferred to a commons council or the statutory conservation bodies. In all other cases, the dominant land will also have to be transferred to the community body that is to manage them for the future.

A community body could, of course, undertake management without also assuming ownership of the rights themselves. In most cases where a ‘new’ common is established the separation of legal ownership of the rights (which will remain with the owner of the dominant land), and the management of the common by a community body, will be the preferable solution. In this event, the recipient of the common rights created to ‘trigger’ the registration of the land as a common could create a trust, under which she/he could hold the common rights in trust for a community body as beneficiary for the wider community. The legal technicalities for ensuring community management are not, therefore, insurmountable. They do, however, reflect the fact that the drafters of the 2006 Act did not have the creation of new commons as a recreational resource in view when framing these provisions.

6. Town and village greens – an alternative model?

An alternative legal model for creating new ‘green space’ is provided by the registration of land as a TVG under the 2006 Act. Securing the registration of land as a TVG can be achieved either by establishing long community usage within the terms of the 2006 Act, or by its express dedication as a TVG by the landowner.

Land can be registered as a TVG where a “significant number of the inhabitants of any locality or neighborhood within a locality” have indulged as of right in ‘lawful sports and pastimes’ on the land for a period of at least 20 years. A ‘locality’ for these purposes is a local government unit and could include, for example, a parish council (*Oxfordshire County Council v Oxford City Council* [2006]). Once registered as a TVG the land is protected as a community resource – but the 2006 Act makes no provision for the vesting of individual property rights over it in members of the community. Moreover, only the inhabitants of the qualifying ‘neighbourhood’ will have recreational rights to use the land once it has been registered (*R (Oxfordshire and Buckinghamshire Mental Health Foundation Trust) v Oxfordshire County Council and others* [2010]). They can, however, use the land for all the purposes that fall within the definition of ‘lawful sports and pastimes’, not just those that gave rise to the claim for registration (*Oxfordshire County Council v Oxford City Council and Robinson* [2006]).

This has been widely construed by the courts. In *R v Oxfordshire County Council ex parte Sunningwell Parish Council* (2000), it was held that there is no need for a ‘communal’ element to the recreational activity. Lord Hoffman endorsed the view that ‘lawful sports and pastimes’ can include a wide range of recreational activities including dog walking, playing with children, blackberry picking and other forms of informal recreation. It is not necessary for the activity to be communal, and neither must it involve what is usually considered a ‘sport’. The 2006 Act introduced a new provision for landowners to voluntarily dedicate land as a TVG (2006 Act, s. 15 (8), (9)). The application must specify the locality, or neighbourhood within a locality, for the benefit of the inhabitants of which the TVG is being dedicated.

The TVG model for green space is very different from that for establishing ‘new’ commons advocated earlier. Registration of a TVG confers no private property rights on members of the community – unlike a new common where the creation of new property rights are fundamental to securing its status as ‘common’ land. The creation of private

property rights gives members of the local community a direct proprietary interest in the management of a new common. This will be absent in a TVG. Moreover, the registration of a TVG will confer the same wide rights of lawful recreational use on all members of the community, irrespective of local circumstances or of the historical use of the green – thus arguably distorting the recreational land use that gave rise to the registration in the first place if it is based on long usage exceeding 20 years (Clarke 2015, 227). And in the case of a TVG, the concept of locality – ‘connectedness’ – is geographically bounded in that only members of the ‘neighbourhood within the locality’ will have recreational access to the green. The wider ‘right to roam’ under the Countryside etc. Act 2000 does not apply to TVGs.

7. Discussion

Notwithstanding the reforms discussed in this article, the approach in English law to creating public recreational access over land remains restrictive, and characterised by the pre-eminence it affords to private property rights. The Countryside etc. Act 2000 greatly extended the range of recreational access in England and Wales, e.g. by designating mapped open country (above 600 metres in height) as access land. Although this means that large areas of open countryside are now open to public access, it did little to address the urgent need for greater public access to ‘green space’ in the urban fringe near towns and cities. The legal mechanisms for opening larger areas of land in the urban fringe for recreational access depend largely upon the voluntary participation of landowners – for example in executing access agreements under the National Parks and Access to the Countryside Act 1949, or in dedicating land as common land or as a TVG. Very few access agreements have been concluded since the passage of the 1949 Act. Common land, however, is a ‘mobile’ element in the definition of ‘access land’ under the 2000 Act – in the sense that it is possible to create more of it, and thereby to enlarge the amount of land dedicated to public recreational access. This article has emphasised the potential for the creation of ‘new’ commons in the urban fringe by granting private property rights over land to local inhabitants to secure its registration as common land.

Creating new commons will require the voluntary dedication of land for recreational use. The benefits to landowners in doing so can, in some circumstances, be considerable. The most obvious advantage is the certainty of titles that commons registration conveys. The landowner can choose the type of use rights she/he wishes to create, and the terms on which public access is created will then be governed by the 2000 Act (unless enlarged by the landowner in the dedication). In any other context, a landowner who voluntarily allows the public to use land for recreational purposes risks legal user rights being created by long usage – for example, if the land is used by the public for ‘sports or pastimes’ for 20 years, it may become registrable as a TVG. In this scenario, the landowner will have no control over the types of use right that have been created over the land. If the land is, instead, dedicated as a common, then the landowner will retain the right to use the land for any purposes that do not interfere with the commoner’s rights and that do not impede public access. Once registered as a common, however, the land cannot be deregistered other than in very limited circumstances, and it will be protected as public ‘green space’ in perpetuity.

Dedicating land for registration as a new common can also benefit the landowner in the context of development control. It can, for example, be used to secure the long-term protection of land offered as a biodiversity offset, or to secure other forms of planning gain offered by a landowner seeking planning consent. The registration of common land

under the 2006 Act can provide the legal mechanism (or legal ‘wrapping’) by which new public recreational space, acquired using planning instruments, can be given secure and indefinite legal protection from development. ‘New’ commons could also have an important part to play where land is zoned by local planning bodies as potential new ‘green space’ in local development documents. The draft plan for the Greater London National Park City already incorporates the potential for new commons within its ambitions, and Birmingham City Council’s plans to become a ‘biophilic city’ also envisage creating new urban commons (National Park City Partnership 2015; BiophilicCities 2016; Morris 2014).

The complexity of the legal mechanisms for securing public access to land in England and Wales owes much to the deference that English law affords to private property rights. This is absent in many other legal systems, which instead prioritise public access over private property rights – as for example does Scots law, which starts from the statutory premise that the public should have access over all private land. By contrast, the ability to structure public access by dedicating new commons or TVGs is carefully hedged around in English law by the tools and language of private property (Blomley 2004, 3). This results in several key differences in the way the law shapes ‘connectedness’ with new ‘green space’, which will differ for access land that is a registered common as opposed to a TVG. These differences will determine the way that locality and identity with the common as a community resource can be structured and developed.

Common land is characterised by the duality of the legal regime that applies for public access (see Figure 2). In the first place, appropriators (commoners) will have private property rights giving them access to the land for collecting specified resources, e.g. foraging rights to take berries or fruit from trees (estovers). A private property right of this kind will not confer a right of access for other purposes (*Besley v John* [2003]). But, because common land is ‘access land’ for the purposes of the Countryside etc. Act 2000, the wider public (including appropriators) will have a statutory right of access to the land.

Once it is mapped, common land becomes ‘access land’ for open-air recreation by the public (2000 Act, s. 1(1), 2006 Act Schedule 5, para 7). The land will therefore acquire a ‘public’ character, under which access rights are granted for any person to use the land for open air recreation, subject to statutory restrictions that exclude the use of vehicles; horse riding, cycling or camping; the intentional or reckless taking, injuring or disturbance of wildlife; the intentional or reckless taking damage or destruction of eggs; any activities connected with hunting, shooting, fishing, trapping or snaring, taking or destroying of wildlife (2000 Act, s. 2(1) and Schedule 2). Some of these activities (for example fishing) may be permissible as a matter of private right under a profit a prendre granted by the landowner. In general terms, however, the public right of access under the 2000 Act facilitates and protects the right to open air recreation over all common land, including walking, sightseeing, bird watching, climbing and running. The landowner can also voluntarily dedicate a common for public access under the 2000 Act (2000 Act, s. 16), and this can be used to extend the right of access to people other than walkers (for example horse riders) and for activities not otherwise allowed by the 2000 Act.

By comparison, the legislation on TVGs presents a unitary model for public access. Members of the public have no private property rights in a TVG as such, and no right to take or use the land’s natural resources or produce. The public are, instead, given a general right of access for ‘lawful sports and pastimes’. But this is subject to a geographically constructed qualification, limiting recreational use to members of the local ‘neighbourhood’. This is a potentially exclusionary rule, and one which can be used

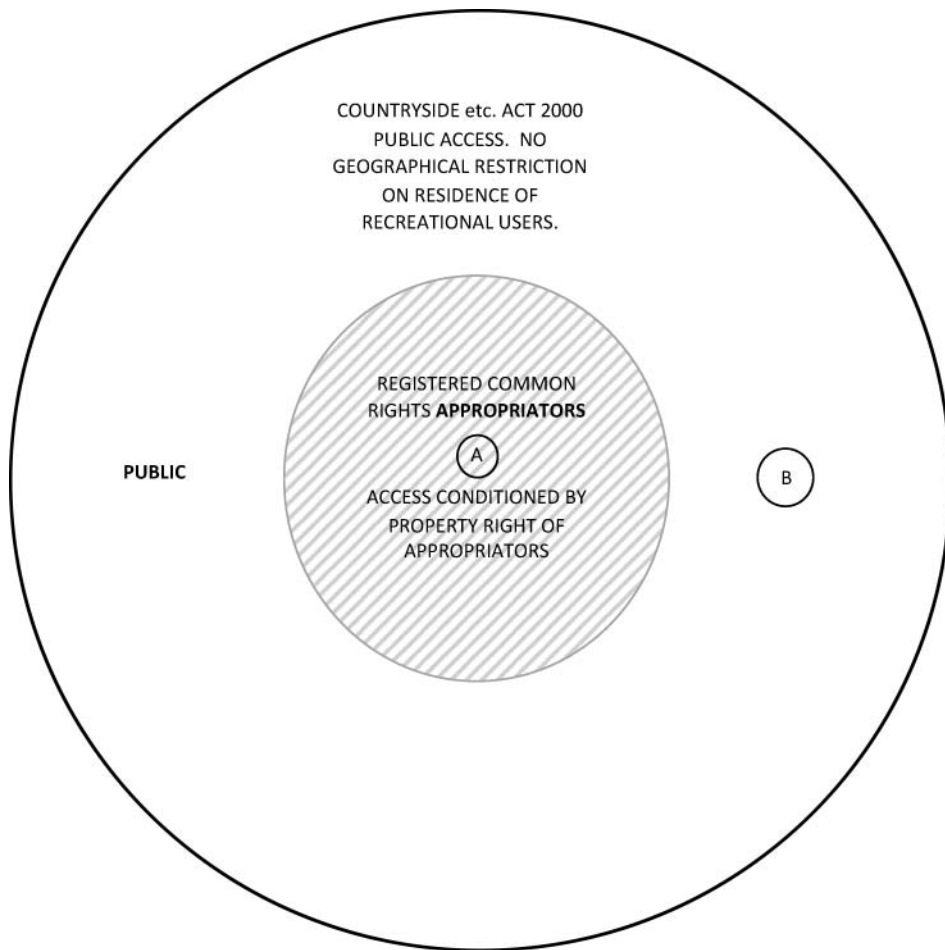


Figure 2. Common land: property and access rights.

to deny the status of TVG where it can be shown that members of the public outside the local neighbourhood have historically used the common or 'green' for recreational purposes (McGillivray and Holder 2007). Further, for a TVG, this means that 'connectedness' and 'locality' must be constructed by reference to a bounded geographical concept of the 'commons'. Although the access arrangements for a TVG appear at first sight to be generous, they are more restrictive than those that would apply instead to a 'new common' registered under the 2006 Act – for there is no geographical qualification on the public's required 'connectedness' with common land under the right to roam conferred by the 2000 Act.

Because the creation of new green space as 'common land' requires a grant of private property rights to members of the local community, it is possible to construct notions of 'connectedness' with the 'new' common through the discourse of ownership and property rights, as well as through geographically bounded notions of locality and community. By contrast, a TVG confers merely 'recreational space for a geographically defined section of the public', and excludes the possibility of developing communal notions of 'connectedness' through ownership or property

A legal device similar to that suggested in this article was used in 1994 to create the only new common known to have been registered in England since 1965, at St Clements, Rushall near Diss in Norfolk (Wright, P 1995; Open Spaces Society 2016). In that case a right of ‘estovers’ (to gather furzes and bracken) was granted by a philanthropic donor to a local member of the Open Spaces Society, thereby enabling the 3 acres of land over which it was exercisable to be registered as a common. The common was registered in the common land register maintained by Norfolk County Council (reference CL 443). The common right itself was subsequently transferred in 2016 to the Open Spaces Society to hold in trust for the public, and to mark the Society’s 150th anniversary. The common land itself had earlier been transferred to the local parish council, who manage the land for the benefit of the community.

Two points should be noted in a modern context:

1. The common right in this case was granted as a personal right i.e. a right ‘in gross’. Rights in gross could be registered under the 1965 Act, and this enabled the right (not being attached to land) to be transferred to the Open Spaces Society (a registered charity dedicated to the protection of open access rights) to hold for the public benefit. Once the 2006 Commons Act is in force this would be impossible – the rights would have to be granted as appurtenant to a dominant tenement (land that they benefit) and this land would have to be transferred to the intended recipient if the rights were also to be transferred.
2. The rights registered here were generically registered as ‘estovers’. For the creation of a new common using the model described in this article, the rights should be more precisely defined and registered e.g. foraging rights to pick fruit from bushes or trees, to collect wood etc. A precise registered description of the rights granted provides future security and certainty for the landowner as to the resource use rights that have been created over the land.

Figure 3. Case study of a new common.

rights. As we have seen, the creation of a new common can be achieved by a simple expedient, a grant of estovers over the intended ‘new common’, e.g. to take fallen wood or fruit and berries. The only qualification is that the initial recipient of the rights must own land or a dwelling near the common which can benefit from the right’s exercise. Registration as common land will then secure its protection as a community resource with open access in perpetuity to the wider public, and not just members of the local community (as with a TVG).

Towards the end of his life, in 1910, Robert Hunter was writing of a movement to promote an equality of opportunity for everyone to become stakeholders in their own country, taking a share in the social and economic benefits of everyone’s environment and developing a vision of a democracy that invested in people and places. The imaginative use of existing – and in some cases, ancient – legal concepts to create ‘new’ commons can contribute to the realisation of this vision.

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Notes

1. See the Commons Registration (England) Regulations 2014 (SI 2014/3038). These are Cumbria, North Yorkshire, Devon, Kent, Cornwall, Hertfordshire, Herefordshire, Lancashire (excluding metropolitan districts), and Blackburn with Darwen – and in all others in England for corrections to the commons registers.
2. Commons Registration (New Land) Regulations 1969, Schedule, Forms 29 and 31.
3. Schedule 4, para 1 Commons Registration (England) Regulations 2014 and Form CA1.
4. See the Commons Registration (England) Regulations 2014, SI 2014/3038, Schedule 3, Part 1 Model Entries 3 (Common Rights) and 15 (Common Land).

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