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TOWARDS A TAXONOMY FOR PUBLIC AND COMMON PROPERTY

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ABSTRACT. *This article argues that public property rights should be recognised as a separate category of property interest, different and distinct from private and common property interests and conferring distinctive rights and obligations on both "owners" and members of the public. It develops a taxonomy to differentiate private, public and common property rights. The article concludes that it is a mistake to think in terms of "private property", "common property" or "public property". The division and allocation of resource entitlements in land can result in private, common and public property rights subsisting over the same land simultaneously, in different combinations and at different times. The categorisation of property interests in land (as private, common or public) may also shift and change from time to time. The article considers the importance of distinguishing between private, common and public property interests for developing new strategies for environmental governance, and for implementing the effective protection of natural resources.*

KEYWORDS: *property theory, public property, common property, resource utility, environmental governance.*

I. INTRODUCTION

Property is a multi-faceted and contested concept. Much scholarly attention has been focused on identifying the key characteristics of *private* property.[1] But should we also recognise *public* property rights as a separate category of property interest, conferring recognisably different and distinctive rights and obligations on both "owners" and members of the public? And if public property rights can be recognised as creating a distinct form of property

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[1] There is a large literature. See e.g. J. Waldron, "What Is Private Property?" (1985) 5 O.J.L.S. 313; J.W. Harris, "Private and Non Private Property" (1995) 111 L.Q.R. 421; A. Honore, "Ownership" in A. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford 1961), ch. V; J.W. Harris, *Property and Justice* (Oxford 1996), especially 140ff.; J.R. Pennock and J.W. Chapman (eds.), *NOMOS XXII: Property* (New York 1980).

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relationship, how are they to be distinguished from both private and *common* property rights?

Why does this matter? The ability to distinguish accurately between common, public and private property interests is necessary for the effective governance of natural resources. It also has important public policy implications, in that a well-balanced society should seek to harmonise private and public property rights: both serve crucial aspects of civic need.[2] Private property rights are important in a market economy, where they underpin autonomous decision-making and provide an important medium of exchange. Public property rights, on the other hand, are rights which members of the public have in relation to things (including land) which are enforceable against the state and against all other members of the public. These rights will usually be particular use rights – for example rights to make a specific or limited use of land or its natural resources – and will not confer ownership of the land, its resources or the thing in question. Public property rights could, therefore, include public rights of way, public recreation rights, public navigation rights, or foreshore rights (e.g. for bathing or recreation). They may be exercisable over state-owned property, property in private or communal ownership, or over ownerless things (the question of who owns a thing being separate from the question of who, if anyone, has any other kind of property right in it). Common property lies somewhere between private and public property; whereas a private property right confers the right to exclude others from a resource, a common property right confers a right *not to be excluded* from the use of property.[3] But in all cases where land or a thing is owned, the recognition of a public or common property right over it will restrict the owner's right to act as s/he wishes in relation to the land resource, in that s/he cannot do anything which interferes with the exercise of public or common rights.

Distinguishing public, common and private property rights requires a consideration of the functional role and attributes of property. In this context, progressive property scholarship has stressed the relational nature of "property", as a social construct capturing the functional relationship between property concepts and the resources that they represent.[4] Its focus has been on the role of property rights in promoting social interests, such as environmental stewardship or aggregate wealth.[5] This challenges us to consider the role of property rights in defining the relationship between the "owner", the land over which property rights are asserted, and the

[2] M. Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge 2014), 308.
[3] Cf. N. Blomley, "Enclosure, Common Right and the Property of the Poor" (2008) 17 Social and Legal Studies 311, at 320
[4] For example, L. Underkuffler, "On Property" (1990) 100 Yale L.J. 127; J. Singer, "No Right to Exclude" (1996) 96 N.W.U.L.R. 1283.
[5] See G. Alexander, E.M. Penalver, J.W. Singer and L.S. Underkuffler, "A Statement of Progressive Property" (2009) 94 Cornell L.R. 743.

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resources to which those rights give access. Relational property models stress the role of property rights as representing the elements of resource utility that (taken together) make up a land interest.[6] The Hohfeldian conception of property as consisting of "a bundle of rights" offers a useful starting point for this analysis.[7] The bundle of property "rights" over land that the law recognises will define, distribute and reflect different elements of resource utility that accrue to the "owner" of the right in question.[8] This approach has considerable utility as a lens through which to view the dynamic interrelationship between property rights and instruments of environmental governance.[9] It also complements economic models for property that stress the dynamic nature of property rights.[10]

The taxonomy suggested below builds upon a resource utility model of property rights to map the relationship between property concepts and the distribution and protection of "public goods", namely those benefits attributable to and derived from the land resource that are made available to the public at large, or (in the case of common rights) to a section of it, and are not reserved for the exclusive use of the "owner". Its utility will then be interrogated by considering the property rules used in English law to secure public recreational access, and to promote nature conservation, on privately owned land.

II. Private, Common and Public Property – Problems of Definition

The growth in legislation restricting the ownership privileges of private property in English law has given rise to claims that much land is now "public space".[11] This does not mean, however, that all land over which restrictions on ownership privileges have been placed should be viewed as either common or public property. To establish a taxonomy for differentiating and organising different categories of property rule, including those creating what may be truly regarded as "public" property rights, we first need to consider the fundamental legal conception of "property" itself. Waldron describes property as a system for determining access to, and

[6] Freyfogle, for example, draws attention to the replacement of the notion of "secure" property rights with that of "entitlements" that are "interconnected and relative": E. Freyfogle, "Context and Accommodation in Modern Property Law" (1989) 41 Stan.L.Rev. 1529, at 1530.

[7] W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning" (1913) 23 Yale L.J. 16; J. Penner, "The Bundle of Rights Picture of Property" (1996) 43 U.C.L.A.L.Rev. 711.

[8] See K. Gray and S.F. Gray, "The Idea of Property in Land" in S. Bright and K. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford 1998), 15, at pp. 39ff.

[9] See e.g. C.P. Rodgers, "Nature's Place? Property Rights, Property Rules and Environmental Stewardship" [2009] C.L.J. 550.

[10] See e.g. D.W. Bromley, *Environment and Economy: Property Rights and Public Policy* (Oxford 1991). Also H. Demsetz, "Towards a Theory of Property Rights" [1967] 57 Am.Econ.Rev. 347; B. Colby, "Bargaining over Agricultural Property Rights" (1995) 77 American Journal of Agricultural Economics 1186.

[11] J. Holder and T. Flessas, "Emerging Commons" (2008) 17 Social and Legal Studies 299, at 302ff.; J. Mitchell, "What Public Presence? Access, Commons and Property Rights" (2008) 17 Social and Legal Studies 352.

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control of, material resources that will usually assign to different people rights in the same resource.[12] This article will argue that the ways in which it does so will determine whether elements of resource utility in land can be categorised as having been granted by public, private or common property rights.

In the case of *private property*, the rules governing access to the land resource are organised around the idea that resources are assigned to and belong to some individual. Each person to whose name that object is assigned decides how that resource is to be used and by whom.[13] This conception of "property" is usually called the "ownership model": property is about rights over things and the people who have those rights are called "owners".[14] Where common and/or public property rights have been created over land, however, the "owner" will lose the sole right to control access to the resource. Access to the resource is instead vested in several others, or in a group or "community" of others (in the case of common property rights); or rights of access will be vested in the public at large (thereby creating a public property right). This tells us that the land resource may be subjected to a mix of common property rights, private property rights and public property rights. In many cases, therefore, it is not possible to characterise the property relationship simply as one of "private property", or as one of "common" or "public property".

The analysis can be deepened if we adopt a "progressive property" perspective of the kind advocated by many modern property theorists.[15] If we accept that an inherent value underpinning private property is the recognition of social obligations owed by the property "owner" to the wider community, then obligations as to the way land is to be managed that are imposed by common law (or applied externally by statute) may be seen as aspects of the integral qualities of the private property right itself.[16] We are not concerned here, however, with what we might term *property-management* norms or rules,[17] or with the symbiotic relationship between property rights and environmental regulation, by virtue of which it may be claimed that regulatory measures not only vary but also *shape* property

[12] Waldron, "What Is Private Property?", p. 324; see also Honore, "Ownership", pp. 107ff.; and J.W. Harris, *Property and Justice*, especially pp. 140–42.
[13] Waldron, "What Is Private Property?", p. 327.
[14] J. Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000), 2, 3.
[15] See e.g. C. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press 1994); Alexander et al., "A Statement of Progressive Property"; Underkuffler, "On Property"; Singer, "No Right to Exclude".
[16] See e.g. B. France-Hudson, "Surprisingly Social: Private Property and Environmental Management" (2017) 29 J.E.L. 101, at 107 (illustrating this using the examples of the New Zealand Emissions Trading System and quota management system for fish catches).
[17] On which see C.P. Rodgers, "Agenda 2000, Land Use and the Environment: Towards a Theory of Environmental Property Rights" in J. Holder and C. Harrison (eds.), *Law and Geography* (Oxford 2003).

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rights[18] – but rather with the primary property rules that allocate elements of resource utility, and whether these can be characterised as creative of either "private", "public" or "common" property rights. And in this regard, the key normative question is *to whom*, and *how*, the law grants the right to allocate and control access to the property resource.

In the case of *common property* Waldron's analysis suggests that the resource must be held for the use of every member of a group and that allocative decisions are based on what is fair for all.[19] This does not, however, capture the essence of some types of property rule in English law that are widely considered to create or support "common" property rights. Take, for example, the law governing common land in England and Wales. Common land, and the common rights exercisable over it, has to be registered on the commons registers maintained by each local authority.[20] Decisions on the allocation of the land resource (for example grazing rights over a registered common) are not based on what is "fair" to members of the group but are instead based solely on the rights reflected in the common registers. The customary practices on which registrations were originally claimed may have been based in notions of equitable access to the resource.[21] But in the modern context, the right to resource use on common land is determined solely by the commons registers, and not by issues of collective fairness or through a collective allocative process.[22] It is not, in any event, necessary for allocative decisions made by a group (or a community) holding common property rights to be based on notions of their internal fairness *inter se*. They may have an internal constitution and make whatever resource allocation decisions they wish. Communities may be dominated by the most powerful amongst the members and run for their benefit, or in a way which perpetuates an unequal hierarchy. Institutional scholars would argue that they would not in this case be efficient resource users – their management of the common resource would, for example, fail to exhibit the widely accepted design principles for successful communal resource use.[23] But they would still be using their resources communally and exercising "common" property rights.

[18] As to which, see E. Scotford and R. Walsh, "The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context" (2013) 76 M.L.R. 1010; cf. S. Blandy, S. Bright and S. Nield, "The Dynamics of Enduring Relationships in Land" (2018) 81 M.L.R. 85.

[19] Waldron, "What Is Private Property?", p. 327.

[20] Constituted as a commons registration authority for this purpose: Commons Registration Act 1965, s. 2; Commons Act 2006, s. 4.

[21] On this see A.J.L. Winchester and E.A. Straughton, "Stints and Sustainability: Managing Stock Levels on Common Land in England c 1600–2006" (2010) 58 Agricultural History Review 29.

[22] Custom retains an important role in the management of common land, but not in the allocation of property rights per se: see further C.P. Rodgers, "Commons Governance: Legal Pluralism and the Enduring Role of Custom" in A. Clarke and T. Xu (eds.), *Legal Strategies for the Development and Protection of Communal Property* (Oxford 2018), ch. 2.

[23] As to which, see E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge 1990), 90. Ostrom identified eight design principles for successful common resource management. These included the adoption of clearly defined boundaries and use rights, the adoption of

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We are presented with similar definitional problems when we consider the nature of *public* property rights. Despite its importance, the nature and legal parameters of "public" property, as a distinct type of property interest, has received scant attention from property theorists in English law.[24] The term "public property" (or sometimes "crown" property) is often loosely used to describe property collectively owned by the state for the benefit of citizens. In English law it is, however, subject to the same rules of entitlement ("ownership" rules)[25] as private property – the only difference being that the "owner" is a public body.[26] In an English context this might, for example, be a government department such as the Ministry of Defence or a local government body. The public are not given access to the land resource owned by a public (or "crown") body simply by virtue of that fact. But they may be given a legally enforceable right of access to it by statute or by agreement with the "owner", subject to specific terms and conditions – as for example in the case of nature reserves managed by the statutory conservation bodies,[27] who can grant public access by the use of their statutory powers to make bye-laws,[28] or by an access agreement concluded with the local planning authority by the landowner.[29]

The position in English law is very different to that in civil law jurisdictions, where land dedicated to public service use is treated as a distinct category of "public property" which is not alienable, and not subject to the acquisition of private or common user rights by prescription. This has its origins in the Roman law concept of *res extra patrimonium* – that is, land that could not be in the ownership of an individual. This could take

collective choice arrangements in which all affected individuals can participate, the monitoring of resource use and the application of graduated sanctions for breach of resource allocation rules. There is now a substantial literature critiquing, refining and developing the design principles. See e.g. T. Dietz, E. Ostrom and P.C. Stern, "The Struggle to Govern the Commons" (2003) 302 Science 1907; T. Dietz, N. Dolsak, E. Ostrom, P.C. Stern, S. Stonich and E.U. Weber, *The Drama of the Commons* (Washington, DC 2002); E. Ostrom, *Understanding Institutional Diversity* (Princeton, NJ 2005).

[24] See e.g. J. Page and A. Brower, "The Four Dimensions of Public Property" in H. Conway and R. Hickey (eds.), *Modern Studies in Property Law*, vol. 9 (Oxford 2017), ch. 16. Page and Brower refer to the "paradox" of public property in land, "a resource critical to our well-being and propriety, yet … sorely under-theorised in the common law … an ill-defined topic into which few legal scholars wade" (ibid., at p. 297).

[25] See Singer, *Entitlement*, pp. 2, 3.

[26] But note the spectrum of ownership models for "public" property identified by Page and Brouwer, "The Four Dimensions" – including the "state as owner" model, the "many owners" model and the "unorganised public" as owner (pp. 297ff.).

[27] In England, this is Natural England; in Wales, Natural Resources Wales: Natural Environment and Rural Communities Act 2006, ss. 1, 32 as amended; Conservation of Habitats and Species Regulations 2017, SI 2017/1012, reg. 5.

[28] See National Parks and Access to the Countryside Act 1949, s. 20. This power also extends to European wildlife sites: Conservation of Habitats and Species Regulations 2017, SI 2017/1012, reg. 32.

[29] National Parks and Access to the Countryside Act 1949, ss. 60, 64, Sch. 2. The power to dedicate land by an access agreement only applies to "open country", i.e. "any area appearing … to consist wholly or predominantly of mountain, moor, heath etc. or foreshore" (s. 59(2)).

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one of two forms: *res communes* or *res publicae*.[30] *Res communes* comprised things of common enjoyment available to all citizens by virtue of their existence, and that were therefore incapable of private appropriation because their use was an incident of personality – for example air, sea or the seashore. *Res publicae*, on the other hand, belonged not to humanity as a whole but to the state, and included (for example) public roads, public baths, or flowing rivers.[31] Citizens therefore enjoyed use and access to *res publicae* as citizens of the state. They were also treated as *res extra commercium*, in that they could not be bought or sold. By contrast, the feudal origins of English property law dictate that all property – irrespective of whether we may characterise it as "public", "common" or "private" – must have an "owner".

III. A Taxonomy for Common and Public Property

Many of these definitional problems can be resolved if we adopt a new taxonomy for identifying – and then recognising the interactions of – private, common and public property rights. Developing a model for characterising common and public property rights requires a nuanced interpretation of the way that access to a resource is defined by property rules. In particular, we need to recognise the multiplicity of, and the differences in the nature and types of, property right that give access to land and to elements of its resource utility.

Scholarship on the resource allocation function of property rights has stressed the role of property as an "allocative mechanism for promoting the efficient or ecologically prudent utilization of resources",[32] and the stewardship function that property rights can fulfil and promote.[33] To develop a taxonomy differentiating common and public property rights, however, we need to think not only of the role of property rules in allocating resource utility, but also about *to whom* different elements of resource utility are allocated, and the terms on which that access is granted (including any restrictions that may be placed upon it). The taxonomy suggested here would organise different classes of property right by reference *to whom* access to elements of resource utility is given and *on what*

[30] The distinction is probably attributable to the late classical jurist Marcian: see W.W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 3rd ed., revised by P. Stein (Cambridge 1963), 182.

[31] See generally ibid., at pp. 182–83; J.A.C. Thomas, *Textbook of Roman Law* (Oxford 1976), 127–29.

[32] K.J. Gray and S.F. Gray, *Elements of Land Law*, 5th ed. (Oxford 2009), 1.5.57; see also K.J. Gray and S.F. Gray, "Private Property and Public Property" in J. McLean (ed.), *Property and the Constitution* (Oxford 1999), 11–39.

[33] W.N.R. Lucy and C. Mitchell, "Replacing Private Property: The Case for Stewardship" [1996] C.L.J. 566; M. Raff, "Environmental Obligations and the Western Liberal Property Concept" (1998) 22 M.U. L.R. 657; T.W. Frazier, "The Green Alternative to Classical Liberal Property Theory" [1995] Vermont L.R. 299; M.B. Metzger, "Private Property and Environment Sanity" [1976] 5 Ecology L.Q. 792; E.T. Freyfogle, "Land Ownership and the Level of Regulation: The Particulars of Owning" (1999) 25 Ecology L.Q. 574; Rodgers, "Nature's Place?", pp. 550–74.

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terms – they may enjoy access to a resource subject to restrictions, or only for some and no other purposes, and the type of access may differ from case to case. A key consequence of the adoption of this approach would be the recognition that private, common and public property rights can subsist over land separately or in combination at any one time, depending upon the overall distribution of its constituent elements of resource utility.

Applying this taxonomy, the key attributes of private, common and public property rights would be the following:

(1) *Private property rights*: in this case, access to the resource is controlled by the "owner". This person or those licenced (only) by him/her have access to the resource. It may be necessary, in this context, to distinguish private and "individual" property rights. Private property is defined by reference to whether an "owner" controls access to the resource. The "owner" may be an individual, but may also be a corporate body, a public body, a charity or a group of such persons or bodies. It is, therefore, also important to distinguish between (1) those "owners" who can do whatever they like with their resources subject to general law restrictions[34] and to contractually agreed constraints, and (2) not-for-profit "private" owners bound by their constitutions, or by legislation, to use their assets only for designated purposes.[35] In all these cases, however, the system of property rules supporting the institution of private property is distinguished by its focus on the way in which access to the resource is sanctioned by the "owner" – and *not* by reference to the identity of those by whom it is exercised. By contrast, in the case of common and public property rights, access to the resource can be sanctioned otherwise than by the "owner", such as by legislation or by an administrative act by a public body.[36] Additionally, the property rules supporting the institutions of common and public property are distinguished by their focus not only on the way in which access to the resource is sanctioned, but also by the identity of its recipients, and how they are defined (individually or as a class), as explained below.

(2) *Common property rights*: in this case, access to the resource is shared by a defined category of users. This may be large or small but is distinguished by the fact that some restriction on the identity of potential users is imposed. The property rules defining common property rights

[34] For example, restrictions applied by the common law of nuisance; or by statutory nuisance under Part 2 Environmental Protection Act 1990; or by the requirement for planning permission for "development" under the Town and Country Planning Act 1990.

[35] For example, the National Trust, whose management of its property estate is constrained by the objectives and requirements set out in the National Trust Act 1907, the National Trust Act 1937 and the National Trust Act 1971.

[36] This is the case for "access land" mapped by public bodies for public recreational access under the Countryside and Rights Act 2000, for example: see note 38 below.

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are both inclusionary and exclusionary. They will define the category of users (or "appropriators") to whom a right of access to the resource is granted, and by implication exclude all others. An example might include, for instance, a right granted to the residents of Blackacre village by a private act of Parliament to fish in the river Blueacre. Or a right granted to the residents of Greenacre to use a privately owned field for hosting cricket matches.[37]

(3) *Public property rights*: access to the resource is granted by a property rule that does not limit potential access solely to those permitted by the "owner", or to the members of a group (however defined). Access to the resource is granted to everyone – although there may be restrictions on what members of the public may do on it, or take from it, and there may be restrictions on the quantity of a resource that may be taken. There may be land-use restrictions, but they are not definitive of the public's entitlement to access *some element* of the land's resource utility. So, for example, "access land" over which the "right to roam" applies is land over which public property rights have been created in this sense; access for recreational use is granted to all members of the public, albeit subject to restrictions as to what is, and is not, permitted on the access land in question.[38] Land held by public bodies for the benefit of the citizen is not subject to public property rights in this sense – unless the public are given direct access to the resource, such as for recreational use.[39] And where access to a resource is granted to everybody without any restriction as to the type or quantity of resource that may be taken or used, then this will characterise it as a "common pool resource". Where access is granted to everybody, but subject to quantitative restrictions, or restrictions as to the elements of resource utility that may be used, then the property rules in question may also fulfil a stewardship function. But if there are no property rules qualifying the public's land-use entitlement, then the common pool resource will be potentially open to the "tragedy of the commons", namely its uncontrolled depletion and degradation by overuse.[40]

Several further distinctions can be made to complete the taxonomy. Common property must be distinguished from "communal" and "collective" property systems. For property to be "communal" there must be a

[37] But note that in some circumstances this type of grant may constitute the dedication of the field as a Town or Village Green: see note 69 below.

[38] See Countryside and Rights of Way Act 2000, s. 1(2) and Sch. 1; and for criticism see Mitchell, "What Public Presence?".

[39] Cf. J. Page, "Towards an Understanding of Public Property" in N. Hopkins (ed.), *Modern Studies in Property Law*, vol. 7 (Oxford 2013), ch. 10. Page classifies this as "corporeal" public property, i.e. "alienated land held by the state or the Crown, state agencies, or public lands leased to long term private rights-holders" (ibid., at p. 197).

[40] G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.

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link between the appropriators of the resource and a "community" – however that community is defined. So, access to, or use of, a resource may be limited to the residents of a village or town (the "community") or some other geographically defined area. If we apply the taxonomy outlined above, then a resource will be subject to "common" property rights if access to it is granted to a group of individuals, however they be defined. Their social affiliation is not relevant. So, for example, common land will be subject to common property rights in this sense but may not support "communal" property rights – the social affiliation of the commoners entitled to use the common resource is not integral to its definition as common land in English law.[41] Indeed, commoners may (and sometimes do) live at great distance from the common over which they have registered common rights.[42]

The utility of the taxonomy outlined above can be tested by: (1) an examination of the property rules used in English law to grant recreational access to the public, principally those applicable to common land and town and village greens and; (2) its application to characterise the property rules used to promote nature conservation, both through regulatory measures (e.g. in protected area such as Sites of Special Scientific Interest[43] or European wildlife sites[44]) and (second) by the use of conservation covenants with landowners. These are all cases where private property rights have been adjusted in order to protect and promote the "public interest" – to protect natural resources, to protect wildlife or wildlife habitats, or to promote public recreational access to privately owned land. In some cases, this has resulted in the creation of public property rights in the sense described above, while in others it has not.

IV. Testing the Taxonomy: Property Rules for Public Recreational Access

Common land and village greens offer two of the most important examples of land over which public rights of access are secured in English law.[45] They are frequently also subject to a multiplicity of other land-use rights,

[41] See Commons Registration Act 1965, s. 22(1); Commons Act 2006, s. 49 and Sch. 5, para. 7.

[42] See e.g. instances drawn from the commons registers for Norfolk (Brancaster) of registered rights held by appropriators living elsewhere: C. Rodgers, E. Straughton, A.J.L. Winchester and M. Pieraccini, *Contested Common Land: Environmental Governance Past and Present* (London 2010), ch. 9, especially pp. 179 ff.

[43] Pursuant to Wildlife and Countryside Act 1981, s. 28.

[44] Pursuant to Conservation of Habitats and Species Regulations 2017, SI 2017/1012, regs. 12–16.

[45] Although important, commons and village greens are not the only land over which public access may be secured. Land can be voluntarily dedicated by the landowner for open air recreation under an access agreement if it is in "open country", i.e. "any area appearing … to consist wholly or predominantly of mountain, moor, heath etc. or foreshore": National Parks and Access to the Countryside Act 1949, s. 60, Sch. 2. Or it may be "dedicated access land" that the landowner dedicates under the Countryside & Rights of Way Act 2000, s. 16. Coastal access rights can also be dedicated under the Marine & Coastal Access Act 2009, Part 9.

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the character and interactions of which can be explained using the taxonomy outlined above. The Commons Registration Act 1965 introduced registration for both common land and for town and village greens, although registration operates very differently in each case.

Common land comprises land that was formerly the waste of a manor, or over which common rights subsist entitling common appropriators to take the produce of the land.[46] It is not communally owned – rather, it is land owned by individuals, not-for-profit bodies[47] or public bodies, over which others possess land-use rights, giving them legal access to particular resources. Its use was underpinned until the Commons Registration Act 1965 by a stable framework of property rights, which vested ownership of "waste" in the hands of the lord of the manor, while recognising the user rights of the local community.[48] As owners of the soil, manorial landowners generally retained a wide range of property rights, including mineral and game rights and a right to any residual grazing over and above the use rights of commoners.

English law developed a sophisticated classification of commoners' land-use rights,[49] the most significant of which is *common of pasture* – the right to graze livestock on the common. *Common of turbary* gives the right to take peat or turf for fuel – a right that must in principle always be attached (appurtenant) to a dwelling and limited to taking what is necessary for its heating. *Common of estovers* gives the right to take wood or other vegetation necessary for the maintenance and use of the dominant tenement to which it attached.[50] Other rights of common include the *right of pannage* – the right to graze pigs in woodland or forests – and rights to take fish, wild animals and the soil itself.

The rules for the creation and transfer of common rights are focused on the preservation of a link between "common" land and the "community" it is intended to benefit. Most rights are "appurtenant" – that is attached to a nearby land holding or dwelling (the "dominant tenement") as a subsidiary right. It is generally accepted that neither estovers or turbary rights can be severed from the land they benefit.[51] Rights can also be held "in

[46] Commons Registration Act 1965, s. 22; Commons Act 2006, s. 61(2).
[47] For example, the National Trust, which has an extensive landholding of common land.
[48] On the history of common land in English law, see Rodgers et al., *Contested Common Land*, chs. 1, 2; A.J.L. Winchester, *The Harvest of the Hills: Rural Life in Northern England and the Scottish Borders 1400–1700* (Edinburgh 2000); and W.G. Hoskins and L.D. Stamp, *The Common Lands of England and Wales* (London 1963).
[49] For the classification of the various common rights recognised in English law, see E. Cousins, *Gadsden on Commons and Greens*, 2nd ed. (London 2012), paras. 2-34 to 2-65. Many established rights are difficult to place within one or more of the recognised categories described here.
[50] There are several subcategories of the profit of estover; "house bote" (the right to take timber for repairing houses or as fuel); "plough bote" (to take timber for making or repairing agricultural implements); and "hay bote" (to take timber shrubs or brush to make or repair hedges and fences). See Cousins, *Gadsden*, para. 2-38.
[51] Ibid., at paras. 2-39, 2-41.

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gross"[52] but since 28 June 2005 it has not been possible to sever rights of common from the land to which they are "appurtenant" and thereby convert them into rights in gross.[53] This is intended to reinforce the "community" focus of common rights.

There is no national register of common land or common rights. The Commons Registration Act 1965 designated local authorities as "commons registration authorities" and requires them to maintain registers of both common land and the common rights subsisting over it.[54] The act provided for a once and for all registration of land and rights before a cut-off date in 1970[55]; those claiming to enjoy common rights were invited to register, and if there were objections then a commons commissioner was appointed to resolve the claim and investigate the historical accuracy of the claims made.[56] Once registration became final under the 1965 Act, land was conclusively deemed to be common land.[57] The registration process was seriously deficient.[58] No provision was made for correcting inaccurate registrations, or for rectifying incorrect registrations of land as "common" land, or for reviewing provisional registrations when they became final.[59] Neither was provision made for updating the registers to take account of subsequent changes in landownership or land-use rights – an important oversight given the need for pro-active registration arrangements in communal property systems, where changes in customary land use can frequently occur.[60]

Notions of equitable resource distribution that were implicit in the customary origins of common land were also lost in the registration process. For example, the practice of "stinting" on many commons originally required the calculation of the total available grazing resource on the common, and this was then allocated as fixed numbers of livestock grazing rights[61] by agreement between the appropriators.[62] Similarly, on large

[52] That is, as not attached to land that they are intended to benefit, i.e. they are not attached to a dominant tenement.

[53] Commons Act 2006, s. 9, Sch. 1. There are limited exceptions allowing for the transfer of rights to public bodies such as Natural England, for example. The 2006 Act reversed the decision in *Bettinson v Langton* [2001] 1 A.C. 27.

[54] In England this would be the County Council, or in areas with no county council the District Council or London metropolitan boroughs; In Wales it was the county council or county borough councils: Commons Registration Act 1965, s. 2(1).

[55] Commons Registration (General) Regulations 1966, SI 1966/1471, reg. 5; and Commons Registration (objections and Maps) Regulations 1968, SI 1968/989. Two periods for objections were specified: 1 October 1968 to 30 September 1970 in the case of provisional registrations made during the first registration period, and 1 May 1970 to 31 July 1972 for those made in the second registration period.

[56] Commons Registration Act 1965, s. 17, as amended by the Courts and Legal Services Act 1990, s. 71 and Sch. 10, para. 26.

[57] Commons Registration Act 1965, s. 10.

[58] For examples, see Cousins, *Gadsden*, para. 3.17.

[59] See *Corpus Christi College v Gloucestershire C.C.* [1982] 3 All E.R. 995.

[60] See A. Clarke, "Land Titling and Communal Property" in W. Barr (ed.), *Modern Studies in Property Law* vol. 8 (Oxford 2015), 225.

[61] That is, "stints".

[62] See Winchester and Straughton, "Stints and Sustainability", pp. 29–47.

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open upland commons the number of grazing rights was usually fixed by the custom of levancy and couchancy, which entitled an appropriator to put to the common only the number of sheep or cattle that his farm could support during the winter.[63] This meant that common rights were allocated by reference to the relative size of the farms which exercised grazing rights over each common. These reflexive and customary principles were lost when the commons registration system was introduced. New registers are to be introduced under the Commons Act 2006, but the original registers will remain an important source for ascertaining legal entitlement to common ownership and use.[64]

Common land is an important community resource, with substantial economic value to appropriators, and often subject to multiple land-use rights vested simultaneously in different people – the owner of the soil, commoners (appropriators) and members of the public. All registered common land is "access land" giving the public recreational access to the land (the "right to roam") once it has been mapped by the public authorities.[65] If we recognise the allocation of different elements of resource utility to the landowner, appropriators and the public, we can see that common land simultaneously supports private, common, and public property rights. It supports *private property* rights – the owner of the soil retains the right to grant leases and other rights to third parties as long as s/he does not, in so doing, interfere with the commoners' land-use rights. Further, common rights are themselves a form of *profit a prendre*[66] – a *private* property right that confers on its owner the right to take part of the land, its natural produce or wild animals (*animae ferae*) from another person's land.[67] They are also transferable, although for appurtenant rights their transfer presupposes a transfer of the "dominant" land to which they attach.

At the same time common land supports *common* property rights. The right to take the produce of the land is shared with those holding registered rights of common to graze livestock or to take its natural resources (estovers, turbary, etc.). And because it gives a right to a limited resource, it is likely that the appropriators will have developed customary or agreed norms for sharing the resource; these will define their relationship with other appropriators and with the owner of the common over which the rights are exercised. But it also supports *public* property rights viz. the

[63] See Cousins, *Gadsden*, paras. 2-69ff.

[64] Part 1 of the 2006 Act is being introduced in stages. By virtue of the Commons Registration (England) Regulations 2014, SI 2014/3038, it applies in: Cumbria, North Yorkshire, Devon, Kent, Cornwall, Hertfordshire, Herefordshire, Lancashire (excluding metropolitan districts) and Blackburn with Darwen. It has also been implemented in all other registration authorities in England for certain "corrective" applications to amend the registers (under s. 19(2) and Sch. 2, paras. 6–9 of the 2006 Act). The transitional period for correction of the registers in these areas ran to 14 December 2018.

[65] Countryside and Rights of Way Act 2000, s. 2. These are subject to restrictions set out in Sch. 2 of the 2000 Act.

[66] See Cousins, *Gadsden*, paras. 2-03ff.

[67] *Beckett (Alfred F.) v Lyons* [1967] Ch. 449.

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statutory right of access over common land granted by the Countryside and Rights of Way Act 2000, which confers an element of resource utility (recreational access) on the public at large.

It is not unusual for local communities to hold additional rights over common land – for example under private acts of Parliament giving the residents of a town or village the right to fish in standing waters or rivers (a right of piscary) or to enjoy extended recreational access to the common.[68] If these rights are vested in a defined group, for example the residents of Blackacre, then they will constitute a species of common property right. This must be distinguished, however, from the resource use rights vested in appropriators with registered common rights over the land. The members of the fluctuating Blackacre community will not be as readily identified, and there will be no exit point for them. Their rights cannot be transferred. If the land is also registered common land, then it will also be subject to "public" property rights viz. the statutory right of open access over common land granted to the public, irrespective of geographical residence restrictions.

Village greens are another important category of community property 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.[69] There is no requirement for the land to conform to a specific physical description: it does not have to represent the traditional village "green" and may include, for instance, part of a beach or even land that has been "created" by the deposit or accretion of soil.[70] The Commons Act 2006 introduced a new provision enabling landowners to voluntarily dedicate land as a TVG.[71] Unlike the provision for registration of commons, the land itself is registered as a TVG, and not the community rights over it. Importantly, registration of land as a TVG does not engage the "right to roam" under the Countryside and Rights of Way Act 2000: recreational access is limited to members of the local neighbourhood or locality, and registration gives

[68] For an example, see the Birmingham Water Acts 1892, 1896 and 1902. These give the residents of the town of Rhayader the right to fish in the river Elan and other standing waters in the Elan Valley water catchment in central Wales, some of which is also registered common land.

[69] Commons Act 2006, s. 15.

[70] See *Newhaven Properties and Port Ltd. v East Sussex County Council* [2013] EWCA Civ 2013 (a tidal portion of a beach, covered by water for part of each day, was held to be in principle registrable as a TVG); *R. (Beresford) v Sunderland City Council* [2014] 1 A.C. 889 (sports arena maintained by the local authority, with seating etc. provided); *R. (Lewis) v Redcar Borough Council* [2010] UKSC 11 (golf course over which public also exercised recreational use).

[71] Commons Act 2006, s. 15(8), (9).

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no right of access to the wider public. Once registered as a TVG the land is protected as a common resource – but the legislation makes no provision for the vesting of individual property rights over it in members of the community, or for the registration of specific recreational rights in them.[72]

The recreational rights vested in the community are not defined in the 1965 or 2006 Acts – the land can be used for all "lawful sports and pastimes", not just those that gave rise to the claim for registration.[73] This has been widely construed by the courts. In *R. v Oxfordshire County Council, ex parte Sunningwell Parish Council*[74] 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". 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. This has been criticised as it arguably distorts the recreational land use that gave rise to the registration in the first place, if it is based on long usage exceeding 20 years.[75] 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.

Viewed through the prism of the property rights taxonomy suggested above, the registration of a TVG creates *common* property rights because it confers elements of resource utility (recreational use) on a defined class of recipients, namely the inhabitants of the qualifying "neighbourhood" within a locality.[76] This is an exclusionary property rule, as well as an inclusionary one.[77] Admittedly, the boundaries of the class entitled to use the resource are imprecisely defined and may fluctuate from time to time. Once registered, the right to recreational use only extends to all residents of that locality, or those neighbourhoods, on which registration was based. And its geographic boundaries will also be potentially imprecise. The courts have given "locality" a wide meaning, to include all land "within legally significant boundaries".[78] A "locality" for these

[72] "The law relating to greens produces a public right to land but in private form": D. McGillivray and J. Holder, "Locality, Environment and Law: The Case of Town and Village Greens" (2007) 3 Int.J. L.C. 1, at 3.
[73] *Oxfordshire County Council v Oxford City Council and Robinson* [2006] UKHL 25.
[74] *R. v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 A.C. 335.
[75] Clarke, "Land Titling and Communal Property", p. 227.
[76] *R. (Oxfordshire and Buckinghamshire Mental Health Foundation Trust) v Oxfordshire County Council and others* [2010] EWHC 530 (Admin).
[77] For an exploration of the implications of this aspect, see McGillivray and Holder, "Locality, Environment and Law".
[78] *Adamson v Paddico (267) Ltd.* [2012] EWCA Civ 262.

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purposes will often be a local government unit and could include, for example, an electoral ward[79] or parish council area.[80] Nevertheless, limiting the use of recreational resources to a legally defined – albeit imprecisely bounded – group of recipients characterises a TVG as creating a common property interest. Despite being a model for creating "community" land-use rights in the widest sense, it is not constitutive of "public" property rights. Whereas, paradoxically perhaps, the registration of common land is, by virtue of the application of open recreational access under the "right to roam" legislation, creative of "public" (as well as common) property rights.

V. Testing the Taxonomy: Property Instruments and Nature Conservation

We can also interrogate the taxonomy by considering those legal instruments used to promote the public interest in nature conservation. This is a broad subject,[81] and we will limit our analysis to the property rules supporting two discrete instruments: the property restrictions imposed by regulatory measures to prevent damaging land-use operations in protected areas, and the use of conservation covenants to protect conservation features on privately owned land.

The principal land designations used to implement protected areas policy in English Law are Sites of Special Scientific Interest ("SSSIs") and European sites designated under the European Union Habitats and Wild Birds Directives.[82] There are currently 4,126 SSSIs in England covering 1,092,780 ha. of land, and over 1,000 in Wales covering 12% of its land area.[83] The key mechanisms for regulating land use in SSSIs are enhanced consultation and development control for the grant of planning permission for "development" by planning bodies[84]; and the requirement of a statutory

[79] See *R. (Lancashire County Council) v Secretary of State for Environment Food and Rural Affairs and Janine Bebbington* [2016] EWHC 1238 Admin, especially para. 28. The further issue arose in this case viz. whether the "locality" had to have remained the same geographical unit during the 20 years for which recreational use was claimed to have been exercised, thus leading to the claim for registration. Electoral ward boundaries had changed during this period, but it was held on the facts that in substance the "locality" was unchanged. Also *R. (NHS Property Services Ltd.) v Surrey County Council and Timothy Jones* [2016] 4 W.L.R. 130.

[80] *Oxfordshire County Council* [2006] UKHL 25.

[81] On which, see inter alia C.T. Reid, *Nature Conservation Law*, 3rd ed. (Edinburgh 2009); C.P. Rodgers, *The Law of Nature Conservation: Property, Environment and the Limits of Law* (Oxford 2013).

[82] Council Directive 92/43/EEC on the Conservation of Habitats and Species, [1992] OJ L 206/7; Directive 2009/147/EC of the European Parliament and the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7 26.1.2010 (replacing Council Directive 79/409/EC, OJ L 103 25.4.79 p.1).

[83] For detailed statistics on SSSIs in England, see further <https://designatedsites.naturalengland.org.uk/ReportConditionSummary.aspx?SiteType=ALL>. For SSSIs in Wales, see further <https://designatedsites.naturalengland.org.uk/ReportConditionSummary.aspx?SiteType=ALL>.

[84] Wildlife and Countryside Act 1981, s. 28L; *National Planning Policy Framework* (DCLG 2012), paras. 113ff.; and revised *National Planning Policy Framework* (DCLG 2018), especially para. 173, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685289/Draft_revised_National_Planning_Policy_Framework.pdf>.

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consultation with the statutory conservation body[85] before a landowner can lawfully carry out operations that have been specified in the site notification as likely to damage the flora, fauna, or other special features of the site ("operations likely to damage the conservation interest" of the site, hereafter "OLDSI").[86] The conservation body can refuse operational consent indefinitely, subject to a right of appeal to the secretary of state,[87] and an OLDSI can only be carried out with their written consent, or under the terms of a management agreement, management scheme or a management notice.[88] Similar provisions apply to control land-use operations in European sites.[89]

The imposition of statutory consultation and operational consent requirements for carrying out OLDSIs has implications for the allocation of property rights in protected sites. If we adopt a resource allocation model of property rights, the overall impact of the mechanism is to transfer property rights from the landowner to the statutory conservation body notifying the SSSI. The site notification does not expropriate property; rather it reallocates key decisions on land use, and thereby on access to the land resource, to the conservation body. The extent of the rights transferred, and the nature of the decisions reallocated to the conservation body, will depend in each case upon the terms of the list of OLDSIs served on the landowner and/or occupiers of the site when the SSSI is notified. In practice, the list of notified OLDSIs in many SSSIs is extensive and will prohibit a wide range of land-use operations without prior consultation and the agreement of the statutory conservation body.[90]

Although these requirements restrict the owner's property rights, they do not directly allocate elements of resource utility to members of the public. They impose land-use restrictions on the owner or, in the case of common property, on appropriators, as the case may be. They therefore adjust, shape and potentially restrict private or common property rights – but without necessarily enlarging the rights of the public, and without conferring on them new rights relative to the land resource.[91] The only "right" that the

[85] Namely Natural England or (in Wales) Natural Resources Wales: note 27 above.
[86] Wildlife and Countryside Act 1981, s. 28(4)(b).
[87] 1981 Act, s. 28E(1).
[88] Namely an agreement under National Parks and Access to the Countryside Act 1949, s. 16, Countryside Act 1968, s. 15, or Natural Environment and Rural Communities Act 2006, s. 7.
[89] Conservation of Habitats and Species Regulations 2017, SI 2017/1012, Part 2, regs. 12–16, 23–26.
[90] To take just one example, the site notification for the Ingleborough SSSI, a large upland protected area in the Yorkshire Dales, sets out 28 OLDSIs, including a prohibition of cultivation, of any change in livestock numbers or livestock management practices, or the application of pesticides or fertilisers to the land: see <https://designatedsites.naturalengland.org.uk/PDFsForWeb/Consent/1001537.pdf>. The list of prohibited operations in most other notified SSSIs is similar in extent, although the operations listed will depend upon the type of land management practised such as whether arable farming, livestock farming, or other operational use is practised (quarrying for example).
[91] This is an example of what Scotford and Walsh have described as the contextualisation and reconstitution of property rights by an administrative regime regulating land use: "the decision-making process surrounding SSSIs involves the determination of land-use rights through administration, which takes account of a variety of interests and overriding legislative considerations and results in a democratic

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public acquire is a referential one – to ensure that the public bodies carry out their statutory duties in the manner specified in the environmental legislation. This might be done by judicial review of the statutory conservation body's decision-making processes – for instance by challenging their refusal to designate an area for protection, or by challenging the terms on which an SSSI notification has been made.[92] It follows that the imposition of land-use restrictions in a protected area such as an SSSI, although introduced to implement public policy, is not constitutive of "public" property rights. The "owner" retains a private property interest, but one in relation to which his/her ownership privileges have been reduced by an administrative act[93] pursuant to the relevant environmental legislation.[94]

Conservation covenants are a very different property instrument, grounded in private law and of an inherently consensual nature. They are therefore a more flexible medium for adjusting property rights and reallocating elements of resource utility.

Their use in England and Wales has been limited. Currently the only body with power to enter into conservation covenants in gross (that is, without owning adjoining land that can benefit from the covenant taken) is The National Trust, which has statutory power to take conservation covenants which impose conditions "restricting the planned use or development [of the land over which they subsist]".[95] They are enforceable against successors in title of the donor. This power can only be used to take restrictive covenants, neither does it enable the trust to take rights of access to private land. It has been used principally to protect buildings and heritage features from the impacts of development. So, 36,614 ha. of land in England and Wales was covered by National Trust conservation covenants in 2004, with 89% of the covenants taken being protective in purpose, aimed at protecting buildings or land from inappropriate development.[96]

The Law Commission has recommended the establishment of a new, and much wider, statutory scheme for conservation covenants in England and Wales.[97] The "core conditions"[98] for a covenant would be the requirement

reshaping of property rights": Scotford and Walsh, "The Symbiosis", pp. 1027, 1038. For the purposes of the argument pursued here, the key point is that it is only *private* or *common* property interests that are reconstituted in this way.

[92] For example, as in *R. v Secretary of State for the Environment ex parte Royal Society for the Protection of Birds* [1997] Q.B. 206; [1996] ECR 1-3805.

[93] That is, by the statutory conservation body serving a list of OLDSIs on the owner or occupier of the land in question.

[94] Namely in the case of SSSIs under Wildlife and Countryside Act 1981, s. 28, as amended by Countryside and Right of Way Act 2000, Sch. 9; and in the case of a European Site under the Conservation of Habitats and Species Regulations 2017, SI 2017/1012, regs. 23–26.

[95] National Trust Act 1937, s. 8.

[96] See *The Potential Of Conservation Covenants: A Report by Green Balance to the National Trust* (National Trust 2008), Appendix 3, p. 51. The remaining 11% were taken to protect land or buildings from anticipated future development or were taken upon the disposal by the trust of alienable land in its ownership. A small number were concluded with former owners gifting land to the trust.

[97] Law Commission, *Conservation Covenants* (Law Comm. 349, 2014).

[98] Ibid., at paras. 2.82ff.

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for an agreement between two parties, one of whom would be a landowner[99] and the other a "beneficiary" holding the covenant on behalf of the public – this would be a "responsible body" with responsibility for monitoring and enforcing the obligations in the covenant.[100] The covenant could be either positive or restrictive, would bind the land in the hands of successors, and be "perpetual" in effect, binding the land indefinitely.

The Law Commission also supported the introduction of a non-statutory code of practice to assist landowners and responsible bodies in drafting covenants, a recommendation influenced by the successful use of a standard conservation covenant template by the Queen Elizabeth II National Trust in New Zealand.[101] The legislation on conservation covenants in New Zealand has a wider purview. The Queen Elizabeth II National Trust has wide statutory power to enter into open space covenants where it is satisfied that private land ought to be maintained or established as "open space".[102] "Open space" has a wide meaning that captures any area of land that preserves (or facilitates the preservation of) landscapes of aesthetical, cultural, recreational, scenic, social or scientific interest or value.[103] Thus although the legislation facilitates the promotion of public access to private land, covenants are in practice extensively used in New Zealand to promote nature conservation and to protect important landscape features. It is a very flexible model and is widely used: at 30 June 2017 the Queen Elizabeth II National Trust held 5,720 Open Space covenants.[104]

If the English Law Commission proposals are adopted they would facilitate the wider use of conservation covenants for the public benefit; to preserve, protect, restore or enhance the land's natural environment (including flora and fauna), its natural resources, or any historical, cultural or built heritage features on the covenanted land.[105] The provision of public recreational access to land under a conservation covenant would be optional, to be agreed between the landowner and the responsible body taking the covenant as beneficiary.[106] The proposed covenanting model for English law is therefore primarily focused to the conservation of natural resources and the natural and built environment, and could provide an important element in

[99] That is, someone with a freehold interest in the land burdened with the covenant, or someone with a lease of at least seven years' duration (see ibid., at para. 2.82).

[100] This is a similar model to that in Scotland, where only designated conservation bodies can hold the benefit of a conservation covenant: Title Conditions (Scotland) Act 2003, 38.

[101] The New Zealand template is reproduced as Appendix G in Law Commission, *Conservation Covenants*, p. 229.

[102] Queen Elizabeth the Second National Trust Act 1977, s. 22(1) (New Zealand).

[103] Ibid., at s. 2.

[104] Queen Elizabeth II National Trust, *Annual Report 2017: Covenant Statistics* (Wellington 2018), 26. The average covenant size is 38.5 ha. The largest covenant covers 21,910 ha. of the Coronet peak in Central Otago, available at <https://qeiinationaltrust.org.nz/wp-content/uploads/2018/02/MHL157_QEII_AnnualReport_Final-2017-1.pdf>.

[105] Law Commission, *Conservation Covenants*, para. 3.05.

[106] Ibid., at paras. 3.35ff.

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the implementation of future environmental policy in England and Wales.[107]

The use of conservation covenants is illustrative of the fact that public property interests can be created by the exercise of ownership privileges by the "owner" – for example, if the owner allocates unlimited access to an element of resource utility, such as recreational access, to members of the public. The interest may have perpetual effect, provided the law makes provision for the owner's decision to be irrevocable, as is the case in New Zealand and in the Law Commission's suggested scheme for England and Wales.[108] If it does not, and the re-allocation of property rights by the owner is time-limited, or is subsequently revoked, then the land will cease to support a "public" property interest when that element of resource utility reverts to the landowner. It will also support key private property rights throughout, however, in that the owner will retain the power to grant further interests to third parties and to deal with the land – including selling or bequeathing it by will – as long as this does not interfere with the covenant's objectives.

Whether a covenant creates a public property interest will depend on the terms on which it is entered in to by the owner, and this will vary from case to case. If it grants open public access to the covenanted land, then it will create a public property right. If, on the other hand, the covenant qualifies the section of the public entitled to use the land for recreational purposes – it opens land up to recreational use by the members of a village or town, or to specified birdwatching groups, for example – then it will create a "common" property interest within the meaning of the model suggested here. The wide range of individually negotiated conservation covenants held by the Queen Elizabeth II National Trust in New Zealand, for example, includes examples of both.[109]

VI. The Permeability of Common and Public Property

The examples given above illustrate that private, common and public property rights can (and often will) subsist over the same land simultaneously and in combination. The categorisation of the property interests subsisting

[107] The wider use of conservation covenants for these purposes is an integral element of the proposed implementation of the UK Government's 25 Year Environment Plan: see DEFRA, *A Green Future: Our 25 Year Plan to Improve the Environment* (2018), 62, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf>.

[108] Queen Elizabeth the Second National Trust Act 1977, s. 22(1) (New Zealand); Law Commission, *Conservation Covenants*, para. 5.44.

[109] Some Queen Elizabeth II National Trust covenants provide for open public access to covenanted land, while the majority provide for permissive access only. For examples of both, and the varied uses to which covenants are put in New Zealand, see the Queen Elizabeth the Second National Trust's 2017 Annual Report, available at <https://qeiinationaltrust.org.nz/wp-content/uploads/2018/02/MHL157_QEII_AnnualReport_Final-2017-1.pdf>.

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in or over land may also shift and change from time to time – for example if a conservation covenant is revoked, varied or released this may change the extent to which it creates a "public" property interest in the land over which it was originally taken.

It is also important to recognise that the boundaries between private, common and public property rights are often permeable. Property interests may shift from one category to another independently of any consensual variation in property rights agreed by the owner and/or independently of any variation effected by statute or by administrative action by public bodies exercising statutory powers. The property rules characterising interests in land as "private", "common" or "public" are not always established by "bright line" (or hard edged) rules. Sometimes they are established by blurred or "fuzzy" property rules.[110]

Both "fuzzy" and bright line rules are present in the legal framework for public and common property rights, and the boundaries between the two are often blurred. The blurring is usually attributable to the use of "fuzzy" rules for identifying the nature of the resource utility rights that a property rule creates or conveys. This will often be because of the prominent role of custom in determining the precise ambit and content of the property right conveyed or created. In the case of common land, for example, custom often continues to play an important role in its management.[111] It can, in particular, play an important role in filling out the detail of land-use rights held by common appropriators, because the commons register will usually only record a generic type of registered common right vested in an appropriator (e.g. a right to take "estovers" or "turbary"), or it may fail to clearly identify the land over which grazing rights for animals are to be exercised.[112] If custom and practice regulating the access to the land resource by common appropriators changes from time to time, this may result in their property rights displaying characteristics of "common" property at some times and not others.

The blurring can also sometimes arise from judicial interpretation of the imprecise statutory terminology used to define common property rights. What start as bright line rules of classification may become "fuzzy" as the courts recognise exceptions and qualifications in individual cases when interpreting property rules.[113] But its manifestation in this context is specific to the context and mirrors the property rules applied to define common land and other "community" property in English law – many of which are of customary origin. It is perhaps noteworthy that the property rules applicable to common land in English law exhibit the opposite of

[110] As to which see generally C.M. Rose, "Crystals and Mud in Property Law" (1988) 40 Stan.L.Rev. 577.
[111] On the continuing role of custom in this context, see Rodgers, "Commons Governance".
[112] For an example of the latter, see *Dance v Savery* [2011] EWCA Civ 1250.
[113] This is a phenomenon recognised by Rose, "Crystals and Mud".

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the normal progression (bright line to fuzzy).[114] In the case of common land, most property entitlements were initially customary in origin and based in local practice, meaning that they were flexible and subject to adjustment to meet different circumstances. The registration system introduced by the Commons Registration Act 1965 established "bright line" rules for identifying commons entitlements by reference to the commons registers. This had unfortunate consequences, as we have seen – and in some cases still requires the courts to refer to custom to explain and interpret the full extent of the rights secured by registration.[115] This is a case, therefore, of property rules moving from mud to crystal, and (partially at least) back to mud again.

VII. Conclusion

Several conclusions can be drawn from an analysis of property rights based on the taxonomy presented in this article. The first is that the boundaries between "private", "common" and "public" property rights are not fixed. They are permeable and may shift from time to time. And land may support both private and common property rights, or private and public property rights, or all three at the same time. All land will in English law display *some* characteristics of private property, however, in the sense that private property rules are the basis for defining ownership and legitimating land-use rights – but it will often also manifest common and/or public property rights as well. Common and public property rights should not be regarded as in opposition to private property – rather, they coexist in a multi-faceted representation of "property".[116] The multi-dimensional reality of "property" suggested in this paper is partly (but not wholly) produced through the ownership model.[117] But the ownership model is not a unitary, coherent representation of property; rather it is what Blomley has called a "distillation of multiple enactments of property".[118]

Applying the taxonomy outlined above to define "public" property rights, and to distinguish them from private and common property rights, has important consequences for the effective governance of natural resources. Distinguishing common and public property rights more clearly will enable us to identify situations in which the "tragedy of the commons"[119] is a genuine threat to the preservation of natural resources, and where it is not. One way to think about this is to visualise the interrelationship between private, common and public property interests as a sliding

[114] Ibid., at pp. 577, 580ff.
[115] As e.g. in *Dance* [2011] EWCA Civ 1250.
[116] Cf. Holder and Flessas, "Emerging Commons", p. 300.
[117] On this, see e.g. N. Blomley, "Performing Property: Making the World" (2013) 23 C.J.L.J. 23, at 35.
[118] Ibid., at p. 34.
[119] Hardin, "The Tragedy of the Commons".

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scale, or continuum, where resources are subject to bundles of property rights comprising mainly private property rights at one end of the continuum, and a greater proportion of public property rights at the other.[120] Resources which are subject to "public" property rights will be at greatest risk of degradation arising from the tragedy of the commons; those subject only to private property rights will fall at the other end of the scale and be at less risk. Another category may be "no property": in this case, everyone can use the resource, but nobody has a right to do so. Like property that supports public property rights, this will be at enhanced risk of the tragedy of the commons scenario.

Resources that are subject to common property rights will fall somewhere in the middle: in some situations, they may be at risk of environmental degradation, while in others they may not. This requires us to think about a further distinction, between open access common property, and limited access common property.[121] An open access common resource will exist where everyone in the world has the right to use it in the sense of not being excluded from it. Whereas a limited access common resource will arise where the only persons entitled to use the resource are members of a defined community: all members of the "community" have a right not to be excluded from the resource. But they have a right to exclude others, including the wider public. A town and village green would fall into this category: it is a limited access common resource, in that only members of the "neighbourhood" within a "locality" have recreational access to it, and they are entitled to exclude others.[122]

The relevance of these distinctions to the "tragedy of the commons" is important. Arguably, the original thesis[123] suffered from terminological confusion, in that it failed to distinguish between the different categories of "commons" – even though in practice each has very specific characteristics and a different potential to suffer the "tragedy of the commons" or not as the case may be.[124] A resource subject to "no property" will potentially be subject to the tragedy of the commons; whereas an open access community resource will also be threatened, but only if the scarce resource remains unregulated. The notion of unregulated access rights implies the existence of some form of "owner", moreover, who could sanction or prohibit use of the resource[125]; and in this case the argument shifts to identifying what

[120] Cf. M.R. Marella, "The Commons as a Legal Concept" (2017) 28 Law & Crit. 61.
[121] See A. Clarke, "Creating New Commons: Recognition of Communal Land Rights Within a Private Property Framework" [2006] C.L.P. 319.
[122] Commons Act 2006, s. 15.
[123] Hardin, "The Tragedy of the Commons".
[124] Clarke, "Creating New Commons", p. 322.
[125] Ibid., at p. 323.

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regulatory regime provides the most efficient means of doing so in terms of economic and social costs.[126]

The use of a taxonomy of the kind suggested above would also be useful in identifying species of "public" or "common" property right that can engage new stewardship obligations – for example by the development of resource use obligations of a public trust nature.[127] Ultimately this is important for the implementation of sustainable development. If we recognise that the land resource can simultaneously support private, common and public property rights at the same time, this will enable us to devise resource use strategies and governance arrangements that effectively balance competing land-use demands. At its core, sustainable development is concerned with balancing property interests – ensuring that property rights confer access to resources in an equitable manner that also ensures their preservation for future generations.[128] Identifying and recognising the different classes of property interest that can subsist in land and give access to its constituent resources is therefore essential as a first step in delivering effective strategies for sustainable development.

[126] On which there is a substantial economics literature. See e.g. Ostrom, *Governing the Commons*; E. Ostrom, "The Rudiments of a Theory of the Origins, Survival, and Performance of Common-Property Institutions" in D.W. Bromley (ed.), *Making the Common Work: Theory, Practice and Policy* (San Francisco 1992), 293; Dietz et al., "The Struggle to Govern the Commons"; T. Dietz et al., *The Drama of the Commons*.

[127] For example, McGillivray and Holder argue for the adoption of a public trust approach in English law to get beyond the narrow public/private property rights analysis of the kind pursued by the courts in the case law on town and village greens in English law: see McGillivray and Holder, "Locality, Environment and Law", pp. 15–17. And see Page, "Towards an Understanding", pp. 206ff.

[128] See K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed. (London 2017), 21.

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