PROPERTY AND COMMONS: THE TANGIBLE AND THE INTANGIBLE

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In this chapter we review the commons in law and in practice in a British context, taking the long historical perspective. We set the scene with some modern legal definitions, then explore what ancient common land meant in practice. The commons is a property regime, but survives from a fundamentally different relationship with land to that of legal modernity. Before enclosure and the converting of common land to private property, land was not understood conceptually as a form of property. Land was a resource, which many people could have different rights over without conflict. Land can sustain many different uses, some continuously, some irregularly, some for only a fixed season or period of time. Legal modernity has thinned out the content of the legal commons, but the idea of the commons remains a powerful challenge to how we own and use land.

THE COMMONS IN LAW

Definitions

The primary legislation covering commons in England and Wales today is the *Commons Act 2006*. The Act is for the creation of registers of common land and town and village greens (TVG) by the relevant local authorities. These registers are separate, and definitive. In a strict legal sense the definition of common land in England and Wales is simply land which is registered as such. The Act also allows for the creation of new common land and TVGs and thus to catch some common land which was excluded from the 1965 Act, particularly waste land. The Act also created 'commons councils' responsible for management, including their conservation. Notably, however, the 2006 Act does not offer a specific definition of common land.

The leading textbook on commons, *Gadsden and Cousins on Commons and Greens*, defines common land as 'land over which common rights are exercised' (Cousins et al 2020). Rights of common are rights held by people other than the owner of the land to use or take from the natural product of the land. This is crucial and initially counter-intuitive – common rights are private property rights. This means they are attached to property which is near to the common land, and held by the owner of that property. Common rights could historically be rights in gross, that is personal rights which could be severed from the land and transferred. The 2006 Act prohibits further creation of common rights in gross, as well as the creation of common rights through prescription, that is through long usage. In the second part of this chapter we enumerate some of the forms of rights of common which have been historically practiced and claimed.

The *Commons Registration Act 1965* defines common land in s.22 (1) as '(a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods; (b) waste land of a manor not subject to rights of common'. Rights of common are not enumerated however. Tracing legislation further back, the *Commons Act 1876* was the first modern piece of legislation to regulate positively for the commons. Tellingly, the definition of commons in this Act refers to 'any land subject to be inclosed under the Inclosure Acts, 1845 to 1868' (s.37). The historical search for a statutory definition of the commons is useful then, but quickly proves frustrating. The earliest statutory definition is found in the *Commons Act 1285 (*c. 46)

but refers only to ‘wastes, woods and pastures’, while no definition of common land is offered by the anti-enclosure legislation of the 16th and 17th centuries, perhaps demonstrating that the meaning of the word was certain. The *Inclosure Act 1773*, the oldest Act still in force in the area, also only refers to ‘common arable fields, wastes and common pastures’. The *Inclosure Act 1845* lists five categories of common land in s. 11. These run from manorial commons to land where just one other person has a right to the natural product of the land other than the soil owner. Up until the 1965 Act most other legislation defines commons as simply land subject to inclosure.

We can move closer to understanding what the commons is in practice by exploring common rights. These fall under the form of property rights known as *profits à prendre*, defined by Gadsden as the ‘right to take from the land of another person some part of the soil of the tenement or minerals under it, some of its natural produce or (and perhaps more questionably) the animals *ferae naturae* upon it.’ (Cousins et al, 2 – 03, derived from *Alfred F Beckett Ltd v Lyons* [1967] Ch. 449 at 482, per Winn LJ). This is the form of common right now registerable under the *Commons Act 2006*, and the 1965 Act. However, while this form remains the only commons right which fits under the current statutory regime, there are exceptions. For example, rights of *vicinage* have been registered, that is rights not to be sued in trespass where two unenclosed commons abut one another and a person with rights over one strays in to the other. Another anomaly with several examples registered under the 1965 Act is charitable trusts over land. There is no *profits à prendre* here as the right is as a beneficiary against a trustee, not of one property owner against the soil owner.

What is clear so far, in legal doctrine at least, is that commons are a type of property right, not a type of title. One can hold common rights over land, but the land is not owned *in common*. Neither is common property the same as community property, it usually remains in private ownership. That said, land that is registered as common land does lead to more general rights than those of the owner of an adjacent property who will hold the specific rights in common. Under the *Countryside & Rights of Way Act 2000*, registered common land is access land. This means that the public in general have rights of access, as they do to other forms of access land, such as the coastal margin, unmapped open country over 600m above sea level, and ancient monuments under public control.

Returning to our definition, or lack thereof, it should be emphasised that the statutory definition found in the 1965 Act was both too wide, including manorial waste land, and too narrow, failing to capture the multiplicity of common rights which were enjoyed historically. To the lay person, the common *is* a piece of land. To the lawyer, it is the type of rights held *over* the land. However, it makes sense to disaggregate different types of land use which make up the general category of common land. Gadsden gives common land and stinted pastures as the two main forms – common land being the servient tenement to a dominant tenement which holds a right to take a part of the natural product of the land. Stinted pastures are distinguished from common land as the right is held only by the dominant tenement and is not shared with the owner of the servient tenement. The other forms of land holding which might be described as ‘common’ are common fields held in severalty, that is to say land held in undivided shares, and land held in divided shares but nonetheless grazed in common. None of these forms would fit the definition of commons under the 2006 Act, but they can accurately be described as commons in a non-technical sense.

The common can also be distinguished from related concepts. Most relevant is the easement, a right held over the land of another, most often rights-of-way and access rights. As with commons,

easements require a servient tenement, land over which the right is exercised, and a dominant tenement, the land from which the right is derived by the owner. An easement has nothing to do with the produce of the land, which is a central feature of common rights. Neither can an easement be held in gross, there must be a dominant tenement, whereas historically rights in common could be held in gross, without being attached to adjoining land. Common rights in gross can no longer be created, but that does not mean they do not and have not existed. The legal principles for establishing easements do apply for commons though, and rights to common land will include all necessary easements required for the enjoyment of the right. There is also something similar to the trust concept. Common rights can only exist where there is a separation between the owner of the land and the holder of the right, and are extinguished when these are unified. However, common rights arise from a distinctive historical jurisprudence, being a product of manorial and then common law, not of equity. There are no perpetuity limits of common land, nor is the role of a common council, a very recent development, in any way comparable to the supervision powers over trusts held by the Lord Chancellor.

Comparative Concepts

It is obviously reductive to talk only about the commons in England and Wales, and yet the legal specificity is illuminating. The failure of a strictly legal definition to capture more than a small part of what we mean when we talk about 'common land', 'commons' and 'commoning' is instructive. The law has severely limited what the commons is. Before trying to expand this concept out again with the study of the practice of commoning, we will address some related concepts, unfortunately superficially and briefly. A comparison of common land practices in different jurisdictions is well beyond the scope of this chapter, but is a topic of considerable interest.

Town and Village Greens are not today common land in the sense of being a right to take something from the land, in the form of *profits à prendre*, but are instead about access and recreational use. Since the 1965 Act very many TVGs have been registered, but very few new commons. The evidential requirements for TVGs are much less onerous, simply demonstrating use for 'lawful sports and pastimes on the land for a period of at least 20 years'. 'Pastimes' has been interpreted very liberally, including dog walking and children's play (*R v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 per Lord Hoffman 356-7).

Scotland has a similar history of common land practice to England and Wales, but a distinct legal system. The *Land Reform (Scotland) Act 2003* is the current statutory authority, primarily concerned with access, and reasserting a customary right to roam giving everyone recreational rights across most land in Scotland. It also sets out community interests in land, and a community right to buy, and a specific right for crofting communities to buy their land. A croft is a small agricultural land holding, normally held in tenancy. This is a very different legal position to that in England and Wales set out above. The demonstration of community interests requires evidence of interest, rather than specific forms of use or lengths of time. However, particularly where crofting is concerned, these regulations are not entirely disconnected from historical commons.

Outside the UK many countries have some form of land holding similar to commons in England and Wales. The European Union surveys and maintains registers of farming and agricultural methods across the EU, including commoning, in the Farm Structure Survey (the metadata is available here: https://ec.europa.eu/eurostat/cache/metadata/en/ef_esms.htm but there are also a large number

of interpretive articles). Several EU countries have distinctive forms of common land rights, such as partition units in Finland and Sweden, which are the joint management of resources owned by several adjoining private land holders. Other countries have limited common lands, such as Germany which records very few, and only permanent grasslands. Spain, on the other hand, records a very large area of common land, which is recorded as owned by local public authorities. In Croatia common land is so widespread as to be hard to measure accurately. Early English colonisers of the United States established commons, some of which remain in some form such as Boston common. Commons is also a prominent idea in development work, with a focus on common pool resources. Many indigenous and nomadic peoples across the world also have a form of land ownership which is similar to the commons.

Finally, the commons has become a powerful concept in political theory. The biologist Garret Hardin notoriously dismissed the 'tragedy of the commons', intentionally misrepresenting the commons regime in order to support his own white nationalist politics (Southern Poverty Law Centre). The economist Eleanor Ostrom won a Nobel prize in large part for her work refuting Hardin and developing an economics of common pool resources, built on the historical study of commons regimes (Ostrom 1990). The legal theorist Carol Rose has built conceptual bridges from Ostrom's work to the contemporary growth of commons as open access resources, particularly internet communication resources (Rose 2020). The Marxist historian Peter Linebaugh even talks of a commons manifesto for a post-capitalist future (Linebaugh 2014).

At this stage two things should be apparent – the commons is a concept of huge scope, and the legal commons is a concept of quite narrow scope. In the next section we attempt to add some meat to this thin legal gruel by tracing the archaeological and historical practice, the actually existing commons, before this contemporary legal moment.

THE COMMONS IN PRACTICE

In Britain collective rights to land and resources were already regulated by the 7th century AD (Oosthuizen 2011) but they are likely to be far older. The spatial layouts of prehistoric and Roman fields hint at collective rights to arable land, narrow ridged strips are evidence for collective cultivation, unbounded pastureland suggests equity of access, small-scale seasonal habitation on upland implies collective herding and there is good evidence of seasonal gatherings or public assemblies, perhaps for the purposes of governance and decision-making (Oosthuizen 2013).

By the later Middle Ages, when the practices are better documented, the exploitation of common resources was often seasonal, regionally varied and always regulated. Lower lying peat moors, for example, were exploited for fishing and trapping eels, fowling, turbary (the digging of peat bog or 'moss' for fuel and sometimes for roofing material) and the gathering of reeds for thatch (Shaw-Taylor 2002). Elsewhere, furze was useful as fuel, fodder in winter, shelter and fencing, especially where peat and woodland were scarce, and even thorns were gathered for fuel and hedge repairs and to protect newly planted hedges. All of these practices were small-scale and intended to supplement the table of the householder (the rule of sufficiency), so it is generally only when infringements occur that they are documented. There is, however, plenty of archaeological evidence through the identification of fish and bird bones, macrofossil plant remains from peat turves (Hall 2003) and, perhaps most remarkably, the survival of inner layers of medieval reed thatch as a roofing material in standing buildings, especially in southern England (Letts 2000). 'On the ground',

turbary roads can be mapped and earthwork scars trace out where turves were once cut. Turbary stones may survive too, marked by letters and numbers to indicate the parish and the plot. Landscape impacts can be massive: the 200km of navigable waterways on the Norfolk Broads are in fact inundated medieval peat diggings (Williamson 1997).

Where common rights existed, the privileges of tenants to gather wood from wooded commons (which sometimes included Forests where infringements were dealt with at a Forest court) could include 'housebote' (the repair of dwellings), 'heybote', 'hedgebote' and 'fencebote' (the repair of gates and fences), ploughbote (to make implements), 'herbage' (woodland grazing), and 'estover' (the right to collect wood for fuel), though these do not always imply a common wood (Rackham 1986, 121). Thus in 1754 at Shapwick in Somerset the c.50ha common wood at Loxley was said to provide tenants with 'sparrs, strechers and garden frith sufficient to repair their respective tenements' (Knight 2007, 344). Here, as elsewhere, the woods belonged to the lord of the manor and infringement of privileges quickly led to disputes about over-use, cutting and carrying way trees, fines for grazing the wrong animals and for those not entitled to be there at all. The right to pasture cattle was referred to as 'agistment' while 'pannage' was the right to put pigs in to forage in the autumn; additional beasts being grazed for a small payment.

Given the damage that cattle, horses, sheep, goats, pigs and sometimes geese can inflict on the young growth of plants, numbers were carefully regulated by a reeve or hayward. The ditches and woodbanks (once topped with hedges or dead hedges) identified by archaeologists served to keep the animals out of managed blocks of young coppicing which were the reserves of underwood and timber. Compartmentation of this kind tends to imply the strength of the landowner as against the weaker hand of the commoner. Hatfield Forest (fig. 1) is an excellent case study of a woodland with typical earthworks of exactly this kind, as well as illustrating the importance of ancient woodland indicator species, and the role of the ecologist, to identify the surviving core of older woodland and other evidence for woodland management (Rackham 1989).

Fig. 1 Hatfield Forest, Essex (UK). Ash-maple coppice stools, here cut to near ground level long ago and then grown out again, indicate more ancient regimes of woodland management to produce crops of poles. Copyright drewkeavey licensed under CC BY-SA 2.0

Coppice stools can live for many centuries. Woodland in Rockingham Forest was already being managed by 1130 AD (Foard et al 2009, 24, 30) and here there is evidence for narrow, hedged droves along which animals were driven; some still survive as 'green lanes' while others are infilled with later tenements. More generally, archaeology provides off-site evidence of woodland crafts, from the 'deadwood' needed for baking, brewing, cooking of pottages and stews, lighting and heating, to flexible rods of hazel employed in fencing, pit linings, wattle screens and the sheets of moss recovered by archaeologists in latrines. The bracket fungi found aboard Henry VIII's sunken battleship the *Mary Rose* and on excavations in York were probably used as tinder (Greig 1988, 125).

So far we have seen how rights to shared resources in the Middle Ages often leave quite subtle traces in the archaeological record which need to be 'read' within a regional context and often benefit from a multidisciplinary approach. Not all the archaeology is so ephemeral, however. Quarrying for sand, gravel, clay, loam and stone also took place on common land and can leave very obvious traces in the form of extraction pits and exposures of bedrock (Bowden et al 2009, 33-43). Mostly this was for repairs of roads and improvements of soil but potters too sometimes took clay from their own strips in the open fields and these could be hazardous to grazing animals.

Medieval meadows could be private or held in common. The great meadows around Oxford are still in existence and were allocated in strips called 'doles' from which commoners took their hay crop. This process is particularly well documented for the Dolemoor, near Puxton on the North Somerset Levels (Rippon 2006, 110-111). The 'doles' were 18 yards wide here (the distance between Puxton church's west door and the rood screen) and distributed by selecting apples from a bag. Each apple

was marked with a symbol and the turf cut with that symbol when the apple was drawn. That strip was held by a commoner from Lammas (1 August) for one year and a separate part of the Dolemoor auctioned to cover expenses.

One aspect of medieval and later husbandry which has been of particular interest to archaeologists and historians is common pasture. First recorded in Domesday Book in the 11th century, common grazing could be found on the stubble of the arable fields after the harvest, wherever arable land was left uncultivated, on meadows after the hay had been cut, or out on the common 'waste', whether in uplands or wetland moor (see above). All these different kinds of grazing were governed by communal regulations which determined how many animals could be present ('stinting'), what kinds of animals (usually cattle, sheep and horses but sometimes geese and pigs), the season, and, most importantly, who could access those rights (Winchester 2000). For the most part, common rights were generally restricted to those with land in the open fields or with common-right cottages (Bailey 2010).

Although summer pasture was by no means restricted to higher ground and could also be found on marsh and fen, it is largely in the uplands of northern and western Britain where extensive earthworks of medieval enclosures, shelters and dwellings have been recorded through archaeological fieldwork, air photography and place-names with important additional evidence from documents and folklore (eg. Ramm et al 1970; Winchester 2002; Fox 2012). The earthworks of 'shielings' are the physical remains of seasonal movement of cattle in summertime from lowland pasture, where meadows were left to grow the hay which was so essential for winter fodder, up to rough communal hillside pastures. Stock was then driven down from these upland settlements at the start of autumn and overwintered in the fields to increase soil fertility for springtime when the ground could be sown once again. This practice is known as 'transhumance'. In cases where wider survey has been undertaken, such as along Hadrian's Wall, shielings are shown to be linked to specific townships (eg. Crow 2007) which converge to share the upland pasture between them. Palynological data, where it is available, infers long-term stability in the management of grassland over many centuries (Davies and Dixon 2007).

Fig. 2 Shieling at Duirinish in the Isle of Skye in Scotland. This site is associated with a number of shieling huts as well as sites of earlier periods. Copyright Richard Dorell licensed under CC BY-SA 2.0

'Shielings' (which go by different names, 'booley houses' in Ireland, 'hafod' in Wales, 'havos' in Cornwall) are simple huts or shelters for herdsmen in rough pastures or 'shielding grounds' (Dixon 2009; Costello 2016; Withers 1995). Most are remarkably alike and simply constructed of drystone walling and turf, using local materials wherever possible. Most English examples date to the later medieval period (ie. 12th to 16th centuries with some later examples), although Norse place-names suggest earlier use in some areas (Whyte 1985 for Cumbria) and this is supported by radiocarbon dates from, for example, shielings in Upper Ribblesdale (North Yorkshire) which centre on the 7th and 8th centuries AD (Johnson 2012). There is a persistent link with sites of earlier periods so, for example, the shieling excavated at Mons Fabricus, east of Castle Nick on Hadrian's Wall, was built of recycled Roman stone (Crow 2007). In plan, they are subdivided, rectangular buildings of variable length and narrow width, though there are also ovoid and square types. Storage rooms and sleeping spaces seem the most likely room functions. Excavations, such as that at Crosedale near Sedburgh (Hair, Newman and Howard-Davies 1999), reveal internal features such as hearths or fire pits in one corner (thereby maximising standing space under a low roof), low stone benches and kerb stones to define beds of heather. Relatively few diagnostic finds are recovered by excavations, an impoverishment that may derive from the temporary and seasonal nature of occupation or perhaps the precarious nature of cycles of living and leaving.

Stock enclosures or 'pounds' are often found nearby and survive as dry stone walls or banks with ditches to prevent stock escaping. Those recorded at Whitley Shielings near Alston in Northumberland are about 150m^2 (Fairburn and Robertson 2007). The important point to emphasise in this chapter, however, is that shielings on the upland waste were part of a dynamic upland

landscape which could change over time. So, for example, ridge and furrow, the tell-tale earthwork evidence of cultivation, may hint at something more than short-term settlement (eg. Alnham Moor, Northumberland; Crosedale, Cumbria), and crops grown on shieling grounds were probably sometimes brought back downhill with cattle, along with supplies of peat needed for the winter. Some shielings did evolve into permanent farmsteads (eg. Asby Scar in the Lake District; Oxford Archaeology North 2010) and this is confirmed by modern place-names like Linshiels in the Upper Coquet valley in Northumberland. Likewise, a drift from permanent to seasonal settlement has been observed on excavations at Pitcarmick in Perthshire (Dalglish 2013), for example. In each case, the land would have belonged to the lord of the manor, but the right to the grazing belonged to the commoners.

Then and now

Piecemeal and then general enclosure between the Middle Ages and the 19th century, culminating in the *Inclosure Act 1845*, had very significant implications for every aspect of the British landscape (eg. for hedgerows Barnes and Williamson 2006; Blomley 2007). There are many cases in which the process was hotly disputed: the enclosure riots in 17th century Berkhamsted (Herts) provide a fascinating example (Falvey 2001). Protests about access to resources to common land flared again during the Victorian open space and anti-modernism movement, marked by the foundation of the Commons, Open Spaces and Footpaths Preservation Society in 1865 (now the Open Spaces Society; Cowell 2002). The Ashdown Forest Case (1876-1882) is one well documented story (Short 1999) and there is a rich 19th century case law concerning access to resources on common land (Williams 1877) to which must be added their importance for military training, rifle ranges, practice trenches, as well as staging agricultural shows, sports such as boxing, and political rallies (Bowden et al 2009, 44-75). The long series of statutes since the 19th century, as detailed in the first section of this paper, aimed to protect public rather than agricultural interests. Ancient practices are still drawn into current (and passionate) claims for commons, for example by recreational canoeists who come into conflict (sometimes physically) over water use with the more ancient interests of anglers, often local people, who fish along English and Welsh rivers (Dudley 2017). However, with some notable exceptions around 'living heritage' such as watermeadows, many claims for rights today revolve around recreational rights, particularly on village greens and urban public spaces. This 'right to open-air recreation', as established in the *Countryside and Right of Way Act 2000* and the *Commons Act 2006,* has its roots in common law principles but not necessarily in ancient practices. Likewise, rights of access or nature conservation, so called 'non-economic rights', may not be embedded in more ancient customs and practices.

Common land and customary rights are still a persistent source of litigation. To give a very recent example, in *R. (on the application of Muir) v Wandsworth BC* [2018] 4 All E.R. 422 the Court of Appeal reviewed the decision of the local authority to give permission for the building and operation of a children's nursery on common land. The decision had been overturned, and the appeal was dismissed, on the basis that running a nursery did not fall within 'recreation' or any other permitted use of registered common land. Disputes over TVGs are very common, usually where the land owner fences in previously open land which had been used for recreational purposes for the required 20 years previously. For example, *TW Logistics Ltd v Essex CC* [2018] EWCA Civ 2172 where the High Court approved the registering of a working quayside as a TVG after the land owner and business operator had fenced it off. The quayside had long been a recreational walking route.

Conflict between environmental and property regimes is also a contemporary feature of commons management. Different rights and interests overlap on the same piece of land, often with different concepts of land. A clash between agricultural use, forestry use, and water supply use is typical. The agricultural user views the land as private property over which they have a right to graze. The land is part of a semi-managed forest, which supplies timber, soil management and biodiversity. Both uses impact on the role of the land for water supply for the public (Mansfield 2017). These different relationships to the land inevitably lead to conflict, even when all parties are concerned with ecologically sound land use. In many ways it is the management of this conflict which characterises the practice of the commons, rather than peaceful communal enjoyment.

Conclusion - The future of the commons

When we turn to consider the practice of the commons, many of the legal specificities melt away. The most often imagined is the manorial common, shared amongst tenants but owned by the manorial lord. However, communally-used woodlands and upland grazing were clearly major and significant forms of land management, as are the many different rights exercised. What we are actually trying to understand here is a fundamentally different relationship with land to that of legal modernity. Before enclosure and the converting of common land to private property, land was not understood conceptually as a form of property. Land was a resource, which many people could have different rights over without conflict. Land can sustain many different uses, some continuously, some irregularly, some for only a fixed season or period of time. Access rights need not interfere with grazing, there is no necessary conflict between blackberry picking and ploughing. But by transforming it in to property, land becomes exclusive and the right to exclude becomes primary.

This was a long conceptual change as much as a material change. Conceptually, David Seipp reports that the yearbooks do not show the use of the term 'property' to mean 'land' until the early sixteenth century, and emphasises the importance of Christopher St German's *Doctor and Student* for setting out the idea of land as property. Before 1490 lawyers 'did not apply the word "property" to land because land was different'. Land was different for theoretical and practical reasons. In theory, land was held for a feudal lord, and could not be devised by will. In practice, land can sustain many overlapping claims by many individuals, and be used casually or regularly by many others. Rights to land could be held by many without excluding anyone. The yearbooks are filled with detailed descriptions and disagreements about the multiple estates, tenures, and customary arrangements. Those things termed property were much simpler. Property was held by one person and 'excluded all relations with other persons'. For the simpler and more abstract terminology of property to take over the complexity of landholding needed a change in how land was conceptualised. This change in terms 'invoked a stark mental image of one solitary person alone in complete and exclusive possession of one tract of land' (Seipp 1994; on the connection to English colonialism see Jones 2019).

The ancient commons exist alongside new commons. The commons are important for agriculture, for example in the Brecon Beacons in Wales common grazing remains the main form of agriculture. The commons are important for ecology and wildlife (Short 2000, Rogers 2010). The commons are also major sources of open space, for recreation and access. The value of the commons has changed over time, and today common land in England and Wales is most valued as a public good, whether for recreation and access, or for conservation. This again is a change in how the land is understood,

and leads to conflicts and requires now forms of management and knowledge (Short 2008). The agricultural function of the commons has declined, but the common lands are still highly valuable for other functions. Perhaps most significant are the lessons about community land management and local ownership of resources that the surviving common lands are testament to.

Today commons practices are being rediscovered for their sustainability, for the sound ecology of traditional land husbandry (McKay and Acheson 1987). In other places, the commons have been evoked 'for the benefit of all human kind' in the high seas and on the deep sea bed (Pardo 1967). The internet (Cerf 1999) or the city (Stavrides 2016) have both been described as a 'commons', outer space too (Outer Space Treaty 1967). And, of course, there is more than etymology connecting commons and communism (Basso 2015). Commons as a legal tool in England and Wales is quite narrow and restrictive, but communing as an idea is powerful and revolutionary. There is work to be done in connecting these ideas up, or maybe severing them completely, to rediscover what was useful in the communal ownership of resources and how to relearn these lessons for the 21st century. Stavrides describes commoning as 'a relatively new idea' (Stavrides 2016, 1). That ignores too much of the historical specificity of the concept, but it also reveals that there is huge potential for new commons. In fact, the new commons are urgently needed in the face of new enclosures in all these spaces and more.

The taking of gulls from the cliffs at Eastbourne (England) in the 16th century, the drawing of water from a public well for bleaching at Eyemouth in the Scottish Borders in 1846, an ultimatum over the playing of golf on a Sunday in Aberdovey (Gwynedd, Wales) in 1927, all these incidents drew on claims to common rights through the centuries. The disappearance of sharing practices has consequences. Our knowledge of local habitats (for example, woodland and its management) is weaker, biodiversity is threatened, traditional skills are lost, the bond between settlement and territory is more fragile, and there have been fundamental changes in social practices which underestimate the contribution of local practitioners in sustaining their environment, not to mention the value of sharing work, time and space. When woodlands and uplands are perceived to be wholly 'natural' and managed for their natural heritage and tourism, this denies the historical and cultural practices that shaped those landscapes in the first place.

What lessons do our understanding of the history and archaeology of commons teach us? In the first instance they provide evidence of customs and contested commons practices, contributions to 'microhistories' perhaps, which might be compared across space and time, particularly against other European case studies where geography and climate are similar. They evidence a verb-based landscape of practice which does not conform easily with monuments-based definitions beloved of the thesaurus or archaeological catalogue. Most importantly, they remind us how far in the past the products of the commons were integral to the structuring of everyday life - to construction, to diet, to warmth and shelter. In that sense 'commoning', in whatever form, could invite a sense of belonging and certainly required a detailed awareness of the land and its productive capacities. Among the challenges that archaeologists face is the relative invisibility of the jurisdictional element.

Second, commoners may have enjoyed the principle of membership of commons but this was no free-for-all. Practices were underscored by economic necessity, performed and re-asserted during territorial perambulations of boundaries or 'Beating the Bounds' and defended when threatened. Above all, common lands were not 'marginal'. Third, the practicing of common rights must be seen

in the context of the contemporary land units and settlement hierarchies which may extend far away, in the case of upland moor down into peripheral lowland, for example. It is better to talk in terms of 'landscapes of rights'. Fourth, we begin to see 'commons' as being in a constant process of negotiation, then as now. While on the face of it commons offer a sustainable and fair distribution of resources, the availability of common resources was not the same everywhere and it varied through time, as the archaeology of upland shielings shows us. Rights were restricted to particular groups (usually those with local landholdings) and excluded others (those who had no property), they did not apply to all the local inhabitants in general, and there were regulations over what could be done and when. Finally, it reminds us that common rights are shaped by local conditions and practices and that our understanding must be informed by interdisciplinary practice which consistently underlines the value of context. Methodologically at least, an understanding of commons sits at the intersection of archaeology, ecology, history, historical geography and law; fieldnames, placenames, fauna and flora and documentary evidence for regulation must sit alongside the physical traces of earthworks and excavation.

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