CIVIL RIGHTS, CIVIL WRONGS AND QUASI-PUBLIC SPACE[1]

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Even today a flicker of concern ought to be aroused by the suggestion that the common law allows one private actor, on invoking the threat of indefinite incarceration, to exile a group of citizens permanently from the centre of their home town, thereby endangering their livelihood and severely impairing their freedom to engage in the social and commercial relationships of their choice. Yet when, in 1995, a ruling of such feudal resonance emerged from the English Court of Appeal in *CIN Properties Ltd v Rawlins*,[2] the decision attracted -- quite extraordinarily -- virtually no comment or criticism of any kind.[3] Can it really be the case that an insidious culture of exclusion -- which bids fair to become a dominating social phenomenon of the years ahead -- has already begun to take hold of us and paralyse our critical legal faculties?

I. The *Rawlins/Anderson* case

The factual background

The greater part of the centre of the market town of Wellingborough is occupied by a shopping complex held by CIN Properties Limited on a long lease from the local council as freeholder. The Swansgate Shopping Centre is a predictably brutal construction of the 1970s, made possible by the stopping up of several public highways of ancient origin[4] and now enclosing some 12 acres of down-town Wellingborough. The Centre comprises a covered square and four pedestrian malls which contain Wellingborough's main shopping

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1 Thanks for advice, assistance and critical comment are owed to many, including Tim Bonyhady, Kurt Iveson, Jennifer Lawrence, Philip Leach, Patrick Troy, Andrew von Hirsch, David Wills and Peter Zawada.

2 [1995] 2 EGLR 130. The decision in *Rawlins* was the subject of a challenge in the European Commission of Human Rights sub nom *Mark Anderson and Others v United Kingdom* (Application No 33689/96).

3 See, however, [1995] Conv 332 (Haley).

4 The names of these streets are still preserved in the walkways of the shopping centre.

facilities, various cafés, the town's gas and electricity payment offices, and the Co-operative Bank. The retail outlets in the Centre (including many well-known high street names) employ large numbers of people from Wellingborough and the surrounding district, and over 100,000 visitors enter the Centre each week. According to the terms of its lease CIN Properties undertook to allow "full pedestrian access to the common parts of the demised premises" from 7.00 am to 11.00 pm daily.[5]

In the 1990s the Centre came to be frequented by a small group of locally resident, mostly unemployed youths, of whom the majority were black. The Centre was policed by employees of the private security firm Group 4 (and later Firm Security Group Limited), who allegedly called the youths "chimpanzees" and attempted from time to time to have them arrested for trifling defaults such as whistling in public.[6] It is not necessary for present purposes to suppose that the young men in question were possessed of either deeply attractive personalities or imperturbable temperaments. It is nevertheless undoubted that following an incident in the Centre in 1991 ten of the youths were charged with public order offences. Claiming that the youths had been "frequently guilty of nuisance at the premises", CIN Properties immediately purported, by solicitor's letter, to ban each of them in perpetuity from entering the Centre "for any purpose whatsoever" and indicated that injunction proceedings would follow.

Some months later the criminal prosecutions fell apart, after a trial lasting several days, when police testimony was fatally contradicted by video surveillance evidence. Two weeks after the abortive criminal trial CIN Properties applied for injunctive relief to reinforce the privately imposed ban on entry. The youths were caused to give undertakings that they would not return to the Centre, and some of their number were subsequently subjected to committal proceedings for contemptuous breach of their undertakings.

The litigation in *CIN Properties Ltd v Rawlins* turned ultimately on the question whether, in English law, a landowner (freeholder or leaseholder) is entitled in all circumstances to exclude strangers from entry upon his land and, by invoking the law of trespass and nuisance, obtain declaratory and injunctive relief in support of his exclusory preferences. By raising in raw form the legal status of unconsented access to privately held land, the *Rawlins* case takes its place amongst a steadily evolving body of jurisprudence in the common law world, in which the symbolic test of the limits of private ownership has come, curiously, to focus on the scope of the power of exclusion from the precincts of the shopping mall. Virtually every major jurisdiction throughout the modern Anglo-American world has now had experience of hotly contested mall access litigation.[7] In common with most of this litigation, the *Rawlins* case is vitally concerned with the impact

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5 Lease for 125 years dated 22 December 1980, Clause 3(15)(b).

6 This account of the factual background of the *Rawlins/Anderson* case has been drawn, in part, from information supplied by Jennifer Lawrence (Lawrences Solicitors, Wellingborough) and Philip Leach (Liberty), from the pleadings in the County Court proceedings in *CIN Properties Ltd v Rawlins*, from the applicants' petition in *Mark Anderson and Others v United Kingdom* and, finally, from an article in *The Observer*, 26 May 1996.

7 See eg *Harrison v Carswell* (1975) 62 DLR (3d) 68 (Supreme Court of Canada); *PruneYard Shopping Center v Robins*, 447 US 74 at 81, 64 L Ed 2d 741 (1980) (United States Supreme Court).

of the common law of trespass on the freedom of the individual citizen. Can the law of civil trespass be held to justify the curtailment or redefinition of civil liberty? Can civil wrong be pleaded in derogation of civil right?

The curial history of the *Rawlins/Anderson* case

When CIN Properties' injunction application was heard in Birmingham County Court late in 1993, Mr Recorder Philip Cox QC ruled, in an interim judgment, that the implied invitation to the defendant youths (as indeed to all members of the public) to enter the Swansgate Shopping Centre could not be arbitrarily withdrawn by CIN Properties.[8] Instead the County Court Recorder acknowledged that

> "members of the general public ... in their use of the pedestrian ways, or Malls as they are called, which have replaced the former street pattern of a substantial area of central Wellingborough, are not to be considered as bare licensees whose rights can be revoked at will by the Plaintiff ... [I]t seems to me that equity must step in to preserve for the public an irrevocable right to use these Malls in the town centre, when they are open in accordance with the terms of the lease, even though they are passing through private property ... "[9]

On this basis Mr Recorder Cox QC held that members of the public, subject only to a requirement of "reasonable conduct", had an "equitable" or "irrevocable" right to enter and use the shopping mall during its normal opening hours.[10]

The Court of Appeal (Balcombe, Roch and Saville LJJ) unanimously reversed this ruling in 1995. Lord Justice Balcombe, who gave the only substantial judgment, expressly rejected the existence of any "equitable" or "irrevocable" right of public entry to pedestrian malls within an inner town shopping centre. Despite the citation of weighty comparative authority derived from North American courts, Lord Justice Balcombe refused to accept that a landowner's power to exclude is exercisable only upon the showing of good cause. Whilst acknowledging that the courts "may have to be ready to adapt the law to new social facts where necessary", Lord Justice Balcombe led the Court of Appeal in declining, in the present context, to construct an "appropriate legal framework" to accord with social change.[11] Instead, in a decision from which further leave

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8 At common law the existence of a bare licence (express or implied) to enter another's land merely suspends liability for trespass. The visitor's immunity ends, usually with almost immediate effect, when the licence is withdrawn or terminated (see *Thomas v Sorrell* (1673) Vaugh 330 at 351, 124 ER 1098 at 1109; *Goldsack v Shore* [1950] 1 KB 708 at 714; *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 352; *Beaton v McDivitt* (1985) 13 NSWLR 134 at 146E; Gray, *Elements of Land Law* (Butterworths, London, 2nd edn 1993), pp. 891, 899). See, however, *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 188.

9 Interim Judgment of Mr Recorder Philip Cox QC, 6 January 1994, Birmingham County Court, *Transcript*, p. 14.

10 *Transcript*, p. 15.

11 [1995] 2 EGLR 130 at 134H-J.

to appeal was refused,[12] the Court effectively endorsed CIN Properties' peremptory exclusion *sine die* of persons against whom no charge of misconduct (or other rational ground of eviction) had ever been made out.

In 1997 the Court of Appeal's decision was unsuccessfully challenged, sub nom *Mark Anderson and Others v United Kingdom*,[13] before the European Commission of Human Rights, the Commission's intervention being inhibited in part by the United Kingdom's failure to ratify the guarantee of liberty of movement contained in Protocol No 4, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[14] The applicants' most realistic opportunity of success being thus rendered unavailable, the Commission, by a majority, proceeded to declare inadmissible the complaint that the applicants had been deprived of freedoms of peaceful assembly and association guaranteed by Article 11.[15] The Commission pointed out, perhaps a trifle unadventurously, that the Convention case law on Article 11 had not, to date, indicated that freedom of assembly "is intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes." The Convention freedom of association was likewise ruled irrelevant on the ground that it comprised a highly purposive right "for individuals to associate 'in order to attain various ends'."[16] The Commission specifically noted that the applicants had "no history of using the [Swansgate] Centre for any form of organised assembly or association", although adding a broad hint that the applicants' case might have been more appropriately presented as an alleged violation of liberty of movement within the territory of a state.

The wider impact of the *Rawlins/Anderson* case

For the group of young men involved, the *Rawlins/Anderson* litigation resulted in the imposition of a lifelong civil sanction,[17] disproportional to any possibly perceived threat of harm, thus exposing them to the risk of imprisonment for contempt should they ever re-enter an extensively demarcated no-go zone in the middle of their home town. The effect of the youths' exclusion from the Swansgate Shopping Centre was permanently to

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12 On 15 November 1995 the House of Lords likewise refused a petition for leave to appeal against the decision of the Court of Appeal.

13 Application No 33689/96 (Decision as to admissibility dated 27 October 1997). See [1998] EHRLR 218.

14 *Decision as to admissibility*, p. 5.

15 *Decision as to admissibility*, p. 6.

16 *Decision as to admissibility*, p. 5.

17 Only now is substantial attention being directed to the issue of civil sanctions following criminal conviction (see eg von Hirsch and Wasik, "Civil Disqualifications Attending Conviction" (1997) 56 Cambridge LJ 599). The irony of the *Rawlins/Anderson* case is that here, of course, the subjects of the civil sanction had been acquitted of all charges of criminal activity.

cut off their access to the commercial and other facilities contained within the Centre.[18] The prohibition on their entry was sufficiently comprehensive to preclude their seeking work in their town's primary location of employment. In this way the property owner's denial of access to the shopping centre impaired the youths' ability to perform one of the essential preconditions of their receipt of state benefit -- that of being available for all forms of paid employment -- and may well have helped to condemn them to a lifetime of unemployment. Here the impact of arbitrary exclusion on the life chances of the young men was not merely potential, but actual and far-reaching.

In such circumstances it becomes at least questionable whether the private exercise of a property power can be allowed to impose the sort of "internal exile" which Charles Reich once feared might become the fate of the unconventional and the unwaged.[19] Is the private denial of access for proscribed citizens to a large part of a town centre entirely beyond the reach of legal scrutiny? Can the common law prerogatives of private ownership be permitted to define or delimit public access to those social, commercial and recreational utilities which nowadays characterise areas of "mass private property"[20]? Have we entered a "new feudalism [where] huge tracts of property and associated public places are controlled -- and policed -- by private corporations"[21]?

In its distinctive way the *Rawlins/Anderson* case presents, in microcosm, a number of fundamental issues relating to the social and political ecology of modern urban space. The litigation casts a fresh focus on the difficulty of reconciling an emergent (and, for some, compulsory) leisure culture with the pressing demands of public safety in an age of heightened awareness of civil liberty.[22] New criteria have come to

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18 One of the youths subsequently complained that his shopping now required a two-hour bus trip to Northampton and that he had been forced to close his bank account because the Co-operative Bank's only branch was located in the shopping centre (*Observer*, 26 May 1996).

19 Reich, 100 Yale LJ 1465, 1467 (1990-91). See Gray, "Equitable Property", (1994) 47(2) Current Legal Problems 157 at 175 ("Are the private security firms which patrol shopping malls indeed entitled to extrude from the premises the jobless, the Rastafarian and the down-and-out? Nothing would epitomise quite so forcefully the growing apartheid between rich and poor as the reservation of exclusive consumerist havens for the relatively affluent of our society"). See also White, "No-Go in the Fortress City: Young People, Inequality and Space", 14(1) Urban Policy and Research 37 (1996).

20 The term "mass private property" has been loosely used by criminologists and other social scientists to characterise "huge, privately owned facilities ... [including] shopping centers ... enormous residential estates ... equally large office, recreational, industrial, and manufacturing complexes, and many university campuses" (Shearing and Stenning, "Private Security: Implications for Social Control", 30 Social Problems 493 at 496 (1982-83)).

21 Shearing and Stenning, loc. cit. at 503. For an historical overview of the emergence of the modern mall paradigm "supported by investment capital from pension funds and insurance companies", see Sandercock, "From Main Street to Fortress: The Future of Malls as Public Spaces -- OR -- 'Shut Up and Shop'", 9 Just Policy 27 at 28 (1997). See also Kowinski, *The Malling of America* (William Morrow, New York, 1985); Lord, "The Malling of the American Landscape", in Dawson and Lord (ed), *Shopping Centre Development: Policies and Prospects* (Croom Helm Ltd 1985), p. 209; Crawford, "The World in a Shopping Mall", in Sorkin (ed), *Variations on a Theme Park: The New American City and the End of Public Space* (Hill and Wang, New York 1992), p. 8.

22 On the attractiveness of the modern shopping mall or centre to young people who lack neighbourhood leisure facilities and the money to purchase alternative forms of entertainment, see White, "Street Life: Police

impact upon the allocation of empty social space to people with relatively empty social lives. It has been rightly said that the development of "mass private property" has meant that "more and more public life now takes place on property which is privately owned."[23] Accordingly, in such locations, the protection of property has started to coalesce with the preservation of public order, raising important questions about the proper balance between public and private strategies of policing. In these zones it is not irrelevant that the privatisation of space has effectively "relocate[d] the power to define and maintain order ... from the state to property developers."[24] The exercise of stringent corporate control over the domain of the shopping mall may have begun to threaten an important element of pedestrian democracy and in this very context some commentators have recently spoken of a "decline of urban liberalism" and "the end of what might be called the Olmstedian vision of public space."[25]

The *Rawlins/Anderson* case highlights no less clearly some of the central tensions of contemporary environmental criminology. The construction of defensible commercial space may find itself in substantial conflict with the moral and practical imperatives of social community. When implemented for the purpose of curbing behaviour believed inimical to the commercial process, proactive or preventive policing almost always accentuates the social exclusion of marginalised and disadvantaged people.[26] Environmental prevention strategies which seek to design inconvenient (or merely unconventional) people out of sensitive urban spaces "may in fact have quite significant detrimental consequences with regard to overall community relationships."[27] In a wider context, the difficult choice between inclusive and exclusive social strategies is

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Practices and Youth Behaviour", in White and Alder (ed), *The Police and Young People in Australia* (Cambridge University Press 1994), p. 111 (" ... the mall, public square or shopping centre represents the main community focal point in the late twentieth century"). See also Shields, "The Individual, Consumption Cultures and the Fate of Community", in Shields (ed), *Lifestyle Shopping: The Subject of Consumption* (Routledge 1992), p. 110.

23 Shearing and Stenning, loc. cit. at 496.

24 Davis, "Less Mickey Mouse, More Dirty Harry: Property, Policing and the Modern Metropolis", 5(2) Polemic 63 at 64 (1994). For further influential and critical reference to "what is now a nationwide trend toward the privatization of public property", see *Chicago Acorn, SEIU Local No 880 v Metropolitan Pier and Exposition Authority*, 150 F3d 695 at 704 (1998) per Chief Judge Posner.

25 Davis, "Fortress Los Angeles: The Militarization of Urban Space", in Sorkin (ed), op. cit., p. 156. (Frederick Law Olmsted was the American architect and landscaper who notably extolled the democratic virtues -- "the harmonizing and refining influence" -- of shared public space (Davis, ibid, p. 156)). See also Iveson, "Putting the Public Back into Public Space", 16(1) Urban Policy and Research 21 (1998).

26 "The distancing of a high and growing proportion of young people from the processes of production and consumption ... is reverberating through the social system in diverse ways and directions. The fact that many young people are no longer welcome in the commercialised zones of urban life is reinforced time and again by policing practices which both criminalise their actions and ... trivialise their cultural choices and lifestyle options. The emphasis has been on social control ... " (White, "Young People and the Policing of Community Space", 26(3) ANZJ Crim 207 at 216 (1993)).

27 White and Sutton, "Crime prevention, urban space and social exclusion", 31(1) Australian and New Zealand Journal of Sociology 82 at 90 (1995). For an example drawn from an earlier generation, see *In re Cox*, 474 P2d 992 at 994 (1970) (exclusion of long-haired and unconventionally dressed youths from shopping mall premises).

nowhere more starkly revealed than in the generally shared concern, in an increasingly fearful society, to protect publicly accessible urban space from the attentions of the mindless yob, the would-be mugger or rapist and the potential child molester. Is heightened protection against ever-present threats to personal security compatible with the achievement of socially integrative values of liberty, equality and fraternity? Is zero tolerance of social indiscipline ultimately consistent with civic tolerance of one's fellow human beings?

The *Rawlins/Anderson* case returns us, inevitably, to the proposition that there exists no unbridgeable gulf between public and private law: the public/private divide may turn out to be much more "continuous" than "dichotomous".[28] Given that public decision-making nowadays comes under increasingly strict scrutiny, it may not be wholly surprising that similar principles of at least procedural propriety should begin to infiltrate control strategies which are practised within the supposedly private law realm of property. "On the contrary it would seem rather odd that public power should be increasingly subjected to restraint, whilst private power -- supremely evidenced in the exercise of rights of property -- should substantially escape similar social control."[29] Indeed, if the *Rawlins/Anderson* litigation demonstrates anything, it is that the complexity of modern institutions tends to falsify any attempt to conserve the pure quality of the distinction between public and private domains. Even in the context of modern urban space, designations of publicness and privateness now tend to operate across a spectrum where adjacent connotations shade inevitably into each other.

II. The roots of *CIN Properties Ltd v Rawlins* in a rule of arbitrary exclusion

For English property lawyers the outcome in *CIN Properties Ltd v Rawlins* merely confirmed a doctrine, once widely accepted within the common law tradition, that the landowner enjoys an absolute prerogative to determine -- no matter how arbitrarily, selectively or capriciously -- who may enter or remain on his or her land. Accordingly, as a general principle, the landowner has an uncontrolled discretion to exclude any person from trespassing on private property.[30] It is generally believed that this rule of peremptory exclusion makes no distinction between the kinds of land to which it may relate. In its strict conventional form the common law rule is as readily applicable to the domestic home as to vast tracts of privately owned territory in the Australian outback, and quite clearly embodies an absolutist, as distinct from relativist, view of the nature of property in land.

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28 See Benn and Gaus, "The Public and the Private: Concepts and Action", in Benn and Gaus (ed), *Public and Private in Social Life* (Croom Helm, London and Canberra, 1983), p. 25.

29 Gray, "Equitable Property", (1994) 47(2) Current Legal Problems 157 at 212.

30 Gray, *Elements of Land Law* (Butterworths, London, 2nd edn 1993), pp. 893-899. In strict terms trespass is actionable only at the instance of a person currently in exclusive possession of land (see *Harper v Charlesworth* (1825) 4 B & C 574 at 585, 107 ER 1174 at 1178; *Simpson v Knowles* [1974] VR 190 at 195; *Street v Mountford* [1985] AC 809 at 816B-C; *Sky Four Realty Co v State*, 512 NYS2d 987 at 989 (NY Ct Cl 1987); *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 at 429).

This "arbitrary exclusion rule", rooted historically in the medieval action for trespass *quare clausum fregit*,[31] has doubtless served a noble purpose in times past.[32] It enabled Chief Justice Coke to declare in *Semayne's Case*[33] that "the house of every one is to him as his castle and fortress". This recognition long provided an important pillar of the law of civil liberty and created a vital defence for the citizen against the intrusion of the state. In *Entick v Carrington*[34] in 1765 Lord Chief Justice Camden observed that "[b]y the laws of England every invasion of land, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence".[35]

From these beginnings has emerged the common law dogma that "[t]he right to exclude strangers is an ordinary incident of ownership of land".[36] Thus Justice Ritchie was able to refer in the Supreme Court of Canada to "the long-standing right of a citizen ... to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it".[37] Under a 19th century English doctrine, enunciated in *Wood v Leadbitter*[38] and slavishly followed in more recent times in the United

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31 See Blackstone, *Commentaries on the Laws of England* (Facsimile edn, University of Chicago Press 1979), Vol. III, pp. 209-210; Ames, "Injuries to Realty", in *Lectures on Legal History* (Harvard UP, Cambridge Mass 1913), p. 224.

32 "Trespass laws ... have been, and doubtless still are, important features of any government dedicated ... to a rule of law" (*Bell v Maryland*, 378 US 226 at 346, 12 L Ed 2d 822 at 867 (1964) per Justice Black). See also *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 83 per Justice Dickson.

33 (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195. See *Lyons v The Queen* (1985) 14 DLR (4th) 482 at 501.

34 (1765) 19 Howell's State Trials 1029 at 1066, 2 Wils KB 275 at 291, 95 ER 807 at 817.

35 See also *Coco v The Queen* (1994) 179 CLR 427 at 435 ("Every unauthorized entry upon private property is a trespass"); *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 at 1050H-1051B.

36 *Gerhardy v Brown* (1985) 159 CLR 70 at 150 per Deane J (High Court of Australia). See also *Coco v The Queen* (1994) 179 CLR 427 at 438. In *Newbury DC v Russell* (1997) 95 LGR 705 at 713, Rattee J referred to the "fundamental right of the owner of land ... to object to trespass ... ". The Supreme Court of the United States has likewise observed that this right of exclusion is universally held to be a "fundamental element of the property right" (*Kaiser Aetna v United States*, 444 US 164 at 179-180, 62 L Ed 2d 332 at 346 (1979) per Justice Rehnquist) and "traditionally ... one of the most treasured strands in an owner's bundle of property rights" (*Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 at 435, 73 L Ed 2d 868 at 882 (1982) per Justice Marshall). See now *Jacque v Steenberg Homes, Inc*, 563 NW2d 154 at 159-160 (Wis 1997).

37 *Colet v The Queen* (1981) 119 DLR (3d) 521 at 526. See also *Allred v Harris*, 18 Cal Rptr 2d 530 at 533 (Cal App 4 Dist 1993); *Judlo, Inc v Vons Companies, Inc*, 259 Cal Rptr 624 at 628-629 (Cal App 4 Dist 1989); *State v Steinmann*, 569 A2d 557 at 560 (Conn App 1990); *Newbury DC v Russell* (1997) 95 LGR 705 at 715.

38 (1845) 13 M & W 838 at 844-845, 153 ER 351 at 354.

States,[39] permissions to enter land came to be seen as revocable at the will of the landowner without prior notice[40] and without any explanation.[41] No doctrine of reasonableness[42] or natural justice[43] controls the selective grant of access to land. In the absence of some overriding statutory or common law constraint,[44] the landowner simply enjoys an unchallengeable discretion to withhold or withdraw permission to enter.[45] Except in extraordinary circumstances of humanitarian necessity[46] or of compelling need to prevent or prosecute serious crime[47] or effect hot pursuit,[48] no excuse, however worthy,[49] can prevent the unconsented intrusion into private property from ranking as an actionable trespass.[50]

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39 *Marrone v Washington Jockey Club*, 227 US 633 at 636, 57 L Ed 679 at 681 (1912) per Justice Holmes. See also *Shubert v Nixon Amusement Co*, 83 A 369 at 371 (1912); *Woolcott v Shubert*, 154 NYS 643 at 645 (1915); *Wilhoite v Melvin Simon & Associates, Inc*, 640 NE2d 382 at 385 (1994).

40 *Lambert v Roberts* [1981] 2 All ER 15 at 19d.

41 The landowner, being wholly unaccountable, is entitled to exclude without assigning any kind of reason (see eg *Russo v Ontario Jockey Club* (1988) 46 DLR (4th) 359 at 361).

42 See eg *Austin v Rescon Construction (1984) Ltd* (1989) 57 DLR (4th) 591 at 593; *Russo v Ontario Jockey Club* (1988) 46 DLR (4th) 359 at 364; *Plenty v Dillon* (1991) 171 CLR 635 at 655. At common law the landowner is generally entitled, however intransigently, to deny access even in return for reasonable offers of payment (see *Jacque v Steenberg Homes, Inc*, 563 NW2d 154 at 159-160 (1997)) or, conversely, to grant access only on payment of an arguably unreasonable premium (see *Newbury DC v Russell* (1997) 95 LGR 705 at 715-716). See now, however, Access to Neighbouring Land Act 1992, s 1(1), (2), for a judicial discretion to make an 'access order' allowing unconsented entry upon adjoining or adjacent land for the purpose of certain works of preservation in respect of buildings on the entrant's own land.

43 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 511; *Russo v Ontario Jockey Club* (1988) 46 DLR (4th) 359 at 362.

44 Certain limitations -- irrelevant for present purposes -- may now be imposed by common law doctrines of contract and estoppel (see *Elements of Land Law* (1993), pp. 312-368, 909-914).

45 See *Madden v Queens County Jockey Club, Inc*, 72 NE2d 697 at 698 (1947) ("The question posed ... is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin").

46 The humanitarian necessity must involve imperative intervention in order to preserve or protect life or to prevent or remedy serious physical harm arising to the person (or, exceptionally, the property) of another. See *Swales v Cox* [1981] QB 849 at 853F, 855A-C; *R v Perka* (1984) 13 DLR (4th) 1 at 14; *R v Landry* (1986) 26 DLR (4th) 368 at 392; *Dehn v Attorney-General* [1988] 2 NZLR 564 at 580; *R v Thomas* (1992) 67 CCC(3d) 81 at 93; *R v Macooh* (1993) 105 DLR (4th) 96 at 104; *R v Anderson* (1996) 108 CCC (3d) 37 at 50; *DPP v Delaney* [1996] 1 ILRM 536 at 542; *R v Godoy* (1997) 115 CCC (3d) 272 at 284-287. See also *Restatement of the Law, Second: Torts 2d*, (St Paul, Minn 1965), sections 196-197 (Vol. 1, pp. 353-361), for instances of privileged entry in order to avert "an imminent public disaster" or "serious harm" to a person, land or chattels.

47 *Swales v Cox* [1981] QB 849 at 853F, 855A-C; *R v Landry* (1986) 26 DLR (4th) 368 at 387, 392; *Plenty v Dillon* (1991) 171 CLR 635 at 647. In a development avoided elsewhere (see eg *Shattock v Devlin* [1990] 2 NZLR 88 at 110; *DPP v Delaney* [1996] 1 ILRM 536 at 543), English courts have recently confirmed the existence of an ill-framed and overbroad police power to enter private premises on a reasonable belief in the imminence of a breach of the peace (see *McLeod v Metropolitan Police Commissioner* [1994] 4 All ER

In terms of received doctrine, this absolute exclusory power is as freely available to the owner of a leasehold estate as to the owner of a freehold estate.[51] In common law jurisprudence both kinds of estate comprise merely an abstract "bundle of rights" -- an artificial construct -- interposed between the possessor of land and the land itself.[52] Therefore each "owner" owns not land but an *estate* in land, the nature of the precise estate being graded by reference to its temporal duration. The complex conceptualism of the "estate" has seemed to render it unnecessary for the common law to develop any comprehensive or coherent theory of *dominium* in relation to land.[53] However, this default has inevitably disabled the common law from arriving at any more subtle gradation of the exclusory powers inherent in ownership; and it is precisely this shortcoming in English law which came to the fore in the *Rawlins/Anderson* case. In a crowded modern urban environment, where recreational, associational and expressional space is increasingly at a premium, an "unanalysed, monolithic privilege of arbitrary exclusion"[54] is no longer tenable.

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553 at 560e), a stance apparently endorsed by the European Commission of Human Rights. See *Sally McLeod v United Kingdom* (Application No 24755/94), Report dated 9 April 1997, paras. 55-61.

48 *Plenty v Dillon* (1991) 171 CLR 635 at 647; *Miller v Stewart*, 1991 Ont CJ LEXIS 1822 (12 December 1991); *R v Macooh* (1993) 105 DLR (4th) 96 at 103-109; *R v Anderson* (1996) 108 CCC (3d) 37 at 50.

49 Unavailing excuses include the supposed invitation of a "for sale" sign (*Wells v Polland*, 708 A2d 34 at 44 (Md App 1998)); bona fide protest against the commissioning of a nuclear waste dump (*United Kingdom Nirex Ltd v Barton* (1986) *Times*, 14 October); concern about the development of the nuclear industry (*Commonwealth v Averill*, 423 NE2d 6 at 7-8 (Md App 1981); *Commonwealth v Hood*, 452 NE2d 188 at 196 (Mass 1983)); sincere indignation about proven nuclear contamination (*British Nuclear Fuels Ltd v Greenpeace Ltd* (Court of Appeal, 25 March 1986)); a desire to stop a defence contractor's "war crimes" (*State v Marley*, 509 P2d 1095 at 1109-1112 (1973)); and opposition to logging in ecologically sensitive forest areas (*MacMillan Bloedel Ltd v Simpson* (1994) 113 DLR (4th) 368 at 384-385). There is no defence of necessity for anti-abortion protestors who invade the premises of an abortion clinic (*Sigma Reproductive Health Center v State*, 467 A2d 483 at 493-498 (Md 1983); *Jones v City of Tulsa*, 857 P2d 814 at 816-817 (1993); *Elizabeth Bagshaw Society v Breton* (1997) 75 ACWS 3d 183).

50 The mere fact of trespass does not, of course, justify extreme retaliation or excessive force by the aggrieved occupier of land. See eg *R v McKay* [1957] VR 560 at 562; *Revill v Newbery* [1996] QB 567 at 578D, 580C-D; *Campbell v Lord Advocate* 1997 SCCR 269 at 272B (reckless or negligent shooting of trespasser); although compare *R v Hussey* (1924) 18 Cr App R 160 at 161. See also *Arthur v Anker* [1997] QB 564 at 576A-C (exaction of fee for release of wheel-clamped vehicle); although compare *Carmichael v Black*, 1992 SLT 897 at 900H-901D.

51 *Street v Mountford* [1985] AC 809 at 816 per Lord Templeman ("A tenant armed with exclusive possession can keep out strangers and keep out the landlord ... "). See also *Morrill v Mackman*, 24 Mich 279, 9 Am Rep 124 (1872); *Folgueras v Hassle*, 331 F Supp 615 at 624-625 (1971).

52 See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.

53 See Gray, "Property in Common Law Systems", in van Maanen and van der Walt (ed), *Property Law on the Threshold of the 21st Century* (MAKLU, 1996), pp. 247-248.

54 Gray and Gray, "The idea of property in land", in Bright and Dewar (ed), *Law and Land: Themes and Perspectives* (Clarendon Press, Oxford, 1998), pp. 38-39.

III. The modern retreat from traditional trespass doctrine

Whilst the strict enforcement of traditional trespassory concepts may make perfect sense within, say, the domestic curtilage,[55] there is growing support today for the proposition that arbitrary and potentially capricious powers of exclusion can no longer comprise an inevitable incident of property in *all* kinds of land and that the unqualified assertion of such powers may in practice derogate from fundamental principles of human freedom and dignity. It so happens that the contemporary marketplace of the shopping mall or civic commercial centre has come to provide a significant testing-ground for this proposition. Is the absolute exclusory prerogative of common law ownership to prevail undiminished and unqualified even in relation to such premises?

The "quasi-public" character of the shopping mall or civic commercial centre

As one of the more pervasive phenomena of contemporary urban design, the locale of the shopping mall or town-centre commercial complex ranks superficially as a pre-eminent domain of private enterprise. Yet, although privately owned, the modern shopping complex has a profoundly public dimension: it has rightly been said that "access by the public is the very reason for its existence."[56] Such premises perform a mixture of functions of which the buying and selling of goods now represent only one feature[57]: in late 20th century culture shopping has itself become a recreational activity.[58] The layout of the shopping mall, with its extensive provision of seating, fountains, open-plan cafés, snack bars, entertainments and exhibitions, affords much of the recreational aspect of a social, cultural and artistic meeting-place.[59] Nowadays such complexes

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55 See *People v Wolf*, 312 NYS2d 721 at 723 (1970) ("the owner of a private premises can exclude anyone and everyone for any reason whatever and preclude their return. It is well settled law that a man's home is his castle and there would be no reason whatever, no lawful reason, for a person excluded to return to the premises whether for good or evil"). See also *Bell v Maryland*, 378 US 226 at 253, 263, 12 L Ed 2d 822 at 873, 879 (1964) per Justice Douglas ("The home ... is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public").

56 *Schwartz-Torrance Investment Corp v Bakery and Confectionery Workers' Union, Local No 31*, 394 P2d 921 at 924 (Supreme Court of California 1964).

57 See *Barker v R* (1983) 153 CLR 338 at 348 per Mason J, 361-362 per Brennan and Deane JJ. For a description of the non-exchange characteristics of the modern shopping mall, see Shields, "Spaces for the Subject of Consumption", in Shields (ed), *Lifestyle Shopping: The Subject of Consumption* (Routledge 1992), p. 13; Ferguson, "Watching the World Go Round: Atrium culture and the psychology of shopping", ibid, p. 21. Lauren Langman has referred to shopping malls as "carnivals of consumption ... as the main sites of the intentionally produced stimulations that constitute a new dream-like order of commercial reality as the promise of wish fulfilment in this new 'hyper-reality' of spectacular images and fantastic gratifications" ("Neon Cages: Shopping for subjectivity", ibid, pp. 40, 48).

58 See eg *Wilhoite v Melvin Simon & Associates, Inc*, 640 NE2d 382 at 385 (1994) ("the new American pastime").

59 See also Crawford, "The World in a Shopping Mall", in Sorkin (ed), *Variations on a Theme Park: The New American City and the End of Public Space* (Hill and Wang, New York 1992), pp 14-17.

frequently incorporate the local library, a post office or bank and various local government-run public information outlets. The location effectively provides the equivalent, in an enclosed format, of a city square or public park,[60] civic venues which, in the common law tradition, have long been viewed as affected by some public trust guaranteeing free access for all.[61] It is also often the case that the modern mall provides a place of solace for the disadvantaged, the disabled, the elderly and the troubled of society. The open areas of these complexes may well embody what Frank Michelman has termed a "civic common", that is, "a site that not only accommodates cerebral exchanges of ideas but, at the same time, generates a supportive good that we may call civic sociability, an aspect of what others have recently been calling 'social capital'."[62] The cathedrals of private commerce have indeed evolved into civic and social fora of large public significance.

The socially integrative function of contemporary civic commercial complexes has been aptly described by the Supreme Court of New Jersey. In *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*[63] the late Chief Justice Wilentz remarked that

> "[a]lthough the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events. We know of no private property that more closely resembles public property. The public's invitation to use the property ... is correspondingly broad ... For the ordinary citizen it is not just an invitation to shop, but to do whatever one would do downtown, including doing very little of anything ... The predominant characteristic of the normal use of these properties is its all-inclusiveness ... The invitation to the public is simple: 'Come here, that's all we ask. We hope you will buy, but you do not have to, and you need not intend to. All we ask is that you come here. You can do whatever you want so long as you do not interfere with other visitors' ... The multitude of non-shoppers testifies to the success of this invitation, and it is a 'success' because the centers know that the phenomenon of 'impulse buying' will make shoppers out of many of these non-shoppers. So people go there just to meet, to talk, to 'hang out,' and no one stops them; indeed, they are wanted and welcome. The activities and uses, the design of the property, the open spaces, the non-retail activities, the expressive uses, all are designed to make the centers attractive to everyone, for

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60 See eg *R v Heywood* [1994] 3 SCR 761 at 795, where Justice Cory, on behalf of the majority in the Supreme Court of Canada, observed that parks are "places which are specifically designed to foster relaxation, indolent contemplation and strolling; in fact it may be assumed that 'hanging around' and 'idling' is encouraged in parks."

61 See eg *Hague v Committee for Industrial Organization*, 307 US 496 at 515, 83 L Ed 1423 at 1436 (1939) per Justice Roberts.

62 Michelman, "The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein", 64 U Chi L Rev 57 at 61 (1997).

63 650 A2d 757 at 761, 772-773 (NJ 1994).

all purposes, to make them a magnet for all people, not just shoppers. The hope is that once there they will spend. The certainty is that if they are not there they will not."[64]

The origins of a doctrine of reasonable access

Against this background many jurisdictions have nowadays come to recognise it as extraordinary that a venerable common law doctrine of possessory control, once invoked to uphold the individual's immunity from state intrusion into his home and his personal affairs, should now be employed to support an unconstrained corporate power arbitrarily to exclude ordinary citizens from such "quasi-public"[65] areas as the common parts of a privately owned shopping mall or civic commercial complex.[66] Moreover, public law developments during the past three decades have done much to underscore our sharply lowered levels of tolerance for the brute exercise of unaccountable power and to induce certain expectations of rationality across wide ranges of decision-making. Can it therefore really be the case today that the private owner of a shopping centre is legally empowered to exclude someone "simply for wearing a green hat or a paisley tie" or because he or she has "blond hair, or ... is from Pennsylvania"[67] or is ugly[68] or unsightly?[69] Is it really true that a mall security

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64 Other American courts have likewise emphasised the way in which the modern shopping mall is designed both to "encourage the public to linger and congregate" and to "serve as a gathering place and events center" (see *Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 851, 859 (AD 2 Dept 1985); *City of Jamestown v Beneda*, 477 NW2d 830 at 837-838 (ND 1991)). See also "Submissions to the Task Force on the Law Concerning Trespass to Publicly Used Property as it Affects Youth and Minorities", 35 Osgoode Hall LJ 819 at 820-821 (1997).

65 The term "quasi-public" is widely used, particularly in North America, to denote land which, although nominally subject to private ownership, has been so opened up to public use, through general or unrestricted invitation, that it can no longer be regarded as a purely private zone. The implied liberality of the invitation to the public has caused the land to lose its purely private quality and become instead "private property having an essential public character" (*R v Layton* (1988) 38 CCC (3d) 550 at 568). See also *Central Hardware Co v National Labor Relations Board*, 407 US 539 at 547, 33 L Ed 2d 122 at 128 (1972) per Justice Powell; *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 73 per Chief Justice Laskin.

66 "The truth is ... that the corporate interest is in making money, not in protecting 'personal preferences' ... Corporate motives have no tinge of an individual's choice to associate only with one class of customers, ... to erect a wall of privacy around a business in the manner that one is erected around the home" (*Bell v Maryland*, 378 US 226 at 246, 265-266, 12 L Ed 2d 822 at 870, 880-881 (1964) per Justice Douglas).

67 *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 514, 518 (1986). Compare *Bellaney v Reilly* [1945] IR 542 at 554; and see *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 70 per Chief Justice Laskin ("an extravagant position"). See, however, *Drews v State*, 167 A2d 341 at 343 (1961), for the proposition that an amusement park could "properly exclude would-be patrons ... because they are ... unescorted women ... or because for some other reason [sic] they are undesirables in the eyes of the establishment" (aff'd 204 A2d 64 at 67 (1964)). See also *Collister v Hayman*, 76 NE 20 at 21 (1905).

68 For disapproving reference to "an 'ugly' rule" of exclusion from a library, see *Kreimer v Bureau of Police for Town of Morristown*, 765 F Supp 181 at 194 (DNJ 1991).

69 In May 1997 Miss Eilene Kadden, an overweight American wearing leggings which had been purchased in Harrods of London, claimed to have been thrown out of Harrods for contravention of the store's dress code, an allegation which she later construed as a form of "sizeism" (See *Times*, 21 May 1997 (p. 1) and 15 December 1997 (p. 5)). She is reportedly suing Harrods, motivated by the belief that it "is appalling

guard can extrude individuals selectively,[70] capriciously, or without a showing of any kind of reason at all? Have we reached the stage where a form of privatised police power[71] -- ever more common in the modern context[72] -- is unchallengeable? Does the sight of *any* uniformed official nowadays mandate unquestioning compliance with *any* order however irrational? Such might be thought a dangerous precedent to embed within the collective subconscious.

It is, of course, at this point that the exercise of supposed rights of property begins markedly to impact upon the practical recognition of those critical, but fragile, social values which are summed up in irreducible notions of fairness and respect for human dignity. The legitimate expectation of reasoned communication -- as distinct from a mere liability to be acted upon[73] -- increasingly provides a core element in modern prescriptions for fair treatment of one's fellow citizens.[74] In accordance with this Kantian or dignitarian view,[75]

[Harrods] feels it can pick and choose its customers". Miss Kadden has obviously become conversant with relevant areas of legal discourse, her words closely echoing those famously used by Justice Douglas in *Bell v Maryland*, 378 US 226 at 254-255, 12 L Ed 2d 822 at 874 (1964) ("[W]hy should Hooper Food Co, Inc, or Peoples Drug Stores -- or any other establishment that dispenses food or medicines -- stand on a higher, more sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers?")

70 Ouster may, of course, take a less obvious form as, for instance, where, on threat of ejection, a mall imposes excessively onerous controls or conditions on certain visitors. See eg *Vaughn v NSBF Management, Inc*, 1996 US Dist LEXIS 6228 (1 April 1996), aff'd 1997 US App LEXIS 14496, where mall security guards professed to have a policy of breaking up groups of youths numbering more than four, although a "tester" group of seven Caucasians hired by the aggrieved plaintiffs later proceeded through the mall unmolested. (During an eight-month period, the mall expelled 1887 individuals of whom 1592 were African-Americans.)

71 It has been pointed out that the status of modern private security guards as "agents of property" allows them to exercise "a degree of legal authority which in practice far exceeds that of their counterparts in the public police" (Shearing and Stenning, "Private Security: Implications for Social Control", 30 Social Problems 493 at 497 (1982-83)). See also Queensland's South Bank Corporation Act 1989 (as amended), s. 37D, which empowers private security officers in Brisbane's South Bank Parkland (the site of Expo 1988) to stop persons and require them to state, on pain of criminal liability, their name and address (and demand further proof thereof).

72 For an account of the growing concern aroused by private policing, see "Private Police and Personal Privacy: Who's Guarding the Guards?", 40 NYL Sch L Rev 225 (1995-96). See also *Northcott v Johnston* (1982) 18 ACWS 2d 238; *R v Smith* (1996) 30 WCB 2d 345. American courts have generally resisted -- but have not altogether excluded -- the possibility that privately employed security officers in a shopping mall are instruments or agents of the state and may therefore be subject to constitutional control (see eg *US v Shahid*, 117 F3d 322 at 327-328 (7th Cir 1997), where the availability of constitutional protection was envisaged if the mall security personnel operate as the "de facto or de jure law enforcement agency" for the mall).

73 See Fuller, *The Morality of Law* (New Haven and London 1964), pp. 162-163, 186. See also *Feiner v New York*, 340 US 315 at 327, 95 L Ed 295 at 304 (1951) per Justice Black, dissenting ("at least where time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society").

74 See eg *R v Ministry of Defence, ex parte Murray* (1997) *Times*, 17 December.

75 See eg Pincoffs, "Due Process, Fraternity, and a Kantian Injunction", in Pennock and Chapman (ed), *Due Process* (Nomos XVIII, New York 1977), p. 172. See also T.R.S. Allan, "Procedural Fairness and the Duty of Respect", (1998) 18 OJLS 497.

it is suggested today that "rights to interchange" are intrinsic to a proper recognition of a person's humanity[76] just as the interposition of explanatory procedures conduces ultimately to the fairness of all decisional processes involving an individual's welfare or liberty. Admittedly such assertions usually arise in the context of public administrative law, but only because it is still widely overlooked that there now exists a vast realm of "quasi-public" administrative law which, equally pertinently, comprises the discretionary issuance of permissions, franchises, controls and directives in relation to matters once deemed to be areas of exclusively private law. Of the myriad actors caught up daily in this world of "quasi-public" administration the uniformed security patrol in the shopping mall stands as but one representative.[77]

The modern ferment of the common law with regard to "quasi-public" locations is generally regarded as having been instigated in 1975 by the vigorous dissent of Bora Laskin in *Harrison v Carswell*.[78] Here the Chief Justice of Canada voiced incredulity that "[a]n ancient legal concept, trespass, [should be] urged ... in all its pristine force by a shopping centre owner in respect of areas of the shopping centre which have been opened by him to public use".[79] In Laskin's view,

> "To say in such circumstances that the shopping centre owner may, at his whim, order any member of the public out of the shopping centre on penalty of liability for trespass if he refuses to leave, does not make sense if there is no proper reason in that member's conduct or activity to justify the order to leave."

Questioning whether the common law can today be "so devoid of reason as to tolerate this kind of whimsy", the Chief Justice indicated that the shopping mall issue pointed to the need to "search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation."[80] Laskin's dissent in *Harrison v Carswell* was destined, within the common law world, to open up a more general debate over the limits of property in quasi-public premises.

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76 See eg Tribe, *American Constitutional Law* (2nd edn, Foundation Press, New York, 1988), p. 666 ("rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be consulted about what is done with one").

77 The capricious exercise of discretion by a mall security guard produces a situation not far distant from that once described by Justice Black as government not by law but rather by "the moment-to-moment opinions of a policeman on his beat" (*Cox v Louisiana*, 379 US 536 at 559 at 579, 13 L Ed 2d 487 at 501 (1965)). See also *Shuttlesworth v Birmingham*, 382 US 87 at 90, 15 L Ed 2d 176 at 179 (1965).

78 (1975) 62 DLR (3d) 68 (Supreme Court of Canada). Justices Spence and Beetz joined in Chief Justice Laskin's dissent. The headnote in *Harrison v Carswell*, but curiously no other part of the report, uses the terminology of "quasi-public" character in relation to the shopping centre.

79 (1975) 62 DLR (3d) 68 at 73.

80 (1975) 62 DLR (3d) 68 at 74.

In the context of such premises, the way was prepared for a rejection of the authority of *Wood v Leadbitter*[81] in favour of a more restrictive view of the right to exclude from premises affected with a public interest.

Virtually only in England has Chief Justice Laskin's plea for the revision of trespass doctrine gone completely unanswered.[82] The non-interventionist approach of the Court of Appeal in *CIN Properties Ltd v Rawlins* contrasts remarkably with the legal stance now adopted in many other parts of the common law world with respect to quasi-public property. Elsewhere it has been increasingly acknowledged that entry to and exclusion from quasi-public premises must alike be governed by an overarching doctrine of reasonableness.[83]

A partial defence of the "arbitrary exclusion rule"

The facility of eviction without good cause is sometimes supported, of course, by reference to arguments of social policy and commercial utility. There is a view that only the widest formulation of the common law power can relieve the landowner not only from the necessity of affirmative showings of sound justification in every case[84] but also from the daily burden of instant ad hoc decision-making under pressured conditions[85] and from the constant possibility of costly law suits by way of review.[86] Only a broadly framed and unchallengeable power of exclusion, it is said, can enable the owner of quasi-public land decisively to deny a

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81 See, for instance, the way in which some courts in the United States have simply accepted that the old *Wood v Leadbitter* approach is now a curiosity of legal history, having been overtaken by the steady evolution of the common law (*Uston v Resorts International Hotel Inc*, 445 A2d 370 at 374 (NJ 1982); *Marzocca v Ferrone*, 453 A2d 228 at 232 (NJ Super AD 1982); *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 519 (1986)).

82 Change in Canada came soon, partly (although not wholly) in response to the enactment of the Canadian Charter of Rights and Freedoms (see *R v Layton* (1988) 38 CCC (3d) 550 at 570; *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385).

83 In *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 at 134J, of course, the Court of Appeal conceded that the landowner's power of arbitrary exclusion was subject to any countervailing claim of discriminatory conduct which might arise under the Race Relations Act 1976.

84 "[P]roprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so. What the proprietor of a race track does not want to have to do is prove or explain that his reason for exclusion is a just reason" (*Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 517 (1986)). See also *Nation v Apache Greyhound Park, Inc*, 579 P2d 580 at 582 (1978).

85 See *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 792-793 (NJ 1994) per Justice Garibaldi (dissenting).

86 See *Nation v Apache Greyhound Park, Inc*, 579 P2d 580 at 582 (1978).

forum for the expression of offensive and anti-social viewpoints or lifestyles (for instance, Neo-Nazi, Ku Klux Klan, National Front or other extremist sectional interests).[87]

It is also frequently argued that an essential feature of the smooth ordering of places of public resort is an untrammelled facility to exclude visitors on the sole ground that they look like trouble.[88] The subjectively perceived threat of crime or other disturbance is alleged to override any need for objectively rational justification of peremptory ouster. Indeed, the exigency of situational crime prevention in a lawless era is thought by some to endorse the ultimate wisdom of the received common law trespass rule. It is suggested, accordingly, that intensive access control, entry screening and proactive surveillance and management[89] often provide key techniques of situational prevention,[90] even though such exclusion strategies -- particularly if based upon a theory of pre-emptive intervention[91] -- effectively target not actual or suspected code violators but rather those who merely fit certain predetermined risk profiles.[92] On this view the over-zealous sanitisation of quasi-public space may simply represent the price which the community must pay today for the achievement of greater peace, security and stability of enjoyment.[93]

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87 *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 792-793 (NJ 1994) per Justice Garibaldi.

88 "The proprietor wants to be able to keep someone off his private property even if they only look like a mobster" (*Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 517 (1986)). See also *Meisner v Detroit, Belle Isle & Windsor Ferry Co*, 118 NW 14 at 15 (1908); *Tropical Park, Inc v Jock*, 374 So2d 639 at 640 (Fla Dist Ct App 1979). Compare, however, *Kreimer v Bureau of Police for Town of Morristown*, 765 F Supp 181 at 183 (DNJ 1991) ("enforcement [of library exclusion policy] cannot be left to the whim or personal vagaries of the persons in charge ... [W]e cannot -- we dare not -- cross the threshold of barring persons from entering because of how they appear based upon the unfettered discretion of another").

89 The panopticon-like layout of many shopping malls and the visible presence of video surveillance, when coupled with the insidious commodification of consumer comfort, creates an "imagery [which] treads a thin line between invitation and exclusion" (see Crawford, "The World in a Shopping Mall", in Sorkin (ed), *Variations on a Theme Park: The New American City and the End of Public Space* (Hill and Wang, New York 1992), p. 27).

90 See eg Clarke, "Situational Crime Prevention", in Tonry and Farrington (ed), *Building a Safer Society. Crime and Justice: A Review of Research* (University of Chicago Press 1995), p. 91; White, "No-Go in the Fortress City: Young People, Inequality and Space", 14(1) Urban Policy and Research 37 at 42 (1996).

91 It has even been suggested that the playing of classical music in quasi-public places deters the presence of trouble-prone youths, thereby reducing vandalism and rendering such locations safer, see Grabosky, "Fear of Crime and Fear Reduction Strategies", *Trends & Issues in Crime and Criminal Justice*, No. 44 (Australian Institute of Criminology 1995), p 4. See also White, 14(1) Urban Policy and Research 37 at 42 (1996).

92 "[P]rivate security defines deviance in instrumental rather than moral terms ... and sanctions are applied more often against those who create opportunities for loss rather than those who capitalize on the opportunity -- the traditional offenders. Thus, the reach of social control has been extended" (Shearing and Stenning, "Private Security: Implications for Social Control", 30 Social Problems 493 at 503-504 (1982-83)). For an attempted ethical defence of preventive strategies, see Felson and Clarke, "The Ethics of Situational Crime Prevention", in Newman, Clarke and Shoham (ed), *Rational Choice and Situational Crime Prevention: Theoretical Foundations* (Dartmouth 1997), p. 197.

93 For an argument that markets are self-regulating and that, by tipping commercial advantage in favour of non-discriminating competitors, market forces will eventually operate to preclude any outrageous excesses

Ultimately, however, the defence of the landowner's power of arbitrary exclusion comes to rest upon the idea that only the absolute form of the rule sufficiently vindicates the institution of private ownership. Any other perspective, it is alleged, derogates from the *plenum ius* of ownership by threatening to "confiscate a part of an owner's private property and give its use" to strangers without payment of compensation.[94] Whatever the obligation of the state to advance the best interests of its citizens, "it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation."[95]

IV. The human rights implications of the "arbitrary exclusion rule"

Notwithstanding the foregoing considerations, it is no mere coincidence that common law jurisdictions the world over have begun to reassess the applicability of strict trespassory concepts to many forms of land ownership. The catalyst in current developments has been the fresh realisation that property rights and personal rights coalesce in some degree,[96] and that the scope of an owner's "property" even in such resources as land is intrinsically curtailed by limitations of a broadly moral character.[97]

The public interest in private property

Private property is never truly private[98]; it is rarely, if ever, truly absolute.[99] During the last thirty years a new social primacy has been accorded to the values which underlie various claims of civil liberty and human right;

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of discretionary power, see *Western Pennsylvania Socialist Workers 1982 Campaign v Connecticut General Life Insurance Co*, 515 A2d 1331 at 1339 (1986); *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 518 (1986). In the latter case the court did concede, however, that "the reality of an imperfect market" already allows "numerous consumer depredations*".*

94 See *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc*, 391 US 308 at 332, 20 L Ed 2d 603 at 620 (1968) per Justice Black (dissenting). Absent an unchallengeable power of exclusion, the "private property owner may be forced to subsidize causes which are highly controversial, morally or socially offensive, explosive, or repugnant to the owner, by having to provide their proponents with a rent-free forum. The obvious result is that a number of the property owner's rights are trammeled upon or disregarded" (*Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 863 (AD 2 Dept 1985) per Justice Niehoff (dissenting)).

95 *Marsh v Alabama*, 326 US 501 at 515, 90 L Ed 265 at 273 (1946) per Justice Reed (dissenting).

96 See eg *Lynch* v *Household Finance Corp*, 405 US 538 at 552, 31 L Ed 2d 424 at 434-435 (1972), where Justice Stewart observed in the United States Supreme Court that "the dichotomy between personal liberties and property rights is a false one."

97 Gray, "Property in Thin Air", (1991) 50 Cambridge LJ 252 at 297-299.

98 Gray, (1991) 50 Cambridge LJ 252 at 303-304.

99 "A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others ... [T]he maxim [expresses] the inevitable

and it has always been one of the fundamental features of a civilised society that exclusory claims of property stop where the infringement of more basic human freedoms begins.[100] The limits of property, Justice Murphy once said, "are the interfaces between accepted and unaccepted social claims"[101]; and for this reason the law of property has always said much more than is commonly supposed about the subject of human rights.

In the present context it is likely that the "arbitrary exclusion rule", as applied indiscriminately to land ownership in English law, can be sustained only at the cost of intolerable damage to a range of more highly rated human interests and values. Foremost amongst these threatened concerns are important freedoms of association, assembly and movement. Inextricably linked with such freedoms is freedom of expression,[102] which in its wider connotations embraces not only verbal activity but also many of the symbolic or nonverbal communications[103] which are intrinsic to perceptions of individuality, personhood and self-worth.[104] Freedom of expression, particularly where it involves leafletting, solicitation and other forms of democratic consultation, becomes an integral component of free movement and assembly. Expressive freedom is

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proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another" (*State v Shack*, 277 A2d 369 at 373 (1971)). See also *Marsh v Alabama*, 326 US 501 at 506, 90 L Ed 265 at 268 (1946) per Justice Black.

100 The history of slavery law provides ample demonstration of this last proposition. See *Somerset v Stewart* (1772) Lofft 1 at 19, 98 ER 499 at 510 per Lord Mansfield ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political ... it's so odious, that nothing can be suffered to support it ... therefore the black must be discharged").

101 *Dorman v Rodgers* (1982) 148 CLR 365 at 372.

102 Canadian courts, for instance, regard freedom of assembly as "speech in action" and accordingly subject freedoms of speech and assembly to the same analysis (see *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 745). For similar recognition of the organic link between freedoms of communication, association, assembly and movement, see *NAACP v Alabama,* 357 US 449 at 460, 2 L Ed 2d 1488 at 1498 per Justice Harlan (1958); *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 at 91 per Toohey J, 115 per Gaudron J; *Dale v Boy Scouts of America*, 706 A2d 270 at 285 (1998).

103 See the broad interpretation accorded speech in the United States, where, for instance, even the act of begging "has a message associated with it" (*Loper v New York City Police Department*, 802 F Supp 1029 at 1037, 1042 (1992)). In the same case the United States Court of Appeals for the Second Circuit confirmed that, even in the absence of actual speech, "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance" (999 F2d 699 at 704 (2d Cir 1993)).

104 See eg *Brown v Louisiana*, 383 US 131 at 141-142, 15 L Ed 2d 637 at 645 (1966). Freedom of expression may thus extend to the display or celebration of a particular lifestyle or cultural, religious or political affiliation. According to Justice Tobriner of the Supreme Court of California, this freedom would be violated where, for instance, a shopping centre attempted to "exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations" (*In re Cox*, 474 P2d 992 at 1000 (1970)). Freedom of speech equally covers "nondisruptive speech" such as that comprised in the wearing of a T-shirt or button which contains a political message (*Board of Commissioners of the City of Los Angeles v Jews For Jesus, Inc*, 482 US 569 at 576, 96 L Ed 2d 500 at 508 (1987) per Justice O'Connor). Compare *Roulette v City of Seattle*, 78 F3d 1425 at 1427 (1996); *City of Seattle v McConahy*, 937 P2d 1133 at 1139-1142 (Wash App Div 1 1997).

ultimately indistinguishable from freedom of association, for together they comprise the liberty to be oneself in constructive interaction with a self-selected community of one's peers.

It cannot, of course, be argued that *all* privately owned land must therefore be made available for the effective exercise of a range of human freedoms.[105] Nevertheless the record of comparative law in this area increasingly points to an evolving search for the critical balance to be maintained between claims of private property and the assertion of fundamental human rights. In the present context the vital question seems to be that articulated by Justice Black in the Supreme Court of the United States[106]: "Under what circumstances can private property be treated as though it were public?" Justice Black had, in fact, anticipated this inquiry some two decades earlier when, in a much quoted dictum, he expressed the view that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it".[107] Accordingly, in a number of contexts, American courts have moved steadily towards the view that "[w]here an organisation is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare related to its public characteristics."[108] The challenge is always to delineate more clearly that portion of the field of private ownership where access rights have become so integral to the realisation of human freedom and dignity that the absoluteness of the owner's regulatory prerogative over land must finally give way.

Indeed much recent North American and Australasian jurisprudence has come to acknowledge the delimiting impact exerted on private ownership by notions of public interest.[109] As the Supreme Court of New Jersey observed in a seminal pronouncement of 1971, "[p]roperty rights serve human values. They are recognised to that end, and are limited by it."[110] The same Court went on to confirm that "an owner must

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105 As graphically expressed in *Armes v City of Philadelphia*, 706 F Supp 1156 at 1164 (ED Pa 1989), "[t]he right to exclude others is a fundamental element of private property ownership, and the First Amendment does not create an absolute right to trespass." See also *Brown v Louisiana*, 383 US 131 at 166, 15 L Ed 2d 637 at 659 (1966).

106 *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*, 391 US 308 at 332, 20 L Ed 2d 603 at 620 (1968).

107 *Marsh v Alabama*, 326 US 501 at 506, 90 L Ed 265 at 268 (1946). See also *In re Cox*, 474 P2d 992 at 999 (1970). For the influence which this passage has exerted on Canadian jurisprudence, see *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996).

108 *Matthews v Bay Head Improvement Association*, 471 A2d 355 at 366 (NJ 1984). See also *Doe v Bridgeton Hospital Association, Inc*, 366 A2d 641 at 646 (1976), cert den 433 US 914, 53 L Ed 2d 1100 (1977).

109 See eg *Dalury v S-K-I, Ltd*, 670 A2d 795 at 799-800 (Vt 1995) ("[r]eliance on the private nature of defendants' property would be inconsistent with societal expectations about privately owned facilities that are open to the general public ... Defendants' facility may be privately owned, but that characteristic no longer overcomes a myriad of legitimate public interests").

110 *State v Shack*, 277 A2d 369 at 372 (1971). Compare *Davis v Johnson* [1979] AC 264 at 274F per Lord Denning MR ("Social justice requires that personal rights should, in a proper case, be given priority over rights of property").

expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies." In this respect developments in the common law world have begun to mirror the deeper sensitivity shown by European law[111] (and particularly by German law) towards the social limitations of ownership. In the words enshrined in Article 14(2) of the German *Grundgesetz*, "[p]roperty imposes duties. Its use should also serve the welfare of the community".[112]

The personal dimension of public access issues

A certain poignancy is nowadays imparted to public access issues by the way in which large areas of quasi-public property have begun to serve as a meeting-place for the unemployed, the disadvantaged and the discouraged of society. This aspect has recently been intensified in the United Kingdom by the widespread closure of government-funded medical and therapeutic institutions and their replacement by less effective policies of "care in the community".[113] Ironically, there is a sense in which Thatcher's "care in the community" strategy can be made to work only if down-town shopping malls and other civic facilities are caused to remain open to all comers as a haven or retreat for the destitute, the elderly, the disabled and the depressed.

Nor is it any accident that the circumstances which underlie the *Rawlins/Anderson* case coincide with a spate of litigation in the United States and elsewhere whose scarcely concealed objective is to "sweep [the city's] commercial zones clear of homeless people and other social pariahs".[114] The "arbitrary exclusion rule" and the status of unconsented presence on land have thus recently become the key issues in determining whether indigents are liable to be peremptorily evicted from such locations as public libraries,[115] public parks,[116] railway stations[117] and city sidewalks.[118] Still more pressing is the question whether the

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111 See eg the insistence in the European Court of Justice that the right to property is not "an absolute prerogative in Community law" (*O'Dwyer v Council of the European Union* (Joined Cases T-466/93, T-473/93 and T-477/93 [1995] ECR II-2071 at 2109 (para 93)), and that the fundamental rights recognised by the Court "are not absolute ... but must be considered in relation to their social function" (*Wachauf v Federal Republic of Germany* (Case 5/88) [1989] ECR 2609 at 2639 (para 18)). See also *R v Chief Constable, ex parte International Trader's Ferry Ltd* [1998] QB 477 at 495G-496B.

112 See Leisner, "Sozialbindung des Eigentums nach privatem und öffentlichem Recht", NJW 1975, 233; van der Walt, "The Fragmentation of Land Rights", (1992) 8 SAJHR 431 at 442.

113 For reference in Canada to the similar effects of policies of deinstitutionalisation, see also "Submissions to the Task Force on the Law Concerning Trespass to Publicly Used Property as it Affects Youth and Minorities", 35 Osgoode Hall LJ 819 at 821 (1997).

114 *Roulette v City of Seattle*, 78 F3d 1425 at 1435 (1996), 97 F3d 300 at 311 (9th Cir 1996) per Pregerson J (dissenting).

115 *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 (3rd Cir 1992).

116 *Pottinger v City of Miami*, 810 F Supp 1551 (SD Fla 1992).

117 *Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 (SDNY 1995).

unconsented presence of the homeless[119] is punishable under anti-loitering ordinances.[120] Not every court has scrupulously disregarded "a perceived public interest in avoiding the aesthetic discomfort of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty."[121]

It is perhaps inevitable that persons such as the homeless, the unemployed and the single issue protestor should be received unenthusiastically by the private owners of the shopping malls in which they may choose to spend a substantial part of their day. Yet arbitrary exclusion from the precincts of civic commercial complexes -- a practice which has become increasingly common up and down the country -- may mean that sizeable portions of down-town areas are being effectively converted into no-go areas for certain classes of individual.[122] Nothing, of course, is quite so alienating as the perception that one is not welcome; nothing quite so calculated to induce a sense of demoralised disempowerment as groundless eviction from a

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118 *Roulette v City of Seattle*, 78 F3d 1425 (1996), 97 F3d 300 (9th Cir 1996). See Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning", 105 Yale LJ 1165 (1996).

119 Quite different issues may be raised, at least in the view of some, if the person accused of loitering is a convicted sex offender (see *R v Heywood* [1994] 3 SCR 761 (Supreme Court of Canada)) or a member of a "criminal street gang" (see *City of Chicago v Morales*, 687 NE2d 53 (1997)). See also *Nunez v City of San Diego*, 114 F3d 935 (1997).

120 See *Pottinger v City of Miami*, 810 F Supp 1551 at 1580-1581 (SD Fla 1992); *Berkeley Community Health Project v City of Berkeley*, 902 F Supp 1084 at 1092-1095 (ND Cal 1995). Compare *Joyce v City and County of San Francisco*, 846 F Supp 843 (ND Cal 1994); *Tobe v City of Santa Ana*, 892 P2d 1145 (Cal 1995); *State v Sturch*, 921 P2d 1170 (Hawaii App 1996); *Davison v City of Tucson*, 924 F Supp 989 (D Ariz 1996); *City of Seattle v McConahy*, 937 P2d 1133 (Wash App Div 1 1997); *Los Angeles Alliance For Survival v City of Los Angeles*, 987 F Supp 819 (1997). American courts have begun to construct a jurisprudence which distinguishes between "passive" begging and "aggressive" begging which may coerce, threaten or intimidate a passerby (see also *Ledford v State*, 652 So2d 1254 at 1256-1257 (Fla App 2 Dist 1995)).

121 *Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 at 1066 (SDNY 1995); *Roulette v City of Seattle*, 97 F3d 300 at 309 (9th Cir 1996). See also *Pottinger v City of Miami*, 810 F Supp 1551 at 1581 (SD Fla 1992).

122 See White, "No-Go in the Fortress City: Young People, Inequality and Space", 14(1) Urban Policy and Research 37 (1996).

supposed public or communal facility.[123] In the modern urban context such segregation of the affluent and the indigent or agitator has become both morally offensive and socially quite dangerous.[124]

For Blackstone two centuries ago, personal liberty consisted in the "power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may suggest; without imprisonment or restraint, unless by due course of law."[125] Nowadays freedom of movement, once instinctively understood in terms of inter-state or overseas travel, is again beginning to assume a new, more municipal, dimension[126]; and such freedom of movement is, of course, significantly limited by the process of arbitrary exclusion from quasi-public places.[127] Excessive curtailment of this freedom threatens to controvert the instinctive impulse that "the right to move freely about one's neighborhood or town ... is indeed 'implicit in the concept of ordered liberty'."[128] Above all, the uncompromising enforcement of trespass law in quasi-public areas violates that most fundamental of rights, so often left unarticulated because so obvious, "the right

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123 The personal psychological impact of arbitrary and unwarranted exclusion from commercial premises has been vividly described as "so deeply painful and assaultive as to constitute something I call 'spirit-murder'" (see Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism", 42 U Miami L Rev 127 at 129 (1987)). Compare, however, *People ex rel Gallo v Acuna*, 929 P2d 596 at 623, 633 (Cal 1997), where the Supreme Court of California, albeit prompted by an extraordinary degree of social and subcultural anomie, reached what the dissenting Justice Mosk termed a decision to "permit our cities to close off entire neighbourhoods to Latino youths", even when such youths had "not been convicted of a single crime."

124 "Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights" (*Edwards v California*, 314 US 160 at 185, 86 L Ed 119 at 131 (1941) per Justice Jackson). See also Gray, (1994) 47(2) Current Legal Problems 157 at 207-214.

125 *Bl. Comm*., Vol. I, p. 130.

126 American courts have insisted that "the right to intrastate travel (which includes intramunicipal travel) is a basic human right ... implicit in the concept of a democratic society and ... one of the attributes of personal liberty under common law" (*Tobe v City of Santa Ana*, 892 P2d 1145 at 1163 (Cal 1995)). See also *R v Heywood* [1994] 3 SCR 761 at 794-796 (Supreme Court of Canada); *City of Chicago v Morales*, 687 NE2d 53 at 65 (Supreme Court of Illinois 1997).

127 See *Pottinger v City of Miami*, 810 F Supp 1551 at 1580-1581 (SD Fla 1992) ("Like the anti-sleeping ordinances, enforcement of the challenged ordinances against homeless individuals significantly burdens their freedom of movement. It has the effect of preventing homeless people from coming into the City"). In *Bell v Maryland*, 378 US 226 at 293, 12 L Ed 2d 822 at 837 (1964), Justice Goldberg considered the right to move freely to be "now more than ever inextricably linked with the right of the citizen to be accepted and to be treated equally in places of public accommodation."

128 *Lutz v City of New York*, 899 F2d 255 at 268 (3d Cir 1990). See also *People ex rel Gallo v Acuna*, 929 P2d 596 at 618 (Cal 1997).

to be let alone"[129] -- an entitlement once described by Justice Brandeis as "the most comprehensive of rights and the right most valued by civilized men."[130]

The primacy of human dignity

In the end the damage wrought by unqualified applications of trespass law is the incalculable injury inflicted upon human dignity.[131] This point is well taken in a string of American court decisions during the 1970s concerning the entitlement of attorneys, welfare workers and other assistance organisations to enter and offer advice within employer-owned camps for migrant farmworkers.[132] In overruling the property owners' attempts to invoke trespass law in denying access to such visitors, the courts stressed considerations of human dignity as the keynote of their decisions. In *State v Shack*[133] the Supreme Court of New Jersey held that

> "the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties."[134]

Likewise, in *Folgueras v Hassle*,[135] a court in Michigan ruled that

> "[a]s a matter of property law, the ownership of a labor camp does not entail the right to cut off the fundamental rights of those who live in the camp ... [T]he property rights of the camp owner do not include the right to deny access to his camps to guests or persons working for

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129 Thus the right to travel "includes the right to stay as well as the right to go" (*Tobe v City of Santa Ana*, 892 P2d 1145 at 1180 per Justice Mosk (Cal 1995)), the "freedom to enter and abide" (*Dunn v Blumstein*, 405 US 330 at 338, 31 L Ed 2d 274 at 282 (1972)).

130 *Olmstead v United States*, 277 US 438 at 478, 72 L Ed 944 at 956 (1928). See *Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 at 1065 (SDNY 1995).

131 See *Furman v Georgia*, 408 US 238 at 296, 33 L Ed 2d 346 at 382 (1972) per Justice Brennan ("the dignity of the individual is the supreme value").

132 *State v Shack*, 277 A2d 369 (1971); *Folgueras v Hassle*, 331 F Supp 615 (1971); *Franceschina v Morgan*, 346 F Supp 833 (1972). See also *State v DeCoster*, 653 A2d 891 (Me 1995).

133 277 A2d 369 at 374-375 (1971).

134 "Underlying that conclusion was recognition of the fundamental right of the farmworker to live with dignity" (*Vasquez v Glassboro Service Association, Inc*, 415 A2d 1156 at 1164 (NJ 1980)).

135 331 F Supp 615 at 623-624 (1971).

> any governmental or private agency whose primary objective is the health, welfare or dignity of the migrant workers as human beings."[136]

Recognising that "[p]roperty rights are not absolute", the court pointed emphatically to the "fundamental underlying principle ... that real property ownership does not vest the owner with dominion over the lives of those people living on his property."[137]

Here again there is a transatlantic echo of the principle, given such prominence in Article 1(1) of the German *Grundgesetz*, that "human dignity is inviolable". Indeed so pervasive is the German concern with the dignity of the individual that the German Constitutional Court has construed the property provisions of the *Grundgesetz* as providing "not primarily a material but rather a personal guarantee."[138] On this analysis, property is "an elementary constitutional right which is closely related to the guarantee of personal liberty."[139] A similar echo has been heard even more recently in an important line of Canadian decisions on the scope of the freedoms of expression and assembly safeguarded by the Charter of Rights and Freedoms. The Supreme Court of Canada has rationalised its protection of these rights as being integrally linked with the "pursuit of truth, participation in the community and the conditions necessary for individual fulfilment and human flourishing."[140] According to Justice McLachlin, the Court can properly recognise "the role of expression in maximising human potential and happiness" only through "the encouragement of a tolerant and welcoming environment which promotes diversity in forms of self-fulfilment and human flourishing".[141]

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136 "Nor can ownership alone give him the right to censor the associations, information and friendships of the migrants living in his camps." See also *Franceschina v Morgan*, 346 F Supp 833 at 839 (1972).

137 "The migrants who travel across the country to work in the grower's fields and live on the grower's property are clothed with their full bundle of rights as citizens and human beings. They may not be held in servitude or peonage, and they are not serfs. They are, however, citizens of the United States and tenants. As such they are entitled to the kinds of communications, associations, and friendships guaranteed to all citizens, and secured by the Constitution. The owner's property rights do not divest the migrants of these rights" (331 F Supp 615 at 625).

138 24 BVerfGE 367 at 400 (1968) (*Hamburg Flood Control* Case).

139 "Within the general system of constitutional rights its function is to assure its holder autonomy in the economic sphere and thereby to enable him to fashion a self-determining existence" (24 BVerfGE 367 at 389).

140 *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 457*d* per Justice McLachlin. See also *Irwin Toy Ltd v Quebec (Attorney-General)* (1989) 54 DLR 577 at 612 per Chief Justice Dickson; *Ramsden v Peterborough (City)* (1994) 106 DLR (4th) 233 at 245 per Justice Iacobucci.

141 *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 457*h*. See also *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 704.

Excessive concentrations of power

A strong theme running through the contemporary common law is the idea that, in certain circumstances, unqualified applications of the "arbitrary exclusion rule" effectively endorse a socially unacceptable concentration of power in the landowner.[142] Although such a perception clearly necessitates, in each case, a judgment of degree, it is increasingly acknowledged that "[a]ccumulations of economic power by nongovernmental entities can, by use of that power, pose as great a threat to individual liberty as can government."[143] As Justice Murphy often pointed out in the High Court of Australia, "[t]he distinction between public power and private power is not clear-cut and one may shade into the other".[144] It is at precisely this blurred borderline that the exercise of power calls for particularly vigilant scrutiny lest it become unreasonable and oppressive. In the words of Murphy,

> "When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide ... and with due regard to the persons affected by its exercise".[145]

(a) Abuse of right

The critical question concerns the degree to which the power of property should be allowed to constrain the exercise of fundamental human freedoms. As Chief Justice Laskin indicated in *Harrison v Carswell*,[146] property powers which excessively curtail or even destroy the basic liberties of the citizen are probably best classified in terms of *abuse of right*.

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142 For one of the more famous curtailments of over-concentrated power conferred by land ownership, see *Hawaii Housing Authority v Midkiff*, 467 US 229 at 241-242, 81 L Ed 2d 186 at 198 (1984), where the United States Supreme Court declared that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers ... " In *Midkiff* the Court saw no reason to overturn state legislation which had sought to remedy a notorious land oligopoly in Hawaii by redistributing fee simple titles more widely throughout that community. The former over-concentration of freehold ownership had "skewed the land market" within the state and was quite properly the subject of corrective intervention (467 US 229 at 244, 81 L Ed 2d 186 at 199). See also *Richardson v City and Council of Honolulu*, 124 F3d 1150 at 1156-1157 (9th Cir 1997).

143 *Jacobs v Major*, 407 NW2d 832 at 853 (Wis 1987) per Bablitch J (dissenting).

144 *Gerhardy v Brown* (1985) 159 CLR 70 at 107.

145 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 275.

146 (1975) 62 DLR (3d) 68 at 74-75 (Chief Justice Laskin thought the civil law doctrine of abusive exercise of rights "an apt analogue" for the extremes of exclusory power claimed by a shopping centre).

Resounding through the comparative law is the stern admonition -- uttered by Justice Frankfurter in *Marsh v Alabama*[147] -- that "[t]itle to property as defined by State law controls property relations; it cannot control issues of civil liberties". Thus courts in the United States have frequently voiced the argument that the "mere naked title" of private property owners should not be permitted to foreclose the exercise of civil rights by members of the public.[148] In the well known phrase of Justice Roberts,[149] a person "is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Whilst emphasising that much may turn on the scale of the premises covered by the owner's property right,[150] American courts have been keen to assert that titular ownership does not inevitably truncate the fundamental liberties of strangers.[151] Freedoms of religion, speech, press and assembly do not, for instance, "become suspended on the threshold of an agricultural labor camp."[152]

Equally the citizen's basic rights of free association and expression are not left behind or abandoned outside the precincts of the modern shopping mall or civic commercial complex.[153] In *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*,[154] the private owner of a shopping centre had asserted an arbitrary control over the use of the common parts of its premises. A District Court in Massachusetts was quick to point out that, by so doing, the owner had ceased to act "as a private contractor" and had assumed a "function ... more akin to that of a policeman".[155] Indeed the court declared that the owner's arrogation of the power to decide who could enter the premises went "even beyond that of a policeman". By making policy decisions in this regard, the owner had adopted a "role ... more like that of a

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147 326 US 501 at 511, 90 L Ed 265 at 271 (1946).

148 See eg *In re Lane*, 79 Cal Rptr 729, 457 P2d 561 (1969); *Allred v Shawley*, 284 Cal Rptr 140 at 142 (Cal App 4 Dist 1991); *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 777 (NJ 1994). See also *Committee for the Commonwealth of Canada v Queen in Right of Canada* (1987) 36 DLR (4th) 501 at 510.

149 *Schneider v Irvington*, 308 US 147 at 163, 84 L Ed 155 at 166 (1939). See also *Lewis v Colorado Rockies Baseball Club, Ltd*, 941 P2d 266 at 278 (Colo 1997).

150 "The smaller the business, the more weight the owners' rights will have" (*Allred v Shawley*, 284 Cal Rptr 140 at 142 (1991)). See also *State v Guice*, 621 A2d 553 at 555 (NJ Super L 1993); *Rouse v City of Aurora*, 901 F Supp 1533 at 1536 (1995).

151 See eg *State v Shack*, 277 A2d 369 at 371-372, 374 (1971); *Folgueras v Hassle*, 331 F Supp 615 at 623 (1971); *Petersen v Talisman Sugar Corporation*, 478 F2d 73 at 81 (1973).

152 *Franceschina v Morgan*, 346 F Supp 833 at 839 (1972).

153 See eg *R v Layton* (1988) 38 CCC (3d) 550 at 568 ("the occupier cannot set a condition on its invitation whereby the invitees enter the mall with money in hand but must leave their Charter rights and freedoms outside the mall property").

154 745 F Supp 65 (D Mass 1990).

155 745 F Supp 65 at 71-72.

legislature".[156] For this reason, in combination with other compelling grounds, the court decided that the landowner had improperly obstructed access by members of the public who had sought to distribute leaflets within the premises.

(b) Differential access to civil rights

The exercise of uncontrolled regulatory discretion over large civic commercial centres may well be characterised as an over-concentration of power in the corporate monoliths which commonly hold title to these properties. In the *Rawlins/Anderson* case, for instance, it was strongly arguable that an excessive concentration of ownership rights had subverted fundamental liberties of association and expression -- liberties which, as already remarked, tend to merge in practical reality.[157] Moreover, as Justice L'Heureux-Dubé has indicated in the Supreme Court of Canada,[158] the consequence of leaving such power unchecked is the emergence of unacceptable inequalities in the enjoyment of civil rights. The stranglehold of arbitrary permission would mean, for example, that "only those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated), would be able to engage in free expression."[159] It is indeed arguable that, in the context of the European Convention on Human Rights, such differential access to essential freedoms constitutes a breach of the guarantee in Article 14 that the enjoyment of Convention rights and freedoms "shall be secured without discrimination on any ground such as ... property ... "

In extreme cases the peremptory denial of access may, for certain categories of citizen, substantially prejudice their freedom of movement and even their fundamental right to existence. More than a century ago Henry George warned that

> "[T]o this manifest absurdity does the recognition of individual right to land come when carried to its ultimate -- that any one human being, could he concentrate in himself the individual rights to the land of any country, could expel therefrom all the rest of its inhabitants; and could he thus concentrate the individual rights to the whole surface of the globe, he alone of all the teeming population of the earth would have the right to live."[160]

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156 745 F Supp 65 at 72.

157 It is significant that, in the analogous context of freedom of expression pursuant to Article 10 of the European Human Rights Convention, the European Commission of Human Rights has reserved the right to insist upon the eradication of "excessive press-concentrations" (see *De Geillustreerde Pers NV v The Netherlands*, No 5178/71, 8 DR 5 (1976) Com Rep para 88).

158 *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 426.

159 See also *Ramsden v Peterborough (City)* (1994) 106 DLR (4th) 233 at 242; *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 708-709.

160 George, *Poverty And Progress* (New York 1981) (first published 1879), p. 345.

That this absurdity is not nowadays quite so remote from modern city life is evidenced forcefully in an American court's finding that the plaintiff indigents before it, being banned from city parks, sidewalks and other places of open air resort, had "no place where they can be without facing the threat of arrest ... the plaintiffs truly have no place to go."[161] The restriction of access to quasi-public areas had "denie[d] them a single place where they can be without violating the law."[162]

(c) Considerations of proportionality

Considerations of proportionality tend to provide the sharpest test of the presence of unacceptable over-concentrations of power. In the *Rawlins/Anderson* case it is noteworthy that the challenged exclusion was of expressly perpetual duration; the ouster of the youths purported to constitute a lifetime ban. It remains gravely debatable whether a privately ordained exclusion of such scope, duration and consequence -- permanently foreclosing access to a large part of a town centre -- can ultimately remain immune from legal challenge. "Internal exile" of this kind may be thought quite disproportional to any supposed ground of exclusion,[163] although in the *Rawlins/Anderson* case itself it appeared that no allegation of misbehaviour had ever been established against the excluded youths.

Experience in other common law jurisdictions suggests that courts elsewhere tend to require that a clear proportionality be maintained between the scope of an exclusion from premises and the legitimate interests and purposes of the excluder.[164] Thus, in *State v Morse*,[165] a Superior Court in New Jersey overruled a ban imposed until further written notice on a casino patron suspected of cheating. The Court thought it obvious that "if a patron acts disorderly, a casino can lawfully exclude the patron for that day."[166] In the Court's view, however, "fairness mandates that when the patron attempts to return to the casino and acts in accordance with all lawful conditions imposed, the patron cannot be excluded, as he is not interfering with

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161 *Pottinger v City of Miami*, 810 F Supp 1551 at 1580 (SD Fla 1992). For an even more recent and rather less liberal view of "status crime", compare, however, *Tobe v City of Santa Ana*, 892 P2d 1145 at 1166-1167 (Cal 1995).

162 810 F Supp 1551 at 1581. See also Simon, "Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities", 66 Tulane L Rev 631 (1991-92).

163 One of the increasingly important themes of contemporary jurisprudence is a concern about the propriety of imposing on an individual a "permanent state of exile within his community" (*R v Graf* (1988) 42 CRR 146 at 150). See also *R v Heywood* [1994] 3 SCR 761 at 795 per Justice Cory.

164 See eg *R v Layton* (1988) 38 CCC (3d) 550 at 566.

165 647 A2d 495 (NJ Super L 1994).

166 See also *Corn v State*, 332 So2d 4 at 8 (1976).

any legitimate business interests."[167] Similarly, in *Kreimer v Bureau of Police for Town of Morristown*,[168] a United States Third Circuit Court of Appeals indicated that the conduct rules enjoined by a public library upon its users were sufficiently "narrowly tailored" to withstand constitutional challenge, not least because the rules did not "bar permanently a patron from reentry to the Library once the patron complies with the requirements in the absence of pervasive abuse."[169]

The demands of proportionality may press even where a prohibition of access to quasi-public areas is based upon potentially severe threats to the preservation of personal security. In *R v Heywood*,[170] for instance, the Supreme Court of Canada struck down an anti-loitering provision directed against convicted sex offenders, attaching decisive significance to the overbreadth of a "life-time prohibition without a review process." Justice Cory, delivering the judgment of the majority, indicated that, in the context of "a very significant limit on an individual's freedom of movement",[171] the imposition of "an indeterminate sentence upon dangerous offenders in the absence of a review procedure would constitute a cruel and unusual punishment and violate the principles of fundamental justice."[172]

(d) Freedoms cannot be defeasible at mere discretion

It may also be argued that an inevitable element of repugnancy arises wherever a power of exclusory control is asserted in terms so absolute and unchallengeable that its sheer arbitrariness emerges as ultimately inconsistent with *any* countervailing claim of liberty by a stranger. A supposed civic freedom which is defeasible across relevantly substantial areas of application -- at someone's inscrutable discretion -- cannot properly be termed a "freedom" at all. A "freedom" which, by law, depends on the irrational or uncontrollable caprice of another is no "freedom" worth having: it is more akin to the *pro tempore* suspension of an inherent

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167 647 A2d 495 at 497. Compare *Ledesma for Ledesma v Dillard Dept Stores, Inc*, 818 F Supp 983 at 985 (ND Tex 1993), and see *State v Slobin*, 682 A2d 1205 at 1207 (1996), where another New Jersey court held that exclusion on grounds of misbehaviour is not necessarily limited to a 24 hour period.

168 958 F2d 1242 at 1264 (3rd Cir 1992).

169 For other evidence in the United States of judicial concern about permanent or perpetual barring from quasi-public facilities, see *State v Johnson*, 381 So2d 498 at 500 (1980); *Turney v State*, 922 P2d 283 at 287-288 (Alaska App 1996).

170 [1994] 3 SCR 761 at 796.

171 The relevant statute applied not merely to school grounds and playgrounds, but also to all public parks and bathing areas.

172 For further emphasis upon the requirement of proportionality, see *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996), where the Ontario Court of Justice held that an airport's exclusion of an unlicensed taxi driver was not impermissible as a form of permanent "banishment", precisely because the indefinite prohibition on entry was tempered by a provision for discretionary readmission to the airport premises after proven good behaviour.

disability. Yet, under the English common law of trespass, such is precisely the textbook definition of the effect of a bare licence granted by a landowner.[173]

Accordingly, in the *Rawlins/Anderson* context, an intrinsic repugnancy may well be generated by the idea that, under the banner of an ancient concept of trespass, a citizen's supposed freedoms of expression, association and movement are constantly vulnerable to being snuffed out at will across extensive areas of his or her home town.[174] It is not fortuitous that, in several comparable circumstances, American jurisdictions have recently begun to interpose a requirement of something approaching procedural due process. In consequence, the withdrawal of an existing freedom must not be random or arbitrary, but must instead be accompanied by the provision of some opportunity to challenge the relevant deprivation. Thus, for instance, the exclusion of a reader from a public library may be invalidated by a failure to afford the reader "pre-deprivation process"[175] or at least some formal or informal procedure by which he can challenge his denial of access.[176] Such innovations in the law of quasi-public access are clearly actuated by a deep distrust both of purely subjective determinations[177] and of the excessive power thereby conferred upon the owners of land. As indicated some time ago by a New York court, the upholding of an absolute power to refuse entry to a quasi-public area would "give tremendous power to the [owner] to exclude everyone solely within his discretion and this cannot be the law because it is dictatorial in nature and no one can be invested with that sole power."[178]

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173 See Gray, *Elements of Land Law* (1993), p. 891. A licence "properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful" (*Thomas v Sorrell* (1673) Vaugh 330 at 351, 124 ER 1098 at 1109 per Vaughan CJ). See also *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1 at 5; *Street v Mountford* [1985] AC 809 at 814F-G per Lord Templeman; *Ashburn Anstalt v Arnold* [1989] Ch 1 at 13E-F.

174 See *Grayned v Rockford*, 408 US 104 at 108-109, 33 L Ed 2d 222 at 228 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

175 *Wayfield v Town of Tisbury*, 925 F Supp 880 at 889 (D Mass 1996).

176 *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993). See also *Rockwell v Pennsylvania State Horse Racing Comm'n*, 327 A2d 211 at 214-215 (1974). Compare, however, *Wilhoite v Melvin Simon & Associates, Inc*, 640 NE2d 382 at 385-387 (1994).

177 See eg *H-CHH Associates v Citizens for Representative Government*, 238 Cal Rptr 841 at 852-854 (1987) ("unbridled" or "unbounded" discretion); *Capital Area Right To Life, Inc v Downtown Frankfort, Inc*, 862 SW2d 297 at 304 (1993) per Wintersheimer J (dissenting).

178 *People v Wolf*, 312 NYS2d 721 at 724 (1970).

V. Guidance from other common law jurisdictions

One of the ironic twists in the current debate is that closer analysis tends to reveal that the common law trespass rule is not, and perhaps originally never was, quite so absolutist as is widely supposed.[179]

The Australian experience

Already in Australia there have been suggestions that the scale of a particular land holding may begin to impact upon the degree to which that land can properly be subjected to an owner's comprehensive regulatory control. In *Hackshaw v Shaw*,[180] for instance, Justice Deane indicated in the High Court of Australia that conventional notions of trespass may no longer be strictly applicable to isolated stations situated within the large expanses of the Australian outback.[181]

Similarly, in *Gerhardy v Brown*,[182] it appeared that a land title covering 100,000 square kilometres -- more than ten per cent of the total land area of South Australia -- had been vested in a supposedly private non-government corporation controlled by a tribal council. Unconsented access to this huge tract was rendered a criminal offence.[183] The High Court of Australia grudgingly accepted these arrangements as a "special measure" required to protect the traditional cultural, social and religious interests of the tribal people concerned. Several members of the High Court nevertheless demonstrated a clear willingness to recognise that rights of exclusion from land may sometimes be abridged by more highly valued social objectives.[184] Justice Mason was prepared to envisage "exceptional circumstances" where existing statutory guarantees of freedom of movement might indeed confer rights of unconsented access to the lands of private owners. Such derogation from the normal attributes of title was justified if, for example, "the purpose and effect of vesting extensive tracts of land in private ownership and denying a right of access to non-owners was to impede or

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179 See *Russo v Ontario Jockey Club* (1988) 46 DLR (4th) 359 at 363.

180 (1984) 155 CLR 614 at 659. See also *Gerhardy v Brown* (1985) 159 CLR 70 at 103-104 per Mason J. In *McKee v Gratz*, 260 US 127 at 136, 67 L Ed 167 at 170 (1922), Justice Holmes observed that "[t]he strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts, at least, of this country ... A license may be implied from the habits of the country."

181 It was integral to the High Court majority's approach in the recent *Wik* case that parliament was thought unlikely to have intended to invest an estate owner with absolute exclusory power under pastoral leases covering "huge areas as extensive as many a county in England and bigger than some nations" in "remote and generally unvisited" terrain (see *Wik Peoples v Queensland* (1996) 187 CLR 1 at 244, 246 per Kirby J). In such areas, declared Kirby J (at 233), "talk of 'exclusive possession' or 'exclusive occupation' has an unreal quality" (see also per Gaudron J at 154).

182 (1985) 159 CLR 70.

183 Pitjantjatjara Land Rights Act 1981, s 19(1).

184 Gray, "Property in Thin Air", (1991) 50 Cambridge LJ 252 at 287-290.

defeat the individual's freedom of movement across a State or, more relevantly, to exclude persons of a particular race from exercising their freedom of movement across a State".[185] Likewise, in the view adopted by Justice Murphy, the selective exclusion of strangers from land areas of this scale could not be said to occur within "a private zone".[186]

The "company town" case

American courts have also been required to address the proposition that private exclusory powers may be untenable in respect of extensive or over-large holdings of land. For instance in the original "company town" case, *Marsh v Alabama*,[187] the Supreme Court ruled that a Jehovah's Witness who distributed religious literature on the "public" sidewalk against the private owner's wishes was not guilty of criminal trespass. Freedom of press and religion could not be denied the residents of the municipality of Chickasaw, Alabama, simply because a private company, Gulf Shipbuilding Corp, held legal title to the entire town. Justice Black declined to agree that "the corporation's property interests settle the question" or that "the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests."[188] Ownership "does not always mean absolute dominion"[189] and mere title to property which had been opened up for public use gave the corporation no authority "to govern a community of citizens so as to restrict their fundamental liberties".[190]

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185 (1985) 159 CLR 70 at 103-104.

186 (1985) 159 CLR 70 at 107. For Justice Deane considerations of human dignity and equality were paramount in *Gerhardy v Brown*. Justice Deane feared that the tight regulation of access rights for non-tribal visitors seemed "likely to create an over-isolated enclave within South Australia entrenched behind what amounts to a type of passport system" ((1985) 159 CLR 70 at 152). He voiced concern over how the restrictions on the access of strangers would affect facilities for such needs as education and health, and could only "speculate about the danger that, particularly for the female and the weak, the difference between separate development and segregation might become more theoretical than real."

187 326 US 501, 90 L Ed 265 (1946).

188 326 US 501 at 505-506, 90 L Ed 265 at 268.

189 326 US 501 at 506, 90 L Ed 265 at 268.

190 326 US 501 at 509, 90 L Ed 265 at 270. The "company town" analogy is beginning to enjoy a new relevance in American law by providing an explicit source of guidance for the resolution of various access problems associated with large-scale, privately owned residential condominiums and common interest developments (see eg *Guttenberg Taxpayers and Rentpayers Association v Galaxy Towers Condominium Association*, 686 A2d 344 at 347 (1995), 688 A2d 156 at 159 (NJ Super L 1996)).

The shopping mall or civic commercial complex

The "company town" case is naturally a tempting analogy to draw upon in arguing for the curtailment of excessive regulatory power in the context of the large shopping centre complex. American courts have not been slow to point to the similarity of the civil liberties issues and "scale of territory" problems involved.[191] Accordingly in *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*,[192] Justice Marshall led the Supreme Court in extending *Marsh v Alabama* to justify access for expressional freedom within the precincts of a large shopping plaza. Eight years later, however, in *Hudgens v National Labor Relations Board*,[193] the Supreme Court effectively disowned the "company town" analogy[194] notwithstanding Justice Marshall's spirited protests. Marshall pointed out that "[t]he underlying concern in *Marsh* was that traditional public channels of communication remain free, regardless of the incidence of ownership."[195] Likewise, in the case of the extensive shopping mall, the danger remained that the mall owner "may acquire a virtual monopoly of places suitable for effective communication."[196] In the words of Justice Marshall,

> "No one would seriously question the legitimacy of the values of privacy and individual autonomy traditionally associated with privately owned property. But property that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of those values diminishes. A degree of privacy is necessarily surrendered ... And while the owner of property open to public use may not automatically surrender any of his autonomy interest in managing the property as he sees fit, there is nothing new about the notion that that autonomy interest must be accommodated with the interests of the public."[197]

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191 *Folgueras v Hassle*, 331 F Supp 615 at 623 (1971); *Petersen v Talisman Sugar Corporation*, 478 F2d 73 at 82 (1973); *Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 857, 859 (AD 2 Dept 1985).

192 391 US 308 at 319-320, 20 L Ed 2d 603 at 612-613 (1968).

193 424 US 507 at 519-520, 47 L Ed 2d 196 at 206-207 (1976). See also *Central Hardware Co v National Labor Relations Board*, 407 US 539 at 547, 33 L Ed 2d 122 at 128-129 (1972); *Lloyd Corp, Ltd v Tanner*, 407 US 551 at 558-570, 33 L Ed 2d 131 at 136-143 (1972).

194 See also *Illinois Migrant Council v Campbell Soup Co*, 574 F2d 374 at 376 (1978); *Western Pennsylvania Socialist Workers 1982 Campaign v Connecticut General Life Insurance Co*, 515 A2d 1331 at 1338 (Pa 1986); *Jacobs v Major*, 407 NW2d 832 at 844-845 (Wis 1987); *Rouse v City of Aurora*, 901 F Supp 1533 at 1536 (1995).

195 424 US 507 at 539, 47 L Ed 2d 196 at 218.

196 424 US 507 at 539, 47 L Ed 2d 196 at 219.

197 424 US 507 at 542, 47 L Ed 2d 196 at 220 (citing *Munn v Illinois*, 94 US 113 at 126, 24 L Ed 77 at 84 (1877)).

It is interesting to note that, despite the Supreme Court's disavowal of the "company town" analogy in the case law of the 1970s, some of the more recent and significant American decisions on shopping mall access have returned to *Marsh v Alabama* and to the emphasis laid in this case on the liberality of invitation and the abhorrence of monopolistic power.[198] In *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*,[199] the Supreme Court of New Jersey based its upholding of mall access rights upon

> "an enduring principle recognized in *Marsh*, a principle that remains pertinent for our purposes even though it has not been accepted in this context as a matter of federal constitutional doctrine. The principle of that case (and *Logan*) is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it."

Likewise in *Shad Alliance v Smith Haven Mall*,[200] the Supreme Court of New York referred to the "continuing vitality" under the state constitution of the "principles regarding expressive activity in quasi-public forums first set forth in *Marsh v Alabama* ... and later expanded in *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*".[201] The message of the contemporary American cases, although as yet far from uniform,[202] thus suggests a resurgence of concern that the territorial control of large-scale private owners should not be permitted to overreach the essential liberties of the citizen. As the Supreme Court of California indicated in *Robins v PruneYard Shopping Center*,[203] "the public interest in peaceful speech

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198 See, for instance, the invocation in *Bock v Westminster Mall Co*, 819 P2d 55 at 62 (Colo 1991) of Justice Marshall's stirring dissent in *Hudgens v National Labor Relations Board*, 424 US 507 at 539-540, 47 L Ed 2d 196 at 218-220 (1976). See also, notably, *Lloyd Corpn Ltd v Whiffen*, 849 P2d 446 at 453 (Or 1993) (*Whiffen II*); *Stranahan v Fred Meyer, Inc*, 958 P2d 854 at 873-876 (1998).

199 650 A2d 757 at 777 (NJ 1994).

200 484 NYS2d 849 at 857 (AD 2 Dept 1985). "The Mall is thoroughly clothed in the attributes of public or quasi-public property" (462 NYS2d 344 at 348 (1983)).

201 For further reference to "the type of quasi-public facility that figured in *Logan Valley* ... ", see also *City of Helena v Krautter*, 852 P2d 636 at 639 (Mont 1993). The terminology of "quasi-public" property is now widely and explicitly used by American courts in relation to the large shopping mall or retail outlet (see eg *Sutherland v Southcenter Shopping Ctr, Inc*, 478 P2d 792 at 800 (1970); *State v Marley*, 509 P2d 1095 at 1104 (1973); *Corn v State*, 332 So2d 4 at 8 (1976); *People v Wilson*, 469 NYS2d 905 at 908 (1983); *Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 857 (AD 2 Dept 1985); *Cox Cable San Diego, Inc v Bookspan*, 240 Cal Rptr 407 at 411 (1987); *Planned Parenthood Shasta-Diablo, Inc v Williams*, 16 Cal Rptr 2d 540 at 543 (Cal App 1 Dist 1993); *State v Woods*, 624 So2d 739 at 740 (Fla 5th DCA 1993), rev den 634 So2d 629 (Fla 1994); *Rivers v Dillards Dept Store, Inc*, 698 So2d 1328 at 1332 (Fla App 1 Dist 1997)).

202 See eg *Cologne v Westfarms Associates*, 469 A2d 1201 (Conn 1984); *Woodland v Michigan Citizens Lobby*, 378 NW2d 337 (Mich 1985); *Jacobs v Major*, 407 NW2d 832 (Wis 1987); *People v Diguida*, 604 NE2d 336 (Ill 1992); *Charleston Joint Venture v McPherson*, 417 SE2d 544 (SC 1992); *Eastwood Mall, Inc v Slanco*, 626 NE2d 59 (Ohio 1994); *Wilhoite v Melvin Simon & Associates, Inc*, 640 NE2d 382 (1994).

203 592 P2d 341 at 347 (1979).

outweighs the desire of property owners for control over their property." Only on this basis can the corporate conglomerates which own and run major shopping complexes be restrained from "abusive exercise of rights".[204]

Two further factors increasingly point towards the same conclusion.

First, courts are nowadays placing renewed emphasis upon the idea that, in the shopping mall context, the liberality of the property owner's initial invitation to the public is intrinsically aimed at furthering his own (essentially economic) interests rather than those of the community.[205] Having thus fixed the terms of engagement so determinedly in his own favour, the property owner is effectively estopped from making arbitrary or selective derogations from the inclusiveness of the invitation.[206] It was Blackstone who two centuries ago described the inclusiveness of the common callings in a passage which dealt, significantly, with the "general undertaking", ie the implied obligations, attaching to wide categories of business operation. In Blackstone's view, the man who "hangs out a sign" and "opens" his premises to all comers enters into "an implied engagement" or "universal *assumpsit*" not to abuse the implicit rights of those who enter.[207]

Second, insofar as much entrepreneurial activity today relies upon the intellectual property protection of commercial advantage, it ill becomes the commercial owner to complain that enforced quasi-public access may diminish his own cherished concerns in the matter of free speech. Commercial owners, in "so transform[ing] the life of society for their profit (and in the process, so diminish[ing] its free speech) must be held to have relinquished a part of their right of free speech."[208] This may be, ultimately, a large part of the

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204 *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 74-75. See, for instance, the significant victories for mall access won in *Alderwood Associates v Washington Environmental Council*, 635 P2d 108 (1981) (Supreme Court of Washington); *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 (D Mass 1990); *City of Jamestown v Beneda*, 477 NW2d 830 (ND 1991); *Bock v Westminster Mall Co*, 819 P2d 55 (Colo 1991)*; Lloyd Corpn Ltd v Whiffen*, 849 P2d 446 (Or 1993) (*Whiffen II*); *State v Dameron*, 853 P2d 1285 (Or 1993); *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 (NJ 1994); *Fred Meyer, Inc v Casey*, 67 F3d 1412 (Or 1995); *Stranahan v Fred Meyer, Inc*, 958 P2d 854 (1998).

205 It is pre-eminently this argument which promotes the imposition of liability for carelessly caused harm on the premises of shopkeepers, supermarket owners and mall operators (see eg *Ann M v Pacific Plaza Shopping Center*, 863 P2d 207 at 212 (Cal 1993)). Indeed the foreseeability of criminal attack or other harm inflicted upon business invitees -- even though they are mere invitees -- may require the employment of security guards in partial discharge of the landowner's duty of care (see eg *Clohesy v Food Circus Supermarkets, Inc*, 694 A2d 1017 at 1027-1030 (NJ 1997)).

206 The most forthright statement of this principle is still Justice Black's declaration in *Marsh v Alabama*, 326 US 501 at 506, 90 L Ed 265 at 268 (1946), that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it". This dictum is now increasingly cited in the shopping mall jurisprudence (see eg *Corn v State*, 332 So2d 4 at 6-8 (1976); *Lloyd Corpn Ltd v Whiffen*, 849 P2d 446 at 451 (Or 1993) (*Whiffen II*), and perhaps most significantly, *Stranahan v Fred Meyer, Inc*, 958 P2d 854 at 873-876 (1998)). See also *Bell v Maryland*, 378 US 226 at 314-315, 12 L Ed 2d 822 at 848-849 (1964).

207 *Bl. Comm.*, Vol. III, p. 164. See also *In re Cox*, 474 P2d 992 at 996 (1970).

208 *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 780 per Wilentz CJ (NJ 1994) ("They have relinquished that part which they would now use to defeat the real and

response to those who allege that the recognition of rights of quasi-public access comprises a "taking" which requires the payment of compensation to the affected property owner.[209]

VI. A "reasonable access rule" for quasi-public premises

Throughout substantial reaches of the common law world there is nowadays significant support for the proposition that uncontrolled powers of exclusion are ultimately inconsistent with basic principles of freedom and dignity.[210] The traditional law of trespass, as symbolised in *Wood v Leadbitter* and applied in the revocation of the applicants' licences in the *Rawlins/Anderson* case, rests upon a supposedly clear dichotomy between public and private powers. This dichotomy may have made sense in the social and other circumstances of some bygone era, but it no longer accords with the reality of modern conditions.[211] Accordingly, in numerous common law jurisdictions, recent years have seen a move away from the "arbitrary exclusion rule" towards a "reasonable access rule" under which the private owner of quasi-public premises may nowadays exclude members of the public only on grounds which are objectively and communicably reasonable.[212]

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substantial need of society for free speech at their centers; they should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited").

209 Significantly, as American courts now move slowly towards an acceptance of the right not to be unreasonably excluded from quasi-public places, much of the focus of argument has shifted away from the primary issue of principle towards the consequent issue of compensable "takings" (see *Stranahan v Fred Meyer, Inc*, 958 P2d 854 at 863-865 (1998)). See also Epstein, "Takings, Exclusivity and Speech: The Legacy of *PruneYard v Robins*", 64 U Chi L Rev 21 (1997). For a denial that any compensable taking has occurred in the present context, see *PruneYard Shopping Center v Robins*, 447 US 74 at 82-85, 64 L Ed 2d 741 at 753-754 (1980); *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 779 (NJ 1994); Michelman, "The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein", 64 U Chi L Rev 57 (1997).

210 See eg *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996), where a statutory authority to exclude (which the court conceded was merely a codification of the landowner's common law power of exclusion) was said to confer no "delegated jurisdiction" on the owner to infringe values enshrined in the Canadian Charter of Rights and Freedoms. The discretion to exclude "must be exercised in a manner consistent with Charter values ... [and] exercised within reasonable limits."

211 See eg *Bock v Westminster Mall Co*, 819 P2d 55 at 60 (Colo 1991) for a refutation of the "simplistic division of the universe into public and private spheres".

212 "Land, of a public function and character, presumptively clothes persons with the privilege and licence of attendance. The absolute right of exclusion, retained to the private citizen, ... is whittled away ... " (see *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996), where an airport's exclusion of an unlicensed taxi driver was nevertheless upheld on the ground that such exclusion was imposed in consequence of a "reasonably held view", the action being "legitimately taken in good faith and in an evenhanded, not an arbitrary, or capricious, way." The means chosen had been "rational and ... proportionate to the problem faced"). See also the emphasis upon the rationality of exclusory strategies in *R v Layton* (1988) 38 CCC (3d) 550 at 567.

It is important to note the relatively modest parameters of this development in the conventional common law of trespass. *First*, a "reasonable access rule" affects only "quasi-public" land or land "affected with a public interest" (ie privately owned premises to which the public enjoys a general or largely unrestricted invitation). *Second*, the recognition of a rule of reasonableness cuts both ways: it confers a guarantee of access during good (ie reasonable) behaviour, but also provides a clear ground for the exclusion of unreasonable users[213] (ie those who are guilty of misconduct). From the earliest days of quasi-public property jurisprudence there has been no doubt that the privileged entry upon another's premises is "subject to lawful behaviour", but that, accordingly, the privilege is "revocable only upon misbehaviour ... or by reason of unlawful activity."[214]

Emergence of an overriding principle of reasonableness

A "reasonable access" proviso to the general law of trespass has so far emerged most notably in the common law jurisdictions of the United States and Canada.[215] Here, of course, it is occasionally difficult to disentangle the constitutional overlay of protected civil or charter-based rights from the strictly common law rights and obligations of parties, but even this concession should not be allowed to obscure the significance of the modern infusion -- from whatever source -- of a substantial qualifier of reasonableness in the exercise of exclusory power.[216] Even when couched in constitutional terms, the message is clear: the courts of the common law world have been striving to fashion a controlling requirement of rationality in certain areas of the law of trespass.

(a) State constitutional protections

In the United States the Supreme Court has made it clear that the Federal Constitution (and particularly its First Amendment protection of the freedoms of religion, speech, press and assembly) mandate no general

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213 See *Freedman v New Jersey State Police*, 343 A2d 148 at 150-151 (1975).

214 *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 74 per Chief Justice Laskin. The misconduct limitation can be found in early cases such as *R v Ivens* (1835) 7 C & P 213 at 219, 173 ER 94 at 96-97; *Jencks v Coleman* (1835) 13 Fed Cas 442 at 443-444; *Markham v Brown* (1837) 8 NH 523, 31 Am Dec 209 at 210; *Hall v State of Delaware* (1844) 4 Harr 132 at 145. For the same point in more modern quasi-public jurisprudence, see footnote 378, infra.

215 See eg *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 (Supreme Court of Canada). For Australian authority, see *Bethune v Heffernan* [1986] VR 417 at 423-424 (Supreme Court of Victoria).

216 In the United States a potent influence in this direction has been the development of a constitutional jurisprudence which imposes "reasonable time, place and manner" requirements in relation to access to certain kinds of "non-public fora" and government property "opened up for use by the public as a place for expressive activity" (see *Perry Education Association v Perry Local Educators' Association*, 460 US 37 at 45-46, 74 L Ed 2d 794 at 804-805 (1983)).

right of access to private property.[217] Federally guaranteed freedoms do not constrain private (as distinct from state-sanctioned) conduct, however wrongful, if occurring on private premises used only for private purposes.[218] To this basic rule of abstention only limited exceptions are allowed. The most famous exception relates, of course, to the case of the "company town"[219] in which a private owner was deemed to be "performing the full spectrum of municipal powers" and therefore to stand "in the shoes of the State".[220]

The Supreme Court has nevertheless held that the limited reach of federal law in this area in no way inhibits the competence of state laws to provide for individual liberties more expansive than those conferred by the Federal Constitution.[221] For this reason the primary development of a "reasonable access" proviso in the law of trespass has occurred in the construction of state constitutional provisions. Thus, in *State v Schmid*,[222] the Supreme Court of New Jersey held that Princeton University had violated the defendant's state constitutional rights by evicting him from university premises and by securing his arrest for distributing political literature on its campus. In the view of the majority, "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property."[223] The Court recognised that the owner of private property is "entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights

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217 *Hudgens v National Labor Relations Board*, 424 US 507 at 519-520, 47 L Ed 2d 196 at 206-207 (1976). See also *Lloyd Corp, Ltd v Tanner*, 407 US 551 at 569-570, 33 L Ed 2d 131 at 143 (1972); *Frisby v Schultz*, 487 US 474 at 484-485, 101 L Ed 2d 420 at 431-432 (1988); *Citizens for Ethical Government v Gwinnett*, 392 SE2d 8 at 9-10 (Ga 1990); *William G. Mulligan Foundation for the Control of First Aid Squadders and Roving Paramedics v Brooks*, 711 A2d 961 at 963 (1998).

218 *Shelley v Kraemer*, 334 US 1 at 13, 92 L Ed 1161 at 1180 (1948). See *Estes v Kapiolani Medical Center*, 787 P2d 216 at 219 (Hawaii 1990); *State v Lacey*, 465 NW2d 537 at 539 (Iowa 1991); *Capital Area Right To Life, Inc v Downtown Frankfort, Inc*, 862 SW2d 297 at 303 (1993).

219 *Marsh v Alabama*, 326 US 501, 90 L Ed 265 (1946). See eg *Radich v Goode*, 886 F2d 1391 at 1398 (3rd Cir 1989); *People v Yutt*, 597 NE2d 208 at 212 (Ill App 3 Dist 1992); *Family Planning Alternatives, Inc v Pruner*, 15 Cal Rptr 2d 316 at 321 (Cal App 6 Dist 1992).

220 *Lloyd Corp, Ltd v Tanner*, 407 US 551 at 569, 33 L Ed 2d 131 at 143 (1972). There is a suggestion that there may also be a First Amendment right of access to private property where all other "adequate ... avenues of communication" are barred (see *Cape Cod Nursing Home Council v Rambling Rose Rest Home*, 667 F2d 238 at 241 (1981); *Rains v Mercantile National Bank At Dallas*, 599 SW2d 121 at 124 (1980)). Compare *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 426*a-c* per Justice L'Heureux-Dubé.

221 *PruneYard Shopping Center v Robins*, 447 US 74 at 81, 64 L Ed 2d 741 at 752 (1980), affirming *Robins v PruneYard Shopping Center*, 592 P2d 341 (1979) (Supreme Court of California). See eg *Bock v Westminster Mall Co*, 819 P2d 55 at 59 (Colo 1991).

222 423 A2d 615 (1980).

223 423 A2d 615 at 629. "[I]t is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property" (423 A2d 615 at 630).

upon his property."[224] In *Schmid*, however, the university's rules had been "devoid of reasonable standards" designed to protect both the legitimate interests of the university as an institution of higher education and the individual exercise of expressional freedom. In the total absence of any such "reasonable regulatory scheme", the university was at fault for having ejected a defendant whose actions had themselves been "noninjurious and reasonable".[225] State constitutions have similarly been used to justify a rule of "reasonable" access to such other quasi-public facilities as a camp for farmworkers,[226] a shopping mall,[227] a public library,[228] and a large railway station.[229]

(b) ***A proviso of "reasonable access" at common law***

So compelling is the trend towards limitation of the unqualified operation of trespass law that a number of American jurisdictions have simply announced that the common law no longer entitles the owner of quasi-public premises arbitrarily "to exclude anyone at all for any reason".[230] Thus, without reference to any state constitutional guarantee of any kind,[231] the Supreme Court of New Jersey confirmed, in *Uston v Resorts International Hotel, Inc*,[232] that admission to such premises as a casino is nowadays controlled by a doctrine of "reasonable access".[233] Justice Pashman held that

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224 423 A2d 615 at 630.

225 423 A2d 615 at 632-633. See the identical application of a rule of "reasonable access" to a college campus in Pennsylvania (*Commonwealth v Tate*, 432 A2d 1382 at 1390 (Pa 1981)). See also *People v Leonard*, 477 NYS2d 111 at 116 (Ct App 1984), where a "persona non grata" letter was overruled on the ground that there was no evidence to "indicate that the order to remain off the property had a legitimate purpose, rationally related to the power to maintain order on the campus".

226 *State v Shack*, 277 A2d 369 at 374 (1971); *Freedman v New Jersey State Police*, 343 A2d 148 at 150-151 (1975); *Baer v Sorbello*, 425 A2d 1089 at 1090 (NJ Super AD 1981).

227 *Bock v Westminster Mall Co*, 819 P2d 55 at 59-63 (Colo 1991); *State v Dameron*, 853 P2d 1285 at 1301 (Or 1993).

228 *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1265, 1270 (3rd Cir 1992). See also *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993).

229 *Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 at 1059-1061 (SDNY 1995).

230 See *Uston v Resorts International Hotel Inc*, 445 A2d 370 at 373 (NJ 1982). Courts in other states have likewise rejected a rule of exclusion for any or no reason at all, insisting that exclusion from quasi-public premises must be for good cause only (see *Cummins v St Louis Amusement Co*, 147 SW2d 190 at 193 (Mo Ct App 1941); *Rockwell v Pennsylvania State Horse Racing Comm'n*, 327 A2d 211 at 213-214 (Pa 1974); *Toms v Tiger Lanes, Inc*, 313 So2d 852 at 854 (La Ct App 1975), cert den 319 So2d 443; *Bonomo v Louisiana Downs, Inc*, 337 So2d 553 at 558-559 (La Ct App 1976)).

231 Compare, in this respect, the potentially misleading reference made to *Uston* in *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 at 134E-F per Balcombe LJ.

232 445 A2d 370 at 375 (1982).

> "when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises."[234]

Likewise, in *Marzocca v Ferrone*,[235] the same court indicated, against the background of the former rule of absolute exclusory power, that it would "now limit the common law doctrine by proscribing exclusions that violate public policy."[236] In doing so, the court invoked an analogous approach in the area of employment at will, pointing out that "although a contract of employment is terminable at the discretion of the employer, that action is subject to challenge when the termination is for reasons that contravene public policy."[237]

(c) A standard of "reasonableness" already recognised in English law

Ironically, even in English law, there already exists a "reasonable access rule" at least in relation to certain categories of quasi-public property. The imposition of a standard of reasonableness is today well established in relation to private owners whose rights of control derive from statutory authority.[238] Thus, in *Cinnamond v British Airports Authority*[239] for example, Lord Denning MR declared, in relation to a statutorily established

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233 See also *Hoagburg v Harrah's Marina Hotel Casino*, 585 F Supp 1167 at 1173 (1984), where it was noted that in *Uston* the court had simply reverted to a recognition of the "common law right of reasonable access".

234 It is significant that the same outcome is sometimes achieved by a liberal interpretation of the "reasonable opportunity" which at common law must be afforded a licensee to remove himself and his property following revocation of his licence. See eg *Sammons v American Automobile Association*, 912 P2d 1103 at 1106 (Wyo 1996) (garage proprietor not allowed to charge access fee where a motorist preferred to call AAA to recover his broken down vehicle from garage premises).

235 461 A2d 1133 at 1137 (NJ 1983).

236 In *Marzocca*, the court indicated that while public policy would restrain the peremptory eviction of a racecourse patron from the racetrack, no similar consideration of public policy would diminish the old common law right to exclude a racehorse owner who merely wished to perform his "vocational activities" on racetrack property. Any other view would "create an unwarranted interference with the business relationships of a private racetrack" (461 A2d 1133 at 1137).

237 See also *Mosher v Cook United, Inc*, 405 NE2d 720 at 722 (1980) per Hofstetter J (dissenting).

238 A doctrine of "reasonableness" may well provide part of the true explanation of the old "railway cases" (see eg *Barker v Midland Railway Co* (1856) 18 CB 46, 139 ER 1281; *Foulger v Steadman* (1872) LR 8 QB 65; *Perth General Station Committee v Ross* [1897] AC 479).

239 [1980] 1 WLR 582 at 588A-E.

airport authority, that "[i]f a bona fide airline passenger comes to the airport, they cannot turn him back -- at their discretion without rhyme or reason -- as a private landowner can. Nor can they turn back the driver of the car. Nor the friends who help him with the luggage. Nor the relatives who come to see him off." Lord Denning emphasised, significantly, that the airport authority would have a right to exclude only "if the circumstances are such as fairly and reasonably to warrant it".[240]

There appears consistently to be no good ground for withholding the same approach from premises whose quasi-public status is not fixed by legislation, but whose open invitation to the citizen is marked by similar conditions of virtual monopoly, scarcity or general public importance.[241] Thus in *R v London Borough of Brent, ex parte Assegai*[242] the Court of Appeal agreed that principles of "fairness" would intervene if a local authority singled out an individual for different treatment, as for instance by excluding him from "premises belonging to the local authority which are usually open to the public in general" (such as a recreation area).[243] Here, although public access is not a matter of any statutory permission, Woolf LJ declined to agree that the council was "entitled to exclude unwanted visitors from their property as of right" or had an "unfettered right to give or withhold permission to visitors". He declared that before the authority could exclude on the ground of an individual's conduct, "ordinary principles of fairness" required that the individual be given "an indication of what they are proposing to do and an opportunity to make representations why that course should not be taken." Even where the local authority's premises are affected by a statutory right of public access (as in the case of council debating chambers, libraries and museums), Woolf LJ considered that the underlying common law power to exclude must be "treated as being subject to" the same requirement of "fairness". Accordingly, except where "reasons of urgency" rendered it impractical, exclusion from such premises could properly be effected only following the completion of some process of reasoned exchange and rational justification.

A further category of property long governed by a rule of "reasonable access" comprises the premises of the common innkeeper. For centuries, in the absence of some reasonable ground of refusal,[244] the common innkeeper has always been bound by the common law and custom of the realm to receive and

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240 The Master of the Rolls indicated that there were clear examples of circumstances (eg traffic congestion or terrorist alert) which might make it "fair and reasonable for the airport authority to restrict or prohibit entry". See also *British Airports Authority v Ashton* [1983] 1 WLR 1079 at 1089F per Mann J.

241 See eg *Bellaney v Reilly* [1945] IR 542 at 554-560, where the lessee of a racecourse supposedly held "upon trust or condition" for the "benefit of the general public" was said, on the analogy of the innkeeper, to be disabled from excluding any individual arbitrarily. All individuals had a "*prima facie* right to be allowed to participate in the enjoyment, on reasonable terms, of the premises so demised for their use and benefit." None could be excluded except for "just cause". Compare the terms of the lease in *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 (footnote 5, supra).

242 (1987) *Times*, 18 June (LEXIS transcript).

243 Compare the rather different circumstances in *Wheeler v Leicester City Council* [1985] AC 1054, where a local council purported to ban a rugby club from using a recreation ground which was not freely available to members of the public but was available only on payment of a fee.

244 See *Hawthorn v Hammond* (1844) 1 Car & K 404 at 407, 174 ER 867 at 869.

provide lodging in his inn for all comers who are travellers.[245] It has been settled law in all common law jurisdictions that "the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities".[246] In the discharge of this important calling the common innkeeper is neither entitled to select his guests nor justified in applying any ground of exclusion or discrimination which is itself unreasonable.[247] A similar rule extends to other common callings such as those of the carrier or ferryman and the farrier.[248]

The instance of the common innkeeper is an important reminder that premises used in pursuit of a public (or common) calling have been subjected from time immemorial to special rules curtailing the freedom arbitrarily to turn away all comers.[249] Accordingly it would be quite inaccurate to suppose that the delineation of special rules of rationality for quasi-public property now represents a startling innovation in English law. Indeed, in dealing over two centuries ago with the inclusiveness of the innkeeper's duty, Blackstone was careful to emphasise the keynote of "good reason" as underlying the innkeeper's only ground of lawful refusal of access.[250] Perhaps even more significantly, Blackstone was prepared to regard this requirement of

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245 On the compellability of the common innkeeper to admit all comers, subject to good behaviour, to such accommodation as remains available, see YB 39 H VI fo 18, pl 24 (1460); *White's Case* (1558) 2 Dyer 158b, 73 ER 343 at 344; *Calye's Case* (1584) 8 Co Rep 32a, 77 ER 520; *Anon* (1623) 2 Roll Rep 345, 81 ER 842 at 843; *Newton v Trigg* (1691) 1 Show 268 at 269, 89 ER 566; *Lane v Cotton* (1701) 12 Mod 472 at 484, 88 ER 1458 at 1464-1465; *Markham v Brown* (1837) 8 NH 523, 31 Am Dec 209 at 210; *Robins & Co v Gray* [1895] 2 QB 501 at 503-504; *Lamond v Richard* [1897] 1 QB 541 at 547; *Said v Butt* [1920] 3 KB 497 at 502; *Bellaney v Reilly* [1945] IR 542 at 557-558.

246 *De Wolf v Ford*, 86 NE 527 at 529 (1908) per Werner J. For further reference to the "quasi-public" character of the innkeeper, see also *Slaughter v Commonwealth* (1856) 54 Va 767 at 777; *Civil Rights Cases*, 109 US 3, 27 L Ed 835 at 849 (1883) per Justice Harlan; *Garifine v Monmouth Park Jockey Club*, 148 A2d 1 at 2 (1958); *Cahill v Rosa*, 651 NYS2d 344 at 349 per Levine J (dissenting) (Ct App 1996). See also Wyman, "The Law of Public Callings as a Solution of the Trust Problem", 17 Harv L Rev 156 at 158-159 (1903-04); Burdick, "The Origin of the Peculiar Duties of Public Service Companies", 11 Col L Rev 514 at 521-523 (1911); Arterburn, "The Origin and First Test of Public Callings", 75 U Penn L Rev 411 at 424-425 (1927).

247 "The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want" (*R v Ivens* (1835) 7 C & P 213 at 219, 173 ER 94 at 96-97 per Coleridge J). Compare the contemporaneous American authority to like effect (*Markham v Brown* (1837) 8 NH 523, 31 Am Dec 209 at 210), and see now *Doe v Bridgeton Hospital Association, Inc*, 366 A2d 641 at 646 (1976), cert den 433 US 914, 53 L Ed 2d 1100 (1977).

248 See *Streeter v Brogan*, 274 A2d 312 at 315-317 (1971), where the common rule relating to innkeepers and farriers was applied to uphold the right of a motorist sporting a peace symbol to receive non-discriminatory service at a gasoline service station. Furman J thought that the combined services of the innkeeper and farrier could now be viewed as "assumed by the gasoline service station proprietor and garage keeper, who render equivalent fueling and maintenance services for motor vehicles." See also *Sammons v American Automobile Association*, 912 P2d 1103 at 1105-1106 (Wyo 1996).

249 See *Lane v Cotton* (1701) 12 Mod 472 at 484 per Holt CJ; *Reitman v Mulkey*, 387 US 369 at 386, 18 L Ed 2d 830 at 841 (1967) per Justice Douglas.

250 "[I]f an innkeeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action

reasonable access (and reasoned denial of access) as applying to a rather broader range of places of public accommodation than merely the premises of the innkeeper or those others engaged in the traditionally common callings.[251]

(d) A revisionist history of trespass doctrine

When closer regard is had to the chequered history of the trespass doctrine, there is, indeed, substantial ground for doubting whether the "arbitrary exclusion rule" has ever truly enjoyed the consistent legal hegemony normally attributed to it.[252]

Three centuries ago Chief Justice Hale pointed out that private property, when "affected with a public interest, ... ceases to be *juris privati* only."[253] Hence emerged a theme, of pervasive significance in Anglo-American jurisprudence,[254] that private property becomes "clothed with a public interest"[255] when used in such manner as to make it "of public consequence" and "affect the community at large."[256] Even conservative English authorities came to admit the relevance of Hale's proposition "*though this be private property*".[257] In the words of Lord Ellenborough CJ,[258]

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on the case will lie against him for damages, if he without good reason refuses to admit a traveller" (*Bl. Comm.*, Vol. III, p. 164). See also ibid, p. 212.

251 See *Bell v Maryland*, 378 US 226 at 297 (n 17), 12 L Ed 2d 822 at 839 (1964) per Justice Goldberg, noting that, in the reference to "other victualler", Blackstone had "stated a more general rule". See also *Streeter v Brogan*, 274 A2d 312 at 315-317 (1971) (gasoline service station). For confirmation, in the ante-bellum American case law, of the broader nature of the common law duty to provide access, see Singer, "No Right to Exclude: Public Accommodations and Private Property", 90 Nw U L Rev 1283 at 1322-1325 (1996). See also Tobriner and Grodin, "The Individual and the Public Service Enterprise in the New Industrial State", 55 Cal L Rev 1247 at 1250 (1967); *In re Cox*, 474 P2d 992 at 996 (1970) per Justice Tobriner; *Dalury v S-K-I, Ltd*, 670 A2d 795 at 799-800 (Vt 1995).

252 That the exercise of the common law power of exclusion was always more closely tethered to a showing of good cause may appear from the Public Bodies (Admission to Meetings) Act 1960. Section 1(8) expressly provides that the Act operates "without prejudice to any power of exclusion to suppress or prevent disorderly conduct or other misbehaviour at a meeting." In *R v Brent Health Authority, ex parte Francis* [1985] QB 869 at 878C, Forbes J indicated that this limited (ie misconduct-based) power of exclusion represented merely a statutory confirmation of the general common law power.

253 Hale, *De Portibus Maris*, 1 Harg L Tr 78.

254 Hale's proposition has been "accepted without objection as an essential element in the law of property ever since" (*Munn v Illinois*, 94 US 113 at 126, 24 L Ed 77 at 84 (1877) per Chief Justice Waite).

255 See, indistinguishably, *Allnutt v Inglis* (1810) 12 East 527 at 542, 104 ER 206 at 212 per Le Blanc J (" ... private property clothed with a public right ... ").

256 *Munn v Illinois*, 94 US 113 at 126, 24 L Ed 77 at 84 (1877) per Chief Justice Waite. See the similar reference in *Mobile v Yuille* (1841) 3 Ala (NS) 140, 36 Am Dec 441 at 444, to "private property [which] is employed in a manner which directly affects the body of the people."

257 *Allnutt v Inglis* (1810) 12 East 527 at 542, 104 ER 206 at 212 per Le Blanc J (emphasis supplied).

> "[I]f for a particular purpose the public have a right to resort to [a man's] premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

Hale's identification of private property infused with public interest was extended by Ellenborough to cover cases of "virtual monopoly",[259] a stance which was later followed readily and quite explicitly by the highest American authority. In *Munn v Illinois*,[260] the United States Supreme Court ruled that "[w]hen, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[261] Ellenborough's reference to "virtual monopoly" was widely translated in the United States as catching the larger and more obvious aggregations of economic power.[262]

This changed recognition of the balance between public and private interest was to exert an inevitable impact upon the propriety of exclusory power at common law. Even Blackstone, for all his talk about the "right of property" as comprising a "sole or despotic" power to exclude "the right of any other individual in the universe",[263] was careful to allow fairly generous exceptions in his formulation of trespass law.[264] Indeed, the decision traditionally regarded as the most draconian embodiment of a common law rule of "arbitrary exclusion", *Wood v Leadbitter*,[265] fits less than ideally or uniformly into any historical account of the Anglo-

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258 *Allnutt v Inglis* (1810) 12 East 527 at 538, 104 ER 206 at 211.

259 *Allnutt v Inglis* (1810) 12 East 527 at 540, 104 ER 206 at 211.

260 94 US 113, 24 L Ed 77 at 84 (1877).

261 This significant passage was later quoted by Justice Marshall in *Hudgens v National Labor Relations Board*, 424 US 507 at 543, 47 L Ed 2d 196 at 220-221 (1976), immediately after the extract from his judgment which appears in connection with footnote 197, supra.

262 See eg *Munn v Illinois*, 94 US 113, 24 L Ed 77 at 86 (1877) per Chief Justice Waite ("[D]uring the twenty years in which this peculiar business had been assuming its present 'immense proportions', something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here").

263 *Bl. Comm*., Vol. II, p. 2.

264 *Bl. Comm*., Vol. III, pp. 212-214 (eg gleaning after harvest, hot pursuit of vermin).

265 (1845) 13 M & W 838, 153 ER 351. Here the plaintiff, having purchased a ticket of admission to a racecourse grandstand and enclosure, unsuccessfully sued for assault and false imprisonment when he was unceremoniously ejected. The court upheld the revocation of his licence, notwithstanding that the revocation constituted a clear breach of contract. For a contrary conclusion exactly 100 years later in precisely similar circumstances, see *Bellaney v Reilly* [1945] IR 542.

American jurisprudence of trespass.[266] Whilst a strong exclusionary principle is doubtless applicable in some kinds of circumstance, there remains a strong suspicion that, in *Wood v Leadbitter*, references to "mere" or "naked"[267] licences became fatally disoriented in a slather of debate about the formalities attendant on the grant of interests in land.[268] In the course of litigation concerned with the termination of contractual licences, certain overbroad statements about the revocability of bare licences slipped out almost accidentally, thereby conducing to a confusion which has lasted well into modern times.

The theory in *Wood v Leadbitter* -- since rejected[269] -- that even vested contractual rights were irrelevant to the revocability of a licence tended to suggest, albeit erroneously, that criteria of reasonableness were likewise wholly unimportant. This was not, however, the view taken in the contemporary American law, which continued for some time to stress the requirement of rational justification and communication as necessary bases for the termination of a licence to be present on land. Thus, in *Macgoverning v Staples*,[270] the Supreme Court of New York ruled that an innocent intruder into grounds apparently open to the public could not be removed until he was apprised of information about a requirement to pay and given an opportunity to make such payment or depart voluntarily. In the absence of such communication the intruder's presence was "rightful", his removal being "justifiable" only on a showing that his "conduct ... was such ... as to justify the belief that he was going to create disorder on the grounds, and it could only be prevented by his exclusion from them."[271]

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266 Even in *Wood v Leadbitter* (1845) 13 M & W 838 at 842, 153 ER 351 at 353, Alderson B referred to the difficulties posed by the "conflicting authorities". Amidst the confusion rife in an era of deficient law reporting, the reasoning in *Wood v Leadbitter* seems deeply at variance, for instance, with the old doctrine of the "licence acted upon" (see *Webb v Paternoster* (1619) 2 Rolle 143, 81 ER 713; Palm 71 at 72-73, 81 ER 983 at 984; Popham 151, 79 ER 1250). Alderson B was forced towards awkward distinguishing of such cases as *Tayler v Waters* (1816) 7 Taunt 374, 129 ER 150. Pointing out that *Wood v Leadbitter* "turned largely on the pleadings, and ... was decided before the fusion of law and equity", a New Zealand court has felt free to read the decision subject to equitable principles not available to the Court of Exchequer in 1845 (*McBean v Howey* [1958] NZLR 25 at 28). See also *Adrian Messenger Services and Enterprises Ltd v Jockey Club Ltd* (1972) 25 DLR (3d) 529 at 544.

267 (1845) 13 M & W 838 at 852, 153 ER 351 at 357-358.

268 For criticism of the view that a non-revocable right of reasonable short-term access to land can arise only by way of deed -- effectively the ruling in *Wood v Leadbitter* -- see Conard, "The Privilege of Forcibly Ejecting an Amusement Patron", 90 U Pa L Re 809 at 810 (1942). See also *Rockwell v Pennsylvania State Horse Racing Comm'n*, 327 A2d 211 at 213 (1974).

269 Even on the contractual licence point, the force of *Wood v Leadbitter* was later subjected to dramatic modification by the ruling in *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 at 11, 15. See now *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189; *Duffield v Police* [1971] NZLR 381 at 384.

270 (1873) 7 Lans 145.

271 7 Lans 145 at 148-149 ("[The plaintiff] had no means of learning his error, and was chargeable with no wrong until he was informed of his duty to pay or leave the seats"). See also *Smith v Leo*, 36 NYS 949 at 950 (1895); *Hoagland v Forest Park Highlands Amusement Co*, 70 SW 878 at 879-880 (1902).

Although the context later became riddled with inconsistency,[272] it is noteworthy that the exclusionary rule so strongly endorsed in *Wood v Leadbitter* was initially denounced by American jurists and legislators as misrepresenting the common law -- and this at a time when American courts and lawyers were deeply familiar with, and still derived substantial authority from, English sources. Underlying the congressional discussion in 1868 of the Fourteenth Amendment's guarantee of due process and equal protection was the assumption that the state "by the 'good old common law' was obligated to guarantee all citizens access to places of public accommodation."[273] This obligation, declared Justice Arthur Goldberg a century later, was "rooted in ancient Anglo-American tradition."[274] The abolition of slavery soon stimulated a myriad of enactments purporting to confer rights of equal access, incapable of peremptory withdrawal, to "places of public accommodation and amusement" such as restaurants, barber-shops, transport facilities, parks, leisure complexes, theatres, and cinemas.[275] Constitutional challenge was apt to be met by the response that these statutes were "only declaratory of the common law".[276]

Accordingly, in late 19th century American law, a new and explicit jurisprudence of "quasi-public" property was generated by a combination of at least four factors -- the old "common callings" doctrine, Hale's "public interest" pronouncements, the continuing insistence upon common law rationality and the advent of civil rights inspired "public accommodations" statutes.[277] Even a quarter century after the widely publicised decision in *Wood v Leadbitter*, an American judge was able to observe that "[a]mong those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community." These rules, alike directed against

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272 An account of the inconsistencies in the American reception of *Wood v Leadbitter* can be found in Turner and Kennedy, "Exclusion, Ejection, and Segregation of Theatre Patrons", 32 Iowa L Rev 625 (1946-47). See also *Shubert v Nixon Amusement Co*, 83 A 369 at 370-371 (1912). (LEXIS searchers should be aware of the almost identical decision of the Court of Exchequer in *Wood v Leadbetter*!).

273 See *Bell v Maryland*, 378 US 226 at 293-305, 314-316, 12 L Ed 2d 822 at 837-843, 848-850 (1964). See also Singer, "No Right to Exclude: Public Accommodations and Private Property", 90 Nw U L Rev 1283 at 1292-1295 (1996).

274 See also 378 US 226 at 255, 12 L Ed 2d 822 at 874-875 per Justice Douglas.

275 For an historical account of public accommodations law, see Singer, 90 Nw U L Rev 1283 (1996). See also Rosenblum, "Note: Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws", 72 NYU L Rev 1243 (1997). For a demonstration of the infirmity of some public accommodations statutes, see *Riegler v Holiday Skating Rink, Inc*, 227 NW2d 759 at 762-763 (1975).

276 *Ferguson v Gies*, 46 NW 718 at 720 (1890) (Supreme Court of Michigan) ("The common law ... gave ... a remedy against any unjust discrimination to the citizen in all public places"). See also *Donnell v The State* (1873) 48 Miss 661, 12 Am Rep 375 at 381.

277 For early use of the "quasi-public" classification, see *Slaughter v Commonwealth* (1856) 54 Va 767 at 776. The phrase "quasi public property" soon came, in related contexts, to characterise the assets of private companies regulated by the courts in the public interest. See eg *In the Matter of Swigert*, 6 NE 469 at 475 (1886); *People v Illinois Cent Railway Co*, 84 NE 368 at 373 (1908) (railroads and grain elevators); *State v Nordskog*, 136 P 694 at 695 (1913) (telephone systems); *Imperial Irrigation Co v Jayne*, 138 SW 575 at 585 (1911) (irrigation networks). See also *Miners' Ditch Co v Zellerbach* (1869) 37 Cal 543 at 577, 591, 99 Am Dec 300 at 306, 319 (railroad, turnpike and canal companies).

irrational discrimination, extended beyond the common callings of the innkeeper, the carrier or ferryman and the farrier, to protect even those who "applied for admission to ... public shows and amusements". Thus, declared Justice Simrall in *Donnell v The State*[278] in 1873, such persons "were entitled to admission, and in each instance for a refusal, an action on the case lay, unless sufficient reason were shown."

In terms of this new jurisprudence of quasi-public property, owners of places of public amusement were deemed to have "devoted" their property to "quasi public use",[279] and protective legislation merely reinforced all citizens in their "right to admission ... to public resorts and to equal enjoyment of privileges of a quasi public character."[280] In the words of Justice Harlan in the *Civil Rights Cases*,[281] "discrimination practiced by corporations and individuals in the exercise of their public or quasi public functions is a badge of servitude." In quasi-public places the rule was clear: if a licensee "behaved himself" and did not, "by his conduct, forfeit his right to remain", he came under no duty to leave the licensor's premises merely on the capricious request of the proprietor.[282]

It is one of the darker sides of American legal history that by the end of the 19th century, when the racially non-discriminatory effects of "public accommodations" laws had finally become apparent, American courts were only too ready to reinvent, on behalf of the landowner, a general common law power of peremptory and unchallengeable exclusion of unwanted strangers.[283] At this point American courts fell eagerly upon the welcome authority of *Wood v Leadbitter*,[284] leaving their modern-day successors to note

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278 (1873) 48 Miss 661, 12 Am Rep 375 at 381.

279 *People v King*, 18 NE 245 at 249 (1888). See also *United States v Taylor*, 3 F 563 at 565 (1880) (" ... any employment which is *quasi* public in its character ... ")

280 *People v King*, 18 NE 245 at 248 (1888) See also *Aaron v Ward*, 96 NE 736 at 738 (1911). In the *Civil Rights Cases*, 109 US 3, 27 L Ed 835 at 850 (1883), Justice Harlan's strong dissent stressed that "places of public amusement ... are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large...[C]onsequently, the public have rights in respect of such places, which may be vindicated by the law. It is, consequently, not a matter purely of private concern."

281 109 US 3, 27 L Ed 835 at 850 (1883).

282 *Cremore v Huber*, 45 NYS 947 at 949 (1897) (unlawful exclusion from theatre).

283 See eg *Bowlin v Lyon*, 25 NW 766 at 767-768 (Iowa 1885); *Breitenbach v Trowbridge*, 31 NW 402 at 404 (1887); *Horney v Nixon*, 61 A 1088 at 1089 (1905); *Meisner v Detroit, Belle Isle & Windsor Ferry Co*, 118 NW 14 at 15 (1908); *Brown v J.H. Bell Co*, 123 NW 231 at 233-234 (Iowa 1909). The impact of the rediscovered exclusionary principle was such that by 1961 a Maryland court was simply able to rule that the owners of an amusement park could "pick and choose their patrons for any reason they decide upon, including the color of their skin" (see *Drews v State*, 167 A2d 341 at 343 (1961), aff'd 204 A2d 64 at 67 (1964)). See also *Bailey v Washington Theatre Co*, 34 NE2d 17 at 19 (1940).

284 The explicit invocation of *Wood v Leadbitter* in the context of racially motivated exclusion can be traced back to *McCrea v Marsh* (1858) 78 Mass (12 Gray) 211, 71 Am Dec 745 at 746. Together these two decisions came to be much cited in later endorsements of the effects of racially exclusory actions (see eg *Horney v Nixon*, 61 A 1088 at 1089 (1905), commenting on *Drew v Peer* (1880) 93 Pa 234; *Aaron v Ward*, 96 NE 736 at 737 (1911)). The double hammer-blow citation of *Wood v Leadbitter* and *McCrea v Marsh* was soon to bring about a more general reassertion of a supposedly race-neutral prerogative to exclude from all

that the resurrection of the common law right to exclude without cause "alarmingly corresponds to the fall of the old segregation laws".[285] As Justice Pashman observed in *Uston v Resorts International Hotel Inc*,[286] the "arbitrary exclusion rule" may often have "less than dignified origins." It was left to another generation of judges, lawyers and legislators during the 1960s and 1970s to regain the ground which had been lost in the interim,[287] it becoming ever clearer in the process that powers of arbitrary exclusion derive from no impeccably ancient or sacrosanct common law source.[288]

The definition of "quasi-public" land

If developments in the comparative law make it feasible to contend that the private owner of quasi-public premises may nowadays exclude members of the public only on objectively reasonable grounds, there remains the difficulty of defining more closely the categories of premises which may properly be regarded as "quasi-public". The task is that of elaborating a more subtle gradation or taxonomy of the kinds of land which are appropriately included within the scope of a "reasonable access rule". As one American judge has said, "private ownership is a generic term for many different relationships."[289] Just as it seems increasingly clear that an identical power to repel all comers should not necessarily inhere in every claim of ownership, it is equally incontestable that a rigorous power of exclusion remains an indispensable incident of certain categories of land title. Thus there may, in effect, be a spectrum of differing intensities of exclusory power

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premises not governed by the common callings rule or public accommodations laws (see eg *Greenberg v Western Turf Association*, 73 P 1050 (1903); *Meisner v Detroit, Belle Isle & Windsor Ferry Co*, 118 NW 14 at 15 (1908); *Marrone v Washington Jockey Club*, 227 US 633 at 636, 57 L Ed 679 at 681 (1912); *W.W.V. Co, Inc v Black*, 75 SE 82 at 84 (1912); *Shubert v Nixon Amusement Co*, 83 A 369 at 371 (1912)). See also, in the parallel Canadian case law, *Loew's Montreal Theatres v Reynolds* (1919) 30 Que KB 459 at 460-461, 465; *Franklin v Evans* (1924) 55 OLR 349 at 350-351; *Christie v York Corpn* [1940] 1 DLR 81 at 82-84.

285 *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 519 (1986). See also *Bell v Maryland*, 378 US 226 at 308, 12 L Ed 2d 822 at 845 (1964) per Justice Goldberg. For a review of American 1940s - 1960s case law demonstrating that before the advent of modern civil rights legislation, courts justified racially discriminatory ejectment by "applying the traditional common law tenet that an owner could exclude patrons arbitrarily", see Sutherland, "Patron's Right of Access to Premises Generally Open to the Public", (1983) U Ill L Rev 533 at 547. For some really unattractive case law, see *Bailey v Washington Theatre Co*, 34 NE2d 17 at 19 (1940); *Terrell Wells Swimming Pool v Rodriguez*, 182 SW2d 824 at 825-826 (1944); *Drews v State*, 167 A2d 341 at 343 (1961), 204 A2d 64 at 67 (1964); *State v Cobb*, 136 SE2d 674 at 677-678 (1964).

286 445 A2d 370 at 374 (1982).

287 See eg *Taylor v Louisiana*, 370 US 154, 8 L Ed 2d 395 (1962) (public transportation); *Bell v Maryland*, 378 US 226, 12 L Ed 2d 822 (1964) (restaurants); and *Brown v Louisiana*, 383 US 131, 15 L Ed 2d 637 (1966) (libraries).

288 See *Bell v Maryland*, 378 US 226 at 315, 12 L Ed 2d 822 at 849 (1964), where Justice Goldberg pointed out that it cannot be asserted that "the Fourteenth Amendment, while clearly addressed to inns and public conveyances, did not contemplate lunch counters and soda fountains. Institutions such as these serve essentially the same needs in modern life as did the innkeeper and the carrier at common law."

289 *Western Pennsylvania Socialist Workers 1982 Campaign v Connecticut General Life Insurance Co*, 515 A2d 1331 at 1342 (Pa 1986) per Nix CJ (dissenting).

extending from the purely private zone through a group of quasi-public premises towards a category of genuinely public property.[290]

Fears that there might be difficulty in delineating the scope of quasi-public premises have proved largely unfounded within the present context. Central to the "reasonable access rule" is the demarcation of an area of "private autonomy",[291] where privacy concerns and the interests of self-determination outweigh any competing, and necessarily intrusive, claims of access. Correspondingly the enforcement of reasonable access has been extended precisely to those premises which are deliberately laid open to public resort and where the claim of private autonomy has thus been waived in whole or part. A key notion here is that of "dedication" to public use.[292] "Quasi-public" property is private property which has been made the subject of an open invitation to the public[293] and which therefore becomes "private property having an essential public character".[294]

In *State v Schmid*,[295] the Supreme Court of New Jersey formulated its famous "sliding scale test",[296] according to which "as private property becomes, on a sliding scale, committed either more or less

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290 In the strict common law tradition there are not many examples of genuinely public property, since even government-owned property is regarded, technically, as still subject to "private ownership" (see eg *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 402*e* per Justice La Forest).

291 *Johnson v Tait*, 774 P2d 185 at 190 (1989) (Supreme Court of Alaska).

292 See eg *Bellemead Development Corp v Schneider*, 483 A2d 830 at 832 (NJ Super AD 1984); *State v Brown*, 513 A2d 974 at 975 (NJ Super AD 1986); *State of Delaware v Elliott*, 548 A2d 28 at 32-33 (1988); *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 402*f* per Justice La Forest; *Huffman and Wright Logging Co v Wade*, 857 P2d 101 at 112 (1993); *Guttenberg Taxpayers and Rentpayers Association v Galaxy Towers Condominium Association*, 688 A2d 156 at 158 (NJ Super L 1996). American cases are legion in which the degree of public dedication is used as a means of determining whether a claimed location is or is not "fundamentally and functionally dissimilar from the shopping center" (see eg *Planned Parenthood of San Diego v Wilson*, 282 Cal Rptr 760 at 764, 286 Cal Rptr 427 at 430-431 (Cal App 4 Dist 1991); *Allred v Harris*, 18 Cal Rptr 2d 530 at 533-534 (Cal App 4 Dist 1993)).

293 See eg *People v Leonard*, 477 NYS2d 111 at 115 (Ct App 1984) ("when the public enjoys broad license to utilize certain property, State trespass laws may not be enforced solely to exclude persons from exercising First Amendment rights or other protected conduct in a manner consistent with the use of the property". See also *Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 857 (AD 2 Dept 1985).

294 *R v Layton* (1988) 38 CCC (3d) 550 at 568.

295 423 A2d 615 (1980).

296 Even the most sceptical observers of the emerging right of quasi-public access have spoken of the way in which recent thinking "blurs the line between the public and nonpublic forum, suggesting a sliding-scale approach -- a standard versus a rule or categories -- in which the benefits and costs of free speech are balanced in particular settings" (see *Chicago Acorn, SEIU Local No 880 v Metropolitan Pier and Exposition Authority*, 150 F3d 695 at 703 (1998) per Chief Judge Posner). See also *Planned Parenthood of Monmouth v Cannizzaro*, 499 A2d 535 at 538 (NJ Super Ch 1985); *State v Guice*, 621 A2d 553 at 555 (NJ Super L 1993).

to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights."[297] At a certain point on the scale

> "the private property is sufficiently devoted to public use to impose constitutional obligations on the private entity, assuming that the proposed use is not significantly discordant with the normal uses ... If the obligation attaches, a court should then examine the reasonableness of the property owner's regulations limiting access to the property."[298]

Whether by use of this test or some similar formula, it is clear that courts in the common law world have experienced relatively little difficulty in differentiating those kinds of land which have and do not have an essentially "quasi-public" character.[299] North American courts have been careful, for instance, to emphasise that the "reasonable access rule" does not authorise members of the public to invade the "property or privacy rights of an individual homeowner".[300] In deference to the traditional respect for "the sanctity of a man's home and the privacies of life",[301] no court has allowed the "reasonable access rule" to reach into the family home or its immediate environs,[302] whether for the purpose of protesting about the involvement of its

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297 423 A2d 615 at 629. The Court went on to propose a tripartite test taking into account "(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property" (423 A2d 615 at 630). This "three prong" test has been widely applied or emulated in the United States (see *Bellemead Development Corp v Schneider*, 483 A2d 830 at 832 (NJ Super AD 1984); *Shad Alliance v Smith Haven Mall*, 484 NYS2d 849 at 858 (AD 2 Dept 1985) (NY); *Crozer Chester Medical Center v May*, 506 A2d 1377 at 1384 (Pa Super 1986); *State of Delaware v Elliott*, 548 A2d 28 at 32 (1988); *State v Dameron*, 853 P2d 1285 at 1302 (Or 1993)) and bears close similarities to the approach adumbrated by Justice L'Heureux-Dubé in *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 429-430. See also *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 708-9.

298 *State v Guice*, 621 A2d 553 at 555 (NJ Super L 1993).

299 Quasi-public status is not established merely by the absence of a fence, wall or guardhouse. See *Bellemead Development Corp v Schneider*, 472 A2d 170 at 176 (NJ Super Ch 1983) ("As a matter of public policy, no commercial property owner should be compelled to completely enclose its private property in order to keep out trespassers").

300 *Diamond v Bland*, 113 Cal Rptr 468 at 478 (1974) per Justice Mosk, cited with approval in *Robins v PruneYard Shopping Center*, 592 P2d 341 at 347 (1979). See also *Ferguson v Gies*, 46 NW 718 at 721 (1890); *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*, 391 US 308 at 325-326, 20 L Ed 2d 603 at 616 (1968) per Justice Douglas; *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 73 per Chief Justice Laskin.

301 *Boyd v United States*, 116 US 616 at 630, 29 L Ed 746 at 751 (1886) per Justice Bradley, citing *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 95 ER 807. See also *Weeks v United States*, 232 US 383 at 391, 58 L Ed 652 at 655 (1914); *Oliver v United States*, 466 US 170 at 193, 80 L Ed 2d 214 at 234 (1984); *Frisby v Schultz*, 487 US 474 at 484-485, 101 L Ed 2d 420 at 431-432 (1988). In *Hester v United States*, 265 US 57, 68 L Ed 898 at 900 (1923) Justice Holmes declared the distinction between the home and "open fields" to be "as old as the common law".

302 The implied licence of the public to approach a private home of course "ends with the knock on the door" (*Edwards v Attorney-General* [1986] 2 NZLR 232 at 238) -- at some reasonable hour of the day or night (*Howden v Ministry of Transport* [1987] 1 NZLR 747 at 754-755) -- at which point the stranger must inquire whether he may be admitted to the house or perform some other act on the land (*Robson v Hallett* [1967] 2

inhabitants in abortion practices[303] or for the purpose of gathering news about animal cruelty[304] or for any other substantial purpose.[305]

Similarly immune from invasion is the "modest retail establishment",[306] the "mom and pop store",[307] the small business,[308] and the business office,[309] workplace or adjoining parking lot[310] which are not normally open to the public.[311] There is no right of reasonable access to a working laboratory,[312] a hospital,[313] or a nursing home.[314] Fairly obviously any claim of quasi-public status for an abortion clinic is

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QB 939 at 951F, 953G-954A; *Burich v Ministry of Transport* [1988] 1 NZLR 754 at 759). See also *Snook v Mannion* [1982] RTR 321 at 326C-D; *Nevill v Halliday* [1983] 2 VR 553 at 556; *Halliday v Nevill* (1984) 155 CLR 1 at 7.

303 *Frisby v Schultz*, 487 US 474 at 484-485, 101 L Ed 2d 420 at 431-433 (1988); *Murray v Lawson*, 642 A2d 338 at 345-346 (NJ 1994); *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 744.

304 *Anderson v WROC-TV*, 441 NYS2d 220 at 223 (1981).

305 See, however, *Halliday v Nevill* (1984) 155 CLR 1 at 7, where the High Court of Australia thought that a passer-by is not rendered a trespasser "if, on passing an open driveway with no indication that entry is forbidden or unauthorised, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath." Nor is there any trespass if the passer-by goes upon the driveway or path "to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child." The law is "not such an ass" as to convert a de minimis intrusion into a trespass.

306 *Diamond v Bland*, 113 Cal Rptr 468, 478 (1974) per Justice Mosk. See *Johnson v Tait*, 774 P2d 185 at 188, 190 (Alaska 1989); *Judlo, Inc v Vons Companies, Inc*, 259 Cap Rptr 624 at 628 (Cal App 4 Dist 1989); *Allred v Harris*, 18 Cal Rptr 2d 530 at 534 (Cal App 4 Dist 1993).

307 *State v Dameron*, 853 P2d 1285 at 1300 (Or 1993).

308 *City of Sunnyside v Lopez*, 751 P2d 313 at 318 (Wash App 1988); *Planned Parenthood of San Diego v Wilson*, 286 Cal Rptr 427 at 432 (Cal App 4 Dist 1991); *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 at 781 (NJ 1994).

309 *State v Marley*, 509 P2d 1095 at 1104 (1973); *Le Mistral, Inc v Columbia Broadcasting System*, 402 NYS2d 815 at 817f (1978); *Belluomo v Kake TV & Radio, Inc*, 596 P2d 832 at 844-845 (1979); *Rains v Mercantile National Bank At Dallas*, 599 SW2d 121 at 123 (1980); *Bellemead Development Corp v Schneider*, 483 A2d 830 at 832 (NJ Super AD 1984); *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 460F; *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 at 172-174.

310 *State v Purdue*, 826 P2d 1037 at 1039 (1992).

311 *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 739.

312 *Commonwealth v Hood*, 452 NE2d 188 at 192 (Mass 1983).

313 *Estes v Kapiolani Medical Center*, 787 P2d 216 at 219-220 (Hawaii 1990); *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 730-732.

314 *Cape Cod Nursing Home Council v Rambling Rose Rest Home*, 667 F2d 238 at 241-242 (1981).

precluded not merely by the restricted scope of the invitation to resort to such premises but also by the overriding privacy interests of those who attend.[315] There is equally no right to insist upon reasonable access to a bank,[316] a theatre,[317] or a church[318] (unless perhaps one is a parishioner[319]). Predictably, the category of quasi-public places does not include a nuclear installation[320] or such locations as archdiocesan offices,[321] internal government offices, air traffic control towers, prison cells or judges' chambers.[322]

Conversely common law courts have had little hesitation in attributing quasi-public status to locations such as a community library,[323] a university campus,[324] a ski resort,[325] a racecourse held on a trust for the

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315 *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497; *Brown v Davis*, 495 A2d 900 (NJ Super Ch 1984); *Planned Parenthood of Monmouth v Cannizzaro*, 499 A2d 535 (NJ Super Ch 1985); *State v Brown*, 513 A2d 974 (NJ Super AD 1986); *Crozer Chester Medical Center v May*, 506 A2d 1377 (Pa Super 1986); *State of Delaware v Elliott*, 548 A2d 28 (1988); *City of Sunnyside v Lopez*, 751 P2d 313 (Wash App 1988); *Armes v City of Philadelphia*, 706 F Supp 1156 (ED Pa 1989); *City of Cleveland v Sundermeier*, 549 NE2d 561 (Ohio App 1989); *Fardig v Municipality of Anchorage*, 785 P2d 911 (Alaska App 1990); *Akron v Wendell*, 590 NE2d 380 (Ohio App 9 Dist 1990); *Allred v Shawley*, 284 Cal Rptr 140 (Cal App 4 Dist 1991); *Planned Parenthood of San Diego v Wilson*, 286 Cal Rptr 427 (Cal App 4 Dist 1991); *People v Yutt*, 597 NE2d 208 (1ll App 3 Dist 1992); *Zarsky v State of Texas*, 827 SW2d 408 (1992); *Family Planning Alternatives, Inc v Pruner*, 15 Cal Rptr 2d 316 (Cal App 6 Dist 1992); *Allred v Harris*, 18 Cal Rptr 2d 530 (Cal App 4 Dist 1993); *City of Helena v Krautter*, 852 P2d 636 (Mont 1993); *Planned Parenthood Shasta-Diablo, Inc v Williams*, 873 P2d 1224 (Cal 1994), 898 P2d 402 (Cal 1995); *Madsen v Women's Health Center, Inc*, 512 US 753, 129 L Ed 2d 593 (1994); *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 732-6. Compare *Ex Parte Tucci*, 859 SW2d 1 (Tex 1993); *Horizon Health Center v Felicissimo*, 638 A2d 1260 (NJ 1994).

316 *Bank of Stockton v Church of Soldiers of the Cross of Christ of the State of California*, 52 Cal Rptr 2d 429 at 434 (1996).

317 *Bailey v Washington Theatre Co*, 34 NE2d 17 at 19 (1940); *Wilhoite v Melvin Simon & Associates, Inc*, 640 NE2d 382 at 385 (1994).

318 *State v Steinmann*, 569 A2d 557 at 560 (Conn App 1990). This may be so even though the church purports to be a place of public worship (*Canterbury MC v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 541B-C).

319 *Cole v Police Constable 443A* [1937] 1 KB 316 at 330, 333-334; but see also *State v Steinmann*, 569 A2d 557 at 560 (Conn App 1990) (ban on man pestering women parishioners).

320 *Semple v Mant* (1985) 39 SASR 282 at 287.

321 *Chicago v Rosser*, 264 NE2d 158 at 162 (1970).

322 *R v London Borough of Brent, ex parte Assegai* (1987) *Times*, 18 June; *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 426*d* per Justice L'Heureux-Dubé, 450*f* per Justice McLachlin. Contrast the status of a courthouse hallway (*Lynch v Rifkin*, 1997 US Dist LEXIS 11201 (28 July 1997)).

323 *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1255 (3rd Cir 1992); *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993).

324 *State v Schmid*, 423 A2d 615 at 631-633 (1980); *Commonwealth v Tate*, 432 A2d 1382 at 1390 (Pa 1981); *People v Leonard*, 477 NYS2d 111 at 115 (Ct App 1984).

public,[326] a casino,[327] a gasoline service station,[328] and the privately owned environs of a baseball stadium,[329] where it has been clear that such places were the subject of an open invitation to public use.[330] Similarly a police station is a location where public policy requires that persons should have "unfettered access" for the purpose of lawful enquiry or business.[331] Quasi-public quality also attaches to an airport,[332] bus[333] or railway terminal.[334] In *The Queen in Right of Canada v Committee for the Commonwealth of Canada*,[335] for instance, the Supreme Court of Canada ruled that access could not be arbitrarily denied in respect of a government-owned airport terminal concourse. The Court took the view that an airport terminal bore the earmarks of a "public arena"[336] and was "in many ways a thoroughfare"[337] or "contemporary

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325 *Dalury v S-K-I, Ltd*, 670 A2d 795 at 799-800 (Vt 1995).

326 *Bellaney v Reilly* [1945] IR 542 at 554, 560 (see, however, [1945] IR 602).

327 *Uston v Resorts International Hotel, Inc*, 445 A2d 370 at 373-375 (NJ 1982); *Hoagburg v Harrah's Marina Hotel Casino*, 585 F Supp 1167 at 1173 (1984); *Campione v Adamar of New Jersey, Inc*, 643 A2d 42 at 52 (NJ Super L 1993); *State v Morse*, 647 A2d 495 at 497 (NJ Super L 1994).

328 *Streeter v Brogan*, 274 A2d 312 at 315-317 (1971).

329 See *Lewis v Colorado Rockies Baseball Club, Ltd*, 941 P2d 266 at 270, 274 (Colo 1997), where the architectural design and layout of the sidewalks and walkways around a baseball stadium, with their barriers, street lights, benches, plants and trash bins, were "all deliberately integrated to create a sense of public space" and thus failed to "indicate to the public that they have entered a private area."

330 Compare *State v Guice*, 621 A2d 553 at 555-556 (NJ Super L 1993) (College issued "only limited invitations to the public for specific purposes, and cannot thus be deemed an 'open' campus").

331 *Bethune v Heffernan* [1986] VR 417 at 423-424.

332 *Jamison v City of St Louis*, 828 F2d 1280 at 1283 (8th Cir 1987). See also *International Society for Krishna Consciousness v Schrader*, 461 F Supp 714 at 718 (1978).

333 *Wolin v Port of New York Authority*, 392 F2d 83 at 90 (1968).

334 *Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 at 1061-1062 (SDNY 1995). Pennsylvania Station has been described as "something of a small indoor city. These facilities are not places of restricted public access, but, rather, large, public areas ... Indeed, facilities such as Pennsylvania Station are so public in nature, that they actually invite conduct that could be construed as loitering" (*People v Bright*, 526 NYS2d 66 at 72 (1988)). See also *In re Hoffman*, 434 P2d 353 at 356 (1967) ("a railway station is like a public street or park"); *People v Pratt*, 625 NYS2d 869 at 873 (NY City Crim Ct 1995); *Rogers v New York City Transit Authority*, 680 NE2d 142 at 147-148 (NY 1997).

335 (1991) 77 DLR (4th) 385 at 393*d*-*h* per Chief Justice Lamer, Justices Sopinka and Cory concurring, 402*f* per Justice La Forest, 421*h*-422*b* per Justice L'Heureux-Dubé, 449*d*-450*c* per Justice McLachlin.

336 (1991) 77 DLR (4th) 385 at 426*f* per Justice L'Heureux-Dubé. See also *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996) ("a forum imbued with many characteristics associated with public places").

337 (1991) 77 DLR (4th) 385 at 396*h* per Chief Justice Lamer.

crossroads",[338] a "modern equivalent of the streets and by-ways of the past".[339] Such property, being "quasi-fiduciary",[340] was owned for the benefit of the citizen and could not therefore be closed off from reasonable public access.[341]

Whilst the degree of dedication to general public use thus ranks as a strongly decisive factor in attributing quasi-public status to land,[342] additional criteria may, in certain cases, intensify the quasi-public aspect of the premises in question.[343] Partly pursuant to the constitutional "state action" doctrine, American courts have been ready to acknowledge, for instance, that nominally private enterprises may "bear such a close relationship with governmental entities or public monies" that they become "affected with a public interest."[344] In these circumstances the public entity can be said to have "so far insinuated itself into a position of interdependence with [the private enterprise] that it must be recognized as a joint participant" in the activity under challenge.[345] In the result the private entity cannot be allowed, by disavowing the intrinsic component of "public interest", to act in an arbitrary or unreasonably discriminatory way towards the public in

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338 (1991) 77 DLR (4th) 385 at 430*g* per Justice L'Heureux-Dubé.

339 (1991) 77 DLR (4th) 385 at 459*g* per Justice McLachlin.

340 (1991) 77 DLR (4th) 385 at 393*d* per Chief Justice Lamer.

341 (1991) 77 DLR (4th) 385 at 393*f* per Chief Justice Lamer. See *R v Asatne-Mensah*, 1996 Ont CJ LEXIS 1959 (8 May 1996), although here the court confined the principle to the terminal concourse as distinct from its vehicular approaches and roadways. See also *R v Trabulsey* (1995) 97 CCC (3d) 147 at 157.

342 In other words, the areas in question "function as virtual public spaces" (*Bock v Westminster Mall Co*, 819 P2d 55 at 62 (Colo 1991)).

343 Courts have sometimes attached relevance, for example, to the absence of any discernible boundary to indicate that property is intended to be purely private or to mark off private from quasi-public areas (see eg *Marsh v Alabama*, 326 US 501 at 503, 90 L Ed 265 at 266 (1946); *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 at 71 (D Mass 1990); *Lewis v Colorado Rockies Baseball Club, Ltd*, 941 P2d 266 at 270, 274 (Colo 1997)).

344 *Bock v Westminster Mall Co*, 819 P2d 55 at 60 (Colo 1991) ("a private project may develop and operate in a manner such that it performs a virtual public function").

345 *Burton v Wilmington Parking Authority*, 365 US 715 at 725, 6 L Ed 2d 45 at 52 (1961). See also *H-CHH Associates v Citizens for Representative Government*, 238 Cal Rptr 841 at 851 (1987).

whose name this close nexus exists.[346] In such circumstances civil freedoms cannot be violated on the supposition that the location of their attempted exercise is an exclusively private zone.[347]

The element of interdependence or "symbiotic" relationship[348] with government is most obviously relevant where a privately owned operation is sited in premises which are leased from some agency within the public sector.[349] American courts have sometimes characterised such premises as not private, but "quasi-private",[350] in active recognition of the fact that the purely private nature of the ventures conducted on publicly owned land has been qualified by "many forms of hybrid governmental involvement and/or by private interests performing the equivalent of public functions."[351] Thus courts have tended to attach significance to the circumstance that the private developer/public sector lessee of shopping mall premises has been the recipient of substantial public subsidies or other fiscal benefits doubtless designed, in part, to further public purposes by revitalising downtown areas for general community benefit.[352] Indeed, much modern urban development exhibits the character of "ongoing mutual subsidisation between the Company and the City",[353]

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346 On this basis it is sometimes alleged that a government-imposed licensing requirement for some forms of private enterprise "virtually permits the existence of the [activity] in question as a regulated monopoly", with all the public access implications which follow from monopoly status (*Rockwell v Pennsylvania State Horse Racing Comm'n*, 327 A2d 211 at 213 (1974)). See, however, *Madden v Queens County Jockey Club, Inc*, 72 NE2d 697 at 698-699 (1947), *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 516-518 (1986).

347 See *City of Jamestown v Beneda*, 477 NW2d 830 at 835 (ND 1991) ("Although the City might act in a proprietary role as landowner and let the premises on nondiscriminatory terms, it cannot furnish as part of its rental package assurance to a tenant that the tenant's activity is insulated" from the exercise of protected civil freedoms). See also *International Society for Krishna Consciousness v Schrader*, 461 F Supp 714 at 718 (1978); *Bock v Westminster Mall Co*, 819 P2d 55 at 61 (Colo 1991).

348 See eg *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 at 74 (D Mass 1990).

349 The circumstances of the *Rawlins/Anderson* case of course involved a lease of public authority-owned shopping mall premises. Even in England courts are now beginning to accept that there may be a distinction between the private landowner and a land-owning local authority, in that it may not be lawful for the latter to do exactly what it wishes with its own property (see *R v Somerset CC, ex p Fewings* [1995] 1 WLR 1037 at 1042G-H). See also *Edwards v Lutheran Senior Services of Dover, Inc*, 603 F Supp 315 at 321 (D Del 1985), aff'd 779 F2d 42 (3d Cir 1985); *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 at 73 (D Mass 1990).

350 *Allred v Shawley*, 284 Cal Rptr 140 at 144 (Cal App 4 Dist 1991). See also *H-CHH Associates v Citizens for Representative Government*, 238 Cal Rptr 841 at 851 (1987).

351 *Bock v Westminster Mall Co*, 819 P2d 55 at 60 (Colo 1991) (where the presence of a police substation within the mall premises underscored the symbiotic relationship between public and private organs).

352 See *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 at 73-74 (D Mass 1990); *City of Jamestown v Beneda*, 477 NW2d 830 at 836 (1991).

353 See *Bock v Westminster Mall Co*, 819 P2d 55 at 61 (Colo 1991) ("It is now common for governmental entities to compete, by providing financial subsidies or inducements, to attract private business so as to reap the benefits of an increased tax base"). See also *City of Jamestown v Beneda*, 477 NW2d 830 at 836 (ND

with the consequence that publicly funded private actors cannot be heard to abrogate civic-oriented responsibilities engendered by underlying patterns of public investment and financial participation.[354]

It is inferable that in days to come the larger definitional problems affecting "quasi-public land" will concern, not so much the scope of the *land* which is subject to access, but rather the categories of the *public* who are excludable from access.[355] Can, for instance, a convicted sex offender be banned from certain, otherwise quasi-public, locations? On one view, such a prohibition is reconcilable with a rule providing for reasonable, conduct-dependent, access if, for this purpose, relevant conduct is deemed to include past misconduct. The provision could equally be seen, however, as a severe duplication of penalty targeted at an extremely limited subset of the offending population. Some indication of the complexity of this issue is conveyed by the way in which the Supreme Court of Canada was recently divided in *R v Heywood*.[356] Here a slender majority in the Court struck down a statutory provision, which prohibited a convicted child molester from loitering in or near public parks and bathing areas, as representing a "significant limit on freedom of movement."[357] In so far as the statute applied not merely to school grounds and playgrounds, but also to all public parks and bathing areas, the majority found the prohibition "overly broad in its geographical ambit".[358]

The status of the civic commercial complex

Against this background there is plainly a powerful argument in favour of upholding the quasi-public character of the modern civic commercial complex or plaza. Although the comparative case law is far from unanimous on the point, the preponderant view (particularly in very recent American decisions) is that the large shopping

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1991). Compare *State v Wicklund*, 576 NW2d 753 at 757 (Minn App 1998), but note that this decision is currently subject to appeal (1998 Minn LEXIS 457 (17 July 1998)).

354 "Economic necessity, however, cannot provide the cover for government-supported infringements of speech" (*Bock v Westminster Mall Co*, 819 P2d 55 at 61 (Colo 1991)). See also *Capital Area Right To Life, Inc v Downtown Frankfort, Inc*, 862 SW2d 297 at 303 (1993) per Wintersheimer J (dissenting).

355 An indirect exclusion from quasi-public space may take the form, as in a number of American states, of the statutory imposition of enhanced penalties for certain kinds of crime committed within the area (see eg *People v Townsend*, 73 Cal Rptr 2d 438 (1998) (drug dealing within 1000 feet of school premises)).

356 [1994] 3 SCR 761.

357 [1994] 3 SCR 761 at 795.

358 [1994] 3 SCR 761 at 794. See also *R v Graf* (1988) 42 CRR 146 at 150, where a Canadian court similarly struck down a provision which rendered a convicted sex offender "a person in a permanent state of exile within his community who is, because of his status, absolutely prohibited from standing idly in vast areas of this country." The individual concerned was said not to have "the liberty of movement and locomotion to go where other citizens are entitled to go ... He is, for example, banned for life from standing idly about the ... Park, including the aquarium and the zoo area ... the playing fields, the beaches and the entertainment area." He was similarly precluded from access to a "multitude" of city parks and gardens, the province's marine and wilderness parks, ski areas, and "all lakes and rivers in Canada capable of being used by people for bathing."

mall[359] or retail commercial area[360] comes within the rule of reasonable public access.[361] The common parts of such premises comprise private property "affected with a public interest" precisely because, in the classic terms of Chief Justice Waite in *Munn v Illinois*,[362] they "stand ... in the very 'gateway of commerce'."

The quasi-public nature of civic commercial areas is intensified, of course, by the fact that these areas are impliedly the subject of an open invitation to the public and thus represent "private property having an essential public character as part of a commercial venture".[363] In *City of Jamestown v Beneda*,[364] for instance, the Supreme Court of North Dakota merely confirmed a more general perception when remarking that the modern shopping mall has come to provide "the functional equivalent of the city streets, squares and parks of earlier days"[365] -- areas which the United States Supreme Court has long declared to be "held in the public trust".[366] The imperative of reasonable civic access is, if anything, reinforced by the circumstance that -- as in the *Rawlins/Anderson* case itself -- privately developed commercial centres are frequently built over and thus physically incorporate existing public highways.[367] As Chief Justice Hale asserted, some three

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359 A shopping centre on a relatively small scale may not rank as "quasi-public" (see eg *Rouse v City of Aurora*, 901 F Supp 1533 at 1540 (1995), distinguishing *Bock v Westminster Mall Co*, 819 P2d 55 (Colo 1991) on precisely this ground).

360 Some American courts have designated large stores and supermarkets as becoming "by reason of the owner's invitation, ... a forum for assembly by the community" (see *State v Cargill*, 786 P2d 208 at 214 (1990); *Fred Meyer, Inc v Casey*, 67 F3d 1412 at 1414 (9th Cir 1995). For a consideration of the criteria which tend to govern the attribution of quasi-public status to shopping outlets, compare *Safeway, Inc v Jane Does 1 through 50*, 920 P2d 168 at 170 (1996); *Stranahan v Fred Meyer, Inc*, 958 P2d 854 at 861-863 (1998), with *Wabban, Inc v Brookhart*, 921 P2d 409 at 411 (1996), rev den 927 P2d 600 (1996).

361 See Berger, "Pruneyard Revisited: Political Activity on Private Lands", 66 NYU L Rev 633 (1991).

362 94 US 113, 24 L Ed 77 at 86 (1877).

363 *R v Layton* (1988) 38 CCC (3d) 550 at 568. See also *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 73 per Chief Justice Laskin.

364 477 NW2d 830 at 837-838 (ND 1991). See also *Alderwood Associates v Washington Environmental Council*, 635 P2d 108 at 117 (1981) (Supreme Court of Washington).

365 "With its controlled environment, [the mall] is an appealing place for the public to converse and socialise as well as to browse and shop in and about the stores there" (477 NW2d 830 at 838).

366 *Frisby v Schultz*, 487 US 474 at 481, 101 L Ed 2d 420 at 429 (1988) per Justice O'Connor. See eg *Hague v Committee for Industrial Organization*, 307 US 496 at 515, 83 L Ed 1423 at 1436 (1939).

367 See eg *Citizens To End Animal Suffering And Exploitation, Inc v Faneuil Hall Marketplace, Inc*, 745 F Supp 65 at 70-72 (D Mass 1990). See also *Lewis v Colorado Rockies Baseball Club, Ltd*, 941 P2d 266 at 274 (Colo 1997) (sidewalks and walkways "specifically designed to be integrated into downtown Denver's street grid").

centuries ago, "if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a publick interest."[368]

It is also significant that American courts have traditionally pointed towards a link between the protection of reasonable shopping mall access and the "interest of a free society in the highly placed value of open markets for ideas."[369] As the Supreme Court of Colorado has observed, "the historical connection between the marketplace of ideas and the market for goods and services is not severed because goods and services today are bought and sold within the confines of a modern mall."[370] In this way, not least, the courts continue to safeguard the characteristic American concern with the organic integrity of the "freedom to think as you will and to speak as you think."[371] As Justice Frankfurter made clear in *Marsh v Alabama*,[372] American jurisprudence has long accorded a preferred position to the "purveyors of ideas". The restriction of access to quasi-public places inevitably chills the communication of socially valuable information.[373]

In one of the more recent, and certainly most influential, shopping mall decisions in the United States, *New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*,[374] the Supreme Court of New Jersey once again applied the "sliding scale test" and found that

> "There is no doubt about the outcome of this balance ... [T]he weight of the private property owners' interest in controlling and limiting activities on their property has greatly diminished in view of the uses permitted and invited on that property. The private property owners in this case ... have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community; they have told this public in

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368 Hale, *De Jure Maris*, 1 Harg L Tr 78. See also *Bolt v Stennett* (1800) 8 TR 606 at 608, 101 ER 1572 at 1573.

369 See *City of Jamestown v Beneda*, 477 NW2d 830 at 835 (1991), citing *International Society for Krishna Consciousness v Schrader*, 461 F Supp 714 at 718 (1978). For reference to the importance of "free trade in ideas", see *Abrams v United States*, 250 US 616 at 630, 63 L Ed 1173 at 1180 (1919), where Justice Holmes went on to suggest that "the best test of truth is the power of the thought to get itself accepted in the competition of the market".

370 *Bock v Westminster Mall Co*, 819 P2d 55 at 62 (Colo 1991).

371 *Whitney v California*, 274 US 357 at 375, 71 L Ed 1095 at 1105 (1927) per Justice Brandeis. See Gray, (1991) 50 Cambridge LJ 252 at 286.

372 326 US 501 at 510, 90 L Ed 265 at 270 (1946).

373 As the Supreme Court of Washington made clear in *Alderwood Associates v Washington Environmental Council*,635 P2d 108 at 117 (1981), "[t]he ability ... to communicate ideas would be greatly reduced if access to such centers were denied". See also *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 449*d-f* per Justice McLachlin.

374 650 A2d 757 at 776 (NJ 1994).

every way possible that the property is theirs, to come to, to visit, to do what they please, and hopefully to shop and spend"

Taking the view that "[t]he sliding scale cannot slide any farther in the direction of public use and diminished private property interests" the Court held here that access to the shopping mall could not be unreasonably denied to any member of the public.

Time, place and manner limitations on access to quasi-public premises

The modern trend in favour of a rule of "reasonable access" in respect of quasi-public places is not inconsistent with a substantial degree of regulatory control exercisable by the landowner.[375] The adoption of a "reasonable access rule" does nothing more than eliminate the utterly capricious or rationally unjustifiable exercise of exclusory power. In all the jurisdictions which have modified their trespass law in this way, it remains clear that the landowner is still free to regulate public access in any manner which is "reasonable".[376] The landowner is deprived merely of a facility of arbitrary eviction, but may in turn impose "reasonable time, place and manner restrictions" on the conduct of those who enjoy access to his premises.[377] Whilst the landowner plainly retains the right, in extreme cases, to exclude "unreasonable" users altogether,[378] the visitor is meanwhile assured a guarantee of access during good (ie "reasonable") behaviour.

It is clear that the abstract concept of "reasonable" use can be construed only within the more detailed and case-specific context of time, circumstance and relevant operational purpose. Thus, for instance, those who use a library facility can be expected to comport themselves consistently with the fundamental purposes

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375 See eg *State v Woods*, 624 So2d 739 at 740 (Fla 5th DCA 1993), rev den 634 So2d 629 (Fla 1994) ("Certainly shopping malls are quasi-public places which must be open to the public on a nondiscriminatory basis. But the owner of such a mall does not lose all control over its private ownership interest").

376 See, for instance, the statement of Justice Black, in one of the early modern cases on access jurisprudence, that "[n]o one supposes ... that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities" (*Martin v City of Struthers*, 319 US 141 at 143, 87 L Ed 1313 at 1317 (1943)).

377 See eg *In re Hoffman*, 434 P2d 353 at 356-357 (1967); *H-CHH Associates v Citizens for Representative Government*, 238 Cal Rptr 841 at 850 (1987); *Bock v Westminster Mall Co*, 819 P2d 55 at 63 (Colo 1991). It may even be that the landowner can impose reasonable pre-announced "limitations on the classes of public entrants" (see *Harrison v Carswell* (1975) 62 DLR (3d) 68 at 74 per Chief Justice Laskin).

378 It is undoubted that the owner of quasi-public premises may properly exclude those guilty of misconduct, provided that his response is fairly proportional to the subject matter of complaint. See eg *In re Hoffman*, 434 P2d 353 at 357 (1967); *Streeter v Brogan*, 274 A2d 312 at 316-317 (1971); *State v Shack*, 277 A2d 369 at 374 (1971); *State v Schmid*, 423 A2d 615 at 631 (1980); *Baer v Sorbello*, 425 A2d 1089 at 1090-1091 (NJ Super AD 1981); *Uston v Resorts International Hotel Inc*, 445 A2d 370 at 375 (NJ 1982); *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1263-1264 (3rd Cir 1992). See also *People v Leonard*, 477 NYS2d 111 at 114-116 (Ct App 1984); *Commonwealth of Virginia v Levien*, 1985 Va Cir LEXIS 87 (7 January 1985).

of a library as a place for quiet reading, research and contemplation.[379] A public library may therefore impose "reasonable" rules of conduct on its patrons,[380] which prohibit disruptive[381] or anti-social[382] behaviour or limit the use of the library as merely "a lounge or a shelter"[383] or even outlaw the playing of chess.[384] Similarly the operator of a subway system, albeit a "quasi-public" entity, may properly impose a code of conduct within its premises which is "purpose-related and premised on and accommodating to safety and access and general traveling public needs".[385]

It is "reasonably incident" to the proper control of such "quasi-public" premises as a shopping mall that the mall owner should be entitled to require that shoes be worn or to ask a "screaming, yelling, boisterous person" to leave the mall and not re-enter until the following day.[386] Likewise, it may be "reasonable" for the owner of a shopping centre to impose access conditions on petitioner groups which require the payment of a cleaning deposit, regulate the size and tone of language of their displays, prohibit fund-raising and the use of loudspeakers and lights, but not conditions which confer on the centre management "broad, unbridled discretion" to determine subjectively whether a planned activity will "adversely affect the shopping center environment, atmosphere or image."[387] Again, a shopping complex may quite properly prohibit the

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379 See *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 395*d* per Chief Justice Lamer; *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993).

380 *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1246 (3rd Cir 1992). Compare *Madrid v Lopez*, 1997 US Dist LEXIS 2501 (3 March 1997) (prison library). The library's rules must not, of course, be vague or overbroad. See eg *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993), where a library's exclusion policy was struck down on the ground, inter alia, that it purported to apply indiscriminately even to minor incidents of misbehaviour occurring outside the library at locations miles away.

381 It would be obviously unreasonable for a library patron to "shout a political message" within the library, although "wearing a T-shirt bearing a political message would be a form of expression consistent with the intended purpose of such a place" (*The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 at 395*d* per Chief Justice Lamer). See also *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1256; *Brinkmeier v City of Freeport*, 1993 US Dist LEXIS 9255 (2 July 1993).

382 A library may legitimately impose standards of attire and physical hygiene in furtherance of its interest in preventing unreasonable interference with other patrons' use of the library in a sanitary and attractive condition (see *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1264).

383 *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1262. There is some question whether reasonable library use includes "staring vacantly" or mere "loafing in library reading rooms" (see *Brown v Louisiana*, 383 US 131 at 150-151, 15 L Ed 2d 637 at 650 (1966) per Justice White). See also *Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 at 1266-1267.

384 *People v Taylor*, 630 NYS2d 625 at 626-627 (Sup 1995).

385 *Rogers v New York City Transit Authority*, 680 NE2d 142 at 148 (NY 1997).

386 *Corn v State*, 332 So2d 4 at 8 (1976) (Such disturbance would "certainly be to the financial detriment of all the store owners in the Mall").

387 *H-CHH Associates v Citizens for Representative Government*, 238 Cal Rptr 841 at 852-858 (1987).

distribution of religious leaflets within its car park on the ground that such activity is likely to cause litter and traffic problems.[388] A university may enforce "reasonable, nondiscriminatory rules" governing demonstrations on its campus.[389] It may, sadly, be the case that it has now become "reasonable" for certain schools to exercise strict regulation over access to their premises during school hours.

Such examples, although far from exhaustive, plainly demonstrate that the mere concession of "reasonable access" to quasi-public property in no way precludes the continuing exercise of substantial purposive control over the premises by the landowner.

VII. Conclusion

This article has attempted to demonstrate the way in which the operation of the private law of trespass is inevitably and increasingly qualified by the paramountcy of human rights considerations. Throughout the common law world the conceptual apparatus of property has been slowly infiltrated by the idea that the owner of quasi-public premises may exclude members of the public only on grounds which are objectively reasonable and rationally communicable. Any contrary approach entails, ultimately, an unacceptable derogation from centrally important notions of civil liberty.

This shift from an "arbitrary exclusion rule" towards a "reasonable access rule" has necessarily involved a more subtle gradation of the exclusory powers inherent in land ownership and a more careful taxonomy of the land which is appropriately included within the scope of the "reasonable access rule". Yet such has been the task taken on and discharged by many common law courts during recent decades. From this evolution of legal principle has emerged a new version of a more ancient jurisprudence of quasi-public property, the new version being directed and moulded by unprecedented changes in the social, demographic and urban structure of contemporary life. The simultaneous appearance of this body of quasi-public law throughout the common law world comprises an important part of the developing social and political ecology of modern urban space. Not for the first time -- nor for the last -- our understanding of "property" is shown to be thoroughly permeated by subliminal notions of social "propriety".[390]

The legal trends outlined in this article also throw into focus the difficult borderline between civil wrong and civil right. During the last 20 years in Britain the increasing privatisation of urban space has vested new and enormous powers of social regulation in the hands of large, publicly unaccountable corporations. The essential thrust of the article is, at one level, that the law of civil wrongs -- in the form of strict doctrines of trespass law -- can no longer serve as an instrument for the curtailment of various kinds of civil right. Only a

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388 *Savage v Trammell Crow Co, Inc*, 273 Cal Rptr 302 at 303 (Cal App 4 Dist 1990).

389 See *Sword v Fox*, 446 F2d 1091 at 1096-1097 (1971).

390 See Gray, "Equitable Property", (1994) 47(2) Current Legal Problems 157 at 183, 208.

society deeply misguided or cynical would today consign the freedoms of its citizens to the uncontrolled discretion of a generation of property developers. The untenability of arbitrary trespass rules in relation to quasi-public land is merely one index of the constant need to monitor the distribution of social and economic power between corporate and non-corporate persons and, equally, to invigilate the allocation of police power between non-governmental entities and the state itself. It may be that only a clearer acknowledgement of the concept of the "corporate citizen" -- until now virtually a contradition in terms -- can enable a range of civil freedoms to be moderated fairly and consistently with fundamental principles of liberal democracy.

At a different, but related, level, it is indeed striking that common law discourse on matters traditionally regarded as central to private law has been invaded by the once unfamiliar terminology of public law. Concerns with "reasonableness", legitimate expectation, "rights to interchange", due process and proportionality have noticeably begun to infiltrate the heartland of private law, transforming the property talk not merely of theorists but of common law courts as well. The emergence of recognisable species of "quasi-public" space underscores the fact that a starkly dichotomous view of the public/private distinction is nowadays impossible to sustain. Even within the hallowed territory of real property it is no longer heretical to suggest that the domains of the public and the private are separated, not by a clean cut, but rather by incremental gradations which only superficially conceal the interpenetrating nature of some of our most cherished legal categories. One inevitable effect of this evolutionary process has been the increasing politicisation of property; and the modern jurisprudence of quasi-public property is indeed the by-product of rejuvenated ideas of moral and social community. But this development need not, in itself, strike terror into the hearts of the conservative; it points up only the fact that, in the Britain of the last 20 years, a remarkably new order of things has come about.

Of course, the legal developments described in this article represent the road *not* taken by the English Court of Appeal in *CIN Properties Ltd v Rawlins*. It remains to be seen whether the statutory accommodation of the European Convention on Human Rights will rectify this omission. The issues posed by the *Rawlins/Anderson* case will certainly not be the last of their kind to emerge in this jurisdiction: there are already rumblings of similar litigation. For any seasoned observer it must by now be plain that one of the challenges of the immediate future is the elaboration of a new civic morality in the field of property relationships.