

## PARKS, PROPERTY RIGHTS, AND THE POSSIBILITIES OF THE PRIVATE LAW

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**I**t is commonly assumed that private property rights are incompatible with the preservation of such environmental and recreational amenities as our national parks and that governmental ownership is therefore required. This paper takes a different approach and argues that private alternatives to public ownership of parks are legally feasible and are desirable on both efficiency and ethical grounds.

Although this paper is concerned with legal issues, every effort has been made to make it accessible to a general audience. Even so, the discussion should interest lawyers, both practitioners and academicians. Indeed, it is vitally important that it do so. Because of their preoccupation with public solutions, lawyers have contributed to the decline of public discourse on law and social policy. Often led by professional self-interest, theirs is an enthusiasm for complex public solutions that resort to law and for traditional distinctions of legal scholarship that often obscure rather than illuminate. As Friedrich Hayek, perhaps our premier scholar of spontaneous common-law adjudication, admonishes us, the preservation of a free society requires more than the simplistic espousal

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of abstract principles.<sup>1</sup> It requires careful thought about specific legal arrangements that will foster that delicate balance between deliberation and spontaneity that lies at the heart of a free legal order.<sup>2</sup>

The organizing principle of this paper is one of ascending radicalism: from reform through volunteerism and privatization of services to the outright abolition of public ownership and the transfer of the parks to private parties. The transition to a freer legal order is not costless, however, and a prescription for change must be tempered with a sensitivity to the capacity for change of the existing legal order.

Governmental ownership of parkland is a relatively recent phenomenon. Prior to the late nineteenth century, the principal objective of government had been to sell and later give away as much of the public lands as possible.<sup>3</sup> Toward the turn of the century, however, a new sense of scarcity arose because of the perceived depletion of natural resources.<sup>4</sup> Theodore Roosevelt, for example, enthusiastically embraced the views of early advocates of a national park system, including Gifford Pinchot and Gilbert Grosvenor.<sup>5</sup> The National Park Service was subsequently created in 1916, although some parks, such as Yellowstone, had been authorized by Congress as early as 1872. In addition to this new sense of scarcity, the conservation movement was inspired by the egalitarianism of populism.<sup>6</sup> The Populists demanded that the remaining public

<sup>1</sup>Friedrich Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), p. 111.

<sup>2</sup>William L. Letwin, "The Achievement of Friedrich A. Hayek," in *Essays on Hayek*, ed. Fritz Machlup (Hillsdale, Mich.: Hillsdale College Press, 1976), p. 162.

<sup>3</sup>For discussions of public land policy prior to the rise of the conservation movement, see Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), pp. 202-5, 361-67; Everett N. Dick, *The Lure of the Land* (Lincoln: University of Nebraska Press, 1970); Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Government Printing Office, 1968); Benjamin H. Hibbard, *A History of the Public Land Policies* (New York: Peter Smith, 1924); Jonathan R. Hughes, *The Governmental Habit* (New York: Basic Books, 1977), pp. 13-23, 50-61; Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837* (New York: Oxford University Press, 1968).

<sup>4</sup>Friedman, *A History of American Law*, pp. 361-67; Hughes, *The Governmental Habit*, p. 97; Dwight R. Lee and Robert F. McNown, *Economics in Our Time: Concepts and Issues* (Chicago: SRA, 1975), pp. 131-32.

<sup>5</sup>See Gifford Pinchot, *Breaking New Ground* (New York: Harcourt Brace, 1947), pp. 509-10; Theodore Roosevelt, *Autobiography* (New York: Charles Scribner's, 1913), p. 409; Gifford Pinchot, "How Conservation Began in the United States," *Agricultural History* 11 (October 1937): 262-63; Melville Bell Grosvenor, "A Long History of New Beginnings," *National Geographic* 156 (July 1979): 18.

<sup>6</sup>John D. Hicks, *The Populist Revolt* (Minneapolis: University of Minnesota Press, 1931), pp. 420-21; Hughes, *The Governmental Habit*, pp. 105-6.

lands be withdrawn from the market and reserved for conservation. Today most parks are publicly owned. The national park system includes over seventy million acres,<sup>7</sup> state parks account for nearly ten million acres, and country and municipal parks add approximately one million acres.<sup>8</sup>

Most governments charge a zero or less-than-equilibrium price for access to public parks.<sup>9</sup> Predictably, with the quantity demanded exceeding the available supply, a "shortage" develops, and public parks are usually overcrowded. Overcrowding contributes to deterioration and erosion and, as nonprice competition for limited space increases, illegal camping.<sup>10</sup> Overcrowding and deterioration also encourage the subsidized and crowded recreationists to demand that existing parks be expanded and new ones created. Vote-maximizing politicians will thus have an incentive to expand further the scope of subsidized recreation, while those taxpayers paying its diffuse costs will have little incentive to resist its being given. To be sure, other allocative criteria, such as rationing by reservation, lottery, or queuing, would generate different incentives for benefited client groups.<sup>11</sup> It remains, however, that suboptimal pricing is the fundamental cause of overcrowding.

Not only are public parks overcrowded, they do not distribute

<sup>7</sup>U.S. Department of Commerce, *Statistical Abstract of the United States* (Washington, D.C.: Government Printing Office, 1979), p. 239. The total acreage was more than doubled on December 1, 1978, when President Carter added over 40 million acres of public domain in Alaska by declaring them national monuments under authority of the Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (1976). This further politicization of property rights in favor of environmentalists has been greeted with great hostility by many Alaskans.

<sup>8</sup>*Ibid.*, p. 241.

<sup>9</sup>Armen A. Alchian and William R. Allen, *University Economics*, 3d ed. (Belmont, Calif.: Wadsworth, 1972), p. 154. Recently, perhaps in response to the aging of the American population and the growing political influence of older voters, at least fourteen states (Arkansas, Delaware, Indiana, Louisiana, Massachusetts, Montana, Nevada, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Utah) have by statute set a zero or reduced price for older residents for access to state parks. The National Park Service set a reduced price for the elderly through its Golden Age passport program. See also U.S. Department of Interior, National Park Service, *Camping in the National Parks System* (Washington, D.C.: Government Printing Office, 1979).

<sup>10</sup>For a description of the problems of overcrowding, see "Crowding and Decay Threaten U.S. Parks," *New York Times*, August 3, 1980, pp. 1, 40; and Frederick L. Campbell, John C. Hendee, and Roger Clark, "Law and Order in Public Parks," *Parks and Recreation* 3 (December 1968): 28.

<sup>11</sup>George H. Stankey and John Baden, "Rationing Wilderness Use: Methods, Problems, and Guidelines," Research paper INT-192 (Ogden, Utah: U.S. Department of Agriculture, Forest Service, Intermountain Forest and Range Experiment Station, July 1977), pp. 6, 7, 8, 14.

their benefits randomly. With their high costs of access, remote wilderness parks present the most extreme examples of a subsidy for the affluent.<sup>12</sup> Of course, not all public parks are inaccessible. Access to public parks in urban areas is much less costly for most people, and the relatively inexpensive recreational pursuits offered there require few accoutrements. A pair of tennis shoes and a frisbee are much less of an impediment to recreation than mobile recreation vehicles and the L. L. Bean catalog. As a result, city parks are more likely to have a lower-income client group than are wilderness parks. Furthermore, some nonrecreational uses of city parks (e.g., commerce in drugs or provision of shelter) can also be attributed to suboptimal pricing for entry. In light of these shortcomings resulting from the absence of private property rights, privatization of the parks offers a means of much-needed reform.

### Parks and the Independent Sector

There is no presumption that those who work in publicly owned parks must be public employees. Accordingly, the most tentative step in the privatization of public parks would be to increase the recruitment of volunteers to help manage the parks, particularly in the more accessible municipal parks. This practice is already widespread.<sup>13</sup> Indeed, volunteers have long been a vital part of public recreation in America, continuing the tradition of volunteerism and free association so ably described by Alexis de Tocqueville.<sup>14</sup> They form but another example of the independent sector, neither governmental nor commercial, that is grounded in voluntary, private action.<sup>15</sup> The primary benefit of volunteerism is, of course, the provision of labor at a zero price to the agency. No tax revenues need to be collected to pay for volunteered services. Furthermore, volunteers have less incentive to engage in the kind of political entrepreneurship so characteristic of bureaucracies.

<sup>12</sup>Edwin G. Dolan, *TANSTAAFL: Economic Strategy for Environmental Crisis* (Hinsdale, Ill.: Holt, Rinehart & Winston, Dryden Press, 1971), p. 94; John Baden, "Neospartan Hedonists, Adult Toy Aficionados, and the Rationing of Public Lands," in *Managing the Commons*, ed. Garrett Hardin and John Baden (San Francisco: W. H. Freeman, 1977), pp. 250-51.

<sup>13</sup>U.S. Department of the Interior, *Heritage Conservation and Recreation Service: Volunteer Handbook* (Washington, D.C.: Government Printing Office, 1978); Richard Kraus, "An Urban Alternative: Making Do with Volunteers," *Parks and Recreation* 12 (March 1977): 35.

<sup>14</sup>Alexis de Toqueville, *Democracy in America*, ed. Phillips Bradley (New York: Vintage Books, 1954), p. 198.

<sup>15</sup>For a description of the independent sector, see the remarkable book by Richard Cornuelle, *Reclaiming the American Dream* (New York: Random House, 1965), pp. 20-41.

There is no significant legal impediment to volunteerism. One should, however, expect opposition from park personnel and their unions should it become apparent that volunteers are precluding the hiring or retention of salaried employees. Few people welcome competition of any sort, especially that charging a zero price.

Volunteerism, however, must always be examined in the context of the incentives generated by the political process. Political entrepreneurs in quest of votes from rationally ignorant voters tend to favor inflationary policies with clearly recognizable benefits and partially concealed costs.<sup>16</sup> In their early stages, inflation and "bracket creep" will very likely lead to a lessening of volunteerism within the independent sector because there is an incentive created for individuals to work longer hours and for both spouses to work in order to maintain their standard of living. As the amount of time available for volunteer activities decreases, there will be fewer volunteers available to help with recreational programs in the public parks.

In the short run, in the face of inflation and higher taxes, the incentive to work is still sufficiently strong that the attempt to maintain a standard of living would lead to the atrophy of volunteerism; however, should marginal tax rates rise further, the work incentive may be largely destroyed. As a result, the consumption of recreation may become widespread, as in contemporary Sweden, thereby enlarging the recreation constituency. Because of lessened incentives to maintain taxable income, this induced consumption of idleness could conceivably lead to a resurgence of volunteerism, albeit at a very high cost to societal productivity. Recreation and volunteerism grounded in prosperity-generated leisure is far preferable to that inspired by the futility of working.

Governmental expansion is not inevitable, and increased taxation carries with it the risk of taxpayer rebellion. To be sure, given the concentrated benefits and diffuse costs of governmental regulation,<sup>17</sup> it is not surprising that political entrepreneurs give

<sup>16</sup>Rational voter ignorance stems from an individual voter's recognition that his vote will have little impact on the outcome of an election. He has little incentive to incur the information costs of being informed on political matters, and it is rational for him to remain uninformed or rely on the low-cost provision of information by the various media. See James Gwartney, *Microeconomics* (New York: Academic Press, 1977), pp. 333-34.

<sup>17</sup>The concentrated benefits of regulation make it natural for producers, unlike consumers, to intervene in the political process because the benefits obtained exceed the costs of intervention. It is irrational for consumers to lobby against the subsidy because the cost of doing so exceeds the tiny benefits that would accrue to each con-

voter coalitions what they want in return for electoral support. As was shown in California with the passage of Proposition 13, however, taxation may reach a level where the heretofore diffuse costs of government become sufficiently concentrated that the free-rider problems are overcome and the voters demand a reduction in expenditures. The California experience has had a dramatic impact on its public parks. With public expenditures for recreation reduced, park administrators have turned to the private sector for support and have relied more on the price system through the privatization of services and user fees. It is to such moderate reforms that we now turn our attention.

### Privatization of Services

At present, many supporting services in the public parks are provided by governmental agencies. This governmental service monopoly dates from the Progressive Era, when many national parks were established and the municipal reform movement was at its height.<sup>18</sup> The monopolized park services are varied but typically include grounds maintenance and repair, refuse collection, and maintenance of special recreational facilities, such as tennis courts and swimming pools. Obviously it is not necessary that governmental agencies provide these services. Indeed, many private firms provide identical services to their customers, often at a lower price. In light of the widespread dissatisfaction with governmental services, privatization is a promising avenue for reform for the public parks, one that has been demonstrably successful in recent years.

At the outset, one should have a clear idea of what privatization means because this term can refer to a variety of strategies.<sup>19</sup> For our purposes, it will be assumed that public ownership of parks will continue and that privatization entails the contracting out of support services to private firms operating for profit. By contracting out, the governmental unit has not shed its responsibilities for providing park services. It has, rather, by means of traditional con-

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sumer, and any resulting benefits would be shared by all consumers, not just those opposing the transfer. As a result, the amorphous consumer interest is systematically underrepresented. See Allan H. Meltzer, *Why Government Grows* (Los Angeles: International Institute for Economic Research, 1976); Richard A. Posner, *Economic Analysis of Law*, 2nd ed. (Boston: Little, Brown, 1977), pp. 239-70.

<sup>18</sup>Lawrence White, "Privatization of Municipally-Provided Services," *Journal of Libertarian Studies* 2 (1978): 187.

<sup>19</sup>For discussions of varying degrees of privatization, see Robert W. Poole, *Cutting Back City Hall* (New York: Universe Books, 1980), pp. 26-27; White, "Privatization," pp. 187-88.

tract-law principles, allocated its tax revenues to a low-bidding private firm rather than to its own employees.<sup>20</sup>

If services are contracted out to profit-motivated private firms, considerable costs savings result.<sup>21</sup> Unlike a governmental bureaucracy, which has little incentive to hold down costs, competitive private firms are driven to minimize costs in order to survive and prosper in the marketplace. Public parks can only benefit from this wider range of potential suppliers and their impetus toward efficiency. In addition, contracting out obviates the need for specialized but rarely used services and large initial capital investments in plant and equipment.<sup>22</sup> Not all persons, however, welcome the advantages of private contracting. Public-employee labor unions, for example, have bitterly opposed the contracting out of governmental services.<sup>23</sup> Given the general disinclination of the comparatively inefficient to welcome more efficient competitors, such opposition is not surprising. Even if services are contracted out, however, the public parks will remain partially politicized because the level of services will still be a political question. On the other hand, relying on private firms reduces the number of potential political entrepreneurs who might otherwise pursue coalition profit.

From a procedural standpoint, the privatization of services will have significant legal consequences. Because governmental units will be awarding contracts to low-bidding firms, the privatizing agreements will be subject to the requirements of government contracts generally, especially those governing the bidding process. Although these regulatory provisions are complex and apply to all levels of government, the burdens presumably would not outweigh the efficiency gains to be made from contracting with competitive private firms. However, any advocate of privatization of services by contract must deal with the problem of collusion.

It is well known that governmental buyers are especially vulnerable to collusive sellers. First and most important, public administrators have little incentive or reward for economizing by obtaining goods and services from competitive sellers. Second, so long as sealed bids are solicited by formal advertisement and opened simultaneously with no rebidding allowed, the vulnerability of governmental buyers will be enhanced.<sup>24</sup> The sellers' incentive to

<sup>20</sup>White, "Privatization," p. 187.

<sup>21</sup>Poole, *Cutting Back City Hall*, pp. 27, 105-6.

<sup>22</sup>*Ibid.*, pp. 28-29.

<sup>23</sup>"Contracting Out Is Cheaper for City, But Unions Are Very Upset," *Washington Post*, November 5, 1980, p. B1.

<sup>24</sup>Alchian and Allen, *University Economics*, p. 355.

collude is strengthened because bidders are given no chance to undercut each other, and the policing of cheaters who offer bids lower than the agreed price is simplified because all bids are usually revealed at the time the low-bidding firm is awarded the contract.

How might privatized services for the public parks be obtained by a method of procurement that fosters competition? So long as public ownership continues, one cannot be overly optimistic about the prospects for a reduction in governmental vulnerability to collusion. Indeed, the weak incentives and meager rewards for economizing by public managers make private ownership all the more compelling. If the parks were privately owned, their managers would have a very strong incentive to obtain goods and services from competitive sellers. Such managers would have every reason to forcefully "put the squeeze" on the seller simply by informing him of their unwillingness to reveal their best offers from competing sellers.<sup>25</sup>

Although private ownership offers the best avenue for undermining the sellers' collusion, some arguments for reform within the context of public ownership have been made. One possible approach would require the opening of all bids simultaneously, revealing only the name of the low-bidding firm and deferring until later the revelation of its bid. Meanwhile, the losing firms would be invited to submit further bids in hopes of undercutting the apparent winner. In order to encourage new entrants for subsequent projects, along with rivalry among the already competing firms, the bids of all the losing firms might also be revealed while the winning low bid was still concealed.<sup>26</sup> It has also been suggested that renegotiation should be mandatory when formal advertising produces identical low bids from few suppliers.<sup>27</sup> With greater secrecy surrounding the winning bid, the incentives for dishonesty of governmental procurement officers are increased. Accordingly, a reward system for the discovery and reduction of collusion might possibly alter these incentives and encourage a more competitive bidding system.<sup>28</sup> If the bidding process is reformed while public ownership continues, then the efficiency gains from the minimization of collusion might possibly complement the gains stemming from the purchase of supporting park services from profit-moti-

<sup>25</sup>Arman A. Alchian, *Economic Forces at Work* (Indianapolis: Liberty Press, 1977), pp. 259-69.

<sup>26</sup>Richard A. Miller, "Economy, Efficiency and Effectiveness in Government Procurement," *Brooklyn Law Review* 42 (1975): 208, 228-29.

<sup>27</sup>*Ibid.*, p. 227.

<sup>28</sup>*Ibid.*, pp. 239-40.



vated private firms. The surest way to obtain competitive prices from sellers, however, is to turn the parks over to private managers.

### User Charges

As has been noted, the low cost of visiting parks has led to overuse and deterioration. Even with continued public ownership of the parks, this suboptimal pricing is not inevitable. Indeed, if equilibrium prices were charged for access to the parks or for particular services within the parks, much could be done to ameliorate present conditions.

With the payment of a user fee, the consumer pays for a service in much the same way as in the private sector; and in the case of the public parks, the incentives for park users are drastically altered. In the absence of user fees, the public parks are financed out of general tax revenues. Park users thus have an incentive to lobby for increased appropriations for public parks in the rational expectation that the bulk of these costs will be borne by the majority of taxpayers who rarely use the parks. As a result of these incentives, more public expenditures are made for parks than would otherwise be made. The user fee internalizes these costs and introduces important economizing incentives by imposing the cost of the parks directly on the park user. If the price of recreation is raised, less of it will be demanded by consumers and overcrowding in the parks will be reduced. In addition, the payment of user fees is a precise indication of consumer preference that will generate useful information on just how much people actually value the competing uses of the parks, and one could expect an increase in park uses that people are willing to pay for.<sup>29</sup> It has also been suggested that the user fee is a more equitable allocative device because it eliminates cross-subsidies within a given community or by one community of nonresidents.<sup>30</sup>

User fees in public parks (and in privately owned parks, as will be discussed later) are feasible only if nonusers can be excluded from users. It is one thing to define property rights in a park;<sup>31</sup> it is quite another to transfer those property rights to fee-paying consumers. It is essential that property rights in the parks be defined,

<sup>29</sup>See Richard Stroup and John Baden, "Externality, Property Rights, and the Management of our National Forests," *Journal of Law and Economics* 16 (1973): 303.

<sup>30</sup>Poole, *Cutting Back City Hall*, p. 33.

<sup>31</sup>The term "property right" refers to the ability to control the use of a given resource. It does not have any legal connotations of real estate but refers rather to the total body of substantive law. See Alchian and Allen, *University Economics*, p. 142.

transferred, and enforced because it is by the alleged inability to exclude nonusers that public control and the avoidance of user fees can be justified, if at all.<sup>32</sup>

In most national parks and in some municipal parks, entrance by users is monitored, and very low fees are charged for entry. In most municipal parks, entry is not monitored, and the cost of entry is zero. This does not mean that monitoring could not occur. For most parks, particularly those in wilderness areas and those urban parks with few entrances on public roads and city streets, the transaction costs of monitoring and charging for entry are low enough that exclusion of nonusers is feasible.

To be sure, in a few cases the exclusion of nonusers may not be feasible because of multiple access. City parks with multiple entrances on public streets present particularly difficult problems.<sup>33</sup> Should the imposition of user charges for these city parks require the closing of intersecting streets in order to preclude free riders and reduce the transaction costs of monitoring entry, one could expect inconvenienced motorists to join subsidized recreationists in opposition to the proposal. Similarly, merchants dependent on walk-in patronage attracted by the suboptimal pricing of nearby public parks would also object.

Although exclusion of nonusers is usually feasible and one is able to demonstrate the benefits resulting from equilibrium pricing, market-clearing prices are rarely, if ever, charged for access to public parks. Why are the prices so low? This suboptimal pricing is in large part attributable to the incentives of political entrepreneurs to subsidize voters who consume recreation. Under federal law, for example, the fees charged for access to the national parks must be "fair and equitable."<sup>34</sup> It is not surprising to discover that this means

<sup>32</sup>According to Milton Friedman, public ownership would be justified in such a case because of the difficulty of identifying and charging the beneficiaries. See Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 31.

<sup>33</sup>One example might be the Chattanooga Memorial Park surrounding the city of Chattanooga with entrances from city streets and county and state roads. See William J. Whalen, "Proposal to Increase Entrance and Users Fees within the National Park System," *Hearings Before the Subcommittee on Parks, Recreation, and Renewable Resources of the Senate Committee on Energy and Natural Resources*, 96th Cong., 1st sess., 1979, p. 49.

<sup>34</sup>U.S.C. § 4601-6a[d] [1976]. The statute also directs that the agency take into consideration the "direct and indirect cost to the Government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic and administrative feasibility of fee collection and other pertinent factors."

that the prices charged are very low. Any realistic approach to reform must grapple with this strong sense of entitlement.

Up to now the discussion has focused on reform within a context of state ownership. It was assumed that the state would retain title to the land and that reform would be aimed at encouraging prosperity-based volunteerism, improving the efficiency with which public funds were expended for supporting services, and enhancing the environment by rationing access through user fees. While these reforms are certainly desirable, they do not address the fundamental question of how best to structure the ownership of the parks in order to preserve their natural beauty.

### Private Ownership Considered

Who should own the public parks? At present the parks belong to "the people." Although at first glance this is a rhetorically reassuring notion, it cannot withstand analysis. The public parks "belong" to those persons who use them, and that is only some of "the people."<sup>35</sup> It need not be this way. The parks may be privately owned as, indeed, many recreation areas already are. Existing public parks could either be given away or sold to the highest bidder.<sup>36</sup>

What would be the consequences of such a transfer of title?<sup>37</sup> At the outset one should recognize that privately owned parks charging admission fees face the same problem of exclusion of nonusers as would a public park. Similarly, however, the transaction costs of excluding nonusers are usually low enough that private admission fees are feasible. Assuming that one successfully crosses the transaction-cost hurdle, the benefits of freely transferable property rights in private parks would be quite similar to those discussed earlier in a context of charging market-clearing user fees. By forcing the consumer of park amenities to pay directly for indulging his preferences, free exchange would introduce important economizing incentives on the consumption of recreation. Because demand curves do slope downward, private parks would avoid major problems of overcrowding and degradation, and the private firms operating the parks would have every incentive to preserve their beauty in order to attract customers. The payment of admission

<sup>35</sup>One enticing myth is the notion that conservation of parks and wilderness is the common concern of all mankind. This argument is used primarily to persuade the majority of nonconservationist taxpayers to pay for the special interest of conservationists. See Dolan, *TANSTAFL*, pp. 86-88.

<sup>36</sup>In a manner perhaps reminiscent of the Homestead Act of 1862. See Hughes, *The Governmental Habit*, p. 59.

<sup>37</sup>The following discussion derives in part from Stroup and Baden, "Externality."

fees would generate information on consumer willingness to pay for park services, and those park services that were preferred would be provided.

Privatization of the ownership of public parks would, however, have consequences that go far beyond those resulting from the mere charging of market-clearing user fees.<sup>38</sup> Government would have shed its responsibilities entirely and would no longer be in the park business. If the parks were given away, the recipients would receive a revenue windfall when they, in turn, sold their land. If the parks were sold to the highest bidder, the government would enjoy the revenue windfall. In addition, because private firms respond to consumer preference, the parks would become much more diverse as each entrepreneur sought to satisfy as yet unmet consumer willingness to pay. Individual liberty would also be enhanced because the provision of private parks would rest on the consent of the contracting parties.

Given the response of private parks to consumer preference, what kind of parks would consumers prefer and be willing to pay for? Some newly privatized parks, particularly those in or near urban areas, would undoubtedly be redeveloped for mass recreation. Some urban parks might even cease to be parks at all because recreationists might not be willing to pay enough to bid away the land from alternative uses. On the other hand, much park land would remain untouched because of the willingness of consumers to pay for access to wilderness. While the precise allocations must admittedly be unknown because of the prevailing suspension of the market mechanism, the probable general trends are predictable.

### Private Ownership and the Law

It is one thing to describe the benefits of private ownership of parks. It is quite another to describe its legal foundation. For that one must turn to the complex rules and distinct concept of ownership in real-property law. The Anglo-American law of real property has its origin in the elaborate system of reciprocal political responsibilities of English feudalism.<sup>39</sup> During the early Middle Ages, land was not "owned"; rather, it was "held" on good behavior, with the king theoretically being the ultimate owner. As a result of its de-

<sup>38</sup>See *ibid.*, pp. 309-10.

<sup>39</sup>See Cornelius Moynihan, *Introduction to the Law of Real Property* (St. Paul, Minn.: West Publishing Co., 1962), pp. 1-27; and Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown & Co., 1956), pp. 505-45.

pendence on tenure relationships, the common-law system of estates is one of ownership divisible in time.<sup>40</sup>

What do we mean by speaking of ownership in durational terms? Simply, that the total ownership of a parcel of land may be divided like a bundle of sticks in order to set up a queue. The whole bundle represents total and complete ownership of the land. Because the bundle is divisible, however, different people with different sticks may be entitled to exclusive possession of the same land at different times. Exclusive possession of the land today (by means of a stick known as a present estate) does not necessarily guarantee exclusive possession tomorrow (by means of a stick known as a future estate). This does not mean that the person enjoying the land now is any more of an owner than the person who will enjoy the land later. It just means that the division of the sticks has set up the queue, and each person must wait his turn. The owner of the stick of a future estate must wait until his possession becomes operative after the person with the other stick gives up present possession. Furthermore, everyone in the queue will be protected by the courts. Because both persons are owners of valid estates (one present, the other future), the courts will protect both rights today regardless of when possession occurs. By thinking of this bundle of sticks, one can more readily understand the admittedly conceptual common-law approach to estates, where what matters is the time at which one is entitled to exclusive possession of the land.

### Private Ownership in Fee Simple Absolute

Assume that one wanted to create a private park. What would be its legal foundation? The most obvious response would be that one would want complete ownership of the land outright. Accordingly, one would want the whole bundle of sticks. In order to enjoy the whole bundle, the owner of a private park must have title in fee simple absolute.

The fee simple absolute is the largest estate known to Anglo-American law<sup>41</sup> and represents the ultimate in ownership.<sup>42</sup> It cor-

<sup>40</sup>Thomas F. Bergin and Paul G. Haskell, *Preface to Estates in Land and Future Interests* (Brooklyn: The Foundation Press, 1966), pp. 3-7. The following discussion borrows heavily from the same, pp. 23-26.

<sup>41</sup>*Ibid.*, pp. 26-31; John E. Cribbet, *Principles of the Law of Real Property*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1975), pp. 40-42; and Moynihan, *Law of Real Property*, pp. 29-35.

<sup>42</sup>This is not to say that the fee simple has not been diminished by the recent advent of public regulation in the guise of the police power. See, for example, Harry M. Cross, "The Diminishing Fee," *Law and Contemporary Problems* 20 (1955): 517. Furthermore, the holder of a fee simple absolute in the United States is subject to the

responds to our commonsense notions of ownership and can be freely sold or inherited. Because the owner of the fee simple absolute has the whole bundle of sticks,<sup>43</sup> he enjoys possession that is of potentially infinite duration. To illustrate: The owner in fee simple absolute of a beautiful meadow can, subject to the police power or private promises, control its use, and if he is so inclined he can preserve the meadow in its natural state for use as a park for himself or anyone he chooses. As holder of the entire bundle of sticks, the owner decides. Ownership in fee simple absolute has the virtue of simplicity of administration, because one need be concerned only with the present preferences of the owner. In addition, title in fee simple absolute generates the needed incentives for careful husbandry of the land because the residual claimant is the person having title.

But what happens in the future? Perpetual stewardship grounded solely in fee-simple ownership is not feasible because of the inevitability of the owner's death. How might a holder of a fee simple absolute perpetuate the stewardship of his land?

One way would be to transfer the meadow to a perpetual legal entity that shares the transferor's preferences for the use of the land. A private for-profit recreation firm with perpetual existence could continue to husband the land as part of its enterprise. A conservationist-entrepreneur could run the park as a business that continues after his death. Direct ownership in fee simple would be well suited to such an enterprise and would enhance the reduction in transaction costs associated with for-profit firms.<sup>44</sup> Assuming that consumer preference favored the consumption of park recreation, the firm would have every incentive to preserve the beauty of the meadow because in the absence of such husbandry it would be unable to attract customers. The private firm would thus bring about all the benefits of private ownership and perpetuate them long after the death of the original owner.

A private park owned in fee simple absolute could be managed in a variety of ways. For example, the corporation could hold title to the land and charge admission. Under traditional tort principles the firm

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payment of applicable property taxes to the state. For a description of the evolution of land ownership in the United States, see Hughes, *The Governmental Habit*, pp. 15-21.

<sup>43</sup>The conveyancing rules governing the creation of a fee simple have been simplified in modern times. At present, a conveyance "to A" will transfer a fee simple absolute, although in some states the older formula of "to A and his heirs" may still be necessary. See Cribbet, *Principles of the Law of Real Property*, pp. 41-42.

<sup>44</sup>See Posner, *Economic Analysis of Law*, pp. 289-90.

would owe a duty of reasonable care to the ticket purchaser who would be an "invitee." The firm could monitor entry at the gate and ration access to a wide variety of activities and amenities.<sup>45</sup> Park visitors could be required to carry appropriate nontransferable permits, such as hiking or fishing stamps. The firm could issue stamps for such pursuits as spelunking, bird watching, fishing, hunting, or skiing. The stamps, in responding to the sensitivity of the price system, would be as diverse as consumer preference could make them. The gate fee could cover such hard-to-charge-for amenities as the sky, broad vistas, and fragrant flowers. Specific fees might then be charged for particular amenities, such as caverns, geysers, and waterfalls. In this way, the cross-subsidization of consumers of particular amenities by nonusers could be reduced to a minimum.

Alternatively, ownership could be divided among the customers with each person owning an undivided proportionate share.<sup>46</sup> With this approach, called a tenancy in common, each of the owners, called tenants, is entitled to possession of the entire park subject to a reciprocal right in his cotenants. Under such an agreement, the legal relations among the owners become very important, and, in dealing with the common property, the tenants in common owe a duty of good faith to one another.

On the nonprofit side, the meadow could be conveyed to a self-perpetuating conservation organization chartered as a charitable corporation under applicable state law.<sup>47</sup> The organization's board of directors could then choose as successor members only those persons who share the preferences of the original grantor. Of course, the conservation organization would bear the cost of preserving the land because it presumably would not be charging fees for access to the land.

Ownership in fee simple, however, can be a burdensome and costly means of preserving natural areas. Although it is feasible for the establishment of private parks by for-profit firms or conservation organizations that are able to attract sufficient capital, ownership of the whole bundle of sticks can be beyond the capacity of

<sup>45</sup>The following owes much to conversations with Terry Anderson. For a general discussion of legal aspects of parks and recreation areas under private control, see 4 Am.Jur.2d, Amusements and Exhibitions [1962 & Cum. Supp. 1980].

<sup>46</sup>See Moynihan, *Law of Real Property*, pp. 224-29.

<sup>47</sup>One frequently cited example is the Nature Conservancy. Such an example is apposite to the extent that it retains title to and privately manages its own lands, and no one denies the great benefits that come from the Conservancy's private stewardship of land and wildlife. All too often, however, the Conservancy transfers title to its land to a governmental agency, thus negating the benefits obtained from private ownership.

some individuals. On the other hand, property owners can use less-than-fee property interests to preserve natural areas privately; that is, they can divide up the bundle of sticks instead of keeping it all.

### Qualification of the Fee Simple

Ownership in fee simple absolute is not necessary to ensure the preservation of the meadow. Absolute fee-simple ownership is theoretically of infinite duration, and the owner's preferences are paramount. If the owner who wished to preserve the meadow could cut off the otherwise infinite duration of the subsequent owner's ownership if he did not preserve the land in its natural state, the first owner could exert a significant degree of control over the future use of the parcel. Because of the time horizon resulting from the historical development of the common-law scheme of estates,<sup>48</sup> the first owner can indeed control the future use of the land by retaining one of the sticks from the bundle (known as a future estate) when he conveys the meadow. By retaining one stick, the first owner enjoys a privilege of possession of the meadow in the future that is given present protection, notwithstanding his conveyance of the rest of the bundle to the subsequent owner. The grantee, on the other hand, does not receive the whole bundle of sticks of a fee simple absolute. Rather, he receives a bundle that is tied by a string to the first owner's stick, with the market price presumably reflecting this diminution of control.

If the grantor's purpose is the preservation of the meadow, then the conveyed bundle can be forfeited upon the happening of a specified event, e.g., the development of the meadow or destruction of its natural amenities. Two varieties of bundles (known as qualified fees) may be employed, each tied to its own associated future estate to be retained by the grantor. For example, he can convey a bundle known as a fee simple subject to a condition subsequent and retain a stick on a string known as a power of termination.<sup>49</sup> Thus A, the owner of the meadow, could convey the land to B and his heirs on condition that if the meadow is ever developed, A and his heirs may reenter and possess the premises. Should the meadow be developed, A or his successor in interest has the power to pull the string and retrieve B's bundle by any appropriate act,<sup>50</sup> after which that

<sup>48</sup>Lewis M. Simes, *Handbook of the Law of Future Interests*, 2d ed. (St. Paul, Minn.: West Publishing Co., 1966), pp. 5-12.

<sup>49</sup>See Cribbet, *Principles of the Law of Real Property*, p. 43; Moynihan, *Law of Real Property*, p. 36; and Simes, *Handbook of the Law*, pp. 30-32.

<sup>50</sup>At common law, it was necessary for the grantor to actually enter the premises in order to terminate the granted estate. Today, the grantor may bring an action to re-



party will once more have the whole bundle of sticks and own the meadow in fee simple absolute. Care should be taken to use the proper language to tie the string to the bundle. The typical words used are "on condition that," "upon the express condition," "provided that," "but if," and similar expressions. The pulling of string may be predicated on any event, including the failure of the grantee to make or refrain from a designated use, so long as it is not against public policy.<sup>51</sup> The conservation of natural areas is surely a legitimate purpose for private restrictions.<sup>52</sup>

The power of termination is not the only future interest that can be retained by the grantor. He can also convey a bundle known as a fee simple subject to a special limitation and retain a stick on a string known as a possibility of reverter. In this instance, A would convey the meadow to B and his heirs so long as the meadow remains undeveloped. Should the meadow be developed, B automatically loses his bundle (known also as a defeasible fee simple) and A, who now has the whole bundle of sticks, is restored to full fee-simple ownership. This retained stick automatically retrieves the bundle, giving rise to full fee-simple ownership once the meadow is developed. As with the power of termination, the proper language should be used in tying the string of the possibility of reverter. The terms "so long as," "during," or "until" are preferred, followed by an express provision for automatic termination of the grantee's bundle in the event of breach. As with the power of termination, the possibility of reverter may be predicated on the same event,<sup>53</sup> including the failure to conserve natural areas. Although these two future interests have different characteristics,<sup>54</sup> particularly regarding their creation and the severity of their forfeiture, they both enable the grantor to convey scenic land while retaining a significant ability to compel the transferee to maintain it in its natural state.

The use of the power of termination and the possibility of reverter is complicated by questions of alienability and heritability. Once

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cover the land without first making an entry, although in some jurisdictions notice of his election to terminate may be required. See Moynihan, *Law of Real Property*, p. 36, note 1.

<sup>51</sup>Lewis M. Simes and Allan F. Smith, *The Law of Future Interests*, 2d ed. (St. Paul, Minn: West Publishing Co., 1956), p. 274, § 244.

<sup>52</sup>See, for example, *Carpender v. New Brunswick*, 39 A.2d 40, 135 N.J. Eq. 397 (1944).

<sup>53</sup>Simes and Smith, *Law of Future Interests*, p. 337, § 285.

<sup>54</sup>It has been forcefully argued, however, that functionally the two property interests are largely indistinguishable. See Allison Dunham, "Possibility of Reverter and Powers of Termination: Fraternal or Identical Twins," *University of Chicago Law Review* 20 (1953): 215.

they are created, may they be sold or inherited? The results differ depending on the future interest used. Powers of termination may not usually be sold but they may be inherited. By contrast, both are possible with possibilities of reverter.<sup>55</sup> In addition, in some states these property rights may expire if not used within a certain number of years. That is, in order to avoid burdening land with obsolete restrictions, the string may not be pulled. To the extent that these limits apply, perpetual private planning may be frustrated.

We have considered the preservation of a meadow by means of the conveyance of fee-simple ownership qualified by the grantor's holding a future estate that allowed him to use the threat of forfeiture to compel the meadow's preservation. A similar result could be achieved by means of a very different property right, the easement.<sup>56</sup> Returning to the meadow example, we can divide up the bundle of sticks, removing an easement. This time, however, we do not set up a queue. Instead, we determine how different parties may coexist in using the meadow in the present. The meadow is burdened by the easement, and the possessor of the meadow must defer to the rights of the easement holder who is entitled to a limited use or enjoyment of the land. The virtue of the easement is that it carves out precise property rights that can be exercised simultaneously. There is no need for a queue or the pulling of strings, because our aim is present multiple use.

What type of easement would be best suited for the preservation of natural areas? In the context of environmental conservation, the traditional distinctions between affirmative and negative easements and those appurtenant and in gross are critical. For example, ownership of an affirmative easement entitles the holder to go onto the burdened land and do acts that, in the absence of the easement, he would be unable to do. One example might be the granting of a right-of-way that entitles the owner of the easement to drive across the meadow. By contrast, the owner of a negative easement can compel the owner of the burdened land to refrain from doing acts that, were it not for the easement, he would be privileged to do. The holder of the easement might seek only to preserve the natural appearance of the land and would not want to do anything on the land itself. The prevention of development is thus best accomplished by a negative easement.

<sup>55</sup>Simes and Smith, *Law of Future Interests*, pp. 179, § 1862; 204, § 1903; 177, § 1860; 204, § 1903.

<sup>56</sup>See Cribbet, *Principles of the Law of Real Property*, pp. 335-46.

The second distinction between easements appurtenant and those in gross is important in terms of future enforceability. If the holder of the easement owns other land and the easement benefits him in the use or enjoyment of that land, then the easement is appurtenant to it.<sup>57</sup> For example, if the owner of the negative easement governing the meadow were entitled to prevent development in order to benefit his land, Whiteacre, at the top of a nearby hill, the easement is appurtenant to that land. Whiteacre is usually called the "dominant tenement," and the appurtenant easement is attached to it so that whenever Whiteacre is sold, the easement over the meadow goes with it as an incident of ownership. The owner of Whiteacre is the "dominant tenant," and the meadow, being burdened by the easement, is the "servient tenement." On the other hand, the easement might not benefit the owner in the ownership of any other land. Such personal easements are referred to as "in gross." An example would be if the owner of the easement were entitled to prevent development in the meadow as a matter of personal right but not in order to benefit a parcel such as Whiteacre.

Assume that the meadow is burdened by a negative easement. What will happen to the meadow in the future? If the easement benefits Whiteacre at the top of the hill, it will pass with Whiteacre when it is transferred. Similarly, if the meadow is transferred, the burden of the easement preventing development will pass with it as an incident of ownership. What will happen in the future if the meadow is burdened by a negative easement in gross? On the burden site, the general rule is that the burden follows the meadow. Therefore, if the meadow were transferred to another owner, that person would still be bound to observe the negative prohibition of development. Problems would arise on the benefit side, however, if the owner of the in-gross easement attempted to transfer the easement itself. Unlike the appurtenant easement, the in-gross easement is personal to its owner and attaches to no particular parcel of land. Should the in-gross easement be transferred to another, it may be extinguished.<sup>58</sup> True, the owner of the in-gross easement may want to preserve the meadow just as much as the owner of the land at the top of the hill with his appurtenant easement, but, nonetheless, differing rules have often evolved.

One possible solution to the problem of the nontransferable easement in gross would be to originally convey the in-gross easement

<sup>57</sup>Ibid., pp. 341-42.

<sup>58</sup>Ibid.

to a permanent conservation organization.<sup>59</sup> If its permanent legal existence were assured, then the group could perpetually prohibit development of the meadow without having to acquire any benefited parcel of land. Thus the same result would be obtained, not by having any land nearby that would always carry the appurtenant easement with it, but rather by ensuring that the easement in gross was never transferred to another owner. This strategy would work only if one could ensure that the conservation organization were never dissolved or reorganized into a new legal entity. Should such a dissolution or reorganization occur, then the easement in gross would likely be extinguished.

How might a negative easement burdening the meadow best be created? Both appurtenant and in-gross easements can be expressly created either by direct grant (conveying one stick) or by reservation (conveying the bundle and keeping one stick). In a direct grant, the easement is conveyed directly to the new owner in the same manner as any other stick from the bundle.<sup>60</sup> Thus, if the owner of the meadow conveyed a negative easement to the owner of the land at the top of the hill, it would, by virtue of its benefiting Whiteacre, be appurtenant. Similarly, if the owner of the meadow conveyed a negative easement to a conservation organization that owned no land benefited by the easement, it would be in gross. By contrast to creation by direct conveyance, the owner of a parcel of land may create an easement by reservation by conveying the whole bunch of sticks of the burdened meadow and retaining one stick from the bunch, which is a negative easement over it. The transferee of the meadow thus receives less than a fee simple absolute because the conveyance did not include that one stick carrying the privilege of developing the land. If the former owner of the meadow who retained the negative easement also owned Whiteacre at the top of the hill and intended to benefit that parcel of land by precluding development in the meadow, then the reserved negative easement is appurtenant. Likewise, if the former owner of the meadow owned no other land to be benefited by the retained easement, then it would be personal and in gross. Although there are various methods available for the creation of conservation easements, one should always keep in mind the importance of the legal consequences of appurtenancy.

<sup>59</sup>For a discussion of the creation of conservation trusts, see Allison Dunham, *Preservation of Open Space Areas: A Study of the Non-Governmental Role* (Chicago: Welfare Council of Metropolitan Chicago, 1966), pp. 33-49.

<sup>60</sup>Cribbet, *Principles of the Law of Real Property*, p. 337.

## Promises Regarding the Use of Land

Two methods of private planning are grounded in the contractual side of property law. Instead of conveying bundles of sticks, you make a promise about the use of the land. The first and older type of promise is that of the real covenant at law.<sup>61</sup> Burdened by complex requirements for enforceability, real covenants proved nearly impossible to use for private planning. The second type of promise, the equitable servitude,<sup>62</sup> arose in the courts of equity in the nineteenth century, where promises regarding the use of land were made enforceable because parties subject to them had actual or constructive notice of the restrictions.<sup>63</sup>

In this century the use of equitable servitudes is widespread, and a restrictive covenant inserted in a deed could be used to preserve land in its natural state. For example, A, owning the meadow and nearby Whiteacre, could convey one of them to B and also exact a promise from B not to develop his parcel of land. The effect of B's promise is the same as that of a negative easement, only this time instead of keeping a stick, A has the benefit of B's promise. Of course, the promises could be tailored to the specific needs of the land in question.

When you make promises to keep land in its natural state, it is important that the person to whom the promise is made own some adjacent land that is benefited by the promise. Promises are regarded as properly appurtenant to specific land and enforceable by the land's owner. If A conveys the meadow to B and exacts a promise from B to preserve it in order to benefit Whiteacre, A will be able to enforce B's promise. On the other hand, if A owns only the meadow and conveys it to B, A will retain no land benefited by the promise made to him by B to preserve the meadow. Recalling our earlier discussion, note that if A had kept a future estate (stick on a string) instead of B's promise, he could use the threat of forfeiture to compel the meadow's preservation even while owning no benefited land.

Promises regarding the use of land may not be enforceable in perpetuity for a variety of reasons, most of which focus on the disutility of obsolete restrictions.<sup>64</sup> In some states, statutes spell out

<sup>61</sup> Charles E. Clark, *Real Covenants and Other Interests Which "Run With Land,"* 2d ed. (Chicago: Callaghan, 1947), pp. 92-143; William B. Stoebuck, "Running Covenants: An Analytical Primer," *Washington Law Review* 52 (1977): 861, 865-67.

<sup>62</sup> Clark, *Real Covenants*, pp. 170-86; Stoebuck, "Running Covenants," pp. 887-919.

<sup>63</sup> Cribbet, *Principles of the Law of Real Property*, p. 356.

<sup>64</sup> *Ibid.*, pp. 358-61.

the applicable time limits. In others, judge-made common-law principles govern the termination of covenants, reflecting a special concern for changing conditions that render it impossible to secure the benefits of the promise. Because of the prohibitively high transaction costs of negotiating with owners of scattered parcels of land, the use of the restrictive covenant is most feasible either in preserving a single parcel of land as a park for the benefit of nearby land or in maintaining the park-like environmental amenities of parcels subdivided from a single, initial tract of land.<sup>65</sup> In either case, nearby land is benefited, and the transaction costs should be low enough to facilitate private planning. Once again, however, one must keep in mind the problem of enforcement of environmental covenants that, like easements, might be personal to the covenantee and not appurtenant to any land.

In light of these complex requirements, it is of great interest that eight states have recently enacted statutes eliminating these traditional distinctions that have, at times, so impeded private planning for environmental purposes.<sup>66</sup> These statutes frequently dispense with many of the formalities necessary for the creation of less-than-fee interests in land for conservation purposes.<sup>67</sup> Usually the conservation restriction may be stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument. Most important, these statutes provide that conservation restrictions are not unenforceable for lack of privity of estate or because the benefits of the restriction are not appurtenant to any particular parcel of land or on account of the benefit's being assignable or assigned. In addition, where transaction costs are high, these statutes, by making conservation restrictions enforceable by injunction, make it more likely that areas will remain in their natural state than would be the case if money damages were the only remedy. With an injunction available, the prospective violator is com-

<sup>65</sup>Posner, *Economic Analysis of Law*, p. 50.

<sup>66</sup>Conn. Gen. Stat. Ann. §§ 47-42a, -42b to -42c (1978); Fla. Stat. Ann. § 704.06 (West Supp. 1980); Ga. Code Ann. §§ 85-1407(c), -1408 to -1410 (1978 & Supp. 1979); Ill. Ann. Stat. ch. 30, §§ 401-406 (Smith-Hurd Supp. 1980-1981); Md. Real. Prop. Code Ann. § 2-118 (1974 & Supp. 1979); Mass. Ann. Laws ch. 184, §§ 31-33 (1977 Michie/Law. Co-op & Supp. 1980); N.H. Rev. Stat. Ann. §§ 47:45(I), 46-47 (Supp. 1979); N.C. Gen. Stat. §§ 121-34 to -42 (Supp. 1979).

<sup>67</sup>Several states authorize "preservation restrictions" extending the same dispensation to less-than-fee interests in land created for the preservation of historic buildings and areas. To the extent that some of these statutes extend their benefits to the preservation of open space natural areas, they will enhance the potential for privatization of park areas.

pelled to negotiate with every right holder and perhaps face the problem of holdouts.<sup>68</sup>

Regrettably, individuals are not authorized to use these statutes.<sup>69</sup> Conservation restrictions may usually be acquired only by a charitable corporation or trust whose purposes include the conservation of land and water areas or by any unit of local or state government. To the extent that private groups can avail themselves of the benefits of the statutes, private planning will be enhanced. In addition, under most of these statutes, private, for-profit corporations are not allowed to avail themselves of the simplified conveyancing rules governing conservation restrictions. In 1979 North Carolina went further and authorized any private corporation or business entity with conservation purposes to hold conservation agreements.<sup>70</sup> This service could be offered to consumers for a fee. If conservationists were willing to pay for the services of such a firm, then entrepreneurs might provide a private corporate alternative to the political vagaries of public parks and zoning boards. The conservation firm could purchase conservation restrictions acting on behalf of its customers, some of whom might not own any property appurtenant to the restricted parcel, but who nonetheless would favor conservation. Like any business firm, the conservation firm would reduce the transaction costs of private planning, costs that might be high among scattered parcels of land.<sup>71</sup>

### Tort Law and Privatization

Assuming no reformulation of the law of torts (which governs redress for harms to persons or their property), a privatized park system with access rationed by price would bring no great change in the obligations owed by the owners or occupants of the parkland. Liability in tort for accidental injuries by owners or occupiers of land to the users of that land has traditionally depended on whether the user is classified as a trespasser, licensee, or invitee.<sup>72</sup> Pursuant to a theory of an implied representation of reasonable care,<sup>73</sup> users of municipal, state, and federal parks have been classified as invi-

<sup>68</sup>Posner, *Economic Analysis of Law*, pp. 50-51.

<sup>69</sup>Individuals can, of course, continue to plan privately through the use of the traditional methods with all of their complex requirements.

<sup>70</sup>N.C. Gen. Stat. § 121-35(2) (Supp. 1979).

<sup>71</sup>Posner, *Economic Analysis of Law*, pp. 289-90.

<sup>72</sup>Clarence Morris and C. Robert Morris, Jr., *Morris on Torts*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1980), pp. 132-40; and W. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1971), pp. 376-98.

<sup>73</sup>Prosser, *Handbook of the Law of Torts*, pp. 388-89.

tees.<sup>74</sup> Accordingly, they stand on a higher footing than licensees, and the landowner has a duty to protect them against dangers known to him or discoverable by him with reasonable care.

With the abolition of governmental ownership and the establishment of access rationed by price, users of privately owned parks would, as business visitors,<sup>75</sup> continue to be classified as invitees. With the payment of a fee, the economic benefit to the landowner is clear, and the cases would undoubtedly reach the same result, perhaps on the older theory of economic benefit,<sup>76</sup> as that achieved under the theory of an implied representation of reasonable care. The incentive structure created by tort law for the landowner to exercise care would be the same under both a public and private regime, although the landowner would change.

Not all private recreation need be allocated by price. Private landowners are not compelled to charge a fee to grant access to their property for recreational purposes. Indeed many choose not to, and much recreation takes place within the independent sector with no state involvement.<sup>77</sup> It has been suggested by one careful student of private governance that tax incentives and liability safeguards should be granted to individuals who allow their privately owned land to be used for public recreation.<sup>78</sup> In part this suggestion has been met; in recent years most states have enacted recreation statutes that deny to the gratuitous user of the land his customary status as an invitee.<sup>79</sup> Because the landowner has no

<sup>74</sup>Regarding municipal parks, see *Caldwell v. Village of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 (1952); regarding state parks, see *LeRoux v. State*, 307 N.Y. 397, 121 N.E.2d 386 (1954), and *Surmanek v. State*, 24 Misc. 2d 102, 202 N.Y.S.2d 756 (1960); regarding federal parks, see *Adams v. United States*, 239 F. Supp. 503 (E.D. Okla. 1965), and *Smith v. United States*, 117 F. Supp. 525 (N.D. Cal. 1953).

<sup>75</sup>*Morris and Morris, Morris on Torts*, p. 133.

<sup>76</sup>Prosser, *Handbook of the Law of Torts*, pp. 386-87.

<sup>77</sup>Property owners in North Carolina, for example, often gratuitously grant permission (in law, a revocable license) to dove hunters to use their land during the dove-hunting season. The supply of doves and land is so plentiful that as a result of freely available substitutes, the price demanded for access is zero. On the other hand, the supply of Canadian geese is relatively small. Thus on the eastern shore of Maryland farmers will open their fields for a price, often as much as \$100 per day.

<sup>78</sup>Richard C. Cornuelle and Robert H. Finch, *The New Conservative Liberal Manifesto*, (San Diego: Viewpoint Books, 1968), p. 74.

<sup>79</sup>Ala. Code tit. 35, §§ 35-15-1 to -5 (1975); Ark. Stat. Ann. §§ 50-1101 to -1107 (1971); Cal. Civ. Code § 846 (West Supp. 1980); Colo. Rev. Stat. §§ 33-41-101 to -106 (1973 & Supp. 1979); Conn. Gen. Stat. Ann. §§ 52-557f to -557i (West Supp. 1980); Del. Code Ann. tit. 7, §§ 5901-5907 (1974); Fla. Stat. Ann. § 375.251 (West 1975 & Supp. 1979); Ga. Code Ann. §§ 105-403 to -409 (1968); Idaho Code § 36-1604 (1977); Ill. Ann. Stat.



duty of care to keep the premises safe or warn of danger, he has less incentive to bar entry to his property because the cost of the precautions necessary to preclude a finding of negligence will be lower.

There are two major exceptions to this dispensation. The landowner typically loses his exemption if he willfully or maliciously fails to warn of a danger or if he charges a fee for admission to the property. The second exception is important should the governmental parks be auctioned off and sold to entrepreneurs who wish to charge entry fees. Unlike the gratuitous host, owners of private parks for profit would not be protected by these statutes, and their customers would be owed the duty accorded to invitees.

### Privatization and the Criminal Law

The privatization of public parks would have both substantive and procedural consequences for the criminal law. With the sale of the public parks,<sup>80</sup> any applicable federal jurisdiction would end, and state statutes would determine the content of the criminal law applicable to the newly private land.

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ch. 70, §§ 31-37 (Smith-Hurd Supp. 1979); Ind. Code Ann. § 14-2-6-3 (Burns 1973); Iowa Code Ann. §§ 111c.1-7 (West Supp. 1979-1980); Kan. Stat. §§ 58-3201 to -3207 (1976); Ky. Rev. Stat. § 150.645 (1971); La. Rev. Stat. Ann. § 9:2795 (West Supp. 1980); Me. Rev. Stat. tit. 12, §§ 3001-3005 (1974); *ibid.*, tit. 14, § 8103(2)(F)(2) (Supp. Pamph. 1965-1979); Md. Nat. Res. Code Ann. §§ 5-1101 to -1108 (1974); Mass. Gen. Laws Ann. ch. 21, § 17C (West 1973); Mich. Comp. Laws Ann. § 300.201 (Supp. 1979); Minn. Stat. Ann. §§ 87.01-.03 (West 1977); Mont. Rev. Codes Ann. §§ 70-16-301 to -302 (1979); Neb. Rev. Stat. 37-1001 to -1008 (1974); Nev. Rev. Stat. § 41.510 (1973); N.H. Rev. Stat. Ann. § 212:34 (Supp. 1977); N.J. Stat. Ann. § 2A:42A-2 to -5, :53A-7 to -9 (West Supp. 1979-1980); N.M. Stat. Ann. § 16-3-9 (1978); N.Y. Gen. Oblig. Law § 9-103 (McKinney 1978 & Supp. 1979-1980); N.C. Gen. Stat. §§ 113-120.5-.6 (Supp. 1979); N.D. Cent. Code §§ 53-08-01 to -06 (1974); Ohio Rev. Code Ann. §§ 1533.18-.181 (Anderson 1979); Okla. Stat. Ann. tit. 2, § 1301-315 (West 1973); Or. Rev. Stat. §§ 105.655-.680 (1977); Pa. Stat. Ann. tit. 68, §§ 477-1 to -8 (Purdon Supp. 1979-1980); R.I. Gen. Laws §§ 32-6-1 to -7 (Supp. 1979); S.C. Code §§ 27-3-10- to -70 (1976); S.D. Codified Laws Ann. § 20-9-5 (1975); Tenn. Code Ann. §§ 11-10-101 to -103 (1980); *ibid.*, §§ 51-801 to -805 (1977); Tex. Rev. Civ. Stat. Ann. art. 1b (Vernon 1979); Vt. Stat. Ann. tit. 10, § 5212 (1973); tit. 13, §§ 3769-3770 (1974); Va. Code § 10-150.18 (Supp. 1979); *ibid.*, § 29-13-.2 (1979); Wash. Rev. Code Ann. §§ 4.24.200-.210 (Supp. 1980); W. Va. Code §§ 19-25-1 to -6 (1977); *ibid.*, § 20-7A-6 (1978); Wis. Stat. Ann. § 29.68 (West 1973 & Supp. 1979); Wyo. Stat. §§ 34-19-101 to -106 (1977).

<sup>80</sup>At present, criminal jurisdiction in the public parks varies a great deal. In local parks, state law governs; while in the national parks, the determination of jurisdiction is more complex. See "Comment: The Criminal Law Enforcement Authority of Park Rangers in Proprietary Jurisdiction National Parks: Where Is It?" *California Western Law Review* 13 (1976): 126, 128-30.

Once the parks were privatized there would be no reason why law enforcement should remain a public monopoly.<sup>81</sup> To the extent that each private park was a discrete entity, private patrolling would be quite feasible because one would avoid the free-rider problem<sup>82</sup> that might otherwise prevent the purchase of private protection services. The detection and apprehension of criminals could be confined to the premises of the subscriber, and the conferral of benefits could easily be minimized.<sup>83</sup> Municipal parks present perhaps the easiest case for privatization of police services because of their clearly defined boundaries. These islands of greenery in an urban setting could easily be patrolled without conferring substantial benefits on neighboring property owners. Violations that occurred on the property of nonsubscribers could be ignored. More remote parks in nonurban areas present a different set of problems. The borders of rural parks might be less well defined, resulting in uncertainties of jurisdiction and difficulties of patrolling. Nonetheless, the acreage of the more remote private parks would be self-contained enough to avoid major spillover of benefits.

Private law enforcement in the parks would simplify and enhance the protection of park visitors. Within each park, one firm would probably be responsible for law enforcement, and visitors would not be confused by the overlapping duties of various public law-enforcement agencies, as is the case today in some public parks. Private law-enforcement firms serving the parks could utilize brand names and lower the costs of search to the consumer of protection services in a manner reminiscent of franchised food outlets and department stores. Within each park the efficiencies of the firm would lower the costs of law enforcement as internal decision-making disciplined by the market remedied the inefficiencies and lack of coordination prevalent among public agencies.

<sup>81</sup>Because of its focus on law and private park management, this discussion is limited to private patrolling of property and apprehension of criminals in the field and assumes a continued public monopoly of prosecution and trial, although privatization in the latter area is also feasible. For a discussion of the private enforcement of the criminal law at the trial stage, see Posner, *Economic Analysis of Law*, pp. 461-78. See also Poole, *Cutting Back City Hall*, pp. 50-61. Because of the delays resulting from crowded dockets, the use of private judges in civil litigation is increasing. See "California Is Allowing Its Wealthy Litigants to Hire Private Jurists," *Wall Street Journal*, August 6, 1980, p. 1.

<sup>82</sup>See White, "Privatization," p. 193. For a discussion of the external benefits produced by patrolling, see Gordon Tullock, *Private Wants, Public Means* (New York: Basic Books, 1970), pp. 212-13.

<sup>83</sup>Tullock, *Private Wants*, p. 211.

## The Parks, Public Choice, and the Future

The impediments to privatization of the public parks are not legal. Indeed, the legal system could adapt quite easily to a privatized system of parks and recreation. In the best tradition of private ordering, if there were a need, imaginative conveyancing lawyers could devise a way to meet it. Just as the private lawyers made possible the mortgage, long-term lease, and myriad uses of the law of trusts,<sup>84</sup> so could they be the architects of the private parks. Their creative drafting could renew the private law and build consensual institutions consistent with economic efficiency and individual freedom.

On the other hand, the impediments to privatization are primarily political. At a time when entrepreneurial coalitions have succeeded in politicizing economic choice by a resort to the public law,<sup>85</sup> the legal possibilities of privatizing the public parks are inseparable from the profound questions of public choice. These questions are crucial ones for lawyers. Because they are often the harbingers of rent seeking in a politicized society,<sup>86</sup> their services all too frequently amount to social waste. Most important, however, by encouraging the rent seekers' breakdown of restraint, the new public lawyers are degrading and transforming the law from an instrument of spontaneous private agreement into one of public coercion. It is no accident that the era of politicization has seen the decline of the evolving common law and the rise of transfer legislation. If we can solve the riddle of democratic governance, then we can save not only the parks but also the law and the lawyers.

<sup>84</sup>Karl N. Llewellyn, *The Bramble Bush* (New York: Oceana Publishers, 1960), pp. 146-47.

<sup>85</sup>See, for example, Meltzer, *Why Government Grows*; Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1980); and A. Walters, *The Politicization of Economic Decisions* (Los Angeles: International Institute for Economic Research, 1976).

<sup>86</sup>This is not to deny that real economic growth may contribute to an increased demand for legal services.