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Wade Graham's Walden

The erosion of our right to roam

I can think of nothing more relaxing than walking along the shore, taking in the sights, sounds, and smells of moving water. I can think of no worse way to shatter that good mood than being suddenly confronted by someone blocking my way, their posture hardened, telling me I'm trespassing. I've been confronted by both men and women, some stiffly polite, some seething and shouting, informing me *this is private property*. I've been intercepted by security guards while crossing restaurant parking to get to the beach. I've been surrounded by armed men on quad bikes, demanding I leave the "private" beach on which I was walking peacefully. When I pointed out I was walking on wet sand, manifestly below the high tide line and therefore legally on public property, they nonetheless threatened to radio the Sheriff and have me arrested.

Ever since childhood I've had to resort to what's been categorised as, and indeed has felt like, criminality, just to reach the shoreline to surf, swim or stroll. I've snuck through drainage culverts under roads and highways, catching spiders' webs and banging my head in the darkness. I've climbed barbed wire fences, run through fields and down driveways, sometimes just steps ahead of shouting pursuers. Many times, in many states, while making my way along a beach or stream, I've been shouted out, confronted by angry homeowners and ranchers, threatened with arrest and prosecution, and more than once accosted by paid goons with guns. Yes, guns – as though walking along the sand was a capital offence, threatening the very integrity of society. The problem is, to some people who've invested their capital in water-adjacent real estate, it is.

Many of these incidents happened in California, where the law states explicitly that the public owns the beaches below the mean high tide line, and that reasonable access must be assured. Despite this, wealthy landholders are more successful in paying for fences and lawyers than the state is in opening up public access. We, the public, are losing a constant battle against the forces of privatisation and exclusion, intent on stripping away one of our oldest rights.

The public's fundamental right to common resources, beginning with the sea and the rivers, was codified as a public trust doctrine by Roman Emperor Justinian in 535 AD: "By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea." These rights were reiterated in Magna Carta and English common law, which was enshrined whole in American law.

But in Britain and America, this bedrock assurance of legal protections has very little purchase; instead, acquisition of land by private owners reliably buys the exclusion of the public. The worst situation is in England and Wales, where just 3% of waterways are open to the public. Landholders wield almost feudal power – though ironically in feudal times people enjoyed guaranteed access to common lands and waters. Since then, water has been enclosed, just as happened with land – the gradual but near-complete seizure of public trust resources by a tiny minority.

In the US, formed in part by immigrants fleeing enclosure laws in Britain and Ireland, the public trust doctrine is law in all 50 states, meaning the people own the

shore below the mean high tide line (with one exception). The problem is gaining access to that shoreline, when in many cases more than 80% is in private hands. Even in states where courts have affirmed the public's right to use "customary" ways of access across private lands, including California, Oregon, Texas, New Jersey, Florida, and Hawaii, real obstacles are numerous and hard to remove.

Landowners may argue that their ownership precedes state laws guaranteeing access, or that the risks of liability, vandalism or disturbance outweigh the public's prerogative. Most often, straight legal obfuscation and delay keeps the water locked up. In Malibu, California, entertainment mogul David Geffen fought for more than two decades to keep from opening a public beach passage he had agreed to in exchange for expanding his house. Finally, it was enforced, and you and I can now sunbathe on his formerly "private" beach. Further north, in Santa Cruz County, a newly-minted Silicon Valley billionaire bought a coastal ranch property which had long allowed, and charged modestly for, public access to its beach. He promptly gated it off and employed security to keep people out, leading to a case in which five young surfers were forced from the water by sheriff's deputies and arrested. The US supreme court eventually ruled in their favour, but the flood tide of exclusion runs on unabated. In many states, townships collude with landowners, fencing off beaches, charging fees, limiting parking, even deeding the waterfront ends of public streets to private owners, who then block public access.

The waters are clouded even more by the mismatch between the law's rigid prescriptions and fluid, changing nature. Where is the mean high tide line? I say it is up there, where that fringe of dried wrack, seaweed and plastic debris has been left by the receding water, while the hired goons say no, it's much farther down, where the sand happens to be wet today. Confusion sets the stage for conflict, and this is the legal terrain we have inherited.

The Commonwealth of Massachusetts set a uniquely low bar of clarity when, in the 1640s, the colonial authorities wanted to encourage wharf building and granted upland landowners the rights to tidelands uncovered at low tide, up to "100 rods" or 1,650 feet away. Yet there was no grant of the water itself, which remained accessible for the purposes of navigating, fishing and fowling. Thus, in Massachusetts today, one may walk in front of private property while fishing, shooting birds (watching them apparently also counts as fowling), or windsurfing, but can be charged with criminal trespass if simply strolling. Likewise, a swimmer may stroke along over "private" mud when the tide allows, but not poke a toe into said mud without violating the law of the Commonwealth. Predictably, arguments and hot-headed confrontations are not uncommon on the wealthy shores of Cape Cod and Martha's Vineyard.

Equally unsurprisingly in the current US political climate, right-wing state courts have reversed "open beach" laws passed by their people's representatives (Massachusetts, New Hampshire, Maine) or rejected "customary use" (Connecticut); while in others, right-wing legislators have tried to block local municipal efforts to reopen beaches.

The situation along streams and rivers is even worse. Most states recognise the right to use "navigable" waters, that is, to float over or along them in a boat. But many, like Colorado and Utah, give landowners the right to the stream bed up to the midpoint – making walking in the water, to fish or otherwise, illegal. Arguments over what is navigable and when are infinite. In practice, landowners enjoy wide latitude to block access. Menacing signs are everywhere. Fences line the water, and are even strung low across it, threatening to ensnare and flip a boat or take off a head.

Even with strong laws, access disputes favour wealthy private landowners rather than mere citizens

Some friends in Utah have for years fished a lovely stretch of mountain stream for trout, reached by walking from a public highway, though it flows through private ranch land. They do no damage, leave no trace, and always release their catches. Once, walking quietly, they startled a black bear that then charged them, before both parties judiciously backed away. The next time, chatting audibly to avoid surprise encounters in the stream, they were ambushed and arrested by private guards with guns drawn. Only a few years before, a Republican party Utah legislator responded to public fishing "trespass" by passing a law outlawing access, even to public-trust navigable waters.

What is the answer? Even with strong laws, access disputes are fought on a case-by-case basis, which favours wealthy private landowners rather than mere citizens or overstretched government agencies charged with safeguarding rights. The most discouraging example ironically comes from what is thus far the greatest victory for public access rights: the Countryside and Rights of Way (CRoW) Act of 2000, which enshrined customary use in law in England and Wales. Yet only 8% of the lands in those countries is now open, half that of a century before. And the window for listing other passages closes in 2026 – effectively using a public access law to seal off the vast majority of land in private hands. Even in Scotland, which in 2003 bravely declared 100% of its waterways open to the public, case-by-case removal of physical obstacles advances at a glacial pace.

What is needed are new, unambiguous laws, without limitation dates. The state of Oregon led the way in 1967, classifying its entire 362-mile (583-km) Pacific coastline as a public highway, and tasking the state with guaranteeing reasonable access, just as it does for drivers of cars on its roads. Better yet would be stronger laws at the national level, like Scotland's, combined with dedicated and effective means of enforcement.

Climate change brings new urgency, as the high tide line inexorably moves upwards, into private lands. If no mechanism is invented to allow the law to change along with nature, one of our last inalienable public rights will be extinguished forever.

I walked into this new reality on a recent ramble along the shingle in Scotland, near Ullapool, when the rising tide crashing against a small headland blocked my way back to my starting point. A path existed up and over the promontory, but it was blocked by barbed wire fences, stretched taut to the very precipice, ostensibly to allow a landowners' sheep maximum grazing, but very effectively blocking human beings from walking on their common inheritance. I had no choice but to swim – not an appealing prospect in November – or to scale the barbed wire, then risk a confrontation walking along the land's edge. The rams, happily, let me pass without incident.

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